

MILITARY JUSTICE at the SUMMARY TRIAL LEVEL

Updated, January 12th 2011.

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CHAPTER 1

THE PURPOSE OF MILITARY JUSTICE

SECTION 1

MILITARY LAW AND THE MAINTENANCE OF DISCIPLINE

After the organization of troops, military discipline is the first matter that presents itself. It is the soul of armies. If it is not established with wisdom and maintained with unshakeable resolution you will have no soldiers. Regiments and armies will only be contemptible, armed mobs, more dangerous to their own country than to the enemy....

Maurice de Saxe: Mes Reveries, 1732

Defining Law

1. The function of *law* has been described as follows:

Law essentially serves two functions in modern, western, industrial society. First, it serves to regulate the affairs of all persons, be they individuals, corporations or governments. Secondly, law acts as a standard of conduct and morality, variously directed at individuals and groups, businesses and governments. In short, through both of these functions, the law seeks to promote and achieve a broad range of social objectives.¹

2. In effect the law is the means by which social interaction is regulated. The law provides stability, predictability and a means by which activity contrary to the wishes of society can be controlled. Laws not only set out the structural framework upon which governance is built; they also identify the core values of a society.² In addition, this legal framework provides for courts and administrative tribunals, which are empowered to regulate disputes between our society and its citizens (e.g. the criminal law) and between the citizens themselves (e.g. civil law suits).

3. As part of our legal heritage, dispute resolution and other interaction within society are governed by principles of fairness wherein citizens are provided a meaningful opportunity to be heard, and to have disputes resolved by impartial arbitrators. The degree of fairness and impartiality of the arbitrator is dependent upon the nature of the decision being made. For example, criminal proceedings, where the liberty of the accused may be at stake, require the highest degree of fairness and impartiality, while administrative processes, where the liberty of an accused is not at stake, do not have to meet as high a burden. These principles of fairness are

¹ Gerald Gall, *The Canadian Legal System*, (Toronto: Carswell, 1990) at 1.

² These values can be found in the *Canadian Charter of Rights and Freedoms* (the *Charter*) contained in our Constitution, and federal statutes such as the *National Defence Act* and the *Criminal Code of Canada*.

guaranteed in the *Canadian Charter of Rights and Freedoms* (the *Charter*)³ and under the common law.

Types of Law in Canada

4. The supreme law of Canada is contained in our Constitution. There are three subsidiary types of law: judicial decisions (otherwise known as the common law), statutory law and the exercise of the executive authority of government through the Crown Prerogative. Statutes are the single most important source of law. The enactment of a law by Parliament is in many ways the ultimate political act as it serves as a record of the decisions made by democratically elected officials. Indeed the use of the word *Act* in the title of the *National Defence Act (NDA)* conveys that very meaning. Legislation passed by Parliament serves a twofold purpose: first, it constitutes one of the means by which elected officials regulate social conduct; second, it provides a vehicle for the injection of societal values into that conduct. The link between political control and the law is reflected in the term *The Rule of Law (De Lex Regula)*.

The Military and the Law

5. Since the government controls the military it should not be surprising to find out that laws regulate it. The military in a democracy is unique in that the most physically destructive power of the state is concentrated in the hands of a relatively small number of non-elected government officials. This unique status inevitably leads to a large number and variety of laws designed not only to control the armed forces, but also to assist in ensuring that the values of broader society are maintained within the social fabric of the military. Indeed one of the true dangers to any civilian government is an armed force that it does not adequately control, and which does not identify with broader societal goals.

The Political-Legal Interface Affecting Armed Service

6. Armed service for the state is a highly regulated activity. The organization of the military is reflected in our Constitution and the *NDA*. Control is exercised over the armed forces through the application of the *NDA*, its *Code of Service Discipline*, and the regulations, orders and instructions that flow from the Act. That is not to say that the political control that is exercised over the armed forces is limited to the written law of the *NDA*. There is also executive authority to issue binding direction under the Crown Prerogative. In addition, the Minister of National Defence (MND) exercises daily control over military activities. However, the *NDA*, as an organizational document, sets out the fundamental framework upon which civilian political control of the military, in Canada, is based.

The Effect of International Law on Armed Service

7. The laws that govern military activity are not solely domestic in origin. International law serves the same purpose as its domestic counterpart. It regulates the affairs between states and acts as a standard of conduct and morality. Therefore, international laws such as the *Charter of*

³ A copy of the *Canadian Charter of Rights and Freedoms* is found in Annex A.

the United Nations, the Hague Conventions governing naval, land and air operations, the Geneva Conventions and Additional Protocols I & II to the Geneva Conventions reflect the standard of conduct required of military forces.⁴ These laws bind the Canadian Forces (CF) in the conduct of its operations in the international arena either by customary law, or because the government has signed and ratified the relevant treaties and conventions. Customary international law reflects the practices of nations against which the actions of a particular country or its armed forces will be judged. The military, its officers and non-commissioned members (NCMs) being agents of the state, is bound by Canada to follow the provisions of international law when conducting military operations.

8. The international treaties and obligations do not solely relate to armed conflict. The *Charter of the United Nations*, the *Convention of the Prevention and Punishment of the Crime of Genocide*, 1948, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984 as well as number of other treaties relating to the establishment and enforcement of international human rights standards bind the CF.⁵

9. Many of these international obligations are incorporated directly into domestic legislation. For example, the *Geneva Conventions Act*⁶ clearly gives effect to these international treaties on a domestic level. Similarly, the provisions against torture and inhumane treatment found in the 1984 *Torture Convention* are reflected in section 269.1 of the *Criminal Code*. Since the criminal laws of Canada are incorporated into military law by virtue of section 130 of the *NDA* members of the CF who torture persons under their control are subject to penal consequences.⁷

The Constitutional Status of Military Force in Canada

10. The constitutional basis for the existence of an armed force in Canada is found in the *Constitution Act, 1867* which provides as follows:

91. ...the exclusive Legislative Authority of the Parliament of Canada extends to...

7. Militia, Military and Naval Service, Defence

It is pursuant to this authority that the *NDA* has been enacted.

11. Constitutional recognition is also given to the military in the *Charter* that provides as follows:

11. Any person charged with an offence has the right

⁴ This body of law is explained in detail in the CF Publication *The Law of Armed Conflict at the Operational and Tactical Level* (B-GG-005-027/AF-020).

⁵ International human rights documents include: *The Universal Declaration of Human Rights*, 1948; *The International Covenant on Economic, Social, and Cultural Rights*, 1966; *The International Covenant on Civil and Political Rights*, 1966; *The Optional Protocol to the International Covenant on Civil and Political Rights*, 1966; *The International Convention on the Elimination of All Forms of Racial Discrimination*, 1966; *The Convention on the Elimination of All Forms of Discrimination Against Women*, 1979; *The Convention on the Rights of the Child*, 1989.

⁶ *The Geneva Conventions Act*, R.S.C. 1985 c. C-46.

⁷ It was this incorporation of international obligations, in particular the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, into domestic criminal and military law that enabled the prosecution of CF members in respect of incidents arising from the peace support mission in Somalia.

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury....

12. This specific reference to military law in a constitutional document confirms the constitutional validity of the separate system of military justice. In addition, the Supreme Court of Canada has acknowledged the validity of the military justice system in two cases: *MacKay v. R.*⁸ and *R. v. Genereux*.⁹

The Legislative Control of the Canadian Forces

13. A review of the *NDA* gives a clear indication of the pervasive impact that the law has on the organization, command and control of the military. The whole existence of the CF, and the authority of its officers to command, is dependent upon that law. For example, the composition of the armed forces, their organization into units and other elements, the appointment of a Chief of Defence Staff, the enrolment of officers and NCMs and their authority to exercise command, and service members' obligations and terms of service are all provided for in the *NDA*.¹⁰ The Act also authorizes the making of regulations known as *Queen's Regulations and Orders (QR&O)*, and the issuance of orders and instructions for the control and administration of the armed forces.¹¹

14. The *NDA* makes extensive provision for a system of discipline. The *Code of Service Discipline* contained within the *NDA* and *QR&O* prescribes service offences; provides for summary trials and courts martials; and outlines trial and appeal procedure. The fact that the appellate courts, the Courts Martial Appeal Court (CMAC) and ultimately the Supreme Court of Canada, are staffed by civilian judges reflects the importance given to the supervisory role over the military justice system by civilian institutions. In addition, the Federal Court of Canada and the provincial superior courts have a residual authority to provide judicial review. The decisions of these civilian courts help ensure that the essential legal principles afforded to Canadians by our civilian courts are reflected in its interpretation of military law.

15. The *NDA* and *QR&O* also address the values and basic principles of service life which distinguish the military from civilian society. These principles include:

- a. duty: An unlimited liability for service combined with a requirement to be present for duty when ordered;
- b. obedience to authority: The obligation to obey all lawful commands, including those which might lead to death or serious injury and the potential to be penalized for failing to do so;¹²
- c. subordination to those in authority;¹³
- d. enforcement of discipline;¹⁴ and

⁸ [1980] 2 S.C.R. 370.

⁹ [1992] 1 S.C.R. 259.

¹⁰ *NDA* s.14, 15, 17, 18, 19, 20, 23, 33.

¹¹ *NDA* s.12.

¹² *QR&O* 19.01.

¹³ *QR&O* 4.02, 5.01, 19.01, 19.015.

e. welfare of subordinates.¹⁵

16. The law is not solely about enforcing obedience in a hierarchical fashion. It also recognizes an obligation on members to promote the welfare, efficiency and good discipline of subordinates; to not rebuke any member in the presence of a subordinate except when absolutely necessary for the maintenance of discipline; and to not do or say anything which would cause subordinates to be discouraged or dissatisfied with the service.¹⁶ The mechanisms to lodge complaints when the treatment of subordinates does not meet the high standards imposed by military law include the formal redress of grievance procedure as well as the right to complain personally to the Commanding Officer (CO).

Procedural Fairness

17. Every military commander knows the importance of not only treating subordinates fairly, but also of being perceived to be fair. A lack of fairness on the part of a superior can seriously undermine cohesion, morale and discipline of subordinates thereby impacting negatively on unit effectiveness. However, if ten military commanders each have their own idea of what constitutes procedural fairness, subordinates could ultimately be unfairly treated through a lack of consistency. It should therefore come as no surprise that military law, as a vehicle for regulating relationships between members of military society, must concern itself with the issue of fairness. Fairness is not only fundamental to the disciplinary process, but is also a foundation of the handling of grievances and the conduct of investigations. Many CF policies such as release, investigation of harassment complaints and the administration of sexual misconduct cases reflect these fairness principles.

18. At law fairness is most often expressed in concepts such as the right to reasons for a decision, the making of oral or written submissions, rules of evidence, provision of information, notice of any career action or charges and right to counsel. The level of fairness provided depends upon: the effect of any action taken against a member of the society, the relationship between the individual and the decision making body, and the nature of the decision. If someone is to be imprisoned or detained they have a right to a higher standard of procedural fairness, such as that found at court martial. The threat of losing employment attracts a lower standard of procedural fairness, as exists in administrative action. Some administrative decisions require no procedural fairness at all.¹⁷ *Procedural fairness* is a legal doctrine that applies to the decision making process and existed prior to the enactment of the *Charter*. It is often associated with the terms natural justice and fundamental justice. The principle of procedural fairness is reflected in a number of the provisions in the *Charter*.¹⁸

¹⁴ *Id.*

¹⁵ *QR&O* 4.02.

¹⁶ *QR&O* 4.02, 5.01, 19.13 and 19.14.

¹⁷ For example, issuing driver's licences.

¹⁸ See Chapter 4, Fairness and the Application of the Charter.

Rights and Obligations of Military Service

19. A Canadian serving in the armed forces does not give up the rights and obligations of Canadian citizenship. As was affirmed by the Supreme Court of Canada in *MacKay v. R*:

...it is a fundamental constitutional principle that a soldier does not, by virtue of joining the armed forces and the consequent military character he assumes, escape the jurisdiction of the civil courts of this country. Accordingly, the ordinary law that applies to all citizens also applies to members of the armed forces but by joining the armed forces those members subject themselves to additional legal liabilities, disabilities and rights, that is to say Canadian military law.¹⁹

20. Members remain protected by the rights set out in the *Charter*. The following passage from the 1997 *Leadership Report* highlights the importance of ensuring common social values and rights are respected and protected in military society:

The record of modern warfare clearly demonstrates that military effectiveness depends upon armed forces being integral parts of the societies they serve, not being isolated from them. The society in which and for which the CF serve is in the process of rapid legal, economic and social change. As a result, the Forces must respect women's rights, reject discrimination based on race or sexual orientation and conform to other Canadian legislation reflecting evolving social values.²⁰

Limitation of Rights

21. What does change, however, is the degree to which some of the rights provided to all Canadians apply to members of the CF. For example, under s.11(f) of the *Charter* the right to a jury trial is not available in the case of an offence under military law tried before a military tribunal. Some military tribunals consist of a panel of military members. Similarly, Section 2 of the *Charter* states that everyone has the right of freedom of association, freedom of peaceful assembly, freedom of thought, belief, opinion and expression. However, *QR&O* reflect legal restrictions on the public communication of information and candidature for office. Each of these restrictions is based on a unique military requirement for the limitation of communication or freedom of association. The restriction on involvement in political activities is based on the need to ensure nothing affects the actual or perceived political neutrality of the CF. The military is such a potentially influential force in society that the armed forces, and those serving in it, cannot influence or be seen to influence the outcome of political activities such as elections, other than by their right to vote.

22. The need to be apolitical in terms of outward appearances may at first glance seem to be at odds with the requirement that the CF be responsive to the needs of political leaders. The answer is found in the nature of the political interest that is to be institutionally protected. Service authorities have a responsibility to follow political direction and to advise the MND and other government officials on the proper use of the armed forces. However, that political involvement is subservient in nature. In contrast, the outward involvement in political

¹⁹ [1980] 2 S.C.R. 370 at 399.

²⁰ 1997 *Report to the Prime Minister on the Leadership and Management of the Canadian Forces "Values and Ethics"* (March 25, 1997) at 11.

campaigning, or running for office, carries with it a controlling function which falls outside the realm of military service.

Balancing Rights and Limitations

23. Even though a member cannot take an active part in many political activities, a member can vote, attend political meetings and run for minor political office. The rights normally attached to Canadian citizenship are limited where they are inconsistent with the basic obligations of military service. This weighing of rights is provided for under Canadian law. Section 1 of the *Charter* states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it *subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*. (emphasis added)

24. In a similar fashion equality rights, such as the protection under the *Canadian Human Rights Act* against discrimination on the basis of disability can be justified where there is a *bona fide occupational requirement*.²¹ In respect of the military such discrimination has, in certain cases, been justified on the basis of universality of service, which is another way of expressing the unlimited liability to serve or universality of service principle.

25. The key to justifying the limitation on the constitutional rights of a service member is identifying the core principles, or tenets, of military service. The balancing process between enabling soldiers to enjoy the rights of fellow citizens, and protecting the core values of military service (unlimited liability, obedience, etc.) is an important undertaking in a democracy. Should the values of military service be undermined the armed forces could become ineffective and ill disciplined. If military values are upheld to the exclusion of the rights enjoyed by other citizens the members of the military would become isolated from their fellow citizens. Taken to its extreme a military force that does not enjoy, or identify with, the rights and values that underpin civilian society would quickly become a danger to that society.

The Law and Ethics

26. The law cannot be considered in isolation from the ethical obligations of leadership and military service. In considering the scope of ethics the following two definitions are helpful:

ethical 1. a set of moral principles; relating to morals, esp. as concerning human conduct;....
2. morally correct; honourable.²²

moral 1. Concerned with goodness or badness of human character or disposition, or with the distinction between right and wrong,...concerned with accepted rules and standards of human

²¹ Employment in particular jobs may not be limited to persons of a particular sex, religion, or national origin unless the employer can show that sex, religion, or national origin is an actual qualification for performing the job. The qualification is called a bona fide occupational requirement. *Black's Law Dictionary*, (St. Paul, Minn.: West Publishing Co., 1990) at 177.

²² *The Concise Oxford Dictionary of Current English*, (9th ed) (Oxford: Clarendon Press, 1995) at 463.

behaviour; virtuous in general conduct (of rights, etc.) founded in moral law...law, conditions to be satisfied by any right course of action.²³

27. Ethics and morals are very much about regulating conduct. Ethical and moral behaviour incorporate the obligation to adhere to the law and obey orders issued by lawful authorities. The requirement to obey the law, enforce the law, be committed to the law and maintain discipline is consistent with, and in fact an integral part of, ethical military conduct.

28. However, there are exceptional circumstances when direction is so immoral that it must be disobeyed. For example, the obligation to disobey a manifestly unlawful order. In the words of the Supreme Court of Canada (*Finta v The Queen*²⁴) a manifestly unlawful order is “an order which shocks the conscience of every reasonable, right thinking person”. The law provides an essential reference point for members in guiding ethical behaviour.

SECTION 2 DISCIPLINE

Role of the Armed Forces

29. It is evident that discipline and law are intertwined.²⁵ The ultimate role of the armed forces is to apply force, or the threat of force, in the furtherance of the interests of the state. It is significant that this role is related to the application of violence, because it is the potential destructive power of these forces which requires that they be more closely controlled than other segments of society. As has been discussed, the Government of Canada, as empowered by Parliament maintains ultimate control over the use of sanctioned violence in Canada. However, the responsibility for actual training and on site deployment of the armed forces has been placed in the hands of military officers and NCMs. For members of the military the control exercised within military society is referred to in terms of the maintenance of discipline.

Why Armed Forces Fight

30. In order to fulfil the role of an armed force, military leaders must be able to train and motivate personnel under their command to fight. This readiness to fight, whether willingly or otherwise, requires that the members of the armed forces often suppress their own interests including, ultimately, the preservation of their own lives. It has been determined that the factors affecting the motivation of soldiers to fight are primary group allegiances (group cohesion and buddy loyalties), unit esprit, manpower allocation, socialization, training, discipline, leadership,

²³ *Id.* at 883.

²⁴ [1994] 1 S.C.R. 701.

²⁵ The principle focus of this chapter is the relationship of military law to discipline. It should be noted that there are other important individual and social psychology dimensions of military discipline such as the differential nature of obedience and the sub-components of functional discipline. However, an in-depth analysis of these concepts is beyond the scope of the chapter and the intent of the manual.

ideology, rewards, pre-conceptions of combat, combat stress and combat behaviour (including self-preservation).²⁶

31. However, it is identification with being a member of an armed force which ultimately causes soldiers to fight.²⁷ Research has confirmed the findings of a study conducted at the end of World War II, known as the Stouffer study. The Stouffer study drew the following conclusion:

We are forced to the conclusion that personal motives and relationships are not uniquely determinate for organization in combat...officers and men must be motivated to make the organization work, but not *all* of them have to be so motivated, nor must they all agree on details of social philosophy or be bound by ties of personal friendship in order for a functioning organization to exist. To put it another way, the best single predictor of combat behaviour is the simple fact of institutionalized role: knowing that a man is a soldier rather than a civilian. The soldier role is a vehicle for getting a man into the position in which he has to fight or take the institutionally sanctioned consequences.²⁸

The maintenance of discipline performs an essential role in socializing its members in the institutional values.

Institutional Values in Armed Forces

32. Military institutional values such as liability for 24 hours service, subjection to military discipline and the inability to resign, strike or negotiate working conditions, has been contrasted with the civilian occupational model wherein *self-interest* has a greater priority than the employing institution.²⁹ This contrast between military *institutional* values, and civilian *occupational* values is not unlike the balancing of rights and obligations, which arises in respect of section 1 *Charter* analysis. It is clear that one of the factors which distinguishes the military *institution* from the civilian *occupation* is the subjugation of members of the armed forces to military discipline and law.

Defining Discipline

33. Discipline has traditionally been considered to be the soul of the armed forces. To discipline someone is to "1. Punish, chastise. 2. bring under control by training in obedience; drill".³⁰ Discipline serves a threefold purpose:

- a. ensuring members carry out assigned orders in the face of danger;
- b. controlling the armed forces so that it does not abuse its power; and
- c. assisting in assimilating a recruit to the institutional values of the military.

²⁶ Anthony Kellett, *Combat Motivation: The Behaviour of Soldiers in Battle* (The Hague: Kluwer Nijhoff Publishing, 1982).

²⁷ *Id.*

²⁸ *Id.* at 334.

²⁹ Charles Moskos "Institutional and Occupational Trends in Armed Forces" in *The Military: More Than Just a Job* (London: Pergamon-Brassey's International Defence Publishers Inc., 1988) at 16-17.

³⁰ *The Concise Oxford Dictionary of Current English*, (9th ed) (Oxford: Clarendon Press, 1995) at 385.

34. Discipline does not simply consist of the imposition of punitive sanctions. The maintenance of discipline in Canada's modern armed forces relies on a blend of both collective discipline (imposed discipline of recruit camp) and self-discipline (individual acceptance of the requirement to obey). Within each of the Army, Navy and Air Force the nature of military service may require a different blend of collective and self-discipline. The maintenance of discipline, and in particular the development of self-discipline, requires that a positive role be played by military leaders.

35. The essence of discipline is found in the *Mainguy Report*, which inquired into disciplinary problems in the Canadian Navy in 1949:

When we come to deal with discipline, we shall only point out that the only discipline which in the final analysis is worthwhile is one that is based upon *pride in a great service, a belief in essential justice, and the willing obedience that is given to superior character, skill, education and knowledge*. Any other form of discipline is bound to break down under stress. (emphasis added)³¹

36. A good leader will maintain discipline by means of personal example, skill, integrity and knowledge. The term *essential justice* is closely related to legal concepts such as *natural justice* or *fundamental justice*.³² What *essential justice* means is ensuring subordinates have an opportunity to be heard, and to deal consistently with any grievances or problems; in other words, to be fair. The *Code of Service Discipline* is used when the more positive means of ensuring a habit of obedience have been unsuccessful. It is readily apparent that the authority to command, fairness and the ability to sanction behaviour inconsistent with the institutional values of the military, all integral parts of military law, are essential to the development of the habit of obedience so necessary for the creation of an effective armed force.

Unique Aspects of Military Discipline

37. The high level of control that must be placed on an armed force has a unique effect on the maintenance of military discipline. An essential feature of military discipline is that it is meant to be intrusive. As a means of socializing members of the armed forces, and particularly recruits, military control of the member's life must be much more pervasive than the control exercised by civilian society over its members. The intrusiveness of the disciplinary process is reflected in the scope of the *Code of Service Discipline*. That Code includes not only offences which are found in the civilian criminal law, but also offences such as absence without leave, mutiny, insubordination and ill-treating subordinates which are not subject to punitive sanction in civilian life. The broader scope of military law and the unique requirements of discipline were acknowledged by the Supreme Court of Canada in *MacKay v. R.*.

Without a code of service discipline the armed forces could not discharge the functions for which they were created. In all likelihood those who join the armed forces do so in time of war from motives of patriotism and in time of peace against the eventuality of war. To function efficiently as a force there must be prompt obedience to all lawful

³¹ *Report on Certain "Incidents" Which Occurred on Board H.M.C. Ships Athabaskan, Crescent and Magnificent and on Other Matters Concerning the Royal Canadian Navy* (the *Mainguy Report*), October 1949 at 32.

³² See Chapter 4, Fairness and the Application of the Charter.

orders of superiors, concern, support for, and concerted action with, their comrades and a reverence for and a pride in the traditions of the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfilment of the role they have chosen and paramount in that there must be rigid adherence to discipline.

Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is, for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.³³

38. Since the habit of obedience requires a compliance with all but unlawful orders no breach of orders can be overlooked. Failure to comply with even minor orders and regulations involves a lack of respect for authority. The degree to which military law provides sanctions against failures to comply with authority is reflected in section 129(2) of the *NDA*. That section states that a contravention of the provisions of that Act; any regulations, orders or instructions published for the general information and guidance of the CF; and any general, garrison, unit, station, standing, local or other orders is deemed to be prejudicial to good order and discipline. Conviction for an offence under section 129 of the *NDA* is punishable by Dismissal with Disgrace from Her Majesty's Service or to less punishment.

39. If obedience cannot be ensured by willing compliance then it must be enforced by corrective action. In some cases the disciplinary problem can be addressed through administrative action. Minor breaches are usually dealt with by summary trial and result in the imposing of a minor punishment. It is by correcting the minor breaches that compliance with all lawful orders is ensured and discipline is maintained. In becoming disciplined members of the armed forces, the individuals conform to the institutional requirements of the military thereby making it more likely that they will fight when required to do so.

Responsibility for Maintaining Discipline

40. The essential requirement for, and intrusive nature of, discipline in the military is reflected in the wide-reaching responsibility for all members of the armed forces to ensure discipline is maintained. No member of the military can be a bystander or remain neutral as to whether other members respect and obey authority. The acquiescence to insubordinate behaviour is harmful to the creation and maintenance of a habit of obedience. The obligation on all members of the military to enforce military law (and thereby obedience to orders and instructions) is reflected in the requirement for all officers and NCMs to become acquainted

³³ [1980] 2 S.C.R. 370 at 399.

with, observe and enforce the *NDA*, regulations, rules, orders and instructions that pertain to the performance of their duties.³⁴ The maintenance of discipline is a function of leadership at all levels of command.

41. The responsibility which officers have to deal with breaches of discipline within their control reflects the unique status given to them at law. As M. Wakim states:

The expertise of the officer imposes upon him a special social responsibility. The employment of his expertise promiscuously for his own advantage would wreck the fabric of society. As with the practice of medicine, society insists that the management of violence be utilised only for socially approved purposes. Society has a direct, continuing, and general interest in the employment of this skill for the enhancement of its own military security.... The skill of the officer is the management of violence; his responsibility is the military security of his client, society. The discharge of the responsibility requires mastery of the skill; mastery of the skill entails acceptance of the responsibility. Both responsibility and skill distinguish the officer from other social types. All members of society have an interest in its security; the state has a direct concern for the achievement of this along with other social values; but the officer corps alone is responsible for military security to the exclusion of all other ends.³⁵

42. As the persons responsible for the readiness and capability of the armed forces it is officers who must ensure that the habit of obedience, and therefore the discipline of subordinates, is maintained at a proper level. At the same time subordinates look to the persons whom they must obey in order to have disciplinary issues resolved.³⁶

43. This special responsibility which is placed on commissioned officers has been acknowledged by the Supreme Court of Canada in both *MacKay v. R*³⁷ and *R v. Genereux*. In *R v. Genereux* the court stated in respect to officers sitting on courts martial:

Their training is designed to insure that they are sensitive to the need for discipline, obedience and the duty on the part of members of the military and also to the requirement for military efficiency. Inevitably, the court martial represents to an extent the concerns of those persons who are responsible for the discipline and morale of the military.³⁸

The special needs of military discipline prompted the court to go on to state:

³⁴ *QR&O* 4.02, 5.01, 19.01.

³⁵ M. Wakim, ed., *War, Morality and the Military Profession*, (Boulder, Colorado: Westview Press, 1979) at 17.

³⁶ “We, reposing especial Trust and Confidence in you Loyalty, Courage and Integrity, do by these Presents Constitute and Appoint you to be an Officer in our Canadian Armed Forces. You are therefore carefully and diligently to discharge your Duty as such in the rank of Second Lieutenant or in such other Rank as We may from time to time hereafter be pleased to promote or appoint you to, and you are in such manner and on such occasions as may be prescribed by Us to exercise and well discipline both the Inferior Officers and Non-Commissioned Members serving under you and use your best endeavour to keep them in good Order and Discipline. And We do hereby Command them to Obey you as their Superior Officer, and you to observe and follow such Orders and Directions as from time to time you shall receive from us, or any your Superior Officer according to Law, in pursuance of the Trust hereby reposed in you”. (From Canadian Forces Officer Commissioning Scroll).

³⁷ [1980] 2 S.C.R. 370.

³⁸ [1992] 1 S.C.R. 259 at 295.

Recourse to ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military.³⁹

44. All officers are required to report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of persons subject to the *Code of Service Discipline* when the officer cannot deal with the matter.

Commanding Officers

45. The authority to maintain discipline at the unit level is concentrated in the hands of the CO. COs not only have the powers of trial and punishment but can also authorize officers and NCMs to lay charges, can cause investigations to be conducted and issue search warrants. Further, COs can delegate powers of trial and punishment to delegated officers. The concentration of disciplinary authority at the level of the CO reflects the personal nature of leadership. The ability to command respect and to effectively control subordinates is based to a large part on the leadership ability of the officer.

46. The decision to centre disciplinary power in the hands of the CO reflects a balance between the level of responsibility and professional status of that officer on one hand and the degree of personal identification and control over subordinates on the other hand. Among the factors affecting the ability of personnel to fight, are primary group allegiances, unit esprit and leadership.⁴⁰ Like leadership, primary group allegiances and unit esprit have a strong personal component. The effectiveness of these primary group allegiances is further enhanced "where the loyalty to the group is supplemented by commitment to a wider entity..⁴¹ In the CF this wider entity is embodied in the unit, examples of which are the ship, squadron and regiment. The enhancement of fighting effectiveness through primary group allegiance, unit esprit and leadership is most effective at the lower levels of the military structure where personal contact and allegiances are their strongest.

Non-Commissioned Members

47. All officers and NCMs are required to report to the proper authority infringements of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of persons subject to the *Code of Service Discipline*. The obligation to report extends to the misdeeds of their superiors. For authorized officers and senior NCMs the obligation to report extends to the laying of formal accusations of breaches against service discipline in Part I (charge reports) of the Record of Disciplinary Proceedings (RDP).

48. The obligation to report breaches of military law is not intended to create an armed force filled with informers. It reflects a more positive goal of ensuring there is a universal acknowledgement by all members of the vigilance required to maintain discipline and foster respect for authority. Non-commissioned officers (NCOs) are the eyes, the ears and the backbone of the disciplinary process. While officers adjudicate and have a special responsibility for the

³⁹ [1992] 1 S.C.R. 259 at 293.

⁴⁰ Anthony Kellett, *Combat Motivation: The Behaviour of Soldiers in Battle* (The Hague: Kluwer Nijhoff Publishing, 1982) at 319-332.

⁴¹ *Id.* at 321.

maintenance of discipline it is NCMs who are tasked with building the habit of obedience through early intervention when resistance to, or non-acceptance of, authority is noted. As was stated in the 1997 *Leadership Report*:

In all armed forces, senior NCMs play an extremely important role in passing on values, instilling discipline and bolstering morale. For the CF, the complexity of current operations makes this even truer today than it was in the past.⁴²

Accountability

49. The special responsibility which officers and senior NCMs have to maintain *institutional* standards means they will be held to a higher standard of accountability than lower ranking members of the military for the same breach of discipline. That is not to say that every transgression by an officer or senior NCM warrants formal disciplinary action. The greater number of decisions and an increased requirement to exercise discretion, which comes with higher rank, often enhances the likelihood that mistakes may be made. The corrective action which is taken must reflect the nature of the error made by the officer or senior NCM. However, challenges to authority, insubordination, ill treatment of subordinates, etc., normally take on an increasing severity the higher in rank of the accused member involved.

Threats to Discipline

50. It is understood that there will be individual breaches of discipline. The disciplinary process is designed to correct, and if necessary punish individual disobedience. The most significant threat to discipline is a group or systemic disobedience of the orders, direction, and standards of conduct established by the government through its military hierarchy. In a hierarchical organization like the military a break in the chain of willing obedience potentially could result in the existence of a physically destructive force outside the control or influence of the democratic government.

51. In its most obvious manifestation group disobedience is known as a mutiny. Mutiny is defined in section 2 of the *NDA* as:

collective insubordination or a combination of two or more persons in the resistance of lawful authority in any of Her Majesty's Forces or in any forces co-operating therewith.

Joining in a mutiny is a service offence. Similarly, anyone who causes or conspires; endeavours to persuade; does not suppress; or fails to report a mutiny is subject on conviction to life imprisonment. It is also an offence under section 53 of the *Criminal Code* to seduce a member of the CF from his duty and allegiance to Her Majesty.⁴³

52. The control that the government exercises over military forces can be adversely affected when the requirement to obey regulations, rules, orders or instructions is weakened by a breakdown in discipline at any level in the chain of command. Indeed the term *chain* implies a link between various levels within the hierarchy. The importance of the chain of command and

⁴² 1997 *Report to the Prime Minister on the Leadership and Management of the Armed Forces "Values and Ethics"* (March 25, 1997).

⁴³ Also consider *Criminal Code of Canada* s.62.

discipline was addressed in the 1997 *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (the Special Advisory Group):

Just as it is not possible to understand the military justice system unless it is directly related to the need for military discipline, so it must be recognized that all persons subject to the *Code of Service Discipline* have a CO to whom they are accountable in matters of discipline. Service members are required to obey the lawful orders and instructions of their superiors. COs are in turn responsible to their superiors for all matters of discipline within their units. At each level of the military hierarchy, there is an expectation that the person at the next higher level has the authority to hold subordinates accountable, and to impose disciplinary and administrative measures as a means of enforcing that accountability. Military justice and the chain of command are, therefore, closely intertwined.⁴⁴

53. The failure to observe and enforce common standards, which are set at the national level, poses a threat to the discipline of the CF as a whole. There is room for differences between units, or distinctions based on rank. Competition and inter-unit rivalry can be powerful forces for creating unit cohesion. However, the acceptable distinctions must be carefully developed, and from an organizational point of view, tightly controlled. Most distinctions such as unit dress are clearly regulated and are based on all members of a unit being subject to rules established by a higher headquarters. The most obvious common obligation that exists for all members of the armed forces is to obey the *Code of Service Discipline*. The enforcement of that Code must not only be firm and fair, but also comprehensive and universal. There cannot be more than one standard of obedience in an armed force. In effect the law represents the unifying obligations of military service. Discipline is maintained by obeying lawful commands for the purpose of performing lawful duties.

Discipline and Change

54. There is a general perception that the changes that have occurred in Canadian society in the past decade, particularly since the enactment of the *Charter*, have placed unique strains on the CF. The development of new policies to meet the changing nature of civilian society is sometimes adversely received by members of the military. However, change, and resistance to change, are not recent phenomena. The following quote from the 1949 *Mainguy Report* reflects an attitude often heard in more modern times:

The times in which we live...are full of restlessness, uncertainty and change.... The social and economic uncertainties and changes, which affect Canada as they do the world and the general deterioration in the discipline of family life, which is one of the misfortunes of our times, press with particular intensity on the lives of our young men. It would be a miracle if the comparative isolation of men within the walls of a ship at sea should protect them from the disturbing influences that harass their companions and contemporaries on shore.⁴⁵

55. Change is an inevitable and necessary part of military life. Members of the military often have led society in its acceptance of technological change. It should not be a surprise that the

⁴⁴ *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, March 14, 1997, at 9.

⁴⁵ *Report on Certain "Incidents" Which Occurred on Board H.M.C. Ships Athabaskan, Crescent and Magnificent and on Other Matters Concerning the Royal Canadian Navy* (the *Mainguy Report*), October 1949 at 7.

military must also deal with societal changes. If the military does not accept or reflect change in broader society it runs the risk of becoming isolated from that society. What is important for the military is to identify the core values of its society that cannot be altered without an unacceptable effect on discipline and in turn, operational effectiveness.

56. What leaders need to do is to ensure the acceptance of change by subordinates. The acceptance of change is best attained by the demonstration of a personal commitment to the change by the leaders; the provision of education on the value which the change provides to individual members and the military as a whole; and the enforcement of the policy should individual members become too resistant to the changes. The existence of change should be primarily seen as a leadership challenge, rather than a threat.

Law and Discipline

57. Law and discipline are clearly intertwined. Since the law is about organization and the regulation of society, and discipline relates to obedience to a higher authority, it is inevitable that the two concepts are so intimately connected. However, the writing of a law does not guarantee it will be either observed or enforced. There must be an additional ingredient for the attainment of discipline. The willing obedience to orders must be based on a commitment, a spirit and an ethos, on the part of the members of the armed forces.

SECTION 3 MILITARY ETHOS

58. *Ethos* and discipline are closely related. Discipline has been referred to as the *soul* of an armed force. *Ethos* is defined as: "characteristic, spirit or attitudes of a community, etc. [Greek *ethos* character]".⁴⁶ The character or ethos of military society is what separates it from its civilian counterpart. Uniforms and weapons serve to visually and functionally separate the military from civilians. However, it is discipline that reflects the true nature of a military force. Without discipline a military force will at best be ineffective, and at its worst, in the words of Maurice de Saxe, "more dangerous to the country than to the enemy".

Basic Principles

59. What then is the ethos which separates military service from civilian life? Some of the basic principles that separate the ethos of military service from civilian life are:

- a. *Duty*. The obligation to perform at all times any lawful duty is one of the defining principles of military service. The requirements of military service are significantly different than the expectations of civilian employment. The military often attempts to make accommodations for its members for personal and family reasons; however, at the end of the day the basic condition of service is to perform duties when required. The duty required to be performed is often phrased in terms of *unlimited liability*.

⁴⁶ *The Concise Oxford Dictionary of Current English*, (9th ed) (Oxford: Clarendon Press, 1995) at 463.

- b. *Obedience to Authority.* Every officer and NCM must obey the lawful orders of superiors in the chain of command. While leadership is very much a personality driven activity, the ultimate allegiance is not given to the individual officer or unit, but rather through the chain of command to the people of Canada as represented by their governing institutions in accordance with the Canadian Constitution and the *Rule of Law*.
- c. *Subordination to those in Authority.* The requirements to perform military duty and obey orders are premised on the performance of *lawful* duties and the receipt of *lawful* orders. The military is clearly an organ of the state. Members are agents of the state. As such the commitment of the military must be to the *Rule of Law*. Operations, both domestically and internationally, are conducted in accordance with the law. The obligation of Canada in international operations, whether it be acting in defence of the nation or on United Nations operations, is to enforce international legal standards. Similarly, domestic operations, such as the call out at Oka, Quebec in 1990, or the enforcement of fisheries legislation, involve the enforcement of domestic laws and the maintenance of the *Rule of Law*. In order to enforce the law credibly, the State, the armed force, and individual service members must obey the law. Similarly, within the military itself the authority to command is based upon law. The whole function of command and the issuance of orders is based on the premise that the instructions provided by officers and NCMs will be lawful. The leaders within the armed forces must not only issue lawful commands but they must also lead by example. In order to maintain respect for the law on the part of subordinates the leaders within an armed force must respect, obey and enforce the laws that govern military activity.
- d. *Enforcement of Discipline.* The obligation to perform lawful duties and obey lawful orders cannot be optional. The obedience of orders, regulations, and instructions be they verbal or in writing must be pervasive throughout an armed force. The laws governing service life will only truly have meaning when the leadership enforces them. The enactment of laws serves to identify many of the core values of a society. However, it is the willingness of the members of the society to enforce those laws which truly identifies the commitment to societal values. Discipline is the habit of obedience. Officers and NCMs must therefore be constantly vigilant in ensuring the required obedience is observed at all times. A failure to salute, incomplete performance of duties, poor dress or disrespectful language by subordinates may seem relatively minor on their own. However, if a superior, regardless of rank, fails to correct such action the habit of obedience has not been maintained. As one Regimental slogan states: "never pass a fault".
- e. *Welfare of Subordinates.* In order for discipline to be truly effective there must be a willing obedience to orders. By promoting the welfare of subordinates a good leader helps cement not only the personal ties necessary for good discipline, but also helps to bond those subordinates to the organization as whole. One important principle in looking after the interests of subordinates is to ensure their problems are treated fairly and in a timely fashion. However, concern over the welfare of subordinates cannot be used as an excuse for not dealing with a breach of discipline. If the circumstances warrant it charges must be laid. Leadership can

never become a popularity contest. The promotion of the wishes of an individual or even groups of individuals within a unit or sub-unit cannot become paramount to meeting the overall institutional goals of the military.

Articulating the Ethos of Military Service

60. The basic principles which form the spirit or ethos of military service are already written down in military law. While the law is clear and the obligation to obey the law is absolute, the simple existence of those laws will not guarantee a disciplined and effective armed force. The members of the military must be intimately acquainted with the principles behind those laws. The written law must be animated and become an integral part of all of the actions of the officers and NCMs of the armed forces. It is the belief in the principles and the commitment to obey and enforce them, which provides the character or spirit of a military force.

SECTION 4 CONCLUSION

61. The law provides a standard of conduct and morality for all of society including military society. Such standards can be found in the *Charter*, the *Criminal Code*, the *Canadian Human Rights Act* and the *NDA* (the *Code of Service Discipline*). The CF is often deployed to areas of the world where law and order has broken down, or temptations are presented to adopt local standards of conduct. Members often need look no further than the *Code of Service Discipline* to determine what standard of conduct is expected of them. The habit of obedience demands the steadfast application of, and respect for, the laws of Canada, which govern military society by all members of that society.

CHAPTER 2

HISTORY OF SUMMARY PROCEEDINGS

SECTION 1

GENERAL

1. In 1997, the Special Advisory Group concluded that the existence of a strong chain of command is absolutely essential to any efficient and disciplined armed force. The Special Advisory Group stated:

“...[t]he CO is at the heart of the entire system of discipline.” By statute, regulation, custom and practice of the service, the CO has been given authority...to conduct summary proceedings or recommend the matter for court martial.¹

2. The importance of the role of the chain of command, and more specifically the CO, in the maintenance of discipline is highlighted in a historical review of the development of the summary trial system. It is by reviewing the historical basis for summary trial proceedings that a true understanding can be reached of why unique powers of trial have been concentrated in the hands of superior commanders, COs and delegated officers.

SECTION 2

EARLY SUMMARY PROCEEDINGS

3. A form of military tribunal "for the trial of military offenders appears to have co-existed with the earliest history of armies".² Under Roman military law, which was largely customary, disciplinary jurisdiction was exercised at various levels of command. The commanding general (Consul, Praetor or Dictator), lieutenant-generals, military tribunes, centurions and principals all had the power to impose punishments on subordinates. The scale of punishments included death, corporal punishment, dismissal with disgrace, reduction in rank and deprivation of pay.³

4. Among early Germanic tribes judicial proceedings were conducted by the Counts during peace and by the Duke or military chief, through delegation to priests, during times of war. Later there developed courts of regiments conducted by the Colonel or a delegated officer. The judicial authority of the delegated officer was demonstrated by a staff or mace called the regiment.⁴

5. The first written military codes of Europe were civil as well as military, as the military commanders in war were also the civil leaders in peace.

¹ *Report of the Special Advisory Group on the Military Justice System and Military Police Investigation Services, March 14, 1997, at 9.*

² W. Winthrop, *Military Law and Precedents*, 2 ed. (Washington: General Printing Office, 1920) at 45.

³ C.E. Brand, *Roman Military Law* (Austin: University of Texas Press, 1965) at 103-107. While in camp the commanding general sat in a judgment seat known as the tribunal.

⁴ Winthrop, *Military Law and Precedents* at 20-21.

SECTION 3 OUR ROOTS

General

6. Since Canadian policy, well into World War II, was to adopt British military law, the history of British military law is, in effect, the early history of the Canadian military justice system. The military law applicable to the British land and air forces developed in a different manner than the law applied to its naval forces.⁵

The Land Forces

7. **Middle Ages to Mutiny Act.** During the Middle Ages there was often no clear distinction between civilian and military jurisdiction. The control of English feudal armies was exercised under courts of chivalry, *curia militaris*, which were brought to England by William the Conqueror in 1066. Even before the use of courts of chivalry had declined there was an increased use of military courts authorized by various Articles of War.⁶ These *councils of war* eventually evolved into the modern court martial.⁷ The English Military Code of 1666 provided for three types of courts: a General Courts Martial, a Regimental Court and a Detachment with the power of a Regimental Court. The Regimental Court was set up for the trial of soldiers by their officers, but did not have jurisdiction over offences "punishable with life or limb".⁸

8. During the 17th century there was considerable conflict between the English monarchs and Parliament over the maintenance of armed forces in England in peacetime. This conflict resulted in the signing of a Bill of Rights which, among other things, outlawed the keeping of a standing army within the country in times of peace without the consent of Parliament. In 1689, the question of the disciplining of military forces was again brought to the forefront when troops mutinied to join the forces of James II in Scotland. To address this problem the British Parliament quickly passed the first *Mutiny Act*⁹. This Act has been described as the first permanent code of military law.¹⁰

9. The pre-amble to the *Mutiny Act* is particularly instructive in that it indicates an understanding by Parliament that military justice had to be summary in nature. That preamble stated in part:

... according to the knowne and established Lawes of the Realm Yet nevertheless it being requisite for retaining such Forces as are or shall be Raised dureing this Exigence of Affaires in their Duty That **an exact Discipline be observed** and that Soldiers who shall Mutiny or

⁵ K.W. Watkin, LCol, "Canadian Military Justice: Summary Proceedings and the Charter", (1990 LLM thesis) at 35.

⁶ Articles of War were codes of discipline issued on a regular basis for the purpose of controlling the army.

⁷ Winthrop, *Military Law and Precedents* at 9-21.

⁸ C.M. Clode, *The Administration of Justice Under Military and Martial Law*, 2 ed. (London: John Murray, 1874) at 14.

⁹ *An Act for Punishing Officers or Soldiers who shall Mutiny or Desert Their Majestyes Service* 1689, (U.K.) 1 Will. & Mary c. 5. See R.A. MacDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law" (1985) 1 C. F. JAG J. 1 at 12.

¹⁰ W.J. Lawson, "Canadian Military Law" in *The Canadian Bar Review*, vol. 29, March 1951, 241 at 243.

Stirr up Sedition or shall Desert Their Majesties Service **be brought to a more *Exemplary and speedy Punishment then the usuall Formes of Law will allow...*** (emphasis added)

The *Mutiny Act* recognized that discipline had to be exact, and military offenders needed to be brought to trial promptly.

10. **Mutiny Act to 1879.** Throughout the 18th century and well into the 19th century the discipline of military forces was governed by a combination of the *Mutiny Act* and *Articles of War*. In 1803, the *Articles of War* were given a statutory basis.¹¹ The three main types of military courts were: the General Courts Martial, the District Courts Martial and the Regimental Courts Martial.

11. The Regimental Courts Martial was the most summary of the courts, as it did not have to be authorized by a Royal Warrant. Instead, the Colonel (CO) convened it under the authority of Articles of War first issued in 1672. The Regimental Court consisted of five officers (three officers could be used) and could sentence a soldier to corporal punishment, imprisonment for a period of 42 days and to forfeiture of pay. The sentence had to be confirmed by the CO.¹²

12. During the latter half of the 19th century the summary powers of COs were further increased. This was the result of public pressure over the poor conditions of service of the rank and file as evidenced during the Crimean War and the problems with recruiting.¹³ As R.A. Skelly wrote:

In general the tendency for much of the second half of the century was to extend the army officer's authority to mete out punishments of this nature. A similar process extended the summary jurisdiction of civilian magistrates, and the reasons in both cases were similar. Summary powers were increased to ease the burden on military courts, to speed the process of justice, and to provide alternative methods of punishment to imprisonment.¹⁴

13. It was these military tribunals and summary proceedings that were in existence in 1868 when the Canadian Parliament passed the *Militia Act*¹⁵ adopting the *Articles of War* under British military law to govern Canada's armed forces.

14. **The Army Discipline and Regulation Act, 1879 to End of World War II.** The period from 1879 to 1945 was marked by a steady growth of the summary powers of military commanders. The increased use of summary punishments and an expanded summary jurisdiction for COs continued the swing away from the use of courts martial started in the mid-19th century. In general, punishment became milder as there developed an increased sense of humanity for the individual soldier within the army, a response to public pressure and the exigencies of voluntary recruitment.¹⁶

¹¹ Clode, *The Administration of Justice* at 58-59.

¹² *Mutiny Act*, s. 10.

¹³ Skelly, *The Victorian Army At Home* (Montreal: McGill-Queen's University Press, 1977) at 17.

¹⁴ *Id.* at 140. Articles of War (1873), art. 32, 50, 77. See Clode, *The Administration of Justice*, Appendix C at 262, 267-268, 273. The increase in summary jurisdiction did not necessarily mean that the punishments were still not harsh (eg. 7 days confinement to barracks for leaving a brush out on kit display). However, the punishments were considerably less severe than might be awarded by a court martial. See Skelly, *The Victorian Army at Home* at 139-140, 145-150.

¹⁵ *An Act respecting the Militia and Defence of the Dominion of Canada*, S.C. 1868, c. 40.

¹⁶ Skelly, *The Victorian Army at Home* at 141.

15. The *Army Discipline and Regulation Act, 1879*¹⁷ was enacted to amalgamate the *Mutiny Act* and the *Articles of War*. Two years later that Act itself was repealed and replaced by the *Army Act of 1881*.¹⁸ In these Acts the jurisdiction of military law was expanded to include most civil offences committed by soldiers in England.¹⁹

16. The *Army Discipline and Regulation Act, 1879* gave the CO broad powers to impose summary punishments. The CO had the power to investigate charges against officers or non-commissioned soldiers. Where the case involved a soldier it could be dealt with summarily by the CO. That officer could impose imprisonment, with or without hard labour (7 days); for an offence of drunkenness, a fine (10 shillings); deduction from ordinary pay; and minor punishments. The Act also provided for the right of a soldier to request to be tried by district court martial in any case where the punishment to be imposed would involve imprisonment, a fine or deduction from pay.²⁰

17. The legislation of 1879, marked the beginning of two levels of trial under British military law: summary proceedings and courts martial. From this point on the two service tribunals were to develop along considerably different lines. The court martial was used to try more serious offences and to offer a *safety valve* for soldiers who preferred not to be tried by their COs. The summary trial remained an informal process and eventually became the primary service tribunal used to maintain discipline in the British and Canadian Armies.

18. **Expansion of Summary Powers.** The expansion of the summary powers of COs did not end with the legislative reforms of 1879 and 1881. By 1894, the power of the CO to impose imprisonment had been increased from 7 to 14 days.²¹

19. In 1906 the punishment of *detention* was introduced. It was to be imposed instead of *imprisonment*, to those personnel who were to be retained in the Army. At the same time the power of the CO to impose imprisonment was changed to the power to impose detention.²² By 1910 the amount of detention that could be awarded by a CO was increased from 14 days in ordinary cases (21 days for absence without leave) to 28 days for all cases.²³ By 1921 the Regimental Courts Martial was abolished.²⁴

20. By 1929, general officers had been given summary powers over officers below the rank of field officer (captain and below) or a warrant officer. This summary proceeding was the forerunner of the present day trial by superior commander.²⁵ This type of summary proceeding was developed to allow for the trial of a junior officer or warrant officer who committed an offence "which is not serious but yet cannot be overlooked."²⁶

¹⁷ *Army Discipline and Regulation Act, 1879* (U.K.) 42 & 43 Vict. c.33.

¹⁸ *Army Act, 1881*, (U.K.) 44 & 45 Vict., c. 58.

¹⁹ M.L. Friedland, *Double Jeopardy* (Oxford: Clarendon Press, 1969) at 348.

²⁰ *Army Discipline and Regulation Act, 1879*, s. 46.

²¹ *Manual of Military Law 1894*, (London: H. M. Stationary Office, 1984) at 40.

²² *Manual of Military Law 1914*, (London: H. M. Stationary Office, 1914), *The Army (Annual) Act*, 1913, s. 44 at 418.

²³ *Manual of Military Law, 1914* at 424.

²⁴ W.C. Rigby, "Military Justice in the British Commonwealth" (1942) *Fed. Bar Rev. Journal* 291 at 324-325.

²⁵ *Manual of Military Law* at 472-473. (*Army Act*, s. 47).

²⁶ *Id.* at 473, note 1. The use of summary proceedings avoided the stigma of being tried by court martial.

21. It was the system of summary proceedings developed by 1929 that was used by the British Army during World War II. By virtue of the various *Militia Acts* passed by the Parliament of Canada, it was also those summary proceedings that applied to the Canadian Army during that war.²⁷

The Air Force

22. The history of military law relating to the air force is brief, in keeping with the recent origins of such military forces. During World War I, Canadian air force personnel flew with British units. The discipline of British air units was governed by the *Air Force (Constitution) Act 1917*²⁸ which included the *Air Force Act*. The *Air Force Act* was basically a re-wording of the *Army Act* provisions to comply with Air Force terminology. Since that time the military law applicable to British air forces has remained virtually identical to the law governing the British Army.²⁹

23. The Royal Canadian Air Force was created on April 1, 1924 pursuant to an Order in Council passed under the authority of the *Air Board Act*.³⁰ That Order in Council provided that discipline would be maintained in accordance with the British *Air Force Act*, except where it was inconsistent with the applicable Order in Council. In 1940, a separate *Royal Canadian Air Force Act*³¹ was enacted. However, it also incorporated the disciplinary provisions of the British *Air Force Act*.³²

The Navy

24. **General.** British naval law developed in a pattern similar to the law applicable to the land forces with two main exceptions. First, there was not the same conflict with Parliament over the control of discipline in the Navy. This situation was, to a large extent, a result of the lack of threat that the Navy posed to Parliament, since as a *blue water* navy it was primarily tasked with extending military power outward from Britain.³³ Secondly, the military commander was given considerably more power and independence in enforcing discipline than any army counterpart. The greater powers given to the naval commander were a direct result of the independent employment of naval forces away from Britain itself. This tradition of having greater independent powers available to naval commanders was to cause some problems when the amalgamation of Canada's military law was undertaken in 1950.

25. **Early Naval Law.** In the early years of Britain's naval history the disciplinary system mirrored that of the land forces. *Articles of War* governed the maintenance of discipline. The trial

²⁷ K.W. Watkin, LCol, "Canadian Military Justice: Summary Proceedings and the Charter", (1990 LLM Thesis) at 46.

²⁸ *The Air Force (Constitution) Act, 1917*, (U.K.) 7 & 8 Geo. V, c. 51. The Air Force Act formed the Second Schedule to the Air Force (Constitution) Act, 1917.

²⁹ McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law" at 19.

³⁰ *The Air Board Act*, S.C. 1919, c. 11.

³¹ *Royal Canadian Air Force Act*, S.C. 1940, c. 5.

³² McDonald, "Trail of Discipline: Historical Roots of Canadian Military Law", at 20.

³³ See C.G. Reynolds, *Command of the Sea: The History and Strategy of Maritime Empires* (New York: William Morrow & Co. Inc., 1974) at 12-13 for an explanation of the role of a "blue water" navy.

of offenders was initially conducted under the authority of the Office of the Lord High Admiral, then by councils of war and finally by courts martial during the 16th Century.³⁴ Legislatively, the navy was governed by *An Ordinance and Articles Concerning Martial Law for the Government of the Navy*³⁵ enacted in 1645, and subsequently by an Ordinance known as the *Duke of York's fighting instructions*.³⁶

26. A number of consolidations and amendments took place over the next two centuries. The Regulations of 1731 provided for the manner of conducting courts martial and set out *Articles of War* to be read to the ship's company once per month. Included in those *Articles of War* was the power of the captain of the ship to summarily punish seamen (not officers). The limit of the captain's summary powers was "twelve lashes on the bare back...according to the ancient practice of the sea".³⁷

27. As was indicated by Clode in *The Administration of Justice under Military and Martial Law*,³⁸ the great distinction between naval and army courts in the 19th century was the broad power that the former possessed to order the immediate execution of sentences with little supervision from higher authority.

28. By the nineteenth century the navy was feeling the same pressures as the army concerning the need to reform its disciplinary system. In 1860, the English Parliament passed the *Naval Discipline Act, 1860*³⁹ which, after repeated amendments, was replaced by a new *Naval Discipline Act, 1866*.⁴⁰ The CO had jurisdiction over all offences except capital offences and those committed by officers. The punishments that could be awarded at summary proceedings included imprisonment for three months for deserters, imprisonment for six weeks for all other offenders and solitary confinement for up to 10 days.⁴¹

29. **The Twentieth Century.** The *Naval Discipline Act, 1866*, as it was amended over the years, remained the basis of Canadian naval discipline until 1944, when Canada introduced its own naval disciplinary code. However, while the *Naval Service Act, 1944*⁴² finally placed a Canadian stamp on the legal affairs of the navy, the Act was really an outright adoption of the provisions of the *British Naval Discipline Act, 1866*.

30. The *Naval Service Act, 1944* provided for two types of military tribunals, the Courts Martial and the Disciplinary Court, and a summary trial before the CO. The CO could only try non-capital offences. The CO's jurisdiction extended to men, ratings (junior NCMs), petty officers, chief petty officers and subordinate officers (midshipmen and officers undergoing training). The punishments which a CO could award included imprisonment in a penitentiary or other than in a penitentiary for a maximum of three months, detention for three months,

³⁴ McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law" at 3-4.

³⁵ Lord's Journal, vii, 255.

³⁶ Clode, *The Administration of Justice* at 42.

³⁷ *Id.* at 43, n. 2.

³⁸ *Id.* at 48.

³⁹ *Naval Discipline Act, 1860* (U.K.), 23 & 24 Vict., c. 124.

⁴⁰ *Naval Discipline Act, 1866* (U.K.), 29 & 30 Vict., c. 109.

⁴¹ McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law", at 7.

⁴² *Naval Service Act, 1944*, S.C. 1944-45, c. 23.

dismissal, reduction, solitary confinement in a cell or under canvas, and more minor punishments.⁴³ The punishment imposed depended upon the rank of the accused. The CO could also delegate the summary powers to another officer; however, the type and duration of the punishment awarded depended on the rank of the *designated* officer.⁴⁴

31. There was no right to elect court martial. Instead, certain of the more serious punishments (including imprisonment, dismissal, detention, disrating etc.) required a punishment warrant to be approved by a senior officer.⁴⁵ The regulations also provided that an accused's Divisional Officer, or another officer, be appointed to assist the accused before and during the trial.⁴⁶

SECTION 4

THE NATIONAL DEFENCE ACT-1950

32. **Post War Review.** Dissatisfaction with the military justice system, caused largely by the influx of a large numbers of civilians into the armed forces during World War II, prompted a post war review of military law in the United Kingdom, the United States of America and Canada.⁴⁷ DND made a careful study of the existing legislation. New legislation known as the *National Defence Act (NDA)* brought within its ambit all three Canadian services and provided a single *Code of Service Discipline*. Included among other changes was one terminating the application of the United Kingdom statutes, and extended the powers of summary punishment of COs.⁴⁸

33. The *NDA*, as enacted in 1950, provided for three types of courts martial: the General Courts Martial, the Disciplinary Courts Martial and the Standing Courts Martial.⁴⁹ A fourth court martial, the Special General Courts Martial, was added in 1969. The passage of the *NDA* also marked the end of the largely independent status of naval law.

34. The most difficult task in preparing a unified *Code of Service Discipline* was resolving the different summary jurisdiction and powers of punishment available to military commanders. The final solution represented a compromise, which resulted in a reduction of the summary powers of naval COs, but an increase in the summary jurisdiction of military commanders overall.

35. Despite initial attempts to introduce a separate naval summary trial system,⁵⁰ the final legislation established three types of summary trials: trial by CO, trial by delegated officer and

⁴³ *King's Regulations Canadian Navy*, art. 14.43, Table II.

⁴⁴ *K.R.C.N.*, art. 14.09.

⁴⁵ *K.R.C.N.*, art. 14.37.

⁴⁶ *K.R.C.N.*, art. 14.20.

⁴⁷ William T. Generous Jr., in his book *Sword and Scales* (Washington: National University Publications, 1973) at 15, indicates that the dissatisfaction centred on the harsh and inconsistent punishments that "grossly inexperienced" court members imposed on accused persons. He also indicates that "citizen-soldiers lawyers" were particularly concerned about improper command influence. See also D.A. Schlueter, "The Courts Martial: An Historical Survey" at 157-158, where it is indicated that significant American concern with the military justice system began in World War I.

⁴⁸ J. H. Hollies, "Canadian Military Law" (1961) 13 *Mil. Law Rev.* 69 at 70.

⁴⁹ This court was created and intended to be used only in times of emergency and was removed in 1967.

⁵⁰ See Special Committee on Bill No.133, *An Act Respecting National Defence*, "Minutes of Proceedings and Evidence" at 217-219.

trial by superior commander. This judicial structure had elements of both the old Navy (increased punishment-90 days detention, assisting officer, punishment warrants, trial of subordinate officers) and Army (trial by superior commander, right to elect court martial) proceedings.

36. Naval COs lost their power to summarily award a punishment of imprisonment. However, this loss was mitigated somewhat in 1959 by amendments to regulations governing service incarceration where the conditions of imprisonment and detention were made identical.⁵¹ The considerable increase in the power of army and air force COs to award detention (28 to 90 days) appears to have been largely a result of the need to reconcile powers of punishment of the various services. However, there is reference in background material to the Act that the increased summary powers were needed for the army because of the negative effect that holding courts martial had on operational effectiveness during World War II.⁵²

37. **1950 to the Charter.** During the first 30 years of the *NDA* there were only two major changes to the summary trial system. In 1952, delegated officers were given the authority to impose up to 14 days detention.⁵³ This increase in punishment from a maximum punishment of a fine of \$100,⁵⁴ continued the expansion of summary powers of military commanders.

38. The second change to the summary trial system involved the right to elect court martial. In 1959, in anticipation of the enactment of the *Canadian Bill of Rights*⁵⁵ the regulations were amended to expand the right to elect court martial to include any member charged with a service offence that was also a criminal offence under civilian criminal law.⁵⁶ Previously, the right to elect court martial under the *NDA* (but not under the *Army Act*) had only been available to NCOs (i.e. not privates). The time at which the right to elect court martial was extended to the accused was changed from the end of the trial (after hearing the evidence) to the beginning of the hearing.⁵⁷ This made the right to elect court martial appear to be more of a form of waiver than a form of appeal.

39. **Post Charter.** In early 1982, in anticipation of the enactment of the *Charter*, a Charter Working Group was formed at NDHQ to study the effect of the *Charter* on the CF and to make recommendations for changes to the *Code of Service Discipline* and the regulations. The study by the Charter Working Group resulted in two series of amendments to military law. These changes were made in order to achieve a balance between the "*Charter* rights of individuals and the need to maintain the operational effectiveness of the CF".⁵⁸

⁵¹ See *QR&O*, Vol. II, Appendix XVI.

⁵² *National Defence Act: Explanatory Material*, dated November 1, 1950, at 136.

⁵³ As Lieutenant-Colonel McDonald states in "The Trail of Discipline: The Historical Roots of Canadian Military Law" at 24:

...COs were given authority to delegate powers of punishment of up to 14 days detention. Unfortunately, while committee debates on the *NDA* amendments in 1952 discuss the nature of the delegation authorized under the amendments they do not provide any insight into the requirement for the increased power.

⁵⁴ *King's Regulations (Army)*, art. 108.11, Table.

⁵⁵ *Canadian Bill of Rights*, S.C., 1960, c. 44.

⁵⁶ B. Starkman, "Canadian Military Law: The Citizen as Soldier" (1965) 18 *Can. Bar Rev.* 414 at 430-431.

⁵⁷ Hollies, *Canadian Military Law* at 77.

⁵⁸ Statement by the Chief of Defence Staff contained in CF Supplementary Orders announcing changes to *QR&O*. CFSO 48/86 para. 9.

40. The first group of amendments, occurring in December 1982 and January 1983, involved changes to *QR&O*. Those changes were primarily to pre-trial and summary trial procedures. Among the changes was a further expansion of the right to elect court martial to include any offence where the presiding officer considers that, if the accused were found guilty, a punishment of detention, reduction in rank or a fine in excess of \$200 would be appropriate. In many respects this expansion of the right to elect court martial was a return to the election procedures previously available under the *Army Act*.

41. In addition, the power that a delegated officer had to impose a punishment of 14 days detention was removed. This was done to increase the right to elect court martial and therefore to expand access to a legal counsel in cases where detention or a substantial fine might be imposed. In consultation with operational commanders at the time it was decided that delegated officers were not to be given the authority to provide an accused the right to elect court martial. From the operational commander's point of view, the first option was preferable.⁵⁹ As a result only the CO retained the power to impose detention.⁶⁰

42. The summary trial procedure was also made more detailed by providing for an adjournment to allow the accused to prepare the defence and giving the accused an opportunity to admit to the statement of particulars of the offence.⁶¹ The second group of *Charter*-driven amendments occurred in 1986 and involved amendments to both the *NDA* and *QR&O*.

43. In terms of summary trials there were two main changes. First, the power of a CO to try cases where that officer had carried out or directly supervised the investigation, or had issued a search warrant, was restricted to situations where it was not practical for another CO to hear the case (eg. a ship at sea).⁶²

44. Secondly, the accused was expressly given the *right* to be represented by an assisting officer. The regulations were amended to set out the duties of the assisting officer and provide for their involvement in the summary trial. However, the notes to *QR&O* indicated that the presiding officer had the discretion to allow legal counsel to participate at a summary trial.⁶³

SECTION 5

SUMMARY TRIAL REFORM IN THE 1990s

45. The summary trial process came under increasing scrutiny at the beginning of the 1990s. This interest in summary trial proceedings was a direct result of concern over the constitutionality of the summary trial process as a result of the *Charter*. A Summary Trial Working Group was tasked with conducting an extensive review of the constitutionality of the summary trial system. The report approved by Armed Forces' Council in May 1994 made fifty-nine recommendations. The broad ranging recommendations included restricting presiding officers' jurisdiction over service offences, refining the punishments available at summary trial,

⁵⁹ McDonald, "The Trail of Discipline: The Historical Roots of Canadian Military Law" at 26.

⁶⁰ In effect the disciplinary system returned the delegated officers to the status they held during World War II (under the *Army Act*) and immediately after the enactment of the *NDA* (up to 1952).

⁶¹ *QR&O* 108.13, 108.29, 110.05.

⁶² *NDA* s. 141 (1.1).

⁶³ *QR&O* 108.03.

expanding the right to elect court martial and improving compliance with the requirements of procedural fairness.⁶⁴

46. Prior to the implementation of the recommendations contained in the Working Group report a number of disciplinary incidents arising from military operations prompted the appointment of a Special Advisory Group to:

...assess the *Code of Service Discipline*, not only in light of its underlying purpose, but also the requirement for portable service tribunals capable, with prompt but fair processes, of operating in time of conflict or peace, in Canada or abroad.⁶⁵

47. The Special Advisory Group reviewed the summary trial system in respect of jurisdiction, powers of punishment, officer training, assistance to the accused, impartiality of presiding officers and the creation of a record at summary trial proceedings. After commenting on a number of recommendations addressed in the Summary Trial Working Group report, and other studies and proposals the Special Advisory Group concluded,⁶⁶ in part, that:

- a. the maintenance of effective discipline by the established chain of command continues to be a prime prerequisite for a competent and reliable military organization;
- b. the main instrument of this disciplinary process is the traditional summary trial process, which permits the chain of command to administer discipline and justice in a swift, decisive and final manner, both under combat circumstances in times of war, and in training circumstances in times of peace;
- c. notwithstanding the imperative for discipline in military organizations, Canada is founded upon the supremacy of the *Rule of Law*, especially characterized by the *Charter*, which must be fully respected in the application of disciplinary measures within the military justice system; and
- d. in recent years the application of military discipline with the CF has been overly cautious and inconsistent because of concerns by COs about the uncertainties over the effect of the *Charter*.⁶⁷

48. Of particular concern for the Special Advisory Group was the need for additional training for presiding officers, both to ensure that those officers properly fulfilled their duties and to provide confidence to NCMs that presiding officers are familiar with the rights of accused members. Therefore the Special Advisory Group recommended increased training and education for presiding officers to ensure that they are knowledgeable about their roles in the military justice system and competent to perform them and such officers should be certified by the JAG to preside at summary trials.

⁶⁴ The *Summary Trial Working Group Report* was based in large part on a 1990 LLM thesis by LCol K.W. Watkin entitled "Canadian Military Justice: Summary Proceedings and the Charter".

⁶⁵ *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, March 14, 1997, at 1.

⁶⁶ These studies included the *Summary Trial Working Group Report*, various proposals made by the office as the Judge Advocate General, the *Friedland Report* and an internal study commissioned by the Special Advisory Group.

⁶⁷ *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, March 14, 1997, at preamble ii.

49. In addition to the Special Advisory Group Report, the Report of the Somalia Commission of Inquiry⁶⁸ and other reports and studies⁶⁹ have led to a review of the *NDA* and *QR&O*. The resulting amendments to that legislation incorporated the recommendations contained in the Special Advisory Group Report and responded to the recommendations of the Somalia Commission.

SECTION 6 CONCLUSION

50. A common thread throughout the long history of the military justice system has been the requirement for a trial system that is more expeditious and less complicated than the courts found in the civilian system. An essential part of the military justice system has been the concentration of disciplinary power in the hands of military commanders. Regardless of whether the proceeding has been termed as a tribunal, council of war, Regimental Courts Martial, summary investigation or summary trial, it has been the military commander, primarily at the level of the CO, who has administered discipline in the armed forces.

51. It is evident from the review of the evolution of summary trial proceedings in the 19th century that they were developed to fulfil a two-fold purpose. First, summary trials met the traditional need for a responsive and administratively simple means of dealing with disciplinary offences. Secondly, summary trials were designed to be a fair proceeding, particularly in terms of the level of punishments imposed on an offender.

52. The requirement for *summary* proceedings in the military was recognized by the British Parliament with the passage of the *Mutiny Act* in 1689. That requirement was confirmed by the Canadian Parliament in 1950 with the passage of the *NDA*. The enactment of the *Charter* caused the Government to make changes to the summary trial process in order to adequately protect the rights of individual service members, while maintaining the operational effectiveness of the CF. The essential role of summary proceedings and the requirement for the chain of command to maintain discipline has continued with the 1999 amendments to the military justice system.

⁶⁸ *Dishonoured Legacy: The Lessons Learned of the Somalia Affair* (Minister of Public Works and Government Services, 1997).

⁶⁹ For example, M.L. Friedland, *Controlling Misconduct in the Military* (Minister of Public Works and Government Services, 1997).

CHAPTER 3

FRAMEWORK OF THE CANADIAN MILITARY JUSTICE SYSTEM

SECTION 1

GENERAL

1. The purpose of this chapter is to provide a broad outline of the Canadian military justice system including its legal basis, jurisdiction, types of tribunals and procedures.

SECTION 2

LEGAL BASIS FOR THE CANADIAN MILITARY JUSTICE SYSTEM

Canadian Constitution

2. Under the Canadian Constitution, the Parliament of Canada has exclusive authority to make laws relating to the “militia, military and naval service and defence.”¹ Therefore, Canadian constitutional law accords the Federal Parliament the right to make laws relating to military justice.

National Defence Act

3. Using its constitutional authority, the Parliament of Canada has over time enacted a number of laws governing the armed forces raised by Canada. The *NDA* is the law currently in force and sets out, among a number of matters, the organization of the Department of National Defence (DND) and the CF as well as the particulars of the Canadian military justice system.

4. The *Code of Service Discipline* is a central part of the *NDA* and comprises approximately one-half of the Act.² The *Code of Service Discipline* sets out the foundation of the Canadian military justice system including disciplinary jurisdiction, service offences, punishments, powers of arrest, organization and procedures of service tribunals, appeals, and post-trial review.

Regulations and Orders

5. Under the *NDA*, there is authority for the Governor-in-Council and the Minister to make regulations for the organization, training, discipline, efficiency, administration and good government of the CF and generally for carrying the purposes and provisions of the *NDA* into effect.³ The *QR&O* have been made pursuant to this authority. Volume II of *QR&O* is dedicated to disciplinary matters and prescribes in greater detail the jurisdiction, organization and procedures of the Canadian military justice system.

¹ *Constitution Act, 1867*, s. 91(7).

² Pursuant to s. 2 of the *NDA*, the *Code of Service Discipline* consists of Part III of the *NDA* (ss. 60-249.26).

³ *NDA* s. 12.

6. The *NDA* also authorizes the CDS to issue orders and instructions to give effect to the decisions and carry out the directions of the Government of Canada.⁴ The *Canadian Forces Administrative Orders (CFAOs)* and *Defence Administrative Orders and Directives (DAODs)* have been made pursuant to this authority. A number of these orders and directives bear upon the military justice system.

7. Orders and instructions dealing with disciplinary matters may be issued at different levels throughout the chain of command.⁵ All members have a duty to be familiar with and follow orders and instructions issued by the chain of command.⁶ The failure of members to comply with these orders and instructions could lead to charges being laid and disposed of under the military justice system.

Constitutional and Judicial Recognition of the Canadian Military Justice System

8. In 1982 the existence and validity of the Canadian military justice system was implicitly recognized by the *Charter*, which forms part of the Constitution of Canada. Section 11 (f) of the *Charter* recognizes the right of a person charged with an offence to a jury trial “except in the case of an offence under military law tried before a military tribunal.”

9. The Supreme Court of Canada has on two separate occasions, in 1980 and 1992, recognized the constitutional validity of a separate military justice system.⁷

SECTION 3

FUNDAMENTALS OF THE CANADIAN MILITARY JUSTICE SYSTEM

Types of Service Tribunals

10. The *NDA* creates a two-tier system of military justice. The first tier, where most disciplinary matters are dealt with, is the summary trial system. The second tier of the military justice system is the formal court martial system. The term *service tribunal* means either an officer presiding at a summary trial, or a court martial.⁸

Summary Trials

11. The summary trial is the overwhelmingly predominant and most important form for the trial of disciplinary proceedings. Where a member is charged with a service offence, a summary trial permits the case to be tried and disposed of, as a general rule, at the unit level. Summary trials are presided over by superior commanders, Commanding Officers (COs) of bases, units or elements, or delegated officers. There is no requirement for presiding officers at summary trials to be legally trained. However, the CDS has put in place measures to ensure that before assuming their duties presiding officers are trained in accordance with a curriculum established by the

⁴ *NDA* s.18(2).

⁵ For example, see *QR&O* 4.12 (Command Orders) and 4.21 (Standing Orders).

⁶ *QR&O* 4.02 and 5.01.

⁷ *MacKay v. The Queen*, [1980] 2 S.C.R. 370 and *R. v. Genereux*, [1992] 1 S.C.R. 259.

⁸ *NDA* s. 2.

Judge Advocate General and certified by the JAG as qualified to perform those duties. As a general rule, members facing a summary trial are not represented by a lawyer, although they are entitled to an assisting officer. The procedures at a summary trial are straightforward and the powers of punishment are limited in scope. For example, the maximum punishment that can be imposed by a CO presiding at a summary trial is detention for 30 days.⁹

12. The three types of summary proceedings are summary trial before a superior commander, summary trial before a CO and summary trial before a delegated officer. For a complete discussion of the history of summary proceedings, see Chapter 2, History of Summary Proceedings.

Courts Martial

13. A *court martial*, as the name suggests, is a formal military court presided over by a legally qualified military judge. The procedures followed by a court martial are formal and similar to those followed by civilian criminal courts. Members facing a court martial are entitled to a lawyer free of charge from the Director of Defence Counsel Services (DDCS).¹⁰ The prosecution is conducted by a legally-qualified officer from the Canadian military. An accused member may also retain a civilian lawyer at the member's own expense or where qualifying criteria are met, funded by a provincial legal aid plan. The powers of punishment open to a court martial exceed those available to an officer presiding at a summary trial.

14. There are two types of courts martial:

- a. General Courts Martial; and
- b. Standing Courts Martial.

15. General Courts Martial consist of a military judge and a panel of members, respectively analogous to a judge and jury in a civilian criminal court. The panel consists of five members, and is comprised entirely of officers unless the accused member is an NCM.¹¹ In that case, the panel must include two NCMs of the rank of warrant officer or above.¹² The panel is responsible for making a finding on the charges (i.e. guilty, not guilty, etc.) and the military judge is responsible for making legal rulings and imposing sentence.¹³

16. A General Courts Martial may impose any punishment authorized by the *NDA*, including imprisonment for life.¹⁴

17. Unlike General Courts Martial, Standing Courts Martial are presided over by a military judge sitting alone.¹⁵ The military judge makes both a finding on the charges and imposes sentence if there is a finding of guilt.

⁹ *NDA* s. 163(3)(a).

¹⁰ *QR&O* 101.20(f).

¹¹ *NDA* ss. 167.

¹² *NDA* ss. 167(7).

¹³ *NDA* ss. 191-193.

¹⁴ *NDA* ss. 139 and 166.

¹⁵ *NDA* ss. 174.

18. A Standing Courts Martial may impose any punishment authorized by the *NDA*, including imprisonment for life.¹⁶

19. Both General and Standing Courts Martial may try a civilian who is subject to the *Code of Service Discipline*.¹⁷ For example, civilians accompanying members on foreign postings are subject to the *Code of Service Discipline*. When trying a person other than an officer or a non-commissioned member, the powers of punishment of both General and Standing Courts Martial are limited to a fine or imprisonment.¹⁸

Jurisdiction Over Persons

20. The *Code of Service Discipline* applies to a broad range of persons. While the *Code of Service Discipline* primarily applies to CF members, civilians do on occasion become subject to Canadian military law, such as when they accompany units or other elements on service or active service.¹⁹ However, for the most part, it is the officers and non-commissioned members of the regular and reserve forces that are liable to be dealt with by court martial and summary trial.²⁰

21. In the case of courts martial, jurisdiction over the person arises when an individual becomes subject to the *Code of Service Discipline*. Both types of courts martial have jurisdiction over any person who is liable to be charged, dealt with and tried for having committed a service offence.²¹ Any person includes both military and civilian personnel.

22. Officers and non-commissioned members of foreign armed forces who are seconded or attached to the Canadian Forces are also subject to the *Code of Service Discipline*.²²

23. In the case of a summary trial, jurisdiction over the person is limited to military personnel. Civilians charged with service offences are not subject to summary trial.²³

24. Furthermore, jurisdiction over the person in a summary trial varies with the type of summary trial. A CO may try only officer cadets or NCMs who are below the rank of warrant officer.²⁴ A delegated officer may try only NCMs below the rank of warrant officer.²⁵ Members above the rank of sergeant and below the rank of lieutenant-colonel are subject to summary trial only by a superior commander.²⁶ For a full discussion on the subject see Chapter 11, Jurisdiction and Pre-Trial Determination.

¹⁶ *NDA* ss. 139 and 173.

¹⁷ *NDA* s. 166 and 173. These sections state that the respective Courts Martial have jurisdiction over "any person who is liable to be charged, dealt with and tried on a charge of having committed a service offence".

¹⁸ *NDA* s. 166.1 and 175.

¹⁹ *NDA* s. 60(1) and *QR&O* 102.09.

²⁰ A complete list of the persons subject to the *Code of Service Discipline* is contained in *NDA* ss. 60-65, and *QR&O* 102.

²¹ *NDA* s. 166.

²² *NDA* ss. 2, 60(1)(d) and 173.

²³ *NDA* ss. 163(1)(a) and 164(1)(a).

²⁴ *NDA* s. 163(1)(a).

²⁵ *NDA* s. 163(4) and *QR&O* 108.10(2)(b).

²⁶ *NDA* s. 164(1)(a).

Jurisdiction Over Offences

25. A *service offence* is an offence under the *NDA*, the *Criminal Code* or any other Act of Parliament committed by a person while subject to the *Code of Service Discipline*.

26. The *Code of Service Discipline* includes a number of offences that are uniquely military in nature.²⁷ Examples of such offences include misconduct in the presence of the enemy, mutiny, disobedience of a lawful command, desertion, absence without leave, drunkenness, negligent performance of duty and conduct to the prejudice of good order and discipline.

27. Where an offence is committed by a person subject to the *Code of Service Discipline* under the *Criminal Code* or other Federal Law, the *NDA* provides jurisdiction to deal with the matter in the military justice system.²⁸ Such offences are service offences under section 130 of the *NDA*.²⁹

28. Where offences under the *Criminal Code* or other Federal laws are dealt with under the military justice system, the place of the offence becomes an important factor. Where such an offence is committed on Canadian territory, as a general rule the civilian justice system and the military justice system have concurrent jurisdiction to prosecute the matter. However, certain criminal offences that are committed in Canada cannot be prosecuted in the military justice system. These offences include murder, manslaughter and child abduction.³⁰

29. Any offence under the *Criminal Code* or other Federal law, allegedly committed by a person subject to the *Code of Service Discipline* outside Canada (including murder, manslaughter and child abduction) can be dealt with under the military justice system.³¹

30. An offence committed by a person subject to the *Code of Service Discipline* under the law of a foreign territory can also be dealt with as a service offence.³²

31. The jurisdiction to try offences is limited at the summary trial level. Offences of a military nature that a CO or superior commander are authorized to deal with at a summary trial are prescribed by the *QR&O*.³³ A very limited number of offences that are breaches of the *Criminal Code* or *Controlled Drugs and Substances Act* can be tried by a CO or superior commander.³⁴ Furthermore, a CO may delegate his authority to try the uniquely military offences referred to in *QR&O* 108.07 but not the civil offences referred to in *QR&O* 108.07 (3).³⁵ The jurisdiction of a delegated officer to try offences may be further limited through the written delegation of authority by the CO. For example, a CO may say that a delegated officer may not try the offence of absent without leave unless the accused is below the rank of

²⁷ *NDA* ss. 73-129.

²⁸ *NDA* s. 130.

²⁹ In some cases there is an overlapping jurisdiction with the civilian criminal justice system.

³⁰ *NDA* s. 70.

³¹ *NDA* s. 130(1)(b).

³² *NDA* s. 132.

³³ *QR&O* 108.07(2).

³⁴ *QR&O* 108.07(3).

³⁵ *QR&O* 108.10(2)(c).

sergeant³⁶. For a full discussion of these matters, see Chapter 11, Jurisdiction and Pre-Trial Determinations.

Limitations On Jurisdiction

32. As a general rule, a person who is subject to the *Code of Service Discipline* at the time of the alleged commission of an offence continues to be liable to be charged, dealt with and tried at any time under the *Code of Service Discipline*.³⁷ There are two exceptions to this rule.

33. The first exception relates to offences resulting from violations of the *Criminal Code*, other Federal law, or a foreign law. If the act or omission that constitutes the offence would have been subject to a limitation period had it been dealt with other than under the *Code of Service Discipline*, that limitation period applies.³⁸ For example, under the *Criminal Code* proceedings cannot be instituted for summary conviction offences more than six months after the subject-matter of the proceedings arose.³⁹ Therefore, a charge laid under section 130 of the *NDA*, that consists of a summary conviction offence under the *Criminal Code*, would be statute-barred if the charge were laid more than six months after the subject-matter of the charge arose.

34. The second exception relates to summary trials. A summary trial must begin before the expiry of one year after the day on which the offence is alleged to have been committed.⁴⁰

Arrest

35. The *NDA* specifies the circumstances under which a person may be arrested. A person may be arrested if that individual:

- a. has committed, is found committing or is believed on reasonable grounds to have committed a service offence; or
- b. is charged with having committed a service offence.⁴¹

36. It should be noted that the power to arrest relates to a *service offence*. Thus, the *NDA* only authorizes the arrest of persons who are or were subject to the *Code of Service Discipline*.

37. Where circumstances exist that justify an arrest for the commission of a service offence, the *NDA* grants powers of arrest without a warrant to officers, NCMs and Military Police.⁴² COs and delegated officers are authorized to issue warrants for the arrest of persons with respect to the commission of service offences.⁴³ For a complete discussion of this subject, see Chapter 6, Arrest.

³⁶ *QR&O* 108.10(3).

³⁷ *NDA* s. 60(2) and s. 69.

³⁸ *NDA* s. 69(a).

³⁹ *Criminal Code*, s. 786(2).

⁴⁰ *NDA* s. 69(b).

⁴¹ *NDA* s. 154.

⁴² *NDA* s. 155-156.

⁴³ *NDA* s. 157.

Pre-Trial Custody

38. Where a person has been arrested with respect to the commission of an offence, the *NDA* addresses the circumstances in which that person can be retained in custody pending trial. There is a general obligation on a person making an arrest to release a person as soon as is practicable, unless the person making the arrest believes on reasonable and probable grounds that it is necessary that the person under arrest be retained in custody having regard to all the circumstances, including:

- a. the gravity of the offence alleged to have been committed;
- b. the need to establish the identity of the person under arrest;
- c. the need to secure or preserve evidence of or relating to the offence alleged to have been committed;
- d. the need to ensure that the person under arrest will appear before a service tribunal or civil court to be dealt with according to law;
- e. the need to prevent the continuation or repetition of the offence alleged to have been committed or the commission of any other offence; and
- f. the necessity to ensure the safety of the person under arrest or any other person.⁴⁴

39. A decision to retain a person in custody must be reviewed by a *custody review officer* as soon as practicable and no later than 48 hours after the person's arrest.⁴⁵

40. If the custody review officer does not direct the release, the person in custody must be taken before a military judge to determine whether that person should be retained in custody.⁴⁶

41. The decision of a military judge to release or retain a person in custody may be reviewed by the Courts Martial Appeal Court.⁴⁷ For a full discussion of this subject, see Chapter 7, Pre-Trial Custody.

Investigations and Searches

42. Where a complaint is made or there are other reasons to believe that a offence may have been committed, an investigation must be conducted as soon as practical to determine whether there are sufficient grounds to justify the laying of a charge.⁴⁸ In this context, a *complaint* means a report by any person, military or civilian, alleging that a service offence has been committed.

43. An investigation is intended, as a minimum, to collect all reasonably available evidence bearing on the guilt or innocence of the person who is the subject of the investigation.⁴⁹ If it is necessary to conduct a search as part of an investigation, *QR&O* set out a procedure for

⁴⁴ *NDA* s. 158(1).

⁴⁵ *NDA* s. 158.2. Pursuant to s. 153 of the *NDA*, a *custody review officer* means:

- a. the officer who is the detained person's CO, or an officer who is designated by the CO; or
- b. if it is not practical for the foregoing officers to act as a custody review officer, the officer who is the CO of the unit or element where the person is in custody or an officer who is designated by such CO.

⁴⁶ *NDA* s.159. The procedure to be followed at such a "show cause" hearing is set out in *QR&O* 105.27.

⁴⁷ *NDA* s. 159.9.

⁴⁸ *QR&O* 106.02(1).

⁴⁹ *QR&O* 106.03.

obtaining a military search warrant.⁵⁰ For a complete discussion on this subject, see Chapter 5, Powers of Investigation, Search and Seizure, and Inspection.

Laying of Charges

44. A *charge* is a formal accusation that a person subject to the *Code of Service Discipline* has committed a service offence. A charge is laid when it is reduced to writing in Part 1 (Charge Report) of the Record of Disciplinary Proceedings (RDP) and signed by a person authorized to lay charges.⁵¹

45. The following persons may lay charges under the *Code of Service Discipline*:

- a. a CO;
- b. an officer or NCM authorized by a CO to lay charges; and
- c. an officer or NCM of the Military Police assigned to investigative duties with the CF National Investigation Service (NIS).⁵²

46. A person who lays a charge under the *Code of Service Discipline* must have an actual belief that the accused member has committed the offence and that belief must be reasonable.⁵³ For a full discussion on this subject see Chapter 8, Laying of Charges.

Role of the Canadian Forces National Investigation Service

47. The NIS plays an important role in the military justice system with respect to both the investigation and the laying of charges. The mandate of the NIS is to provide DND and the CF with an efficient, accountable, investigative and independent criminal investigation service in Canada and abroad in support of the military justice system.⁵⁴

48. The NIS will normally investigate offences of a serious and sensitive nature.⁵⁵ In general, a *serious offence* is an indictable or hybrid offence under a federal law or its equivalent offence under the *NDA*.⁵⁶

49. A *sensitive offence* is an offence where the accused or the victim is a senior officer (the rank of major or above) or civilian equivalent. An offence is also considered sensitive if it involves a CO or personnel in a position of trust or civilian equivalent. Offences that involve sensitive material, or instances which could bring discredit to DND, are also considered sensitive offences.⁵⁷

⁵⁰ QR&O 106.04-106.11.

⁵¹ QR&O 107.015. A copy of the RDP, the Provision of Information form and a completed sample of both appear at Annex B.

⁵² QR&O 107.02.

⁵³ QR&O 107.02, Note.

⁵⁴ *Military Police Policies and Technical Procedures*, (A-SJ-100-004/AG-000), Chapter 6, Annex A, para. 1. A copy of this document is attached at Annex C.

⁵⁵ *Id.* at para. 11.

⁵⁶ *Id.* at para. 6.

⁵⁷ *Id.* at para. 7.

50. NIS investigations will normally be initiated when:
- a. an investigation is passed to the NIS in accordance with *Military Police Policies and Technical Procedures*;
 - b. a Commander/CO requests NIS assistance;
 - c. a complaint is made directly to the NIS;
 - d. the NIS learns of an incident through an informant;
 - e. the NIS is tasked directly by the Canadian Forces Provost Marshal/Deputy Provost martial CF NIS Investigative Support; and
 - f. the NIS agrees to accept a case that would normally be within the purview of Base/Wing/local investigative personnel but the CF NIS has more expertise in the particular circumstance.⁵⁸
51. Prior to 30 November 1997, the NIS had no authority to lay charges under the *Code of Service Discipline*. Amendments to *QR&O* have specifically granted the NIS such authority.⁵⁹
52. A CO or superior commander who decides not to proceed with a charge laid by the NIS is required to communicate that decision along with the reasons for the decision to the NIS. If, after reviewing the decision and reasons, the NIS considers that the charge should be proceeded with, the NIS may refer the charge directly to a referral authority for disposal.⁶⁰

Conduct of a Summary Trial

53. The procedure for conducting a summary trial and receiving evidence is set out in Article 108.20 and 108.21 of *QR&O*. For a complete discussion of this matter, see Chapter 13, Conduct of a Summary Trial.

Sentencing and Punishment

54. The punishments that can be imposed in respect of service offences range from imprisonment for life to minor punishments. The scale of punishments, from the most severe to the least severe, is as follows:
- a. Imprisonment for life;
 - b. Imprisonment for two years or more;
 - c. Dismissal with disgrace from Her Majesty's Service;
 - d. Imprisonment for less than two years;
 - e. Dismissal from Her Majesty's Service;
 - f. Detention;
 - g. Reduction in rank;
 - h. Forfeiture of seniority;

⁵⁸ *Id.* at para. 15.

⁵⁹ *QR&O* 107.02.

⁶⁰ *QR&O* 107.12(3).

- i. Severe reprimand;
- j. Reprimand;
- k. Fine; and
- l. Minor punishments.⁶¹

55. Courts martial have the greatest powers of punishment. Subject to any maximum punishment ascribed to the offence in question, both General and Standing Courts Martial may impose any punishment provided for in the above scale of punishments.⁶² As noted previously, however, when a court martial tries a person other than an officer or non-commissioned member, it may not impose any punishment from the scale of punishments except imprisonment or a fine.⁶³

56. The powers of punishment of officers presiding at summary trials are more restricted. A CO presiding at a summary trial has powers of punishment ranging from 30 days detention to a minor punishment.⁶⁴ The *NDA* provides for similar, though less severe, powers of punishment for a delegated officer presiding at a summary trial. Although authorized by the *NDA*, *QR&O* do not permit a delegated officer presiding at summary trials to impose a punishment of detention.⁶⁵ A superior commander presiding at a summary trial is limited to imposing a punishment consisting of a severe reprimand, reprimand or a fine.⁶⁶ For a full discussion of this topic, see Chapter 14, Sentencing and Punishment.

Appeal and Summary Trial Review

57. Where a person has been tried by court martial, the *NDA* sets out the rights of appeal of both the offender and the Minister.⁶⁷ Such appeals are heard by the Courts Martial Appeal Court. The grounds of appeal may include:

- a. the severity of the sentence, unless the sentence is one fixed by law;
- b. the legality of any finding of guilty;
- c. the legality of the whole or any part of the sentence;
- d. the legality of a finding of unfit to stand trial or not responsible on account of mental disorder; or
- e. the legality of certain dispositions made as a result of a finding of unfit to stand trial or not responsible on account of mental disorder (i.e. custody or treatment dispositions).⁶⁸

⁶¹ *NDA* s. 139.

⁶² *NDA* ss. 166-169.

⁶³ *NDA* ss. 166.1 and 175.

⁶⁴ *NDA* s. 163(3).

⁶⁵ *QR&O* 108.25. Section 163(4) of the *NDA* provides that a delegated officer may impose punishments ranging from detention to a minor punishment but excluding a reduction in rank. Furthermore, the maximum period of detention that a delegated officer may impose pursuant to section 163(4) is 14 days. Although authorized by the *NDA*, the powers of punishment of a delegated officer set out in *QR&O* 108.25 do not include detention. A delegated officer is limited to imposing a reprimand, fine or other minor punishment.

⁶⁶ *NDA* s. 164(4).

⁶⁷ *NDA* ss. 230-230.1.

58. The Minister may also appeal with respect to the legality of the decision of a court martial that terminates proceedings on a charge or that in any manner refuses or fails to exercise jurisdiction in respect of a charge.⁶⁹

59. A notice of appeal from a decision of a court martial must be delivered within 30 days of the termination of the court martial proceedings.⁷⁰

60. Members found guilty of an offence after a summary trial may submit a request for a review pursuant to the *QR&O*. Such a review is not an appeal nor will it be heard by a formal court. The request for review is submitted to a *review authority* that, in most circumstances, is the next superior to whom the presiding officer is responsible in matters of discipline.⁷¹ The member found guilty of an offence at a summary trial may request a review authority to:

- a. set aside the finding of guilty on the ground that it is unjust; and
- b. alter any punishment on the ground that it is too severe.⁷²

61. A request for review under *QR&O* 108.45 must be in writing and delivered to the review authority within 14 days of the termination of the summary trial and a copy of the request must also be delivered to the officer who presided at the summary trial.⁷³ The review authority must review the summary trial and determine whether to set aside any finding made or alter any punishment imposed within 21 days of receipt of the application, unless the required circumstances arise for an extension of that time.⁷⁴ For a complete discussion of summary trial reviews, see Chapter 15, Request for Review.

⁶⁸ *NDA* ss. 230-230.1.

⁶⁹ *NDA* s. 230.1(d).

⁷⁰ *NDA* s. 232(3).

⁷¹ *QR&O* 108.45(1) and (2).

⁷² *QR&O* 108.45(1).

⁷³ *QR&O* 108.45(4) and (5).

⁷⁴ *QR&O* 108.45(10)-(15).

CHAPTER 4

FAIRNESS AND THE APPLICATION OF THE CHARTER

SECTION 1

GENERAL

1. Tribunals such as civilian courts, courts martial and summary trials have a duty to act fairly.¹ The importance of fairness to legal proceedings is found in the fact that the principles of fairness are reflected in a number of sections in the *Charter* (see Annex A). Those sections include section 7 (principles of fundamental justice), section 8 (search and seizure), section 9 (detention or imprisonment), section 10 (arrest or detention), section 11 (proceedings in criminal and penal matters), section 12 (treatment or punishment), section 13 (self-incrimination) and section 14 (interpreter).

2. One way in which fairness is achieved is through procedural fairness. Procedural fairness has traditionally been expressed in two common law rules of natural justice: *nemo judex in causa sua* (no one is to be a judge in their own cause)² and *audi alteram partem* (hear the other side; the parties are to be given a fair hearing).³ In other words the person trying a case should be unbiased and impartial, and an accused should have adequate notice of the case to be met, and a meaningful opportunity to be heard. The requirement of procedural fairness existed prior to the enactment of the *Canadian Charter of Rights and Freedoms*.

3. The procedures governing the summary trial process set out in *QR&O* are designed to enhance the fairness of how charges are dealt with and trials are conducted. The regulations set out the procedures for handling pre-trial issues such as Provision of Information and access to legal counsel, the conduct of the summary trial itself, and post-trial procedures such as the review process. The unit CO, the presiding officer and the review authority all have the responsibility to ensure that the summary trial process is fair. This Chapter will review a number of the basic principles of procedural fairness in order to highlight their application to the summary trial process.

SECTION 2

FAIRNESS

4. Any proceeding that can make decisions adverse to a person's interests must be conducted in a fair manner.⁴ There is no one definition for procedural fairness. However, it is generally accepted that in order to be *fair* in a legal sense, the common law rules of natural justice, freedom from bias on the part of the decision maker and a meaningful and informed participation by the person in the proceedings, must be followed throughout the process.

¹ *Martineau v. Matsqui Institution* (No. 2), (1979), 106 D.L.R. (3d) 385.

² For more on the principle of *nemo judex in causa sua* see Sara Blake, *Administrative Law In Canada*, 2nd ed. (Toronto: Butterworths, 1997) at 86.

³ S.A. De Smith, *Juridical Review of Administrative Action*, 4th Edition. By J.M. Evans (London: Stevens, 1980) at 158.

⁴ Sara Blake, *Administrative Law In Canada*, 2nd ed. (Toronto: Butterworths, 1997) at 9.

5. The principles associated with procedural fairness can include: the right to counsel, adequate notice of the case to be met, pre-trial release of information, the ability to make submissions, evidentiary standards and the provision of reasons for decisions that are taken. The following is a brief outline of how a number of these principles are addressed in the summary trial context.

Disinterested and Unbiased

6. Presiding officers must act impartially and separate their personal interests and beliefs from their decision-making powers and duties. If a presiding officer has a direct personal or financial interest in the outcome of a case, that officer cannot preside over the matter.

7. It is essential that the presiding officer must be seen to be impartial and without having any preference for any position. Not only is it important that the presiding officer be unbiased, but more importantly that there be no appearance or apprehension of bias. The test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of an adjudicator.⁵

8. However, it cannot be forgotten that in relation to summary trials, presiding officers will always have an interest in the discipline of the unit. Discipline within the CF depends upon the personal interaction between members who serve together. The officers responsible for the conduct of operations are the ones to whom the *habit of obedience* must be directly owed.⁶

9. In order to enhance impartiality, presiding officers are required to take an oath or solemn affirmation at the commencement of every trial⁷, and authorities superior to a presiding officer authority are prohibited from interfering in the conduct of the trial. Further, *QR&O* indicate that a CO who has carried out or supervised an investigation; signed a search warrant; or laid a charge or caused it to be laid should not preside at the summary trial.⁸

10. In the final analysis members must know and believe that leaders will deal fairly and objectively with all members' problems, including lapses of discipline.

Notice of Case and Opportunity to be Heard

11. An accused must be given the opportunity to make representations about the case against them, but before this can be done, the accused must be informed of the case to be met and given an adequate opportunity to put together representations.⁹ An accused cannot effectively exercise the right to be heard if that accused does not have knowledge of the matters in issue.¹⁰

⁵ *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 636.

⁶ *Summary Trial Working Group Report*, Volume 1, 2 March 1994 at 74-75.

⁷ *QR&O* 108.20(2)

⁸ *NDA* ss. 163(2), *QR&O* 108.09.

⁹ The case *Painter v. Liverpool Oil Gas Light Co.* (1936), 3 A&E 433 has codified, to some extent, the rule on giving adequate notice and the opportunity to be heard. The rule is defined by Mr. Justice McRuer in the "First

12. Giving notice of the case to be met includes disclosing facts and documents pertaining to the matter in issue. Information about the case must be given to the accused even if the information may not be used in the hearing. The specific requirements for providing information to an accused at summary trial is provided in *QR&O*¹¹ and is discussed in detail in Chapter 10, Provision of Information.

13. An accused must also be given an opportunity to properly prepare the case and respond to all allegations raised. The *QR&O* set out the procedure that must be followed during a summary trial. The procedures include the accused being present throughout the trial, and the accused being given an opportunity to question all witnesses, give evidence and make representations about the evidence provided.¹² The procedures at summary trial are discussed in detail in Chapter 13, The Conduct of Summary Trials.

14. Although the basic procedure that must be followed in summary trial is set out in *QR&O*, there are situations where the presiding officer must exercise discretion when determining when to apply these procedures. In following the procedures provided in *QR&O* for pre-trial, trial and post-trial activities, there are many situations where the CO of the unit, the presiding officer, and review authority are required to exercise their discretion. As well, there are many practical details not specified in *QR&O* that are left to the discretion of the CO of the unit and the presiding officer. This discretion must be exercised fairly taking into consideration the facts of the particular case.

15. For example, the Regulations do not expressly provide the right to counsel to the accused; however, the presiding officer has discretion to allow legal counsel to participate and, if so, to determine the level of participation to be allowed. When deciding whether to permit an accused to be represented by legal counsel at the summary trial, *QR&O* indicate that the presiding officer should, at the least, consider the nature and complexity of the offence, the interests of justice, the interests of the accused, and the exigencies of the service.¹³ The presiding officer should also consider whether justice will be done if a non-legally trained presiding officer is placed in the position of having to rule on legal arguments made by a trained lawyer. In many cases the appropriate forum for resolving such legal issues will be a court martial.

McRuer Report", vol. 1, at 137, as cited in *The Canadian Legal System* (3d), Gerald L. Gall (Toronto: Carswell, 1990) at 360, note 25, as including the following elements:

1. Notice of the intention to make a decision should be given to the party whose rights may be affected.
2. The party whose rights may be affected should be sufficiently informed of the allegations against his interest to enable him to make an adequate reply.
3. A genuine hearing should be held at which the party affected is made aware of the allegations made against him and is permitted to answer.
4. The party affected should be allowed the right to cross-examine the party giving evidence against his interest.
5. A reasonable request for adjournment to permit the party affected to properly prepare and present his case should be granted.
6. The tribunal making the decision should be constituted as it was when the evidence and argument were heard.

¹⁰ *Desjardins v. Bouchard* (1982), 51 N. R. 204 at 214 (F.C.A.).

¹¹ *QR&O* 108.15.

¹² *QR&O* 108.20.

¹³ *QR&O* 108.14 Note B.

16. If procedural fairness is not observed throughout a summary trial the decision may be quashed on review.¹⁴ The availability of a review after a summary trial is discussed in Chapter 15, Request for Review.

Exercising Discretion

17. When exercising discretion, presiding officers are required to act in good faith and not abuse their powers or exercise those powers arbitrarily or dishonestly. There is also a requirement not to discriminate against an accused or witnesses based on irrelevant criteria such as religion, race or language.¹⁵

18. There are, however, limitations on the discretion exercised by the CO of the unit and presiding officer. Discretion must be used to promote the policies and objectives of the governing statute, in this case the *NDA*,¹⁶ and not used to achieve an improper purpose, which would be one not contemplated by the *NDA*. For example, under *QR&O* a presiding officer shall ask whether the accused requires more time to prepare the accused's case and grant any reasonable adjournment required for that purpose.¹⁷

19. In exercising discretion, all relevant evidence should be considered and weighed, and the decision should be based only on the proper or specified considerations.¹⁸ For example, when *QR&O* dictate factors that must be considered when making a decision on a specific matter, it would be improper for the presiding officer not to consider those factors. However, when *QR&O* do not specify the factors to be considered, the presiding officer must exercise the discretion to achieve the purpose contemplated by the *NDA*. For summary trials, *QR&O* provide that "the purpose of summary proceedings is to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency, in Canada and abroad in time of peace or armed conflict".¹⁹

20. The discretion given to a presiding officer under Statute and Regulation cannot be fettered or restricted by such means as policies and guidelines unless the Statute specifically provides for such. For example, in *QR&O* 108.14, Note B, general guidelines are given on what is to be considered by the presiding officer when deciding on the application by an accused member for legal representation at the summary trial. It must be emphasized that the Notes are guidelines. They are not to be construed as if they have the force and effect of law although they should not be deviated from without good reason.²⁰ It would be improper for a superior officer to

¹⁴ *QR&O* 108.045 and 116.02 and *Federal Court Act*, R.S.C. 1985, Chap. F-7, s. 18.1.

¹⁵ Blake, *Administrative Law* at 82 – 83.

¹⁶ *Padfield v. Minister of Agriculture, Fisheries & Food*, [1968] A.C. 997 at 1030 (H.L.) applied in *Oakwood Developments Ltd. V. St Francois Xavier (Rural Municipality)* (1985), 61 N.R. 321 at 331 (S.C.C.).

¹⁷ *QR&O* 108.20(3)(a).

¹⁸ Sara Blake, *Administrative Law In Canada*, 2nd ed. (Toronto: Butterworths, 1997) 81.

¹⁹ *QR&O* 108.02. Also see *QR&O* 101.07 which states:

Where in any proceedings under the *Code of Service Discipline* a situation arises that is not provided for in *QR&O* or in orders or instructions issued to the Canadian Forces by the Chief of the Defence Staff, the course that seems best calculated to do justice shall be followed.

²⁰ *QR&O* 1.095.

produce a policy that puts rigid constraints on the factors to be considered by the presiding officer when making a decision at a summary trial.

21. When the authority to exercise discretion has been provided, the presiding officer cannot refuse to exercise that discretion. Using the earlier example, if an accused applies for legal counsel the presiding officer cannot flatly refuse to hear or consider the matter,²¹ or deal with the issue in a terse manner that would otherwise constitute a failure to consider the matter. For example, if the accused makes a verbal application for legal representation and the presiding officer denies the application before allowing the accused a chance to put forward an argument.

22. If during the course of the summary trial process a presiding officer improperly exercises discretion and the accused is eventually found guilty this could result in a finding of guilty being quashed on review.²² The Regulations embody the legal principles of fairness in order to ensure that in the maintenance of discipline the decisions are made fairly.

Duty to Act Expeditiously

23. The *NDA* and *QR&Os* expressly require that charges under the *Code of Service Discipline* be dealt with as expeditiously as the circumstances permit.²³ This regulation, which is fully consistent with the stated purpose of summary trials²⁴, prescribes an obligation upon units that was designed with the *interests of justice and discipline* in mind. The interests given emphasis here include the interest accused members have in ensuring that their *Charter* right to be tried within a reasonable time is respected,²⁵ as well as the unit's interest in ensuring that minor breaches of the Code of Service Discipline are dealt with promptly. For a full discussion of the *interests of justice and discipline* see Chapter 11, Jurisdiction and Pre-Trial Determinations.

24. The term *expeditiously* ("acting or done with speed and efficiency"²⁶) refers to the steps that must be taken to bring the charges to a prompt resolution. From the accused's perspective, the expeditious handling of charges reduces the stress and possible prejudice of lingering charges. From the standpoint of the unit, the requirement serves to emphasize the need to restore or maintain unit discipline.

25. As is often the case, the regulatory requirement cannot be considered in a vacuum. The obligation on unit authorities to deal with charges expeditiously must be considered in light of

²¹ Blake, *Administrative Law* at 84 – 85.

²² *QR&O* 108.45. See Chapter 15 for a detailed discussion on the review process.

²³ *NDA* s. 162 and *QR&O* 107.08.

²⁴ *QR&O* 108.02.

²⁵ *Canadian Charter of Rights and Freedoms*, s. 11(b). The majority decision in *R. v. Askov*, [1990] 2 S.C.R. 1199, 59 C.C.C. (3d) 449, 79 C.R. (3d) 273 stated, as per Cory J.: "Although the primary aim of s.11 (b) is the protection of the individual's rights and the provision of fundamental justice for the accused, none the less there is, in my view, at least by inference, a community or societal interest implicit in s.11 (b). That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Secondly, those individuals on trial must be treated fairly and justly." (C.C.C., p.474). In a military context the community interest would arguably include the requirement to bring the matter to trial promptly in order that unit discipline within the military community might be restored.

²⁶ *The Concise Oxford Dictionary* (9th ed.), (1995, Clarendon Press, Oxford) p. 474.

the circumstances surrounding the charge. For instance, if the investigation is necessarily prolonged, the unit is not required by the regulation to prematurely prosecute an accused. Also, the accused member may wish a reasonable delay in commencement of the summary trial to allow for the interview of a number of witnesses. As always, the exercise of discretion in these pre-trial decisions must be made fairly and in conformity with the procedural requirements, such as, for example, the need to comply with election procedures, where applicable.

SECTION 3

THE CHARTER OF RIGHTS AND FREEDOMS

26. There can be no doubt that the *Charter* applies to the summary trial process. In the words of the Special Advisory Group "...this [military justice] system must be compatible with our Constitution, including the *Canadian Charter of Rights and Freedoms*".²⁷ Of particular note are the expectations of persons subject to the *Code of Service Discipline* that they will be dealt with according to principles enshrined in the *Charter*.

...there are different expectations of the military justice system, understanding that phrase in the broadest possible sense. These men and women have grown up in an era of the *Canadian Charter of Rights and Freedoms*, which was enacted in 1982. They may not have a detailed knowledge of that pivotal document, but they do know it contains fundamental principles relating to free speech and equal treatment. They know it applies to all Canadian citizens.²⁸

27. The significance of the *Charter* cannot be overstated. It is reflective of basic human rights that are recognized under both international human rights law and law of armed conflict treaties.²⁹

28. The right to a fair hearing is directly protected in two sections of the *Charter*: section 7 (Life, Liberty and Security of the Person) and section 11 (Proceedings in Criminal and Penal Matters). The application of these provisions of the *Charter* depends in part on the type of offence and the nature and severity of the punishments which can be imposed by the tribunal in question.³⁰ *Charter* rights are not absolute.

Section 7 – Principles of Fundamental Justice

29. Under the subject heading "Legal Rights" within the *Charter*, section 7 provides:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

²⁷ *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, March 14, 1997 at 9.

²⁸ *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, March 14, 1997 at 11. See also the legal opinion found at Annex F to that Report, at 6-7 and *R v. Wigglesworth*, [1987] 2 S.C.R. 541.

²⁹ For example, the *Universal Declaration of Human Rights*, 10 December 1948, the 1949 *Geneva Conventions*, the *International Covenant on Civil and Political Rights* (1966) 999 U.N.T.S. 171 and *Additional Protocol I to the Geneva Conventions of 12 August 1949* (section 75).

³⁰ *Wigglesworth v. R.*, (1987), 37 C.C.C. (3d) 385 (S.C.C.). Also see *Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution* (1985), 19 C.C.C. (3d) 195 (F.C.A.).

30. The principles of fundamental justice must be followed in any proceedings where a person's life, liberty and security of the person are in jeopardy. An accused's right to liberty may be affected by a summary trial where detention is a possible punishment.³¹

31. The term *fundamental justice* is not defined in the *Charter*, and the courts have not developed a complete definition. It is accepted that some of the principles of fundamental justice are procedural in nature.³²

32. It has also been accepted that if an accused were deprived of any of the legal rights defined in sections 8 to 14 of the *Charter*, depending on the circumstances, it would be a violation of the principles of fundamental justice.³³ This includes the right not to be arbitrarily detained or imprisoned, the right to be presumed innocent, and the right not to be compelled to be a witness in a proceeding against one's self. It is from the right to not be compelled to be a witness against one's self that the right against self-incrimination and the right to remain silent have emerged.³⁴

Section 11-Proceedings in Criminal and Penal Matters

33. Section 11 of the *Charter* contains a number of provisions related to procedural fairness. For example, section 11(d) states:

11. Any person charged with an offence has the right...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

34. For example, *Charter* rights must be assessed in light of the unique requirement of maintaining a disciplined armed force as found in the Special Advisory Group Report discussion of the right to be tried by an independent and impartial tribunal under section 11(d) of the *Charter*. The Special Advisory Group concluded that the chain of command must remain directly involved in the conduct of summary trials. They were also convinced that this approach could be *justified* under the *Charter*, notwithstanding the fact that presiding officers were neither independent, nor impartial, in the legal sense. The Special Advisory Group Report stated:

Because officers presiding at summary trials are not necessarily impartial since they know the accused and have a direct interest in the outcome of the trial, namely the well-being of

³¹ For a review of the concept of liberty in military context see the Summary Trial Working Group Report, 2 March 1994, Vol 1 at 119-124, and P. Rowe, *The Loss of Liberty in a Military Context. Summary Proceedings in the British Armed Forces*, Summary Trial Working Group Report, 2 March 1994, Vol, Tab E.

³² *Reference re Section 94(2) of the B.C. Motor Vehicle Act R.S.B.C.*, [1985] 2 S.C.R. 486 as cited in J.M. Evans, "The Principles of Fundamental Justice: The Constitution and the Common Law" (1991) 29 Osgoode Hall Law Journal 51. However, fundamental justice is not limited to the principles of natural justice since while many of the principles of fundamental justice are procedural in nature they are not limited to procedural guarantees. The principles of fundamental justice are to be found in the basic tenets and principles not only of our judicial process, but also in other components of the legal system.

³³ *Reference re S. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 at 500-504. See also Annex A for sections 7 – 14 of the *Charter*.

³⁴ Sections 9, 11(c) & (d) of the *Charter*.

their unit, we believe that they should be distanced further from active involvement in cases than is presently the case.... We think the impartiality of the summary trial process would be enhanced if commanding officers were systemically removed from the investigative and charging process. They would, however, continue to review the matter, including any investigation report and charge report, just prior to deciding whether to deal with the matter summarily or refer it to court martial.³⁵

35. The requirement of presiding officers to take an oath³⁶, the protection from interference from superior authorities³⁷, and the limitation on trying a case if the presiding officer performed certain pre-trial functions³⁸ all support an argument under section 1 of the *Charter* that the infringement of an accused's right to be tried by an independent and impartial tribunal is justified.

Section 1 of the *Charter*

36. In assessing the application of the *Charter* to the summary trial process it cannot be forgotten that rights under Canadian law are not unlimited. As is stated in section 1 of the *Charter*:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Therefore, even if it could be argued that a part of the summary trial process limits the rights under section 7 or 11 of the *Charter*, the provisions of the *NDA* and *QR&O* have been designed to address these limits. As a result, the legality of the summary trial process would still be upheld.³⁹

37. Therefore when discussing the application of the *Charter* to the summary trial process it should never be done in isolation from the purposes and needs of discipline in the CF. An effective presiding officer must act fairly. At the same time a presiding officer must meet the needs of military service in order to maintain a disciplined armed force. The "...military must be in a position to enforce internal discipline effectively and efficiently."⁴⁰ Therefore, there are times when the summary trial process applies standards of fairness which are different than those applicable to courts martial or civilian criminal courts.

³⁵ *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, March 14, 1997 at 50-51.

³⁶ *QR&O* 108.20(2).

³⁷ *QR&O* 108.04.

³⁸ *QR&O* 108.09.

³⁹ The recommendations of the Summary Trial Working Group, 25 March 1994, upon which many of the 1997 and 1998 amendments to the summary trial system were based, specifically reviewed the constitutionality of the summary trial process and possible s. 1 justifications. The work of the *Special Advisory Group on Military Justice and Military Police Investigation Services* was based in part on the 1994 Working Group Report.

⁴⁰ *R v. Genereux*, [1992] 1 S.C.R. 259.

Waiver and the Right to Elect Courts Martial

38. The broad right to elect trial by court martial,⁴¹ and the opportunity to consult with legal counsel prior to making that election,⁴² have been incorporated into the summary trial procedures to permit an accused to *waive* trial by court martial.⁴³ The waiver must be clear and unequivocal and the person must make the waiver with the full knowledge of the rights being given up.⁴⁴ In *Korponay v. A.G. Canada*, the Supreme Court of Canada stated:

the validity of such a waiver, . . . is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process. . . . The factors [the Judge] will take into account in determining whether the accused has clearly and unequivocally made an informed decision to waive his rights will vary depending on the nature of the procedural requirement being waived and the importance of the right it was enacted to protect.⁴⁵

39. An accused may choose, in most cases, to be tried by a court martial which provides a more complete set of procedural and fundamental legal guarantees. The requirement to record the election on the RDP and to indicate that opportunity to consult legal counsel has been provided to an accused is designed to ensure the presiding officer has confirmed the accused is making an informed choice before opting to proceed by way of summary trial.⁴⁶

SECTION 4

OBLIGATION ON PARTICIPANTS IN THE DISCIPLINARY PROCESS

40. As has been noted the role of summary trials is to allow for a speedy, efficient and effective process to deal with breaches of discipline at the unit level. None of the participants in the disciplinary process: the presiding officer, the accused, the assisting officer or unit personnel who lay charges, conduct arrests or administer the summary trial process are required to be lawyers or *Charter* scholars. However, there is a clear obligation to respect and uphold the constitutional rights of an accused person and act fairly throughout the summary trial process.

41. This obligation can best be fulfilled by studying, learning and applying the *NDA* and *QR&O* in all aspects of dealing with service offences. The ability of presiding officers to meet this obligation is enhanced through the completion of certification training. For other members

⁴¹ *QR&O* 108.17.

⁴² *QR&O* 108.18.

⁴³ See *Clarkson v. R.*, [1986] 1 S.C.R. 383, *Korponay v. A.G. Canada*, [1982] 1 S.C.R. 41, *R v. Manninen* (1987), 58 C.R. (3d) 97 (S.C.C.), *R v. Bartle*, [1994] 3 S.C.R. 173 and *Middendorf v. Henry* 425 U.S. (1976). For a discussion of the concept of “waiver” and its application to the summary trial process see the report of the Summary Trial Working Group, 25 March 1994, Vol I at 209-226.

⁴⁴ M.L. Friedland, *Controlling Misconduct in the Military* (Minister of Public Works and Government Services, 1997) at 98-100.

⁴⁵ *Korponay v. A.G. Canada*, [1982] 1 S.C.R. 41 (S.C.C.) at 49-50.

⁴⁶ *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, March 14, 1997, Annex F at 15-16.

the successful completion of other training programs, and a commitment to treating all persons fairly will help ensure that constitutional and other legal obligations are met.

CHAPTER 5

POWERS OF INVESTIGATION, SEARCH AND SEIZURE, INSPECTION

SECTION 1

INVESTIGATIONS

1. The *QR&O* authorize, and in some instances require, the conduct of an investigation. The nature of the matter to be investigated determines the scope and type of investigation as well as who authorizes and conducts the investigation.

2. In general, investigations can be categorized into two types; administrative and disciplinary. The purpose of this Chapter is to provide an overview of disciplinary investigations. It will also discuss the influence of administrative investigations on the disciplinary process.

Disciplinary Investigations

3. Disciplinary investigations are conducted pursuant to *QR&O* Chapter 106 (Investigation of Service Offences) to determine whether a service offence has been committed.

4. The purpose of investigating a service offence is to reconstruct events, gather evidence, identify elements of the alleged offence and identify those responsible.¹ An investigation shall be conducted when a complaint² is made or where there are other reasons to believe that a service offence may have been committed.

5. The investigation shall be conducted as soon as practical to determine whether there are sufficient grounds to justify the laying of a *charge*.³ As a minimum, the investigation must collect all reasonably available evidence bearing on the guilt or innocence of the person who is the subject of the investigation.⁴

Types of Investigations

6. The type of investigation conducted is dependant upon the nature of the offence and the gravity or sensitivity of the matter.

¹ *QR&O* 106.02 Note B.

² A *complaint* is a verbal or written report made by any person, military or civilian, alleging that a service offence has been committed. Complaints may be made through the chain of command, to the military police, or to the NIS (*QR&O* 107.01 Note A). See also Chapter 8, Laying of Charges.

³ *QR&O* 106.02(1). A *charge* is a formal accusation that a person subject to the *Code of Service Discipline* has committed a service offence (*QR&O* 107.015(1)). A charge is laid when it is reduced to writing in Part 1 of the RDP and signed by a person authorized to lay charges (*QR&O* 107.01). See also Chapter 8, Laying of Charges.

⁴ *QR&O* 106.03.

7. **NIS Investigations.** The NIS will normally investigate all offences of a *serious* and *sensitive* nature.⁵ For a description of the role of the NIS, see Section 3 of Chapter 3, Framework of the Military Justice System.

8. A *serious offence* is generally any indictable or hybrid offence under a federal statute or its equivalent offence under the *NDA*. A *sensitive offence* is any offence involving sensitive material; or where the subject or the victim of the offence is a senior officer (Major and above), a CO, personnel in a position of trust, or the civilian equivalent. However, this does not normally include those comparatively minor offences listed in Appendices 2 and 3 to Annex A of Chapter 6 of the *Military Police Policies and Technical Procedures*. This document is attached at Annex C. Such offences are normally investigated by Base/Wing military police.

9. When there is doubt between the military police and NIS as to who has jurisdiction for the investigation of an offence, the matter will be referred to the NIS for assignment.⁶ Further, the NIS may waive its primary jurisdiction to investigate sexual assault and certain other hybrid offences to either the Base/Wing military police or to other civilian police agencies.⁷

10. **Military Police Investigations.** Base/Wing Military Police can conduct investigations regarding offences that involve either members or civilians. The military police have the jurisdiction to investigate any non-serious or non-sensitive offence. Examples of such offences are found in Appendix 2 and 3 to Annex A of Chapter 6 of the *Military Police Policies and Technical Procedures*, which are attached at Annex C. In addition, they may also have jurisdiction over serious and sensitive offences over which the NIS has waived jurisdiction.

11. **Unit Investigations.** Although the military police have jurisdiction to investigate any service offence over which the NIS does not take jurisdiction, there are circumstances when disciplinary investigations will be undertaken by the unit authorities pursuant to *QR&O* Chapter 106 (Investigation of Service Offences). The circumstances of the offence as well as the seriousness of the offence, complexity of the investigation and location of the unit having regard to the availability of Military Police resources, are factors to be considered in determining whether the unit or the military police should conduct the investigation.

12. Units have traditionally assumed responsibility for conducting investigations into minor breaches of discipline. The offences referred to at paragraph (1) of *QR&O* 108.17 may be considered to fall into this category, provided the circumstances surrounding the commission of the offence are sufficiently minor in nature such that no right to elect court martial would arise, and the alleged perpetrator is not a senior officer (major and above) or civilian. They would not investigate offences that are serious and sensitive or which are likely to be tried by court martial. This list is meant to be a guideline rather than an exhaustive group. For example, although they do not appear on this list, allegations of the negligent discharge of a weapon are often investigated at the unit level. If there is any question about whether an investigation should be referred to the military police, the unit legal advisor or the military police should be contacted for advice.

⁵ *Military Police Policies and Technical Procedures*, (A-SJ-100-004/AG-000), Chapter 6, Annex A, para. 11. A copy of this document is attached at Annex C..

⁶ *Id.* at para 11.

⁷ *Id.* at para 12.

Conduct of Unit Investigations

13. The investigator's role is to reconstruct the events that occurred at the time of the alleged offence. The investigation shall, as a minimum, gather all readily available evidence bearing on the guilt or innocence of the person who is the subject of the investigation, identify those responsible and identify the required elements of the specific offence in order to support a charge.⁸

14. An important part of conducting an investigation is interviewing witnesses, which may include obtaining statements from anyone suspected of committing the offence. Care should be taken when interviewing or obtaining statements. It is important that the information come directly from the witness and not be suggested through the wording of the investigator's questions. Where, for example, the unit is conducting an investigation on an alleged assault between two members in the mess at closing time, it would be proper to ask a potential witness: "Were you at the mess? ... What time were you there? ... Did you see any thing happen at closing time?". It would not be appropriate to ask: "Were you at the mess when Lt Jones hit Lt Smith?".

15. When a disciplinary investigation is conducted by the unit, it is important that it is conducted properly and that the rights of the accused be respected.

16. Given the strict requirements of the law relating to the use of statements made by an accused as evidence, those members conducting unit investigations should only take statements from those suspected of committing an offence in exceptional circumstances. The suspect must be *cautioned* about the right to remain silent. The following form for the caution can be used where no charge has been laid, but it is suspected that the person may be implicated in the offence:

Before you say anything relating to any charge which has or may be preferred against you, you are advised that you are not obliged to say anything, but anything you say may be taken down in writing or recorded by other means, or both, and may be used as evidence. Do you fully understand this warning?⁹

Where a charge has been laid, the following caution can be used:

You are not obliged to say anything. You have nothing to fear from any threat and you have nothing to hope from any promise whether or not you do say anything, but anything you say may be taken down in writing or recorded by other means and may be used as evidence. Do you fully understand this warning?¹⁰

17. When a person who is suspected of being implicated in an offence has been questioned previously about the circumstances under investigation the following supplementary caution should be used before questions are put to that person or a statement is taken:

I wish to give you the following warning: You must clearly understand that anything said to you previously should not influence you not make you feel compelled to say anything at this time. Whatever you felt influenced or compelled to say earlier you are not now obliged to

⁸ See also Chapter 8, Laying of Charges.

⁹ QR&O 101.12(3).

¹⁰ QR&O 101.12(2).

repeat, nor are you obliged to say anything further, but anything you do say may be taken down in writing or recorded by other means, or both, and may be used as evidence. Do you fully understand this warning?¹¹

18. These cautions do not have to be given to every witness before questioning or obtaining a statement, only those who are suspected of committing an offence or have already been charged. Further, the questioning of an individual member who is the subject of an investigation presents numerous challenges to the gathering of *admissible* evidence such as the detention of the individual and obligation to provide the individual with a meaningful right to legal counsel. The advice of the unit legal advisor should be obtained before any statement or interview is sought from a member who is suspected of committing a service offence.

19. With respect to any *physical* evidence collected during the investigation, such as documents, a weapon, clothing etc., these items must be protected and kept secure. This is important to ensure the items are not misplaced or tampered with.¹² Questions concerning the handling and storage of evidence should be referred to the unit legal advisor.

Administrative Investigations

20. There are three types of administrative investigations; summary investigations,¹³ boards of inquiry,¹⁴ and informal investigations. These investigations are conducted when required by regulations and orders¹⁵ or when necessary for the effective and efficient control of administration of a unit or other element.¹⁶

21. While the purposes of administrative investigations and investigations of service offences are quite different, the conduct of an administrative investigation may well have an influence upon the conduct of the investigation of a service offence where its scope or witness lists are similar. Some administrative investigations have the authority to compel witnesses to give evidence and this may well have a detrimental effect upon the admissibility of certain evidence at a disciplinary hearing. Further, if both investigations are conducted simultaneously, the distinctions in purpose may be lost upon all parties involved to the detriment of both.

22. **Boards of Inquiry.** A board of inquiry can be convened by the MND, the CDS, an officer commanding a command or formation, or a CO.¹⁷ A board of inquiry will only be convened in the following circumstances:

- a. to investigate matters of unusual significance or complexity;

¹¹ QR&O 101.12(4)

¹² This can be done by placing the evidence in a secure place to which only one member has access and has overall responsibility for safekeeping the evidence.

¹³ QR&O 21.01.

¹⁴ QR&O 21.07.

¹⁵ For example, a summary investigation or board of inquiry must be commenced in certain circumstances where a member suffers injuries or dies (QR&O 21.46) and when there has been an aircraft accident (QR&O 21.56).

¹⁶ For example, a summary investigation or board of inquiry may be commenced when a member is missing (QR&O 21.41), when there is a fire or explosion that destroys public or non-public property (QR&O 21.61), or when public or non-public property has been lost (QR&O 21.71).

¹⁷ QR&O 21.06(2).

- b. when specifically required by *QR&O*, CFAOs, DAODs or other orders; or
- c. when directed to do so.¹⁸

23. The composition of a board of inquiry is determined by the convening authority and may involve two or more officers or two or more officers with one or more NCMs above the rank of sergeant.¹⁹ An investigation by a board of inquiry is formal and may involve taking evidence under oath or solemn affirmation. The board conducts the inquiry and prepares and submits minutes in accordance with the terms of reference prepared by the convening authority.

24. **Summary Investigations.** A summary investigation can be ordered by the CDS, an officer commanding a command or formation, or a CO.²⁰ A summary investigation will normally be ordered when:

- a. it is specifically required by *QR&O*, DAOD, CFAO or other orders;
- b. the incident or situation is minor and of a straightforward and uncomplicated nature; or
- c. any authorized authority believes it is appropriate.

25. The authority who orders a summary investigation also appoints the investigating officer. The investigating officer can be an officer or, if no suitable officer is available, a warrant officer. The investigating officer will conduct the summary investigation and prepare a report in accordance with the specific terms of reference provided by the authority ordering the investigation. The specific procedures to be followed in conducting the investigation are provided in orders.

26. **Informal Investigations.** As the name implies, informal investigations are less formal than summary investigations or boards of inquiry and are conducted at the unit level. For example, informal investigations are specifically provided for in CFAO 19-39 as a method of investigation available to a CO with respect to a complaint of harassment.²¹

27. **The purpose of administrative investigations.** A list of the occurrences for which a summary investigation or board of inquiry is usually conducted is attached as Annex D. The purpose of an administrative investigation is to obtain evidence relevant to the terms of reference, not for a disciplinary purpose or to assign criminal responsibility; in such cases a disciplinary investigation must be conducted in accordance with *QR&O* Chapter 106 (Investigation of Service Offences).²²

28. It is inevitable that during the course of some administrative investigations, evidence or information will be received alleging that a service offence has been committed. In such cases, and in order to protect the rights of any accused or potential accused, the investigation must be halted and the matter referred to the unit legal advisor. Based on the circumstances the legal

¹⁸ *QR&O* 21.06(1).

¹⁹ *QR&O* 21.08.

²⁰ *QR&O* 21.01.

²¹ CFAO 19-39, para. 45 and Annex B.

²² *NDA* s. 45.

advisor may refer the matter to the NIS, the military police or back to the unit for a disciplinary investigation or for disciplinary proceedings.

29. When considering the use that might be made of information gathered during the course of an administration investigation, advice from the unit legal advisor should be sought. For example, during a summary investigation into a complaint of harassment, the investigating officer receives information from the complainant or witnesses that a sexual assault may also have occurred, the investigator must halt the investigation and refer the matter to the unit legal advisor. This would include providing the legal advisor with any statements, notes, or preliminary reports relevant to the suspected service offence. Based on the information received, the legal advisor would normally advise the unit to refer the issue to the NIS or military police to conduct a disciplinary investigation from which charges may be laid.

30. The unit legal advisor will also advise the unit on how to handle the administrative investigation in light of any disciplinary investigation in progress or to be commenced. For example, based on the circumstances, it may be appropriate to terminate the administrative investigation altogether; to delay the investigation until all disciplinary proceedings are completed or a decision is made by the appropriate authority not to proceed with charges; or to redraft the terms of reference for the investigation in light of the disciplinary issues. If, on rare occasions, it is reasonably believed that failure to complete the investigation in a timely manner could have serious safety or security implications, the unit legal advisor may advise that it is appropriate to proceed with the administrative investigation and obtain statements from a potential accused.

31. Neither the minutes of a board of inquiry nor the report from a summary investigation can be admitted as evidence at a court martial or summary trial. However, the transcript of a statement made by a person at a board of inquiry or summary investigation can be used as evidence against that person in relation to a charge involving perjury, giving false or contradictory evidence or making a false or contradictory statement.²³

32. If there is any questions about whether information relating to a service offence has arisen during an administrative investigation, or how best to proceed, the unit legal advisor should be contacted as soon as possible.

Civil Investigations

33. In circumstances where certain offences will be investigated by either the civilian or military police a decision will be made on whether proceedings will be pursued in the military or the civilian justice system. The circumstances of the incident, the interests of military discipline, and whether the military or the civilian agencies have better resources to accomplish the task will dictate whether proceedings will be instituted in the military justice system, the civilian justice system or not at all. For example, while the CF has the authority to investigate and prosecute cases of spousal assault, these cases are usually dealt with in the civilian system so that the abused spouse is able to utilize the victim assistance and social services available through the civilian justice system. In cases of doubt regarding the appropriate jurisdiction, the unit legal

²³ *QR&O* 21.16(1) & (2).

advisor should be consulted. As a matter of policy, all alcohol influenced driving offences involving DND vehicles occurring in Canada will be processed in civilian court.²⁴

SECTION 2

SEARCH AND SEIZURE

34. A *search* is an examination of a person or property, including a person's house or other buildings, premises, or vehicle, with a view to the discovery of contraband or illicit or stolen property, or some evidence of guilt to be used in the prosecution of a criminal action for some crime or offence.²⁵

35. The object of conducting a search is to obtain admissible evidence which could be used in any service tribunal, including a court martial, or a civilian criminal proceeding.²⁶ Everyone, including persons subject to the *Code of Service Discipline*, has the right to be secure against unreasonable search and seizure.²⁷ In order to be a reasonable search under s. 8 of the *Charter*, the search must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner.²⁸ The advice of the unit legal advisor should be sought when considering any proposal to conduct a search with or without a warrant.²⁹

Searches Requiring a Warrant

36. The *QR&O* require that any member who conducts an investigation that involves a search consider whether a search warrant is necessary prior to conducting that search.³⁰ This is a threshold question that must be answered before a search is to be conducted. Where a search warrant is required to conduct a search in Canada, the investigators will normally seek the search warrant from a civilian judicial authority under the *Criminal Code*, by way of an application before a *justice*.³¹ If an investigator contemplates seeking a search warrant from a CO under the *Code of Service Discipline* for a search in Canada, the unit legal advisor should be consulted beforehand. Military search warrants would most often be used outside Canada while deployed at sea or on operations.

37. A CO may issue a search warrant if satisfied by information on oath that there is in any quarters, locker, storage space or personal or movable property:³²

- a. anything on or in respect of which any offence against the *NDA* has been or is believed on reasonable grounds to have been committed;

²⁴ *Military Police Policies and Technical Procedures*, A-SJ-100-004/AG-000, Chapter 5, at para. 44(a).

²⁵ *Black's Law Dictionary*, 5th ed. (St. Paul, Minnesota: West Publishing Company, 1979) at 1211.

²⁶ *QR&O* 106.04 Note B.

²⁷ *Charter*, s. 8.

²⁸ *R. v. Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1; *R. v. Caslake*, (1998), 121 C.C.C. (3d) 97.

²⁹ *QR&O* 106.04 Note B.

³⁰ *QR&O* 106.04.

³¹ *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s.487. Also, a *justice* means a justice of the peace or a provincial court judge, *Criminal Code*, s.2.

³² Quarters, locker, storage space or personal property referred to in *NDA* 273.2 and *QR&O* 106.04(2).

- b. anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence against the *NDA*; or
- c. anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant.³³

38. *QR&O* outlines the authority of a search warrant to search specified premises or objects. These include:

- a. quarters under the control of the CF or DND and occupied for residential purposes by any person subject to the *Code of Service Discipline* either alone or with that person's dependants, as well as any locker or storage space located in those quarters and exclusively used by that person or those dependants for personal purposes; and
- b. the personal or movable property of any person subject to the *Code of Service Discipline* located in, on or about any defence establishment, work for defence or material.³⁴

There are two exceptions : search incidental to arrest or a search conducted with the consent of the individual.

39. The search warrant authorizes any member named in the warrant and assisted by any other members or peace officers as are necessary, to search the specified place or property for the items sought, including:

- a. anything on, or in, which any offence has been, or is believed on reasonable grounds to have been, committed;
- b. anything that there are reasonable grounds to believe will afford evidence relating to the commission of an offence; and
- c. anything that there are reasonable grounds to believe is intended to be used for the purpose of committing an offence against the person.

Any items that have been seized should be brought before the issuing CO as soon as practical.³⁵

40. A search warrant will be in writing and should be in Form A.³⁶ When directed to a member to execute, a copy of the form and a completed sample form are attached in Annex E. When directed to a civilian peace officer, a search warrant should be in Form B³⁷, a copy of which is attached in Annex F.

41. Before a CO may issue a search warrant, the Information to Obtain a Search Warrant³⁸ must be received. A copy of the form for the Information and a completed sample form are attached as Annex G. The Information received by the CO must contain a sworn or affirmed

³³ *NDA* 273.3 and *QR&O* 106.05(1)(c).

³⁴ *NDA* s. 273.2 and *QR&O* 106.04(2).

³⁵ *QR&O* 106.05(1) and *QR&O* 106.08(1).

³⁶ *QR&O* 106.07.

³⁷ *QR&O* 106.07(1).

³⁸ *QR&O* 106.06(2).

written statement by an informant that satisfies the CO that *reasonable grounds* exist for believing that the items sought are linked to:

- a. the location to be searched; and
- b. the offence for which a search warrant can be issued, specified on the search warrant (see paragraph 38 above).³⁹

Every CO authorized to receive information for the purpose of issuing a search warrant has the authority to administer the oath or affirmation to the informant.⁴⁰

42. The CO must carefully consider the grounds contained in the Information. The CO must determine whether they are sufficient in light of the significant curtailment of the subject member's privacy and *Charter* rights. In making the determination about whether sufficient reasonable grounds exist to issue the search warrant, the CO should consider the following five questions:

- a. What are the grounds for saying that the offence has been committed?
- b. What are the grounds for believing that the things to be searched for exist?
- c. How will the things to be searched for afford evidence of the commission of the offence alleged? (Or what are the grounds for belief to link the items sought to the particular offence.)
- d. What are the grounds of belief to link the items sought or searched to the place to be searched? (See Question c.)
- e. What are the grounds for saying that the place to be searched is at the location identified?⁴¹

43. A CO who carries out or directly supervises the investigation of a matter may issue a search warrant in relation to that investigation, but only if that CO believes on reasonable grounds that:

- a. the conditions for the issuance of the warrant exist; and
- b. no other CO is readily available to determine whether the warrant should be issued.⁴²

A CO of a military police unit may not issue a search warrant.⁴³

44. Where a member authorized to conduct a search is lawfully in any of the places listed in paragraph 34, the member may seize evidence of the commission of any offence.⁴⁴ Regulations authorize the lawful seizure of anything obtained by or used in the commission of an offence, unexpectedly found in the course of a search authorized by a warrant where that evidence does

³⁹ *QR&O* 106.06 Note B and 106.07 Note B.

⁴⁰ *QR&O* 106.06.

⁴¹ *Search Warrants: Sufficiency of the Grounds of Belief*, S/Sgt R.F. Purcell, Criminal Operations Branch, 18 February, 1997, at 47.

⁴² *QR&O* 106.05(2).

⁴³ *QR&O* 106.05(3).

⁴⁴ *QR&O* 106.04 Note D; *QR&O* 106.08(2).

not relate to the offence or grounds stated in the warrant.⁴⁵ If a search warrant provides authority to search quarters for stolen property and during the course of the search a bag of marijuana is found in the drawer of a table in the living room, the marijuana may be seized as evidence for a new offence of possession of narcotics.

45. When the search warrant is being executed, every person authorized to execute the search warrant may use such force, and obtain such assistance, as the person considers reasonably necessary to gain entry to the premises specified.⁴⁶

Search Incidental to Lawful Arrest

46. Military police and other members have the right to search the person being lawfully arrested and the immediate area surrounding the person.⁴⁷ The right to search arises from the fact of the arrest and the enforcement requirements of safety and preservation of evidence. It is justifiable because the arrest itself requires reasonable and probable grounds (*QR&O* 105.01) or an arrest warrant (*QR&O* 105.05). However, as the legality of the search is derived from the legality of the arrest, if the arrest is later found to be invalid, the search will be also.⁴⁸

47. The search must be conducted in a manner reasonable in the circumstances and not in an abusive fashion.⁴⁹ It must be conducted for a reason related to the arrest.⁵⁰ The member may seize anything in the arrested person's possession and immediate surroundings in order to guarantee the safety of the members and the arrested person, to prevent the escape of the arrested person, or to provide evidence against the arrested person. For example, if a soldier is arrested at the Mess for drunken behaviour in the parking lot, neither the circumstances nor the offence would justify the search of the arrested member's vehicle or quarters, but a search of the soldier would be justified.

Consent Searches

48. A *consent search* is a search for admissible evidence, otherwise impermissible or subject to procedural and *Charter* requirements such as a warrant to search, where the person subject to the search has waived those protections. The onus to establish that the consent was both voluntary and informed rests upon the prosecution.

49. For the waiver to be considered consensual the subject person's consent must be voluntary. The onus is on the prosecution to establish that the person had full knowledge of the right to be secure against an unreasonable search and that the person had full knowledge of the effect the waiver would have on that right.⁵¹ In summary, for any consent search to be lawful,

⁴⁵ *QR&O* 106.08(1).

⁴⁶ *QR&O* 107.10(2).

⁴⁷ *QR&O* 106.04 Note A; *R. v. Golub* (1997), 117 C.C.C. (3d) 193; *R. v. Bedard* (1998), 125 C.C.C. (3d) 348. See also Chapter 6, Arrest.

⁴⁸ *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, [1984] 2 S.C.R. 145; *R. v. Caslake*, (1998), 121 C.C.C. (3d) 97.

⁴⁹ *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, 53 C.C.C. (3d) 257, 74 C.R. (3d) 316.

⁵⁰ *R. v. Belnavis* (1996), 107 C.C.C. (3d) 195. Where an accused arrested on basis of warrant for unpaid fines, a search of the vehicle was not considered to be referable to the arrest.

⁵¹ *R. v. Nielsen* (1988), 43 C.C.C. (3d) 548 and *R. v. Borden*, [1994] 3 S.C.R. 145.

the subject person must provide *informed consent*; that is, the subject person must be aware of the true purpose of the investigation and the legal protections that are being waived.⁵²

Detention, Restoration and Disposal of Items Seized

50. Where items are seized during the execution of a search warrant and brought before the issuing CO, the CO shall:

- a. direct that the items be detained if the CO considers that they are required as evidence for any investigation or for production as evidence before a service tribunal;
- b. direct that the items be transferred to civil authorities for use as evidence before a civil court; or
- c. direct that the items be restored or arrange for them to be *disposed* of in the manner described in *QR&O*.⁵³

51. Any direction to detain, transfer, restore, or dispose of items seized ceases to apply if the item's restitution is ordered by a service tribunal or it becomes an exhibit submitted to a service tribunal.⁵⁴ Alternatively, a CO who is satisfied that any item detained pursuant to subparagraph (3)(a) of *QR&O* 106.09 is no longer required for an investigation, service tribunal or civil trial, may direct that it be *restored* or arrange for it to be *disposed* of.⁵⁵

52. Any person entitled to the lawful possession of any item detained pursuant to subparagraph (3)(a) of *QR&O* 106.09 may apply to that CO for a *restoration* or *disposal* order.⁵⁶

53. To *restore* an item seized by the execution of a search warrant means to return the item to:

- a. the person from whom it was seized, if possession of it by that person would be lawful; or
- b. the person apparently entitled to it, if possession of it by the person from whom it was seized would be unlawful but, possession by the other person apparently entitled to it would be lawful.⁵⁷

⁵² The Ontario Court of Appeal established six criteria for the informed consent of a waiver of *Charter* rights in *R. v. Wills* (1990), 70 C.C.C.(3d) 529. These are:

1. There was consent, express or implied;
2. The giver of the consent had authority to give the consent in question;
3. The consent was voluntary in the sense that the word is used in *R. v. Goldman* (1980), 51 C.C.C.(2d) 1 and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose or not allow the police to pursue the course of conduct requested;
4. The giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;
5. The giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and
6. The giver of the consent was aware of the potential consequences of giving the consent.

⁵³ *QR&O* 106.09(3).

⁵⁴ *QR&O* 106.09(2).

⁵⁵ *QR&O* 106.09(4).

⁵⁶ *QR&O* 106.09(5).

In the circumstances where lawful title to possess an item seized is unclear, the advice of the unit legal advisor should be sought.

54. The CO shall, 90 days after the seizure of the items, direct that any item detained pursuant to the initial order, be *restored* or arrange for its *disposal*.⁵⁸

55. An officer commanding a command may, upon a CO's application prior to the expiration of the 90-day period, direct the continued *detention* of the items for any additional period of time that the officer commanding a command considers necessary in the circumstances.⁵⁹ The officer commanding the command may review and vary that order at any time.⁶⁰

56. In the circumstances where a person is convicted of an offence under the *Code of Service Discipline*, the service tribunal, including the presiding officer at a summary trial, shall order that any *property obtained by the commission of the offence* be restored to the person so entitled if at the time of the trial the property is before the service tribunal or has been detained and can be immediately restored.⁶¹ *Property obtained in the commission of the offence* includes property seized by the execution of a search warrant or any other property that is before the tribunal or has been detained for purposes of the trial and can be immediately restored to the person so entitled.

57. Similarly, where a member has been tried but not convicted at a summary trial and it appears to the presiding officer that an offence has been committed, the presiding officer may order that any *property obtained by the commission of the offence* shall be restored to the person apparently entitled to the items.⁶²

58. A restoration order shall not be made in respect of:

- a. property to which an innocent purchaser for value has acquired lawful title;
- b. a valuable security that has been paid or discharged in good faith by a person who was liable to pay or discharge it; or
- c. a negotiable instrument that has, in good faith, been taken or received by transfer or delivery for valuable consideration by a person who had no notice and no reasonable cause to suspect that an offence had been committed.⁶³

In circumstances where the ownership of the items is unclear, the advice of the unit legal advisor should be sought.

59. Any item that has been submitted at a summary trial and has not been ordered restored to the person apparently entitled to it may be returned to that person with the approval of the CO of the unit, base or element where the item has been retained or otherwise in accordance with directions issued by the Minister.⁶⁴

⁵⁷ QR&O 106.09(1).

⁵⁸ QR&O 106.09(6).

⁵⁹ QR&O 106.09(7).

⁶⁰ QR&O 106.09(8).

⁶¹ QR&O 101.055(1).

⁶² QR&O 101.055(1).

⁶³ QR&O 101.055(1) (3).

⁶⁴ QR&O 101.055(2), 101.055(3) and 106.09(9).

60. Any order by the service tribunal to restore the items shall be carried out by the appropriate service authorities whom the service tribunal normally orders to execute their process.⁶⁵ For courts martial this would mean the peace officers, military police, officers or NCMs who normally serve summons to witnesses. For summary trial courts this would normally mean the officers or NCMs who served documents like the RDP upon the accused.

SECTION 3 INSPECTIONS

61. The maintenance of military efficiency and discipline is enhanced by the use of *inspections* of members, military equipment and places. The purpose of an *inspection* distinguishes it from a *search*. The *Inspection and Search Defence Regulations*⁶⁶ have been enacted pursuant to the *NDA* s.273.1. These regulations authorize inspections in accordance with the custom or practice of the service to maintain military standards of health, hygiene, safety, security, efficiency, dress and kit, of any other officer or non-commissioned member or anything in, on or about

- a. any controlled area, or
- b. any quarters under the control of the Canadian Forces or the Department,

in accordance with the custom or practice of the service.⁶⁷

62. The words *in, on or about any controlled area*, for the purposes of the above section, includes all defence establishments and materiel, whether static or mobile, wherever located, and their immediate vicinity.⁶⁸ For example, this will include inspections of:

- a. married or single quarters for cleanliness and good order;
- b. personnel for dress and deportment;
- c. kit for proper maintenance and completeness;
- d. buildings for physical security and fire safety; and
- e. personnel to ensure that ammunition is not removed without authority from the firing range.⁶⁹

63. Inspections shall not be conducted with the intent of seeking incriminating evidence in a place that would otherwise require a search warrant in order to be entered.⁷⁰ For example, a locker inspection must not be conducted because of a belief that drugs may be found, seized and used as evidence in a disciplinary proceeding. Searches authorized by the *Defence Controlled Access Area Regulations*⁷¹, searches conducted as a condition of access to a controlled area⁷²,

⁶⁵ *QR&O* 101.055(1) (4).

⁶⁶ *Inspection and Search Defence Regulations*, SOR/86-958, *QR&O* Vol IV, Appendix 3.3.

⁶⁷ *QR&O* Vol IV, Appendix 3.3, s.3.

⁶⁸ *QR&O* Vol IV, Appendix 3.3, s.2; *QR&O* 19.76 Note B.

⁶⁹ *QR&O* 19.76 Note A.

⁷⁰ *QR&O* 19.76 Note D and 106.04 Note C.

⁷¹ *QR&O* Vol IV, Appendix 3.2.

⁷² *QR&O* 19.77.

and searches conducted for the purpose of obtaining evidence of the commission of an offence and authorized pursuant to *QR&O* 106.04 are not *inspections*.⁷³

64. However, if a lawful inspection reveals in *plain view* evidence of the commission of any offence, that evidence may be properly seized by the member conducting the inspection and used as evidence in any criminal or disciplinary proceedings.⁷⁴

⁷³ *QR&O* 19.76 Note C.

⁷⁴ *QR&O* 19.76 Note D.

CHAPTER 6

ARREST

SECTION 1

GENERAL

1. The purpose of this chapter is to discuss the issues related to *arrest* that are contained in the *Code of Service Discipline* and *QR&O*, and therefore are applicable to service members and the military police.¹

2. *Arrest* means taking a person into custody for the purpose of holding or detaining the person in relation to a service offence or criminal matter. *Arrest* involves the deprivation of a person's liberty by legal authority,² and extends to the entire time that the person is detained.

3. Authority exists for authorized persons to *detain* a person under certain circumstances before the person is tried for an offence and in some cases before the person is even arrested or charged with an offence. A person is detained where their liberty is restrained other than by arrest.

Authority to Arrest

4. The authority to arrest is contained within many statutes including the *NDA*³ and the *Criminal Code*⁴. These statutory provisions are based on the common law, such as, for example citizen's arrest. Limitations on the authority to arrest are provided for, and vary according to, the legislation. These limitations dictate who may be arrested, by whom, and in what circumstances an arrest may be carried out.

¹ The *Criminal Code* contains various provisions related to arrest which do not specifically apply to members of the CF or the military police in the exercise of their duties.

² *Black's Law Dictionary*, 5th ed. (St. Paul, Minnesota: West Publishing Company, 1979) at 100.

³ *NDA* s. 154.

⁴ *Criminal Code* s. 31(1) states:

(1) Every peace officer who witnesses a breach of the peace and everyone who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or renew the breach of the peace.

Criminal Code s. 494(1) and (2) also apply, which state:

494(1) Any one may arrest without a warrant

- (a) a person whom he finds committing an indictable offence; or
- (b) a person who, on reasonable grounds, he believes
 - (i) has committed a criminal offence, and
 - (ii) is escaping from and is freshly pursued by persons who have lawful authority to arrest that person.

(2) Any one who is

- (a) the owner or a person in lawful possession of property; or
- (b) a person authorized by the owner or by a person in lawful possession of property,

may arrest without a warrant a person whom he finds committing a criminal offence on or in relation to that property.

In addition, *Criminal Code* s. 495(1) provides:

494 (1) A peace officer may arrest without a warrant

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;

- (b) a person whom he finds committing a criminal offence;

- (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

5. Every person who has committed, is found committing or is believed on reasonable grounds to have committed a service offence, or who is charged with having committed a service offence, may be placed under arrest.⁵

Who may be Arrested

6. Anyone subject to the *Code of Service Discipline* can be arrested pursuant to the *NDA*.⁶ There is also the authority to arrest persons who are no longer subject to the *Code of Service Discipline*, but who were subject to that *Code* at the time the alleged offence was committed.⁷

7. Those who are subject to the *Code of Service Discipline* are listed in the *NDA*⁸ and include:

- a. officers and NCMs of the Regular Force;
- b. officers and NCMs of the Special Force;⁹
- c. officers and NCMs of the Reserve Force in certain circumstances;¹⁰
- d. persons who are attached or seconded as an officer or NCM to the CF;¹¹
- e. persons not otherwise subject to the *Code of Service Discipline* serving as an officer or NCO of any forces raised and maintained outside Canada and commanded by an officer of the CF;
- f. persons not otherwise subject to the *Code of Service Discipline* who accompany any unit or element of the CF which is on service¹² or active service¹³ in any place;

⁵ *NDA* s. 154(1).

⁶ *NDA* s. 154(1) and *QR&O* 105.01 Note A.

⁷ *NDA* s. 155(3) and *QR&O* 105.02.

⁸ *NDA* s. 60(1).

⁹ *QR&O* 1.02 defines *special force* as “such component of the Canadian Forces as may be established pursuant to subsection 16(1) of the *National Defence Act*”.

¹⁰ The circumstances when Reserve Members are subject to the *Code of Service Discipline* as provided in *NDA* s. 60(1)(c) as follows:

- (i) undergoing drill or training, whether in uniform or not;
- (ii) in uniform;
- (iii) on duty;
- (iv) called out under Part VI in aid of the civil power;
- (v) called out on service;
- (vi) placed on active service;
- (vii) in or on any vessel, vehicle, or aircraft of the Canadian Forces or in or on any defence establishment or work for defence;
- (viii) serving with any unit or other element of the regular force or the special force; or
- (ix) present, whether in uniform or not, at any drill or training of a unit or other element of the Canadian Forces.

¹¹ *QR&O* 102.05.

¹² *NDA* s. 33.

¹³ *NDA* s. 31.

- g. persons attending educational institutions established under section 47;¹⁴
 - h. alleged spies for the enemy;
 - i. a person, not otherwise subject to the *Code of Service Discipline*, who, in respect of any service offence alleged or committed by the person is in civil or service custody;¹⁵ and
 - j. a person, not otherwise subject to the *Code of Service Discipline*, who is serving with the CF who has agreed to be subject to the *Code*.
8. A person who “accompanies a unit or other element of the CF that is on service or active service”, referred to in paragraph 7(f) above, is defined as:
- a. a person who participates in movements, manoeuvres, or certain specified duties with any unit or element;
 - b. a person who is accommodated, or provided with rations, by the unit or element, whether at the expense of the unit or of the individual in any country or place designated by the Governor-in-Council;
 - c. a dependant, outside of Canada, of a member serving beyond Canada with that unit or element; or
 - d. a person embarked in a vessel or aircraft of that unit or element.¹⁶
9. When an offence has occurred either on or off DND property, the status of the alleged offender is the primary factor in determining whether the military police have jurisdiction to arrest the person. The jurisdiction of the military police to arrest persons subject to the *Code of Service Discipline* exists no matter where the alleged offence took place. For example, the military police can arrest a member who is involved in a fight at a bar away from the base.¹⁷ Whether the military police hold the member, or turn the member over to the civilian police in such a circumstance, depends on the offence and any arrangements that have been made with the civilian police for such cases. Where practical, a person who is to be retained in custody should be placed in service custody rather than civil custody.¹⁸
10. Persons not subject to the *Code of Service Discipline* may also be subject to arrest by the military police acting as a peace officer, where for example, an offence has been committed on

¹⁴ NDA s. 47 provides for the establishment of institutions for the training and education of officers and NCMs, officers and employees of DND, candidates for enrolment in the CF or employment by DND, and other persons whose attendance is authorized by or on behalf of the Minister. This would include the CF College and the Royal Military College of Canada, among other institutions.

¹⁵ For example, while accompanying the CF in Germany, the dependant of a member is subject to the *Code of Service Discipline*. On the return to Canada, the dependant is no longer subject to the *Code of Service Discipline*; however, if upon the dependant's return to Canada that dependant is arrested and placed in custody by civil authorities and it is alleged that the dependant committed a service offence while in Germany, the dependant can be arrested pursuant to NDA s. 60(1)(i).

¹⁶ NDA s. 61(1).

¹⁷ See also Section 3 of this Chapter regarding arrests by the military police without a warrant for arrest.

¹⁸ QR&O 105.13 Note A.

CF property¹⁹ or in relation to a Defence establishment.²⁰ In order to do so, however, there has to be a link or a factor linking the alleged offence to the military organization. Furthermore, the link will be sufficient if the alleged offence occurred in a military establishment. Finally, the Military Police will need to have conducted the arrest in relation to the alleged offence within a certain perimeter surrounding the military establishment and within a reasonable delay after the alleged offence occurred.

SECTION 2

DETENTION BEFORE ARREST

11. If a person is detained by a peace officer or other agent of the state, and this detention interferes with the person's liberty or freedom of action, then section 10 of the *Charter* gives the person detained the following rights:

- a. to be informed promptly of the reasons for the arrest or detention;
- b. to retain and instruct counsel without delay and to be informed of that right; and
- c. to have the validity of the detention determined by way of *habeas corpus*,²¹ and to be released if the detention is not lawful.²²

12. Section 10 of the *Charter* does not apply to all cases when someone is stopped. As part of their regular duties or as part of an investigation, peace officers, members or investigators may have to stop people for various reasons including to obtain information, to issue provincial offences notices, eg. to issue speeding tickets, or for security or safety checks. One example is random roadside checks used to check for licenses, registration, or vehicle safety.

13. Section 10 does apply if a peace officer or someone authorized to enforce the law has assumed physical control over the movement of a person. For example, a driver is stopped by the military police and during the stop the military police form the suspicion that the driver is impaired. If the driver is required to wait in the military police car for the A.L.E.R.T. unit

¹⁹ *Nolan v. R.* (1987), 34 C.C.C. (3d) 289 (S.C.C.), and *R. v. Haynes* (1994), 4 M.V.R. (3d) 217 (N.S.C.A.). In *Nolan v. R.*, the military police pursued a vehicle which had been traveling at excessive speed while exiting the confines of the base and stopped the accused on a public highway. The military police made a breathalyser demand, however the civilian accused refused to comply with the demand. The Supreme Court of Canada held that the military police officer was acting within his lawful duties as prescribed in the *Government Property Traffic Regulations*, C.R.C. 1978 c. 887, and the *Defence Establishment Trespass Regulations*, C.R.C. 1978, c. 1047, (repealed and replaced by the *Defence Controlled Access Area Regulations* SOR/86-957), and QR&O 22.01(2) and therefore fell within the definition of peace officer pursuant to then s. 134 of the *NDA* (now s. 156). Therefore, the military police officer had the power to follow the civilian driver when he left the base and went onto a public street, and had the authority to issue a breathalyser demand.

²⁰ The authority for military police officers to arrest civilians for an offence in relation to CF property is arguably very narrow. In both *Nolan v. R.* and *R. v. Pile* [1982] 14 M.V.R. 96 (Ont. C.A.) the nexus for military police authority related to the enforcement of military law or regulations. As stated by Callaghan J. in *R. v. Pile* at p.105:

“A military policeman, while acting as a peace officer and exercising authority or duties conferred upon him by the Act, is not subject to municipal or provincial restraint so long as his actions arise as a result of incidents which took place on or in respect to the defence establishment.”

²¹ *Habeas Corpus* is directly translated to mean "you have the body". The term refers to a type of writ that can be issued by the court and is most often used to require the release of someone being illegally detained.

²² The *Canadian Charter of Rights and Freedoms*, s. 10. A copy of the *Charter* is found at Annex A.

(roadside breathalyser screening device) to arrive, this could constitute a detention for the purposes of section 10.

14. Section 10 also applies if a peace officer or agent of the state does not physically control the movement of the person, but interferes with that person's liberty or freedom of action by means of compulsion or coercion and the person believes there is no choice but to submit or face legal sanctions.²³ For example, if a driver is stopped by a peace officer for a random spot check, and although the driver is not confined or under the physical control of the officer during any questioning or inspection of the driver's vehicle, if the driver feels compelled to submit to avoid legal consequences, section 10 of the *Charter* would apply.²⁴

SECTION 3

ARREST WITHOUT WARRANT

15. There are two types of arrest, arrest without a warrant and arrest with a warrant. A Warrant for Arrest is written authorization for the arrest of any specified person for the offence(s) specifically indicated in the warrant.

16. Any person subject to the *Code of Service Discipline* may be arrested including without a warrant who:

- a. has committed;
- b. is found committing;
- c. is believed on reasonable grounds to have committed; or
- d. is charged with having committed

a service offence.²⁵

17. All service offences are found in Part III of the *NDA*. It is important to note that service offences, by virtue of section 130(1) of the *NDA*, include all offences under other federal statutes, including the *Criminal Code* and the *Controlled Drugs and Substances Act*.

18. It is not necessary that a person be charged with a service offence before being placed under arrest. Similarly, it is not always necessary to arrest a person who has been charged with an offence. The circumstances of each case should be considered to determine if arrest is appropriate.²⁶

Arrest by Service Members

19. Service members may arrest members in certain circumstances. The alleged offence, as well as the respective ranks of the members, are factors to be considered in determining the lawfulness of an arrest by a member. A service member may arrest another member where the member:

- a. has committed;

²³ *R. v. Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.).

²⁴ *R. v. Hufsky* (1988), 40 C.C.C. (3d) 398 (S.C.C.).

²⁵ *NDA* s. 154(1), and *QR&O* 105.01.

²⁶ *QR&O* 105.01 Note B.

- b. is found committing;
- c. is believed on reasonable grounds to have committed; or
- d. is charged

with having committed a service offence.²⁷

20. Officers may arrest, or order the arrest of NCMs, other officers of equal or lower rank, and any officer of higher rank who is engaged in a quarrel, fray or disorder.²⁸ NCMs may arrest or order the arrest of any other NCM of lower rank, and any NCM of equal or higher rank who is engaged in a quarrel, fray or disorder.²⁹

21. The CO may designate another person to arrest a person who is neither an officer nor NCM but was subject to the *Code of Service Discipline* at the time of the alleged commission of a service offence.³⁰

Duty of Members to Arrest

22. A duty to effect an arrest is specifically imposed on any member who is ordered by a superior to arrest a person. The member must carry out the order and effect the arrest even if the member would not normally have been able to do so because of the member's rank or status.³¹

Arrest by Military Police

23. Military police personnel who are appointed for the purposes of section 156 of the *NDA*, are peace officers with respect to persons subject to the *Code of Service Discipline*.³² The military police have a broader authority than other members to arrest or detain. The military police can arrest any person subject to the *Code of Service Discipline*, regardless of the person's rank or status who:

- a. has committed;
- b. is found committing;
- c. is believed on reasonable grounds to be about to commit or to have committed; or
- d. who is charged with having committed

a service offence.³³

24. Unlike other members, the military police have the authority to arrest someone subject to the *Code of Service Discipline* who it is believed is *about to commit* a service offence.³⁴ This

²⁷ *NDA* s. 154(1) and *QR&O* 105.01.

²⁸ *NDA* s. 155 (1) and *QR&O* 105.04(1).

²⁹ *NDA* s. 155 (2) and *QR&O* 105.04(1).

³⁰ *NDA* s. 155(3) and *QR&O* 105.02.

³¹ *QR&O* 105.07.

³² *Criminal Code* s. 2 includes members of the military police who are appointed under *NDA* s. 156 as peace officers when exercising their authority over someone subject to the *Code of Service Discipline*, even if the offence was committed by that person off the military establishment (*R. v. Courchene* (1989), 52 C.C.C. (3d) 375 (Ont C.A.)). The contents of *NDA* s. 156 is provided in *QR&O* 105.04(2).

³³ *NDA* s. 156(a).

includes the authority to arrest someone for an anticipated breach of a condition or conditions on which a person was released from custody.

25. Only the military police have the authority to arrest dependants of service members, who are accompanying the members on service or active service in any place out of Canada, when the dependant is alleged to have committed an offence under the laws applicable in that place.³⁵

Jurisdiction of Civilian Police Officers

26. Members are subject to the civil laws of Canada.³⁶ Therefore, members can also be arrested by civilian authorities including civilian police officers.

27. COs have a duty to assist civil authorities in detecting and apprehending officers and NCMs under their command whose arrest is required on a criminal charge, provided the civilian police produce a warrant or satisfactory evidence of their capacity to act.³⁷ In addition, anyone who neglects or refuses to deliver an officer or NCM for whom a warrant has been issued or to assist in the lawful apprehension of an officer or NCM accused of an offence punishable by a civil court, is guilty of a service offence.³⁸ In most cases the arrest of service members for civilian criminal offences by the civilian police will be co-ordinated with the military police.

Removal from “Controlled Access Areas”

28. Although not an arrest, any person who is not subject to the *Code of Service Discipline* who is found in or on a “controlled access area”³⁹ in contravention of applicable regulations may be removed.⁴⁰ A peace officer, Commissionaire, officer or NCM, employee or other individual engaged directly or indirectly by the CF or DND who is assigned to enforce access regulations may remove such an individual.⁴¹ Only as much force as is necessary may be used in order to

³⁴ *NDA* s. 156.

³⁵ *NDA* s. 272 and *QR&O* 105.03 and 105.03 Note. For the purposes of *NDA* s. 272, *dependant* means a spouse of a CF member, or any other person who is wholly or mainly maintained by a member or in the member's custody, charge or care.

³⁶ For clarification see *QR&O* 19.51(1).

³⁷ *QR&O* 19.51(3).

³⁸ *NDA* s. 103 and *QR&O* 103.36.

³⁹ *Defence Controlled Access Area Regulations*, SOR/86-957, Vol. IV *QR&O* tab 3.2, s. 2 provides:

“2. In these regulations, *controlled access area* means any defence establishment, work for defence or materiel and includes any restricted area within such place or materiel; (*secteur d'accès contrôlé*).

⁴⁰ *Defence Controlled Access Area Regulations*, s. 10 states:

“10. Every person found in or on a controlled access area in contravention of these Regulations may be removed therefrom by a security guard, but the security guard shall use only such force as is necessary and that removal shall be without prejudice to any other proceedings that may be taken.”

⁴¹ *Defence Controlled Access Area Regulations*, s. 2 provides:

“2. In these regulations,

security guard means

- (a) a peace officer,
- (b) a member of the Corps of Commissionaires,
- (c) an officer or NCM, or
- (d) an employee or other person engaged directly or indirectly by the Canadian Forces or the

remove the person.⁴² Removal of a person under this regulation does not impair further legal proceedings which may be taken against that person.⁴³

SECTION 4

ARREST WITH WARRANT

29. Arrests can be made when a warrant for arrest has been issued. Warrants for arrest exist both in the military justice system and in the civilian justice system.

Military Warrants for Arrest

30. A warrant for arrest may be issued by a CO or a delegated officer for the arrest of any person subject to the *Code of Service Discipline* where that person:

- a. has committed;
- b. is believed on reasonable grounds to have committed; or
- c. is charged under the *NDA* with having committed

a service offence.⁴⁴

Form of Military Warrants for Arrest

31. The form that the warrant should be issued in is found at *QR&O* 105.06, and a copy is attached at Annex I. The warrant names the person who is authorized to effect the arrest, the name of the issuing officer, the service number, rank and name of the person who is to be arrested, and the alleged offence. The warrant provides direction with respect to where the person is to be taken once arrested. There is also a place on the warrant to indicate, if necessary, that the arrest of an officer of higher rank than the officer issuing the warrant for arrest is required by the exigencies of the service. The warrant must be signed and dated by the issuing officer and must indicate the service number, rank, name, appointment and unit of the issuing officer. One warrant may be issued with respect to several offences of the same nature, and a single warrant for arrest may be issued for the arrest of more than one person.⁴⁵

Use of Warrant for Arrest

32. The member named in a warrant for arrest as being authorized to carry out an arrest, as well as anyone called upon by that member to assist, are authorized to effect an arrest, and to use reasonable force in doing so.⁴⁶ Special considerations apply with respect to the rank of the member ordering or effecting an arrest and the person who is to be arrested, as follows:

Department

to whom a designated authority has assigned the duties relating to the enforcement of these Regulations. (*guard de securite*)

⁴² *Defence Controlled Access Area Regulations*, s. 10.

⁴³ *Defence Controlled Access Area Regulations*, s. 10.

⁴⁴ *NDA* s. 157 and *QR&O* 105.05.

⁴⁵ *NDA* s. 157(3) and *QR&O* 105.05 (3).

⁴⁶ *NDA* s. 154(2), *QR&O* 105.09 and Note and 105.05 Note.

- a. **Arrest of a Superior.** An officer issuing a warrant for the arrest of a superior must certify on the warrant that the exigencies of the service require that a warrant for arrest be issued against a superior officer.⁴⁷
- b. **Arrest of a Subordinate.** Unless it is essential to do so, a member should not physically participate in the arrest of any member who is subordinate in rank. Instead, the member should have another member who is equal to or junior in rank to the person being arrested, carry out the arrest.⁴⁸

Civilian Warrants for Arrest

33. Civilian arrest warrants may be issued for the arrest of service members for the contravention of civil legislation or breaches of civil court orders. If the military police become aware that a civilian arrest warrant has been issued for a member, the military police will normally contact the police force who investigated the charge related to the warrant and coordinate the arrest of the member. Where a member becomes aware of the existence of a civilian arrest warrant issued against another member, the military police should be advised. In addition, civilian arrest warrants and warrants of committal may be issued and enforced against members for civilian criminal offences or other offences, including breaches of civilian court orders.⁴⁹

SECTION 5 RIGHTS AND REQUIREMENTS ON ARREST

Requirement to Submit to Arrest and Lawful Use of Force

34. There is a legal requirement to submit to a lawful arrest. It is an offence for a person subject to the *Code of Service Discipline* to resist or wilfully obstruct another member who is performing a duty related to the arrest, custody or confinement of a person subject to the *Code of Service Discipline*. It is also an offence to refuse to assist another member in the performance of a duty pertaining to the arrest of a person subject to the *Code of Service Discipline*, when called upon to do so.⁵⁰

35. Regardless of who is effecting an arrest, only force that is reasonably necessary in the circumstances can be used to effect an arrest.⁵¹ The use of excess force may lead to liability under the criminal or civil law.⁵² Similarly, the *Criminal Code* also allows the use of force when carrying

⁴⁷ NDA s. 157(2) and QR&O 105.05. See also Annex I, Form of Military Warrant for Arrest. An example of when the *exigencies of the service* require an officer to issue a warrant against a superior officer, is when no officer equal or higher in rank to the officer subject to the warrant is available.

⁴⁸ QR&O 105.10.

⁴⁹ QR&O 19.51(1).

⁵⁰ NDA s. 102 and QR&O 103.35.

⁵¹ NDA s. 154 (2).

⁵² QR&O 105.09 and 22.01 Note B.

out an arrest,⁵³ while imposing criminal responsibility for the use of excess force.⁵⁴ For example, if someone is peacefully submitting to the arrest, it would not be a reasonable use of force for the member to throw the arrested person to the ground.

36. In addition, the *Criminal Code* includes the offences of obstructing a peace officer,⁵⁵ resisting arrest⁵⁶ and assaulting a peace officer⁵⁷ which further impose duties to submit to an arrest and to assist peace officers in the execution of their duty in effecting arrests.

Indicators of Arrest

37. The member who carries out an arrest must touch the arrested person while explaining that the person is under arrest. Touching is not required if the person being arrested acknowledges the arrest by actions or words.⁵⁸

Powers Incidental to Arrest

38. Powers which exist incidental to arrest include the search of the person being arrested and the search of the immediate surroundings. The purposes of such a search include: guaranteeing the safety of the police or the arrested person, preventing escape, and securing evidence.⁵⁹ A search incidental to arrest could include a search of a motor vehicle, or other areas immediately surrounding an arrested person.⁶⁰

⁵³ *Criminal Code* s. 25(1) and s. 26.

⁵⁴ *Criminal Code* s. 25.

⁵⁵ *Criminal Code* s. 129. Obstruction of a peace officer requires a specific act performed to prevent a peace officer from performing their duty or an omission of something that one is legally required to do. Examples of obstruction could include deliberately concealing or destroying evidence or refusing to provide one's name where the peace officer has reasonable grounds to believe that the person has committed an offence.

⁵⁶ *Criminal Code* s. 129.

⁵⁷ *Criminal Code* s. 270.

⁵⁸ 10 *Halsbury's Laws of England*, 3rd ed., 342 (para. 631) as quoted and confirmed in *R. v. Whitfield* [1970] S.C.R. 46, 1 C.C.C. (3d) 481 when the Supreme Court of Canada accepted that an accused was placed under arrest when, while the accused was attempting to escape in his vehicle, the police officer reached through the window, grabbed the accused's shirt and said "you are under arrest". This is explained further by Moreland, *Modern Criminal Procedure* (New York, Bobbs, 1959) at 21 as cited in R.E. Salhany, *Canadian Criminal Procedure*, 6th ed. (Aurora: Canada Law Book Inc., 1998) at 3-3 as follows:

Mere words, however, do not constitute an arrest. There must be some actual restraint of the person by the arrestee or he must submit in a situation where the officer has the power of control. So to merely say to the accused that he is under arrest is not enough unless he submits and the officer is in a position to effect a seizure if desired.

⁵⁹ Martin's *Criminal Code*, 1999, CH / 30, Notes pertaining to Section 8 of the *Charter* state the following:

In order for a search to be incidental to arrest, the police must be attempting to achieve some valid purpose connected to the arrest. The three main purposes of search incident to arrest are ensuring the safety of the police and public, the protection of evidence from destruction at the hands of the arrestee or others and the discovery of evidence. ... The police must have one of the purposes for a valid search in mind and the officer's belief must be a reasonable one so there is some reasonable basis for doing what the police officer did. ... Furthermore, searches that are truly incidental to arrest will usually occur within a reasonable period of time after the arrest. *R. v. Caslake* (1998), 121 C.C.C. (3d) 97 (S.C.C.).

⁶⁰ Many issues surrounding search and seizure are complex and involve *Charter* rights. Search and seizure issues are dealt with extensively in Chapter 5, Powers of Investigation, Inspection, Search and Seizure.

39. Any search should be conducted in a reasonable fashion in view of the circumstances. Except where the arrested person may be an imminent threat, all searches must be conducted by someone of the same gender as the arrested person, and be conducted in an area that affords maximum privacy.

Rights on Arrest or Detention

40. Persons who have been arrested or detained must, without delay, be informed:
- that they are under arrest or are being detained;
 - of the reason for the arrest or detention;
 - that they have the right to retain and instruct counsel without delay;
 - that they have the right to have access to free and immediate advice from duty counsel provided by the DDCS or other duty counsel in the jurisdiction where the person is arrested or detained and how duty counsel may be contacted; and
 - of the existence and availability of Legal Aid plans, where applicable.⁶¹
41. The above information should be provided in the following form:
- You are under arrest for (*reason for arrest*). It is my duty to inform you that you have the right to retain and instruct counsel without delay. You have the right to have access to free and immediate advice from duty counsel provided by the Director of Defence Counsel Services at the following phone number... Advice may also be available to you from other duty counsel at the following number Legal Aid may also be available to you at the following number... Do you understand? Do you want to exercise this right?⁶²
42. It is not essential to use this exact wording, as long as the person is made aware of the information set out above. However, it is recommended that the above format be used to ensure that all of the required information is provided.⁶³
43. Certain circumstances may make it impossible to provide the required information to an arrested person immediately following the arrest, such as where the person is unconscious or attempting to escape from custody. In such circumstances, the required information is to be provided to the arrested person as soon as possible.⁶⁴

Right to be Informed of the Reason for Arrest or Detention

44. The regulations clearly provide that the arrested person must be informed of the reason for the arrest or detention without delay. The complete legal description of the alleged offence need not be provided. For this purpose, the offence need only be described in general terms.⁶⁵
45. The right to be informed of the reason for arrest or detention is found in the *Charter*. The *Charter* states: that "Everyone has the right on arrest or detention to be informed promptly of the reasons therefor".⁶⁶

⁶¹ QR&O 105.08(1).

⁶² QR&O 105.08 Note A.

⁶³ QR&O 105.08 Note A.

⁶⁴ QR&O 105.08(2).

⁶⁵ QR&O 105.08 Note B.

Right to Counsel

46. The right to counsel is fundamental to Canadian criminal law and is codified in the *Charter* which states: "Everyone has the right on arrest or detention ...to retain and instruct counsel without delay and to be informed of that right".⁶⁷

47. The right to counsel includes the right to consult counsel in private. Where the arrested person has indicated that they wish to exercise the right to counsel, there is a duty on the arresting authorities to refrain from attempting to elicit evidence from an arrested person until the arrested person has had a reasonable opportunity to do so.⁶⁸

48. In a military context, the right to counsel without delay is tempered slightly in deference to military operations, in that the opportunity to contact counsel is to be provided as soon as practical under the circumstances.⁶⁹ Other aspects of the right to counsel, such as privacy while consulting counsel and restrictions on certain police activities until the right has been exercised apply equally to those arrested under the *Code of Service Discipline* as they do to those arrested pursuant to the *Criminal Code*.

49. Information about the availability of Legal Aid is to be given to individuals who have been arrested or detained. In the military context, legal advice is available free of charge through the office of the DDCS.⁷⁰ Civilian lawyers may also be available to provide legal services through provincial legal aid plans to members who qualify according to financial criteria and the nature and seriousness of the allegations.⁷¹

59. Where a member is arrested or detained outside of Canada, legal advice is available through the DDCS.

Special Reporting Requirements in Certain Cases

60. Special reporting requirements exist where an officer or NCM above the rank of sergeant is arrested. Immediately upon the arrest of an officer or NCM above the rank of sergeant the CO must report the case to the Director of Military Careers at NDHQ.⁷²

61. A further reporting requirement exists where an officer or NCM has been arrested by a civil authority. The member shall cause the fact of the arrest to be reported to the member's CO.⁷³

⁶⁶ *Canadian Charter of Rights and Freedoms* s. 10.

⁶⁷ *Canadian Charter of Rights and Freedoms* s. 10(b).

⁶⁸ *R. v. Manninen* (1987) 34 C.C.C. (3d) 385, [1987] 1 S.C.R.1233, 58 C.R. (3d); *R. v. Ross* (1989), 46 C.C.C. (3D) 129, [1989] 1 S.C.R. 3, 67 C.R. (3d) 209; re: privacy: *R. v. Dempsey* (1987), 77 N.S.R. (2d) 284, 46 M.V.R. 179 (C.A.).

⁶⁹ *QR&O* 105.08(3).

⁷⁰ Toll-free numbers for these services are available from military police, from unit disciplinary personnel or from the unit legal advisor.

⁷¹ This could include service members who have been arrested or charged with a non-service offence and are to be tried in the civilian courts or who have been charged with a serious service offence which would likely be tried by way of court martial. *QR&O* 101.20(2)(a).

⁷² *QR&O* 105.11.

⁷³ *QR&O* 19.56.

CHAPTER 7

PRE-TRIAL CUSTODY

SECTION 1

GENERAL

1. *Custody* refers to the "care and control of a thing or person". It also includes the "keeping, guarding, care, watch, inspection, preservation of a [person], carrying with it the idea of the [person] being within the immediate personal care and control of the person in whose custody [the person] is subjected".¹ Under the *Code of Service Discipline* it is also possible for someone to be *retained in custody* until the completion of the court martial or summary trial for any offence charged.
2. The *NDA* refers to two types of custody. *Service Custody* is defined as "[t]he holding under arrest or in confinement of a person by the Canadian Forces, and includes confinement in a service prison or detention barracks." *Civil Custody* is defined as "[t]he holding under arrest or in confinement of a person by the police or other competent civil authority and includes confinement in a penitentiary or civil prison."²
3. Pre-trial custody involves the retention of someone before that person has been tried or found guilty of an offence. There are specific conditions that must be met and procedures that must be followed for a person to be retained in pre-trial custody. These requirements and procedures are in place to ensure that the person is treated fairly and that the person's individual rights are respected.

SECTION 2

RETENTION IN CUSTODY AFTER ARREST

Conditions for Custody

4. Once someone has been arrested³ it is not necessary or appropriate in every case to retain the arrested person in custody. In general, anyone who is arrested must be released unless the circumstances justify holding the person in custody. The circumstances of each case must be examined to determine whether retention in custody is appropriate.
5. When someone has been arrested pursuant to the *NDA* that person must be released from custody as soon as practicable unless the person who made the arrest believes, on reasonable grounds, that in all the circumstances the person arrested should be retained in custody.⁴ The

¹ *Black's Law Dictionary*, 5th ed. (St. Paul, Minnesota: West Publishing Company, 1979) at 347.

² *NDA* s.2.

³ The procedures and requirements related to arrest are contained in Chapter 6, Arrest.

⁴ *NDA* s. 158(1) and *QR&O* 105.12. In most cases the person arrested will be a member of the CF; however, civilians who are subject to the *Code of Service Discipline* could also be arrested.

circumstances to be considered by the arresting person when making this determination include the following:

- a. the gravity⁵ of the alleged offence;
- b. the need to establish the identity of the arrested person;
- c. the need to secure or preserve evidence of or relating to the alleged offence;
- d. the need to ensure that the arrested person will appear before a service tribunal or civil court to be dealt with according to law;
- e. the need to prevent the continuation or repetition of the alleged offence or the commission of any other offence; and
- f. the necessity to ensure the safety of the arrested person or of any other person.⁶

6. Normally, it is not considered a sufficient reason to retain a person in custody because the investigation involving that person is not yet complete. As well, the *mere possibility* of the person going absent without leave, without some indication that the accused intends to go “AWOL”, is not normally sufficient grounds to retain the person in custody.⁷ However, the likelihood of the person arrested going absent without leave should be considered because, if absent, the arrested person would not be available for trial⁸ and such an act would constitute an “other offence”.⁹

7. Once it is decided that the arrested person will be retained in custody or released, the person who made the arrest must inform the arrested person of that decision.¹⁰

Where Arrested Person to be Taken

8. Where the conditions for custody have been met and the arrested person is to be retained in custody, the arrested person must be placed in service custody or civil custody.¹¹ However, where practical, a person who is to be retained in custody should be placed in service custody.¹²

9. It is the responsibility of the person who effects the arrest and decides it is necessary to hold the person in custody to have that person taken under escort and committed into the custody of the member in charge of a guard or a guard room, or to any member of the military police.¹³ Any member to whom the custody of an arrested person has been committed has a duty to receive and keep that person.¹⁴

⁵ Gravity refers to the importance or seriousness of the alleged offence.

⁶ NDA s 158(1)(a)-(f) and QR&O 105.12.

⁷ QR&O 105.12 Note.

⁸ NDA 158(1)(d).

⁹ NDA s 158(1)(e).

¹⁰ QR&O 105.12 (2) .

¹¹ NDA 158(2).

¹² NDA s. 158(2) and QR&O 105.13 Note A.

¹³ QR&O 105.15. Military Police are appointed pursuant to the NDA s. 156 to arrest and detain without a warrant, any person who is subject to the *Code of Service Discipline*.

¹⁴ NDA s. 158(3) and QR&O 105.14.

10. Anyone responsible for placing an arrested person in custody can use such force as is reasonably necessary to do so.¹⁵ To determine what amount of force is *reasonably necessary*, the circumstances in existence at the time must be considered. For example, if the arrested person is highly intoxicated and has difficulty walking, it may be reasonable to physically assist and move the person. Similarly, a person who is violent may have to be physically restrained, such as by the use of handcuffs. However, if the arrested person is cooperative and able to move without assistance, it would not be reasonable to physically or forcibly move the person.

Requirement to Observe Persons in Custody

11. The *QR&O* impose an obligation upon the unit to ensure that the physical safety of the person in custody is maintained. This obligation includes at least two requirements:

- a. to observe persons in custody; and
- b. daily visits by a medical officer.

12. The *QR&O* require the person in charge of the place where the member is held to observe the member at least once every hour for the first three hours after the member arrives at the place of custody and at least once every two hours thereafter. These observations are to be made upon any retained NCMs below the rank of warrant officer and upon the retained officers or NCMs above the rank of sergeant who are held in custody in a place other than the member's quarters.¹⁶

13. The CO has a further requirement to ensure that any member retained in custody is visited at least once daily by a medical officer.¹⁷ If the person in charge of the place of custody observes the retained person to be showing signs of illness at any time, the person shall immediately send for a medical officer.¹⁸

Segregation by Gender

14. Male and female persons may be held in service custody in the same accommodation provided they are segregated within that accommodation.¹⁹ Further, no person shall be held in service custody in the exclusive charge of guards of the opposite sex, except where other arrangements are not practicable and then only for as short a time as possible.²⁰

SECTION 3 REPORTING REQUIREMENTS

15. The *QR&O* place various requirements on a member who commits an arrested person into custody and on the member in whose custody the arrested person is placed. These

¹⁵ *NDA* s. 158(2).

¹⁶ *QR&O* 105.38(1).

¹⁷ *QR&O* 105.36.

¹⁸ *QR&O* 105.38(2).

¹⁹ *QR&O* 105.37(1).

²⁰ *QR&O* 105.37(2).

requirements include providing specific information to the person being committed and providing written accounts or reports to the appropriate service authority.

Account in Writing

16. The person who commits an arrested person into service custody shall prepare and sign an account in writing setting out why the arrested person is being committed to custody. The account in writing must be delivered at the time of *committal*, to the member into whose custody the person under arrest is being committed.²¹

17. The form that should be used for the account in writing is provided at *QR&O* 105.16(3). A copy of both the form and a completed sample form are provided at Annex J.²² The specific information to be provided on an account in writing includes:

- a. the name of the member into whose custody the person under arrest is being committed;
- b. the service number, rank (if applicable), and name of the person arrested;
- c. the time and date of the arrest;
- d. the time and date of the committal;
- e. the time and date when it was determined that the person should be retained in custody after considering the circumstances and the factors contained in *QR&O* 105.12, and the specific reasons for the retention in custody;
- f. the time and date of delivery of the account in writing; and
- g. the signature, appointment and unit of the member who committed the person into custody.²³

The account in writing may be the only information available at the time the decision to retain the arrested person in custody is reviewed, and therefore, the reasons for the committal should be in as much detail as possible having regard to the circumstances. It is essential that this information is provided in detail to ensure that the decision making process is conducted fairly.²⁴

18. At the time of committal into service custody there is a further obligation to provide the person being held with the name and rank of the person who ordered the committal as well as a copy of the account in writing.²⁵

Report of Custody

19. Once the person arrested is committed into custody, there are further reporting requirements that have to be met. The member into whose custody the person has been committed is responsible for preparing a *report of custody* for the *custody review officer*.²⁶

²¹ *NDA* s. 158(4) and *QR&O* 105.16(1).

²² *QR&O* 105.16(4).

²³ *QR&O* 105.16(3).

²⁴ See Chapter 4, Fairness and the Application of the Charter.

²⁵ *QR&O* 105.16(2).

20. The custody review officer is the CO of the person in custody, or any other officer designated by the CO. However, if it is not practical for the CO or the CO's designate to act as the custody review officer, the CO of the unit or element where the person is being held in custody or any other officer designated by that CO, may act as the custody review officer.²⁷

21. The report of custody must be in writing and must contain the following:

- a. the name of the person in custody;
- b. an account of the alleged offence, as far as it is known; and
- c. the name and rank (if applicable) of the person who committed the person into service custody.²⁸

22. Prior to delivery of the report to the custody review officer, a copy of the report and the account in writing must be provided to the person in custody. Upon receiving these documents, the person in custody must be given an opportunity to make representations regarding the person's release from custody.²⁹ The ability to make such representations ensures that the custody review officer is able to make an informed decision concerning the person's continued retention in custody and that the process is procedurally fair.³⁰

23. There is no requirement that the person in custody make representations, but if the person chooses to do so, the representations can be made in writing or verbally by or on behalf of the person in custody. If the representations are not in writing, they must be reduced to writing or recorded by any other means.³¹ It is the responsibility of the member who has custody of the arrested person to ensure that all representations are reduced to writing or recorded.

24. The member into whose custody the arrested person is committed must deliver the report of custody, along with a copy of the account in writing and any representations made, to the custody review officer as soon as practicable, but not later than 24 hours after the person has been arrested. If the person in custody chooses not to make representations, the member must submit with the report of custody, a statement confirming that the person in custody was given an opportunity to make representations and chose not to do so.³²

Guard Reports

25. In addition to a report of custody, a guard report is also required when the person in custody is being held in a guard room, detention room or detention barracks, or is confined in a hospital under escort supplied by the base or other unit or element. In such cases, the member in

²⁶ NDA s.158.1(1) and QR&O 105.17.

²⁷ NDA s. 153 and QR&O 105.17 Note.

²⁸ NDA s. 158.1(2) and QR&O 105.17.

²⁹ NDA s. 158.1(3) and QR&O 105.17.

³⁰ See Chapter 4, Fairness and the Application of the Charter.

³¹ NDA s. 158.1(4) and QR&O 105.17.

³² NDA s. 158.1(5) and QR&O 105.17.

charge of the guard room must prepare a report to be given to the CO on each person held or confined.³³

26. The guard report must contain the following information:

- a. the service number, rank, name and unit of the person in custody;
- b. the date on which the person was first received into custody;
- c. the offence with which the person has been charged; and
- d. the name of the authority by whose order the person was confined.³⁴

27. A guard report must be made to the CO on the first day any person is admitted to custody. If the person is an NCM, subsequent daily reports must be made for the duration of the custody. Further, when an NCM is confined to hospital under escort, the guard report is due the first day an escort is provided and subsequent daily reports must be made.³⁵

SECTION 4 REVIEW REQUIREMENTS

Initial Review

28. To help ensure that persons are not committed to custody improperly, or retained in custody longer than necessary, *QR&O* require a review of custody at various times during the custody period.

29. The first review is conducted by the custody review officer. This review must take place as soon as practicable after the officer receives the report of custody and accompanying documents, but not later than 48 hours after the arrest of the person in custody.³⁶

30. The custody review officer must review the account in writing and accompanying documents. On completing the review, the officer must direct that the person in custody be released immediately unless that officer believes on reasonable grounds that it is necessary that the person be retained in custody having regard to all the circumstances, including those set out in subsection 158 (1) of the *NDA*.³⁷

31. In the event the person in custody has not been charged with an offence within 72 hours after being arrested, the custody review officer is further required to determine why a charge has not been laid and consider whether it remains necessary to retain the person in custody.

32. The duty of the custody review officer to release a person in custody when there are no longer sufficient grounds for keeping the person, continues after the initial review. If at anytime

³³ *QR&O* 22.06(1).

³⁴ *QR&O* 22.06(3).

³⁵ *QR&O* 22.06(2).

³⁶ *NDA* 158.2 and *QR&O* 105.18. Care must be taken not to abuse the 48-hour period of review in cases where an arrest is made on a weekend or over a period of leave. Unless impractical, the review of custody by a custody review authority should take place on weekends and during any periods of leave.

³⁷ *NDA* 158.2(2) and *QR&O* 105.18. The factors from *NDA* s. 158 are listed in para. 5 above.

after receiving the report of custody and before the person in custody is brought before a military judge, the custody review officer no longer believes that the necessary grounds to continue custody exist, that officer must direct that the person be released from custody.³⁸

33. When the person in custody has been charged with a designated offence, the custody review officer must direct that person be held in custody.³⁹ The designated offences are defined in section 153 of the *NDA*.⁴⁰

Powers of Custody Review Officer

34. The custody review officer may direct that the person be released with or without conditions. The custody review officer can require that the person being released comply with any of the following conditions:

- a. remain under military authority;
- b. report at specified times to a specified military authority;
- c. remain within the confines of a specified defence establishment or at a location within a geographical area;
- d. abstain from communicating with any witness or specified person, or from going to any specified place; and
- e. comply with such other reasonable conditions as are specified.⁴¹

35. The copy of the form that should be used for the direction for release, as well as a completed sample form, are attached at Annex K.⁴² Any condition that applies to the release must be unambiguous and clearly expressed on the form. Further, when conditions do apply to the release, the person in custody must acknowledge and agree to comply with the conditions by signing the form.

³⁸ *NDA* 158.3 and *QR&O* 105.19.

³⁹ *QR&O* 105.20.

⁴⁰ *Designated Offences* are defined at *NDA* s. 153 as:

- a. An offence punishable under *NDA* s. 130 that is
 - i. Listed in *Criminal Code* s. 469,
 - ii. Contrary to the *Controlled Drugs and Substances Act* ss. 5(3), 6(3) or 7(2) and is punishable by imprisonment for life, or
 - iii. An offence of conspiring to commit an offence referred in subsection ii above;
- b. An offence under the *NDA* that carries a minimum punishment of life imprisonment;
- c. An offence under the *NDA* for which a punishment higher in the scale of punishments than imprisonment for less than two years may be imposed, which is alleged to have been committed while at large after being released with respect to another offence pursuant to Division 3 (Arrest and Pre-trial Custody) or Division 10 (Release Pending Appeal); or
- d. An offence under the *NDA* that is a criminal organization offence.

⁴¹ *NDA* s. 158.6(1) and *QR&O* 105.22.

⁴² *QR&O* 105.22(2).

Review of Direction to Release

36. The person subject to a direction to release can apply to have the direction reviewed. The application can be made in letter or memorandum form and must be forwarded to the appropriate review authority without delay.⁴³

37. If the custody review officer is an officer designated by the CO, the review of the direction to release would be conducted by the CO. If the CO is the custody review officer, it is the next superior officer to whom the CO is responsible in matters of discipline who conducts the review.⁴⁴

38. The officer conducting the review will give both the released person and a representative of the CF an opportunity to speak on the review. After both sides have been heard, the review authority may make any direction respecting the conditions for release that the custody review officer could have made.

Hearing by Military Judge

39. When the custody review officer does not direct the release of a person in custody, the custody review officer shall cause the person to be taken before a military judge, as soon as practicable, for a hearing.⁴⁵ Such a proceeding is called a *show cause hearing*, and the purpose is to determine whether the person in custody is to be retained in custody.

40. When it is necessary to hold a show cause hearing, the custody review officer is required to immediately advise the nearest representative of the DMP.⁴⁶ The CF will normally be represented at a show cause hearing by counsel appointed by DMP; however, in the absence of counsel, the custody review officer may appoint someone to represent the CF.⁴⁷

41. The person retained in custody is entitled to be represented at the show cause hearing by legal counsel.⁴⁸ When the custody review officer advises the DMP that it is necessary a show cause hearing be held, the officer must also inquire whether the person in custody:

- a. desires legal counsel to be appointed by the DDCS;
- b. intends to retain legal counsel at the person's own expense; or
- c. does not require legal counsel.⁴⁹

42. When the person in custody wants legal counsel appointed by DDCS, the custody review officer must inquire whether the person prefers that a specific legal advisor assisting the DDCS be appointed, or that the legal advisor selected by the DDCS is acceptable. The custody review

⁴³ NDA s. 158.6(2) and QR&O 105.23 Note.

⁴⁴ NDA s. 158.6(2)(a)&(b) and QR&O 105.23.

⁴⁵ To determine when it is practicable to have the hearing, the custody review officer may consider the constraints of military operations, including the location of the unit or element where the person is held in custody and the circumstances under which it is deployed (NDA s. 159(2) and QR&O 105.24).

⁴⁶ QR&O 105.25.

⁴⁷ QR&O 105.25 Note.

⁴⁸ QR&O 105.26(1).

⁴⁹ QR&O 105.26(2).

officer shall advise the DDCS of the person's wishes, and where a specific legal advisor has been requested, the DDCS must try to have that legal advisor made available. If the requested legal advisor is not available, the DDCS shall ensure that another legal advisor is available.⁵⁰

43. The procedure to be followed during a show cause hearing is set out in the *NDA* and *QR&O*.⁵¹ Further, and except as otherwise provided in *QR&O*,⁵² all provisions of the *NDA* and *QR&O* that apply to a court martial also apply to a show cause hearing where the context permits. Modifications can be made to these provisions in keeping with the circumstances of the show cause hearing.⁵³

44. The military judge determines at the show cause hearing whether the person in custody has to remain in custody or should be released. In all cases, the hearing involves a person who has not yet been convicted of an offence and in some cases, the person in custody has not yet been charged with an offence. Therefore, it is essential that the rights of the person held in custody are protected.

45. A show cause hearing is generally open to the public. The person held in custody along with that person's legal counsel and the representative of the CF all attend before the military judge.⁵⁴ A record of the proceedings is to be kept and a copy of the record must be included in the minutes of the proceedings. Further, an interpreter will be available if required.

46. Both the representative of the CF and the person in custody or that person's legal counsel, may make any statements pertinent to the issue of custody. Once all statements have been made, first the representative of the CF and then the person in custody or that person's legal counsel may call witnesses. The military judge may call witnesses if the judge requires that further evidence be heard.⁵⁵ Once all the evidence is put forward, the representative of the CF and the person in custody or that person's legal counsel, can make addresses to the military judge.

47. After all evidence and addresses are heard, the military judge will decide on whether the person will be released from custody. The military judge can direct that the person be released without conditions, and in such case the person must be released forthwith.

48. The military judge can also order that the person be released subject to an undertaking. In such a case the judge must prepare a form of direction and undertaking, which should be in the form provided in *QR&O* 105.28, and deliver the undertaking to the member who has custody of the person.⁵⁶ A copy of the form of Direction and Undertaking is provided at Annex L.

49. The form used should contain two parts: the direction that the named person be released from custody which is signed by the military judge; and the undertaking which contains all the

⁵⁰ *QR&O* 105.26(3)-(5).

⁵¹ *NDA* s. 159.1 to 159.7 and *QR&O* 105.27.

⁵² This refers to the contents of *QR&O* 105.24 to 105.29.

⁵³ *QR&O* 105.29.

⁵⁴ *QR&O* 105.27(2).

⁵⁵ *QR&O* 105.27(5). The order for statements, witnesses and addresses is that the representative of the CF goes first followed by the person in custody or that person's legal counsel, after which the representative of the CF can make a reply. The order which statements are made and witnesses are called is reversed if the person in custody has been charged with a designated offence.

⁵⁶ *QR&O* 105.27(9).

conditions which apply to the release and which is to be signed by the person being released.⁵⁷ A copy of the Form of Direction and Undertaking must be added to the minutes of the proceeding.⁵⁸

50. An application to review any direction made by the judge at the show cause hearing can be made to the CMAC at any time before the person is tried by court martial or summary trial for the offence charged.⁵⁹ An application for review can be submitted by either the CF or the person who was in custody.⁶⁰

SECTION 5

RIGHTS AND REQUIREMENTS DURING PRE-TRIAL CUSTODY

Performance of Duties

51. Members who are on active service when committed to custody may be ordered to perform any duties that the member could properly be ordered to perform if not in custody. However, the member cannot be ordered to perform more duties than others, merely for being an alleged offender.⁶¹

52. Members who are not on active service shall not be required to perform any duty except that which is required to relieve the member of responsibility for any cash, accounts or material for which the member is responsible. In addition, if the member is an NCM, the member may also be required to perform such duty as is necessary to keep the member's cell in good order.⁶²

53. An order given to a member to perform a duty, or the performance of any duty required of a member in custody, does not relieve the member from liability for the alleged offence.⁶³

54. The member in custody can be deprived of all articles that may facilitate escape or cause harm to the member, except when carrying out duties in custody involving bearing arms.⁶⁴

Visitors

55. No one can visit a member in custody without the CO's permission, except for the following:

- a. the member's CO or a member designated by the CO;
- b. the Officer of the Watch or Officer of the Day;
- c. the orderly officer;

⁵⁷ *QR&O* 105.28(1).

⁵⁸ *QR&O* 105.28(2).

⁵⁹ *NDA* s. 159.9(1) and *QR&O* 105.30.

⁶⁰ See *QR&O* 105.27(6).

⁶¹ *QR&O* 105.31(2).

⁶² *QR&O* 105.31(1).

⁶³ *QR&O* 105.31(3).

⁶⁴ *QR&O* 105.31(4).

- d. a chaplain;
- e. a medical officer;
- f. a person immediately responsible for the member's custody;
- g. the member's assisting officer, legal counsel or advisor; or
- h. where the member does not have legal counsel, a witness for the member.⁶⁵

Correspondence

56. Any member held in custody is permitted to send letters and read all correspondence addressed to that member. However, the CO can require that all correspondence originated by the member or addressed to the member be scrutinized by any officer designated by the CO for that purpose. The officer who scrutinizes the correspondence can withhold or return to sender any correspondence the officer considers detrimental to the morale of the person in custody, to good order, or to security.⁶⁶

Exercise

57. Any member held in custody must be permitted to take, under supervision, the exercise necessary to maintain the member's health.⁶⁷

Mess Privileges

58. Any member in custody is denied the privilege of any mess.⁶⁸

Hospitalization While in Custody

59. While in custody, if the member is sent to a hospital, the member shall remain in custody while in hospital and while being transferred to and from the hospital, unless the member has been released from custody.⁶⁹

In Custody of Civil Authorities

60. When a person subject to the *Code of Service Discipline* is in the charge of a civil authority, the CO of any base, unit or element must, on the request of the civil authority, immediately take that person into the charge of an authority of the CF.⁷⁰ The authority of the CF

⁶⁵ QR&O 105.32.

⁶⁶ QR&O 105.33. Correspondence to and from the member's legal counsel should not be opened as a matter of course where the CO or designate is notified that the member or counsel seek the protection from scrutiny of correspondence afforded by the solicitor-client privilege. *Solosky v. The Queen* [1980], 1 S.C.R. 821. See also *R. v. Caslake* (1998), 121 C.C.C. (3d) 97.

⁶⁷ QR&O 105.34.

⁶⁸ QR&O 105.35.

⁶⁹ QR&O 105.39.

⁷⁰ QR&O 105.40(1).

who takes charge of the person shall determine whether the person will be arrested in respect of a service offence.⁷¹

⁷¹ *QR&O* 105.40(2).

CHAPTER 8

LAYING OF CHARGES

SECTION 1

INTRODUCTION

1. A *charge* is a formal accusation that a person subject to the *Code of Service Discipline* has committed a service offence.¹ A charge is considered to have been *laid* once it has been reduced to writing in Part 1 (Charge Report) of the RDP and signed by a person authorized to lay charges.²
2. A charge should not be confused with a complaint. While a complaint may lead to an investigation which results in charges being laid, a *complaint* is a verbal or written report by any person, military or civilian, alleging that a service offence has been committed.³

SECTION 2

LAYING OF CHARGES

Authority to Lay a Charge

3. The following members have the authority to lay charges under the *Code of Service Discipline*:
 - a. a CO;
 - b. an officer or NCM authorized by a CO to lay charges; and
 - c. an officer or NCM of the Military Police assigned to investigative duties with the NIS.⁴
4. Matters investigated by Military Police will be referred to the unit for the laying of charges.
5. NIS personnel will lay charges, when appropriate, in all cases where they have done the investigation.⁵
6. A CO should consider a number of factors when determining who will be authorized to lay charges. If the CO is considering personally laying a charge or contemplating authorizing an officer who is a delegated officer to lay charges it must be remembered that a presiding officer's jurisdiction to try a charge is limited where that officer has laid the charge or caused it to be laid.

¹ *QR&O* 107.015 (1).

² *QR&O* 107.015 (2).

³ *QR&O* 107.015 Note A.

⁴ *QR&O* 107.02.

⁵ See CFNIS, Standard Operation Procedure ch. 2, para 2, *CFNIS Policy to Lay Charges*, Revised October 2001, contained in Annex M.

In such cases the officer who laid the charge could only conduct the summary trial if it is not practical in the circumstances to have another officer do so.⁶ Therefore in the ordinary course of events that officer should not conduct the trial. Instead it would have to be conducted by another delegated officer, or CO, as appropriate.

7. The CO should be mindful that the designation of specific members as charge laying authorities was introduced to ensure a consistent approach towards the laying of charges within the unit; assist in maintaining a high standard of charge drafting; and enhance accountability. One approach to meeting these objectives is to designate a limited number of personnel within a unit to lay charges such as the unit Adjutant, or senior NCM such as the RSM, unit Chief Warrant Officer, or Coxswain. In some units COs have delegated the authority to lay charges to all NCMs holding the appointment of Master Corporal and above.

8. Regardless of how many personnel are designated, a CO should ensure that a perception is not created that only the persons designed to lay charges have a role in maintaining discipline within a unit. Any member can make a complaint or accusation that a service offence has been committed. Further there is an obligation for all members to report and deal with breaches of the *Code of Service Discipline*.⁷ Even if an officer or NCM is not *authorized* by a CO to lay charges, there is nothing to prohibit a member drafting a charge and submitting the charge to a member who is authorized to formally lay the charge. For example, a CO may only authorize the Chief Warrant Officer and all Master Warrant Officers to lay a charge. However, a policy could be implemented in the unit that NCMs of the rank of Sergeant and above will draft any charges arising from accusations that are brought to their attention.

Grounds to Lay a Charge

9. The member laying the charge must have an actual belief that the accused has committed the alleged offence. The belief that the accused has committed the offence alleged must be *reasonable*. In law, *reasonable belief* is a belief that would lead any ordinary, prudent and cautious person to the conclusion that the accused is probably guilty of the offence alleged.⁸

10. The test for whether grounds to charge exist has two elements: one subjective and the other objective. The subjective element is whether the member who proposes to lay the charge has an actual belief in the accused's guilt. The objective element is whether a reasonable person in the position of the member who proposes to lay the charge would come to the conclusion that the accused was probably guilty of the offence alleged.⁹ Both elements must be present for there to be sufficient grounds to lay a charge.¹⁰

⁶ QR&O 108.09 and Note.

⁷ QR&O 4.02 and 5.01.

⁸ QR&O 107.02 Note. Also see *R. v. Storrey*, [1990] 1 S.C.R. 241.

⁹ *R. v. Storrey* [1990] 1 S.C.R. 241.

¹⁰ This test is similar to that which is applied under Canadian criminal law prior to a charge being laid, where any one who "on reasonable grounds, believes that a person has committed an indictable offence" may lay an information (*Criminal Code* s. 504).

Charging Discretion

11. The discretion to initiate charges rests with authorized service authorities.¹¹ In determining whether to lay charges the charge laying authority should also consider whether it is in the interests of discipline.

12. An example of an offence that might not be in the interests of discipline to pursue, would be the case of a young recruit who is late for the recruit's first duty. Due to the accused's age, unfamiliarity with service life and the seriousness of the offence, it would be inappropriate to use charges to discipline the member.

Double Jeopardy

13. When determining if a charge should be laid, the member authorized to lay charges must consider whether or not the accused has already been found guilty or not guilty for the offence in question.¹² At law an individual cannot be placed in criminal jeopardy for the same, or substantially similar, offence twice.¹³ This is referred to as the rule against double jeopardy.¹⁴

14. The taking of administrative action does not prevent the laying of charges in relation to the same incident.¹⁵ Administrative sanctions relate to the employment aspects of a member, rather than penal. Action under the *Code of Service Discipline* involves the potential imposition of disciplinary sanctions on behalf of society as a whole. Administrative action is not a substitute for disciplinary action. Both administrative action and disciplinary action may be taken in relation to the same incident.

Mandatory Consultation with Unit Legal Advisor

15. Members authorized to lay charges are required to obtain advice from a legal advisor under the following circumstances:¹⁶

- a. when an offence is not authorized to be tried by summary trial under article 108.07;
- b. when an offence is alleged to have been committed by an officer or NCM above the rank of sergeant; or
- c. if a charge would give rise to a right to elect trial by court martial.

¹¹ For example, COs, an officer or NCM authorized by the CO, or the NIS (*QR&O* 107.02).

¹² See Chapter 11, Jurisdiction for further information.

¹³ *R. v. Riddle*, [1980] 1 S.C.R. 380. Also see *NDA* s. 66 and *QR&O* 102.17.

¹⁴ The principle of double jeopardy is also embodied in section 11(h) of the *Charter*. Under criminal law the principle of double jeopardy is contained in two special pleas: *autrefois acquit* and *autrefois convict*. The plea of *autrefois acquit* means that previously the accused has been acquitted of the offence which is now being charged. *Autrefois convict* refers to the fact that the accused was previously convicted of the offence which is now being charged.

¹⁵ See Chapter 14, Sentencing and Punishment.

¹⁶ *QR&O* 107.03.

The unit legal advisor will usually provide this advice.¹⁷

16. There is no requirement to obtain legal advice where the accused is to be charged with one of the five relatively minor offences which do not carry with them the right to elect court martial.¹⁸

17. Members laying charges have an obligation to obtain legal advice concerning the sufficiency of the evidence, whether a charge should be laid under the circumstances and, where a charge should be laid, the appropriate charge.¹⁹

18. In order to support a charge, there must be sufficient evidence to demonstrate a reasonable prospect of conviction.²⁰ An assessment of the evidence will include consideration of matters such as the availability, competence and the objective credibility of witnesses, and the admissibility of evidence implicating the accused.

SECTION 3

DRAFTING CHARGES

Selection of Appropriate Charge

19. Before a charge is laid, the correct charge or charges must be selected. All the offences under the *Code of Service Discipline* are listed in *QR&O* 103, along with specimen charges.²¹ Charges should be worded as indicated in *QR&O* 103, and must contain a statement of the offence and a statement of the particulars of the act, omission, conduct, disorder or neglect constituting the offence.²²

20. All charges against an accused should normally be included in the RDP, Part 1 (charge report).²³

21. It is essential that each charge allege only one offence.²⁴ One way to assess whether this is the case is to review both the statements of the offence and the particulars, for the existence of the words *and* or *or*.

¹⁷ *QR&O* 107.10.

¹⁸ See *QR&O* 108.17 for a list of minor offences.

¹⁹ *QR&O* 107.03(2).

²⁰ This does not require a conclusion that a conviction is more likely than not (see *Interim JAG Screening Policy*).

²¹ For specimen charges for s.130 offences see Annex O.

²² *QR&O* 107.04(2). This procedure is not followed in the Canadian civilian criminal justice system, where the statement of offence and the particulars are combined.

²³ *QR&O* 107.04(1).

²⁴ The common law rule against duplicity prohibits alternative charges in a single count. Also, section 789 of the *Criminal Code* states (in relation to summary convictions):

... the information

22. The reason for ensuring that the charge alleges only one offence is a practical one: the accused must be in a position to properly defend the matter. The accused must not be prejudiced in the preparation of a defence by ambiguity in the charge.²⁵ A statement of offence which alleges two separate offences would be duplicitous, and thus invalid.²⁶ An example of a duplicitous charge would be a single statement of offence under section 86 of the *NDA* alleging that the accused:

QUARRELLED OR FOUGHT WITH A PERSON SUBJECT TO THE CODE OF SERVICE DISCIPLINE.

This duplicity could be corrected by separating the offence into two new charges having statements of offence that allege that the accused:

QUARRELLED WITH A PERSON SUBJECT TO THE CODE OF SERVICE DISCIPLINE.

and

FOUGHT WITH A PERSON SUBJECT TO THE CODE OF SERVICE DISCIPLINE.

23. A charge will also be duplicitous if the particulars allege more than one offence. An example of duplicitous particulars would be :

Particulars: In that he, on 25 May 1999, at the base hospital, said to Sgt. Smith “Next time it will be you in the hospital” or words to that effect, and on 2 June 1999, at the mess, punched P.O. Green in the stomach.

24. These particulars would be duplicitous because they relate to two separate offences committed upon two different occasions. The incidents in question should be the subject of two separate charges.

25. More than one charge may sometimes be appropriate if more than one offence is alleged to have been committed. When more than one offence has occurred, each should be set out in a separate charge. Depending on the circumstances, it may be appropriate to lay the charges in the alternative.

(b) may charge more than one offence or relate to more than one matter of complaint, but where more than one offence is charged or the information relates to more than one matter of complaint, each offence or matter of complaint, as the case may be, shall be set out in a separate count.

²⁵ *R. v. Sault Ste. Marie* [1978] 2 S.C.R. 1299.

²⁶ A charge alleging more than two separate offences would be multiplicitous, and also invalid.

Alternative Charges

26. Charges may be laid in the alternative where the allegations in the particulars are considered capable of supporting a finding of guilty of: one of several offences; or of a particular offence but, failing proof of one or more elements of that offence, another offence.²⁷

27. An alternative charge should only be used where:

- a. there is doubt as to whether, in law, the particulars constitute one offence or another;
- b. an essential element of an offence is in doubt but the requirements for the charge of conduct to the prejudice of good order and discipline can be proven. An example of this type of situation is where the essential element of intent in the offence of stealing is in doubt. A charge under section 129 of the *NDA* for improper possession may be appropriate;
- c. the service offence is a more serious form of conduct to the prejudice of good order and discipline, such as the *NDA* s.92 offence of scandalous conduct and s.93 offence of cruel or disgraceful conduct.²⁸

28. If the charge is under section 130 of the *NDA* the member laying the charge should consider the fact that many offences against other Canadian laws permit a conviction for included offences without such offences being charged. For example, on a charge of murder, an accused may be found guilty of manslaughter even though it was not charged.²⁹ A similar situation arises with respect to *NDA* s.88 (desertion) and s.84 (striking or offering violence to a superior officer).³⁰

29. Where it is not practical, prior to trial, to determine which of several offences have been committed, those that appear reasonably possible of having been committed should be charged in the alternative. An example would be stealing under section 114 of the *NDA* and receiving stolen goods under section 115 of the *NDA*.³¹

30. The more serious charge should precede the less serious charge on the charge sheet. Charges in the alternative should be annotated as such.³²

Drafting Particulars

31. All charges must contain a statement of particulars. The particulars must provide sufficient detail so that the accused is reasonably informed of the offence alleged, in order to be in a position to properly defend the matter.³³

²⁷ *QR&O* 107.05(a).

²⁸ *QR&O* 107.05 Note A.

²⁹ *QR&O* 107.05 Note B.

³⁰ *QR&O* 103.62

³¹ *QR&O* 107.05 Note D.

³² *QR&O* 107.05 Note F.

32. The particulars should also indicate the date, time and place of the alleged offence, as well as the offence. Examples of how to draft particulars are included for each service offence listed in *QR&O* 103.

33. In addition to service offences, Superior Commanders and COs may try certain offences under the *Criminal Code* and the *Controlled Drugs and Substances Act*.³⁴ Examples of charges and particulars for these offences are contained in Annex O.

Essential Elements

34. Every offence is comprised of a number of essential elements that must be proven before a finding of guilty can be made. When drafting a charge consideration must be given to whether evidence exists which can be used to prove each of these elements. If evidence to support all the essential elements does not exist, no charge should be laid. Certain elements are common to all offences, such as:

- a. date on which offence occurred;
- b. place of offence;
- c. identity of accused; and
- d. act or omission constituting the offence.

35. A fundamental requirement for all offences is that there be an act, or some form of conduct. This is referred to as the *actus reus*. The *actus reus* may consist of an act of commission or an act of omission. The former refers to active misconduct, while the latter relates to situations where the accused fails to do something which was required to be done. An example of an act of omission would be where a member fails to fill out the duty roster as was the member's duty to do.³⁵

36. Offences must contain a mental element, or fault requirement. This will vary according to the nature of the offence in question. The term *mens rea* refers to the guilty mind. It is most easily understood in relation to offences involving fault that require the accused to have a state of mind such as intention, knowledge, recklessness or wilfulness.

37. *Negligence* describes fault based on inadvertence or carelessness involving a marked departure from the norm and is based on an objective test. That test involves assessing the accused's actions against the standard of the reasonable person.³⁶ If a reasonable person would have acted, or failed to act, in the same manner as the accused, the accused's actions will not be considered negligent.

³³ *QR&O* 107.04(3). In relation to similar requirements under the *Criminal Code* (s. 581), the Supreme Court of Canada has stated that the charge must include concrete facts of a nature to identify the particular act which is charged and to give the accused notice of it (*Brodie v. R.* [1936] S.C.R. 188, affirmed in *R. v. Wis Development Corp. Ltd. et al.*, [1984] 1 S.C.R. 485).

³⁴ *NDA* s. 130 and also see *QR&O* 108.07.

³⁵ An offence under *NDA* s. 129.

³⁶ Don Stuart, *Canadian Criminal Law*, 3rd ed., (Scarborough: Carswell, 1995) at 143.

38. Different words are frequently used to express an intent requirement, such as: intentionally; wilfully; means to; with intent; or for a purpose. Sometimes offences require a knowledge requirement as with possession offences. However, having intent or knowledge will only satisfy the mental element of an offence if the intent or knowledge relates to the particular offence.

39. For certain offences proving *recklessness* may satisfy the *mens rea* requirement. Recklessness refers to the act of deliberately risking the likelihood of certain consequences, as opposed to the concept of civil negligence, which refers to the failure to take reasonable care. When determining recklessness, one must ask if the accused was aware that there was a danger that the conduct in question could bring about the result prohibited by the criminal law, yet nevertheless persisted, despite the risk.³⁷

40. *Criminal negligence* is different from civil negligence, and is defined as “wanton or reckless disregard for the lives or safety of other persons”.³⁸ Criminal negligence requires a marked departure from the standard of care of a reasonable person.³⁹

41. For the offence of *negligent performance of a military duty* the fault requirement, or standard of care, has been described by the CMAC as:

. . . that of the conduct expected of the reasonable person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred. In the context of a military operation, the standard of care will vary considerably in relation to the degree of responsibility exercised by the accused, the nature and purpose of the operation, and the exigencies of a particular situation.⁴⁰

42. The CMAC, in *R. v. Mathieu*, has stated that:

It is now clearly established that, for penal negligence offences [which term includes negligent performance of a military duty], the applicable standard of liability is an objective standard based on the court’s assessment of what a reasonable person would have done in the circumstances.⁴¹

Surplusage.

43. If information contained in the particulars is not essential to constitute the offence, it will be treated as surplusage. This means that it is not a material element of the offence and need not be proved.⁴²

³⁷ Stuart, at 202.

³⁸ See *Criminal Code* section 219.

³⁹ *R. v. Creighton* (1993) 23 C.R. (4th) 265 (S.C.C.).

⁴⁰ *R. v. Brocklebank*, (2 April 1996) (CMAC 383).

⁴¹ *R. v. Mathieu*, (CMAC 379) at 13.

⁴² Reference to the wrong section of the Act charged is considered a non-fatal defect, since the section number is considered surplusage.

Record of Disciplinary Proceedings

44. The RDP is divided into seven parts; Part 1 being relevant to the laying of charges.⁴³ Every charge laid against an accused must be recorded in Part 1 of the RDP.⁴⁴

45. Part 1 of the RDP contains the Charge Report.⁴⁵ This is comprised of: the statement of offence; statement of particulars; and name, rank, service number, and unit or element, of the accused. Part 1 contains the name, rank, position and signature of the member laying the charge and the assisting officer.⁴⁶ It contains the name and rank of the assisting officer and places to record the choice of language and to indicate that a copy of the charge report has been given to the accused.

SECTION 4 REFERRAL OF CHARGES

46. Once a charge is laid, the member, including a member of the NIS, who has laid the charge must refer it to either the accused's CO, the CO of the base, unit or element in which the accused was present when the charge was laid, or to a delegated officer.⁴⁷ The member who laid the charge must provide a copy of the RDP to the accused. This initial referral like any subsequent referrals by a presiding officer or referral authority, will be recorded on the RDP.⁴⁸

47. The CO or delegated officer to whom a charge has been referred must cause a copy of the RDP to be placed on the Unit Registry of Disciplinary Proceedings.⁴⁹ Also see Chapter 16, Post-trial Administration.

48. When a charge is referred to a delegated officer, the delegated officer must cause the charge to be proceeded with in accordance with *QR&O* 108, which involves taking the steps necessary to commence summary proceedings, or refer the charge to the CO with a

⁴³ See Annex B for sample Record of Disciplinary Proceedings, the Provision of Information form and a completed sample of both.

⁴⁴ *QR&O* 107.06 and 107.07 and see attached Record of Disciplinary Proceedings.

⁴⁵ The information contained in Part 1 is similar to that required under the *Criminal Code* for an information (see Form 2). It has been held that defects in the information, such as the omission of the name and occupation of the informant, although required on the form, are not a defect in substance such as to affect the validity of the form (*R. v. Eddy* (1982), 69 C.C.C. (2d) 568). Courts have also ruled that the failure to indicate the date of the offence does not render the information a nullity unless a question arises as to whether the information was laid within the prescribed time limit (*R. v. Akey* (1990), 1 O.R. (3d) 693). A failure to allege the place of the offence will also be considered a mere defect in the form, which may be amended (*Re R. v. Phelps* (1972), 9 C.C.C. (2d) 127).

⁴⁶ *QR&O* 101.065, on interpretation of charges states:

(1) In the construction of a charge, Part 1 (Charge Report) of a Record of Disciplinary Proceedings or a charge sheet, there shall be presumed in favour of supporting it every proposition that may reasonably be presumed to be implied included, though not expressed, in the charge sheet, charge report or charge.

(2) The statement of the offence and the particulars of the offence shall be read and construed together.

This implies that the convening authority will give effect to charges despite slight defects.

⁴⁷ *QR&O* 107.09.

⁴⁸ *QR&O* 107.07 and RDP Parts 1 and 5.

⁴⁹ *QR&O* 107.09 Note A.

recommendation that the charge not be proceeded with, if in the delegated officer's opinion the charge should not be proceeded with.⁵⁰

49. When a charge is referred to a CO from the member who laid the charge or from a delegated officer, the CO must cause the charge to be proceeded with in accordance with *QR&O* 108, or not proceed with the charge, if in that officer's opinion the charge should not be proceeded with.⁵¹

50. Similarly, should the CO refer the charge to a superior commander, the superior commander must either cause the charge to be proceeded with in accordance with *QR&O* 108, or not proceed with the charge, if in that officer's opinion the charge should not be proceeded with.

51. Where a decision not to proceed with a charge amounts to a final disposition of all of the charges, the CO or superior commander who decided not to proceed with a charge must cause the original RDP and a copy of any investigation report to be placed on the Unit Registry of Disciplinary Proceedings.⁵²

52. Before the officer to whom a charge has been referred decides whether to proceed with the charge, that officer must obtain advice from the unit legal advisor if the charge relates to any of the following offences:

- a. an offence not authorized to be tried by summary trial (for the list of triable offences see *QR&O* 108.07);
- b. an offence that is alleged to have been committed by an officer or a non-commissioned member above the rank of sergeant; or
- c. the offence is one that gives rise to the right to elect trial by court martial.⁵³

53. Finally, this referral process must be conducted as expeditiously as the circumstances permit.⁵⁴ In other words, each officer or NCM who deals with these charges must diligently and promptly conduct the referral and the attendant administrative requirements.

54. The unit legal advisor will provide advice on whether the presiding officer should proceed with a summary trial. Should the presiding officer decide not to act on the advice of the unit legal advisor, then the presiding officer must state the decision and provide written reasons for that decision. A copy of the decision and reasons must be provided to the legal advisor and the officer to whom the presiding officer is responsible in matters of discipline within 30 days of receiving the advice.⁵⁵

55. A decision by a CO or a superior commander not to proceed with a charge would not preclude proceeding with the charge at any subsequent time, where the charge had originally been laid by a member of the NIS.⁵⁶

⁵⁰ *QR&O* 107.09(2).

⁵¹ *QR&O* 107.09(3).

⁵² *QR&O* 107.09 (3).

⁵³ *QR&O* 107.11 (1).

⁵⁴ *QR&O* 107.08.

⁵⁵ *QR&O* 107.11(2).

⁵⁶ *QR&O* 107.12 Note.

56. Should a CO or superior commander decide not to proceed with a charge that has been laid by a member of the NIS, then that officer must communicate a decision in writing along with written reasons for that decision.⁵⁷ The written decision must be provided to the NIS member who laid the charge or to the member who supervised the investigation, and a copy forwarded to the officer to whom the CO or superior commander is responsible to in matters of discipline.⁵⁸

57. The member of the NIS may, upon review of the written decision and reasons, refer the charge directly to a referral authority in accordance with *QR&O* 109.03, if the NIS member considers that the charge should be proceeded with.⁵⁹

⁵⁷ *QR&O* 107.12(1).

⁵⁸ *QR&O* 107.12(1) & (2).

⁵⁹ *QR&O* 107.12(3).

CHAPTER 9

ASSISTING OFFICER

SECTION 1

GENERAL

1. *Assisting Officer* means an officer or a NCM who has been appointed to assist an accused pursuant to *QR&O* article 108.14.¹ An assisting officer shall ensure, before an accused makes a decision to be tried by summary trial or court martial, that the accused is aware of the nature and gravity of the offence and the differences between trial by court martial and by summary trial.² Further, an assisting officer must, to the extent desired by the accused, assist the accused in preparing and presenting the case to be tried by summary trial. Personnel who are appointed to assist members with other matters, such as grievances or preparing requests for review of summary trials, do not have the same duties or responsibilities as assisting officers who are appointed pursuant to Article 108.14.³
2. An assisting officer is not legal counsel and does not act as a defending officer for an accused. The duties, responsibilities and protection applicable to lawyers, including solicitor-client privilege,⁴ do not apply to assisting officers.

Reference for Assisting Officers

3. A handbook entitled *The Election To Be Tried by Summary Trial or Courts Martial - Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001 has been prepared by the office of the Judge Advocate General.⁵ The guide is available in electronic form on the Defence Information Network, and is attached as Annex H to this manual.

When an Assisting Officer is Appointed

4. An assisting officer shall be appointed by the CO as soon as possible after a charge has been laid.⁶ Once appointed, the name and rank of the assisting officer must be recorded in the appropriate space in Part 1 of the RDP.⁷

¹ *QR&O* 108.03.

² *QR&O* 108.14(5).

³ The appointment of an officer or NCM above the rank of sergeant to assist a member requesting a review of a summary trial, is not an *assisting officer*. The role of an officer of NCM performing this function is discussed in Section 5 of this Chapter on Post-Trial Duties.

⁴ The issue of solicitor-client privilege as it applies to assisting officers is discussed in Section 3 of this Chapter.

⁵ *QR&O* 108.14 Note D.

⁶ *QR&O* 108.14(1).

⁷ *QR&O* 107.07. A copy of the RDP, the Provision of Information form and a completed sample of both are contained in Annex B.

Who may be Appointed as an Assisting Officer

5. The assisting officer will normally be an officer, but in exceptional circumstances, such as where no officers are available because they are absent from the unit on duty, or all officers are unavailable due to other essential duties, an NCM above the rank of sergeant may be appointed.⁸
6. If the accused requests a particular service member to act as assisting officer, that member must be appointed unless the exigencies of the service do not permit the appointment or the member is unwilling to act as assisting officer.⁹
7. It is usually someone from the accused's unit who is appointed as assisting officer; however, a member from another unit may also be appointed. Circumstances where it may be more practical to appoint a member of another unit to act include where no one suitable is available from the accused's unit due to its small size, or where the accused is being tried by the CO of another unit.¹⁰

General Duties of Assisting Officer

8. An assisting officer is appointed to assist the accused in the pre-election, pre-trial, trial and sentencing phases of the summary trial process.
9. An assisting officer has the duty to assist an accused, to the extent that the accused desires, in preparing and presenting the accused's case. These duties include assisting in preparing the accused's case and advising the accused regarding witnesses, evidence and any other matters relating to the trial or the charges,¹¹ as well as assisting and speaking for the accused during the trial.¹²

Replacement of Assisting Officer

10. If an assisting officer becomes unable or unwilling to act for any reason, another assisting officer must be appointed.¹³ The assisting officer is not required to provide reasons for withdrawing. Although the *QR&O* do not prohibit the CO from inquiring about the assisting officer's reasons for withdrawing, the CO should be careful not to become privy to information prior to a summary trial which could create a perception of bias for or against the accused.
11. If an accused wants a different assisting officer, the CO should consider appointing another one. While the accused does not have the right to demand the replacement of the assisting officer it may be advisable, in the interests of fairness, to appoint a new assisting officer where the accused is dissatisfied with the assisting officer or where a conflict has arisen between the assisting officer and the accused.

⁸ *QR&O* 108.14(1) and Note A.

⁹ *QR&O* 108.14(3)

¹⁰ *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001, para. 8. See Annex H.

¹¹ *QR&O* 108.14(4)(a).

¹² *QR&O* 108.14(4)(b).

¹³ *QR&O* 108.14(2).

12. Depending on the circumstances it might be argued on review that the failure to appoint a new assisting officer had an effect upon the fairness of the proceedings. A new assisting officer need not be appointed when the request is frivolous or vexatious.¹⁴

SECTION 2 PRE-TRIAL DUTIES

13. The assisting officer has the following pre-trial duties:
- a. ensure the presiding officer has provided the accused with the information relevant to the charge;¹⁵
 - b. advise the accused with respect to witnesses, evidence or any other matters relating to a summary trial, including the rights of the accused at a summary trial;¹⁶ and
 - c. assist the accused in the election process,¹⁷ if applicable, which includes:
 - i. ensuring that the accused is aware of the nature and gravity of any offence charged; and
 - ii. ensuring that the accused is aware of the differences between a trial by summary trial or by court martial.¹⁸

Duties Regarding the Provision of Information – Role of Assisting Officer

14. With respect to the provision of information, it is the duty of the presiding officer to ensure that the accused and assisting officer have been provided with or been given access to any evidence that:

- a. is to be relied on at the summary trial; or
- b. tends to show that the accused did not commit the offence charged.¹⁹

15. See Chapter 10, Provision of Information for the type of information that the accused or assisting officer may be provided or made accessible. This must be done in sufficient time to allow the accused to consider it:

- a. to make an election, if one is to be offered; and
- b. to properly prepare the accused's case for summary trial.²⁰

16. One of the initial steps taken during a summary trial is that the accused is asked whether there has been sufficient time to prepare for trial. If information has not been provided to an accused in time to prepare for trial, the presiding officer must ensure that all relevant information is provided and grant a reasonable adjournment to allow the accused an opportunity to prepare

¹⁴ The terms *frivolous* and *vexatious* are defined in Section 2 of Chapter 13, Conduct of Summary Trials.

¹⁵ *Provision of Information* is defined and discussed in Chapter 10, Provision of Information.

¹⁶ See para. 18 of this Chapter.

¹⁷ The Election process is discussed in Chapter 12, Election.

¹⁸ *QR&O* 108.14(5).

¹⁹ *QR&O* 108.15(1).

²⁰ *QR&O* 108.15(2).

for the summary trial.²¹ In such circumstances, the assisting officer should assist the accused in requesting a reasonable adjournment.

Duties regarding Trial Preparation

17. The assisting officer shall, to the extent desired by the accused, assist in the preparation of evidence, witnesses and representations which may be required during the summary trial.²² This may include making a request that the accused be permitted to be represented by legal counsel at the summary trial, making a request that certain witnesses be required to attend, assisting the accused in deciding which, if any, of the particulars may be admitted at the trial, preparing questions for witnesses, and preparing representations with respect to the guilt or innocence of the accused and the appropriate sentence should the accused be convicted.

18. The assisting officer must make the accused aware of the accused's rights at a summary trial.²³ These rights include:

- a. to have the trial conducted in either English or French;
- b. to be assisted by the assisting officer to the extent desired by the accused;
- c. to admit any of the particulars of the charge;
- d. to request the presence of witnesses, within certain limits;
- e. to present evidence on the accused's own behalf;
- f. to testify on the accused's own behalf, but only if the accused so desires;
- g. to ask relevant questions of any witness;
- h. to be found not guilty of any charge unless the presiding officer is convinced beyond a reasonable doubt that the accused committed the offence charged or any other related, attempted, or less serious offence for which the accused may be found guilty on that charge; and
- i. if found guilty, to present evidence and to make representations concerning the sentence.²⁴

Duties regarding the Election

19. With respect to the election, the assisting officer must ensure that the accused is aware of the nature and gravity of any offence with which the accused has been charged. This involves describing the offence charged to the accused, as well as maximum punishment which could be awarded under the *NDA*.²⁵

²¹ *QR&O* 108.20(3).

²² *QR&O* 108.14(4).

²³ Many of the rights of an accused at a Summary Trial are affected by the procedure which is indicated in *QR&O* 108.20. Guidance on these issues is found in Chapter 13, Conduct of Summary Trial.

²⁴ *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001, para. 18.

²⁵ *QR&O* 108.14(5)(a).

20. The assisting officer must also ensure that the accused is aware of the differences between a summary trial and a court martial. The important differences between a summary trial and a court martial include:²⁶

- a. **Right to Legal Counsel.** While there is no right to representation by legal counsel at a summary trial, the accused may be represented at his or her own expense by civilian legal counsel at the discretion of the presiding officer.²⁷ At a court martial the accused has the right to legal representation, free of charge, by a legal advisor with DDCS or the accused may hire civilian legal counsel at the accused's own expense.²⁸
- b. **Powers of Punishment.** The punishments that may be imposed at summary trial are significantly less severe than the punishments that may be imposed at court martial.²⁹ A comparison of the punishments that may be imposed at a summary trial and at a court martial is contained in Annex A of the *Guide for Accused and Assisting Officers*.³⁰
- c. **Right to Challenge Officers conducting the Trial.** The accused has no right to object to being tried by the specific officer who is presiding at a summary trial. However, where appropriate, the accused may bring this issue to the attention of the presiding officer prior to or during the trial. Conversely, at a court martial, the accused has the right to object to being tried by the members of the court and to the military trial judge.³¹
- d. **Appointment of a Prosecutor.** At a summary trial, the charges are dealt with exclusively by the presiding officer. At a court martial, a legal advisor is appointed as prosecutor to present the case against the accused.³² This may include calling witnesses, making legal arguments, representations and cross-examining the accused if the accused chooses to testify.
- e. **Charges.** At summary trial, the presiding officer will proceed with the trial in respect to the charges indicated in the RDP. When a court martial is to be held, a prosecutor makes a further assessment of the case. There may be a further investigation of the case and the charges may be amended or additional charges may be laid.³³
- f. **Procurement of Witnesses** presiding officer will arrange for the attendance of all military witnesses at summary trial; however, the presiding officer has no

²⁶ *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001, para. 19.

²⁷ *QR&O* 108.14 Notes B and C.

²⁸ *QR&O* 101.21.

²⁹ Table to *QR&O* 108.24, 108.25 and 108.26.

³⁰ *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001.

³¹ *QR&O* 112.05(3), (9), and 112.14.

³² *NDA* s. 165.11.

³³ *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001, para. 19(e).

authority to compel civilian witnesses to attend.³⁴ Instead, the presiding officer can only invite civilian witnesses to attend in order to give evidence. Witnesses may be summoned to appear at a court martial regardless of whether they are military or civilian.³⁵

- g. **Reception of Evidence.** The Military Rules of Evidence do not apply at a summary trial.³⁶ Instead, the presiding officer may consider all evidence which the officer considers to be relevant and of assistance in determining whether the accused committed the offence charged and in imposing sentence, if the accused is found guilty.³⁷ At both summary trials and courts martial, all evidence must be provided under oath or affirmation;³⁸ however, at a court martial the Military Rules of Evidence also apply³⁹ and may limit what or how evidence is received.
- h. **Right to Appeal.** The accused has no right to appeal the findings or sentence of a summary trial. However, accused may submit a request for review of the findings and/or sentence of a summary trial.⁴⁰ The accused may have an officer, or NCM above the rank of sergeant, appointed to assist in preparing the request for review.⁴¹ The details of this process are provided in Chapter 15. On the other hand, both the accused or the Minister of National Defence may appeal the findings or sentence of a court martial,⁴² and in some circumstances civilian or military legal counsel may be appointed to assist the accused with the appeal.⁴³ A punishment of detention imposed at summary trial will be suspended where a review under *QR&O* 108.45 has been requested.⁴⁴ A sentence of detention or imprisonment imposed at court martial may be suspended pending the outcome of the appeal.⁴⁵

³⁴ *QR&O* 108.29.

³⁵ *NDA* s. 249.22 and *QR&O* 111.08, 111.09 and Notes.

³⁶ *QR&O* 108.21 and Notes.

³⁷ *QR&O* 108.21(2).

³⁸ *NDA* s. 251 and *QR&O* 108.30, 112.20 and 112.21.

³⁹ *NDA* s. 181(1).

⁴⁰ *QR&O* 108.45(1).

⁴¹ *QR&O* 108.45(15).

⁴² *NDA* ss. 230 and 230.1 and *QR&O* 115.02 and Note; *NDA* s. 230.1 and *QR&O* 115.03 and Notes.

⁴³ *QR&O* 115.03 Note A, *QR&O* 118.23 and *Courts Martial Appeal Rules*, Rule 20, referred to in *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001, para. 19 (h), see also *R. v. Boland* re: Rule 20 tests regarding financial hardship and *R. v. Brown* regarding appointment of civilian counsel for the respondent when the CF files an appeal.

⁴⁴ A punishment of detention imposed at summary trial may also be suspended pursuant to *QR&O* 114.02. See Chapter 14, Sentencing and Punishment, Section 5.

⁴⁵ *NDA* s. 248.3 and *QR&O* 108.45(14).

Consultation with Legal Counsel Regarding the Election

21. There is no obligation on an accused to contact legal counsel regarding the election; however, the presiding officer must ensure that the accused has had a reasonable opportunity to do so prior to making an election.⁴⁶

22. Although the assisting officer is not required to assist the accused in contacting legal counsel, the assisting officer should do so in cases where the accused has been given an election and the accused requires assistance in contacting legal counsel. The intention behind giving the accused a reasonable opportunity to consult legal counsel about the election, is to allow the accused to make an informed choice with respect to the type of trial.⁴⁷

23. With respect to contacting legal counsel, the assisting officer should ensure that the accused is provided with the telephone number for the DDCS who may be consulted at no expense to the accused. Civilian legal counsel may be consulted, at the accused's own expense. Provincially funded legal aid is not normally available for all the types of offences tried at summary trial.

24. If the accused is unable to consult counsel, or was unable to consult counsel in private, the assisting officer may assist the accused in requesting additional time, prior to making the election, in order to have the opportunity to consult with legal counsel.⁴⁸

SECTION 3

CONFIDENTIALITY OF COMMUNICATIONS BETWEEN ASSISTING OFFICERS AND ACCUSED

Solicitor-Client Privilege

25. Regardless of whether military or civilian legal counsel is used, solicitor-client privilege exists between legal counsel and client. No money need to have changed hands in order for the person to be considered a client; it is the seeking of legal advice about a case that creates the solicitor-client relationship.⁴⁹

26. Legal counsel for an accused is prohibited from disclosing information with respect to the case which has been provided by an accused without the accused's express consent. This may include information shared between legal counsel or their agents and the accused or agents for the accused.⁵⁰ Agents for legal counsel could include clerks,⁵¹ secretaries or interpreters.⁵² Neither the accused nor an agent for the accused can be compelled to disclose such

⁴⁶ *QR&O* 108.18 (1).

⁴⁷ *QR&O* 108.18 and Notes.

⁴⁸ *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001, para. 13.

⁴⁹ Cross, Sir Rupert, *Evidence*, 4th ed (London: Butterworths, 1974) at 248-250.

⁵⁰ *Carpmael v. Powis*, 1 Phillips 687 (1846) as cited in *Wigmore on Evidence*, vol 8 (Toronto: Little, Brown and Co., 1983) at 619.

⁵¹ *Lyell v. Kennedy*, 27 Ch. D. 1, 19 (C.A. 1881) as cited in *Wigmore on Evidence*, vol 8, at 583.

⁵² *Du Barré v. Livette*, Peake N.P. 77 (1791) as cited in *Wigmore on Evidence*, vol 8, at 618.

communications. Only the accused is able to release the lawyer from the privilege, which continues even if the solicitor-client relationship terminates.⁵³

27. Solicitor-client privilege is limited to communications between a client and a person whom the client believes is professionally qualified to practise law.⁵⁴ Solicitor-client privilege does not apply to communications between clients and law students,⁵⁵ or judges,⁵⁶ and it also would not apply to assisting officers. This means that an assisting officer could be compelled, in certain circumstances, to disclose information communicated to that officer by the accused.

28. At law, an assisting officer could be required to reveal the contents of communications overheard between a lawyer and the accused.⁵⁷ Therefore, the assisting officer should take special care not to be party to conversations between the accused and legal counsel, as communications in the presence of third parties, which would include assisting officers, are not subject to solicitor-client privilege.⁵⁸ It is the accused's decision whether to include the assisting officer in communications with counsel.

Communications between Assisting Officers and Accused

29. The integrity of the assisting officer's role and the effectiveness of the summary trial process could be adversely affected if an assisting officer is required to disclose communications with an accused. Therefore, in the military context, the communications between an assisting officer and the accused should, for policy reasons, be treated in a manner similar to communications between a lawyer and their client. The unit legal advisor should be consulted in any case where consideration is being given to requiring an assisting officer to disclose communications between an assisting officer and an accused.

30. An assisting officer who is asked to reveal the contents of any communications with an accused should seek advice from a legal advisor with DDCS prior to disclosing the contents of any such communications. An assisting officer should not disclose information obtained or conversations occurring with an accused without being ordered in writing to do so, and then only after seeking legal advice.

SECTION 4 TRIAL DUTIES

31. If the accused elects summary trial or if no election is offered and a summary trial is held, the assisting officer must assist the accused to the extent the accused desires, which may include:⁵⁹

- a. questioning witnesses during the summary trial;

⁵³ *Bullock v. Corrie*, 3 Q.B.D. 356 and *Chant v. Brown*, 7 Hare 790 as cited in *Cross on Evidence* (4th ed) at 596.

⁵⁴ *Naujokat v. Bratushesky*, [1942] 2 W.W.R. 97 at 107 and *R. v. Choney* (1908), 17 Man. R. 467 (C.A.).

⁵⁵ *Andrews v. Soloman*, 1 Fed. Cas. 899 at 901, as cited in *Wigmore on Evidence*, vol 8, at 581. However, privilege does exist if the law student is acting as an agent of the solicitor.

⁵⁶ *Pritchard v. United States*, 181 F. 2d 326 (6th Cir. 1950) as cited in *Wigmore on Evidence*, vol 8, at 581.

⁵⁷ *Wigmore on Evidence*, vol 8, at 633-635.

⁵⁸ *Wigmore on Evidence*, vol 8, at 633-634 and adopted in *R. v. Kanester*, [1967] 1 C.C.C. 97n.

⁵⁹ *QR&O* 108.14(4)(b).

- b. calling evidence on behalf of the accused;
- c. making representations regarding the evidence and regarding the guilt or innocence of the accused; and
- d. making representations regarding sentence if the accused is found guilty.

SECTION 5 POST-TRIAL DUTIES

32. An assisting officer's duties end after the sentencing phase of the summary trial is completed where the accused has been found guilty. It is not the responsibility of an assisting officer to assist the convicted accused with a request for review. However, if the member requests assistance in preparing the application for review, an officer or NCM above the rank of sergeant will be appointed to help prepare the application for review.⁶⁰ This is discussed in more detail in Chapter 15, Review of Summary Trial Proceedings.

⁶⁰ QR&O 108.45 (18).

CHAPTER 10

PROVISION OF INFORMATION

SECTION 1

GENERAL

1. The purpose of this Chapter is to discuss the issues surrounding the provision of information to an accused.
2. The provision of information to an accused about the charges faced by that accused is at the heart of procedural fairness and the rule that an accused must be informed of the case to be met. See Chapter 4, Fairness and the Application of the *Charter*.
3. The accused's right to provision of information is not an independent right, but is part of the right to make full answer and defence.¹ This right has been included in section 7 of the *Charter* as one of the principles of fundamental justice.² To ensure that the accused can make an informed decision regarding election and adequately prepare and respond to the charges laid, it is important that the accused is provided with sufficient information about the charges, in a timely manner.
4. At summary proceedings the information that must be provided to the accused is set out in *QR&O*.³ This duty is in keeping with both the common law right to make full answer and defence and the principles of fundamental justice as defined by the *Charter*.⁴

SECTION 2

DUTY TO PROVIDE INFORMATION AT SUMMARY TRIAL

General Duty

5. 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.⁵

¹ *R. v. Carosella*, [1997] 1 S.C.R. 80.

² *R. v. Stinchcombe*, (1991) 8 C.R. (4th) 277 (S.C.C.).

³ As was set out in *Stinchcombe* at 289, the broad right of provision of information applicable to indictable offences does not automatically apply to less serious offences such as service offences dealt with at summary trial. *The Summary Trial Working Group Report* at 148-155, concluded that a reduced provision of information would survive section 7 *Charter* analysis or would be justified under section 1. Obligations regarding provision of information for courts martial will be more onerous than those for summary trials. In *Stinchcombe* the Supreme Court of Canada held that there was a duty to disclose all relevant evidence.

⁴ See Chapter 4, Fairness and the Application of the *Charter*.

⁵ *QR&O* 108.15(1).

6. It is important to note that there is no corresponding duty on the part of the accused to provide information.⁶

Types of Information to be Provided

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

- a. a copy of any statement made by the accused;
- b. a copy of any documentary evidence;
- c. a copy of any written statement made by a witness;
- d. 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; and
- e. where physical evidence exists, access to the evidence.⁷

8. There are situations where information or evidence ought to be disclosed, but it is not possible to make a copy of the evidence. For example, material evidence such as clothing cannot be copied and therefore, it would be appropriate for the accused and the assisting officer to be given supervised access to such items.

Timing for Provision of Information

9. The information should 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.⁸ 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.

10. Where the provision of information has not been made in time for an accused to properly consider the election or to prepare for a summary trial, the accused should be granted an adjournment to allow time for obtaining legal advice or trial preparation. The duty of the presiding officer, prior to receiving any evidence at a summary trial, is to ask whether the accused requires more time to prepare the accused's case and to grant any reasonable adjournment for that purpose.⁹

⁶ *R. v. Stinchcombe*, at 283. The Supreme Court of Canada stated that the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to provide information is consistent with this role.

⁷ *QR&O* 108.15 Note B.

⁸ *QR&O* 108.15(2) and *QR&O* 108.15 note C. Also see Chapter 12, Elections.

⁹ *QR&O* 108.20(3)(a).

Who Has Duty to Provide Information

11. Although the duty to ensure that the information has been provided to an accused rests with the officer exercising summary trial jurisdiction,¹⁰ the actual release of information to or access to physical evidence by the accused may be provided by others, including by the military police.

12. The type of information may affect which authorities may release the information to the accused. The security classification of documents and privacy interests must also be considered. Information must be de-designated or declassified prior to release and may have to be examined in conjunction with the *Privacy Act*. These considerations apply not only to documents and reports, but also to any annexes or appendices which may be attached.

13. Specific directions exist with respect to the release of Military Police Investigation Case Files to an accused. Where a summary trial is to be held, the release of military police information should be done in conjunction with the Base/Wing SAMP Advisor who will review all requests to determine whether any of the information in possession of the military police should not be provided to an accused. The review will ensure that information will not be released that:

- a. may endanger national security or international relations;
- b. will reveal the identity of an informant;
- c. is likely to impede a current or planned investigation; or
- d. may endanger a third party.¹¹

14. Although the presiding officer is responsible for ensuring information is provided to the accused, when military police information is involved, it is the Base/Wing SAMP Advisor who releases the military police information to the accused or assisting officer. If a contentious issue arises, the Base/Wing SAMP Advisor should refer the case to the local unit legal advisor for resolution.

15. All evidence to be relied on at trial must be listed pursuant to Part 2 of the RDP and attached to the RDP. This list must include all investigation reports, witness statements, names of witnesses, and any documentary or physical evidence to be presented at summary trial. Once provision of information is made to the accused the member who provides the information to the accused must sign and date Part 2, the attached list and provide that member's rank and position.

Effect of Failure to Provide Information

16. It does not automatically follow that solely because the requirements to provide information were not followed, that the *Charter* right to make full answer and defence was impaired. Therefore, non-provision of information will not necessarily result in the finding

¹⁰ *QR&O* 108.15 indicates that the officer having powers of summary trial must ensure that the proper information has been provided to the accused.

¹¹ *Security Orders for the Department of National Defence and the Canadian Forces*, Vol 4, *Military Police Policies*, Chapter 5, para. 7.

being set aside on Review.¹² The provision of information is just one component of the right to make full answer and defence.

17. Questions with respect to the provision of information should be directed to the unit legal advisor without delay. Where the issues are complicated, a determination should be made as to whether trial by court martial would be more appropriate in the interests of justice.

¹² See Chapter 15, Review of Summary Trial Proceedings.

CHAPTER 11

JURISDICTION & PRE-TRIAL DETERMINATIONS

SECTION 1

GENERAL

1. The term jurisdiction has numerous meanings and is used in a variety of ways. The *Concise Oxford Dictionary*¹ defines it as “**a.** legal or other authority. **b.** the extent of this; the territory it extends over.” *Jurisdiction* is further defined in *Black’s Law Dictionary* as follows:

The word is a term of large and comprehensive import, and embraces every kind of judicial action ... It is the authority by which courts and judicial officers take cognizance of and decide cases ... The legal right by which judges exercise their authority ... It exists when court has cognizance of class of cases involved, proper parties are present, and point to be decided is within powers of court ... Power and authority of a court to hear and determine a judicial proceeding ... The right and power of a court to adjudicate concerning the subject matter in a given case.²

2. Within the context of summary trials, jurisdiction is the legal authority held by the presiding officer to hear and determine issues relating to the summary trial of the accused.

3. Jurisdiction over an accused or a summary trial is not automatic. Jurisdiction is granted to COs, delegated officers and superior commanders to act as the presiding officer over a summary trial in certain circumstances. If the circumstances which provide jurisdiction to act do not exist or cease to exist, then the officer has no jurisdiction to act and may not do so. In such circumstances the presiding officer would have to refer the case to another officer.³

Jurisdiction over the Person in General

4. A person may be tried in the Canadian military justice system if that individual is subject to the *Code of Service Discipline*. The *NDA* provides that a wide range of persons are subject to the *Code of Service Discipline* including:

- a. members of the CF, both regular and reserve force;⁴
- b. members of a “special force” established by the CF;⁵

¹ *The Concise Oxford Dictionary*, 9th ed. (Toronto: Oxford University Press, 1995) at 737.

² *Black’s Law Dictionary*, 5th ed. (St. Paul, Minnesota: West Publishing Co., 1979) at 766.

³ *QR&O* 108.16(3) and 108.34(2).

⁴ *NDA* s. 60(1) (a) and (c). Members of the reserve force are not subject to the *Code of Service Discipline* at all times, and s. 60(1) (c) of the *NDA* sets out the specific circumstances in which they are subject to the *Code of Service Discipline*.

⁵ *NDA* s. 60(1) (b). Pursuant to s. 16 of the *NDA*, the Government of Canada may establish a component of the CF, known as a “special force,” for any action undertaken by Canada under the *United Nations Charter*, *North Atlantic Treaty* or any other similar instrument for collective defence entered into by Canada.

- c. members of foreign armed forces attached or seconded to the CF;⁶
- d. persons attending certain educational institutions;⁷ and
- e. alleged spies for the enemy.⁸

Officers and NCMs continue to be subject to *QR&O* even if they become prisoners of war.⁹

5. The following persons, who would not otherwise be subject to the *Code of Service Discipline*, are also subject to it and to trial by the military justice system:

- a. persons serving in the positions of officers or NCMs of any force raised and maintained by Canada outside of its territory;¹⁰
- b. persons who accompany any unit or other element of the CF that is on service or active service anywhere;¹¹
- c. persons who, in respect of any service offences committed or alleged to have been committed by them, are in civil custody or in service custody;¹² and
- d. persons serving with the CF who have agreed under an engagement with the MND to be subject to the *Code of Service Discipline*.¹³

Jurisdiction over Members of the Regular and Reserve Forces

6. Although the *Code of Service Discipline* applies to all members of the CF, the circumstances in which each member is liable under that Code depends on whether the member belongs to the Regular or Reserve Force.

7. Members of the Regular Force are liable under the *Code of Service Discipline* at all times and in all circumstances. This means that members of the Regular Force can be charged and proceeded against under the *Code of Service Discipline* for any offence provided therein from their enrolment to release. Further, proceedings can be started under the *Code of Service Discipline* after the date of release for offences alleged to have been committed before the release.¹⁴

8. The liability of a member of the Reserve Force under the *Code of Service Discipline* depends on the circumstances and the terms of that member's enrolment. Members of the Reserve Force are subject to the *Code of Service Discipline* when:

- a. undergoing drill or training, whether in uniform or not;

⁶ NDA s. 60(1)(d).

⁷ NDA s. 60(1)(g).

⁸ NDA s. 60(1)(h).

⁹ *QR&O* 1.03(2).

¹⁰ NDA s. 60(1)(e) Note 6.

¹¹ NDA s. 60(1)(f).

¹² NDA s. 60(1)(i).

¹³ NDA s. 60(1)(j).

¹⁴ NDA s. 60(2).

- b. in uniform;
- c. on duty;
- d. called out under Part VI in aid of the civil power;
- e. called out on service;
- f. placed on active service;
- g. in or on any vessel, vehicle or aircraft of the Canadian Forces or in or on any defence establishment or work for defence;
- h. serving with any unit or other element of the regular force or the special force; or
- i. present, whether in uniform or not, at any drill or training of a unit or other element of the Canadian Forces.¹⁵

9. The Reserve Force is composed of two main sub-components: the Supplementary Reserve and the Primary Reserve.¹⁶ Members of the Supplementary Reserve, except when on active duty, are not required to train or perform any other military duty.¹⁷ Members of the Primary Reserve, however, are obliged to perform such military duty and training as may be required of them.¹⁸

10. There are three types of reserve service: Class C, B and A and the description for each is as follows:

- a. Class C service¹⁹ involves full-time service filling an establishment or supernumerary in a Regular Force position and includes proceeding to and returning from the place of duty.
- b. Class B service²⁰ involves full-time service in a temporary position as an instructor, administrator, or candidate at a school or other training establishment, while proceeding on such duties, or while employed on other approved duties of a temporary nature. Class B service includes proceeding to and returning from the place of duty.
- c. Class A service²¹ involves part-time training or duties other than Class B service, and includes proceeding to and returning from the place where training or duty is performed, except when that duty is performed at local headquarters. For example, upon arrival at the armoury, a reservist reporting for weekly drill would be considered to be on Class A service.

¹⁵ NDA s. 60(1)(c) and QR&O 102.01.

¹⁶ Pursuant to QR&O 2.034 there are two other much smaller sub-components of the Reserve Force: the Cadet Instructors Cadre and the Canadian Rangers.

¹⁷ QR&O 2.034(b).

¹⁸ QR&O 2.034(a).

¹⁹ QR&O 9.08.

²⁰ QR&O 9.07.

²¹ QR&O 9.06.

11. While there are limits on the liability of Reserve Force members under the *Code of Service Discipline*, a finding that the member committed an offence while in any of the above circumstances, is sufficient for jurisdiction to be found.²²

12. A Reserve Force member is considered to be *on duty* and subject to *QR&O* when performing any lawful duty. Lawful duty means any duty that is military in nature and includes any duty involving *public service* authorized pursuant to section 273.6 of the *NDA*.²³

13. The Governor in Council, or the Minister in certain circumstances, may authorize the CF to perform any duty involving public service.²⁴ This includes providing assistance in respect of any law enforcement matter if the Governor in Council or the Minister considers the assistance to be in the national interest and the matter cannot be effectively dealt with except with the assistance of the CF.²⁵ The requirement for approval from the Governor in Council or the Minister may not be required for assistance of a minor nature, which is limited to logistical, technical or administrative support.²⁶ Such assistance may be approved by officers who have been delegated approval authority under the Minister's Provision of Services Policy.²⁷

14. A CF component, unit, individual officer or NCM can only be placed on *active service* by the Governor in Council in certain circumstances.²⁸ Pursuant to Order in Council P.C. 1989-583 of 6 April, 1989, the Governor in Council has, for the purpose of fulfilling Canada's role in NATO, placed all members of the Regular and Reserve Force on active service while outside Canada. Therefore, any officer or NCM who has been placed on active service, or is a member of, serving with, or attached or seconded to a component, unit or other element of the CF that has been placed on active service, shall be deemed to be on active service for all purposes.²⁹

15. Members of the Reserve Force may be lawfully ordered to *train* for such periods of time as are prescribed in regulations. For example, *QR&O* provide that members of the Primary Reserve on Class B service may be ordered to train in each training year for a period not exceeding fifteen days, and members on Class A service may be ordered to train for a period not exceeding sixty days.³⁰

²² Two examples where courts martial have reached this conclusion are: *R. v. Cpl Foley*, Courts Martial Transcript, 33/1987; *R. v. MCpl Erath*, Courts Martial Transcript, 60/1990. In certain circumstances, members of the reserve force may be lawfully ordered to train (see *QR&O* 9.04(2)). However, there are no procedures available under the *Code of Service Discipline* to *compel* such members to report for the training. In order to enforce such an order by proceeding against the member under the *Code of Service Discipline*, the member must submit to military jurisdiction by engaging in any of the circumstances listed in paragraph 8 above. In addition, the *NDA* provides, in Part 12, a number of offences that can be prosecuted by civil courts and includes failure to attend parade. Such prosecutions must be commenced within 6 months after the date the alleged offence was committed and require the written consent of the accused's CO. Before any investigation or prosecution is commenced under Part 12, the unit legal advisor should be consulted.

²³ *NDA* s. 33(4).

²⁴ *NDA* s. 273.6 (1).

²⁵ *NDA* 273.6(2).

²⁶ *NDA* 273.6(3).

²⁷ Minister of National Defence *Provision of Services* Order, effective 1 November 1997, B-GS-055-000/AG-001.

²⁸ *NDA* s. 31 and *QR&O* 9.01.

²⁹ *NDA* s.31(2).

³⁰ *QR&O* 9.04(2).

16. Further, members of the Reserve Force may be called out to perform any lawful duty other than training at such time and in such manner as prescribed by regulations or Order in Council.³¹ For example, the Regulations allow the Minister to call out members or units of the Primary Reserve Force, in an *emergency*³² to perform any military duty other than training.³³

Jurisdiction over Persons at Summary Trial

17. Only service members below the rank of lieutenant-colonel can be tried by way of summary trial. Civilians cannot be tried by summary trial.

18. With respect to service members subject to summary trial, the CO of the accused's unit, or the CO of the unit where the accused is present when proceedings are taken, has jurisdiction over the accused.³⁴ Whether a summary trial can be held with respect to a particular charge and who can actually preside over the summary trial is affected by both the rank of the accused, the specific charge that has been laid and any prior involvement the specific officer may have had with the case.³⁵ This is discussed in more detail in Section 2 of this Chapter.

Military Nexus

19. In the past, when determining whether the CF had jurisdiction over offences under the *Criminal Code* and other Acts of Parliament pursuant to section 130 of the *NDA*, the courts applied an interpretation of military law requiring the offences to have *military nexus*.³⁶ To have a military nexus, an offence had to be "so connected with the service in its nature and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service".³⁷ The need to prove military nexus for such offences has been eliminated by the CMAC.³⁸ However, in many circumstances it is more appropriate for civilian authorities to exercise criminal jurisdiction. For assistance with respect to the decision whether military authorities should proceed with prosecution, the advice of the unit legal advisor should be sought.

³¹ *NDA* s. 33(2) and (3).

³² *QR&O* 1.02 provides the meaning of the term *emergency* for this Section: *emergency* means war, invasion, riot or insurrection, real or apprehended.

³³ *QR&O* 9.04(3). The Governor in Council could do the same thing under an Order in Council pursuant to *NDA* s. 31(1).

³⁴ *QR&O* 101.01(1)(b)(i) and 108.16 Notes B and C.

³⁵ *NDA* ss. 163 & 164, and *QR&O* 108.06, 108.07, 108.09, 108.10, 108.12, 108.25 and 108.13. See also Section 2 of this Chapter on Jurisdiction to Proceed by Summary Trial.

³⁶ *Brown v. R.*, [1995] CMAC-372, *R. Catudal* (1985), 18 C.C.C. (3d) 189, and *R. v. MacEachern* (1985), 4 C.M.A.R. 447, *R. v. MacDonald* (1983), 4 C.M.A.R. 277.

³⁷ *MacKay v. The Queen* (1980), 54 C.C.C.(2d) 129 (S.C.C) as quoted in *Brown v. R.*, [1995] CMAC-372.

³⁸ *R. v. Reddick* (1996), 112 C.C.C. (3d) 491. In this case the CMAC concluded that the issue of military nexus is no longer relevant and there is no longer any burden on the prosecution to demonstrate that military nexus exists. Prior to the decision in *R. v. Reddick*, it was the practice that an accused could bring a preliminary motion calling into question the military nexus of the offence with which the accused was to be tried. The prosecution would then have to prove that there was sufficient military nexus before the trial could proceed. All such applications had to be heard and decided upon on a case-by-case basis.

Types of Summary Trials

20. There are three types of summary trials. They are defined by the status of the presiding officer who is to try the case. Summary trials may be held by superior commanders, COs or delegated officers.

21. The status of a superior commander and CO is generally determined by the rank or appointment of the officer concerned and in the case of COs, by reference to the definition of commanding officer contained in *QR&O* 101.01.³⁹ The status of delegated officers is dependent upon a CO having delegated the powers of trial and punishment.⁴⁰

Limitation Period

22. A limitation period is a specified period of time within which a charge must be laid.⁴¹ 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.⁴²

23. In order to proceed by summary trial with respect to any offence, the summary trial must begin within one year of the date on which the service offence is alleged to have been committed.⁴³ The summary trial does not have to be completed before the one-year date, only started.⁴⁴ However, if the trial does not start within one year, the summary trial cannot proceed.

Civilian versus Military Jurisdiction

24. Not all offences can be charged and tried within the military justice system. The CF has no jurisdiction to try any person charged with having committed within Canada the offences of murder, manslaughter, or any offence under sections 280 to 283 of the Criminal Code.⁴⁵ There are also cases where both the civilian and military systems could have jurisdiction over a matter and a decision must be taken on who will take jurisdiction. For example, if a service member is drunk and disorderly in a bar off the base, the civilian authorities could pursue charges, as could the military authorities for drunkenness.⁴⁶

³⁹ *NDA* s. 162.3 defines superior commanders as “officers of the rank of brigadier-general or above and officers appointed by the Chief of Defence Staff”, see also *QR&O* 108.12 Note A, and Section 2 of this Chapter. Commanding Officers are defined at *QR&O* 1.02 and 101.01(1).

⁴⁰ *NDA* s.163(4) and *QR&O* 108.03. *QR&O* 108.10 provides the authority for COs to delegate powers of trial and punishment to a delegated officer.

⁴¹ See also Chapter 13, Conduct of Summary Trial, para 5-8.

⁴² In *R. v. Tobjinski*, Courts Martial Transcript 89/1989, the Court stated the following on the effect of missing a limitation period:

...there seems to be no dispute that the period of liability of the accused under the *Code of Service Discipline* has elapsed and that this court has no jurisdiction to proceed with the trial of the accused in respect of the fourth charge.

⁴³ *NDA* Section 69(b) and *QR&O* 108.05. See Chapter 13, Conduct of Summary Trials, Section Two.

⁴⁴ A summary trial commences when the accused, accompanied by the assisting officer, is brought before the presiding officer and the presiding officer takes the oath and causes the charges to be read (*QR&O* 108.05 Note).

⁴⁵ *NDA* s. 70. Sections 280 to 283 of the Criminal Code relate to the abduction of children from a parent or guardian.

⁴⁶ *NDA* s. 97 and *QR&O* 103.30.

25. In any case where the military and civilian jurisdictions overlap, the matter should be discussed with the unit legal advisor.

Rule against Double Jeopardy

26. As a general rule, an accused cannot be tried more than once for the same offence, regardless of the result from the initial trial.⁴⁷ This rule applies equally to both the military and the civilian criminal justice systems. Therefore, an accused that has been tried for an offence in a civilian jurisdiction cannot then be tried for the same offence in another civilian or military jurisdiction. This rule is the same if the initial trial is held under the military justice system, regardless of whether it is summary trial or court martial.

27. The rule also applies to substantially similar charges arising out of the same circumstances.⁴⁸ For example, a service member in uniform is accused of hitting another member, who is a superior officer to the accused, at a civilian bar. If the member is charged and tried by the civilian authorities for assault pursuant to section 266 of the *Criminal Code*, regardless of the outcome of the trial for that charge, the accused cannot subsequently be charged by the military authorities for Striking a Superior Officer pursuant to section 84 of the *NDA*.⁴⁹

28. This rule does not apply to a subsequent charge arising from the same circumstances, which is not a substantially similar charge. Using the above example, the accused cannot be charged with striking a superior officer; however, given the importance of maintaining discipline in the CF, the accused may be charged with Drunkenness.⁵⁰

29. There are three exceptions to this general rule. The first exception is where the conviction at summary trial or court martial is quashed or set aside by the review authority.⁵¹ The second would only occur following court martial where a petition for a new trial is granted⁵². The third exception would arise where the finding at a court martial is appealed, and in allowing the appeal the CMAC or the Supreme Court of Canada directs that a new trial be held.⁵³ Therefore, in such cases the accused could be tried again for the same offence, provided the service authority decides to proceed with a second trial.

30. Within the military justice system, the rule against double jeopardy also applies with respect to offences admitted at court martial. At the sentencing stage of a court martial, the accused can admit additional service offences that are similar in nature to the offence for which the accused has

⁴⁷ *NDA* s. 66(1) and (2), see also *QR&O* 102.17.

⁴⁸ In *Kienapple v. The Queen* (1974), 15 C.C.C. (2d) 524, the Supreme Court of Canada held that there can not be multiple convictions for the same cause or matter (delict).

⁴⁹ *QR&O* 103.17.

⁵⁰ *NDA* s. 97.

⁵¹ *NDA* s.249.11 and *QR&O* 115.12.

⁵² *NDA* s.249.16, see also *QR&O* 103.30.

⁵³ *NDA* s. 238(1) and s. 245(3), see also *QR&O* 102.17.

been convicted.⁵⁴ If the admitted offence is considered in sentencing, the accused cannot later be tried by court martial or summary trial for the admitted offence.⁵⁵

SECTION 2

JURISDICTION TO PROCEED BY SUMMARY TRIAL

General

31. Not every service member who has been charged with a service offence will have the matter heard by summary trial. The factors that determine whether an offence will be tried by summary trial include the rank or status of the accused and the specific offence with which the accused has been charged.

32. In general, when a service member below the rank of lieutenant-colonel is charged with one of the following service offences defined in the *NDA*, jurisdiction exists for the accused to be tried by summary trial:

- 83 Disobedience of Lawful Command,
- 84 Striking or Offering Violence to a Superior Officer,
- 85 Insubordinate Behaviour,
- 86 Quarrels and Disturbances,
- 87 Resisting or Escaping from Arrest or Custody,
- 89 Connivance at Desertion,
- 90 Absence Without Leave,
- 91 False Statement in Respect of Leave,
- 93 Cruel or Disgraceful Conduct,
- 95 Abuse of Subordinates,
- 96 Making False Accusations or Statements or Suppressing Facts,
- 97 Drunkenness,
- 98 Malingering or Maiming,
- 99 Detaining Unnecessarily or Failing to Bring Up for Investigation,
- 100 Setting Free Without Authority or Allowing or Assisting Escape,
- 101 Escape from Custody,
- 101.1 Failure to Comply with Conditions
- 102 Hindering Arrest or Confinement or Withholding Assistance When Called On,
- 103 Withholding Delivery Over or Assistance to Civil Power,
- 106 Disobedience of Captain's Orders - Ships,
- 107 Wrongful Acts in Relation to Aircraft or Aircraft Material,
- 108 Signing Inaccurate Certificate,
- 109 Low Flying,
- 110 Disobedience of Captain's Orders - Aircraft,
- 111 Improper Driving of Vehicles,
- 112 Improper Use of Vehicles,
- 113 Causing Fires,
- 114 Stealing,
- 115 Receiving,

⁵⁴ *NDA* s. 194.

⁵⁵ *NDA* s.66(3), see also *QR&O* 102.18.

- 116 Destruction, Damage, Loss or Improper Disposal,
- 117 Miscellaneous Offences,
- 118 Contempt of Service Tribunals,
- 118.1 Failure to Appear or Attend
- 120 Offences in Relation to Billeting,
- 122 False Answer on Enrolment
- 123 Assisting Unlawful Enrolment
- 125 Offences in Relation to Documents
- 126 Refusing Immunization, Tests, Blood Examination or Treatment,
- 127 Negligent Handling of Dangerous Substances,
- 129 Conduct to the Prejudice of Good Order and Discipline (including the offence of being a party to or attempting to commit one of the offences listed in this paragraph),
- 130 Service Trial of Civil Offences, in respect of one of the civil offence referred to below:
 - (a) in respect of the *Criminal Code*,
 - 129 Offences Relating to Public or Peace Officer,
 - 266 Assault,
 - 267 Assault with a Weapon or Causing Bodily Harm,
 - 270 Assaulting a Peace Officer,
 - 334 Punishment for Theft (where the value of what is stolen does not exceed five thousand dollars),
 - 335 Taking Motor Vehicle or Vessel Without Consent,
 - 430 Mischief (except mischief that causes actual danger to life),
 - 437 False Alarm of Fire;
 - (b) in respect of the *Controlled Drugs and Substances Act*
 - 4(1) Possession of a Substance⁵⁶

Jurisdiction of Presiding Officers

33. The three types of summary trials are differentiated by the status of the officer who will be presiding over the summary trial: commanding officers, delegated officers and superior commanders. The jurisdiction for each of these officers to act as presiding officer is provided in the *NDA* and the *QR&O* which specifically prescribe who the officers may try, the offences over which they have jurisdiction, and the officer's powers of punishment. The specific jurisdiction given to each class of presiding officer is as stated below.

34. **Commanding Officers.** A CO is the officer in command of a base, unit or element, except when otherwise directed by the CDS; or, any other officer designated as a CO by or under the authority of the CDS.⁵⁷ For the purposes of proceeding under the *Code of Service Discipline*, a CO also includes a detachment commander, and in relation to the accused, it further includes the following:

- a. the CO of the base, unit or element to which the accused belongs, or in which the accused is present when proceedings in respect of the accused are taken under the *Code of Service Discipline*;

⁵⁶ *QR&O* 108.07 (2) and (3) and *QR&O* 108.125.

⁵⁷ *QR&O* 1.02 definition of "commanding officer". Further, *QR&O* 3.23 authorizing a Commanding Officer to designate an acting CO may not apply to COs designated by or under the authority of the CDS. *R. v. Gallagher*, (Courts Martial Transcript, 21 October 1997).

- b. where the accused is a CO, the next superior officer to whom the CO is responsible in matters of discipline or such other officer as the CDS may designate; and
 - c. the executive officer of a ship, where there is no superior commander on board or in company with the ship.⁵⁸
35. A CO has the discretion to try an accused charged with any offence detailed in *QR&O* article 108.07⁵⁹ provided the following conditions are satisfied:
- a. the accused is either an officer cadet or non-commissioned member below the rank of warrant officer;
 - b. having regard to the gravity of the offence, the CO considers that the powers of punishment are adequate;
 - c. the accused has not elected to be tried by court martial;⁶⁰
 - d. the offence is not one that the regulations preclude the CO from trying; and
 - e. the CO does not have reasonable grounds to believe the accused is unfit to stand trial or was suffering from a mental disorder⁶¹ when the alleged offence was committed.⁶²
36. COs have jurisdiction to award the punishments of detention, reduction in rank, reprimand, fine, confinement to ship or barracks, extra work and drill, stoppage of leave, or caution.⁶³
37. Additional limitations on the jurisdiction of officers to preside at a summary trial, are reviewed in detail in Section 3 of this Chapter. A checklist detailing the role of COs at summary trial is attached at Annex Q.⁶⁴
38. **Delegated Officers.** Any officer to whom a CO has delegated powers of trial and punishment pursuant to subsection 163(4) of the *NDA* is a delegated officer.⁶⁵ The jurisdiction of a delegated officer is determined by *QR&O* and the written delegation provided by the CO.
39. The *NDA* and *QR&O* place limitations on the ability of COs to delegate their powers of trial and punishment:
- a. delegated officers must be under the command of the CO who is delegating the powers;⁶⁶

⁵⁸ *QR&O* 101.01(1).

⁵⁹ The offences in *QR&O* 108.07 are listed in para. 32 of this Chapter.

⁶⁰ The procedure involved in making such an election is reviewed in Section 3 of this chapter and also Chapter 12, Elections.

⁶¹ The terms "unfit" to stand trial, and "mental disorder" are defined in Section 3 of this chapter.

⁶² *NDA* 163(1) and *QR&O* 108.06.

⁶³ *QR&O* 108.24. See also Chapter 14, Sentencing and Punishment.

⁶⁴ This checklist is a guide only. It must be used in conjunction with the appropriate sections of *QR&O* and this Manual.

⁶⁵ *QR&O* 108.03.

⁶⁶ *NDA* 163(4) and *QR&O* 108.10(1).

- b. delegated officers must hold the rank of captain or above;⁶⁷
- c. delegated officers must be trained and certified as being qualified to perform the duties of a delegated officer;⁶⁸
- d. only the power to try officer cadets NCMs below the rank of warrant officer may be delegated;⁶⁹
- e. only the power to try accused members charged with the service offences listed in *QR&O* 108.07 may be delegated.⁷⁰ However, *NDA* section 130 offences, which are listed in article 108.07 may not be delegated;⁷¹ and

40. The *QR&O* restrict the delegated officer's powers of punishment to reprimand, a fine of not more than 25% of the accused's basic monthly pay, 14 days confinement to ship or barracks, 7 days extra work and drill, 14 days stoppage of leave or a caution.⁷²

41. COs have the discretion to delegate their powers of trial and punishment to the full extent allowed by regulation or they may limit the delegated officer's powers. While the considerations to be taken by a CO when exercising this discretion are not listed in *QR&O*, the delegated officer's rank, degree of experience and the requirements within the unit may well be relevant. All delegations of power by the CO must be in writing and the delegated officer identified by name, or by reference to the officer's appointment, or the duties the officer performs.⁷³ Any restrictions placed on the delegated officer's powers of punishment by the CO should be set out in the written delegation of power.⁷⁴

42. A delegated officer should not normally exercise jurisdiction over an NCM who is not a member of, but who is present at, the unit to which the delegated officer belongs where the trial could just as conveniently be conducted by that delegated officer's CO or by the accused's CO.⁷⁵

43. Additional limitations on the jurisdiction of officers to preside over a summary trial are reviewed in detail in Section 3 of this Chapter. A checklist detailing the role of delegated officers at summary trial is attached at Annex P.⁷⁶

44. **Superior Commander.** According to the *NDA*, the following officers are considered to be superior commanders:

- a. officers of the rank of brigadier-general or above; and
- b. any officer appointed by the CDS to be a superior commander.⁷⁷

⁶⁷ *QR&O* 108.10(2)(a).

⁶⁸ *QR&O* 108.10(2).

⁶⁹ *QR&O* 108.10(2)(b).

⁷⁰ The offences in *QR&O* 108.07 are listed in para. 32 of this Chapter.

⁷¹ *QR&O* 108.10(2)(c). The offences in *QR&O* 108.07 are listed in para. 32 of this Chapter.

⁷² See Table to *QR&O* 108.25. Some of these punishments may be combined and some may only be imposed on Master Corporals and below.

⁷³ *QR&O* 108.10(3).

⁷⁴ *QR&O* 108.25.

⁷⁵ *QR&O* 108.10 Note B.

⁷⁶ This checklist is a guide only. It must be used in conjunction with the appropriate sections of *QR&O* and this Manual.

45. According to the regulations, the CDS has appointed the following categories of officers to be superior commanders:

- a. officers other than general officers who are commanding a formation, including base commanders not below the rank of lieutenant-colonel and commanders of squadrons of HMC Ships; and
- b. commanding officers of HMC Ships when there is no superior commander on board or in company with the ship.⁷⁸

46. Individual appointments may also be made when necessary for a particular military operation such as peace support operations.⁷⁹ Details of individual appointments are available from the Office of the JAG.

47. Superior commanders have the jurisdiction to try an accused by summary trial provided the following conditions are satisfied:

- a. the accused is an officer below the rank of lieutenant-colonel or a non-commissioned member above the rank of sergeant;
- b. having regard to the gravity of the offence, the superior commander considers that the powers of punishment, which include severe reprimand, reprimand, or fine up to 60% of the accused's monthly basic pay, are adequate;⁸⁰
- c. the accused has not elected to be tried by court martial;⁸¹
- d. the offence is not one that the regulations preclude the superior commander from trying. Superior commanders are specifically authorized to try an accused for any offence set out in *QR&O* 108.07⁸²; and
- e. the superior commander does not have reasonable grounds to believe that the accused is unfit to stand trial or was suffering from a mental disorder⁸³ when the alleged offence was committed.⁸⁴

A superior commander may exercise summary trial jurisdiction when a charge has been referred to the superior commander by a commanding officer, or by another superior commander.⁸⁵

48. Additional limitations on the jurisdiction of officers to preside over a summary trial are reviewed in detail in the following Section of this Chapter. A checklist detailing the role of superior commander at summary trial is attached at Annex R.⁸⁶

⁷⁷ *NDA* s. 162.3 and *QR&O* 108.12 Note A.

⁷⁸ *QR&O* 108.12 Note A.

⁷⁹ *QR&O* 108.12 Note A.

⁸⁰ See the Table to *QR&O* 108.26.

⁸¹ The procedures involved in making an election is reviewed in Section 3 of this Chapter and also Chapter 12, Election.

⁸² *QR&O* 108.125. The offences set out in *QR&O* 108.07 are listed in para. 32 of this chapter.

⁸³ The terms "unfit to stand trial", and "mental disorder" are defined in Section 3 of this Chapter.

⁸⁴ *NDA* s. 164 and *QR&O* 108.12.

⁸⁵ *QR&O* 108.12 Note B.

⁸⁶ This checklist is a guide only. It must be used in conjunction with the appropriate sections of *QR&O* and this Manual.

SECTION 3

LIMITATIONS ON JURISDICTION

General

49. There are a number of factors that will affect the jurisdiction of officers to act as presiding officers at summary trial, and when these factors exist, the presiding officer may be precluded from trying the matter.

Election

50. An accused has the right to elect trial by court martial for all but a very limited number of service offences where the likely punishment is also limited.⁸⁷ When an accused is charged with an offence that carries the right to elect trial by court martial, the accused must be informed of that right before the summary trial begins, and be given a reasonable opportunity of not less than 24 hours to consult counsel and make a decision on the election. There may also be circumstances when an election must be given to the accused during the course of the summary trial.⁸⁸ If the accused elects trial by court martial, the presiding officer cannot conduct a summary trial, and must refer the matter to the another authority.⁸⁹ For more information see Chapter 12, Election.

Previous Involvement in the Case

51. Certain involvement in a case by the presiding officer prior to the summary trial, will affect that presiding officer's jurisdiction to act. A presiding officer who has carried out or directly supervised the investigation of an offence, has issued a search warrant, or has laid or caused a charge to be laid with respect to an offence, may not preside at the summary trial of the person charged with that offence. The only way the presiding officer should try the summary trial in such a case is, if in all the circumstances, it is not practical to have another presiding officer try the matter.⁹⁰

52. The obvious concern in any case where the presiding officer has been involved in laying the charge, issuing a search warrant, or with the investigation, is that the presiding officer may appear to be biased or interested in the outcome of the case as a result of that prior involvement. While a presiding officer may not have engaged in any of these activities the degree of previous

⁸⁷ *QR&O* 108.17(1).

⁸⁸ During a summary trial for one of the five minor offences, where an election is not initially required, if the presiding officer is a CO or superior commander and decides in the circumstances that if the accused is found guilty a punishment of detention, reduction of rank or a fine in excess of 25% of the accused's monthly basic pay would be appropriate, the presiding officer must stop the summary trial and give the accused the opportunity to elect a new trial by court martial (*QR&O* 108.17(6)). See also Section 5 in this chapter on Determinations of Jurisdiction During the Summary Trial.

⁸⁹ *QR&O* 108.16(3).

⁹⁰ *NDA* ss. 163(2) and 164(2) and *QR&O* 108.09, 108.09 Note and 108.13.

involvement should always be considered when determining whether it would be inappropriate for the officer to try the case having regard to the interests of justice and discipline.⁹¹

53. This does not mean that presiding officers must totally distance themselves from a case they may be required to try. As part of the presiding officer's normal duties, the presiding officer must review the investigation report or be familiar with the general circumstances of a case. It is a general requirement of command that an officer know what is occurring in a unit, and such general knowledge does not preclude that officer from trying the accused. Moreover, investigation reports must necessarily be used when making certain pre-trial determinations. However, presiding officers must base their findings at summary trial on the actual evidence received at trial.⁹²

Mental Fitness of the Accused

54. A presiding officer must not conduct a summary trial when there are reasonable grounds to believe that the accused person is unfit to stand trial or was suffering from a mental disorder at the time the alleged offence was committed.⁹³

55. The term *unfit to stand trial* means:

Unable on account of mental disorder to conduct a defence at any stage of a trial by court martial before a finding is made or to instruct counsel to do so, and in particular, unable on account of mental disorder to:

- a. understand the nature or object of the proceedings,
- b. understand the possible consequences of the proceedings, or
- c. communicate with counsel.⁹⁴

56. *Mental disorder* means "a disease of the mind,"⁹⁵ and this term includes any illness, disorder or abnormal condition, which impairs the human mind and its functioning. However, *mental disorder* does not include self-induced states caused by alcohol or drugs, or transitory mental states such as hysteria or concussion.

57. The assessment of an accused person's fitness to stand trial is a complicated legal area and requires careful consideration of current legislation and case law with respect to whether mental fitness, unfitness or a mental disorder may be present at any given time, and if so, what the legal consequences will be. If a question regarding the mental fitness or possible mental disorder of an accused arises, the advice of unit legal advisor should be sought.

⁹¹ QR&O 108.16 (a) (v).

⁹² QR&O 108.21 Note C lists pre-trial duties that would require the presiding officer to use the investigative report before the summary trial, such as, with respect to referral and pre-trial disposal of a charge (QR&O 107.09), pre-trial determinations (QR&O 108.16), election to be tried by court martial (QR&O 108.17) etc.

⁹³ QR&O 108.16 (1)(a)(iv).

⁹⁴ QR&O 119.02.

⁹⁵ QR&O 119.02.

Interests of Justice and Discipline

58. An officer, having summary trial jurisdiction would be precluded from trying a case where it would be inappropriate to do so having regard to the *interests of justice and discipline*.⁹⁶ Variations of this wording appear in the *Criminal Code*, and the NDA.⁹⁷ The regulations do not specify what the interests of justice and discipline require since this will largely depend on the circumstances of the case. Therefore, it is important to understand what is meant by the phrase and how it is to be employed.

59. The *interests of justice* portion of the phrase has been judicially considered. It is commonly employed as a judicial *yardstick* when exercising a discretion to decide how to proceed or whether to act in the circumstances of a particular case. The term encompasses both:

- a. *the interests of the accused* including the accused member's interest in having legal rights and procedural safeguards respected; and
- b. *the interests of the state*⁹⁸ including the requirement that members and others who commit offences be duly convicted and punished and the related need to maintain public confidence in and respect for the administration of military justice.

These interests may sometimes appear to be in conflict. This explains the importance of the decision-maker's role in assessing the weight to be accorded to the various interests when determining what the *interests of justice* require in the circumstances of a particular case.

60. While the phrase *interests of justice* includes both individual and collective interests, not all *interests of justice* relate to interests held exclusively by either the accused or the state. Examples of shared interests would include the interest in ensuring that:

- a. the decision-maker acts fairly;
- b. the procedures set out in regulations are observed;
- c. each side has an opportunity to be heard;
- d. each meritorious issue is resolved; and
- e. the matter is brought to a final resolution.

61. To illustrate how the *interests of justice* determination might be applied in a particular case, imagine a situation where a potential presiding officer has had a close personal relationship with the accused or with a witness who was to be called to give evidence at a summary trial. To an impartial observer, it might appear that such an individual would be biased and therefore incapable of acting

⁹⁶ QR&O 108.16(1)(v).

⁹⁷ See for example ss. 276(4) of the *Criminal Code*, s.16 of the *Supreme Court Act*, and NDA ss. 180(2).

⁹⁸ In the broadest sense, the phrase "interests of the state" may be taken to mean the interests of the public at large. In a military justice context, the public would include the military public. The interests of the state are incorporated into the decision-making process through duties imposed on various participants in the military justice system. For example, the Director of Military Prosecutions will consider, among other factors, the public interest when considering whether a charge should be proceeded with by court martial.

as a fair decision-maker. In such a case, it would not be in the interests of justice for such an officer to preside at the summary trial.⁹⁹

62. The *interests of discipline* portion of the phrase *interests of justice and discipline* refers, in its broadest sense, to the requirement to maintain discipline and, by implication, military efficiency at all levels of the CF, in Canada and abroad, in time of peace or armed conflict. At the unit level, the interests of discipline further require that unit authorities' responsibilities in respect of the *Code of Service Discipline* be exercised promptly and fairly. This would include presiding officers' duties in respect of members charged with minor service offences and is fully in keeping with the purpose of summary proceedings¹⁰⁰ and the unit's obligation to act expeditiously.¹⁰¹

63. To illustrate how the *interests of discipline* determination might be applied in a particular case, imagine a situation where there have been numerous summary trial convictions for the same offence within a unit over a short period of time – such as 15 convictions for negligent discharge of weapons during the first 3 months of a deployment. The unit CO may well be concerned that unit discipline is not being effectively maintained given the high frequency of negligent discharges. In such circumstances, it may well be appropriate, *in the interests of discipline*, for the CO to refer any subsequent charge of this nature to a referral authority, with a view to having the matter dealt with by a court martial, rather than by summary trial.

SECTION 4

PRE-TRIAL DETERMINATIONS

64. Before commencing a summary trial, an officer having summary trial jurisdiction¹⁰² must make several determinations in order to ascertain whether the officer would be precluded from trying the case.¹⁰³ In doing so, the following factors must be considered:

- a. the accused's rank or status;¹⁰⁴
- b. any limitations on the officer's power to try the offence, having regard to:
 - i. the specific offence charged;

⁹⁹ The key to this circumstance is whether there would be an apprehension of bias. For there to be a reasonable appearance of bias, the relationship between the presiding officer and the witness should be more than a passing professional or social acquaintance. For example, speaking to someone at the mess occasionally or attending meetings that include the other person should not lead to an apprehension of bias. However, if the presiding officer and witness are golfing partners, or work closely together on a regular basis, it is more likely and reasonable that an apprehension of bias will exist. See also Chapter 4, Fairness and the Application of the Charter.

¹⁰⁰ QR&O 108.02.

¹⁰¹ QR&O 107.08.

¹⁰² In most cases an officer having summary trial jurisdiction will become a presiding officer once the trial commences.

¹⁰³ QR&O 108.16.

¹⁰⁴ QR&O 108.16(1)(a)(i).

- ii. the prohibition on presiding where the officer: conducted or supervised the investigation; laid or caused the charge to be laid; issued a search warrant in the matter; and
- iii. where the officer is a delegated officer, any limitation contained in the CO's delegation of authority.¹⁰⁵
- c. the adequacy of the presiding officer's powers of punishment having regard to the gravity of the alleged offence;¹⁰⁶
- d. whether there are reasonable grounds to believe that the accused is unfit to stand trial or was suffering from a mental disorder at the time the alleged offence was committed;¹⁰⁷
- e. whether it would be inappropriate for the officer to try the case having regard to the interests of justice and discipline;¹⁰⁸ and
- f. whether the accused has elected to be tried by court martial.¹⁰⁹

65. For presiding officers to assess whether they are precluded from trying the case on any of the above grounds, they must be sufficiently aware of the circumstances of the case and of the accused. This issue is dealt with under Section 3 of this Chapter.

66. If it is determined that the presiding officer is not precluded from trying the case, the presiding officer must then proceed with the summary trial.¹¹⁰ However, if the determination is that the presiding officer is precluded from trying the accused, with respect to any of the factors detailed in paragraph 64 above, then the presiding officer must refer the matter to another authority.¹¹¹ The procedure to be used for referring to another authority is set out in Section 6 of this chapter.

SECTION 5

DETERMINATIONS OF JURISDICTION DURING THE SUMMARY TRIAL

67. Even where it has been determined that an officer has summary trial jurisdiction, that jurisdiction can be lost at any time due to a change in the circumstances of the case.

68. One situation where the presiding officer could lose jurisdiction to continue with a summary trial might arise during the trial for one of the five minor offences listed in *QR&O*

¹⁰⁵ *QR&O* 108.10 and 108.16(1)(a)(ii).

¹⁰⁶ *QR&O* 108.16(1)(a)(iii).

¹⁰⁷ *QR&O* 108.16(1)(a)(iv). See also discussion at Section 3 of this Chapter.

¹⁰⁸ *QR&O* 108.16(1)(a)(v).

¹⁰⁹ *QR&O* 108.16(1)(b). See also discussion at Section 3 of this Chapter.

¹¹⁰ *QR&O* 108.16(2). See also Chapter 13, Conduct of Summary Trials.

¹¹¹ *QR&O* 108.16(3). See also Section 6 in this Chapter.

108.17.¹¹² In the event an election was not initially required and the presiding officer, being either a CO or superior commander, decides in the circumstances that if the accused is found guilty a punishment of detention, reduction of rank or a fine in excess of 25% of the accused's monthly basic pay would be appropriate, the presiding officer must give the accused the opportunity to elect trial by court martial.¹¹³

69. This requirement only applies to COs and superior commanders who are acting as the presiding officer since delegated officers do not have the power to impose punishments of detention, reduction in rank or a fine in excess of 25% of the monthly basic pay.¹¹⁴ Instead, where the delegated officer's powers of punishment would be inadequate, the delegated officer would adjourn the trial and refer the matter to the CO.¹¹⁵

70. The procedure for giving the election during a summary trial, is the same procedure used when the election is given before the trial.¹¹⁶ If the accused elects trial by court martial, the presiding officer cannot continue with the summary trial and must refer the case to another authority.¹¹⁷

71. In addition, if during the summary trial the presiding officer determines there are reasonable grounds to believe the accused is unfit to stand trial or was suffering from a mental disorder at the time of the alleged offence, the presiding officer must adjourn the trial and refer the case to another authority.¹¹⁸ Similarly, if the presiding officer determines that it would be inappropriate to continue trying the case having regard to the interests of justice or discipline, the presiding officer must adjourn and refer the case.¹¹⁹

SECTION 6 REFERRAL

72. The regulations allow certain service authorities to refer charges to other service authorities in a number of circumstances. The regulations stipulate when a charge or case is to be referred, to whom the charge or case can be referred, and the procedures to be used.

73. While charges may be referred to any number of service authorities in accordance with *QR&O*, the term *referral authority* only refers to those specific officers who may refer a charge

¹¹² The following are the offences listed in *QR&O* 108.17(1)(a):

85 (Insubordinate Behaviour);

86 (Quarrels and Disturbances);

90 (Absence Without Leave);

97 (Drunkenness); and

129 (Conduct to the Prejudice of Good Order and Discipline), but only where the offence relates to military training, maintenance of personal equipment, quarters or workspace, or dress and deportment.

¹¹³ *QR&O* 108.17(6).

¹¹⁴ *QR&O* 108.17(6) Note A.

¹¹⁵ *QR&O* 108.34. See Section 6 of this Chapter, Referral.

¹¹⁶ *QR&O* 108.17(6).

¹¹⁷ See Section 6 of this Chapter for the procedure involved in making a referral.

¹¹⁸ *QR&O* 108.34(1)(a). See Sections 3 and 4 of this Chapter.

¹¹⁹ *QR&O* 108.34(1)(b). See Sections 3 and 4 of this Chapter.

to the Director of Military Prosecutions (DMP) for disposal. The CDS and any officer having the power of an officer commanding a command are designated as referral authorities in the regulations.¹²⁰

Referral and Pre-Trial Disposal of Charges

74. The *QR&O* set out specific requirements and procedures for the referral of charges by the member who laid the charge. These requirements and procedures are discussed at Section 2 of Chapter 8, Laying of Charges.

Referral of Charges before Summary Trial

75. There are circumstances where an officer having summary trial jurisdiction would be precluded from commencing a summary trial, and would have to refer the matter to another authority. The *QR&O* dictate the procedures to be used to refer the charge. These procedures vary somewhat depending on whether the officer is acting as a delegated officer, CO, or superior commander or a referral authority.

76. Before a summary trial commences, if it is determined that the officer is precluded from hearing the matter as a presiding officer, the officer must do the following:

- a. if the officer is a delegated officer, refer the charge to the CO or, where appropriate, to another delegated officer;¹²¹
- b. if the officer is a CO, refer the charge to a superior commander, to a referral authority or, where appropriate, to another CO;¹²²
- c. if the officer is a superior commander who is not a referral authority, refer the charge to a referral authority or, where appropriate, to another superior commander;¹²³ or
- d. if the officer is a superior commander who is a referral authority, refer the charge to the DMP or, where appropriate, to another superior commander.¹²⁴

77. If a charge is referred as provided above, the accused and the assisting officer must be informed of the action taken.¹²⁵ In addition, any referrals must be noted on Part 4 of the RDP and any correspondence related to the referral must be attached to the RDP.¹²⁶

78. **Referral to a CO by Delegated Officer.** When a delegated officer refers a charge to the CO, there is particular action that the CO must take.

¹²⁰ *QR&O* 109.02.

¹²¹ *QR&O* 108.16(3)(a).

¹²² *QR&O* 108.16(3)(b).

¹²³ *QR&O* 108.16(3)(c).

¹²⁴ *QR&O* 108.16(3)(d). For example, it would be appropriate for the superior commander to refer the charge to another superior commander instead of to the DMP directly, in the situation where it is alleged that the superior commander is biased against the accused.

¹²⁵ *QR&O* 108.16(4).

¹²⁶ See the RDP provided in *QR&O* 107.07.

79. If the referral is made because the accused has elected to be tried by court martial, then the CO may choose not to proceed with the charge if, in the CO's opinion, the charge should not be proceeded with.¹²⁷ Alternatively, the CO may choose to refer the charge to a referral authority.¹²⁸

80. If the case has been referred to the CO for any reason other than the accused electing to be tried by court martial, the CO may do one of the following:

- a. not proceed with the charge if, in the CO's opinion, the charge should not be proceeded with;
- b. refer the charge back to the delegated officer or to another delegated officer for trial;
- c. try the accused if the CO has the power to do so, and in the CO's opinion it would be appropriate to do so;
- d. refer the charge to a superior commander or, where appropriate, to another CO; or
- e. refer the charge to a referral authority.¹²⁹

81. **Referral to a Superior Commander by CO.** When a CO refers a charge to a superior commander, the superior commander may do one of the following:

- a. not proceed with the charge if in the superior commander's opinion the charge should not be proceeded with;
- b. when the accused is a NCM below the rank of warrant officer, refer the case back to the CO or to another CO with directions to proceed with the summary trial unless the accused has elected trial by court martial;
- c. try the accused if the superior commander has the power to do so and if in the superior commander's opinion, it would be appropriate to do so;
- d. if the superior commander is not a referral authority, refer the charge to a referral authority, or where appropriate, to another superior commander; or
- e. if the superior commander is a referral authority, refer the charge to the DMP, or where appropriate, to another superior commander.¹³⁰

¹²⁷ *QR&O* 107.09(3)(b).

¹²⁸ *QR&O* 108.19(1).

¹²⁹ *QR&O* 108.19(2).

¹³⁰ *QR&O* 108.195.

Referral of Charges During Summary Trial

82. During a summary trial, the circumstances of the case or the presiding officer's perception of those circumstances may change in a way that affects the jurisdiction of the presiding officer to try the matter.¹³¹ In such a situation, the trial must be adjourned and the charge referred to another authority. The status of the presiding officer and the reason for the adjournment and referral determines to which authority the charge is referred.

83. If during a summary trial the presiding officer decides the accused is unfit to stand trial or was suffering from a mental disorder at the time of the alleged offence, or that it is inappropriate for the presiding officer to try the matter in the interests of justice and discipline, then the presiding officer shall adjourn the summary trial and refer the case as follows:

- a. if the officer is a delegated officer, refer the case to the CO, or where appropriate, to another delegated officer;
- b. if the officer is a CO, refer the case to a superior commander, to a referral authority, or where appropriate, to another CO;
- c. if the officer is a superior commander who is not a referral authority, refer the case to a referral authority or, where appropriate, to another superior commander; or
- d. if the officer is a superior commander who is a referral authority, refer the case to the DMP, or where appropriate, to another superior commander.¹³²

84. If a charge is referred as provided above, the accused must be informed of the action taken.¹³³ In addition, any referrals must be noted on Part 4 of the RDP and any correspondence related to the referral must be attached to the RDP.¹³⁴

85. It would normally not be appropriate to refer a charge to another presiding officer of the same status when the presiding officer has decided that the accused is unfit to stand trial or was suffering from a mental disorder at the time of the alleged offence, or when the presiding officer concludes the powers of punishment are not adequate in the circumstances.

86. As discussed in Section 5, circumstances may arise during the summary trial, which require the trial to be adjourned and the accused given the opportunity to elect trial by court martial. Should the accused elect trial by court martial, the presiding officer must refer the case in the same manner as had the election been made before the summary trial commenced.¹³⁵ See paragraph 76 for more detail.

¹³¹ See Section 5 of this Chapter for further detail.

¹³² *QR&O* 108.34.

¹³³ *QR&O* 108.34(3).

¹³⁴ See the RDP provided in *QR&O* 107.07.

¹³⁵ *QR&O* 108.17(6). See also Section 5 of this Chapter; Chapter 13, Conduct of Summary Trials; and Chapter 12, Elections.

Application to Referral Authority For Disposal of a Charge

87. Applications to a referral authority can be made by a CO, a superior commander, or by any member of the NIS. *QR&O* detail the form that the application must take, what must be included in the application, what must accompany the application and the action which is to be taken by a referral authority on receipt of the application.¹³⁶

88. All applications must be in the form of a letter and forwarded directly to the appropriate referral authority. The application must include the reasons for the application, a brief summary of the circumstances surrounding the commission of the alleged offence and the evidence disclosed by the investigation that supports the charge, and any recommendation that may be considered appropriate concerning the disposal of the charge.¹³⁷ Other documentation that must accompany the application includes the following:

- a. the RDP;
- b. a copy of any report of investigation conducted pursuant to Chapter 106;
- c. when an application is forwarded by a member of the NIS, the written reasons provided by the CO or superior commander for not proceeding with the charge;
- d. the accused's conduct sheet, if there is one; and
- e. the record of service or a certified copy of the certificate of service of the accused, if available.¹³⁸

89. If an application is forwarded to a referral authority, who is not the immediate superior in matters of discipline of the CO or superior commander who is making the application, a copy of the application must be forwarded to the officer's immediate superior in matters of discipline.¹³⁹ Further, if an application is forwarded by a member of the NIS, a copy of the application must be sent to the CO or superior commander who decided not to proceed with the charge, and to the officer to whom that CO or superior commander is responsible in matters of discipline.¹⁴⁰

90. When an application is made to a referral authority for disposal of a charge, the commanding officer or superior commander shall cause a copy of the application and the RDP, together with a copy of the report of investigation conducted in accordance with Chapter 106 to be placed on the Unit Registry.¹⁴¹ Also see Chapter 16, Post-trial Administration.

91. When an application is made to the referral authority, the accused's CO must cause the accused to be advised of the application and inquire whether the accused:

- a. wants legal counsel to be appointed by the Director of Defence Counsel Services (DDCS) to represent the accused;
- b. intends to retain legal counsel at the accused's own expense; or

¹³⁶ *QR&O* 109.03 and 109.05.

¹³⁷ *QR&O* 109.03(1) and (2).

¹³⁸ *QR&O* 109.03(6).

¹³⁹ *QR&O* 109.03(3).

¹⁴⁰ *QR&O* 109.03(5).

¹⁴¹ *QR&O* 107.14(3).

- c. does not require legal counsel at that time.¹⁴²

92. When the accused wants legal counsel to be appointed by the DDCS¹⁴³ to represent the accused, the CO must determine if the accused prefers a particular legal advisor, or if the accused is willing to accept any legal advisor. The CO must also inform the DDCS of the accused's wishes.¹⁴⁴ Should the accused request to be represented by a particular legal advisor, the DDCS must attempt to have that officer made available for that purpose, but if that legal advisor is not available, the DDCS must ensure that another legal advisor is made available.¹⁴⁵

Action by Referral Authority

93. Upon receipt of an application for disposal of a charge, the referral authority must either forward the application to the DMP, with any recommendations regarding the disposal of the charge that the referral authority considers appropriate,¹⁴⁶ or direct that a CO or superior commander try the accused by summary trial in respect of the charges referred.

94. A referral authority will only be able to direct that a CO or superior commander try the accused by summary trial if:

- a. the charge was referred because the CO or superior commander did not consider their powers of punishment to be adequate to try the accused by summary trial; and
- b. the referral authority believes the CO or superior commander has adequate powers of punishment to try the accused by summary trial.¹⁴⁷

¹⁴² QR&O 109.04(1).

¹⁴³ QR&O 109.04(2).

¹⁴⁴ QR&O 109.04(3).

¹⁴⁵ QR&O 109.04(4).

¹⁴⁶ QR&O 109.05(1).

¹⁴⁷ QR&O 109.05(2).

CHAPTER 12

ELECTION

1. The term *election* refers to the process by which an accused who is triable by summary trial in respect of a service offence, but has the right to be tried by court martial, decides whether to elect to be so tried.

Purpose of the Election

2. The election process was designed to provide the accused with the opportunity to make an informed choice regarding the type of trial to be held, bearing in mind that an accused who elects not to be tried by court martial is in effect waiving the right to be tried by that form of trial, with full knowledge of the implications.¹

3. There are many differences between summary trials and courts martial. Courts martial are more formal and provide the accused more procedural safeguards than those available at summary trial, such as the right to be represented by legal counsel. The election process was designed to provide the accused a reasonable opportunity to be informed about both types of trial, to decide whether to exercise the right to be tried by court martial and to communicate and record the choice.

4. The *QR&O* set out the specific procedures to be followed for giving and recording the election. These procedures help ensure that the election process is procedurally fair.² A failure to observe these procedural requirements would call into question the legal validity of any subsequent trial.

Circumstances in which an Election must be Offered

5. Certain offences can only be tried by court martial³. Where an offence can be tried by both court martial or by summary trial an accused has the right to elect to be tried by court martial for all but the most minor of service offences, unless the CO decides to refer the matter directly to court martial.

6. The service offences for which an accused does not automatically have the right to an election are:

- a. *NDA* section 85, Insubordinate Behaviour;
- b. *NDA* section 86, Quarrels and Disturbances;
- c. *NDA* section 90, Absence Without Leave;

¹ The importance of the right to elect court martial is discussed in the *Summary Trial Working Group Report*, 2 March 1994, Volume I pages 209 - 226. The Summary Trial Working Group stated at page 225 that "The right to elect court martial provisions should be used as a *safety valve* to enhance the protection of an accused's rights." Friedland likens an election not to be tried by court martial to a waiver of trial by guilty plea (Friedland, at p.99).

² *QR&O* 108.17. See also Chapter 4, Fairness and the Application of the Charter.

³ All offences listed in the *Code of Service Discipline* must be tried by court martial except those listed in *QR&O* 108.07(2).

- d. NDA section 97, Drunkenness; and
- e. NDA section 129, Conduct to the Prejudice of Good Order and Discipline, but only where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment.⁴

7. An election may still be required for these offences where, based on the circumstances surrounding the offence, the officer exercising summary trial jurisdiction concludes that a punishment of detention, reduction in rank or a fine in excess of 25 percent of monthly basic pay would be warranted if the accused were found guilty of the offence.⁵ If the officer determines that these punishments are not warranted, the accused can be tried by summary trial with no opportunity to elect trial by court martial.

8. This means that in many cases the accused must be offered the right to elect to be tried by court martial before an officer having summary trial jurisdiction will be in a position to conduct a summary trial.

Who may offer an Election

9. An election may be offered by any officer exercising summary trial jurisdiction over the accused.⁶ The considerations that must be taken into account when determining whether that officer has jurisdiction to try a summary trial are discussed in Chapter 11, Jurisdiction and Pre-trial Determinations.

Process used to give an Election

10. Where an accused has the right to be tried by court martial, the officer exercising summary trial jurisdiction must cause the accused to be informed of that right prior to the commencement of the summary trial.⁷ Once the accused has been informed of the right to elect trial by court martial, the officer exercising summary trial jurisdiction must ensure that the accused is given a reasonable period of time, of not less than 24 hours, to consult legal counsel with respect to the election, to decide whether to elect to be tried by court martial, and to make that decision known.⁸

11. It is the officer exercising summary trial jurisdiction who stipulates the manner in which the accused is to make known the election decision. Therefore, there is some flexibility in the process. For example, the accused may be required to communicate the decision directly to the presiding officer by directing that the decision be communicated through another person such as the unit adjutant. The practice in some units has been for the accused to appear before the presiding officer at a specific time in order to make the election decision known.

⁴ QR&O 108.17(1)(a).

⁵ QR&O 108.17(1)(b).

⁶ QR&O 108.17(2).

⁷ QR&O 108.17(2). The summary trial begins once the accused has been brought before the officer presiding at the trial and that officer has taken the presiding officer's oath and caused the charges to be read in accordance with QR&O 108.20(1) and (2). See QR&O 108.05 Note.

⁸ QR&O 108.17(2).

Recording the Election

12. To ensure that all the necessary procedures for the election have been completed, *QR&O* require that the following information concerning the election be recorded in Part 3 of the RDP:⁹

- a. the time and date the accused was informed of the right to be tried by court martial;
- b. the time and date the accused was required to make the election decision known;
- c. the accused's election decision;
- d. the signature of the accused;
- e. the signature of the person receiving the election decision; and
- f. the date and time that the election decision was received.¹⁰

13. Further, in endorsing Part 3 the accused will be confirming:

- a. the election decision;
- b. that the accused has discussed, with the accused's assisting officer, the nature and gravity of the offence(s) with which the accused has been charged;
- c. that the accused has discussed the differences between trial by court martial and summary trial with the assisting officer; and
- d. that the accused has had an opportunity to consult legal counsel about the election.¹¹

Effect of Refusal to Make an Election

14. When an accused refuses to make an election, the refusal is treated as an election to be tried by court martial and the accused must be so informed.¹²

Procedure after Election is Made

15. Where an accused has not elected to be tried by court martial, the officer having summary trial jurisdiction retains jurisdiction over the matter and must, unless otherwise precluded, proceed with the summary trial.¹³

16. Where the accused has elected to be tried by court martial the officer having summary trial jurisdiction will be precluded from trying the case and must refer the case to a referral

⁹ *QR&O* 107.07. A copy of the RDP, the Provision of Information form and a completed sample of both are attached as Annex B.

¹⁰ *QR&O* 107.07.

¹¹ *QR&O* 108.17(3). See also *QR&O* 108.14(5) and para. 12 and 19 of *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001, found at Annex H.

¹² *QR&O* 108.17(4).

¹³ *QR&O* 108.16(2).

authority for disposal.¹⁴ If that officer proceeds to try the case by summary trial despite the election, any subsequent finding of guilty would be invalid and would be quashed on review.¹⁵

17. Where the accused elects to be tried by court martial the officer who gave the election will be required to refer the case to a referral authority. If the officer who gave the election is a delegated officer, the case will instead be referred to the CO.¹⁶ The action that must be taken by the CO as a result of the referral is discussed in Chapter 11, Jurisdiction and Pre-Trial Determinations.

18. Where the officer who gave the election is a CO, the case will be referred to a referral authority.¹⁷ If the officer who gave the election to the accused is a superior commander who is not a referral authority, the case will be referred to a referral authority, and if the superior commander is a referral authority, the case will be referred to the DMP.¹⁸ The action that must be taken by the referral authority or DMP as a result of the referral is set out in Chapter 11, Jurisdiction and Pre-Trial Determinations.

Opportunity to Consult Legal Counsel

19. An officer exercising summary trial jurisdiction shall ensure that the accused is provided with a reasonable opportunity, during the period given to make the election, to consult with legal counsel.¹⁹ The opportunity to consult with legal counsel regarding the election enhances the accused's ability to make an informed choice when deciding whether or not to be tried by court martial. The consultation with counsel is in addition to any advice offered by the assisting officer.²⁰

20. What constitutes a *reasonable opportunity* will depend on the circumstances, including the operational posture of the unit. It may be that more than 24 hours is needed to allow the accused to have a private consultation with legal counsel.²¹ If the accused is not able to consult counsel concerning the election or is unable to make the election within the period provided, an extension may be requested.²²

21. Legal officers within the office of the DDCS are available to provide legal advice to the accused with respect to the making of the election.²³ The consultation with the legal officer will normally take place by telephone at no expense to the accused.²⁴ While the accused is not

¹⁴ QR&O 108.16(1)(b) and (3).

¹⁵ See Chapter 15, Request for Review.

¹⁶ QR&O 108.16(3)(a).

¹⁷ QR&O 108.16 (3)(b).

¹⁸ QR&O 108.16 (3)(c) and (d).

¹⁹ QR&O 108.18(1).

²⁰ QR&O 108.18 Note A.

²¹ QR&O 108.18 Note B.

²² The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers, A-LG-050-000/AF-001, para. 13 and 16.

²³ QR&O 101.20(2)(d).

²⁴ QR&O 108.18(2) and Note C and *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001, para. 15 and 17.

precluded from contacting civilian counsel, any consultation with civilian counsel will be at the accused's own expense.

22. The accused is not obliged to consult legal counsel regarding the election. The decision is that of the accused.²⁵

Withdrawal of Election to be Tried by Courts Martial

23. An accused who has elected to be tried by court martial has the right to withdraw that election and have the matter tried by summary trial at any time prior to the DMP preferring the charge to be tried by court martial.²⁶

24. After the DMP has preferred the charge to be tried by court martial the accused may, with the consent of the DMP, withdraw that election and have the matter tried by summary trial at any time prior to the commencement of the court martial.²⁷

Election During Summary Trial

25. When the accused has been charged with one of the five minor service offences described in paragraph 6 above, and an election was not given to the accused before the summary trial, it may become necessary during the summary trial for the presiding officer to stop the proceedings and offer the accused an election. An election must be offered if during the summary trial for one of the minor service offences the presiding officer, being either a CO or superior commander, decides in the circumstances that a punishment of detention, reduction of rank or a fine in excess of 25% of the accused's basic monthly pay would be appropriate if the accused were to be found guilty.²⁸

26. This requirement only applies to presiding officers who are COs and superior commanders. Delegated officers do not have the power to impose punishments of detention, reduction in rank or a fine in excess of 25% of monthly basic pay.²⁹

27. The procedure for giving the election during a summary trial is the same procedure used when the election is given before the trial.³⁰ If the accused elects trial by court martial the presiding officer must adjourn the summary trial and refer the case to a referral authority.³¹

²⁵ QR&O 108.18(2) and *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001, para. 16.

²⁶ QR&O 108.17(5)(a).

²⁷ QR&O 108.17(5)(b) and *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001, para. 14.

²⁸ QR&O 108.17(6).

²⁹ QR&O 108.17(6) Note A. Where the delegated officer's powers of punishment are inadequate the delegated officer would adjourn the trial and refer it to the CO. See Chapter 11, Section 5.

³⁰ QR&O 108.17(6). See para. 11 and 12 in this chapter.

³¹ See para. 18 and 19 in this chapter and Section 6 of Chapter 13, Conduct of Summary Trial.

Subsequent Elections

28. The regulations require that an officer having summary trial jurisdiction comply with *QR&O* 108.17 and consider extending the right to elect court martial to an accused before conducting a summary trial.³² The requirement to comply with *QR&O* 108.17 arises whenever an officer having summary trial jurisdiction intends to try an accused summarily. This requirement would even apply where charges have been referred to an officer having summary trial jurisdiction by another officer who has already complied with *QR&O* 108.17 and extended the right to elect court martial to the accused. This situation might arise where, for example, a case is referred to a CO for disposal by a delegated officer in accordance with *QR&O* 108.34(1)(b) (*Referral to Another Authority During Summary Trial*),³³ or where charges are referred from one officer to another officer in the period between the giving of the election (initial) and the commencement of the summary trial.³⁴

29. The right to elect trial by court martial should not ordinarily be extended to an accused more than once by the same officer. Before offering an accused what would amount to a second election, the advice of the unit legal advisor should be obtained.³⁵

³² *QR&O* 108.16(1)(b) and 108.17(2).

³³ The failure to grant what amounts to a “second” election in these circumstances would clearly be contrary to 108.16(1)(b). It would also be “unfair” as the CO’s powers of punishment exceed those of a delegated officer, bearing in mind that in electing not to be tried by court martial, the accused would only have considered the differences between the delegated officers powers of punishment and those of a court martial (see *QR&O* 108.14(5)(b)(i)).

³⁴ For example, a referral from one CO to another CO. Such referrals are provided for in *QR&O* 108.16(3), 108.19 and 108.195.

³⁵ The unit legal officer may recommend this course of action where a procedural error has occurred and the error is capable of being corrected through a repetition of the election procedures set out in *QR&O* 108.17(2).

CHAPTER 13

CONDUCT OF SUMMARY TRIAL

SECTION 1

GENERAL

1. The purpose of summary proceedings is:
... to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of military discipline and efficiency, in Canada and abroad, in time of peace or armed conflict.¹

The *QR&O* regulating summary proceedings were designed with this purpose in mind.

Procedural Requirements

2. Chapter 108 of *QR&O* prescribes the procedure for each step in the summary trial process. Fairness is essential in the conduct of summary trials and in order to ensure it is maintained, presiding officers are required to follow all procedural requirements contained in the *QR&O*.
3. Occasionally issues will arise for which procedures or specific considerations have not been set out in regulations. Presiding officers must exercise their discretion in resolving such issues in accordance with the principles of fairness and the purpose of summary trials. The principles and requirement of fairness are discussed in Chapter 4, Fairness and the Application of the Charter.

Place of Trial

4. The NDA and *QR&O* provide that any accused charged with having committed a service offence may be dealt with and tried under the Code of Service Discipline either in or outside of Canada. The determination of the location of the trial will depend upon a number of factors, including:
 - a. circumstances of the accused;
 - b. location of witnesses; and
 - c. operational posture of the unit.

The discretion should be exercised based upon a balancing of convenience and disciplinary interests, bearing in mind the principles of fairness and the unit's duty to act expeditiously.²

¹ *QR&O* 108.02.

² *QR&O* 107.08

Limitation Period

5. A *limitation period* is a specified period of time in which a charge must be laid. In general, the limitation period begins the instant conduct occurs that may be subject to a charge. If charges are not laid within the applicable *limitation period*, the authority to try the accused for the offence charged is lost.

6. With respect to service offences, the general rule is that anyone subject to the *Code of Service Discipline* at the time of the alleged commission of a service offence, can at any time be charged, dealt with and tried under the *Code of Service Discipline*.³ There are two exceptions to this rule. First, if the offence is punishable under *NDA* sections 130⁴ or 132⁵ and would have been subject to a limitation period if it had been dealt with other than under the *Code of Service Discipline* (i.e. under another federal statute or foreign law), that other limitation period applies. In the summary trial context this exception would have application in the case of an accused charged with an offence under section 335 (Taking Motor Vehicle or Vessel Without Consent) of the *Criminal Code* or section 4(1) of the *Controlled Drugs and Substances Act* (Possession) where the amount is less than 1 gram of cannabis resin or 30 grams of marihuana and tried by a CO or superior commander.⁶ The limitation period in that case would be six months.⁷

7. The second exception is that summary trials must begin within one year of the date on which the offence is alleged to have been committed.⁸ The summary trial does not have to be completed before the one year date, only begun within that time. A trial is begun when the accused is brought before the presiding officer and the presiding officer takes the oath and causes the charges to be read.⁹

8. An offence involving a series of acts occurring over an extended period of time may form the basis of a single charge where they constitute a continuous transaction.¹⁰ For example, if someone steals money from their roommate's wallet on a regular basis over a six month period, these incidents may all support one charge of stealing rather than a number of separate charges for each act. The relevant date for determining the limitation period in such a case would be the last date of the continuous transaction.¹¹ Therefore, the limitation period would not expire until

³ *NDA* s. 69 and *QR&O* 102.22.

⁴ *NDA* s. 130 includes any act or omission that takes place in or outside of Canada and that is punishable under Part VII of the *NDA*, the *Criminal Code*, or any other Act of Parliament, as a service offence.

⁵ *NDA* s. 132 includes any act or omission that takes place outside of Canada and would, under the law applicable in the place where the act or omission occurred, be an offence it committed by a person subject to that law, as a service offence.

⁶ *QR&O* 108.05 Note B.

⁷ The offence is classified as a summary conviction offence under the *Criminal Code*. The six-month limitation period is set out in *Criminal Code* s.786(2).

⁸ *NDA* s. 69(b).

⁹ *QR&O* 108.05 Note A.

¹⁰ *QR&O* 107.04(2). *R. v. Voszler* (1972), 6 C.C.C. (2d) 212, 18 C.R.N.S. 120 (Alta. C.A.) indicates that a single scheme of operation constituting one continuing offence may be defined as a single transaction. An example of the "single transaction rule" is set out in *R. v. German* (1989), 51 C.C.C.(3d) 175, 77 Sask. R. 310 (C.A.) in which the Court allowed a single charge with respect to allegations of sexual assault of a very young victim at a specified premises over a two and a half year period.

one year from the date on which the last incident in the continuous act of theft is alleged to have occurred.

No Joint Trials

9. When two or more accused are tried together for the same or similar offences, the trial itself is called a joint trial. The regulations allow the DMP to prefer charges jointly and try by court martial two or more accused who are alleged to have committed an offence together.¹² However, there is no similar provision with respect to summary trials. Therefore, where two or more accused acted as accomplices in committing offences they cannot be tried together. Normally in such circumstances the least serious case will be dealt with first.¹³

Records of Summary Trials

10. Once completed, the RDP will reflect the findings and sentence, if any, as well as pre-trial decisions. While a formal transcript of the proceedings is not made, the presiding officer should prepare a list to identify the witnesses heard and all documentary or physical evidence accepted at the summary trial, including witnesses or evidence called or presented by or on behalf of the accused, and attach this list to the RDP.¹⁴ The RDP, together with the attachments and a copy of the report of investigation conducted in accordance with *QR&O* Chapter 106, will be placed on the Unit Registry once the summary trial has been completed.¹⁵ This ensures that a record of the summary trial will exist which can be accessed by a review authority, should the need arise.¹⁶

11. The electronic recording of summary trial is not provided for in *QR&O* and is a practice that may well involve significant administrative requirements under the *Privacy Act*, *Access to Information Act*, and *National Archives of Canada Act*. Although a recording of the summary trial may be considered useful for the presiding officer to review the evidence that was presented, if the evidence is expected to be so lengthy or complex to require making a record, it may be appropriate to refer the case for court martial. A presiding officer who decides to record a summary trial must request and consider advice from the unit legal advisor about compliance with access to information and privacy legislation, as well as the importance of making an accurate and complete recording.

¹¹ In the case of a continuing summary conviction offence that commenced more than 6 months before the charge was laid, the charge has been held to be valid provided the offence continued during the 6 months preceding the charge. *R. v. Belgal Holding Ltd.*, [1967] 3 C.C.C. 34, 1 O.R. 405 (H.C.J.); and *Dressler v. Tallman Gravel and Sand Supply Ltd.*, [1963] 2 C.C.C. 25, 36 D.L.R. (2d) 398 (Man. C.A.).

¹² *QR&O* 110.08.

¹³ When determining the order in which the accused will be tried the unit legal advisor should be consulted.

¹⁴ *QR&O* 108.21 Note E.

¹⁵ *QR&O* 107.14(4) and (5) and Note B.

¹⁶ See the *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, p.51 for Recommendation 26: "We recommend that uniform records of summary trials be prepared"

SECTION 2

PRE-TRIAL ISSUES AND PROCEDURES

12. There are various procedural issues that may arise for consideration at the pre-trial stage, and *QR&O* provide how many of these issues are to be handled. Checklists detailing the role of COs, delegated officers and superior commanders as presiding officer at summary trial, are attached at Annexes P, Q and R.¹⁷

Appointment of an Assisting Officer

13. As soon as possible after a charge has been laid, the accused's CO or someone authorized by the CO shall appoint an assisting officer to help the accused.¹⁸ The assisting officer is normally an officer, but in exceptional circumstances a NCM above the rank of sergeant may be appointed. For information on the appointment, role and duties of the assisting officer, see Chapter 9, Assisting Officer.

Referral of Charges

14. After a charge is laid, and at various times before and during a summary trial, it may be necessary or appropriate for the officer exercising summary trial jurisdiction to refer the charge to another officer with a view to having the charges disposed of at summary trial or court martial.¹⁹ The procedures and considerations involved with referring charges are discussed in Chapter 8, Laying of Charges and Chapter 11, Jurisdiction.

Election to be Tried by Courts Martial

15. Any accused who has been charged with an offence that can be tried by summary trial, has the right to be tried by court martial unless the accused has been charged with one of five minor offences and the circumstances would not warrant certain specified punishments.²⁰ The election to be tried by court martial is discussed in detail in Chapter 12, Election.

Provision of Information to the Accused

16. In order for the accused to be able to make an informed decision on the election, or to properly prepare the accused's case for trial, the accused must be provided with, or given access to, certain prescribed information about the charges and any investigation held. Presiding officers are

¹⁷ These checklists are guides only. They must be used in conjunction with the appropriate sections of *QR&O* and this Manual.

¹⁸ *QR&O* 108.14(1).

¹⁹ *QR&O* 107.09, 108.16(3) and 108.34(2).

²⁰ *QR&O* 108.17.

responsible for ensuring that the required information is made available to the accused.²¹ The provision of information to an accused is discussed in detail in Chapter 10, Provision of Information.

Application for Legal Representation at Summary Trial

17. An accused must be given the opportunity to consult legal counsel with respect to the making of the election to be tried by court martial,²² and has the right to be represented by legal counsel if tried by court martial. Although legal advice of a general nature will be available to an accused or an assisting officer through the office of the DDCS there is no right to be represented by legal counsel at a summary trial.²³ Instead, the accused will be assisted throughout the summary trial process by an assisting officer who is specifically appointed for that purpose.²⁴

18. The nature of the summary trial process, being less formal and intended to deal with less serious service offences at the unit level, does not normally require the accused be represented by legal counsel.²⁵ Nonetheless, the accused may request legal representation and it is within the discretion of the presiding officer to allow the accused to have legal representation at the summary trial.²⁶ The *QR&O* do not provide a specific procedure to an accused for requesting legal representation at summary trial. Since the presiding officer controls the process at summary trial, it is within the presiding officer's discretion as to how the request is made. For example, such a request can be made in writing or in person.

19. When considering a request for legal representation, the presiding officer should consider at least the following:

- a. the nature of the offence;
- b. the complexity of the offence;
- c. the interests of justice;
- d. the interests of the accused; and
- e. the exigencies of the service.²⁷

Further, the presiding officer should also consult with the unit legal advisor.

²¹ *QR&O* 108.15.

²² *QR&O* 108.17(2)(b) and *QR&O* 108.18.

²³ *QR&O* 101.20(2)(c) and *QR&O* 108.14 Note B.

²⁴ *QR&O* 108.14, See also Chapter 9, Assisting Officers. It should be noted that the accused has the right to have access to free and immediate advice from duty counsel provided by the DDCS, on arrest or detention (see *QR&O* 105.08(10(d)) and will have counsel appointed where there are reasonable grounds to believe the accused is unfit to stand trial (*QR&O* 107.10).

²⁵ The following was stated on why there is no right to the legal counsel at summary trial in the *Summary Trial Working Group Report*, at 143 -144:

The decision not to provide a right to counsel at a summary trial is rationally connected to the objective of enforcing discipline effectively and efficiently and thereby maintaining an operationally ready, armed force. The lack of counsel helps in keeping the proceedings uncomplicated, avoids delays in proceeding with the hearing and assists in ensuring the trials can be conducted world wide and in remote areas of Canada.

²⁶ *QR&O* 108.14 Note B.

²⁷ *QR&O* 108.14 Note C.

20. Having considered the relevant factors, the presiding officer has the discretion to:
- permit the accused to have legal representation at the summary trial;
 - deny the accused's request and proceed with the summary trial without legal representation for the accused; or
 - apply for disposal of the charges against the accused by court martial.²⁸

No Funding for Legal Representation at Summary Trial

21. If legal representation is permitted it is at the personal expense of the accused.²⁹ Unlike the procedure followed where the accused will be tried by court martial, a legal advisor with DDCCS will not be appointed to represent an accused who is to be tried by summary trial.

Attendance of the Accused

22. Although the assisting officer will only assist the accused in the preparation and presentation of the accused's case to the extent that the accused desires, both the accused and the assisting officer must be present throughout the summary trial. There are no exceptions to this requirement.³⁰ The right of the accused to be present at the accused's summary trial is a fundamental feature of Canada's system of justice. This right provides the accused with the opportunity to make full answer and defence to the charges.³¹

Procurement of Witnesses

23. The presiding officer has a duty to ensure the attendance of any witness, including witnesses requested by the accused. However, this duty is limited to those witnesses whose attendance may be reasonably obtained without legal process.³² There is no authority to issue a summons or subpoena to compel a witness to attend at a summary trial.

24. Military witnesses may be ordered to attend. Civilian witnesses may only be requested or invited to attend to give evidence at summary trials. At courts martial, the president has the authority to issue a *Summons to a Witness* requiring the attendance of civilian witnesses. Where it is necessary in the interests of justice to compel the attendance of a civilian witness, the matter may have to be referred to court martial.³³

25. The attendance of any witness is, however, subject to the requirement that their attendance may be reasonably obtained. A factor that must be considered is the exigencies of the service.³⁴ The *QR&O* do not specify what would be considered reasonable in the circumstances. However, if a witness is on temporary duty overseas, and another person is available at the unit

²⁸ *QR&O* 108.14 Note B.

²⁹ See Chapter 9, Assisting Officers and *The Election to be Tried by Summary Trial or Courts Martial: A Guide for Accused and Assisting Officers*, A-LG-050-000/AF-001, para. 19(a) at Annex H.

³⁰ *QR&O* 108.14(4) and *QR&O* 108.20(1).

³¹ The *Canadian Charter of Rights and Freedoms*, s. 11(d); see also Chapter 4, Fairness and the *Charter*.

³² *QR&O* 108.29(1).

³³ *NDA* s. 249 and *QR&O* 111.63, including Note and form for *Summons to a Witness*.

³⁴ *QR&O* 108.29(1).

who could give the same evidence, it would not be reasonable in that case to require the witness to return from overseas to attend the summary trial.

26. The presiding officer has no duty to procure the attendance of a witness where the presiding officer believes that the request is *frivolous* or *vexatious*.³⁵

27. According to The *Concise Oxford English Dictionary*, frivolous is defined as “*adj.* **1** paltry, trifling, trumpery. **2** lacking seriousness; given to trifling; silly”.³⁶

28. *Vexatious* is defined as “*adj.* **1** such as to cause vexation. **2** *Law* not having sufficient grounds for action and seeking only to annoy the defendant.”³⁷ The term ‘vexation’ is defined as *n.* **1** the act or instance of vexing; the state of being vexed. **2** an annoying or distressing thing.”, while vex is defined as “*v.tr.* **1** anger by a slight or a petty annoyance; irritate. **2** *archaic* grieve, afflict.”³⁸

29. An example, of a frivolous or vexatious request for a witness would be if the accused is charged with being improperly dressed on a battalion parade and wants to call all the other unit members on parade as witnesses.

30. In exercising the discretion on whether to require the attendance of a witness, *QR&O* specify the factors to be considered by presiding officers: whether the request is frivolous or vexatious, and whether the witness can, having regard to the exigencies of the service, be reasonably procured without legal process.³⁹ To consider other issues not related to these factors in making the decision would be improper. For example, if a presiding officer refuses the accused’s request for the attendance of a witness only because it would require the trial to continue on a second day and there is no reason to believe the request is frivolous or vexatious, the decision would be improper.

31. When assessing requests for a witness, the presiding officer must bear in mind the requirements of fairness, and respect the accused’s right to make full answer and defence to the charges laid. Therefore, subject to any limitations specifically provided for in *QR&O*, all efforts should be made to accommodate requests by an accused for the attendance of witnesses.

32. The failure to make a witness available, or the refusal to grant a reasonable request for the attendance of a witness, could result in a review and a subsequent quashing of any finding of guilt. This does not mean that all requests for witnesses must be granted, only that all requests must be given proper consideration and a reasoned decision made.

33. The *QR&O* also allow for witnesses to give evidence by telephone or other telecommunication device.⁴⁰ This issue will be discussed in more detail in Section 3 on summary trial procedures.

³⁵ *QR&O* 108.29(2).

³⁶ *Concise Oxford English Dictionary*, 9th ed. (Toronto: Oxford University Press) at 543.

³⁷ *Id.* at 1560.

³⁸ *Id.* at 1560.

³⁹ *QR&O* 108.29.

⁴⁰ *QR&O* 108.21(4). Where available, video conferencing could be used. If the accused objects to the witness testifying in this manner, the summary trial may be adjourned in order to allow the witness to attend. Alternatively, the matter may be referred for court martial.

Attendance of the Public

34. Summary trials will ordinarily be open to the public. The *QR&O* direct that, in general, members of the public, both civilian and military, be permitted to attend as spectators to the extent that accommodation permits.⁴¹ There is no requirement that the summary trial be moved to a larger venue to accommodate members of the public who may wish to attend. For example, trials could be held in the base theatre, in an aircraft hanger, or on the flight deck of a ship.

35. Despite the general rule allowing the public to attend a summary trial, the presiding officer may direct that the public be excluded for the whole or any part of the summary trial.⁴² The public may be excluded where the presiding officer considers it to be in the interests of justice and discipline, public safety, defence or public morals.⁴³

36. Another exception to the general rule of openness could arise where classified information will be given in evidence at a summary trial. In such circumstances members of the public without appropriate security clearance and without a need to know must be excluded from those portions of summary trials during which such evidence is to be presented.⁴⁴

Right to Summary Trial in Either Official Language

37. An accused has the right to have a summary trial conducted in either English or French. The presiding officer must be able to understand the trial in the official language chosen for the proceedings without the assistance of an interpreter. This is determined by the presiding officer. If the presiding officer does not have the required language ability, the presiding officer should refer the case to another presiding officer who does have the language ability to try the case.⁴⁵

Language of Witness Testimony

38. Witnesses may testify in their preferred language, and if it is not the official language chosen by the accused for the proceedings, an interpreter must be provided.⁴⁶ The accused, however, may consent to dispense with the interpreter if the witness will be using the official language not chosen for the summary trial where the accused understands that language.⁴⁷ The presiding officer is not required to dispense with the interpreter in such circumstances, and should not do so despite the accused's consent where the presiding would not consider it

⁴¹ *QR&O* 108.28(1).

⁴² *QR&O* 108.28(2).

⁴³ *QR&O* 108.28 (2).

⁴⁴ *QR&O* 108.28(3).

⁴⁵ *QR&O* 108.16 Note A refers to the right of an accused to have proceedings conducted in either official language pursuant to the *Official Languages Act (Revised Statutes of Canada, 1985, Chapter O-3.01)*.

⁴⁶ *Charter* s.14 provides that:

A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Although the *QR&O* do not require that the interpreter possess formal, professional or academic qualifications in the sense of courses or certification, it is necessary to ensure the interpreter is competent to translate the witness' testimony into the language chosen for the proceedings.

⁴⁷ *QR&O* 108.20 Note C.

appropriate to do so. For example, if the presiding officer does not understand the official language which that witness will be using it would not be appropriate to dispense with the requirement for an interpreter.

Protection against Self-Incrimination

39. The term *self-incrimination* refers to any acts or declarations made by a person which implicate that person as a party to an offence or crime. Any witness who testifies in any proceeding, including at a summary trial, has the right not to have incriminating evidence used against the witness in any other proceedings. The only exceptions are where the witness is being prosecuted for perjury or where the incriminating evidence is used for the purpose of cross-examining that witness on a prior inconsistent statement.⁴⁸

SECTION 3 SUMMARY TRIAL PROCEDURE

40. The procedure which must be followed during a summary trial is set out in *QR&O*.⁴⁹ These procedures not only create an underlying consistency in the summary trial process for presiding officers and accused, but also help ensure that the summary trial process is procedurally fair.

41. Although much of the summary trial procedure is set out in *QR&O*, there are also practical details which are left to the discretion of the presiding officer. In the exercise of this discretion the presiding officer must always act fairly.

42. The conduct of the proceedings of a summary trial are the sole responsibility of the officer presiding at the trial and no superior authority shall intervene in the proceedings.⁵⁰ It would therefore be inappropriate for a superior officer to contact the presiding officer in order to influence the outcome of a particular case. Care must also be taken to ensure that no action is taken or statements made with respect to a case, that will create the perception that a superior authority is attempting to influence the result in a particular summary trial.

Preliminary Matters

43. Before the summary trial commences the presiding officer and the public will take their places. The accused, accompanied by the assisting officer, will be brought before the presiding officer.⁵¹ The practical aspects of how this occurs such as, whether the public stands or sits, whether members of the public remove their head-dress, and where the accused and the assisting officer will stand in relation to the presiding officer and the witnesses, typically do not affect the procedural fairness of the trial and will normally be determined in advance by the presiding

⁴⁸ The *Canadian Charter of Rights and Freedoms* s. 13.

⁴⁹ *QR&O* 108.20.

⁵⁰ *QR&O* 108.04. see also *Nye v. The Queen* (1973) 3 C.M.A.R. 85, and *Braun v. The Queen* (1974-88) 4 C.M.A.R. 115

⁵¹ *QR&O* 108.20(1).

officer, having due regard to unit or environmental (Navy, Army, or Air Force) traditions and practices.

44. Once the accused has been brought before the presiding officer, the presiding officer will take the oath or solemn affirmation to duly administer justice according to law without partiality, favour or affection.⁵² At this time all present may be asked to stand and remove head-dress, if applicable, and once the oath or affirmation has been taken, to resume their seats and replace head-dress.

45. The charges will then be read out by the presiding officer or by someone appointed by the presiding officer to do so.⁵³ Although the accused should have been given a copy of the RDP prior to the trial,⁵⁴ as well as copies of or access to any information related to the charges, the formal reading of the charges provides added assurance that the accused knows the case that has to be met, it also completes the series of steps which must be taken to officially begin the summary trial.⁵⁵

46. Once the charges have been read, and before any evidence can be put forward, the presiding officer will ask the accused whether more time is required to prepare the accused's case. The presiding officer must grant any reasonable adjournment requested by the accused for that purpose.⁵⁶

47. To ensure that the proceedings are fair, the accused must be informed of the case to be met, and provided with adequate time to prepare a defence. The ability to request a reasonable adjournment serves these purposes.

48. It is the presiding officer who decides what is a reasonable adjournment. The reasonableness of an adjournment is based on the circumstances of that case. Although not provided in *QR&O*, the presiding officer should at least consider the following factors:

- a. the time which has passed since the accused was provided with a copy of the RDP;
- b. the time which has passed since the accused was provided with a copy of, or was given access to, all the information referred to in *QR&O* 108.15;
- c. the number of charges contained in Part 1 (Charge Report) of the RDP;
- d. the seriousness and complexity of the charges;
- e. the number of witnesses being called;
- f. the availability of defence witnesses; and

⁵² The requirement for the oath is set out in *QR&O* 108.20(2). The precise wording of the oath can be found in *QR&O* 108.27, while provision for taking an affirmation in place of an oath, and the wording to be used are found in *QR&O* 108.32.

⁵³ *QR&O* 108.20(2).

⁵⁴ *QR&O* 107.09(1)(b).

⁵⁵ *QR&O* 108.05. This would be relevant where a limitation period is about to expire. Also see Chapter 4, Fairness and the Application of the Charter.

⁵⁶ *QR&O* 108.20(3)(a).

- g. the volume of documentary and real evidence being considered.

Admission of Particulars

49. If an adjournment is not required, the presiding officer may continue with the summary trial by asking the accused whether the accused wishes to admit any of the particulars of the charges.⁵⁷ By admitting particulars, the accused is agreeing with certain facts related to the alleged offence that are set out in the statement of particulars and consenting to dispense with the requirement that they be proven by calling evidence.⁵⁸

50. The accused can admit none, some, or all the particulars of any charge. For example, an accused is charged with Disobeying a Lawful Command of a Superior Officer (*NDA* s.83), and the statement of particulars read “in that he at Canadian Forces Base Edmonton, at approximately 1630 hours, 12 July 1999, did not leave the non-commissioned members’ canteen when ordered to do so by B87 654 321 Sergeant Green, A.B.”. The accused can admit that he was at the CFB Edmonton NCM’s canteen at 1630 hours on 12 July 1999, but not admit the remaining particulars. It would still be open to him to defend himself by arguing that Sergeant Green did not order him to leave the canteen.

51. Although the accused can admit all the particulars of the charge, it is not possible at summary trial for the accused to plead guilty to the charge. The presumption is that the accused is innocent and must be proven guilty. Where the accused has admitted all the particulars, there is no need to call evidence on that charge unless the presiding officer considers that it would be appropriate to do so at this stage in the proceedings in order to better understand the case. Even where no evidence is called, the presiding officer must still review the particulars of the charge to ensure they contain all the elements that must be present for the accused to be found guilty of the offence charged. The presiding officer can make a finding of guilty only when all the required elements of the offence are met.⁵⁹

52. Although the accused may admit all the particulars, if the particulars are flawed and do not describe all the required elements of the offence, then the presiding officer would have to make a finding of not guilty. Using the earlier example, if the charge failed to state it was Sgt Green who gave the command, the charge would be flawed since there is no allegation that an order was given by a superior officer.⁶⁰

Hearing the Evidence

53. Once all issue of admission of particulars has been dealt with, the presiding officer will hear the evidence.⁶¹ The presiding officer can receive any evidence the presiding officer

⁵⁷ *QR&O* 108.20(3)(b).

⁵⁸ The Statement of Particulars is found in Part 1 of the RDP.

⁵⁹ *QR&O* 103 provides guidance concerning the elements of most service offences. This guidance should be reviewed by the presiding officer prior to commencing the summary trial. Additional advice concerning the elements of the offence may be obtained from the unit legal advisor.

⁶⁰ See also Chapter 8, Laying of Charges.

⁶¹ *QR&O* 108.20(4) and (5).

considers to be of assistance and relevant in determining whether the accused committed any of the offences charged.⁶² The evidence may be received by hearing witnesses or by accepting documentary or physical evidence.⁶³ A discussion on the types of evidence available and the considerations that can be taken to determine if evidence will be of assistance and relevant, are found in Section 4 of this chapter.

54. The majority of evidence will be presented orally, through witnesses, preferably those who have first hand knowledge of an event who should be called to testify.⁶⁴ Before giving evidence, a witness must either take an oath or make a solemn affirmation to tell the truth, the whole truth, and nothing but the truth.⁶⁵ A witness remains under this obligation throughout the witnesses' testimony even if it is interrupted by a break or begins on one day and continues on the next day. The presiding officer may choose to remind a witness of this after any adjournment.

55. Although most witnesses will be present at the summary trial to give evidence, the presiding officer has the discretion to allow evidence to be given by means of a telephone or other telecommunications device that permits the presiding officer and the accused to hear and examine the witness.⁶⁶ In making this determination the presiding officer shall consider all the circumstances including:

- a. the location and personal circumstances of the witness;
- b. the costs that would be incurred if the witness had to be physically present;
- c. the nature of the witness' anticipated evidence; and
- d. any potential prejudice to the accused or adverse impact on the presiding officer's ability to evaluate the evidence caused by the fact that the witness would not be physically present.

For example, a witness may not be reasonably produced because the witness is too far away from the trial, or because it would not be practical to have the witness attend such as where the witness is in the base hospital with a broken back.

56. Before a witness can testify by telephone, the witness must be sworn and the identity established to the satisfaction of the presiding officer.⁶⁷ This can be achieved by having an officer or NCM at the witness' location check the witness' identification and confirm the witness' identity. Also before giving evidence, the witness must take an oath or solemn affirmation. This can be administered by the presiding officer over the telephone or other telecommunications device, in the presence of a witness.⁶⁸

⁶² *QR&O* 108.21.

⁶³ *QR&O* 108.21 Note A.

⁶⁴ *QR&O* 108.21 Note A.

⁶⁵ The requirement for the oath is set out in *QR&O* 108.30. The precise wording of the oath can be found in *QR&O* 108.31, while the authority to use an affirmation in place of an oath and the wording to be used for an affirmation is found in *QR&O* 108.32.

⁶⁶ *QR&O* 108.21(4).

⁶⁷ *QR&O* 108.21 Note B.

⁶⁸ *QR&O* 108.21(4).

57. Where the presiding officer decides not to allow the witness to give evidence by telephone or other telecommunications device, the summary trial should normally be adjourned to allow the witness to attend, rather than proceeding with the summary trial, unless the witness' testimony is no longer required (for example, where another witness could provide the same evidence). Alternatively, the presiding officer may refer the case to a referral authority with a recommendation that the charges be disposed of by court martial.

58. At the summary trial, the presiding officer will first hear all the evidence against the accused, and during the presentation of this evidence the presiding officer will normally question the witness. The accused may also question each witness.⁶⁹ The ability to question witnesses called against the accused is an important part of the accused's right to make full answer and defence to the charges laid, and contributes to the overall fairness of the proceedings.⁷⁰ The questioning of witnesses called against the accused is also a valuable tool for the presiding officer to use to evaluate the credibility or honesty of a witness by observing the witness' demeanour during questioning.

59. The failure to provide an accused with the opportunity to question a witness called against the accused would be contrary to *QR&O*. It would also be procedurally unfair. If the accused is found guilty in such circumstances, the accused would be entitled to ask the review authority to set aside a finding of guilty on the ground that it is unjust.⁷¹

60. Witnesses should remain outside the location of the hearing until such time as they are called to give evidence in order to avoid the appearance that their testimony has been influenced by the evidence of the other witnesses. Once finished giving evidence, witnesses should be requested to leave the summary trial so that they would not be influenced by anything they would hear in the event that they are subsequently required to give further evidence. The witness may be allowed to return to the witness' place of duty if it is nearby or it is unlikely the witness will be called again to give evidence.

61. After the evidence against the accused has been heard, the accused may present evidence in defence of the charges by calling witnesses or producing documentary or real evidence.⁷² The accused may also call witnesses to discredit or call into question the evidence of previous witnesses. During the presentation of the evidence the accused and the presiding officer may question the witness.⁷³

62. The accused may choose to testify but is not required to do so.⁷⁴ One of the basic principles of fundamental justice is that accused persons have the right to remain silent and not be compelled to give evidence in proceedings taken against them.⁷⁵ As well, it is improper for

⁶⁹ *QR&O* 108.20(4). The accused will have been provided with a list of the witnesses who are to be called at the summary trial. See *QR&O* 108.15 Note D and E.

⁷⁰ In *R. v. Potvin* (1989), 47 C.C.C.(3d) 289, the court stated that it is "a principle of fundamental justice that the accused have had the opportunity to cross-examine the adverse witness". See also Chapter 4, Fairness and the Charter.

⁷¹ See Chapter 15, Request for Review.

⁷² *QR&O* 108.20(5).

⁷³ *QR&O* 108.20(5).

⁷⁴ *QR&O* 108.20(5).

⁷⁵ *Canadian Charter of Rights and Freedom* s. 11(c).

the presiding officer to consider or take a negative view of the fact that the accused has not testified.⁷⁶

63. If the accused decides to testify, the accused must do so under oath or solemn affirmation, the same as any other witness. The presiding officer may only question the accused if the accused chooses to testify.⁷⁷

Representations by the Accused

64. After all the evidence has been presented, the accused may make representations with respect to the evidence heard during the summary trial,⁷⁸ which would include offering an interpretation of the evidence in its best possible light from the accused's perspective or suggesting why some of the witnesses were not credible and should not be believed. For example, if the identity of the offender is in issue and the evidence disclosed that a key witness was not wearing their glasses at the time of the commission of the offence, the accused's representations might include comments on that witness' ability or inability to identify the accused as the offender.

65. To the extent desired by the accused, the assisting officer may assist and speak for the accused during the summary trial. This could include presenting evidence, questioning witnesses and making representations on behalf of the accused.

Findings on Guilt and Sentence

66. The presiding officer must consider the evidence received as well as the representations of the accused and determine whether it has been proved beyond a reasonable doubt that the accused committed the offence charged.⁷⁹ In order to make such a finding, the presiding officer must conclude that all the required elements of the offence have been proved beyond a reasonable doubt.⁸⁰ The required elements would include, as a minimum, the following: that the accused was the person who committed the offence; that the accused intended to commit the offence; that the offence was committed on the date that was alleged in the charge report portion of the RDP; and that the acts or omissions alleged occurred.

67. Presiding officers must take care to keep an open mind throughout the trial. It is very important not to pre-judge a case after hearing only part of the evidence. It is only after hearing all of the evidence, both for and against an accused, and the accused's representations, that a measured assessment may be made as to the guilt or innocence of the accused on each charge. It

⁷⁶ In *Regina v. Symonds* (1983), 9 C.C.C. (3d) 225 at 227, the Ontario Court of Appeal stated "It is fundamental that a person charged with a criminal offence has the right to remain silent and a jury is not entitled to draw any inference against an accused because he chooses to exercise that right."

⁷⁷ *QR&O* 108.20(5).

⁷⁸ *QR&O* 108.20(6).

⁷⁹ *QR&O* 108.20(7). See also Section 5 of this Chapter, Determinations.

⁸⁰ Further discussion on the *elements* of an offence is found in Chapter 8, Laying of Charges. As well, the term *reasonable doubt*, and the factors to be considered by the presiding officer in deciding on the innocence or guilt of the accused is detailed in Section 5 of this Chapter, Determinations.

may be appropriate for the presiding officer to adjourn the summary trial while making this determination. A service tribunal must not find a person guilty unless evidence is presented which proves guilt beyond a reasonable doubt.⁸¹

68. Once the guilt or innocence of the accused has been determined the presiding officer must pronounce the finding in respect of each charge.⁸² Where the accused is found not guilty the member will be allowed to proceed. In cases where an accused is found guilty, the sentencing phase of the summary trial commences.

69. During the sentencing phase the presiding officer must receive any evidence concerning the appropriate sentence to be imposed including aggravating and mitigating factors.⁸³ During this phase of the trial, the offender is entitled to present evidence, including calling witnesses and presenting documentary evidence, and questioning each witness about any matter concerning sentence. During the presentation of sentencing evidence the presiding officer may question each witness, including the accused, where an accused chooses to testify.⁸⁴ For a detailed discussion on the factors to consider with respect to sentencing see Chapter 14, Sentencing and Punishment.

Summary Trial Procedure in Special Cases

70. Circumstances may arise during the course of a summary trial that require a presiding officer to depart from the typical summary trial procedures. These include situations where an election or an adjournment becomes necessary after the trial has started, or where a situation arises that is not provided for in *QR&O*.

71. **Election during Summary Trial.** When an accused has not been given an election before the summary trial commences, there could be circumstances which require that the accused be given the opportunity to elect trial by court martial during the summary trial.⁸⁵

72. An accused has the right to elect trial by court martial for all but a limited number of service offences. If an accused has been charged with one of the five minor service offences, and the presiding officer determines that, prior to commencing the summary trial, if found guilty the punishments of detention, reduction in rank or a fine in excess of 25% of the accused basic monthly pay would not be warranted, then no election need be given.⁸⁶ However, if at any time during the summary trial, before making a finding on guilt, the presiding officer decides that if found guilty at least one of these punishments would be warranted, the presiding officer must give the accused the opportunity to elect to be tried by court martial.⁸⁷

⁸¹ *QR&O* 108.20(7) and 108.20 Note B.

⁸² *QR&O* 108.20(8).

⁸³ *QR&O* 108.20(10).

⁸⁴ *QR&O* 108.20(10)(a)-(c).

⁸⁵ See also Section 4 in this Chapter and Chapter 12, Elections.

⁸⁶ *QR&O* 108.17(1).

⁸⁷ *QR&O* 108.17(6). See Chapter 12, Election. This requirement only applies to COs and superior commanders who are acting as the presiding officer (see *QR&O* 108.17 Note A). Delegated officers do not have the power to impose punishments of detention, reduction in rank or a fine in excess of 25% of the monthly basic pay, and therefore, they would not give an election if one of these punishments would be warranted. Instead, where the delegated officer's

73. The presiding officer must apply the same considerations and procedures for an election given during a trial as one given prior to the trial commencing.⁸⁸ Therefore, the summary trial will be adjourned to allow the accused a reasonable opportunity (not less than 24 hours), to consult legal counsel, to decide whether to elect to be tried by court martial, and to make that decision known.⁸⁹

74. The following is an example of when an accused might be given the right to elect court martial during the summary trial. An accused is charged with Insubordinate Behaviour (s. 85 of *NDA*) in that the accused acted with contempt towards a superior officer. The evidence heard at summary trial reveals that the contemptuous behaviour took place in front of the accused's subordinates. The presiding officer might decide that the facts establish that a punishment of detention, reduction in rank or fine in excess of 25% of the accused's basic monthly pay would be appropriate if the accused is found guilty.

75. **Adjournments during a Summary Trial.** The presiding officer may adjourn a summary trial at any time on the initiative of the presiding officer or at the request of the accused, if the presiding officer considers it desirable.⁹⁰ For example, an adjournment may be given to allow the accused the opportunity to discuss the case with the assisting officer or respond to new evidence disclosed.⁹¹ The presiding officer must act fairly when exercising discretion to allow an accused's adjournment request.

76. There are also circumstances when the presiding officer will be required to adjourn the summary trial. A summary trial must be adjourned when there are reasonable grounds to believe that the accused is unfit to stand trial or was suffering from a mental disorder at the time of the alleged offence.⁹² It must also be adjourned where the CO or superior commander decides to offer the accused the election to be tried by court martial after the summary trial has begun.⁹³

77. The summary trial must also be adjourned if the presiding officer concludes that it is inappropriate to try the case, having regard to the interests of justice and discipline.⁹⁴ For example, this could arise in circumstances where evidence is led which puts the presiding officer into a conflict of interest situation.

78. If the presiding officer adjourns a summary trial in circumstances where it would be inappropriate for that officer to continue with the trial, the case must be adjourned and the charge referred to another officer who has the authority to deal with the case.⁹⁵ Furthermore, the accused must be informed that the case is being referred to another authority.⁹⁶

powers of punishment would be inadequate, the delegated officer would adjourn the trial and refer the matter to the CO. (*QR&O* 108.34(1)).

⁸⁸ *QR&O* 108.17(6).

⁸⁹ *QR&O* 108.17(2).

⁹⁰ *QR&O* 108.33.

⁹¹ See Chapter 4, Fairness and the Application of the Charter.

⁹² *QR&O* 108.34(1)(a).

⁹³ *QR&O* 108.17(6).

⁹⁴ *QR&O* 108.34(1)(b).

⁹⁵ *QR&O* 108.34(2).

⁹⁶ *QR&O* 108.34(3).

79. An accused who was in custody prior to the commencement of the summary trial or who was ordered into custody during the trial⁹⁷ may be kept in custody on the direction of the presiding officer when the trial is adjourned for the purpose of referring the case to another authority for disposal.⁹⁸ Alternatively, the presiding officer may order that the accused be released from custody.

80. **Situations not provided for in the *QR&O*.** Occasionally, a situation may arise during a proceeding which is not provided for in *QR&O*, the *NDA* or other applicable orders. In such circumstances, the course to follow is that which seems best calculated to do justice.⁹⁹ The unit legal advisor should be contacted in such a case to provide input on any law or legal principles, and to determine how similar cases may have been dealt with in the past.

Irregularities in Procedure.

81. Deviations from procedure do not make findings or sentences invalid, unless an injustice has been done to the accused as a result of the deviation.¹⁰⁰ Defects of a technical nature, which do not affect the merits of the case, would not invalidate the finding or sentence.¹⁰¹ For example, if the presiding officer caused the charges to be read before taking the oath set out in *QR&O* 108.27.

82. A substantial (non-technical) deviation in procedure which affects the merits of the case, such as not allowing an accused or the assisting officer to ask questions of a witness at a summary trial, could invalidate the result.¹⁰² Deviations of this nature go to the heart of the fairness of the proceeding. On review summary trial findings arrived at in such circumstances would ordinarily be set aside as unjust.¹⁰³

83. The fact that a finding or sentence may still be valid despite a deviation in procedure, does not relieve a service member of the consequences of contravening *QR&O*.¹⁰⁴ Presiding officers and others involved in administering the summary trial process are clearly accountable for any failure to comply with the regulations.¹⁰⁵

⁹⁷ *QR&O* 108.22(1).

⁹⁸ *QR&O* 108.34(3).

⁹⁹ *QR&O* 101.07.

¹⁰⁰ *QR&O* 101.06(1).

¹⁰¹ *QR&O* 101.06 Note A. A deviation from the RDP form would not, by reason of that deviation, invalidate the summary trial proceeding. See *QR&O* 1.11(1).

¹⁰² *QR&O* 101.06 Note C. See also Chapter 15, Request for Review.

¹⁰³ See Chapter 4, Fairness and the Application of the Charter.

¹⁰⁴ *QR&O* 101.06(2).

¹⁰⁵ Presiding officers and others involved in administering the summary trial process are not liable for the diligent and honest execution of their duties under the *Code of Service Discipline*. *NDA* s. 270 states:

No action of other proceeding lies against any officer or non-commissioned member in respect of anything done or omitted by the officer or non-commissioned member in the execution of his duty under the Code of Service Discipline, unless the officer or non-commissioned member acted, or omitted to act, maliciously and without reasonable and probable cause.

SECTION 4

EVIDENTIARY ISSUES

84. To determine whether an accused is guilty of any of the charges, the presiding officer shall only consider the evidence received at the summary trial and any representations made by the accused.¹⁰⁶ The rules of evidence set out in the Military Rules of Evidence¹⁰⁷ which apply at a court martial, and the law applicable to the admissibility of evidence in civilian courts, do not apply at a summary trial.¹⁰⁸ However, *QR&O* provide guidance to the presiding officer on the evidence to be received and the weight to be given to it.¹⁰⁹

Receiving Evidence

85. The *QR&O* state that a presiding officer may receive any evidence the officer considers to be of assistance and relevant in determining whether or not the accused committed the offences charged and, where applicable, in determining an appropriate sentence.¹¹⁰ A presiding officer may receive any evidence which is sufficient to establish any relevant fact, whether the evidence establishes the fact on its own or when considered with other evidence. The presiding officer shall only give the evidence the weight it is warranted by its reliability.¹¹¹

86. To fully appreciate what evidence can be received, the terms *relevant*, *weight*, and *reliability* must be defined along with the factors that affect them.

87. **Relevant.** Relevance is determined by looking at the substance or contents of the evidence put forward. Evidence is relevant if it is related in some way to a fact in issue, if reasonable inferences¹¹² can be drawn from the evidence regarding a fact in issue, or if it sheds light on a contested matter.¹¹³

88. Relevant facts, in this context, mean those facts which assist the presiding officer determine whether the accused is guilty or not guilty of the offence charged. Evidence which will not assist the presiding officer in assessing whether a fact in issue has been proven, or which will not assist in the determination of an appropriate sentence, will not be relevant and should not be heard.

¹⁰⁶ *QR&O* 108.20(7)&(8).

¹⁰⁷ *QR&O* Volume IV, Appendix 1.3.

¹⁰⁸ *QR&O* 108.21(1).

¹⁰⁹ *QR&O* 108.20(7) and 108.21.

¹¹⁰ *QR&O* 108.21(2).

¹¹¹ *QR&O* 108.21(3).

¹¹² An inference is a deduction or conclusion from facts and reasoning. It also includes something implied or suggested. *Concise Oxford English Dictionary* at 696.

¹¹³ *Black's Law Dictionary*, 5th ed. (St. Paul, Minnesota: West Publishing Company, 1979) at 1160. As well, the Ontario Court of Appeal provided the following explanation of relevance in *R. v. Watson*, (1996), 108 C.C.C. (3d) 310 as quoted in P.K. McWilliams, *Canadian Criminal Evidence*, 3rd ed. (Aurora: Canada Law Book Inc., loose leaf) at 3-7:

Relevance ...requires a determination of whether as a matter of human experience and logic the existence of 'Fact A' makes the existence or non-existence of 'Fact B' more probable than it would be without 'Fact A'. If it does then 'Fact A' is relevant to 'Fact B' as long as 'Fact B' is itself a material fact in issue or is relevant to a material fact in issue in the litigation then 'Fact A' is relevant...

89. To determine what is relevant, a presiding officer must first identify the facts that are in issue in the case. Those are the facts that must be proved to establish all the elements of the offence charged.¹¹⁴ For example, if an accused is charged with having assaulted another service member, the following elements must be proved, in order for the accused to be found guilty:

- a. the accused's identity as the perpetrator;
- b. that the accused applied force or the threat of force against the alleged victim at the date, time and place alleged;
- c. that the accused intended the application of force or threat of force; and
- d. that the alleged victim did not consent.

In this hypothetical assault case, a fact in issue that would relate to the element of identity might be whether an identifying tattoo on the accused was visible to a witness.

90. In general, evidence called to prove any of the facts in issue will be considered relevant. However, evidence called for reasons other than to prove a fact in issue may also be relevant if a relationship exists between the evidence and at least one of these facts in issue.¹¹⁵ This would include facts relating to the credibility of a witness who has given evidence.

91. Evidence relating to the credibility of a witness would not be directly relevant to whether the assault occurred, but would be relevant to the extent it impacts on the reliability of a witness' testimony. For example, the fact that a witness is near sighted and must wear glasses does not directly relate to whether an assault occurred; however, it may be relevant when trying to prove the element of identity.

92. When considering whether evidence is relevant, the presiding officer should look at the evidence as a whole. Although a particular fact may not appear to be relevant on its own, it may be relevant in light of all the evidence received.

93. **Reliability.** The reliability of evidence refers to its trustworthiness, and the amount of confidence the presiding officer can have in its accuracy.¹¹⁶ There are various factors that will affect the reliability of the evidence including the truthfulness of the witness, the ability of the witness to perceive and later recall the particular event, as well as the type of evidence being called. Some types of evidence are more reliable and therefore more acceptable than others. Details on the types of evidence as well as the factors affecting the credibility of witnesses are outlined later in this Section.

94. **Weight.** The term weight refers to the amount of consideration that is to be given to a particular piece of evidence to help in reaching a decision on the guilt or innocence of the accused. The reliability of the evidence will affect the weight it is given by the presiding officer.¹¹⁷ Based on its reliability, the presiding officer may give a piece of evidence a lot of weight; some weight; or none at all.

¹¹⁴ J. Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) at 23, and P.K. McWilliams, *Canadian Criminal Evidence* at 3-4.

¹¹⁵ J. Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada* at 24.

¹¹⁶ *Black's Law Dictionary*, 5th ed. (St. Paul, Minnesota: West Publishing Company, 1979), at 1160.

¹¹⁷ *QR&O* 108.21(3).

95. For example, testimony from a credible witness who has perceived the offence with one of the five senses (hearing, sight, taste, smell and touch) and who has first hand knowledge of an event should be considered more reliable than testimony from someone who does not have first hand knowledge and is only relating what someone else has told them. Therefore, the presiding officer should give more weight to a credible first-hand evidence, than to the evidence of a witness who was not present when the offence was committed, or who has no personal knowledge of what took place.

Types of Evidence

96. The nature or type of evidence that is presented may affect the reliability of that evidence. Although the Military Rules of Evidence and common law rules of admissibility do not apply at summary trials, the concerns which led to the establishment of these rules are instructive to the presiding officer when deciding what evidence to accept based on its relevance, the amount of assistance it will give the presiding officer, as well its weight and reliability.

97. **Direct Evidence.** Direct evidence is the testimony of a witness with respect to something that witness perceived with one or more of their five senses and which directly relates to one of the facts in issue. For example, when someone witnesses an assault and gives testimony that it was the accused who struck the victim, that is direct evidence.

98. Direct evidence is given as the truth of what was perceived, and as the proof of a relevant fact in issue. Of the different types of evidence which may be presented at a summary trial, direct evidence provided by a witness testifying at the summary trial is preferred.¹¹⁸ Like any other form of evidence, the presiding officer must determine what weight should be given to direct evidence.

99. Various factors can affect the reliability of direct evidence, including the ability of the witness to perceive what the witness is testifying about, the witness' ability to recall the event and the witness' ability to express and to describe what was observed. In addition, the manner in which questions are asked of a witness and the witness' ability to understand the questions asked may also affect the witness' evidence. Presiding officers must consider the presence of any of these factors when deciding how much weight to give the evidence.¹¹⁹

100. The reliability of direct evidence can be tested by questioning the witness. Questioning by either the accused or the presiding officer can assist in determining not only the witness' credibility but also whether any factors exist that affect the reliability of the witness' evidence, such as the fact that the witness had consumed alcohol prior to witnessing the occurrence or the existence of poor lighting conditions.

101. **Circumstantial Evidence.** Unlike direct evidence that relates directly to a fact in issue, circumstantial evidence is evidence which proves facts or circumstances from which the existence or non-existence of the fact in issue may be inferred.¹²⁰ For example, the evidence of a witness who saw the accused stab the victim is direct evidence, while evidence that the accused

¹¹⁸ *QR&O* 108.21, Note (A).

¹¹⁹ *QR&O* 108.21(3).

¹²⁰ *Black's Law Dictionary* at 221. For definition of inference see note 112 above.

owns the same kind of knife as the one used in the stabbing, the same type of gloves as the ones found beside the victim, and was seen in the vicinity of the stabbing shortly before the stabbing, is circumstantial evidence.

102. One concern about circumstantial evidence is its reliability. To be reliable and useful, the circumstantial evidence must be sufficiently connected to a relevant fact to assist in either proving or disproving that fact. Another concern with circumstantial evidence is that the correct inference be drawn from the evidence.¹²¹ For example, if the grass and ground are wet, one may infer that it rained. However, this is not the only possible conclusion; there could have been a heavy dew or a sprinkler may have been used in the area.

103. It is not necessary that each piece of circumstantial evidence lead inevitably to the conclusion that the accused's guilt in order to be accepted. Circumstantial evidence may be used like other types of evidence either in isolation or in conjunction with other evidence to determine guilt or lack of guilt.¹²² For example, the evidence that the victim was seen being assaulted by someone wearing a red jacket with the number 23 on it, and the evidence that the accused owns the same type of jacket may be sufficient when considered in conjunction with further evidence that the accused was seen in the same area immediately before the assault wearing a red jacket with the number 23 on it.

104. **Hearsay Evidence.** Hearsay evidence is a statement originally made by someone other than a witness testifying at the summary trial, and which is submitted for the purpose of proving the truth of the original statement.¹²³ For example, if Cpl Jones gave evidence that at work on Tuesday, Sgt Smith told her he saw the accused hit the victim, and the purpose behind Cpl Jones's evidence is to prove that the accused assaulted the victim, then the statement of Sgt Smith is hearsay.

105. Hearsay evidence may be of questionable reliability because the person who made the original statement is not present to be questioned. That person's credibility and honesty cannot be tested and the truth of the statement cannot be assessed. The danger of unreliability increases each time a statement is repeated.

106. However, a statement which is made by someone who is not in court which is repeated by a witness not to prove that the original statement is true, but simply that the statement was made, is not hearsay. Evidence such as this could be used to show that the witness recognised a person by their voice or that the person the witness heard speak was present at a particular time. For example, if the purpose of Cpl Jones's evidence is only to prove that Sgt Smith was at work on Tuesday, then the evidence is not hearsay. In this case the reliability of the actual statement is not a concern, only the reliability of Cpl Jones' evidence that Sgt Smith was present needs to be tested through questioning.

107. Hearsay evidence may be presented in the form of oral evidence given during the testimony of a witness, or in writing through a witness presenting a document for the truth of its contents. For example, if a witness submits a letter written by the victim detailing the events of

¹²¹ *John v. R* (1971), 2 C.C.C. (2d) 157 (S.C.C.).

¹²² *R v. Cooper* (1978) 34 C.C.C. (2d) 18 (S.C.C.).

¹²³ *Black's Law Dictionary*, at 649.

an alleged assault, the contents of the letter is hearsay if it is being submitted to prove the circumstances of the assault.

108. Traditionally, hearsay evidence was excluded in civilian courts and at courts martial because of its unreliability unless one of the exceptions applied. For example, statements made spontaneously and concurrently with an event are considered part of the event, such as if the victim of an assault is heard yelling “stop hitting me Bob” during an assault. A statement made by a dying individual is a further exception to the hearsay evidence rule. In these circumstances it is considered unlikely that the statement was concocted. This general exclusion of hearsay evidence has expanded and courts are now more open to accept hearsay evidence in circumstances where it is shown to be reliable and necessary.¹²⁴

109. At summary trials evidence will not be excluded solely because it is hearsay evidence. Presiding officers can accept hearsay evidence provided it is relevant and of assistance. However, the presiding officer must pay particular attention to the question of reliability when evaluating hearsay evidence and determining how much weight it will be given. If the presiding officer decides the evidence is not reliable, even where it may be relevant, the evidence would be of no use and should not be given any weight.

110. **Admissions.** Voluntary admissions made by an accused and reported by another witness, fall outside the hearsay rule and may be admissible.¹²⁵

111. **Documentary Evidence.** Documentary evidence is traditionally defined as “any written thing capable of being made evidence no matter on what material it may be inscribed.”¹²⁶ This may include documents, books, cards, photographs, sound recordings, films, videotapes, microfiche, computer records, and other information recorded or stored by means of any device.¹²⁷

112. The *QR&O* do not require that only original documents be produced at a summary trial. Like all other evidence, the presiding officer can accept any document, including a photocopy of a document, if it is considered relevant and of assistance in the matter; however, the presiding officer must consider the reliability of the document in determining what weight to give it.¹²⁸

113. To determine the reliability of documentary evidence there are a number of factors, related to the nature and quality of the document that the presiding officer should consider. For

¹²⁴ There is a series of Supreme Court of Canada cases that have set out and adopted the more flexible test for the admissibility of hearsay evidence: *R. v. Khan*, [1990] 2 S.C.R. 531, *R. v. Smith*, [1992] 2 S.C.R. 915, *R. v. F.J.U.*, [1995] 3 S.C.R. 764. There is a two-part test for hearsay evidence to be accepted. The evidence must be *reliable*. Where the statement “is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken ... a circumstantial guarantee of trustworthiness is established” (*R. v. Smith* at 933). As well, it must be necessary to use the evidence in order to prove a fact in issue, which would exist when “[t]he person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of testing [by cross-examination]” or “[t]he assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources” (*R. v. Smith* at 934).

¹²⁵ *McCormick on Evidence*, (4th ed. 1992), Vol. 2, at 140 as cited with approval in *R. v. Evans*, [1993] 3 S.C.R. 653 (S.C.C.).

¹²⁶ *R. v. Daye*, [1908] 2 K.B. 333 at 340; also *Fox v. Sleeman* (1987), 17 P.R. 492 (Ont C.A.) as quoted in *The Law of Evidence in Canada*, at 927.

¹²⁷ *The Law of Evidence in Canada*, at 927 and 928 at notes 4 through 10.

¹²⁸ *QR&O* 108.21(2) & (3).

example, a video recording may be unclear in sound or in image, handwriting may be illegible or the condition of a document may make the contents impossible to accurately decipher.

114. If the *document* is a videotape or picture, the presiding officer should verify that it has not been tampered with or the images altered, and that what is shown is a true depiction of what the *document* is supposed to be showing. If the *document* is a paper document, it is important that all the information be readable or visible, and if it is a paper copy of the original, that the contents have not been altered.

115. Further, no matter what kind of document is presented, the presiding officer must be satisfied that the contents are accurate before relying on the document. For example, an accounting ledger may be authentic and unaltered, but it has little evidentiary value if the person who made the entries in the ledgers failed to total the figures correctly.

116. There may be reliability concerns with certain documentary evidence. A document can be tampered with and is only as reliable as the person who created it. Although close examination of a document may help the presiding officer detect any problems such as tampering, it is important that someone who has personal knowledge about the document be available to give evidence and be questioned about the evidence where that would be of assistance.

117. The *QR&O* provide some guidance on the use of particular kinds of documentary evidence. With respect to investigation reports, although they are recognized as a means to summarize and compile information, *QR&O* provide that such documents are not evidence in their own right and are not to be received as evidence at summary trials.¹²⁹

118. Although an investigation report cannot be used as evidence, the maker of a report may be called to testify with respect to how the investigation was conducted, the contents of any statements made to the maker by the accused, and any other matters of relevance contained in the report about which the maker of the report has personal knowledge. As well, there may be documents attached to the report such as statements by an accused which are relevant and which the presiding officer may accept as evidence in their own right. Statements by other witnesses may also be introduced. Where possible statements should be introduced through the person who actually gave the written statement or the person who received it.

119. The *QR&O* also provide that the minutes of a board of inquiry or the report of a summary investigation may not be received as evidence at a summary trial except to the extent provided for in *QR&O* 21.16.¹³⁰

120. **Real Evidence.** Real (physical) evidence refers to things presented to a summary trial for inspection or observation. Real evidence can include material objects, such as a weapon or item of clothing, and demonstrations or experiments conducted for the presiding officer.

121. Where real evidence that is determined to be of assistance and relevant is received into evidence, the presiding officer will still have to determine the weight to be given to it. As with other forms of evidence, the reliability of real evidence will have to be assessed. Normally, this

¹²⁹ *QR&O* 108.21 Note C.

¹³⁰ *QR&O* 108.21 Note D. *QR&O* 21.16(2) indicates that such statements may be used where the maker is accused of an offence involving a matter mentioned in *Military Rules of Evidence* s.40(2), i.e. perjury or giving false or contradictory evidence.

arises in relation to the identity of the object. To ensure the object presented as evidence is the same object related to the alleged offence, a witness would ordinarily be called to introduce the object, and to give evidence about where the object was found, how it was found, and where it has been kept since it was found.¹³¹ The need to establish the identity of the object will be especially important if the object is somehow linked to the accused or the commission of the offence.

122. For example, the accused is charged with assaulting someone with a book, and a book is found at the scene of the alleged offence has the accused's name in it. It is important to have a witness who can confirm that the book was found at the scene after the alleged assault, explain how it was found and indicate that it has been kept safe with no possibility of tampering or being switched before the summary trial.

123. Another related concern about the reliability of real evidence is that on its own, it provides only circumstantial evidence. Depending on the circumstances, the presiding officer must be cautious not to infer too much from its existence. Real evidence can be used to corroborate the direct evidence given by a witness. For example, the mere fact that the book used in an assault belongs to the accused is not proof on its own that it was the accused who used the book and committed the assault. However, proof that the book belongs to the accused may corroborate a witness' evidence that the witness saw the accused throw the book and strike the victim.

124. On completion of the summary trial, any property that has been received as evidence is to be returned to the person who is entitled to have it.¹³²

125. **Opinion Evidence.** Unlike evidence involving the personal knowledge of a witness on particular facts, opinion evidence is evidence of what a witness thinks, believes or infers regarding the facts in dispute.¹³³ The opinion must be based on facts that have been received into evidence.

126. The regulations do not place any limits on the presiding officer's ability to accept opinion evidence provided it is relevant and will be of assistance. However, the reliability of opinion evidence will depend on the subject matter and the experience and knowledge of the witness giving the opinion.

127. For example, an accused is charged pursuant to *NDA* section 111(1)(a) with improperly driving an armoured personnel carrier in a manner that is dangerous to any person or property. An opinion from the accused's supervisor who has experience with the same vehicle and who has driven that vehicle under similar conditions, about the quality of the accused's driving on this occasion, should be considered more reliable and useful than an opinion given by someone who was not present or who has no experience driving that particular type of vehicle.

128. It is not necessary that a witness be an expert on the subject in order to be able to give reliable opinion evidence. There are many everyday occurrences and experiences that most

¹³¹ The procedures for collecting and safeguarding such evidence prior to trial is dealt with in Chapter 5, Powers of Investigations, Inspections, Search & Seizure.

¹³² *QR&O* 101.055.

¹³³ *Black's Law Dictionary* at 985.

people could give an opinion on. For example, most people can give a reliable opinion on whether someone was intoxicated on a particular occasion, without any medical expertise, based on having observed people who were intoxicated on other occasions.

129. If opinion evidence is given at summary trial, there is no requirement for a presiding officer to automatically accept any opinion evidence given. Like all other evidence, once the opinion is found to be relevant and of assistance, the presiding officer must then determine the weight it is to be given. The presiding officer could decide not to give the opinion any weight. When considering opinion evidence the presiding officer must be cautious not to allow the opinion of any witness to circumvent the role of the presiding officer to decide what occurred in a particular circumstance.

130. **Unsworn Evidence.** Each witness called to give evidence at a summary trial, must do so under oath¹³⁴ or solemn affirmation.¹³⁵ In the event that a witness does not appear to understand the nature of an oath or a solemn affirmation, due to their age or apparent mental incapacity, the unit legal advisor should be consulted.

Considering Evidence

131. The presiding officer must consider the evidence received and the representations of the accused before determining whether it has been proved beyond a reasonable doubt that the accused committed the offence charged.¹³⁶ The first consideration in this analysis is to decide how reliable the evidence is and how much weight it will be given.

132. Common sense and close observation are key to deciding whether the evidence is reliable and the weight to be given to it. Presiding officers already possess the necessary skills to do this and should quickly become proficient at assessing the evidence received at a summary trial.

133. Assessing a witness' credibility is the role of the presiding officer alone and the following list details a number of considerations that should be made:

- a. Was there something specific that helped the witness remember the details of the event the witness described? In other words, was there something unusual or memorable about the event so that one would expect the witness to remember the details? Or was the event relatively unimportant at the time, so the witness might easily be mistaken about some of the details?
- b. Did the witness have a good opportunity to observe the event described? How long was the witness watching or listening? Was there anything else happening at the same time that might have distracted the witness?
- c. Did the witness appear to have a good memory?

¹³⁴ *QR&O* 108.30 and *QR&O* 108.31.

¹³⁵ *QR&O* 108.32.

¹³⁶ *QR&O* 108.20(7).

- d. How did the witness appear when giving evidence? Was the witness forthright and responsive to questions? Or was the witness evasive, hesitant, or argumentative?
- e. Was the testimony of the witness reasonable and consistent, or was the evidence contradictory? Was the witness's testimony consistent with the testimony of the other witnesses?
- f. Was the witness biased or have some interest in the outcome of this case? Was there some reason why the witness might tend to favour or not favour the accused?¹³⁷

134. Presiding officers must be cautious to assess each witness individually and not simply apply a standard set of rules to measure credibility. The presiding officer should also consider any cultural or individual attributes, such as a stutter, that may appear to affect the demeanour of a witness, bearing in mind that testifying can be a very stressful experience. A witness who appears very uncomfortable, who does not make eye contact with the questioner, who gives long rambling answers or short terse answers, or who trips over words may be seen as not being credible, where in fact the witness may be very nervous and unfamiliar with the trial setting. One must be careful not to confuse polish with honesty.

135. Although a witness may be quite credible, the witness' testimony may not be reliable because of failings in the witness' original perceptions of the event or ability to recall and explain what was perceived. The witness' ability to perceive the event in the first place may have been impaired by the presence of any of a number of factors. The witness may have been distraught, under the influence of alcohol, too far away to see clearly, not wearing prescription glasses or hearing aid when they witnessed an event. Such circumstances may have prevented the witness from perceiving the event accurately, although at the time of trial the witness states a clear recollection.

136. The witness' ability to recall an event and to clearly express what was seen, heard or felt may also affect the value of that witness' evidence. The passage of time since an event as well as other factors such as certain illnesses or an accident may affect a witness' memory.

137. Similarly, the manner in which questions are asked and the ability of a witness to understand the questions will obviously affect the quality of any responses given. Age, education, vocabulary and sophistication may all have an effect on how questions are understood and answered.

138. While the reliability of, and weight to be given, each piece of evidence must be assessed when determining the ultimate guilt or innocence of the accused the presiding officer will be required to consider the evidence in its totality:¹³⁸

...each piece of evidence must be carefully examined, because that is the accused's right and that is your duty, the case is not decided by a series of separate and exclusive

¹³⁷ Based on instruction for juries provided in G.A. Ferguson & J.C. Bouck, *Canadian Criminal Jury Instructions*, 3rd ed. (Vancouver: The Continuing Legal Education Society of British Columbia, 1995) 4.12-4 and 4.12-5.

¹³⁸ *R. v. Morin* (1988), 44 C.C.C. (3d) 193 at 208 (S.C.C.).

judgements on each item or by asking what does that by itself prove, or does it prove guilt? That is not the process at all. It is the cumulative effect...¹³⁹

139. Real or documentary evidence which corroborates the direct evidence of a witness may increase the weight that is given to that witness' evidence. Where evidence is contradicted by other evidence, an assessment will have to be made regarding the relative weight be given to all the evidence on that issue.

SECTION 5 DETERMINATIONS

140. There are various decisions that a presiding officer must make throughout the summary trial process. Examples of some of these have already been discussed in this chapter. There are also certain formal determinations that must be made. *Determinations* are findings or conclusions made by a presiding officer which have a direct bearing on the matters in issue or impact on the final disposition of the summary trial.

Referral of Charges

141. Before commencing a summary trial, as well as during the trial, there are various situations where the presiding officer must determine if it is appropriate for that officer to try the matter or whether the case should be or must be referred to another authority. The situations where these determinations are made as well as the procedures to be followed are reviewed in Section 6 of Chapter 11, Jurisdiction and Pre-trial Determinations.

Making Findings

142. *Findings* refer to the presiding officer's determination as to whether it has been proven, beyond a reasonable doubt, that the accused committed the offence charged. They include determinations regarding the guilt of the accused for any included offence or an attempt to commit an offence with which the accused has been charged.

143. The purpose of hearing evidence at a summary trial is to allow the presiding officer to determine whether the charge has been proven. To make this determination the presiding officer considers the evidence received at the summary trial relating to each matter in issue, as well as the representations made by the accused and the assisting officer.¹⁴⁰ Having assessed reliability and weight to be given to this evidence, the presiding officer will be in a position to conclude what happened at the relevant time and place.

144. After the presiding officer has determined what occurred, the presiding officer must apply the facts to the charges to determine whether all the required mental and physical elements of the offence have been proved beyond a reasonable doubt. For most offences, in addition to proving that the accused committed the improper act or omission, it must also be proved that the proper mental element was also present. Depending on the offence, it may be necessary to prove

¹³⁹ *Thomas v. The Queen*, [1972] N.Z.L.R. 34 (C.A.) as cited in *R. v. Morin* at 209.

¹⁴⁰ *QR&O* 108.20(7).

that the accused acted *wilfully, intentionally, recklessly, negligently*, etc. In order to do this, the presiding officer must understand the elements which are required in order for the charge to be made out. For a discussion on the required elements of an offence, see Chapter 8, Laying of Charges.

145. Different considerations apply when determining credibility in situations where only one version of the facts is presented as opposed to situations where the defence has raised a version of events that conflicts with the one that supports the charges. Both situations are discussed below.

146. **One Version of the Facts.** Where the evidence only supports one version of the facts, the presiding officer will still be required to assess the evidence presented and reach a finding based on the presiding officer's own assessment of the evidence. Of course, the presiding officer must always bear in mind that the accused can only be found guilty where guilt is proven beyond a reasonable doubt.

147. **Conflicting Versions of the Facts.** Where the evidence conflicts, the presiding officer should not automatically accept the version of the events which supports the charge in preference to the version which is most favourable to the accused. However, the presiding officer may do so where the presiding officer is:

satisfied beyond all reasonable doubt, having regard to all the evidence, that the events took place in this manner; otherwise, the accused is entitled, unless a fact has been established beyond a reasonable doubt, to the finding of fact the most favourable to him provided of course that it is based on evidence in the record and not mere speculation.¹⁴¹

When the presiding officer is in doubt as to which of two conflicting versions of the facts to accept the presiding officer must give the benefit of that doubt to the accused.

148. When there are two different versions of the facts, the presiding officer should consider the following when deciding which version to accept:

- a. first, if you accept the version of the facts of the accused or the defence witnesses you must acquit;
- b. second, if you do not believe the testimony of the accused or defence witnesses, but are left with a reasonable doubt after considering the evidence as a whole, you must acquit; and
- c. third, even if you are not left with a doubt by the testimony of the accused and the defence witnesses, you must determine whether, based on the evidence you accept, you are convinced beyond a reasonable doubt by the evidence of the guilt of the accused.¹⁴²

149. **Considering Statements of Offence and Particulars.** In considering the elements of a particular offence, the statement of offence and the statement of particulars are to be read and construed together.¹⁴³ This means that omissions in one could be cured by the inclusion of information in the other. For example, it would not be fatal to the charge if the statement of

¹⁴¹ *Nadeau v. R.* (1984), 15 C.C.C. (3d) 499 (S.C.C.).

¹⁴² *R. v. D.W.*, [1991] 1 S.C.R. 742 (S.C.C.) and *R. v. Haroun*, [1997] 1 S.C.R. 593 (S.C.C.).

¹⁴³ *QR&O* 101.065(2).

offence indicated that an accused had committed an act to the prejudice of good order and discipline, within the meaning of *NDA* section 129, where the statement of particulars indicated the circumstances without making reference to the prejudicial effect on good order and discipline. There would be no injustice to the accused in such circumstances since that information is already provided to the accused in the statement of offence. For further guidance concerning sufficiency of the particulars of a charge see Chapter 8, Laying of Charges.

150. In addition, *QR&O* state that in the interpretation of a charge, including a charge contained on a RDP in Part 1 (Charge Report), every proposition that may be reasonably implied, even though not expressed, shall be presumed in favour of supporting the charge.¹⁴⁴

151. With all of the above in mind, the presiding officer must determine whether or not the accused is guilty of the offence charged. The presiding officer must consider the evidence as a whole and determine whether guilt is proved beyond a reasonable doubt.¹⁴⁵ This requires that each element of the offence be proved beyond a reasonable doubt.¹⁴⁶

152. **Proof Beyond a Reasonable Doubt.** The *QR&O* provide the following guidance on what is meant by *reasonable doubt*:

At the outset of the summary trial, the accused is presumed to be innocent. That presumption must be displaced by evidence which satisfies the presiding officer, beyond a reasonable doubt, that the accused is guilty. The benefit of any reasonable doubt must be given to the accused. A reasonable doubt is not an imaginary or frivolous doubt nor is it based on sympathy or prejudice. A reasonable doubt is a doubt that is based on reason and common sense. It must be logically derived from the evidence or lack of evidence. The evidence must prove more than that the accused is probably guilty but does not involve proof to an absolute certainty; i.e. proof beyond *any* doubt. A reasonable doubt should not arise where, based on a fair and impartial consideration of all the evidence, the presiding officer has a decided and firm conviction that the accused is guilty.¹⁴⁷

Alternative Charges

153. When offences have been charged in the alternative,¹⁴⁸ an accused can only be found guilty of one offence. The presiding officer shall pronounce a finding on the alternative charge in respect of which the accused was found guilty and direct that the proceedings be *stayed* on the other charge.¹⁴⁹

¹⁴⁴ *QR&O* 101.065(1).

¹⁴⁵ *QR&O* 108.20 Note B.

¹⁴⁶ *R. v. Morin* at 210.

¹⁴⁷ *QR&O* 108.20 Note B. This guidance concerning the meaning of reasonable doubt takes into account the Supreme Court of Canada decision in *R. v. Lifchus* (1997), 118 C.C.C. (3d) 1.

¹⁴⁸ See Chapter 8, Laying of Charges, regarding alternative charges.

¹⁴⁹ *QR&O* 108.20(9).

Stay of Proceedings

154. While a *stay of proceedings* is not a finding, per se, it has the effect of halting or suspending the trial proceedings for an indefinite period. Therefore, although there are certain circumstances where another finding can be substituted for a stay of proceedings,¹⁵⁰ for most practical purposes, a stay of proceedings has the same effect as a finding of not guilty for the charge on which the stay has been directed.¹⁵¹ At the summary trial a stay of proceedings is used when alternative charges have been laid. When the presiding officer finds the accused guilty of one of the alternative charges, the presiding officer will pronounce a finding of guilt for that charge, and direct that the proceedings be stayed on all the alternative charges.¹⁵²

Included Offences

155. A person charged with a service offence may, in certain circumstances, be convicted of a related or less serious offence. Related or less serious offences are known as included offences. An accused may sometimes be convicted of an included offence where the charge laid has not been proved.¹⁵³ For example, a charge of assault causing bodily harm contains the included offence of common assault. A charge of desertion contains the included offence of being absent without leave. Included offences have a specific characteristic: the required elements of the less serious (included) offence form a clear sub-set of the required elements of the more serious offence with which the accused was charged. Therefore it is not necessary to charge a person alternatively in respect of the related or less serious offence.¹⁵⁴

156. In general, findings in respect of included offences can only be made when the evidence does not support the charge laid but is capable of supporting the included offence. For example, in a charge of assault causing bodily harm, if there is evidence that a victim was assaulted by the accused but no evidence was presented that the victim suffered bodily harm, the accused could be found guilty of common assault. Further, in a charge of desertion, if there is evidence that an accused was absent from their place of duty for an extended period of time but no evidence was presented with respect to the accused's intention to remain absent, the accused could be found guilty of being absent without leave, despite the fact that there would be insufficient evidence to find the accused guilty of desertion.

157. Not every offence contains an included offence.¹⁵⁵ Consequently, great care must be taken when determining whether an accused may be convicted of an included offence. The unit legal advisor should be consulted when determining whether a conviction for an included offence can be made.

¹⁵⁰ The Minister and certain other authorities may do so pursuant to *NDA* s.209(1)(b)(ii).

¹⁵¹ *QR&O* 108.23.

¹⁵² *QR&O* 108.20(9).

¹⁵³ *NDA* sections 133, 134, and 135 as referred to in *QR&O* 103.62 and Notes.

¹⁵⁴ *QR&O* 103.62 Note A.

¹⁵⁵ *QR&O* 108.20 Note D.

Attempts to Commit an Offence

158. The *NDA* provides that an accused may be convicted of an attempt to commit an offence, either as a result of having been charged with having committed a complete offence or as a result of having been charged with having attempted to commit an offence.¹⁵⁶

159. With respect to attempts to commit an offence, it is not an offence to think about committing or to prepare to commit an offence. An attempt involves conduct beyond mere preparation, but which falls short of the actual commission, provided the accused has the intention to commit the offence.¹⁵⁷ There is no generally accepted line between preparation and an attempt. In making this determination the presiding officer must consider the facts of the case, including the proximity between what the accused did and the completed offence as well as the intention of the accused to actually commit the offence and not merely to prepare to commit it.

160. An accused who is charged with a complete offence may be found guilty of attempting to commit that offence. If the accused was charged with attempting to commit an offence and the entire offence is proved, the presiding officer can direct that the accused be charged with having committed the complete offence. Alternatively, the presiding officer can find the accused guilty of only the attempted offence with which the accused was charged. However, the presiding officer may not find the accused guilty of the complete offence, as the accused was not charged with and did not stand trial with respect to that offence. In addition, if the accused has been convicted of attempting to commit an offence, the accused cannot later be tried for committing the complete offence based upon the same facts.¹⁵⁸

161. A presiding officer, faced with the situation where an attempt to commit an offence has been charged and the whole offence has been proved, must decide which is the better course of action to follow: to make a finding of guilt on the offence charged or to direct that the accused be charged with the complete offence. When making this decision, issues such as the availability of witnesses and the interests of justice and discipline should be considered.

162. If the presiding officer decides that the accused should be charged with the complete offence, the presiding officer would be required to adjourn the proceedings and refer the matter back to a charge laying authority.¹⁵⁹ Any new charge that is subsequently laid would have to be dealt with in accordance with prescribed pre-trial procedures, just as if no trial had been held.¹⁶⁰ In addition, a different presiding officer should hear the case as that the knowledge that the original presiding officer has of the case would preclude that officer from trying the new charge.

¹⁵⁶ *NDA* s. 137 as provided in *QR&O* 103.63.

¹⁵⁷ *Criminal Code* s. 24 discussed in *Procedure in Canadian Criminal Law* (Scarborough, ON: Carswell, 1997) at 476.

¹⁵⁸ *NDA* s. 137 and *QR&O* 103.63.

¹⁵⁹ In this situation the original charge would be held in abeyance rather than stayed. Neither would the charge that is stayed amount to a final disposition.

¹⁶⁰ These procedures are referred to in Section 4 of Chapter 8, Laying of Charges and Chapter 11, Jurisdiction & Pre-Trial Determinations.

Standard of Proof – Attempts to Commit an Offence and Included Offences

163. An accused has the right to a fair trial and should not be found guilty of any offence unless sufficient evidence has been heard or introduced at the trial, to prove the accused's guilt beyond a reasonable doubt.¹⁶¹ The legal presumption that the accused is innocent, unless the evidence proves guilt beyond a reasonable doubt applies equally to determinations made to attempts to commit offences or included offences.

164. While a presiding officer may find an accused guilty of an attempt to commit an offence or of an included offence, as opposed to the charge that actually appears on the RDP, such a finding should only be reached with great caution and after seeking advice from the unit legal advisor concerning the law of *attempts* and *included offences*.

Special Findings

165. A presiding officer may make a special finding of guilty instead of not guilty when the facts proved at the summary trial differ materially from the facts alleged in the statement of particulars, but are sufficient to establish the commission of the offence charged. However, the difference in the facts alleged and the facts proved must not have prejudiced the accused in preparing a defence.¹⁶² Presiding officers should consult with unit legal advisors when considering making special findings.

166. For example, where an accused was charged with being absent without leave from 1-15 Nov and the evidence showed that the accused was actually absent without leave from 5-10 Nov, the accused could, by special finding, be found guilty of being absent without leave from 5-10 Nov.¹⁶³

Informing the Accused of all Findings

167. As with any other finding, where a presiding officer makes a special finding, finds an accused guilty of an attempt to commit the offence charged, or finds an accused guilty of an included offence, the accused must be informed of that finding.¹⁶⁴

168. The wording used in the findings portion (Part 6) of the RDP must reflect the actual findings made at trial including findings of guilty on included offences, attempts to commit offences, as well as stays of proceedings or special findings.¹⁶⁵

¹⁶¹ QR&O 108.20 Note B.

¹⁶² QR&O 103.64.

¹⁶³ QR&O 108.20 Note D.

¹⁶⁴ QR&O 108.20(8).

¹⁶⁵ QR&O 103.64 Note.

CHAPTER 14

SENTENCING AND PUNISHMENT

SECTION 1

GENERAL

1. The passing of an appropriate sentence is an essential part of the trial process, and often presents one of the greatest challenges to a presiding officer. In order to assist the presiding officer, the procedures to be followed when imposing a sentence are set out in *QR&O*. The procedures incorporate the required elements of fairness and provide guidance on the factors to be considered when determining an appropriate sentence.

2. A sentence may be imposed that consists of more than one punishment. In order to impose an appropriate sentence there must be a clear understanding of the general principles of sentencing, and the application of those principles in the maintenance of the discipline of an armed force. The presiding officer must also consider the circumstances of the offence and the offender, the scope and effect of punishments, and the procedures to be followed in determining the type and severity of punishment.

SECTION 2

THE PURPOSE AND PRINCIPLES OF SENTENCING AND PUNISHMENT

Purpose and Goals

3. The fundamental purpose of sentencing is the protection of society and the promotion of respect for the law through just sanctions. There are four generally accepted goals of sentencing. They are:

- a. general deterrence;
- b. specific deterrence;
- c. rehabilitation and reform; and
- d. retribution.¹

¹ *R. v. Lyons*, [1987] 2 S.C.R. 309 and *R. v. Sweeney* (1992), 71 C.C.C. (3d) 82 (B.C.C.A.). For a general review of sentencing principles see E.G. Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2 ed. (Canada Law Book Co., 1998) at 18-1 to 18-17. Also see C. Ruby, *Sentencing* 3rd ed. (Toronto: Butterworths, 1994) at 1-20. These purposes and principles of sentencing are reflected in Canadian criminal law in the *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 718, which states:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- a. To denounce unlawful conduct;
- b. To deter the offender and other persons from committing offences;
- c. To separate offenders from society, where necessary;
- d. To assist in rehabilitating offenders;
- e. To provide reparations for harm done to victims or to the community; and
- f. To promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and the community.

4. *General deterrence* is based on the concept that legal sanction against an offender will discourage potential offenders. General deterrence is often given particular weight when offences involve violence, or when there is a prevalence of a specific offence in a community. *Specific deterrence* has the goal of dissuading the offender from re-offending. *Rehabilitation* is emphasized in relation to an offender who has demonstrated a reasonable probability that the offender can become a law abiding member of society. *Retribution* will be highlighted to demonstrate society's aversion towards morally reprehensible conduct. Retribution is linked to denunciation as a sentencing objective.

5. None of these sentencing goals should be considered on their own. For example, denunciation, while a legitimate goal of sentencing, can only be assessed having regard to the circumstances of the case and the offender. When assessing the weight given to the goal of denunciation consideration should also be given to the effect it might have on the rehabilitation of the offender.²

6. A basic principle in sentencing is that a punishment imposed must be proportional to the seriousness of the offence. This helps ensure that the public, including members of the CF, can be satisfied that the offender deserves the punishment, and feels confident in the fairness and rationality of the system.³ Punishment must be proportionate to the moral blameworthiness of the offender. A person causing intentional harm should be punished more severely than someone causing harm unintentionally.⁴

Unique Aspects of Military Society

7. The unique requirement for an armed force to maintain discipline may require specific emphasis to be placed on one or more of the goals of sentencing. The CF has a separate system of military tribunals to deal with matters that pertain directly to discipline, efficiency and morale. In the words of the Chief Justice of the Supreme Court of Canada:

To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct...[r]ecourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.⁵

8. In a military context the punishment imposed may be affected by a need to emphasize the goals of specific and general deterrence. Sentencing in military cases must not only promote good order, but also high morale and discipline. Discipline requires the instant obedience to

² *R. v. Pettigrew* (1990), 56 C.C.C. (3d) 390 (B.C.C.A.).

³ *Reference re: Section 94(2) of the Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 (S.C.C.).

⁴ *Regina v. M. (C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.).

⁵ *Genereux v. R.* (1992), 60 C.C.C. (3d) 536 (S.C.C.). Per Lamer C.J..

lawful orders. Therefore, when sentencing a member for a failure to carry out assigned duties, particular emphasis is normally placed on specific and general deterrence.⁶

9. The different nature of offences in military society may also have an impact on the severity of the sentence passed by a service tribunal. For example, theft and assault may have a more serious connotation in military life. Again the Supreme Court of Canada acknowledged these differences in adopting the following statement:

Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier, is also a serious offence.⁷

Similarly while a civilian has the right not to show up at work members of the CF may find themselves charged with absence without leave.⁸

10. Consideration may also be given to the trust that is placed in members of the CF, particularly by virtue of rank and responsibility. Military service often requires CF personnel to work independently. Consequently superiors often place significant reliance on subordinates carrying out their assigned duties and reporting back accurately. A failure to do so, without lawful excuse, undermines authority and discipline within the unit. This explains the particular emphasis given general and specific deterrence in such cases.⁹

11. The unique requirements of military society and the need to maintain a disciplined armed force do not always require a more severe penalty than would be appropriate in civilian life. This is particularly true at the summary trial level where a high degree of emphasis is placed on rehabilitating offenders found guilty of minor disciplinary infractions.¹⁰ While the punishment of detention was introduced in 1906 at the summary trial level as an alternative to imprisonment, it was intended to be *rehabilitative* in nature, and was to be given to those personnel who were to be retained in the armed forces.¹¹

12. Generally, the most appropriate punishment is the least required to maintain discipline. The punishment must be appropriate to both the offence and the offender and serve as an adequate deterrent to the accused and others who may be tempted to commit similar offences.¹²

⁶ *R. v. Stewart* (1993), 5 C.M.A.R. 205. The need for both general and specific deterrence is reflected in the sentencing guidance provided in *QR&O* 108.20, Note G.

⁷ *MacKay v. R.*, [1980] 2 S.C.R. 371.

⁸ *MacKay v. R.*, [1980] 2 S.C.R. 371.

⁹ *R. v. Stewart* (1993), 5 C.M.A.R. 205.

¹⁰ This explains the traditional reliance placed on minor punishments as a rehabilitative tool of discipline at the unit level. See *QR&O* 104.13 Note B.

¹¹ Manual of Military Law 1914, (London: H.M. Stationary Office, 1914), *The Army (Annual) Act, 1913*, s. 44, note 7.

¹² *QR&O* 108.20, Note G.

SECTION 3

SENTENCING PROCEDURE

Factors to be considered

13. When an accused is found guilty the presiding officer shall receive any evidence concerning the appropriate sentence to be imposed, including aggravating and mitigating factors.¹³ The factors which should be considered when considering sentence include:

- a. the deterrent effect of the sentence on the offender and other members, bearing in mind that one of the purposes of summary proceedings is the maintenance of military discipline at both the individual and unit level;
- b. the number, gravity and prevalence of the offences committed;
- c. the degree of premeditation and the consequential harm caused;
- d. the degree of provocation and any other extenuating circumstances;
- e. any time spent in custody prior to or during trial;
- f. where applicable, any sentence imposed on a co-accused or accomplice;
- g. the need for consistency in sentencing, having regard to punishments imposed on other offenders;
- h. the offender's circumstances and previous character including his age, rank, length of service, rate of pay and financial situation, family and personal problems, background, training and experience in the Canadian Forces having regard to his military record and in particular any previous convictions, honours, awards, medals and decorations; and
- i. any indirect consequence of the finding or sentence.¹⁴

14. In considering any administrative action which has been or which may be taken, it must be remembered that the imposition of a disciplinary punishment and the taking of administrative action in respect of the same incident does not constitute *double jeopardy*. The term *double jeopardy* refers to someone being placed in jeopardy under the criminal law twice for the same matter.¹⁵ Administrative sanctions relate to the military service of a member.

15. Put in a civilian context a foreman may be found stealing from a warehouse. The company may choose to terminate the employment of the foreman, while a civilian criminal court may decide to impose a fine and a probationary sentence. The fact that in the military the representative of the employer is also often the presiding officer at a summary trial sometimes causes confusion regarding the interaction between administrative and disciplinary action.

¹³ QR&O 108.20 (10).

¹⁴ QR&O 108.20, Note F.

¹⁵ R. v. Riddle, [1980] 1 S.C.R. 380.

16. Administrative action, such as a recorded warning or counselling and probation, is not a substitute for disciplinary action, nor do such sanctions preclude it.¹⁶ The administrative action taken may include consideration of a pattern of conduct and overall job performance, while the sentence passed at a summary trial relates to the specific offence(s) for which the member has been convicted, including any aggravating or mitigating circumstances.

Trial Procedure

17. The offender may present evidence, testify and question each witness about any matter concerning the sentence. During the presentation of any evidence the presiding officer may also question each witness, including the offender if the offender chooses to testify, on any matter concerning the sentence. The offender may make representations concerning the sentence.¹⁷ The assisting officer may assist and speak for the accused during the sentencing phase of the trial.¹⁸

18. A presiding officer may receive any evidence that the officer considers to be of assistance and relevant in imposing an appropriate sentence. Guidance on the reception of evidence is found in Chapter 13, Conduct of Summary Trial.

19. A presiding officer trying an accused charged with more than one offence may only pass one sentence in respect of all the charges with which the accused has been found guilty.¹⁹

20. The presiding officer will pass sentence in the presence of the offender, the assisting officer and the public.

SECTION 4 POWERS OF PUNISHMENT

Punishments Generally

21. Under military law the scale of punishments which can be imposed at service tribunals ranges from minor punishments to imprisonment for life.²⁰ The punishments that can be imposed at summary trial are limited to detention, reduction in rank, forfeiture of seniority, severe reprimand, reprimand, fine and minor punishments.

22. The restriction on the available punishments at summary trial reflects both the minor nature of the offences which may be tried at that level, and the intention that presiding officers impose punishments which are primarily *corrective* in nature.²¹ Presiding officers' powers of punishment are consistent with the purpose of summary trial proceedings, i.e. contributing to the

¹⁶ CFAO 26-17, para. 7.

¹⁷ QR&O 108.20 (10).

¹⁸ QR&O 108.14(4)(b).

¹⁹ NDA s. 148, QR&O 104.15, QR&O 108.20 Note E.

²⁰ NDA s.139(1).

²¹ Summary Trial Working Group Report, 2 March 1994, Volume I at 87.

maintenance of military discipline and efficiency, including reinforcing the *habit of discipline* at the unit level.²²

23. The punishments that are available at summary trial depend upon the type of summary trial and the rank of the offender.

Powers of Punishment of a Superior Commander

24. The powers of punishment of a superior commander are set out in the Table to *QR&O* 108.26. That Table is reproduced at Annex S.

Powers of Punishment of a Commanding Officer

25. The powers of punishment of a CO are limited to the punishments and subject to the conditions set out in the Table to *QR&O* 108.24. That Table is found at Annex T.

Powers of Punishment of a Delegated Officer

26. The powers of punishment of a delegated officer are limited to the punishments and subject to the conditions set out in the Table to *QR&O* 108.25. That Table is found at Annex U.

27. Even though s. 163(4) of the NDA states that a CO could delegate the authority to impose a punishment of detention not exceeding fourteen days, the power of a delegated officer to impose such a punishment has been restricted by *QR&O* 108.25. Therefore, the only powers of punishment that a delegated officer can impose are a reprimand, fine, confinement to ship or barracks, extra work and drill, stoppage of leave and caution.

28. In delegating powers of trial and punishment a CO may further limit the types of punishment and the amount of punishment found in the Table to *QR&O* 108.25. For example, a CO may determine that a delegated officer will not be authorized to impose a reprimand or a fine. This restriction must be in writing and made at the time of the delegation of the CO's powers.²³

Types of Punishments at Summary Trial

29. **Detention.** A CO is the only presiding officer with the authority to impose a punishment of detention. Detention can only be imposed on NCMs of the rank of sergeant and below.²⁴ The

²² *QR&O* 108.02. See also *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services (March 25, 1997)* at 40.

Summary trials are designed for minor service offences, where the likely punishments are not too severe.... The object is to deal with the alleged offences quickly, within the unit, and to return the member to the service of the unit as soon as possible. In essence, the summary trial is designed as an efficient mechanism for the promotion of internal unit discipline.

²³ *QR&O* 108.10(3).

²⁴ *NDA* s. 142(1), Table to *QR&O* 108.24, Punishment 1, Column D. Since detention cannot be imposed on commissioned officers, any offence committed by an officer that warrants a loss of liberty should be dealt with by a court martial. In this regard, the punishment of detention imposed on an NCM at a summary trial should not be viewed as an

maximum period of detention that can be imposed is 30 days.²⁵ The amount of punishment of detention should be expressed in terms of *days*.²⁶ Before sentencing an offender to detention, the CO must be satisfied that the punishment is both appropriate and essential. It normally should only be used when other lesser punishments have failed to improve the offender's conduct. However, the punishment of detention may also be imposed as means of dealing with a particularly serious incident of misconduct.²⁷

30. In terms of the goals of sentencing, detention primarily incorporates elements of *general deterrence*, *specific deterrence* and *retribution*.

31. In considering the powers of punishment of summary trials as part of its 1997 military justice review, the Special Advisory Group "...heard from the commanders of commands and many other senior officers that it is important to retain this form of punishment, at least as an ultimate deterrent."²⁸ However, it should not be forgotten that detention has, since its inception, been intended to be *rehabilitative* as well. Therefore, the punishment of detention should never be equated to imprisonment. Nor should the imposition of the punishment of detention be seen as automatic grounds for recommending the release of an offender from the CF.

32. The *rehabilitative* aspect of the punishment of detention is reflected in the fact that when a NCM above the rank of private is sentenced to detention, the service detainee²⁹ is only deemed, to be reduced to the rank of private for the period of detention³⁰ and will be paid as a private during the period of detention.³¹

33. Upon release from detention the offender regains the offender's original rank unless also given the punishment of reduction in rank, bearing in mind that the punishment of detention can be combined with the punishments of reduction in rank and a fine.³² In such a case the member would return to the rank to which the offender was reduced at trial

34. **Reduction in Rank.** A CO can reduce a sergeant, master corporal or corporal by one substantive rank.³³ An appointment to master corporal is not a rank. Therefore, a sergeant who is sentenced to reduction in rank would be reduced to the rank of corporal, whereas a master corporal and corporal would be reduced to the rank of private. An offender who is reduced in rank to private holds the highest classification within that rank.³⁴

additional obligation for NCMs, but rather an opportunity to receive a punishment which is more rehabilitative in nature than is available for commissioned officers.

²⁵ Table to *QR&O* 108.24.

²⁶ *QR&O* 104.09, Note.

²⁷ *QR&O* 108.20, Note H.

²⁸ *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services (March 25, 1997)* at 45.

²⁹ *NDA*, s. 2 defines a "service detainee" as any person "...who is under sentence that includes a punishment of detention imposed on that person pursuant to the *Code of Service Discipline*."

³⁰ *NDA*, s. 142(2), *QR&O* 104.09.

³¹ Table to *QR&O* 108.24, Punishment number 1, Column F. For an explanation for the forfeiture of pay that would apply to such a member see *QR&O* 208.30(3).

³² Table to *QR&O* 108.24, Punishment number 1, Column E.

³³ Table to *QR&O* 108.24, Punishment number 2, Column C.

³⁴ *QR&O* 104.10(3).

35. Where an offender is reduced in rank the offender is eligible to count for incentive pay in the lower rank all qualifying service in the higher rank, together with all previous qualifying service in the lower rank.³⁵ The same conditions are used to determine seniority in rank for promotion purposes.³⁶

36. The punishment of reduction in rank has a long lasting and significant financial impact on the service member. It was for that reason that in 1997 the Special Advisory Group recommended that the punishment of reduction in rank imposed at summary trial be limited to one substantive rank only.³⁷ This limitation is consistent with the principle of sentencing that the punishment must be proportionate to the seriousness of the offence and the moral blameworthiness of the offender. In assessing whether to impose the punishment of reduction in rank the presiding officer should weigh the financial impact of this type of punishment having regard to the seriousness of the offence committed and degree of blameworthiness.

37. The punishment of reduction in rank has not traditionally been viewed as a *penal consequence*, but rather is a career related disciplinary action designed to maintain professional standards and integrity.³⁸ Therefore the punishment of reduction in rank may be most appropriate where an offender has abused their rank, or has acted in a manner which demonstrates the offender cannot meet the standards of leadership expected at that rank level. For example if a PO2 is convicted under section 95 of the NDA of verbally abusing subordinates, then the punishment of reduction in rank to Leading Seaman may be appropriate in the circumstances. Similarly, the offence of stealing³⁹ by an NCO, particularly where that service member is in a position of trust over financial assets, may justify a loss of rank.

38. In considering an appropriate sentence, concern over the professional and financial impact of the punishment of reduction in rank should not be given inordinate weight in relation to the ultimate objective of maintaining a disciplined armed force. In *R v. Lyons*⁴⁰ an MWO, who was the senior NCM in charge of vehicle maintenance and had authority to issue purchase orders for goods and services to civilian suppliers, pled guilty to three charges of “fraudulent acts” and one charge of obstructing justice.⁴¹ The CMAC stated the following with respect to the punishment of reduction in rank imposed by the Standing Courts Martial in that case:

Had these offences been committed by a civilian employee, that employee would be subject to discharge for cause. That would be the employer’s choice but, if taken, would be unexceptionable given the nature of the offences. The employee would, as the appellant, be

³⁵ QR&O 204.015.

³⁶ QR&O 3.09(3)(b)(ii) and para. 3 of Annex F to CFAO 49-4.

³⁷ *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services (March 25, 1997)* at p. 48. See also the Report of the Summary Trial Working Group, 2 March 1994 at 106.

³⁸ Summary Trial Working Group Report, 2 March 1994, Volume I at 108. In *Landry v. Gaudet*, (1992) 95 D.L.R. (4th) 289 the Federal Court Trial Division held that sanctions under *The Royal Canadian Mounted Police Act*, such as dismissal, demotion and forfeiture of pay were not penal consequences.

³⁹ NDA s. 114.

⁴⁰ (1993), 5 C.M.A.R. 130.

⁴¹ The fraudulent acts were charged under NDA s. 117(f). That offence falls within summary trial jurisdiction. The charge of obstruction of justice contrary to NDA s. 130 and s. 139 of the *Criminal Code of Canada* does not fall within summary trial jurisdiction. This example is included to emphasize the principles which the CMAC apply regarding the punishment of reduction in rank generally.

entitled to pension benefits. Unlike the appellant, the civilian would lose all entitlement to severance pay, promotion or pay increments attached to that employment. It is true that these losses would not be implicit in the sentence imposed on the civilian but they would be a direct result of the commission of the offence.... On balance the appellant is better off than his civilian counterpart. He still has a job.⁴²

39. **Severe Reprimand and Reprimand.** A superior commander has the authority to impose the punishment of a severe reprimand or a reprimand on officers below the rank of LCol or NCMs above the rank of sergeant.⁴³ COs and delegated officers may only impose the punishment of a reprimand.⁴⁴ The punishments of a severe reprimand and a reprimand may be accompanied by the punishment of a fine. A superior commander may impose a severe reprimand or a reprimand to an officer below the rank of lieutenant-colonel or to a NCM above the rank of sergeant.⁴⁵ COs and delegated officers may impose a reprimand on officer cadets, sergeants, master corporals and corporals.⁴⁶

40. The punishments of severe reprimand and reprimand primarily reflect the *retributive* goal of punishment. However these punishments also incorporate both *general* and *specific deterrence*. They are punishments which are primarily *disciplinary* in nature and which are intended to reflect a sanction against misconduct related to the rank and status of the offender. The punishments of a severe reprimand and a reprimand are intended to stand out as a blemish on the career record of the offender. In imposing this punishment recognition should be given to the place which these punishments hold on the scale of punishments. A severe reprimand is higher on the scale of punishments than a reprimand. They are both higher on the scale of punishments than fines and minor punishments. They are not subject to automatic removal from the member's conduct sheet after one year.⁴⁷

41. **Fine.** Both superior commanders and COs may impose a fine up to 60% of the offender's monthly basic pay.⁴⁸ Delegated officers may impose a fine up to 25% of monthly basic pay.⁴⁹ A fine must be imposed in a stated amount expressed in dollars.

42. The terms of the payment of the fine are in the discretion of the presiding officer who imposes that punishment.⁵⁰ After a summary trial the presiding officer who conducted the trial may vary the terms of payment.⁵¹ In determining the terms of payment of a fine, a presiding officer should have regard to the state of the offender's pay account, and to the extent practical, the financial obligations of the offender.

⁴² (1993), 5 C.M.A.R. 130. The *Lyons* case was quoted with approval in *R v. Stewart* (1993), 5 C.M.A.R. 205, at 214. See also *Matthews v. R.* (1992), 5 CMAR 140 and *Martin v. R* (1995) CMAC 378.

⁴³ Table to *QR&O* 108.26.

⁴⁴ Table to *QR&O* 108.24, Punishment number 3 and Table to *QR&O* 108.25, Punishment number 1.

⁴⁵ *QR&O* 108.12.

⁴⁶ Table to *QR&O* 108.24, Punishment number 3, Column D and Table to *QR&O* 108.25, Punishment number 1, Column D.

⁴⁷ DAOD 7006-1, Preparation and Maintenance of Conduct Sheets at 5/8.

⁴⁸ Table to *QR&O* 108.26 and Table to *QR&O* 108.24, Punishment number 4, Column C.

⁴⁹ Table to *QR&O* 108.25, Punishment number 2, Column C. For calculation of the *monthly basic pay* of members of the Reserve Force on other than Class "C" Reserve Service, see *QR&O* 203.065(6).

⁵⁰ *QR&O* 108.24 Note B, 108.25 Note B and 108.26 Note B.

⁵¹ *NDA* s. 145 and *QR&O* 104.12.

43. In both the civilian and military justice systems a fine is a common means of dealing with crime. Its popularity can be linked to the fact that a fine involves no expense to the public, no burden on the prison/detention system, no social dislocation and less stigma than other punishments.⁵² A fine is particularly useful where the goal is to stop an offender from profiting from their misconduct. However, where the presiding officer wishes to impose a punishment that has a longer-term or continuing impact on the accused, the fine may not be the most appropriate punishment.⁵³ The imposition of a fine also may not reflect the seriousness of the offence.

Minor Punishments

44. Minor punishments consist of confinement to ship or barracks, extra work and drill, stoppage of leave, and a caution.⁵⁴ The imposition of a minor punishment reflects the *rehabilitation* goal of sentencing. The rationale of a minor punishment is to correct the conduct of an offender who has committed a service offence of a minor nature while allowing that offender to remain a productive member of the unit.⁵⁵ A superior commander does not have authority to impose a minor punishment.⁵⁶

45. **Confinement to Ship or Barracks.** Both COs and delegated officers can impose the punishment of confinement to ship or barracks on officer cadets, master corporals, corporals and privates. A CO may impose a maximum of 21 days punishment while a delegated officer is limited to a maximum of 14 days.⁵⁷ The punishment of confinement to ship or barracks includes the punishment of extra work and drill for the same term as the term of confinement to ship or barracks.⁵⁸ Therefore, the default rules for the punishment of extra work and drill apply to an offender undergoing a punishment of confinement to ship or barracks.

46. An NCM undergoing a punishment of confinement to ship or barracks shall not, without the specific permission of the CO, be permitted during the hours the offender is not on duty, to go beyond the limits prescribed by the CO in standing orders.⁵⁹ Members who do not normally live in quarters may be ordered to do so for the duration of the punishment.

47. The punishment of confinement to ship or barracks may be particularly appropriate where the offender has not been able to demonstrate compliance with the routines of service life. An example of this type of offence is where an offender is absent without leave due to being late for duties. In extreme cases the failure of a member to arrive at a rendezvous or duty station on time could result in the injury or death of other members of the unit. Therefore, it is extremely

⁵² C. Ruby, *Sentencing* 4th ed. (Toronto: Butterworths, 1994) at 294, quoting from Alex Samuels, "The fine: The Principles", [1970] Crim. L.R. 201.

⁵³ Where guidance and control are warranted the more "corrective" punishments of detention, confinement to ship or barracks or extra work and drill might be appropriate.

⁵⁴ NDA, section 146 and QR&O 104.13.

⁵⁵ QR&O 104.13 Note B.

⁵⁶ Table to QR&O 108.26.

⁵⁷ Table to QR&O 108.24, Punishment number 5, Column C and Table to QR&O 108.25, Punishment number 3, Column C.

⁵⁸ QR&O 108.37(2).

⁵⁹ QR&O 108.37(1).

important to instil the *habit of obedience* in respect of time and routine at the earliest stages of military service, and reinforce that habit through appropriate corrective action.

48. **Extra Work and Drill.** The punishment of extra work and drill is intended to improve an offender's military efficiency and discipline. It may include the performance of normal duties for longer periods than would be required of the offender if the punishment had not been imposed, and other useful work and extra drill, at such times as may be authorized under unit orders, or other military training. The punishment of extra work and drill shall not be carried out on Sunday. However that day shall count toward the completion of the term of punishment.⁶⁰

49. COs and delegated officers may impose the punishment of extra work and drill on officer cadets, master corporals, corporals and privates. A CO can impose a maximum of 14 days punishment, while a delegated officer is limited to a maximum of 7 days.⁶¹

50. Like all punishments the punishment of extra work and drill should be linked to the offence and the deficiency demonstrated by the offender. Extra work and drill is particularly appropriate in circumstances where an offender has displayed poor dress and deportment, or consistently performs duties below standard. At the same time it must be realized that in some training environments the existence of full training schedules may limit the utility of imposing this punishment.

51. The extra work portion of the punishment provides a unique opportunity to have an offender perform *community service*, bearing in mind that the failure of a member to adequately perform duties, report for duties on time or properly supervise subordinates often places additional burdens on other members of the unit. The extra work portion of the punishment could include extra work details and fatigues such as loading supplies, standing guard, performing cleaning stations or standing additional watches. Extra work could also include acting as part of a work party, or assisting the many volunteers required for the social events that are integral to life in a military community. For example, offenders undergoing the punishment of extra work and drill could be assigned to help out at sporting events or concerts.⁶²

52. The drill portion of the punishment of extra work and drill is particularly relevant in instilling the automatic respect for orders and persons in authority. This may be most appropriately employed when dealing with minor incidents of insubordinate behaviour.⁶³

53. **Stoppage of Leave.** When the punishment of stoppage of leave is imposed, the offender shall not be granted leave during the term of the sentence, unless in exceptional circumstances authority to do so is granted by the CO.⁶⁴ During the hours that the offender is not on duty a NCM shall not, without specific permission of the CO, go beyond the geographic limits

⁶⁰ *QR&O* 108.35.

⁶¹ Tables to *QR&O* 108.24 Punishment number 6, column C and D, and *QR&O* 108.25, Punishment number 4, column C and D.

⁶² In assigning offenders to extra work and drill care should be taken to ensure that the work does not interfere with the regular employment of civilians including public servants.

⁶³ *NDA* s. 85, *QR&O* 103.18. In determining an appropriate sentence the degree and type of insubordinate behaviour could be the basis upon which a punishment of confinement to ship or barracks or extra work and drill is imposed. Since extra work and drill is included in the punishment of confinement to ship or barracks the extra routine imposed on living in quarters could be the basis upon which the more severe punishment is imposed.

⁶⁴ *QR&O* 108.36(1).

prescribed by the CO in orders.⁶⁵ The area contained in the geographic limits to be prescribed by the CO in standing orders must be wide enough to permit the offender to have access to the normal amenities and routine of service life.

54. The punishment of stoppage of leave is particularly effective when used on operational deployments. For example, when an HMC ship is visiting a foreign port, or when a unit is deployed abroad during peace support operations. However, the punishment of stoppage of leave is not to be used as a means to impose a form of confinement to ship or barracks.⁶⁶

55. The punishment of stoppage of leave only involves a geographic limitation. While it may be appropriate to require a member undergoing a punishment of stoppage of leave during a weekend to report to a specified authority, it would not be appropriate to require the member to report so often that the nature of the punishment was effectively changed to that of confinement to ship or barracks.⁶⁷

56. COs and delegated officers may impose the punishment of stoppage of leave on officer cadets, sergeants, master corporals, corporals and privates. A CO can impose a maximum punishment of 30 days, while a delegated officer is limited to a maximum of 14 days.⁶⁸

57. **Caution.** A caution should be imposed where it is desired to give an offender a formal warning without other punishment.⁶⁹

58. COs and delegated officers may give a caution to officer cadets, sergeants, master corporals, corporals and privates.⁷⁰

59. **Rules governing minor punishments** A CO of a base, unit or element shall ensure that a set of rules for defaulters is issued, that the rules are made known to all defaulters and that those rules are rigidly enforced.⁷¹ These rules are a necessary precondition for the administration of minor punishments. The rules allow the CO to tailor a programme of extra work and drill to improve the military efficiency and discipline of members convicted of minor service offences. They also define the geographic limits within which an offender undergoing the punishments of stoppage of leave or confinement to ship or barracks must remain and the routine applicable to offenders serving those punishments.⁷² COs must exercise care to ensure that the rules that they issue governing the administration of minor punishments are consistent with the provisions respecting the punishments of extra work and drill, confinement to ship or barracks and stoppage of leave.

60. The punishments of confinement to ship or barracks, stoppage of leave and extra work and drill all involve some control over the movements of offenders undergoing punishment. This control over movement must be viewed in a military context.

⁶⁵ *QR&O* 104.13 Note C.

⁶⁶ This is particularly important to note in relation to sergeants on whom the punishment of confinement to ship or barracks cannot be imposed.

⁶⁷ *QR&O* 104.13 Note D.

⁶⁸ *QR&O* 108.24, Punishment number 7 and *QR&O* 108.25, Punishment number 5.

⁶⁹ *QR&O* 108.38.

⁷⁰ *QR&O* 108.24, Punishment number 8 and *QR&O* 108.25, Punishment number 6.

⁷¹ *QR&O* 104.13(3).

⁷² *QR&O* 104.13 Note C.

61. It is an essential part of maintaining discipline that faults be corrected swiftly. The goal is to catch faults when they are relatively minor in nature thereby ensuring a member does not embark on more serious breaches of discipline. The corrective action is often based on the offender repeating an act that was improperly completed until it is done correctly. This re-training is often best carried out in an atmosphere of collective discipline. In other words the reinforcement of military life, routine and drills.

SECTION 5

SUSPENSION OF THE PUNISHMENT OF DETENTION AT TRIAL

Authority to Suspend

62. Where an offender has been sentenced to a period of detention the CO who imposed that punishment may, at the time of imposition of the detention, suspend the carrying into effect of the punishment.⁷³ A punishment of detention that has been suspended is deemed to be wholly remitted one year after the date that the suspension is ordered, unless the punishment is put into execution prior to the end of that one year period.⁷⁴

63. The CO of an offender, or any other suspending authority, may at any time while the punishment is suspended direct that the offender be committed to complete the punishment of detention.⁷⁵ The punishment of detention will then be deemed to commence on the date on which it is put into execution, even if that date causes the punishment to run beyond the year following the original ordering of the sentence.

64. A suspending authority may, at any time while a punishment is suspended, direct the authority empowered to do so to commit the offender and, after the date of the committal order, that punishment ceases to be suspended.⁷⁶

65. For example, a corporal is sentenced to a period of 30 days detention on 1 February 1999, and the CO suspends that punishment. The offender continues to serve on assigned duties in the rank of corporal.⁷⁷ However, if before 1 February 2000 the corporal becomes involved in another incident indicating a lack of discipline or other inappropriate conduct, a suspending authority may lift the suspension. The corporal will commence the period of detention at the deemed rank of private for the period of detention. The corporal does not have to be convicted or even charged before the lifting of the suspension. However, the incident resulting in the lifting of the suspension of the punishment of detention should be sufficiently serious to justify such action.

⁷³ NDA s. 215, *QR&O* 104.14.

⁷⁴ NDA s. 217(3).

⁷⁵ NDA s. 218(1).

⁷⁶ NDA s. 218(1).

⁷⁷ The corporal continues to serve in that rank while under suspension since the deemed reduction in rank to private only applies while the offender is actually undergoing the punishment of detention. NDA s. 142(2), *QR&O* 104.09.

Flexibility in Sentencing

66. Changes to the table of punishments that took place in November 1997 were designed to restructure the scheme of punishments in keeping with the summary trials disciplinary, as opposed to penal, character and to make the various sentencing options available to presiding officers more flexible by broadening their application. The changes to the powers of punishments available to COs included the following:

- a. punishments of confinement to ship or barracks and extra work and drill were made uniformly applicable to MCpls and Cpls and Ptes;
- b. the pre-existing limitations on the amount of a fine when accompanying the punishment of detention were removed (the maximum fine that could previously be imposed in such circumstances was \$50, in the case of Sgts, MCpls and Cpls, and \$25 in the case of Ptes);
- c. personnel undergoing detention are in effect paid as privates;
- d. punishments were removed (severe reprimand, forfeiture of seniority and extra work and drill not exceeding 2 hours/day); and
- e. the punishment of reduction in rank was limited to one substantive rank.

67. The changes to the powers of punishments available to delegated officers included the following:

- a. punishments of confinement to ship or barracks and extra work and drill were made uniformly applicable to MCpls and Cpls and Ptes;
- b. stoppage of leave maximum reduced from 30 to 14 days;
- c. fine amounts increased from 200.00 to 25% of basic monthly pay; and
- d. punishments were removed (severe reprimand and extra work and drill not exceeding 2 hours/day);

68. Apart from the traditional sentencing choices of incarceration and fines the *Criminal Code of Canada* provides judges with a number of other sentencing options including:

- a. fine option programs (a period of community service in lieu of paying a fine);
- b. probation (an order compelling an offender to comply with conditions set by the court for a set period of time);
- c. conditional sentences; (sentence of incarceration served in the offender's community i.e.: home); and
- d. intermittent sentences (sentence of incarceration served intermittently i.e.: weekends).

69. These civilian sentencing options are to provide judges with a flexible approach to sentencing that advances the purposes and principles of sentencing in Canadian society; namely, to contribute to respect for the law and the maintenance of a just, peaceful and safe society⁷⁹.

⁷⁹ *Criminal Code of Canada*, s. 718

They are designed to facilitate the supervised reconciliation and reintegration of the accused into society as a productive working member of the community in ways that will not jeopardize public safety, while providing the offender with a sentence that is appropriate to their individual circumstances.

70. Although sentencing in the military justice system also seeks to contribute to respect for the law and the maintenance of a just, peaceful and safe society, its primary purpose is to ensure effective and efficient enforcement of strict discipline to promote efficiency and high morale. The various sentencing options available at the summary trial level either alone or in combination may be utilized to achieve flexibility in sentencing similar to that available to civilian courts while enforcing the high level of discipline that is so essential to good order and high morale.

71. Examples of sentencing approaches in the summary trial context that are somewhat analogous to the civilian sentencing alternatives are as follows:

- a. the punishments of extra work and drill and confinement to ship or barracks may be considered analogous to fine option programs;
- b. extra work and drill and close unit supervision may be analogous to a conditional sentence; and
- c. a suspended sentence is comparable to probation;

72. In summary, the differences in military sentencing options from civilian sentencing options primarily exist due to the differing needs of a disciplinary system as opposed to a criminal system. However, both systems are capable of a large degree of sentencing flexibility with the judicious use of the available sentencing options.

CHAPTER 15

REVIEW OF SUMMARY TRIAL PROCEEDINGS

SECTION 1

GENERAL

1. The opportunity to have an authority, other than the officer who presided at the summary trial, review any finding of guilty made or sentence imposed at summary trial is important for maintaining fairness in the summary trial process. In this regard the Special Advisory Group stated:

...we agree with the concept that a meaningful right of appeal or review should exist when a significant penalty is imposed following a summary proceeding. Such a right would improve the prospects that the constitutionality of the summary trial process would be upheld.¹

The Special Advisory Group went on to recommend that a person convicted at a summary trial have the right to request that “the appropriateness of the conviction and/or sentence” be reviewed by the next level of command.²

2. As a result of subsequent military justice reforms in this area, new provisions applicable to summary trial findings and sentences were developed and incorporated into the *NDA*³ and *QR&O*.⁴ These provisions provide a mechanism for reviewing the findings made and punishments imposed at summary trial, including: who can request a review; who can conduct a review as a *review authority*; how the review is to be conducted; and the review authority’s powers.

3. These review procedures function to protect the offender's right to be dealt with fairly while satisfying the CF requirement to be able to promptly deal with minor service offences at the unit level.

4. In addition to the review processes available under *QR&O*, an offender may also request judicial review from the Federal Court or from the Superior Court in any province.⁵

¹ *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services* (March 25, 1997) at 63.

² *Id.* at Recommendation 33.

³ *NDA* s. 249(3) and (4).

⁴ *QR&O* 108.45, 116.02 and 107.14.

⁵ *Federal Court Act*, R.S.C. 1985, c. F-7, s. 18 and 18.1 and *Summary Trial Working Group Report*, Volume 1, 2 March 1994 at 187.

SECTION 2

REVIEW UNDER *QR&O* 108.45

5. One of the mechanisms for review available after a summary trial is set out in *QR&O* 108.45. The distinguishing feature of this review process is that it is initiated on the request of the offender and is conducted in accordance with defined procedural requirements.

Entitlement and Grounds to Request Review

6. Any member who has been found guilty of a service offence at a summary trial may request a *review authority* to set aside the finding of guilty on the ground that it is *unjust*.⁶ Similarly, the offender may also request a review authority to alter any punishment imposed on the ground that it is *unjust or too severe*.⁷

Review Authority

7. The term *review authority* is defined in *QR&O*.⁸ In the context of a review conducted under *QR&O* 108.45, the term review authority only refers to the officers mentioned in *QR&O* 108.45(2). When determining who can act as a *QR&O* 108.45 review authority, you must consider the status of the presiding officer who tried the case, as follows:

- a. when a delegated officer presided at the summary trial, the review authority is the CO of the unit.
- b. when a CO presided at the summary trial, the review authority is the next superior officer to whom the CO of the unit is responsible in matters of discipline; and
- c. when the presiding officer is a superior commander, the review authority is the next superior officer to whom the superior commander is responsible in matters of discipline.⁹

8. A checklist detailing the role of the review authority in the review process under *QR&O* 108.45 is attached at Annex V.¹⁰

Referral by Review Authority

9. Where an officer is of the opinion that it would be inappropriate to act as a review authority in a particular case, having regard to the interests of justice and discipline,¹¹ the officer must:

- a. not make any determination with respect to the request for review;¹² and

⁶ *QR&O* 108.45(1)(a).

⁷ *QR&O* 108.45(1)(b).

⁸ *QR&O* 116.02(2).

⁹ *QR&O* 108.45(2)(c). The applicable CFOO identifies the next superior officer responsible in matters of discipline.

¹⁰ This checklist is a guide only. It must be used in conjunction with the appropriate sections of *QR&O* and this Manual.

¹¹ See Chapter 11, Section 3, Interests of Justice and Discipline.

¹² *QR&O* 108.45(3)(a).

- b. refer the request to the next superior officer to whom that officer is responsible in matters of discipline.¹³

Redress of Grievance

10. A redress of grievance cannot be used with respect to any matter at summary trial that may be dealt with by a request for review under *QR&O* 108.45.¹⁴ Therefore, if an offender disagrees with the finding of guilty, or the sentence imposed, the offender should request a review rather than submit a grievance.

Contents of a Request for Review

11. The request for review must be made in writing and may be in the form of either a memorandum or letter. The request must set out the relevant facts and reasons why the finding is unjust or why the punishment is unjust or too severe.¹⁵

12. Since there is no requirement for an audio or written record of the summary trial to be made, it is essential that this initial request contain as much relevant information as possible to support the request for review. The regulations do not limit the information that can be provided on review. The member submitting the request for review is not obligated to obtain a copy of the RDP and attachments, or the investigation report, since the review authority will be able to obtain these from the Unit Registry of Disciplinary Proceedings. However, it may be helpful for the member to attach witness statements where they are considered relevant. It may also be appropriate to provide information to the review authority on the punishments that have been imposed within the unit for similar offences, even though that information was not given at the summary trial.

Assistance to Offender Requesting Review

13. When an offender requests assistance in preparing the request for review, the CO must appoint an officer or NCM above the rank of sergeant to provide that assistance. If the offender requests a particular member to provide assistance, the CO should appoint that member where practical.¹⁶ For example, it would not be practical for the requested member to be appointed if that member is on temporary duty away from the unit or if the member is unavailable because of other duties.

¹³ *QR&O* 108.45(3)(b).

¹⁴ *QR&O* 19.26(5.1). The separation of the review process at summary trial from the grievance process serves to highlight the *right of review* available to offenders.

¹⁵ *QR&O* 108.45(4) and 108.45 Note A. Also see discussion on *relevance* at Section 4 in Chapter 13, Conduct of Summary Trial.

¹⁶ *QR&O* 108.45(18).

Procedural Requirements - Timings

14. A request for review must be delivered to the review authority and the officer who presided at the summary trial within 14 days of the termination of the summary trial.¹⁷ The review authority may, in the interests of justice, extend the period for making a request for review, based on what is reasonable in the circumstances.¹⁸

15. The factors to be considered in determining what is reasonable in the circumstances are not provided in *QR&O*. The review authority should make such a determination having regard to such factors as the reason for the delay, the complexity of the issues and the amount of effort required to prepare the application.

16. Upon receiving a copy of the request, the presiding officer has 7 days to deliver the presiding officer's comments to the review authority and provide a copy of these comments to the offender.¹⁹ It is important that the presiding officer comment on the request in as much detail as possible to ensure the review authority has sufficient information to make a decision.

17. Within 7 days of receiving the presiding officer's comments, the offender may deliver further representations to the review authority.²⁰

Suspension of Punishment of Detention

18. Where a non-commissioned offender has been sentenced to detention, the review authority shall suspend the carrying into effect of the punishment of detention pending the completion of the review.²¹

Legal Advice

19. The review authority must obtain legal advice before making a determination on any request for review.²² However, the legal officer who provided advice with respect to laying the charge or concerning any of the summary proceedings related to the matter to be reviewed cannot provide legal advice to the review authority.²³

Review Process

20. The review authority must, within 21 days of receiving a request, review the summary trial and determine whether to set aside any finding or alter any punishment imposed.²⁴ Once the review authority has determined whether to set aside a finding or alter a punishment, the review

¹⁷ *QR&O* 108.45(5).

¹⁸ *QR&O* 108.45(16).

¹⁹ *QR&O* 108.45(6).

²⁰ *QR&O* 108.45(7).

²¹ *QR&O* 108.45(17).

²² *QR&O* 108.45(8).

²³ *QR&O* 108.45(9).

²⁴ *QR&O* 108.45(10).

authority must, as soon as practicable, cause the offender, the presiding officer, and the offender's CO to be notified in writing of the decision.²⁵

21. In determining whether to set aside a finding of guilty or alter any punishment imposed, the review authority shall consider the offender's request and the presiding officer's comments. However, if the review authority is unable to make a determination because more information is required, the review authority shall:

- a. seek the necessary information;
- b. notify the offender that further information has been sought; and
- c. provide the offender with a copy of any information subsequently obtained.²⁶

22. Where additional information is sought, the review authority has 35 days from the date the request for review was received to review the summary trial and determine whether to set aside a finding of guilty or alter any punishment imposed.²⁷

23. *QR&O* 108.45 does not specify what must be established to show that a finding or punishment is unjust or that any punishment is too severe. A finding of guilty would be unjust if it is contrary to the law or is fundamentally unfair. A finding might be considered unjust if any of the following circumstances exist:

- a. the principles of fairness were not observed during the summary trial process.²⁸ This involves more than just the conduct of the trial. It also includes pre-trial activities such as the release of information, the election procedures and any applications made for legal representation, etc.²⁹ A departure from the procedural safeguards contained in *QR&O* may indicate a failure to uphold the principles of fairness;³⁰
- b. the required procedures set out in *QR&O* were not followed;³¹ or
- c. the evidence presented at the summary trial did not establish all the elements of the offence for which the offender was found guilty.

24. With respect to a breach of the procedures set out in the regulations, it is important to show not only that a breach occurred, but also that there is a link between the breach and the finding of guilty, i.e. that the breach somehow renders the finding unjust. The effect of such a breach will depend on the nature of the breach having regard to the circumstances of the case. If the breach was inconsequential with no effect on the final outcome, then the finding will not be considered unjust for that reason alone.

²⁵ *QR&O* 108.45(14).

²⁶ *QR&O* 108.45(11) and (12). The offender may deliver further representations to the review authority within seven days of receiving a copy of the additional information.

²⁷ *QR&O* 108.45(13).

²⁸ See Chapter 4, Fairness and the Application of the Charter.

²⁹ See Section 3 of Chapter 13, Conduct of Summary Trials.

³⁰ *QR&O* 101.06. For example, a failure to comply with *QR&O* 108.20(5) by not allowing the accused to testify at the accused's summary trial.

³¹ For example, a failure to consider a limitation period referred to in *QR&O* 108.05.

25. For example, during the questioning of a witness by the accused, the presiding officer stops the questioning before the accused is finished. If the accused is asking the witness embarrassing questions that are irrelevant to the charges, this would not impact on the accused's right to make full answer and defence to the charges. However, where the accused is prevented from asking the witness questions which are directly related to the charges, this would affect the accused's ability to make full answer and defence and call into question the validity of the findings.

26. A punishment may be considered unjust if the punishment imposed is illegal. A punishment is illegal if it is not in the presiding officer's table of punishments.³² The punishment may also be unjust if the procedures set out in the regulations for the sentencing phase of the summary trial were not followed.³³

27. A sentence may be considered too severe if it is far more severe than what is usually given for the same offence in similar circumstances. The review authority should exercise restraint in reviewing sentences on the basis that the review authority may not be in any better position to assess the sentence than the presiding officer at trial. Therefore, as a general rule, review authorities should avoid disturbing a sentence unless it is clearly unreasonable.³⁴ For example, an accused is convicted of drunkenness and receives a fine in the amount of \$1000. However, in the previous six months there were five other convictions for drunkenness in the unit and the maximum punishment was a \$100 fine. The heavier fine may be considered far too severe in the circumstances.

28. A review authority under *QR&O* 108.45 has the authority to quash findings and alter findings made and punishments imposed at summary trial and to suspend the carrying into effect of a punishment of detention.³⁵ These powers are reviewed in detail in Section 4 of this Chapter.

SECTION 3

REVIEW UNDER *QR&O* 116.02

29. A second form of summary trial review is provided for in *QR&O* 116.02. There are a number of significant differences between a review conduct under this article and a review conducted pursuant to *QR&O* 108.45.

30. For example, a wider group of officers can act as a review authority for a *QR&O* 116.02 review than is available under *QR&O* 108.45. While an officer having authority to act as a

³² See Chapter 14, Sentencing and Punishment.

³³ *QR&O* 108.20(10). See also Chapter 13, Conduct of Summary Trial.

³⁴ As C.J. Strayer observed in *R. v. Seward*, CMAC-376 at 13-14:

... I have no doubt that we must show restraint in the exercise of this power over sentence appeals, consistently with the position recently restated and confirmed by the Supreme Court of Canada in *R. v. Shropshire* [(1995) 102 C.C.C. (3d) 193]. Writing for the Court in that case Iacobucci J. stated that a provincial court of appeal, acting under subsection 687(1) of the *Criminal Code* which is similar to section 240.1 of the *national Defence Act*, should not find that a sentence is "not fit" unless the sentence is "clearly unreasonable". Other language which he endorsed to express the same idea would require that to alter a sentence it must be "clearly or manifestly excessive", "clearly excessive or inadequate" or "falling outside the 'acceptable range' of orders".

³⁵ *QR&O* 108.45 Note B.

review authority under *QR&O* 108.45 may also conduct a review under *QR&O* 116.02, the term review authority also refers to the following military authorities:

- a. the CDS;
- b. an officer commanding a command;
- c. an officer commanding a formation; and
- d. a CO when the offender is under the CO's command and the presiding officer at the summary trial was not a superior commander.³⁶

31. There is no formalized procedure required to initiate a *QR&O* 116.02 review. Nor is it necessary for an offender to request a review in order for a review authority to have jurisdiction to conduct a *QR&O* 116.02 review. In fact, a review conducted pursuant to this article can be initiated by the review authority directly. However, a review authority cannot initiate a review under *QR&O* 116.02 involving an offence for which the accused has been found not guilty.

32. A review can be undertaken by a review authority pursuant to *QR&O* 116.02 regardless of whether a review has already been requested or conducted under *QR&O* 108.45. It is the general policy behind the regulations that *QR&O* 108.45 be used by members who have been found guilty at summary trial, while *QR&O* 116.02 reviews will be conducted on the initiative of a review authority in exceptional situations such as to correct an error identified during a post-trial review, for example, an error found during a review conducted by the unit legal advisor.³⁷

33. Inasmuch as the regulations do not provide the offender with a right to a review under *QR&O* 116.02, such reviews are not subject to the same procedural requirements and limitations as in *QR&O* 108.45. For example, there are no time limits placed on the review authority when determining a *QR&O* 116.02 review. However, the review authority is bound to exercise its discretion fairly both in the conduct of the review and in determining whether to quash a finding or alter a punishment. The powers that can be exercised by a review authority in relation to any matter being reviewed are discussed in Section 4 of this Chapter.

SECTION 4

POWER OF REVIEW AUTHORITIES

34. Should a review authority conclude that the finding of guilty is not unjust or that the punishment is neither unjust nor too severe, the findings made or punishments imposed at the summary trial will stand. On the other hand, the review authority may, in the circumstances, decide that it is appropriate to set aside a finding or alter a punishment.

35. The powers and limitations of review authorities are set out in the following sections of the *NDA*:³⁸

- a. 249.11 (Quashing Findings);

³⁶ *QR&O* 116.02(2) and (3).

³⁷ *QR&O* 116.02 Note B. See also Chapter 16, Post-trial Administration, Section 6. Unit legal advisors review all unit RDPs on a monthly basis for mistakes on the face of the document, such as missing information, and non-compliance with the procedural requirements. If a problem is found that could have resulted in the finding of guilty or could have affected the punishment imposed, the unit legal officer will bring the matter to the attention of a review authority.

³⁸ *QR&O* 108.45 Note B and *QR&O* 116.02 Note A.

- b. 249.12 (Substitution of Findings);
- c. 249.13 (Substitution of Punishments);
- d. 249.14 (Mitigation, Commutation and Remission of Punishments); and
- e. 249.15 (Conditions Applicable to New Punishments).

The same officers who may act as review authorities may also act as suspending authorities for the purposes of *NDA* sections 216-218.³⁹

Quashing Findings

36. A review authority may quash any finding of guilty made at summary trial.⁴⁰ When a finding of guilty has been quashed, and no finding of guilty remains, the whole of the sentence passed by the service tribunal ceases to have force and effect. Further, when a finding of guilty has been quashed, the offender may be tried again for the offence as if no previous trial had been held.⁴¹

37. Where a finding has been quashed and another finding of guilty remains and the review authority believes the punishment that was originally imposed is now unduly severe, the review authority shall substitute such new punishment(s) as the authority considers appropriate.⁴² For example, an accused is found guilty of Drunkenness⁴³ and Improper Driving of a CF Vehicle⁴⁴ and is sentenced to 10 days detention. If the finding of guilty on the charge of Improper Driving is quashed, the review authority must determine if the sentence of 10 days detention is unduly severe in respect of the Drunkenness charge, and if so, must substitute a new punishment. The conditions applicable to new punishments discussed below would apply in such a case.

Substitution of Findings

38. If the review authority determines that a finding of guilty made at summary trial on a particular charge is illegal or cannot be supported by the evidence, the review authority may substitute the finding of guilty with a new finding. For example, the review authority can substitute a finding of guilty with a finding of not guilty.

39. The review authority can only substitute the finding if the new finding could validly have been made by the presiding officer at the summary trial, and if it appears from the comments given by the presiding officer for the review for that charge that the presiding officer was satisfied that the facts given at the summary trial established the offence specified or involved in the new finding.⁴⁵

³⁹ *QR&O* 114.02(3). See Chapter 14, Section 5 for more detail.

⁴⁰ *NDA* s. 249.11(1).

⁴¹ *NDA* s. 249.11(2).

⁴² *NDA* s. 249.11(3).

⁴³ *NDA* s. 97.

⁴⁴ *NDA* s. 111(1)(b). The precise statement of the offence would be: "While his ability to drive was impaired by alcohol, drove a vehicle of the Canadian Forces".

⁴⁵ *NDA* s. 249.12(1).

40. A review authority may also substitute a finding of guilty with a new finding of guilty on a different offence, if it appears that the facts proved the offender guilty of the other offence, provided that:

- a. the presiding officer could have found the offender guilty of the other offence under sections 133, 134 or 136 of the *NDA*;⁴⁶ or
- b. the presiding officer could have found the offender guilty of the other offence or on any alternative charge that was laid.⁴⁷

41. For example, a member is charged with Stealing (*NDA* s. 114) and in the alternative Receiving (*NDA* s. 115). At summary trial the member is found guilty of Stealing and the proceedings on the Receiving charge is stayed. If on review the finding of guilty is found to be unjust, the review authority can quash that finding. In addition, if the review authority is satisfied the facts proved the offender guilty of the alternative offence of Receiving and the presiding officer could have found the offender guilty of that offence, then the review authority can substitute the stay of proceedings with a finding of guilty on the alternative charge of Receiving.

42. When substituting a finding the review authority must ensure that the punishment imposed at the summary trial is appropriate for the new finding. If the punishment imposed at the summary trial is more than what is allowed by the *NDA* for the new finding or if the review authority is of the opinion that the punishment would be unduly severe in light of the new finding, the authority must substitute an appropriate new punishment(s).⁴⁸ The power to substitute a punishment is subject to the conditions applicable to new punishments discussed below.

Substitution of Punishments

43. When a review authority determines that the presiding officer has imposed an illegal punishment, the review authority may substitute, for the illegal punishment, any new punishment or punishments that the review authority considers appropriate and legal.⁴⁹

Mitigation, Commutation and Remission of Punishments

44. A review authority can mitigate, commute or remit any or all of the punishments included in a sentence imposed at the summary trial.⁵⁰ *Mitigation* refers to awarding a lesser amount of

⁴⁶ *NDA* s. 133 provides that a person charged with desertion can be found guilty of attempting to desert or being absent without leave, whereas a person charged with attempting to desert can be found guilty of absence without leave. *NDA* s. 134 provides that anyone charged with any offence under s. 84 can be found guilty of any other offence in that section. *NDA* s. 134 also provides that anyone charged with an offence under s. 85 can be found guilty of any other offence in that section. *NDA* s. 136 provides that when an accused is charged with an offence under *NDA* s. 130, and had the accused been tried by a civil court in Canada for that offence could have been found guilty of another offence, then the accused may be found guilty of the other offence. For additional guidance concerning the application of these sections of the *NDA* see the Notes to *QR&O* 103.62.

⁴⁷ *NDA* s. 249.12(2).

⁴⁸ *NDA* s. 249.12(3).

⁴⁹ *NDA* s. 249.13.

⁵⁰ *NDA* s. 249.14.

the same punishment. For example, by reducing the term of detention which has been imposed.⁵¹

45. The term *commutation* refers to replacing the type of punishment by awarding a punishment lower in the scale of punishments.⁵² For example, a sentence of detention can be commuted to a fine. The review authority can *remit* or dispense with the requirement to undergo the whole or any part of a sentence that remains. For example, in a case of a sentence of 30 days detention, where the offender has served 10 days of the sentence, a review authority could remit up to 20 days of the remaining period of detention.⁵³

Conditions Applicable to New Punishments

46. The following conditions apply where a review authority replaces a punishment imposed at summary trial with a new punishment imposed by way of substitution or commutation.

- a. The new punishment must not be one that could not legally have been imposed by the presiding officer for the charge with which the offender was found guilty.⁵⁴ For example, if the presiding officer was a CO, the punishment of a severe reprimand could not be substituted for the punishment of reduction in rank imposed at the offender's summary trial.
- b. The new punishment must not be higher in the scale of punishments than the punishment originally imposed by the presiding officer at the summary trial. Further, if the punishment imposed by the presiding officer included a period of detention, the new punishment must not involve a period of detention longer than that imposed at the summary trial.⁵⁵

SECTION 5 POST REVIEW ADMINISTRATION

47. The *QR&O* set out administrative action to be completed by a review authority acting pursuant to *QR&O* 108.45 once the decision on the review has been made, and the offender, the presiding officer and, where the review authority is not the offender's CO,⁵⁶ the offender's CO have been notified of this decision in writing.⁵⁷

48. The review authority must:

⁵¹ *QR&O* 116.02 Note C.

⁵² *QR&O* 116.02 Note D.

⁵³ *QR&O* 116.02 Note E.

⁵⁴ *NDA* s. 249.15(a). This assumes that the finding has not been quashed or substituted.

⁵⁵ *NDA* s. 249.15(b).

⁵⁶ The offender's CO also has certain administrative obligations upon being notified of the review authority's decision. They are discussed at *QR&O* 108.45(15).

⁵⁷ *QR&O* 108.45(14)(a).

- a. cause a copy of the review decision to be placed on the Unit Registry on which the original RDP was placed;⁵⁸ and
- b. cause the appropriate entries to be made to Part 7 of the original RDP.⁵⁹

49. An officer conducting a review pursuant to *QR&O* 116.02 will be obligated to take the same action whenever a finding of guilty is quashed or a sentence altered.⁶⁰

SECTION 6 JUDICIAL REVIEW

50. In addition to the review procedures contained in *QR&O* which relate to summary trials, anyone found guilty at a service tribunal may apply for civilian judicial review.⁶¹ Civilian judicial review is available through two means: by application to the Federal Court of Canada⁶²; or by application to the superior court of the province where the summary trial took place (if applicable).

51. Judicial review is not the same as an appeal. It is the purpose of judicial review to evaluate whether the tribunal has exceeded its jurisdictional limits. To initiate this evaluation, the offender must make an application to the civilian court for prerogative relief.⁶³ Prerogative relief originated with the exercise of the extraordinary power held by the Crown in situations where the government was directly interfering with someone's liberty or property. Therefore, prerogative relief can be issued by a superior court only where proper cause is shown and not as a matter of right.

52. The application requirements and procedures related to civilian judicial review are set out in the statute or rules of procedure which apply to the court being asked to conduct the review.

⁵⁸ For more information on the Unit Registry see Chapter 16, Post-Trial Administration.

⁵⁹ *QR&O* 108.45(14)(c).

⁶⁰ *QR&O* 116.03(1). For the CO's duty see *QR&O* 116.03(2).

⁶¹ *Fontaine v. Canada (Minister of National Defence)* (1990), 44 F.T.R. 266 (Fed. T.D.); and *Glowczeski v. Canada* (1989), 27 F.T.R. 112 (Fed. T.D.).

⁶² *Federal Court Act*, R.S.C. 1985, c. F-7, s. 18 and 18.1.

⁶³ This refers to prerogative writs that can be issued by a court when the specific requirements are met, and include *certiorari*, *mandamus*, *quo warranto*, *habeas corpus*, prohibition, injunction and declaratory relief.

CHAPTER 16

POST-TRIAL ADMINISTRATION

SECTION 1

GENERAL

1. *QR&O* prescribe the administrative action that must be taken where:
 - a. a charge is referred to a delegated officer or CO by the charge layer;
 - b. a CO or superior commander makes an application to a referral authority for disposal of a charge;
 - c. a final disposition of all charges has been made by a presiding officer;
 - d. an officer has exercised the power and jurisdiction of a review authority pursuant to *QR&O* 108.45; and
 - e. an officer has exercised the jurisdiction of a review authority other than pursuant to *QR&O* 108.45, i.e. pursuant to *QR&O* 116.02, and quashed a finding or altered the sentence.¹
2. A *final disposition* means a decision not to proceed, a direction that the proceedings be stayed on an alternative charge, a finding of not guilty and, in the case of a finding of guilty, the passing of a sentence.²
3. The purpose of post-trial administration is to:
 - a. standardize procedures governing the retention, release and legal review of documents pertaining to summary trial proceedings;³ and
 - b. ensure that the sentence is enforced and that the member's service records accurately reflect the final disposition.

SECTION 2

UNIT REGISTRY OF DISCIPLINARY PROCEEDINGS

4. A Unit Registry of Disciplinary Proceedings (Unit Registry) must be maintained within each unit. It is the responsibility of the CO of the unit to ensure this is done.⁴

¹ *QR&O* 107.14, 107.09 Note, 108.42(1)(a), 108.45(14)(b), 109.03(4) and 116.03(1)(b).

² *QR&O* 107.13.

³ *QR&O* 107.14 Note A.

⁴ *QR&O* 107.14(1). Further, *QR&O* 1.02 defines a *unit* as an individual body of the CF that is organized as such pursuant to Section 17 of the *NDA*, with the personnel and material thereof. Only one Unit Registry is to be maintained for each unit. Therefore, at a particular base each unit that is co-located at the base will be required to maintain a Unit Registry. A separate Unit Registry will be maintained by the base (which is also a unit). A formation, brigade, wing, naval squadron, area headquarters, command or other senior element would not normally maintain a Unit Registry as these are not considered to be units. If there are any questions concerning the establishment of a Unit Registry, the unit legal advisor should be consulted.

5. The maintenance of a Unit Registry ensures that standardized procedures govern the retention of RDPs and other documents pertaining to summary proceedings conducted within the unit.⁵ The placement of documents on the Unit Registry ensures that the relevant information is readily available when a review authority conducts a review of a finding of guilty or the sentence imposed at a summary trial.⁶ The filing of specific documents in the Unit Registry also aids in the review conducted by the unit legal advisor in furtherance of the JAG's role in superintending the military justice system.⁷ RDPs held on the Unit Registry may also be provided to the public in accordance with *QR&O* 107.16.

6. The Unit Registry should contain only those documents specified in *QR&O* 107.14. It is neither the purpose nor intention of the Unit Registry to be a repository for all documents related to a specific accused. The documents to be included on the Unit Registry are:

- a. a copy of any RDP referred to a CO or delegated officer by the charge layer;⁸
- b. a copy of the application, the RDP, and any report of investigation conducted pursuant to *QR&O* 106, when an application is made to a referral authority for disposal of a charge;⁹
- c. the original RDP, together with a copy of any report of investigation conducted pursuant to Chapter 106, when a final disposition of all charges has been made;¹⁰ and
- d. a copy of any decision made by a review authority pursuant to *QR&O* 108.45,¹¹ as well as a copy of any decision made by a review authority under *QR&O* 116.02, that results in the quashing of a finding or the alteration of the sentence.¹²

For the purposes of *QR&O* 107.14, the term RDP includes any attachment referred to in Parts 1-7 of the RDP form.¹³

7. Examples of documents that should NOT under any circumstances be placed on the Unit Registry include:

- a. the minutes or report of any investigation such as a Board of Inquiry, or Summary Investigations, or other military investigation not conducted pursuant to *QR&O* 106; or
- b. the minutes or report of any investigation that does not pertain to the accused person named in Part 1 (Charge Report) of the RDP.

⁵ *QR&O* 107.14 Note A.

⁶ Such a review can be made pursuant to *QR&O* 108.45 or *QR&O* 116.02. For more information on the review procedures see Chapter 15, Review of Summary Trial Proceedings.

⁷ *QR&O* 107.15 and Note.

⁸ *QR&O* 107.14(2); *QR&O* 107.09 Note.

⁹ *QR&O* 107.14(3).

¹⁰ *QR&O* 107.14(4). Where a superior commander makes a final disposition of all charges, the RDP will be placed on the Unit Registry maintained at the unit of the CO who initially referred the charges for disposal (*QR&O* 107.14(5)).

¹¹ *QR&O* 107.14(6).

¹² *QR&O* 107.14(7).

¹³ *QR&O* 107.14 Note B.

8. The time period for maintaining documents on the Unit Registry is regulated by the Records Scheduling and Disposal Manual A-AD-D11-001/AG-001. This will ensure compliance with the relevant federal legislation.¹⁴

9. Military Police Investigation Reports (MPIR) are subject to special handling and protections including established document control measures regarding their control¹⁵. It is necessary for unit administrative personnel to continue to implement the stringent control measures dealing with the handling and storage of MPIRs. For further information seek the advice of the local senior MP advisor.

10. Any member of the public may request a copy of a RDP held on the Unit Registry. When a request is made, the CO of the unit holding the requested RDP is required to comply with the request as soon as practicable.¹⁶ To assist in maintaining the appropriate balance between the public access rights and the offender's privacy rights, the means of accessing the information from the Unit Registry has been formalized.¹⁷

11. An RDP request must pertain to a particular accused and be submitted in writing to the appropriate unit. The request can be submitted by mail, fax or in person. The request must contain sufficient information to identify the specific RDP being sought,¹⁸ including:

- a. the name, rank or service number of the accused;
- b. the type of offence charged;
- c. the subject matter or circumstances set out in the particulars of the charge such as the date, time and place where the offence was committed;
- d. the date on which the charge was laid;
- e. the date the summary trial was held; and
- f. the date of sentencing or the sentence imposed.¹⁹

12. When a unit receives a request for a specific RDP the CO must, as soon as practicable, provide a copy of the most recent RDP held on the Unit Registry that pertains to the particular accused named in the request.²⁰ Although there are many documents that may be attached to the RDP such as investigation reports or witness statements, only the following attachments can be released:

- a. a statement of additional offences attached to Part 1 of the RDP; and
- b. a statement of special findings attached to Part 5 of the RDP.²¹

¹⁴ For example, the *National Archives of Canada Act*, R.S.C. 1985, Chap. 1 (3rd Supp.). See *QR&O* 107.14 Note C.

¹⁵ *Military Police Policies and Technical Procedures*, A-SJ-100-004/AG-000 Ch. 10

¹⁶ *QR&O* 107.16.

¹⁷ *QR&O* 107.16 Note A.

¹⁸ *QR&O* 107.16(2).

¹⁹ *QR&O* 107.16 Note B.

²⁰ *QR&O* 107.16(1).

²¹ *QR&O* 107.16(3).

13. Not all requests for a copy of an RDP should be complied with. The *QR&O* prohibit the release of a copy of an RDP where:

- a. a court order restricts access to the RDP or the information contained therein;
- b. a pardon has been granted in respect of an offence recorded in Part 1 (Charge Report) of the RDP;²²
- c. a person, other than a member, committed or is accused of having committed a service offence while under the age of 18; or
- d. the CO has reasonable grounds to believe the safety of any person could be threatened as a result of the release of the RDP.²³

The CO should seek advice from the unit legal advisor before acting on the request in circumstances which may be covered by these prohibitions.²⁴

14. The provisions contained in *QR&O* 107.14 to 107.16 relate only to requests for the release of a RDP. Requests for any other information contained on the Unit Registry, such as investigation reports, should be referred to the Departmental access to information coordinator.²⁵

SECTION 3

ROLE OF THE PRESIDING OFFICER

15. There are additional administrative requirements that must also be observed once a final disposition of all charges has been made. Where a summary trial has been held, the presiding officer is required to complete Part 6 of the RDP by recording the findings made and the sentence imposed at the summary trial.²⁶ The presiding officer must then cause the original RDP, along with a copy of the report of investigation conducted pursuant to *QR&O* 106, to be placed on the Unit Registry.²⁷ Where the presiding officer is not the CO of the member tried, the presiding officer must cause a copy of the RDP to be forwarded to the accused's CO for information and necessary follow-up action.²⁸

16. A CO who imposes a punishment of detention or reduction in rank must also cause NDHQ (Director General Military Careers) to be notified by message.²⁹

²² See DAOD 7016-0, Pardons.

²³ *QR&O* 107.16(4).

²⁴ *QR&O* 107.16 Note C.

²⁵ *QR&O* 107.16 Note A.

²⁶ *QR&O* 108.42(1)(a).

²⁷ *QR&O* 107.14(4) and (5). In the case of a superior commander these documents will be placed on the Unit Registry that is maintained by the CO who initially referred the charges.

²⁸ *QR&O* 108.42(1)(b). The necessary follow-up action is discussed in Section 4 of this Chapter.

²⁹ *QR&O* 108.44.

SECTION 4

ROLE OF THE COMMANDING OFFICER

17. In addition to the responsibilities a CO may have when acting as presiding officer at a summary trial, a CO also has certain administrative responsibilities by virtue of being the offender's CO. Where a presiding officer has made a finding of guilt and imposed a punishment, the offender's CO shall:

- a. take the necessary action to ensure that the sentence is carried out;³⁰ and
- b. cause the appropriate entries to be made to the offender's service records, including the conduct sheet.³¹

18. As well, where a review of the summary trial has been conducted by a review authority, the offender's CO shall, upon receipt of the review authority's decision:

- a. cause the appropriate entries to be made to the offender's service records including the conduct sheet in any case where the finding or sentence has been altered on review;³² and
- b. take whatever other action may be required to give effect to the decision.³³

19. COs are also required to forward to the unit legal advisor, by the seventh day of each month, copies of any of the following documents that were placed in the Unit Registry during the preceding month:

- a. a copy of any application made to a referral authority for disposal of a charge, together with the RDP and a copy of the report of investigation conducted pursuant to *QR&O* 106;³⁴
- b. a copy of any RDP containing a final disposition of all charges against an accused;³⁵ and
- c. a copy of any decision made by a review authority pursuant to *QR&O* 108.45, as well as a copy of any decision made by a review authority under *QR&O* 116.02, that results in the quashing of a finding or the alteration of the sentence.³⁶

SECTION 5

ROLE OF REVIEW AUTHORITY

20. As soon as practicable after the completion of a review conducted pursuant to *QR&O* 108.45, the review authority must cause the offender who requested the review, the presiding officer, and where the review authority is not the offender's CO, the offender's CO, to be

³⁰ *QR&O* 108.42(2)(a).

³¹ *QR&O* 108.42(2)(b); See also DAOD 7006 – *Conduct Sheets*.

³² *QR&O* 108.45(15)(a); See also DAOD 7006 – *Conduct Sheets*.

³³ *QR&O* 108.45(15)(b).

³⁴ *QR&O* 107.15(1)(a). See also article 109.03 - Application to Referral Authority for Disposal of a Charge.

³⁵ *QR&O* 107.15(1)(b).

³⁶ *QR&O* 107.15(1)(c).

notified in writing of the decision on review.³⁷ As well, the review authority must cause a copy of the decision to be placed on the Unit Registry on which the original RDP was placed³⁸ and cause the appropriate entries to be made to Part 7 of the original RDP.³⁹

21. A review authority conducting a *QR&O* 116.02 review will be required to take similar follow-up action. However, there is one significant difference. The action need only be taken where the review authority decides to quash a finding of guilty or alter a sentence. Such a decision would be placed on the Unit Registry on which the original RDP was placed.⁴⁰

SECTION 6

ROLE OF THE UNIT LEGAL ADVISOR

22. Unit legal advisors have the responsibility to review copies of all the documents forwarded to them by the CO pursuant to *QR&O* 107.15(1). The purpose of this review is to detect errors on the face of the trial record and to monitor compliance with the procedural requirements.⁴¹ If the review of documents reveal such errors or non-compliance with procedural requirements, the unit legal advisor must advise the CO and any other appropriate service authority. On completion of the review, copies of the documents will be forwarded to the Office of the JAG at NDHQ.

23. The JAG has the responsibility to superintend the administration of military justice in the CF and to report annually to the Minister of National Defence.⁴² The monthly review by the unit legal advisor assists the JAG in fulfilling these responsibilities.⁴³

³⁷ *QR&O* 108.45(14)(a).

³⁸ *QR&O* 108.45(14)(b).

³⁹ *QR&O* 108.45(14)(c).

⁴⁰ *QR&O* 107.14(7) and 116.03.

⁴¹ *QR&O* 107.15(2).

⁴² *NDA* ss. 9.2 and 9.3.

⁴³ *QR&O* 107.15 Note.

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V	Review Authority (under QR&O 108.45) Checklist.

Schedule B Constitution Act, 1982

Enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, which came into force on April 17, 1982

PART I

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and
freedoms in
Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental
freedoms

2. Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly; and
- d) freedom of association.

Democratic Rights

Democratic
rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum
duration of
legislative
bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

Continuation in
special
circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of
legislative
bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months

Mobility Rights

Mobility of
citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move
and gain
livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- a)* to move to and take up residence in any province; and
- b)* to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

- a)* any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- b)* any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative
action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and
security of
person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or
seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or
imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or
detention

10. Everyone has the right on arrest or detention

- a)* to be informed promptly of the reasons therefor;
- b)* to retain and instruct counsel without delay and to be informed of that right; and
- c)* to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Proceedings in
criminal and
penal matters

- 11.** Any person charged with an offence has the right
- a) to be informed without unreasonable delay of the specific offence;
 - b) to be tried within a reasonable time;
 - c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
 - d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
 - e) not to be denied reasonable bail without just cause;
 - f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
 - g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
 - h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
 - i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or
punishment

- 12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

- 13.** A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

- 14.** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before
and under law
and equal
protection and
benefit of law

- 15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative
action programs

- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups

including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

Official
languages of
Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official
languages of
New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of
status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

English and
French linguistic
communities in
New Brunswick

16.1. (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

Role of the
legislature and
government of
New Brunswick

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

Proceedings of
Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Proceedings of
New Brunswick
legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Parliamentary
statutes and
records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

New Brunswick
statutes and
records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Proceedings in
courts
established by
Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

Proceedings in
New Brunswick
courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Communications
by public with
federal
institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

a) there is a significant demand for communications with and services from that office in such language; or

b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications
by public with
New Brunswick
institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of
existing
constitutional
provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Rights and
privileges
preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of
instruction

23. (1) Citizens of Canada

a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of
language
instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application
where numbers
warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of
guaranteed
rights and
freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of
evidence
bringing
administration
of justice into
disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal
rights and
freedoms not
affected by
Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Other rights and
freedoms not
affected by
Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural
heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights
guaranteed
equally to both
sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights
respecting
certain schools
preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.(93)

Application to
territories and
territorial
authorities

30. A reference in this Charter to a Province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative
powers not
extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of
Charter

32. (1) This Charter applies

- a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where
express
declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of
exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year
limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

Five year
limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.



National
Défense

Défense
nationale

RECORD OF DISCIPLINARY PROCEEDINGS – PROCÈS-VERBAL DE PROCÉDURE DISCIPLINAIRE

PART/PARTIE 1 – CHARGE REPORT – ÉTAT DE MISE EN ACCUSATION

The Accused L'accusé	Service Number Numéro matricule	Name and Rank – Nom et grade	Unit or Element Unité ou élément	is charged with having committed the following offence(s): est accusé d'avoir commis l'(les) infraction(s) suivante(s) :
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Statement of Offence / Statement of Particulars (*attach a page(s), as necessary*)

Énoncé de l'infraction / Exposé des détails (*annexez une (des) page(s), si nécessaire*)

Name, Rank and Position of Person Laying Charge(s) Nom, grade et fonction de la personne portant l'(les) accusation(s)	Signature	Date	Charge(s) referred to: L'(les) accusation(s) est (sont) renvoyée(s) à : <input type="checkbox"/> Commanding Officer Commandant <input type="checkbox"/> Delegated Officer Officier délégué	Copy to accused Copie à l'accusé <input type="checkbox"/>
---	-----------	------	---	---

APPOINTMENT OF ASSISTING OFFICER OFFICIER DÉSIGNÉ POUR AIDER L'ACCUSÉ	Name and Rank of Assisting Officer Appointed Nom et grade de l'officier désigné pour aider l'accusé	LANGUAGE OF THE PROCEEDINGS CHOSEN BY THE ACCUSED LANGUE DES PROCÉDURES CHOISIE PAR L'ACCUSÉ <input type="checkbox"/> English Anglais <input type="checkbox"/> Français French
--	--	---

PART/PARTIE 2 – INFORMATION PROVIDED TO ACCUSED PRIOR TO ELECTION OR SUMMARY TRIAL (*Attach a list of all information provided in accordance with QR&O Art. 108.15. List to identify any evidence to be relied on at trial.*) RENSEIGNEMENTS FOURNIS À L'ACCUSÉ AVANT LE CHOIX D'ÊTRE JUGÉ DEVANT UNE COUR MARTIALE OU AVANT LE PROCÈS SOMMAIRE (*Dressez la liste de tout renseignement fourni conformément à l'article 108.15 des ORFC. La liste doit identifier tout élément de preuve sur lequel on compte s'appuyer au procès.*)

INFORMATION IDENTIFIED IN ATTACHED LIST AND A COPY OF THE LIST PROVIDED TO ACCUSED RENSEIGNEMENTS IDENTIFIÉS À LA LISTE CI-JOINTE ET COPIE DE LA LISTE FOURNIE À L'ACCUSÉ	Name, Rank and Position of Person(s) Providing Information Nom, grade et fonction de la (des) personne(s) fournissant les renseignements	Signature	Date
--	---	-----------	------

PART/PARTIE 3 – ELECTION TO BE TRIED BY COURT MARTIAL (Where Applicable) - DEMANDE DE PROCÈS DEVANT UNE COUR MARTIALE (Le cas échéant)
(See QR&O Art./ Voir les art. 108.14 and/et 108.17 des ORFC)

At / À _____, the accused was informed of the right to elect trial by court martial, and of the requirement
Date and Time – Date et heure l'accusé a été informé de son droit d'être jugé devant une cour martiale et de l'obligation

to make his/her decision known by (not less than 24 hours)
de faire connaître sa décision d'ici (au moins 24 heures)

_____ Date and time – Date et heure

I confirm that: a) the nature and gravity of the offence(s) and the differences between trial by court martial and trial by summary trial were discussed with my assisting officer;
Je confirme que : j'ai discuté avec l'officier chargé de m'aider de la nature et de la gravité de l' (des) accusation(s) et des différences entre un procès devant une cour martiale et un procès sommaire;
b) I have had an opportunity to consult legal counsel.
j'ai eu l'occasion de consulter un avocat.

I elect to be tried by _____
Je choisis d'être jugé par / devant une ☐ Summary Trial Procès sommaire ☐ Court Martial Cour martiale

Name, Rank and Signature of Accused
Nom, grade et signature de l'accusé

Name, Rank, Position and Signature of Person Receiving Election
Nom, grade, fonction et signature de la personne informée du choix

Date and Time Received
Choix communiqué – Date et heure

PART/PARTIE 4 – REFERRAL OF CHARGE(S) BY DELEGATED OFFICER, COMMANDING OFFICER, SUPERIOR COMMANDER AND REFERRAL AUTHORITY (Where Applicable)
RENOI DE L' (DES) ACCUSATION(S) PAR L'OFFICIER DÉLÉGUÉ, LE COMMANDANT, LE COMMANDANT SUPÉRIEUR ET L'AUTORITÉ DE RENVOI (Le cas échéant)
(See QR&O Art./Voir les art. 108.16, 108.19, 108.195 108.34 and/et 109.05 des ORFC)

Name, Rank and Position of Officer to Whom Charges Referred
Nom, grade et fonction de l'officier à qui l' (les) accusation(s) est (sont) renvoyée(s)

Name, Rank and Position of Officer Making Referral (attach correspondence to document initial and subsequent referrals)
Nom, grade et fonction de l'officier qui a fait le renvoi (joindre la correspondance qui accompagne le renvoi initial et tout renvoi subséquent)

Signature

Date

PART/PARTIE 5 – CHARGE(S) NOT PROCEEDED WITH – COMMANDING OFFICERS AND SUPERIOR COMMANDERS (Where Applicable)
ACCUSATION(S) À LAQUELLE (AUXQUELLES) ON N'A PAS DONNÉ SUITE – COMMANDANTS ET COMMANDANTS SUPÉRIEURS (Le cas échéant)
(See QR&O Art./Voir les art. 108.19 and/et 108.195 des ORFC)

Charge No.(s) not proceeded with:
N° de l' (des) accusation(s) à laquelle (auxquelles) on n'a pas donné suite :

Name, Rank and Position of Officer Deciding not to Proceed
Nom, grade et fonction de l'officier qui n'a pas donné suite à l' (aux) accusation(s)

Signature

Date

**PART/PARTIE 6 – SUMMARY TRIAL
PROCÈS SOMMAIRE**
(See QR&O Art./Voir l'art. 108.20)

Summary Trial by:
Procès sommaire présidé par :

☐

Delegated Officer
Officier délégué

☐

Commanding Officer
Commandant

☐

Superior Commander
Commandant supérieur

*** Findings – Verdicts**

Having considered the essential elements of each charge, the evidence received, the credibility of the witnesses heard, the representations submitted by the accused and the concept of reasonable doubt, the accused is:

Ayant tenu compte des éléments essentiels de chaque accusation, de la preuve reçue, de la crédibilité des témoins entendus, des représentations de l'accusé et du concept du doute raisonnable, l'accusé est :

Found not guilty of charge(s) no.:
Non coupable de l'(des) accusation(s) n° :

Found guilty of charge(s) no.:
Coupable de l'(des) accusation(s) n° :

Found guilty of related, less serious or attempted offence(s) on charge(s) no.:
Coupable d'une (des) infraction(s) de même nature, moins grave(s) ou de tentative sur l'(les) accusation(s) n° :

Charge(s) is (are) stayed in respect of alternate charge(s) no.:
Suspension de l'instance est ordonnée à l'égard de l'(des) accusation(s) subsidiaire(s) n° :

(* For special finding, see QR&O article 103.64 (Special Findings).)
(* Pour un verdict annoté, voir l'article 103.64 (Verdicts annotés) des ORFC.)

Sentence

Having considered the evidence in support of the charge(s), the evidence concerning sentence, including aggravating and mitigating factors, the representations by the accused, and the circumstances and factors affecting sentence as set out in the notes to QR&O article 108.20 (Procedure), the accused is sentenced to:

Ayant tenu compte de la preuve présentée au soutien de l'(des) accusation(s), de la preuve qui concerne la sentence, y compris des facteurs aggravants et atténuants, des représentations de l'accusé ainsi que des circonstances et des facteurs énumérés aux notes de l'article 108.20 (Procédure) des ORFC, l'accusé est condamné à:

Name, Rank and Position of Officer Conducting the Summary Trial
Nom, grade et fonction de l'officier présidant le procès sommaire

Signature

Date

PART/PARTIE 7 – REVIEW OF FINDINGS AND PUNISHMENTS - RÉVISIONS DES VERDICTS ET PEINES
(See QR&O Art./Voir les art. 108.45 and/et 116.02 des ORFC)

Name, Rank and Position of Review Authority
Nom, grade et fonction de l'autorité de révision

Review Decision (attach relevant correspondence)
Décision après révision (joindre la correspondance pertinente)

Date of decision
Date de la décision



National Défense
Défence nationale

RECORD OF DISCIPLINARY PROCEEDINGS – PROCÈS-VERBAL DE PROCÉDURE DISCIPLINAIRE

PART/PARTIE 1 – CHARGE REPORT – ÉTAT DE MISE EN ACCUSATION

The Accused L'accusé	Service Number Numéro matricule C34 567 890	Name and Rank – Nom et grade Sergeant Green	Unit or Element Unité ou élément RCD	is charged with having committed the following offence(s): est accusé d'avoir commis l'(les) infraction(s) suivante(s) :
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Statement of Offence / Statement of Particulars (*attach a page(s), as necessary*)
Énoncé de l'infraction / Exposé des détails (*annexez une (des) page(s), si nécessaire*)

FIRST CHARGE
(Alternative to Second Charge)
Section 95 N.D.A.

ILL-TREATED A PERSON WHO BY REASON OF RANK WAS SUBORDINATE TO HIM

Particulars: In that he, on 12 July 20__, at Canadian Forces Base Petawawa, did push A23 456 789 Corporal B.C. Jackson.

SECOND CHARGE
(Alternative to First Charge)
Section 130 N.D.A.

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, ASSAULT CONTRARY TO SECTION 266 OF THE CRIMINAL CODE

Particulars: In that he, on 12 July 20__, at Canadian Forces Base Petawawa, did commit an assault upon A23 456 789 Corporal B.C. Jackson.

THIRD CHARGE
Paragraph 112(a)
N.D.A.

USED A VEHICLE OF THE CANADIAN FORCES FOR AN UNAUTHORIZED PURPOSE

Particulars: In that he, on 18 June 20__, at Canadian Forces Base Petawawa, without authority, used a G-Wagon, CFR # 12345, a vehicle of the Canadian Forces, to transport him to Belleville, Ontario, when proceeding on leave.

Name, Rank and Position of Person Laying Charge(s) Nom, grade et fonction de la personne portant l'(les) accusation(s)	Signature	Date	Charge(s) referred to: L'(les) accusation(s) est (sont) renvoyée(s) à :	Copy to accused Copie à l'accusé
CWO A.B. Gagnon, RSM RCD		30 Jul 20__	<input checked="" type="checkbox"/> Commanding Officer Commandant <input type="checkbox"/> Delegated Officer Officier délégué	<input checked="" type="checkbox"/>

APPOINTMENT OF ASSISTING OFFICER OFFICIER DÉSIGNÉ POUR AIDER L'ACCUSÉ	Name and Rank of Assisting Officer Appointed Nom et grade de l'officier désigné pour aider l'accusé Capt C.P. Jones	LANGUAGE OF THE PROCEEDINGS CHOSEN BY THE ACCUSED LANGUE DES PROCÉDURES CHOISIE PAR L'ACCUSÉ	<input checked="" type="checkbox"/> English Anglais <input type="checkbox"/> Français French
--	--	---	---

PART/PARTIE 2 – INFORMATION PROVIDED TO ACCUSED PRIOR TO ELECTION OR SUMMARY TRIAL (*Attach a list of all information provided in accordance with QR&O Art. 108.15. List to identify any evidence to be relied on at trial.*) RENSEIGNEMENTS FOURNIS À L'ACCUSÉ AVANT LE CHOIX D'ÊTRE JUGÉ DEVANT UNE COUR MARTIALE OU AVANT LE PROCÈS SOMMAIRE (*Dressez la liste de tout renseignement fourni conformément à l'article 108.15 des ORFC. La liste doit identifier tout élément de preuve sur lequel on compte s'appuyer au procès.*)

INFORMATION IDENTIFIED IN ATTACHED LIST AND A COPY OF THE LIST PROVIDED TO ACCUSED RENSEIGNEMENTS IDENTIFIÉS À LA LISTE CI-JOINTE ET COPIE DE LA LISTE FOURNIE À L'ACCUSÉ	Name, Rank and Position of Person(s) Providing Information Nom, grade et fonction de la (des) personne(s) fournissant les renseignements CWO A.B. Gagnon, RSM RCD	Signature	Date 1 Aug 20__
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PART/PARTIE 3 – ELECTION TO BE TRIED BY COURT MARTIAL (Where Applicable) - DEMANDE DE PROCÈS DEVANT UNE COUR MARTIALE (Le cas échéant)
(See QR&O Art./ Voir les art. 108.14 and/et 108.17 des ORFC)

At / À 1030 Hrs 6 Aug, the accused was informed of the right to elect trial by court martial, and of the requirement
 Date and Time – Date et heure l'accusé a été informé de son droit d'être jugé devant une cour martiale et de l'obligation

to make his/her decision known by (not less than 24 hours)
 de faire connaître sa décision d'ici (au moins 24 heures)

1130 Hrs 7 Aug
 Date and time – Date et heure

I confirm that: a) the nature and gravity of the offence(s) and the differences between trial by court martial and trial by summary trial were discussed with my assisting officer;
 Je confirme que : j'ai discuté avec l'officier chargé de m'aider de la nature et de la gravité de l' (des) accusation(s) et des différences entre un procès devant une cour martiale et un procès sommaire;
 b) I have had an opportunity to consult legal counsel.
 j'ai eu l'occasion de consulter un avocat.

I elect to be tried by ☒ Summary Trial ☐ Court Martial
 Je choisis d'être jugé par / devant une Procès sommaire Cour martiale

Name, Rank and Signature of Accused
 Nom, grade et signature de l'accusé

Sgt D.E. Green

Name, Rank, Position and Signature of Person Receiving Election
 Nom, grade, fonction et signature de la personne informée du choix

Capt G.F. Richard, Adjt RCD

Date and Time Received
 Choix communiqué – Date et heure

1035 Hrs 7 Aug

PART/PARTIE 4 – REFERRAL OF CHARGE(S) BY DELEGATED OFFICER, COMMANDING OFFICER, SUPERIOR COMMANDER AND REFERRAL AUTHORITY (Where Applicable)
RENOI DE L' (DES) ACCUSATION(S) PAR L'OFFICIER DÉLÉGUÉ, LE COMMANDANT, LE COMMANDANT SUPÉRIEUR ET L'AUTORITÉ DE RENVOI (Le cas échéant)
(See QR&O Art./Voir les art. 108.16, 108.19, 108.195 108.34 and/et 109.05 des ORFC)

Name, Rank and Position of Officer to Whom Charges Referred
 Nom, grade et fonction de l'officier à qui l' (les) accusation(s) est (sont) renvoyée(s)

Name, Rank and Position of Officer Making Referral (attach correspondence to document initial and subsequent referrals)
 Nom, grade et fonction de l'officier qui a fait le renvoi (joindre la correspondance qui accompagne le renvoi initial et tout renvoi subséquent)

Signature

Date

PART/PARTIE 5 – CHARGE(S) NOT PROCEEDED WITH – COMMANDING OFFICERS AND SUPERIOR COMMANDERS (Where Applicable)
ACCUSATION(S) À LAQUELLE (AUXQUELLES) ON N'A PAS DONNÉ SUITE – COMMANDANTS ET COMMANDANTS SUPÉRIEURS (Le cas échéant)
(See QR&O Art./Voir les art. 108.19 and/et 108.195 des ORFC)

Charge No.(s) not proceeded with:
 N° de l' (des) accusation(s) à laquelle (auxquelles) on n'a pas donné suite :

3

Name, Rank and Position of Officer Deciding not to Proceed
 Nom, grade et fonction de l'officier qui n'a pas donné suite à l' (aux) accusation(s)

LCol R.G. McAuley, CO RCD

Signature

Date

7 Aug

**PART/PARTIE 6 – SUMMARY TRIAL
 PROCÈS SOMMAIRE
 (See QR&O Art./Voir l'art. 108.20)**

Summary Trial by:
 Procès sommaire présidé par :



Delegated Officer
 Officier délégué



Commanding Officer
 Commandant



Superior Commander
 Commandant supérieur

*** Findings – Verdicts**

Having considered the essential elements of each charge, the evidence received, the credibility of the witnesses heard, the representations submitted by the accused and the concept of reasonable doubt, the accused is:

Ayant tenu compte des éléments essentiels de chaque accusation, de la preuve reçue, de la crédibilité des témoins entendus, des représentations de l'accusé et du concept du doute raisonnable, l'accusé est :

Found not guilty of charge(s) no.:
 Non coupable de l'(des) accusation(s) n° :

Found guilty of charge(s) no.:
 Coupable de l'(des) accusation(s) n° :

1

Found guilty of related, less serious or attempted offence(s) on charge(s) no.:
 Coupable d'une (des) infraction(s) de même nature, moins grave(s) ou de tentative sur l'(les) accusation(s) n° :

Charge(s) is (are) stayed in respect of alternate charge(s) no.:
 Suspension de l'instance est ordonnée à l'égard de l'(des) accusation(s) subsidiaire(s) n° :

2

(* For special finding, see QR&O article 103.64 (Special Findings).)
 (* Pour un verdict annoté, voir l'article 103.64 (Verdicts annotés) des ORFC.)

Sentence

Having considered the evidence in support of the charge(s), the evidence concerning sentence, including aggravating and mitigating factors, the representations by the accused, and the circumstances and factors affecting sentence as set out in the notes to QR&O article 108.20 (Procedure), the accused is sentenced to:

Ayant tenu compte de la preuve présentée au soutien de l'(des) accusation(s), de la preuve qui concerne la sentence, y compris des facteurs aggravants et atténuants, des représentations de l'accusé ainsi que des circonstances et des facteurs énumérés aux notes de l'article 108.20 (Procédure) des ORFC, l'accusé est condamné à:

\$1500 fine

Name, Rank and Position of Officer Conducting the Summary Trial
 Nom, grade et fonction de l'officier présidant le procès sommaire

LCol R.G. McAuley, CO RCD

Signature

Date

8 Aug

PART/PARTIE 7 – REVIEW OF FINDINGS AND PUNISHMENTS - RÉVISIONS DES VERDICTS ET PEINES

(See QR&O Art./Voir les art. 108.45 and/et 116.02 des ORFC)

Name, Rank and Position of Review Authority
Nom, grade et fonction de l'autorité de révision

Col J.F. Tremblay, Comd 2 CBMG

Review Decision (attach relevant correspondence)
Décision après révision (joindre la correspondance pertinente)

Mitigated to \$1000 Fine

Date of decision
Date de la décision

15 Sep ____

Annex B
Military Justice at the Summary Trial Level v. 2.2

INFORMATION PROVIDED IN ACCORDANCE WITH ARTICLE 108.15

(service number, rank, name and unit)
(To be attached to RDP and provided to the accused)

I. Investigation reports, witness statements or other information made available to the accused:

II. Witnesses to be presented at summary trial:

III. Documentary and real evidence to be presented at summary trial:

Information provided to accused on _____ by _____.
(date) (name, rank and position)_____
(signature)

INFORMATION PROVIDED IN ACCORDANCE WITH ARTICLE 108.15
C34 567 890 Sergeant Green D.E., RCD
(To be attached to RDP and provided to the accused)

I. Investigation reports, witness statements or other information made available to the accused:

Investigation Report: MPIR CFBP 910-23-99 dated 23 July 20##
Investigation Report: MPIR CFBP 910-24-99 dated 24 July 20##

II. Witnesses to be presented at summary trial:

III. Documentary and real evidence to be presented at summary trial:

Cautioned statement provided to the Military Police by C34 567 890 Sergeant Green
Dated 19 July 20##

Information provided to accused on 1 Aug ## by CWO Gagnon, RSM RCD.
(date) (name, rank and position)

A.B. Gagnon
CWO
RSM RCD
5555

CHAPTER 6**MILITARY POLICE INVESTIGATIONS:
GENERAL****SCOPE AND APPLICATION**

1. **Scope.** This chapter provides policy and procedures concerning the general conduct of MP investigations.
2. **References :** The primary reference for Military Police is A-SJ-100-004/AG-000. The following texts are the recognized supplementary investigation reference manuals for use by Military Police :
 - a. Title : Criminal Investigation, Forming Reasonable Grounds. Author. Arcaro, Gino. Publisher. ITP Nelson. ISBN: 0-07-552774-X;
 - b. Title: Basic Police Powers, Arrest and Search Procedures. Gino Arcaro, ISBN 0-17-622314-2 (3rd edition);
 - c. Title: Droit Pénal Général et Pouvoirs Policiers, Droit Pénal III, 3rd edition. Author: Gabias, Blais, Carle Lacoursiere and Lefebvre Publisher: Modulo ISBN: 2-89113-701-9; and
 - d. Title: Investigative Interviewing. Author: MacKinnon, Gordon P. Publisher: Old Village Press (c)1996 (contact direct at 1-905-564-0078) ISBN: 0-9681699-0-2.

CHAPITRE 6**ENQUÊTES DE LA POLICE MILITAIRE :
GÉNÉRALITÉS****PORTÉE ET APPLICATION**

1. **Portée.** Ce chapitre présente la politique et les procédures qui régissent le déroulement général des enquêtes de la PM.
2. **Références :** La référence principale pour le police militaire est A-SJ-100-004/AG-000. Les textes suivants sont les manuels de référence supplémentaire identifiés de recherche à l'usage de police militaire :
 - a. Titre : Criminal Investigation, Forming Reasonable Grounds. Auteur. Arcaro, Gino. Editeur. ITP Nelson. ISBN: 0-07-552774-X;
 - b. Titre : Basic Police Powers, Arrest and Search Procedures. Auteur: Gino Arcaro, ISBN 0-17-622314-2 (3^{ième} édition);
 - c. Titre: Droit Pénal Général et Pouvoirs Policiers, Droit Pénal III, 3e édition. Auteur: Gabias, Blais, Carle Lacoursiere et Lefebvre. Editeur : Modulo ISBN: 2-89113-701-9; et
 - d. Titre: Investigative Interviewing. Auteur: MacKinnon, Gordon P. Editeur: Old Village Press (c)1996 (appeller a 1-905-564-0078) ISBN: 0-9681699-0-2.

3. Where conflict arises between A-SJ-100-004/AG-000 and the above-noted publications, the military publication shall prevail. Detachments are responsible for their own acquisition of supplementary manuals.

POLICY

4. **General.** The Military Police Investigation Policy is detailed in Annex A.

PRINCIPLES

5. **General.** The independence of policing is aimed at ensuring the integrity of our judicial system. The purpose and objectives of an investigation are to reconstruct events, gather evidence, identify the elements of the alleged offence, and identify those responsible for it. Each of these purposes must be fulfilled, and each of these objectives must be achieved with integrity and fairness.

6. **Requirement.** MP conduct investigations and report on criminal and service offences committed, or alleged to have been committed, by any person on, in or in respect of DND Establishments. All investigations conducted by MP must be thorough, complete, and accurate and immediately reported in a SAMPIS. The results will be documented in an MPIR as directed in Chapter 10: Information Management – Military Police Reports.

7. **Independence of Investigations.** MP authority is derived from the *NDA* and the *CC*. MP investigation shall not be influenced by the CF chain of command. When exercising MP powers under the *NDA*, the individual MP member is held personally accountable.

3. Là où un conflit surgit entre A-SJ-100-004/AG-000 et les publications ci-dessus la publication militaire aura préséance. Les unités sont responsables de leur propre acquisition des manuels supplémentaires.

POLITIQUE

4. **Généralités.** La politique sur les enquêtes de la police militaire est énoncée en détail à l'annexe A.

PRINCIPES

5. **Généralités.** L'indépendance des services de police vise à assurer l'intégrité de notre système de justice. Une enquête a pour but et pour objectifs de reconstituer les événements, réunir les éléments de preuve, dégager les éléments de la présumée infraction et déterminer ceux qui en sont responsables. Il faut atteindre chaque but et remplir les objectifs en toute intégrité et impartialité.

6. **Condition.** La PM mène des enquêtes et fait rapport sur des infractions criminelles et militaires commises, ou prétendument commises, par une personne dans des installations du MDN ou en ce qui concerne ces installations. La PM doit toujours mener des enquêtes approfondies, complètes et précises et de les rapporter immédiatement dans SISEPM. Les résultats sont consignés dans un REPM conformément aux directives du chapitre 10 : Gestion de l'information – Rapports de la police militaire.

7. **Indépendance des enquêtes.** Les pouvoirs de la PM découlent de la *LDN* et du *C.cr.* Les enquêtes de la PM ne doivent pas être influencé par la chaîne de commandement des FC. Le policier militaire est tenu personnellement responsable lorsqu'il exerce les pouvoirs de la PM en vertu de la *LDN*.

8. Ethical Principles. MP investigations shall be conducted IAW accepted CF Military Police policies and procedures, with particular attention to the following:

- a. Military Police shall not accord immunities or undue advantages to any person notwithstanding their rank or position;
- b. investigations and other law enforcement activities must be conducted in such a manner, within the law, that facilitates and supports the Commander's legitimate mission, and reinforces military values;
- c. MP shall not attempt to dissuade a complainant from pursuing a complaint, nor will the MP display scepticism about the allegations. MP may attempt to reconcile inconsistencies in a complainant's statement(s) if present, however failure to do so should not prevent the complaint from being pursued; and
- d. MP shall investigate complaints without bias or prejudice to any particular individual. Identification and elimination of suspects shall be based on objective evidence and reasonable grounds; and
- e. MP investigations are conducted as much as to exonerate individuals as to implicate them. All information gathered, whether inculpatory or exculpatory shall be reported, regardless of the initial, interim or final decisions with respect to culpability or the laying of charges.

8. Principes éthiques. Les enquêtes de la PM doivent être menées en conformité avec les politiques et procédures reconnues de la police militaire des FC, en portant une attention particulière aux aspects suivants :

- a. La police militaire ne doit accorder d'immunités ou d'avantages indus à personne, indépendamment de son grade ou de son poste;
- b. les enquêtes et les autres activités d'application de la loi doivent être menées conformément à la loi, de manière à faciliter et appuyer la mission légitime du commandant et à renforcer les valeurs militaires;
- c. la PM n'essayera pas à dissuader un plaignant de porter plainte, ni afficher son scepticisme au sujet des allégations. Le PM peut essayer de réconcilier des contradictions dans la déclaration du plaignant. Toutefois le défaut de le faire n'empêche pas la plainte d'être poursuivie;
- d. La PM doit étudier les plaintes sans parti-pris ou sans porter préjudice à un individu donné. L'identification et l'élimination des suspects doivent être fondées sur une preuve objective et des motifs raisonnables; et
- e. Les enquêtes de la PM sont complétées dans le but de disculper ou d'impliquer des individus. Toutes informations rassemblées, qu'elles soient disculpatoire ou non, doivent être rapportées, sans tenir compte des décisions initiales, provisoires ou finales en ce qui concerne la culpabilité ou l'émission de chef(s) d'accusation(s).

9. CFNIS Chain of Command. The CFNIS is an independent unit and its Commanding Officer reports directly to the CFPM.

9. Chaîne de commandement du SNE. Le SNEFC est une unité indépendante et son commandant se rapport directement au GPFC.

10. Initiating an Investigation. An MP investigation may be initiated whenever:

- a. an MP observes the commission of any criminal or service offence;
- b. an MP is in receipt of a complaint originating from any other person in which a criminal or service offence is alleged;
- c. at the request of a Commander or Commanding Officer;
- d. MP learns of an incident through an informant (i.e., local police, a witness, a confidential informant, an anonymous tip, etc.);
- e. MP are tasked directly by DPM Police or CFNIS; or
- f. an authority in the MP Technical Chain so directs.

10. Ouverture d'une enquête. La PM doit ouvrir une enquête lorsque :

- a. un PM constate la perpétration d'une infraction criminelle ou militaire;
- b. un PM reçoit d'une autre personne une plainte relative à une présumée infraction criminelle ou militaire;
- c. un commandant le demande;
- d. un informateur (c.-à-d. la police locale, un témoin, un informateur confidentiel, une personne anonyme, etc.) signale un incident à la PM;
- e. le GPA Police ou le SNEFC en charge directement la PM; ou
- f. une autorité de la chaîne de commandement technique de la PM en donne l'ordre.

INVESTIGATION MANAGEMENT

11. General. Annex B provides procedures and guidelines concerning the management of investigations.

GESTION D'ENQUÊTE

11. Généralités. L'annexe B présente des procédures et lignes directrices en matière de gestion des enquêtes.

INVESTIGATIVE ASSISTANCE – REQUEST

12. **General.** A request for assistance is to be used when it is feasible and economical to turn interviews or other investigative tasks over to another investigative MP organization without jeopardising the integrity of the investigation.

13. **Request.** MP shall submit a request for assistance either in writing or through SAMPIS. The request shall clearly explain the task required, the sensitivity of the investigation and, where appropriate, the urgency of the request. It must include a point of contact for background information. All requests for assistance, once received, will be generated in SAMPIS and a follow-up will be assigned to the investigator from the receiving Detachment.

CRIMINAL INVESTIGATOR

14. **General.** Criminal investigators are normally provided as part of MP organizations. Criminal investigators will conduct those more complex investigations that cannot be solved by patrol personnel in the course of their duties. This frees patrol personnel to fulfil their force protection and preventive policing duties.

DEMANDE D'AIDE EN MATIÈRE D'ENQUÊTE

12. **Généralités.** Il faut présenter une demande d'aide lorsqu'il est possible et rentable de déléguer les enquêtes ou d'autres tâches connexes à un autre organisme d'enquête de la PM sans compromettre l'intégrité de l'enquête.

13. **Demande.** PM peut présenter une demande d'aide dans l'écriture ou par SISEPM. Dans sa demande, il doit expliquer clairement la tâche requise, le caractère délicat de l'enquête et, s'il y a lieu, l'urgence de la demande. Il doit inclure un point de contact pour obtenir des renseignements généraux. Toutes les demandes d'assistances, lorsque reçues, doivent être générées dans SISEPM et un suivi devra être généré par le détachement recevant l'assistance.

ENQUÊTEUR CRIMINEL

14. **Généralités.** Les enquêteurs criminels font habituellement partie des organismes de la PM. Les enquêteurs criminels mènent les enquêtes plus complexes que les patrouilleurs ne peuvent pas résoudre dans l'accomplissement de leurs fonctions. Cette mesure dégage les patrouilleurs qui peuvent ainsi s'acquitter de leurs tâches policières de la protection de la force et de prévention.

15. Selection. Personnel assigned to a criminal investigation section should be carefully selected based on their investigative and report writing skills. Additional training is essential, and may include speciality training. Although rotation through an investigation subsection is a valuable way to develop and train MP, such rotations must be managed so as to ensure an acceptable level of experience and specialist training is maintained.

16. Dress. MP employed on investigations may wear CF or civilian clothes as appropriate, and the standards of personal appearance may be adjusted to meet investigative social conditions. Enhanced monthly civilian clothing allowance is available to MP members employed on a full-time basis as criminal investigators.

17. Carrying – Small Arms. MP, while lawfully employed on law enforcement duties, will normally carry, wear, or have available CF-approved SA. Personal or non-approved weapons will not be employed or carried by MP.

INVESTIGATIVE OBJECTIVES

18. General. MP investigations will seek all relevant evidence. Investigators may inquire about the following only when absolutely necessary to establish an element of an alleged service or criminal offence:

15. Sélection. Les personnes affectées à une section d'enquête criminelle devraient être choisies avec soin en fonction de leur aptitude à enquêter et à rédiger des rapports. Une formation supplémentaire est essentielle et peut inclure l'instruction d'une spécialité. Même si l'affectation par roulement à une sous-section d'enquête est un bon moyen de former et perfectionner des PM, il faut gérer ces roulements de manière à assurer le maintien d'un niveau acceptable d'expérience et d'instruction professionnelle.

16. Tenue. Les PM chargés des enquêtes peuvent porter une tenue militaire ou civile s'il y a lieu, et la tenue vestimentaire peut être adaptée aux conditions sociales de l'enquête. Indemnité de vêtements civils augmentée est à la disposition des membres de la PM employés sur une base à temps plein en tant qu'investigateurs criminels.

17. Port d'armes légères. Un membre de la PM, lorsque remplissant ses fonctions d'application de la loi, portera normalement ou aura accès aux AL approuvées pour les FC. Les armes personnelles ou non approuvées ne seront pas utilisées ou portées par la PM.

OBJECTIFS D'ENQUÊTE

18. Généralités. Les enquêtes de la PM ont pour but de chercher toutes les preuves pertinentes. Les enquêteurs peuvent enquêter sur les aspects suivants, seulement en cas d'absolue nécessité, pour établir un élément d'infraction militaire ou criminelle présumée:

- a. job competence;
- b. interpersonal relationships;
- c. sexual activities;
- d. religious beliefs; or
- e. personal popularity.

- a. compétence professionnelle;
- b. relations interpersonnelles;
- c. activités sexuelles;
- d. croyances religieuses; ou
- e. popularité personnelle.

SCOPE OF INVESTIGATIONS

19. Authority. Military Police may determine the scope, direction, and disposition of any investigation if they are:

- a. a superior or a supervisor in the MP technical chain;
- b. familiar with the material facts of the investigation;
- c. able to communicate the reasons for their decision in terms of:

(1) solvability factors, including whether:

- (a) there are any witnesses;
- (b) suspects have been described, located, or identified;
- (c) stolen property is traceable or identifiable;
- (d) physical evidence is available; and
- (e) a distinguishable Modus Operandi is present;

(2) relative seriousness of the alleged offence;

PORTÉE DES ENQUÊTES

19. Pouvoir. Un policier militaire peut déterminer la portée, l'orientation et le règlement d'une enquête donnée s'il:

- a. est un supérieur ou un superviseur de la hiérarchie technique de la PM;
- b. connaît bien les faits pertinents de l'enquête;
- c. est en mesure de communiquer les motifs de sa décision en ce qui concerne :

(1) les facteurs d'élucidation notamment si:

- (a) des témoins existent;
- (b) des suspects ont été décrits, situés ou reconnus;
- (c) il est possible de retracer et d'identifier les biens volés;
- (d) des preuves matérielles sont disponibles; et
- (e) on se trouve en présence d'un modus operandi reconnaissable;

(2) la gravité relative de l'infraction présumée;

(3) resource limitations;

(4) evidentiary thresholds; and

(5) the public/military interest.

(3) la limite des ressources ;

(4) les niveaux de preuve, et

(5) l'intérêt public/militaire.

STATUS OF MPIR

20. Authority. In using SAMPIS, there are 4 ways to identify the status of an MPIR:

- a. **Awaiting RMP review.** This title is used when a file is sent to the RMP or crown attorney's office for judicial review;
- b. **On Going.** Once an allegation has been entered into SAMPIS, (after the creation of a CAD), and investigative activities are present, this title will be used;
- c. **Suspended.** When an investigation reveals a complaint was trivial, frivolous, vexatious, or made in bad faith, the local Senior MP Advisor may direct the investigation be suspended. In addition, for a multitude of reasons, such all avenues of investigation have been exhausted, CF operational factors, resource technology limitations; it may be impractical to continue an investigation. Under these circumstances, the investigation may be suspended. A decision to suspend an investigation for any of these reasons must be recorded in writing, signed, and scanned into SAMPIS. Appropriate rationale must be included; and

STATUT DES REPM

20. Autorité. En utilisant SAMPIS, il y 4 façon d'identifier un REPM :

- a. **En attente d'une révision du PMR.** Ce titre est utilisé lorsqu'un dossier est acheminé au PMR ou au bureau du substitut du procureur de la couronne pour la révision judiciaire;
- b. **En cours.** Dès qu'une allégation a été entrée dans SISEPM, (après la création d'un RAO) et qu'il y a des activités présentes à l'enquête, ce titre sera utilisé;
- c. **En suspend.** Lorsqu'une enquête révèle qu'une plainte était sans objet, frivole, vexatoire ou de mauvaise foi, le conseiller principal local de la PM peut ordonner la suspension de l'enquête. De plus, pour une multitude de raisons, tels que toutes avenues d'enquête furent épuisées, les raisons/facteurs opérationnels des FC, de la restriction des ressources technologiques, il peut être inapproprié de continuer une enquête. Si aucune avenue n'est contemplée, ce titre sera employé. La décision de suspendre une enquête pour l'un ou l'autre de ces motifs doit être consignée et balayer au SISEPM. Le raisonnement approprié doit être inclus; et

- d. **Concluded.** MP investigations will normally be concluded when the case is resolved. MP investigations are concluded on the authority of the case manager.

- d. **Terminée.** Les enquêtes de la PM sont terminées habituellement lorsque le cas est réglé. Les enquêtes de la PM sont conclues par le gestionnaire de cas.

21. All investigations may be reviewed, as required, by HQ PM or CFPM staff. This is to ensure the investigative steps have been appropriately conducted and documented. If necessary, the investigation shall be ordered to be reopened, and the allocation of new investigation resources could be provided. Investigations, which are not reopened, shall be shown as concluded or suspended on SAMPIS.

21. Ces enquêtes peuvent, s'il y a lieu, être soumises à l'étude par le QG PM ou par le personnel du GPFC. Cela permet de s'assurer que les étapes de l'enquête furent complétées et documentées convenablement. S'il y a lieu, on pourrait ordonner de poursuivre l'enquête, et fournir de nouvelles ressources pour les besoins de l'enquête. Les enquêtes qui ne sont pas rouvertes devront être considérées comme étant suspendues ou terminées dans SISEPM.

CANADIAN FORCES NATIONAL INVESTIGATION SERVICE

22. **General.** The CF National Investigation Service (CFNIS) provides DND and the CF an efficient, accountable, and independent organization for criminal/service investigation services in Canada and abroad, in support of the military justice system. Certain offences and incidents shall be investigated and reported on by the CFNIS. MP detachments may request CFNIS assistance in technical and/or specialized support for an investigation that they are conducting.

23. **Chain of Command.** The CFNIS is an independent unit and its Commanding Officer reports directly to the CFPM. The CFNIS is organized in seven detachments, each commanded by an Officer Commanding (OC). Each OC is responsible for the operation and administration of their respective detachment.

SERVICE NATIONAL DES ENQUÊTES DES FORCES CANADIENNES

22. **Généralités.** Le Service national des enquêtes (SNEFC) des FC constitue pour le MDN et les FC un organisme efficace, responsable et indépendant de services d'enquête criminelle et d'infractions d'ordre militaire au Canada et à l'étranger, à l'appui du système de justice militaire. Le SNEFC doit enquêter et faire rapport sur certaines infractions et certains incidents. Les détachements de PM peuvent demander le soutien technique et spécialisé du SNEFC dans les enquêtes qu'ils effectuent.

23. **Chaîne de commandement.** Le SNEFC est une unité indépendante et son commandant se rapporte directement au GPFC. Le SNEFC est organisé en six détachements, chacun étant commandé par un officier commandant (Ocmdt). Les Ocmdt sont responsables du fonctionnement et de l'administration de leur détachement respectif.

24. Mandate. The CFNIS exists to investigate serious and/or sensitive service and criminal offences against persons, property, and the department. The CFNIS shall investigate all complaints of offences occurring with the Military Police mandate that are serious or sensitive. A serious or sensitive investigation is one which, by the nature of the allegation, or through those who are, or may be implicated, could have a strategic or national impact. Strict dollar values, ranks or specific offences are not the main criteria to be considered. Investigations that have the potential to reach across provincial or national boundaries, or which involve elements of more than one CF command may be considered serious, even if the allegations themselves are not inherently serious or sensitive. The CFNIS will decide in the first instance which investigations will be assumed by them, and may do so at any time during the conduct of an investigation. However, it is expected that this decision will normally take place within 48 hours of an incident/investigation being reported in SAMPIS. If for any reason the assumption of an investigation by the CFNIS proves problematic for a Provost Marshal/Sr MP Advisor, the matter should be addressed and resolved between that office and the CFNIS chain of command. Issues not resolved by the CO CFNIS and the Provost Marshal concerned will be forwarded to the CFPM for a final decision.

24. Mandat. Le SNEFC a pour mandat d'enquêter sur les infractions militaires et criminelles graves ou de nature délicate contre des personnes, des biens, et le Ministère. Le SNEFC doit mener une enquête sur toutes les plaintes relatives à des infractions qui ont trait au mandat de la Police militaire et qui sont graves ou délicats. Une enquête sérieuse ou délicate est une enquête qui pourrait avoir des répercussions d'ordre stratégique ou à l'échelle nationale en raison des personnes impliquées ou qui pourraient être impliquées ou en raison de la nature de l'allégation. À strictement parler, les sommes en jeu, les grades et les infractions précises ne constituent pas les principaux critères à prendre en considération. Les enquêtes qui sont susceptibles de s'étendre au-delà des frontières provinciales ou nationales ou qui font intervenir des éléments de plus d'un commandement des FC peuvent être considérées comme sérieuses, même si les allégations ne sont pas forcément sérieuses ou épineuses à proprement parler. Les responsables du SNEFC décideront en premier lieu quelles enquêtes ils prendront en charge. Ils peuvent prendre ce type de décision à n'importe quel moment au cours d'une enquête, mais on s'attend en général à ce qu'ils le fassent dans les 48 heures qui suivent le moment où une enquête/un incident est signalé dans le SISEPM. Si, pour une raison ou pour une autre, l'hypothèse d'une enquête menée par le SNEFC s'avère problématique pour un grand prévôt ou pour un conseiller principal de la PM, il appartient à ce bureau et à la chaîne de commandement du SNEFC d'intervenir pour résoudre cette question. Les questions qui n'auront pas été résolues par le Cmdt du SNEFC et le grand prévôt concerné seront transmises au Grand Prévôt des Forces canadiennes afin qu'il prenne une décision définitive.

25. Case Transfer. Annex C outlines investigative handover protocol to be used when the CFNIS assumes responsibility for an investigation.

25. Transfert de cas. L'annexe C démontre les lignes principales à être utilisées lorsque le SNEFC prend responsabilité d'une enquête.

SPECIALTY SERVICES

SERVICES SPÉCIALISÉS

26. General. MP are not expected to be experts in all investigative fields. Assistance from external and internal specialists may be necessary and is encouraged. As such, assistance may be required from specialist(s) to gain further knowledge regarding specific facets of an investigation. The advantage of utilizing a specialist is to achieve successful investigative results and to obtain credible evidence that will help focus an investigation and enable successful prosecution.

26 Généralités. On ne s'attend pas à ce que les PM soient experts dans tous les domaines d'enquête. L'aide de spécialistes de l'extérieur et du Ministère peut s'avérer nécessaire et on l'encourage. Ainsi, on peut avoir besoin de l'aide de spécialistes pour mieux se renseigner sur certains aspects d'une enquête. Le recours à un spécialiste permet d'obtenir des résultats favorables et de recueillir des preuves crédibles qui aideront à orienter l'enquête et à gagner un procès.

27. Requirements. As a minimum, the following factors should be considered when deciding to obtain a speciality service from within or external to DND:

27. Exigences. Il faut à tout le moins tenir compte des facteurs suivants lorsqu'on décide d'obtenir un service spécialisé à l'intérieur ou à l'extérieur du MDN :

- a. which is more cost effective;
- b. urgency (time) of the specialty service required;
- c. availability of equipment and personnel;
- d. priority of the investigation;
- e. necessity; and
- f. currency/competency of the person(s) holding the specialist qualification.

- a. moyen le plus rentable;
- b. urgence (délai) du service spécialisé requis;
- c. disponibilité d'équipement et de personnel;
- d. priorité de l'enquête;
- e. nécessité; et
- f. fiabilité/compétence du spécialiste.

28. Provisions. DPM RM maintains a list of which DND specialty services are available and the process to acquire these. These services may include forensic identification, polygraph, statement analysis, criminal intelligence analysis, arson investigators, information technology crime investigator, forensic accounting, vehicle accident reconstruction, and advance mobile and static surveillance. DPM RM should be advised when an MP member acquires an accredited specialty course. In addition, MP organizations are to familiarize themselves with the speciality services provided by federal, provincial, or municipal police services and which may be available to MP.

REQUEST TO CIVILIAN POLICE FOR ASSISTANCE

29. General. From time to time during the course of MP investigations, the assistance of civilian police agencies may be required in some cases. When civil police are called or requested, it must be remembered that a harmonious working relationship will benefit both organizations.

30. Arrest. In cases where a criminal offence has been committed on, in or with respect of DND property, and evidence gathered leads to a possible arrest outside a Defence Establishment, the MP will contact the civilian police having primary jurisdiction and request them to accompany the investigator to effect the arrest.

28. Dispositions. Le GPA GR conserve un répertoire des services spécialisés du MDN qui sont disponibles et de la marche à suivre pour les obtenir. Ces services peut inclure l'identité judiciaire, le polygraphe, l'analyse des déclarations, l'analyse du renseignement criminel, l'enquête en matière d'incendie criminel, l'enquête criminelle en matière de technologie de l'information, la comptabilité judiciaire, la reconstitution d'accident de véhicule et la surveillance avancée, mobile et statique. Le GPA GR devrait être conseillé quand un membre de PM acquiert un cours accrédité de spécialité. En plus, les organismes de la PM doivent se familiariser avec les services spécialisés offerts par les polices fédérales, provinciales et municipales pouvant être disponibles pour la PM.

DEMANDE D'AIDE DE LA POLICE CIVILE

29. Généralités. De temps à autre au cours des enquêtes de la PM, on peut dans certains cas, avoir besoin de l'aide des organismes de police civile. À cet égard, il faut se rappeler que les deux organisations auront avantage à entretenir des relations de travail harmonieuses.

30. Arrestation. Lorsqu'une infraction criminelle a été commise dans une propriété du MDN ou à l'égard de cette propriété, et que la preuve recueillie mène à une arrestation possible à l'extérieur de l'installation du MDN, la PM se mettra en rapport avec la police civile ayant compétence et lui demandera d'accompagner l'enquêteur au effectuez l'arrestation.

31. Serving Legal Documents. In cases where legal documents (i.e., summons or subpoena) are being served outside a Defence Establishment, it would be appropriate to advise civilian police of the matter. When executing a warrant (i.e., arrest or search) outside a Defence Establishment, civilian police shall be advised and their attendance requested.

31. Documents juridiques signifiés. Lorsqu'on signifie des documents juridiques (c.-à-d. des sommations ou des citations à comparaître) à l'extérieur de l'installation du MDN, il serait bon d'avertir la police civile de l'incident. Lorsqu'on exécute un mandat (c.-à-d. une arrestation ou une fouille) à l'extérieur de la propriété du MDN, il faut avertir la police civile et demander qu'elle soit présente.

32. Investigative Practices. When the law and good police practices permit, investigations and other law enforcement activities will be conducted in a manner that:

32. Procédés d'enquête. Lorsque la loi et de bonnes méthodes policières le permettent, les enquêtes et les autres activités d'application de la loi doivent s'effectuer d'une manière qui :

- a. facilitates the commander's mission;
- b. reinforces military values; and
- c. is least intrusive.

- a. facilite la mission du commandant;
- b. renforce les valeurs militaires; et
- c. comporte le moins d'intrusion.

REPORTING

33. General. An MPIR is used to convey the findings of an investigation that:

- a. was a fact-finding process intended to obtain all information necessary and relevant to establishing the facts and/or elements of the offence of any matter; and
- b. should continue until a clear, comprehensive, and accurate report of all findings can be presented to the appropriate authorities.

RAPPORTS

33. Généralités. Le REPM sert à véhiculer les conclusions d'une enquête, c'est-à-dire :

- a. il s'agit d'un processus d'établissement des faits qui vise à obtenir toute l'information nécessaire et pertinente pour établir les faits et les éléments de l'infraction, quelle qu'elle soit; et
- b. il devrait se poursuivre jusqu'à ce qu'on puisse remettre aux autorités concernées un rapport clair, complet et précis sur toutes les constatations.

SUPERVISORY RESPONSIBILITY

34. All Military Police reports shall be subjected to rigorous review by the appropriate MP supervisors who have a positive obligation to ensure completion and accuracy of both the reports and the investigations they represent. 100% verification of accuracy is the responsibility at both the Detachment and HQ PM level. DPM Police personnel will conduct random spot checks to ensure conformity.

ATTENDANCE AND TESTIMONY AT TRIALS

35. **General.** MP shall conduct themselves IAW the instructions of the prosecuting authorities. The findings reached by tribunals are based on the evidence presented which may include a substantial amount of testimony by MP. All findings and related court dispositions will be recorded in SAMPIS.

36. **Preparation.** The following guidelines must be adhered to:

- a. confirm the prosecution authority is satisfied with the case preparation;
- b. ensure all exhibits are properly labelled and registered into the property sub-system of SAMPIS; and
- c. ensure dress and deportment meets court requirements.

RESPONSABILITÉ DU SUPERVISEUR

34. Tous les rapports de la PM doivent faire l'objet d'un examen rigoureux. L'examen sera effectué par le superviseur de la PM approprié, qui doit veiller à ce que les rapports et les enquêtes sur lesquelles portent ces derniers soient complets et exacts. La vérification entière de l'exactitude est la responsabilité de l'unité et au niveau QG PM. Le personnel de du GPA police procédera au contrôle de qualité aléatoire pour en assurer la conformité.

PRÉSENCE ET TÉMOIGNAGE LORS D'UN PROCÈS

35. **Généralités.** Les PM doivent agir conformément aux directives de la partie poursuivante. Les conclusions des tribunaux sont fondées sur la preuve présentée, dont les dépositions des PM constituent une part importante. Toutes dispositions de la cour seront inscrites au SISEPM.

36. **Préparation.** Il faut respecter les lignes directrices suivantes :

- a. s'assurer que la partie poursuivante est satisfaite de la préparation du cas;
- b. s'assurer que toutes les pièces sont étiquetées correctement et enregistrées dans le menu de Biens et Pièce du SISEPM; et
- c. s'assurer que la tenue et la conduite respectent les exigences du tribunal.

37 Testimony. When giving testimony, MP shall:

- a. be candid about any actions taken;
- b. be honest, impersonal, objective, factual, precise, and courteous;
- c. listen to the question, ensure it is understood, and then reply concisely without hesitation. Ask for clarification if necessary;
- d. avoid using unknown or confusing police and military terms and abbreviations;
- e. avoid humorous, insulting, and contentious comments; and
- f. provide answers directly to the judge.

ANNEX A

MILITARY POLICE INVESTIGATIONS :
INVESTIGATION POLICY

APPENDIX 1

PROTOCOL FOR A BRIEFING

APPENDIX 2

INFORMATION PURSUANT TO THE
YOUTH CRIMINAL JUSTICE ACT

ANNEX B

MILITARY POLICE INVESTIGATION :
INVESTIGATION MANAGEMENT

37. Témoignage. Lors des témoignages, les PM doivent:

- a. être franc au sujet des mesures prises;
- b. être sincère, impersonnel, objectif, s'en tenir aux faits, être précis et poli;
- c. écouter la question, s'assurer de la comprendre, et répondre ensuite brièvement et sans hésiter. Demander des éclaircissements si nécessaire;
- d. éviter d'employer des expressions et des abréviations policières ou militaires inconnues ou prêtant à confusion;
- e. éviter les remarques humoristiques, insultantes et litigieuses; et
- f. répondre directement au juge.

ANNEXE A

ENQUÊTES DE LA POLICE MILITAIRE:
POLITIQUE D'ENQUÊTE

APPENDIX 1

PROTOCOL DE BRIEFING

APPENDIX 2

INFORMATION RELATIVE À LA LOI SUR
LE SYSTÈME DE JUSTICE PÉNALE
POUR LES ADOLESCENTS

ANNEXE B

ENQUÊTE DE LA POLICE MILITAIRE :
GESTION DES ENQUÊTES

ANNEX C

CFNIS

ANNEXE C

SNEFC

**CHAPTER 6
ANNEX A****MILITARY POLICE INVESTIGATIONS:
INVESTIGATION POLICY****BACKGROUND**

1. **General.** Military Police are authorized to conduct criminal or service offence investigations in accordance with the guidelines detailed in this investigative policy. The Canadian Forces National Investigative Service (CFNIS) is to provide to the Department of National Defence and the Canadian Forces an efficient, accountable, and independent service/criminal investigation service in Canada and abroad in support of the military and civilian justice systems. The CFNIS, in support of this mandate, shall investigate incidents when appropriately requested, initiate investigations, and assume control of other investigations as directed by the CFPM. The CFNIS will work with local Military Police members to provide the Department of National Defence and the Canadian Forces with the required investigative support.

2. **Aim.** The aim of this directive is to set out policy and provide direction to the Department of National Defence and the Canadian Forces concerning the responsibilities for the conduct of Military Police investigations.

**CHAPITRE 6
ANNEXE A****ENQUÊTES DE LA POLICE MILITAIRE:
POLITIQUE D'ENQUÊTE****ARRIÈRE-PLAN**

1. **Généralités.** La police militaire est autorisée à mener des enquêtes relativement à des infractions criminelles ou militaires, conformément aux lignes directrices énoncées dans la présente politique d'enquête. Le Service national des enquêtes des Forces canadiennes (SNEFC) doit offrir au ministère de la Défense nationale et aux Forces canadiennes un service d'enquête efficace, responsable et indépendant, tant au Canada qu'à l'étranger, de manière à desservir adéquatement le système judiciaire militaire et civil. Le SNEFC, compte tenu de la mission qui est la sienne, est tenu d'enquêter sur les incidents, quand la demande lui en est faite dans les règles, d'ouvrir des enquêtes et de prendre en charge d'autres enquêtes, lorsque dirigées par le quand le Grand Prévôt des Forces canadiennes (GPFC). Le SNEFC travaille en collaboration avec les membres de la police militaire locale, de façon à fournir au ministère de la Défense nationale et aux Forces canadiennes l'appui requis en matière d'enquête.

2. **But.** La présente directive a pour objet d'établir une politique et une ligne de conduite pour le ministère de la Défense nationale et les Forces canadiennes en ce qui concerne les responsabilités liées à la conduite d'enquêtes menées par la police militaire.

POLICY STATEMENT

3. The responsibilities to conduct Military Police investigations at Base/Wing levels and the CFNIS will be assigned in accordance with the direction at paragraph 24 of chapter 6 and expanded upon herein.

DEFINITIONS

Service Offence

4. An offence under the *National Defence Act*, the *Criminal Code* or any other Act of Parliament committed by a person subject to the *Code of Service Discipline*. It may also include an offence under foreign law if committed in the place where the law is applicable by a person subject to the *Code of Service Discipline*.

Criminal Offence

5. An offence under the *Criminal Code* or any other Act of Parliament creating such offences, committed by any person.

Investigation

6. A planned and organized determination of facts concerning events, occurrences or conditions for a particular purpose.

7. **Inter-Unit Cooperation.** Whenever practicable, CFNIS investigators may involve local MP in the conduct of investigations. These investigative initiatives could involve illicit drug activity, sexual related offences, including sexual assault and fraudulent activity. This practice will assist in the development of local expertise, resulting in strong investigative partnerships being

ÉNONCÉ DE PRINCIPES

3. Les responsabilités liées à la conduite des enquêtes de la police militaire au niveau des bases, des escadres et du SNEFC sont attribuées conformément au paragraphe 24 du chapitre 6 et détaillé dans cette annexe..

DEFINITIONS

Infractions militaires

4. Une infraction aux termes de la Loi sur la défense nationale, du Code criminel du Canada et de toute autre loi adoptée par le Parlement commise par une personne assujettie au Code de discipline militaire. Il peut également inclure une infraction en vertu de la loi étrangère si commis dans l'endroit où la loi est applicable par une personne assujettie au *Code de discipline militaire*.

Infraction criminelle

5. Une infraction aux termes du *Code criminel* ou de toute autre loi adoptée par le Parlement, commise par une personne quelconque.

Enquête

6. Processus planifié et systématique par lequel les faits sont établis dans un but précis relativement à certains événements, situations ou circonstances déterminés.

7. **Coopération entre unités.** Dans la mesure du possible, les enquêteurs du SNEFC peuvent faire appel au service de police militaire local pour mener des enquêtes. Ces initiatives d'enquête peuvent concerner le trafic illicite de stupéfiants, des infractions d'ordre sexuel, dont les agressions sexuelles, et des actes frauduleux. Cette façon de procéder contribue à renforcer les compétences à

established. It is important to note the CFNIS investigators are specifically responsible for the conduct of each of their investigations and will initiate charges when warranted.

Triggering Mechanisms

8. If the CFNIS decides to assume an investigation, this will normally be initiated as soon as an MPUIR is created in SAMPIS. The following incidents necessitate the creation of an MPUIR:

- a. all incidents which could be of special and immediate interest to Area, Command, or National Headquarters;
- b. all cases of MP pointing or discharging a weapon;
- c. all death incidents involving DND/CF personnel or which occur on, or are connected to a DND establishment whether it is a shadow file or not;
- d. cases of criminal negligence;
- e. reports of Sexual Assault;
- f. thefts or loss of weapons, ammunition or explosive owned by DND;
- g. fraud of a significant amount, (over \$ 10,000); and

l'échelon local, ce qui a pour effet de créer de solides partenariats d'enquête. Il est important de souligner que les enquêteurs du SNEFC sont individuellement responsables de la conduite de chacune de leurs enquêtes et peuvent procéder aux mises en accusation quand cela est justifié.

Déclenchement des mécanismes

8. Advenant que le SNEFC décide de prendre la responsabilité d'une enquête, cela sera normalement initié aussitôt qu'un RIIPM est créé dans SISEPM. Les incidents suivants nécessitent la création d'un RIIPM :

- a. tous les incidents qui pourraient être d'un intérêt immédiat et spécial pour la région, les commandements, le Quartier national;
- b. tous les incidents impliquant un PM pointant son arme ou qu'il est engagé dans une décharge accidentelle;
- c. tout incident relié à un décès impliquant un membre des FC ou un employé du MDN qui s'est produit sur le territoire du MDN, ou qu'il est connecté à un établissement du MDN que se soit un dossier de suivi ou non;
- d. incidents de négligence criminel;
- e. cas signalés d'agression sexuelle;
- f. vol ou perte d'armes, munitions ou explosif appartenant au MDN;
- g. fraude d'une somme signifiante, (plus de \$ 10,000);

h. all drug investigations; and

i. all allegations of misconduct against Military Police members;

h. tous les dossiers se rapportant aux drogues; et

i. tous dossiers d'inconduite d'un membre de la police militaire.

When creating an MPUIR, the appropriate MP authority will notify the affected CFNIS Regional Duty Officer, so they can make the decision to assume the investigation, if appropriate, at the earliest opportunity. Incidents with perishable, extant crime scenes require the most expeditious information passage.

Lors de la création d'un RIIPM, l'autorité de la PM appropriée vérifiera avec l'officier régional en devoir du SNEFC, afin de décider de prendre la responsabilité de l'enquête, si nécessaire, dans les plus brefs délais. Les incidents de nature périssable, les scènes de crime d'envergures, exigent le passage d'information rapide et efficace

9. When an allegation or an incident is made directly to CFNIS or if CFNIS learns of an incident through an informant (local police, witness, confidential informant, anonymous tip), this incident must be reported to local base/wing MP Detachments.

9. Lorsqu'une allégation ou un incident est rapporté directement à un détachement du SNEFC ou connu par le dit détachement, soit par un informateur, (police locale, témoin, informateur confidentiel, ou information anonyme, cette allégation/incident devra être rapporté aux détachements locaux de la PM.

Discretionary Powers

10. Initial Case Evaluation. While all complaints that an offence has been committed must be dealt with appropriately and expeditiously, this does not mean all complaints can or should be investigated in a standard manner. The Military Police, similar to other police forces, must conduct an initial evaluation of the complaint. In the event a Sr MP advisor or CFNIS Regional Commander assesses a complaint as trivial, frivolous, vexatious, or made in bad faith, it may be directed that no further investigation be made, or an investigation be ended. The definition of trivial, frivolous, vexatious, and bad faith complaints are:

Pouvoirs discrétionnaires

10. Évaluation initiale. Bien que toutes les plaintes relatives à la commission d'une infraction doivent être traitées comme il se doit et avec diligence, cela ne signifie pas que toutes les plaintes peuvent et doivent faire l'objet d'un processus d'enquête complète. La police militaire, comme les autres services de police, doit d'abord procéder à une évaluation initiale de la plainte. Lorsqu'un conseiller supérieur de la PM ou commandant régional du SNEFC juge qu'une plainte est sans objet, frivole, vexatoire ou de mauvaise foi, il peut ordonner d'interrompre les procédures ou de mettre fin à l'enquête. Voici la définition des quatre types de plaintes mentionnés ci-dessus :

- a. trivial – the complaint is of no consequence;
- b. frivolous – the complaint is devoid of substance or unsubstantiated;
- c. vexatious – the complaint is one of a number of unsubstantiated complaints from the same person, all of which share a common theme; or
- d. made in bad faith – the complaint is made dishonestly for an improper purpose.

All information concerning the complaint will be documented in MP Notebooks and SAMPIS, including the rationale for suspending the investigation.

RESPONSIBILITY TO INFORM COMMANDERS

11. Generally, commanders have the operational need to know who in their command is under investigation. To ensure commanders are appropriately advised of MP investigations:

- a. the local MP Advisor and/or the CFNIS Detachment commander will determine, in consultation with the CO, the appropriate briefing protocol. Established CFNIS protocols will be in writing to ensure the commander is briefed as agreed upon;

- a. plainte sans objet - plainte négligeable, insignifiante, peu importante;
- b. plainte frivole - plainte sans bien-fondé et ne présentant aucune question justifiable;
- c. plainte vexatoire - plainte d'une série de plaintes sans bien-fondé émanant de la même personne et dont le thème est récurrent; ou
- d. plainte de mauvaise foi - plainte malhonnête déposée à une fin illégitime.

Toute information se rapportant à une plainte sera documentée dans le carnet de note et dans SAMPIS, tout en indiquant également la décision rationnelle de suspendre une enquête.

RESPONSABILITÉ D'INFORMER LES COMMANDANTS

11. Généralement, les commandants se doivent de savoir, d'un point de vue opérationnel, quelles sont les personnes sous leurs ordres qui font l'objet d'une enquête. Dans le but de s'assurer que les commandants sont bien au fait des enquêtes menées par la PM :

- a. le conseiller de la police militaire locale et/ou le commandant du détachement du SNEFC et déterminent, en conjonction avec le commandant, la marche à suivre pour acheminer l'information. Cette méthode de briefing du SNEFC doit être consignée par écrit afin de s'assurer que le commandant est informé conformément à la procédure adoptée;

- b. the local MP Advisor, in consultation with the commander, should be prepared to advise the CFNIS on the operational concerns of the commander; and
- c. the local MP Advisor should have a good appreciation of their commander's operational mandate in order to easily identify the operational impact of various investigations.

12. Commander's Responsibilities.

Commanders must at the same time exercise caution to avoid both the reality and the appearance of inappropriate involvement in an ongoing investigation that could endanger the proper conduct of the investigation and/or the reputation of the commander. To minimise the potential difficulties, commanders requiring more detailed information regarding an investigation should seek legal advice from their legal officer before requesting a briefing from MP/CFNIS personnel.

13. An example of the information commanders require and can expect to receive would be that a financial officer under their command is being investigated for fraud and the investigation is anticipated to take another two months to complete. This would put the commander in a position to properly assess if such a person should be deployed to an operational setting where they would be handling large amounts of cash or whether some other finance officer should be deployed or whether the person under investigation should be suspended from duty, if that action would not jeopardise the investigation.

- b. Le conseiller de la police militaire locale, en conjonction avec le commandant, doit être prêt à informer le SNEFC des difficultés opérationnelles du commandant; et
- c. le conseiller de la police militaire locale doit connaître les paramètres de la mission opérationnelle de son commandant afin d'être à même d'identifier aisément les répercussions des diverses enquêtes au plan opérationnel.

12. Responsabilités du commandant.

Les commandants doivent cependant veiller à ne pas se retrouver en fâcheuse posture en étant réellement ou apparemment impliqués dans le déroulement d'une enquête, ce qui pourrait avoir pour conséquence de brouiller l'issue de l'enquête et de salir leur réputation. Afin de minimiser les problèmes éventuels, le commandant qui désire obtenir de plus amples renseignements sur une enquête doit demander à son avocat militaire de lui donner un avis juridique avant de demander au personnel du PM/SNEFC de lui communiquer de l'information.

13. Un genre d'information que les commandants demandent et peuvent s'attendre à recevoir pourrait par exemple concerner un officier des finances sous leurs ordres faisant l'objet d'une enquête pour fraude, enquête que l'on ne prévoit pas achever avant deux mois. Le commandant concerné se verrait alors contraint de décider si le présumé fraudeur peut être déployé sur un théâtre d'opérations, où il se verrait confier des sommes importantes, ou s'il ne serait pas préférable de déployer un autre officier des finances, ou encore, si une suspension n'est pas plus indiquée en l'occurrence et si cela ne compromettrait pas l'enquête.

14. Information Not Required. An example of information a commander would not normally require would be when a search warrant was to be executed or in what order witnesses would be interviewed. Such decisions are made by those with carriage of the investigation, and the knowledge of such details carries a risk of inadvertent disclosure to the wrong parties that could endanger the investigation and/or the reputation of the commander.

Local Senior MP Advisors Information Passage To Commanders

15. As a minimum, relevant GO/CAD entry information of applicable significance, as well as incidents which will require further MP reporting, should be briefed to commanders. A Military Police Occurrence Notice (MPON) or similar format should be used. Verbal briefings may suffice depending on the severity of the information and the briefing protocol established with respective commanders.

Format for the Protocol Briefing on Information from MP Investigation

16. A formal Protocol Briefing on Information from MP Investigation is a useful mechanism to ensure consistency of information passage and to promote cooperation and reasonable expectations of Commanders. A sample briefing protocol is attached as Appendix 1.

14. Informations non-requises. Un exemple d'information qu'un commandant ne devrait normalement pas demander concerne le moment prévu d'exécution d'un mandat de perquisition ou l'ordre dans lequel les témoins seront interrogés. Pareilles décisions incombent aux responsables de l'enquête, et des renseignements de ce genre, s'ils sont connus, pourraient être divulgués par inadvertance aux mauvaises parties, ce qui pourrait nuire à l'enquête comme à la bonne réputation du commandant.

Conseillers supérieurs locaux de la PM Transmission de l'information aux Commandants

15. Au minimum, l'information pertinente contenue dans les EG/RAO, de même que les incidents qui nécessiteront un compte-rendu de la part de la PM, devrait être transmise aux commandants. Une Notice d'incident de la PM (NIPM) ou format similaire devrait être utilisée. Un exposé verbal peut suffire selon la gravité de l'information et le protocole d'entente établi avec le commandant concerné.

Format du Protocole d'entente pour un Exposé sur l'information concernant les enquêtes de la PM

16. Un protocole d'entente formel pour l'exposé sur l'information d'enquêtes de la PM est un moyen utile pour assurer la transmission de l'information de façon constante et promouvoir la coopération et les attentes légitimes des commandants. Un exemple de protocole pour un exposé est joint à l'appendice 1.

SAMPIS Implications

17. The introduction of SAMPIS to MP Detachments is predicated, to some degree, on the concept of "one incident, one report". That is to say that applicable authorities are notified of an incident as soon as practicable after the information comes to light. It is possible, however, that Commanders may receive only one formal report once the investigation is concluded. There remains however, the responsibility of local Senior MP Advisors to ensure authorities are kept informed of the relevant ongoing aspects of an investigation. This may take the form of verbal briefing(s) or other locally developed report formats. At no time is information from SAMPIS to be distributed electronically on any other IT system.

Young Person Information

18. The passage of information specific to young persons must be made judiciously, IAW the *Youth Criminal Justice Act*, (YCJA). Appendix 2 is guidance received from the JAG Branch in this regard.

OPERATIONAL INVESTIGATIVE SUPPORT

International Operations

19. **General.** When deployed as part of a Task Force (TF)/Canadian Contingent, CFNIS personnel will remain under command of the CO CFNIS. CFNIS personnel on deployment shall:

- a. remain under command of the CO CFNIS at all times;

Implications du SISEPM

17. La mise en place du SISEPM au sein des détachements de la PM est basé sur la prémisse du concept « un incident, un rapport ». Ceci revient à dire que les autorités sont informées d'un incident dès que faire se peut, une fois que l'information est disponible. Il est possible, cependant, que les commandants puissent recevoir un rapport formel seulement une fois l'enquête complétée. Par contre, la responsabilité demeure pour les Conseillers supérieurs de la PM locale de s'assurer que les autorités sont tenus informés des aspects encours d'une enquête. En aucun temps, aucune information provenant du SISEPM peut être distribuée électroniquement sur un autre système.

Information de Jeune personne

18. La transmission d'information spécifique aux jeunes personnes doit être faite judicieusement conformément à *Loi sur le système de justice pénale pour les adolescents*. Ci-joint à l'appendice 2 sont les directives reçues de la Branche du JAG à cet effet.

SOUTIEN OPÉRATIONNEL DES ENQUÊTES

Opérations internationales

19. **Généralités.** Lorsque déployé au sein d'une force opérationnelle interarmées, (FOI), le personnel du SNEFC demeurera sous le commandement du SNEFC. Le personnel du SNEFC en déploiement :

- a. demeure en tout temps sous le commandement du SNEFC;

- b. normally keep the TF/contingent commander informed of their investigations. To ensure an appropriate flow of communications, a written CFNIS briefing protocol will be established with the contingent commander. This protocol will determine the mechanism for CFNIS briefings to the commander and the Provost Marshal; and
- c. conduct investigations in full compliance with MP standards while recognizing the need to minimize the impact on the operational effectiveness is considered essential. Advice from the TF/contingent Provost Marshal must be sought on this matter.

20. Criminal or service offence investigations should not impede the operational mission of commanders. Notwithstanding the aforementioned, investigations must be completed in a credible, responsive, independent, and professional manner.

21. CFNIS Responsibilities. CFNIS personnel who are deployed into an operational theatre to conduct specific investigations will:

- a. advise CFNIS HQ of any problems concerning operational effectiveness, who, in turn, will attempt to find an acceptable solution;
- b. in the event that a workable solution cannot be identified from CFNIS HQ, the CFPM will communicate with the TF/contingent commander on the matter; and

- b. tient normalement le commandant de la FOI au courant du déroulement des enquêtes du SNEFC. Afin de s'assurer que les communications se font dans les règles, on consigne par écrit, en conjonction avec le commandant du contingent, la marche à suivre pour la transmission d'information. Cette procédure déterminera le mécanisme des briefings du SNEFC aux commandants et au Grand Prévôt.
- c. mène ses enquêtes en respectant scrupuleusement les normes de la police militaire, tout en reconnaissant qu'il est essentiel de minimiser les répercussions au plan de l'efficacité opérationnelle. On doit à cet égard consulter le Grand Prévôt de la FOI.

20. Les enquêtes portant sur des infractions criminelles ou militaires ne doivent en aucun cas entraver la mission opérationnelle des commandants. Nonobstant ce qui précède, les enquêtes doivent être menées à bien de manière crédible, judicieuse, professionnelle et en toute indépendance.

21. Responsabilités du SNEFC. Les membres du personnel du SNEFC, qui sont déployés dans un théâtre d'opérations pour y enquêter, doivent :

- a. informer le QG SNEFC de tout problème pouvant affecter l'efficacité opérationnelle, qui à son tour tentera de trouver une solution acceptable;
- b. si une solution réaliste ne peut être envisagée, le GPFC communiquera avec le commandant de la FOI de la décision;

- c. conduct the investigation in full compliance with investigative policy, but remain sensitive to the need to minimise the impact on operations.

- c. conduisez l'enquête dans la totale conformité à la politique d'enquête mais restez sensible à la nécessité de réduire au minimum l'impact sur des opérations

INTERACTION WITH PROSECUTORS

23. General. MP will work closely with the appropriate prosecutor to provide an integrated approach to investigations that will result in increased efficiency. MP will:

- a. ascertain what investigative information, reports, and briefings the prosecutor requires;
- b. provide the prosecutor access to evidence when requested; and
- c. routinely seek advice from the prosecutor on investigations and related legal matters.

INTERACTION AVEC LES PROCUREURS

23. Général. La PM travaille en étroite collaboration avec leurs procureurs respectifs, et ce, afin d'en arriver à une démarche intégrée dans le déroulement des enquêtes, d'où une efficacité accrue. La PM doit :

- a. établir avec précision quels sont les renseignements, les rapports et les briefings liés à l'enquête dont le procureur a besoin;
- b. donner au procureur accès aux témoignages, dépositions et preuves quand il en fait la demande; et
- c. chercher régulièrement conseil auprès du procureur en ce qui a trait aux enquêtes et aux questions de droit connexes.

LAYING OF CHARGES -NDA

24. Authority. IAW QR&O 107.02(c), members of the Military Police assigned to investigative duties within the CFNIS are authorized to lay charges.

25. If charges are appropriate, the CFNIS will lay any charges resulting from investigations conducted by the CFNIS.

DÉPÔTS DES ACCUSATIONS -LDN

24. Autorité. Conformément à l'article 107.02(c) des ORFC, les membres de la police militaires affectés au SNEFC sont autorisés à porter des accusations.

25. Si les mises en accusation sont justifiées, le SNEFC peut porter n'importe quelle accusation en relation à une de ses enquêtes.

26. Consultation. CFNIS members, before laying charges, shall consult with and obtain the opinion of their assigned RMP. In those rare situations where there is any disagreement regarding the laying of charges, the matter will be referred up both the CFNIS and prosecution chains of command for resolution. Ultimately, the CO CFNIS will decide whether or not to lay a charge if the resolution process fails.

26. Consultation. Les membres du SNEFC, avant de porter des accusations, sont tenus de consulter leur procureur militaire régional attitré et de prendre note de son avis juridique. Dans les rares cas où les accusations donnent lieu à un quelconque désaccord, la question sera soumise à des instances supérieures par l'entremise des chaînes de commandement SNEFC comme de la poursuite, afin d'y être réglée. Il n'en demeure pas moins que le Cmdt SNEFC décidera s'il est opportun d'émettre des accusations advenant que le processus de règlement du différend a échoué.

CHAPTER 6 ANNEX B

MILITARY POLICE INVESTIGATION: INVESTIGATION MANAGEMENT

SCOPE AND APPLICATION

1. **General.** This Annex concerns the management of investigations. It does not address investigative or forensic procedures: these are contained in the Criminal Investigation Reference Manuals.

PROCEDURES

CASE SCREENING

2. **Responsibility.** MP must conduct an initial evaluation of the complaint. If the local Senior MP Advisor assesses a complaint as trivial, frivolous, vexatious, or made in bad faith, the local Senior MP Advisor may direct no further investigation be made or an investigation be ended. A decision not to pursue an investigation or to end the investigation of a formal complaint must be recorded in writing, signed, and scanned into SAMPIS. The rationale must be included in the record and the complainant appropriately informed.

3. **Management.** Senior MP Advisors should be familiar with the basic premise of each ongoing investigation. In serious cases a written evaluation based on solvability factors should be considered to determine the investigative effort to be used. The purpose of the evaluation is to prioritize cases, and the evaluation should include the following facts:

- a. the seriousness of the offence;
- b. the factors present:
 - (1) were there any witnesses to the offence;

CHAPITRE 6 ANNEXE B

ENQUÊTE DE LA POLICE MILITAIRE : GESTION DES ENQUÊTES

PORTÉE ET APPLICATION

1. **Généralités.** Cette annexe porte sur la gestion des enquêtes. Elle n'aborde pas les procédures d'enquête et médico-légales : celles-ci figurent dans les manuels de référence des enquêtes criminelles

PROCÉDURES

TRIAGE DES ENQUÊTES

2. **Responsabilité.** Les PM doivent effectuer une évaluation initiale de la plainte. Si le conseiller supérieur de la PM établit que la plainte est sans objet, frivole, vexatoire ou faite de mauvaise foi, il peut demander l'arrêt de l'enquête ou indiquer qu'aucune autre enquête ne doit être effectuée. La décision de ne pas initier une enquête ou de mettre un terme à celle-ci au sujet d'une plainte officielle doit être consignée par écrit. Le raisonnement doit être inclus et convenablement l'au courant plaignant. De plus, le plaignant doit être informé convenablement de la décision.

3. **Gestion.** Le conseiller supérieur de la PM devrait, dans la mesure du possible, se familiariser avec les faits de chaque enquête. Lors des enquêtes importantes, une évaluation écrite se fondant sur des facteurs en rapport avec la possibilité de résolution afin de déterminer l'envergure de l'enquête à effectuer. L'évaluation vise à prioriser les cas et elle doit englober les faits suivants :

- a. la gravité de l'infraction;
- b. les facteurs en cause;
 - (1) la question à savoir si des personnes ont été témoins de l'infraction;

- | | |
|--------------------------------------|--|
| (2) identifiable suspect vehicle; | (2) le véhicule suspect reconnaissable; |
| (3) suspect leads; | (3) les pistes quant aux suspects; |
| (4) physical evidence available; | (4) la preuve matérielle disponible; |
| (5) traceable property involved; and | (5) les biens identifiables disponibles; et |
| (6) distinctive method of operation; | (6) la méthode de fonctionnement particulière; |
- c. in addition, the following criteria may be used to screen cases for follow-up investigation:
- | | |
|---|---|
| (1) past experience in handling similar cases; and | (1) l'expérience passée quant au traitement de cas semblables; et |
| (2) any research/crime analysis/analytical information available; | (2) toute recherche/analyse de crime/information analytique disponible; |
- d. the investigative effort may continue as long as it is reasonable to do so on the aforementioned basis. However, if none of the solvability factors are present, it may be suspended and annotated as such in SAMPIS.
- d. l'enquête peut se continuer tant qu'il est raisonnable de le faire pour les motifs susmentionnés. Toutefois, si aucun des facteurs de possibilité de règlement ne prévaut, on peut donc suspendre l'enquête et l'indiquer telle quelle dans le SISPEM.

RESPONSIBILITY OF INVESTIGATORS

4. **Responsibility.** MP are individually responsible for the quality of investigation into cases referred to them, and for the preparation of investigation reports.

RESPONSABILITÉ DES ENQUÊTEURS

4. **Responsabilité.** Les PM sont individuellement responsables de la qualité de l'enquête des cas qui leur sont confiés, et en vue de la préparation des rapports d'enquête.

RESPONSE TO INVESTIGATION REQUEST

5. **Preliminary Investigation.** Upon receipt of a case to be investigated, the MP will first analyze the occurrence, then interview the complainant, witnesses, and the suspect, if identified. This process can often produce additional valuable information, i.e., other witnesses, or possible contacts of persons in the area of the crime known to the individuals interviewed or interrogated. Another means to develop additional information is the exchange of crime information with other law enforcement agencies to ascertain if other departments are investigating similar crimes that could produce suspects. MP are to conduct preliminary investigations at all incidents they are dispatched to. The senior MP supervisor will determine which, if any, investigation assistance is needed and will make the necessary calls through the Senior MP Advisor for support.

6. **Investigation Plan.** The documentation of an investigation plan will assist the investigator and the chain of command in the identification and allocation of time and resources. An investigation plan will be completed for each investigation and will be produced prior to any investigation activity. This investigation plan will be reviewed by the supervisor. The following key elements constitute an investigation plan:

- a. **Synopsis.** A brief description of the information known to-date. Includes dates, times, an estimate of the types of offences, and the elements of each offence that need to be focused on during the investigation (refer to consultation with JAG/Crown during the development of this portion of the plan);

RÉPONSE À UNE DEMANDE D'ENQUÊTE

5. **Enquête préliminaire.** Suite à la réception d'un cas à examiner, la PM analyse d'abord l'événement, puis elle interviewe le plaignant, les témoins et le suspect, si celui-ci a été identifié. Ce processus permet souvent de dégager d'innombrables éléments supplémentaires, par exemple d'autres témoins ou des contacts possibles avec des personnes du domaine criminel connues des personnes interviewées ou interrogées. Pour obtenir de l'information supplémentaire, on peut également échanger des renseignements sur des crimes avec d'autres organismes d'application de la loi, dans le but de déterminer si d'autres ministères enquêtent sur des crimes semblables pouvant produire des suspects. La PM doit effectuer une enquête préliminaire de tous les incidents qu'elle reçoit. Le superviseur en chef de la PM détermine l'aide qui est nécessaire, le cas échéant, pour l'enquête et il effectue les appels requis par l'entremise du conseiller supérieur de la PM en vue d'un soutien.

6. **Plan d'enquête.** Les documents du plan d'enquête aident l'enquêteur et la chaîne de commandement à déterminer et à accorder le temps et les ressources nécessaires. Un plan d'enquête sera effectué pour chaque enquête et sera produit avant toute activité de l'enquête. Ce plan sera révisé par le superviseur. Les éléments clés ci-après constituent un plan d'enquête :

- a. **Synthèse.** Courte description de l'information dont on dispose. Précise les dates, les heures, une estimation des types d'infractions et les éléments de chaque infraction sur lesquels on doit se concentrer durant l'enquête (reportez-vous à la consultation avec le JAG/la Couronne pendant l'élaboration de cette partie du plan);

- b. **Interviews.** Identify personnel who may be interviewed during the course of the investigation;
- c. **Plan.** List the investigative steps in the order it is anticipated they will be carried out;
- d. **Resources.** Identify the anticipated resources required for the investigation; and
- e. **Other.** Jurisdictional issues or any other issues that need to be considered at this point.

7. **Investigation.** After conducting the preliminary investigation and preparing the Investigation plan, MP should now conduct the investigation. These investigations should include, but not be limited to the following:

- a. identifying and apprehending the offender;
- b. collecting, preserving, and evaluating evidence;
- c. recovering stolen property;
- d. interviewing victims, witnesses, and suspects;
- e. determining in detail the exact circumstances of the offence;
- f. determining if the suspect may have committed other crimes;
- g. reporting information obtained; and
- h. where warranted, laying appropriate charges.

- b. **Entrevues.** Déterminez le personnel qui peut être interviewé dans le cours de l'enquête;
- c. **Planification.** Indiquez les étapes de l'enquête dans l'ordre prévu de leur exécution;
- d. **Ressources.** Précisez les ressources prévues nécessaires à l'enquête;
- e. **Autre.** Questions de compétence ou toute autre question qui doit être envisagée pour le moment;

7. **D'enquête.** Après la conduite de l'enquête préliminaire et la préparation du plan d'enquête, le PM devrait maintenant conduire l'enquête. Ces enquêtes doivent englober, mais ne se limite pas aux aspects suivants :

- a. l'identification et l'arrestation du contrevenant;
- b. la collecte, la conservation et l'évaluation de la preuve;
- c. la récupération des biens volés;
- d. les entrevues des victimes, des témoins et des suspects;
- e. l'établissement, en détail, des circonstances exactes de l'infraction;
- f. la question à savoir si le suspect a commis d'autres crimes;
- g. la production de rapports d'après l'information recueillie; et
- h. si la situation le justifie, la ou les mises en accusation correspondantes.

8. Subsequent Contacts. MP, when practicable, will make a second contact of complainants and witnesses several days after the initial contact. This lapse of several days may result in their remembering additional information, which might lead to solving the case. In making such contacts, the investigator should recognize the value it has in building public confidence in the MP organization, as well as indicating the organization's genuine concern for the victim and other citizens associated with the case.

9. Background Investigations. In addition to the criminal activity already being investigated in the course of criminal investigation, the MP will frequently need to conduct a background investigation of persons involved. MP will conduct background investigations of persons only rapport in correlation with an on-going criminal investigation. Information from the background investigation can lead to physical evidence and circumstantial evidence, which can be used against the person being investigated. This background investigation can also provide information essential in obtaining a search warrant; alternately, it can lead to other individuals connected to the criminal activity, or additional witnesses and intelligence information. Depending upon the type of criminal activity being investigated, various sources of information in conducting background investigations are available. The following is intended as a guideline, and not a comprehensive list of information sources (search warrants may be required for some of the following):

8. Contacts subséquents. La PM, lorsque possible, contacte une seconde fois les plaignants et les témoins, plusieurs jours après le contact initial. Ainsi, ces personnes se souviendront peut-être d'éléments additionnels qui pourraient aider à résoudre l'affaire. Dans ces contacts, l'enquêteur doit tenir compte de l'importance que ceux-ci ont car ils suscitent la confiance du public envers la PM, en plus d'indiquer le réel souci de l'organisme envers la victime et les autres citoyens en rapport avec le cas.

9. Enquête sur les antécédents. En plus de l'activité criminelle qui a déjà été examinée dans le cadre de l'enquête criminelle, la PM doit souvent effectuer une enquête sur les antécédents des personnes en cause. La PM n'effectue ce type d'enquête des personnes qu'en avec une enquête criminelle en cours. L'information tirée de l'enquête sur les antécédents peut permettre d'obtenir une preuve matérielle et une preuve circonstancielle, qu'on peut utiliser contre la personne faisant l'objet de l'enquête. Cette enquête peut également permettre d'obtenir des renseignements essentiels en vue de l'obtention d'un mandat de perquisition, ou encore elle peut servir à trouver d'autres personnes qui ont un rapport avec l'activité criminelle ou encore d'autres témoins et des renseignements. Selon le type d'activité criminelle visée par l'enquête, diverses sources de renseignements sont disponibles pour la réalisation de l'enquête sur les antécédents. On présente ci-après une liste partielle des sources de renseignements (un mandat de perquisition peut s'avérer nécessaire dans certains cas) :

- a. CPIC;
- b. financial institutions;
- c. business associates;
- d. past and/or present employment records;
- e. other law enforcement agencies;
- f. informants;
- g. intelligence reports;
- h. criminal histories;
- i. utility companies;
- j. records; and
- k. licensing records.

10. Background Investigation –

Reporting. All information gained from a background investigation will be incorporated into a report that will become part of the case file and will be reviewed by the investigator's supervisor. All reports will be entered into the SAMPIS GO.

11. Investigative Phases. Complex investigations typically follow five discernible phases:

- a. Phase 1 – establish that an offence was committed;
- b. Phase 2 – identify the person(s) who committed the offence;
- c. Phase 3 – establish a prima facie case including the collection of evidence, conducting interviews etc;
- d. Phase 4 – prepare the case for adjudication; and
- e. Phase 5 – present evidence.

- a. CIPC;
- b. institutions financières;
- c. associés commerciaux;
- d. relevés d'emploi passés et/ou actuels;
- e. autres organismes d'application de la loi;
- f. informateurs;
- g. rapports de renseignements;
- h. dossiers judiciaires;
- i. sociétés de services publics;
- j. dossiers; et
- k. dossiers de permis et licences.

10. Enquête sur les antécédents –

Rapports. Toute l'information recueillie suite à l'enquête sur les antécédents est adjointe à un rapport qui fera partie du dossier du cas et qui sera passé en revue par le superviseur de l'enquêteur. Tous les rapports seront enregistrés dans le EG SISEPM.

11. Phases d'enquête. Les enquêtes complexes comportent en général cinq phases distinctes :

- a. Phase 1 – Établir qu'une infraction a été commise;
- b. Phase 2 – Identifier la ou les personnes qui ont commis l'infraction;
- c. Phase 3 – Établir la preuve prima facie y compris la collection d'évidence, conduisant les entrevues etc ;
- d. Phase 4 – Préparer le cas en vue du jugement; et
- e. Phase 5 – Présenter la preuve.

INVESTIGATION MANAGEMENT

12. General. With the advances in crime scene technology and other legal and resource management issues emanating from an investigation, it is paramount guidelines be established to identify an investigative framework to support a successful investigation. Usually, the investigation support section or dedicated investigators fill the following roles:

- a. case manager;
- b. file manager;
- c. primary investigator and investigators; and
- d. specialty support.

13. Concept. The investigation section or organization is established through the approved unit establishment, and the Senior MP Advisor ensures efficient and consistent procedures are used and all available resources maximized. The function of the investigation team should consist of:

- a. **Case Manager.** MP assigned by the Senior MP Advisor to head the overall criminal investigation. This usually includes: direction, correlation of data, assessment of resource/equipment needs, reporting and maintaining information flow, coordination of specialty support requirements, and the management of the investigation team members in consultation with the primary investigator. They should possess strong management skills, a thorough understanding of investigative standards and practices, and familiarity with the context in which the investigation is being conducted;

GESTION D'ENQUÊTE

12. Généralités. En raison des progrès réalisés au chapitre de la technologie criminalistique et des autres questions juridiques et de gestion des ressources découlant d'une enquête, il est primordial d'établir des lignes directrices afin de préciser un cadre favorisant la réussite de l'enquête. En général, la section du soutien aux enquêtes ou des enquêteurs spécialisés s'acquittent de cette tâche :

- a. gestionnaire de cas;
- b. gestionnaire de dossier;
- c. enquêteur principal et enquêteurs; et
- d. soutien spécialisé.

13. Concept. La section ou l'organisme des enquêtes est déterminé à l'aide du processus d'établissement d'unité approuvé, et le conseiller supérieur de la PM fait en sorte que des procédures efficaces et cohérentes soient employées et que toutes les ressources disponibles soient optimisées. Les fonctions de l'équipe d'enquête sont indiquées ci-après :

- a. **Gestionnaire de cas.** Les PM assigné par le conseiller supérieur de la PM qui dirige l'enquête criminelle générale. Cette fonction comprend en général : la direction, la corrélation des données, l'évaluation des besoins en ressources et en équipement, les rapports et le maintien de la transmission de l'information, la coordination du soutien spécialisé nécessaire et la gestion des membres de l'équipe d'enquête en consultation avec l'enquêteur principal. Cette personne doit avoir de solides aptitudes en gestion, une connaissance approfondie des normes et des méthodes d'enquête ainsi que du contexte de l'enquête réalisée;

- | | |
|--|--|
| <p>b. File Manager. MP assigned to maintain control of the file itself, including data entry, and file maintenance;</p> <p>c. Primary Investigator/ Investigators. MP assigned to control and direct every facet of the investigation, including interviews, inquiries, following up on tips, etc. Responsible for the collection, preservation, and presentation of evidence is IAW the Case Manager's strategy and collection plan;</p> <p>d. Specialty Support. On request from the Case Manager, the investigation team may be provided with:</p> <ul style="list-style-type: none"> (1) additional human resources; (2) forensic and identification assistance; (3) specialized support such as: finance, logistic, specialists, coroner, polygraph, surveillance, and electronic interception resources; and (4) Media relations. | <p>b. Gestionnaire de dossier. Les PM assigné pour assumer la responsabilité du dossier, y compris l'entrée de données et la tenue du dossier;</p> <p>c. Enquêteur principal et enquêteurs. Les PM assigné contrôlent et dirigent tous les aspects de l'enquête, dont les entrevues, les recherches, les suivis au sujet des renseignements transmis, etc. Ils ont la responsabilité de s'assurer que la collecte, la conservation et la présentation de la preuve sont conformes à la stratégie et au plan de collecte du gestionnaire de cas;</p> <p>d. Soutien spécialisé. À la demande du gestionnaire de cas, on peut accorder à l'équipe de l'enquête:</p> <ul style="list-style-type: none"> (1) un personnel supplémentaire; (2) une aide légiste et en vue de l'identification; (3) un soutien spécialisé (par exemple : finances, logistique, spécialistes, coroner, détecteur de mensonge, surveillance et éléments d'interception électronique; et (4) des relations avec les médias. |
|--|--|

VICTIM/ WITNESS MANAGEMENT

14. Maintaining Contact. After the investigation is conducted, it is incumbent upon the investigator to maintain contact with the victim/witness. Effective victim/witness management includes keeping the witness informed of the case status, press releases, bail conditions, court dates, final disposition, etc.

GESTION VICTIME/TÉMOIN

14. Maintien du contact. Une fois que l'enquête a été réalisée, l'enquêteur a pour tâche de maintenir le contact avec la victime ou le témoin. Une gestion efficace de la victime ou du témoin exige d'informer le témoin au sujet du cas, des communiqués, des conditions de la caution, des dates d'audience, de la conclusion définitive, etc.

HANDOVER OF INVESTIGATION

15. Deployed units. When disciplinary actions associated with a theatre initiated investigation are not all completed in theatre, the responsibility for dealing with the follow-up/ disciplinary action falls to the concerned ECS, once the unit re-deploys back to Canada. If it appears that either the investigation will not be completed before the unit returns home or, although the investigation may be completed, the administrative/ disciplinary follow-up action will not be completed by the time the unit leaves the theatre, it is critical to relay all the pertinent details/ information on the particular MPICF/ General Occurrence to the concerned ECS Provost Marshal, at the earliest possibility, before the individual's unit returns to Canada.

TRANSFERT DE L'ENQUÊTE

15. Unités déployées. Si les mesures disciplinaires en rapport avec une enquête lancée dans le théâtre des opérations ne sont pas toutes exécutées sur place, la responsabilité du traitement des mesures de suivi/disciplinaires incombe au CEMA en question, une fois que l'unité a été redéployée au Canada. S'il appert que l'enquête ne sera pas terminée avant que l'unité retourne au pays ou que, même si l'enquête est en fait terminée, la mesure administrative/disciplinaire de suivi n'a pas été prise au moment du départ de l'unité du théâtre des opérations, il est crucial de transmettre tous les détails/l'informations pertinentes figurant au DEPM/ occurrence générale au conseiller de la PM du CEMA, le plutôt possible, avant le retour de l'unité de la personne au Canada.

CHAPTER 6 ANNEX C

CANADIAN FORCES NATIONAL INVESTIGATION SERVICE

1. **General.** The following paragraphs outline procedures governing the CFNIS.
2. **Conduct.** When conducting an investigation, the CFNIS shall report through the Senior Military Police Advisor to the appropriate commander of the base, station, or detachment, and state in general terms the nature of the investigation.
3. **CFNIS Duty Investigation Co-ordinator.** All CFNIS Regions provide 24/7-duty investigator support for the mandatory category of investigations which require an MPUIR. Once informed that an incident requiring an MPUIR has occurred, the CFNIS chain of command will decide to assume the investigation or not.
4. **Investigation Handover Protocol.** Once the CFNIS has decided to assume a file, the following steps shall be taken:
 - a. until the arrival of the duty CFNIS investigator, the local Senior MP Advisor shall provide initial investigation support, which as a minimum includes:
 - (1) preservation and protection of the crime scene;

CHAPITRE 6 ANNEXE C

SERVICE NATIONAL DES ENQUÊTES DES FORCES CANADIENNES

1. **Généralités.** Les paragraphes suivants décrivent les procédures qui régissent le SNEFC.
2. **Conduite.** Lorsqu'il procède à une enquête, le SNEFC doit faire rapport, par l'entremise du conseiller supérieur de la police militaire, au commandant correspondant de la base, de la station ou du détachement, et préciser en termes généraux la nature de l'enquête.
3. **Coordonnateur de l'enquête de service du SNEFC.** Toutes les régions du SNEFC offrent un soutien aux enquêteurs 24 heures par jour, 7 jours sur 7, afin de supporter les enquêtes associées au RIIPM. Lorsqu'un incident requiert un RIIPM, la chaîne de commandement du SNEFC décidera de prendre ou de ne pas prendre la responsabilité de l'enquête.
4. **Protocole de transfert d'enquête.** Une fois que le SNEFC a accepté de prendre la responsabilité d'une enquête, on peut effectuer les étapes suivantes :
 - a. jusqu'à ce que l'enquêteur de service du SNEFC arrive, le conseiller supérieur local de la PM doit offrir un soutien initial à l'enquête qui comprend, à tout le moins :
 - (1) la préservation et la protection de la scène du crime,

- | | |
|---|---|
| (2) preservation and protection of evidence; | (2) la conservation et la protection de la ou des preuves, |
| (3) identification of witnesses; and | (3) l'identification des témoins; et |
| (4) detention of suspect(s), if appropriate. | (4) la détention du ou des suspects, si approprié. |
|
b. the duty investigation co-ordinator will provide the local Senior MP Advisor with time of arrival of the investigation team and appropriate contact numbers; and |
b. le coordonnateur de l'enquête de service doit indiquer au conseiller supérieur local de la PM le moment de l'arrivée de l'équipe d'enquête ainsi que les coordonnées des personnes ressources; |
| c. the CFNIS investigator responsible shall complete a text box within SAMPIS acknowledging that the CFNIS is assuming responsibility of the investigation. | c. L' enquêteur du SNEFC responsable doit compléter le texte du SISEPM afin d'indiquer que le SNEFC accepte la responsabilité de l'enquête. |

Occurrences Typically Investigated by a Board of Inquiry or Summary Investigation

Subject	Related Orders and Instructions
Aircraft occurrences	QR&O Chapter 21, Section 8 A-GA-135-001/AA-001 – Flight Safety for the Canadian Forces
Ammunition accidents	QR&O Chapter 21, Section 9 DAOD 3002-4, Ammunition or Explosives Accident, Incident, Defect and Malfunction Reporting
Casualties	QR&O Chapter 21, Section 6 CFAO 24-6, Investigations of Injuries or Death. CFAO 19-44, Suicide Prevention
Claims	QR&O Chapter 21 article 21.19 and Section 4 DAOD 7004-1, Claims and <i>Ex Gratia</i> Procedures
Conflict of interest	DAOD 7021-0, Conflict of Interest and Post-Employment
Disability compensation	QR&O 210.72 CBI 210.72, Reserve Force - Compensation during a period of Injury, Disease or Illness
Discrimination	CFAO 19-40, Human Rights Discrimination
Fires and explosions	QR&O Chapter 21, Section 9 DAOD 4007-1, Fire Reporting and Investigation C-08-005-120/AG-000 – Construction Engineering Manual
Forms	CFAO 36-24, Controlled Serial Numbered Forms
Harassment	DAOD 5012-0, Harassment Prevention and Resolution
Illegal absentees	QR&O 21.43 CFAO 19-19, Disposal of Absentees
Injuries or death	QR&O Chapter 21, Section 6 CFAO 24-6, Investigation of Injuries or Death CFAO 19-44, Suicide Prevention
Loss of damage due to a criminal offence	QR&O 21.73 CFAO 22-10, Investigation and Report of Loss or Damage Due to Criminal Offences CFAO 19-16, Civil Prosecution
Missing or absent officers and NCMs	QR&Os 21.41, 21.43 and 21.44
Mobile support equipment (MSE) occurrences	QR&O Chapter 21, Sections 6 & 10 A-LM-158-005/AG-001 – Transport Manual, Mobile Support Equipment
Personal property	DAOD 7004-2, Compensation for Loss or Damage to Personal Property
Public or non-public property	QR&O 21.71 and Chapter 38 CFAO 38-1, Liability for Public and Non-public Property
Public funds	CFAO 202-4 Public Funds - Reporting Losses, Deficiencies, or Overages

Subject	Related Orders and Instructions
Security violations	QR&O 21.75 A-SJ-100-001/AS-000 – Security Orders for the Department of National Defence and the Canadian Forces INFOSEC 2(D) – COMSEC Material Control Policy, Standards and Procedures
Sexual Misconduct	DAOD 5019-5, Sexual Misconduct and Sexual Disorders
Ships	QR&O 21.71
Suicide	QR&O Chapter 21, Section 6 CFAO 19-44, Suicide Prevention CFAO 24-1, Casualties – Reporting and Administration CFAO 24-6, Investigation of Injuries or Death
Write-off materiel	QR&O 36.20 A-LM-181-000/JS-001 – Standard Supply Instructions, Chapter 14 (Write-Off/Strike-Off of Materiel)

**FORM A
WARRANT TO SEARCH**

(ISSUE TO MILITARY PERSONNEL)

TO _____
(service number, rank, full name of officer or non-commissioned member)

and _____
(if applicable, add full name of any civilian peace officers who will assist in the execution of the search)

WHEREAS it appears by information on the oath of _____
(particulars of informant)

of _____,
(base, unit or element, or address if civilian)

that there are reasonable grounds (*see Notes (B), (C), (D) and (E) to article 106.06 — Information for Search Warrant*) for believing that

(*describe things to be searched for and offence in respect of which search is to be made — see Note (A) to article 106.06*)

are in the _____
(description of place)
(*see paragraph (1) of article 106.05 — Issuance of a Search Warrant by a Commanding Officer, and Note (A) to article 106.06*)

of _____
(owner or occupant of place)

at _____,
(complete address or location of place)

hereinafter called the premises.

THIS IS, THEREFORE, to authorize and require you, assisted by such other officers and non-commissioned members under your direction as are necessary, between the hours of _____ and _____ (*as the commanding officer may direct — see paragraph (2) of article 106.07 – Form of Search Warrant*) to enter into the said premises and to search for the said things and to bring them before me.

Dated this _____ day of _____,
(month) (year)

at _____.
(location)

(commanding officer)

FORM B
WARRANT TO SEARCH
(ISSUED TO A CIVILIAN PEACE OFFICER)

TO _____
(service number, rank, full name)

and _____
(service number, rank, full name of all officers, non-commissioned members and civilian peace officers who will assist in the execution of the search)

WHEREAS it appears by information on the oath

of _____
(particulars of informant)

of _____,
(base, unit or element, or address if civilian)

that there are reasonable grounds (*see Notes (B), (C), (D) and (E) to article 106.06 — Information for Search Warrant*) for believing that

(*describe things to be searched for and offence in respect of which search is to be made — see Note (A) to article 106.06*)

are in the _____
(description of place)
(*see paragraph (1) of article 106.05 — Issuance of a Search Warrant by a Commanding Officer, and Note (A) to article 106.06*)

of _____
(owner or occupant of place)

at _____,
(complete address or location of place)

hereinafter called the premises.

THIS IS, THEREFORE, to authorize and require you, between the hours of _____ and _____
(*as the commanding officer may direct — see paragraph (2) of article 106.07 — Form of Search Warrant*) to enter into the said premises and to search for the said things and to bring them before me.

Dated this _____ day of _____,
(month) (year)

at _____.
(location)

(commanding officer)

INFORMATION TO OBTAIN A SEARCH WARRANT

INFORMATION OF

(service number, rank (if applicable), full name)

(occupation)

(base, unit or element (or address if civilian))

The informant declares that the informant has reasonable grounds for believing that the following things or some part of them

(describe in detail the things to be searched for and the offence in respect of which the search is to be made — see Notes (A), (B) and (C) to this article)

are contained in the following place:

(description of place)

(see paragraph (1) of article 106.05 — Issuance of a Search Warrant by a Commanding Officer, and Note (A) to this article)

of

(owner or occupant of place)

at

(complete address or location)

And the said informant further says that the grounds for so believing are that *(state the grounds for the belief)*

WHEREFORE the informant prays that a search warrant may be granted to search the said place for the said things.

Sworn [or affirmed] before me

at

in the

this

day of

(month)

(year)

(signature of informant)

(commanding officer)

SAMPLE

INFORMATION TO OBTAIN A SEARCH WARRANT

INFORMATION OF

E23 456 789 Sgt Richard White

(service number, rank (if applicable), full name)

Military Police

(occupation)

CFB Greenview Military Police Section

(base, unit or element (or address if civilian))

The informant declares that the informant has reasonable grounds for believing that the following things or some part of them

A quantity of Cannabis resin and a waterpipe are being sought as evidence in respect of the commission of an offence punishable under Section 130 of the National Defence Act and contrary to subsection 4(1) of the Controlled Drugs and Substances Act, namely that CPL Blue during the month of August, 2006, at his residence PMQ #7, Maple Dr., CFB Greenview, did unlawfully have in his possession a quantity of Cannabis sativa in the form of Cannabis resin.

are contained in the following place:

The Private Married Quarter

(description of place)

(see paragraph (1) of article 106.05 -- Issuance of a Search Warrant by a Commanding Officer, and Note (,4) to this article)

of

Cpl Peter Blue

(owner or occupant of place)

at

#7 Maple Dr., CFB Greenview.

(complete address or location)

And the said informant further says that the grounds for so believing are that:

Jane Black, a civilian residing at #9 Maple Dr., CFB Greenview, has stated that she was present in #7 Maple Dr., CFB Greenview on or about 15 August, 2006 when Cpl Blue cut a cube of Hashish from a block and smoked the hashish in a waterpipe in the said place.

WHEREFORE the informant prays that a search warrant may be granted to search the said place for the said things.

Sworn [or affirmed] before me

at CFB Greenview

in the County of Mayfield, Nova Scotia

this 17 day of August, 2006
(month) (year)

(signed) Richard White, Sgt
(signature of informant)

(signed) Louis Green, LCol
(commanding officer)



GUIDE FOR ACCUSED AND ASSISTING OFFICERS

(BILINGUAL)



PRE-TRIAL PROCEEDINGS AT THE SUMMARY TRIAL LEVEL

Supersedes A-LG-050-000/AF-001 dated 2002-08-31

GUIDE À L'INTENTION DES ACCUSÉS ET DES OFFICIERS DÉSIGNÉS POUR LES AIDER

(BILINGUE)

LES PROCÉDURES PRÉLIMINAIRES LORS D'UN PROCÈS SOMMAIRE

Remplace la A-LG-050-000/AF-001 daté 2002-08-31

Issued on Authority of the Chief of the Defence Staff
Publiée avec l'autorisation du Chef d'état-major de la Défense

OPI: JAG/DLaw/MJP&R
BPR: JAG/DJ/JMP&R

2009-10-06

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BACKGROUND

1. The requirement for a separate system of military justice has long been recognized in Canadian law. The safety and security of Canadians depend in large measure upon the efficiency and discipline of the Canadian Forces. For that reason, CF members are subject to the *Code of Service Discipline* in addition to the ordinary law applicable to all Canadians.

2. The *Code of Service Discipline* is designed to deal with service offences ranging from those that are minor in nature to those that are serious and criminal. Two categories of service tribunals have been established to deal with service offences: summary trials and courts martial. Summary trials are designed to provide prompt and fair justice in dealing with service offences that are relatively minor in nature but which have an important impact on the maintenance of military discipline and efficiency, in Canada and abroad, in time of peace or armed conflict.

3. The vast majority of charges under the *Code of Service Discipline* are dealt with by summary trial. Prior to holding a summary trial, the accused is given the opportunity to elect to be tried by court martial, except in the case of certain disciplinary offences where the circumstances surrounding the commission of the offence charged are considered to be minor in nature as provided in QR&O article 108.17 (*Election to be Tried by Court Martial*).

PURPOSE

4. The purpose of this guide is to place the election to be tried by court martial in its procedural context and to provide a convenient summary, for use by accused service members and their assisting officers, of the differences between summary trials and courts martial, so that accused are in a position to make an informed election. This guide describes, in a general way, the jurisdiction of certain officers to conduct summary trials, the charging process, the role of the assisting officer and the process for the provision of information concerning charges to an accused.

TYPES OF SUMMARY TRIAL

5. Three categories of officers are authorized to conduct summary trials: commanding officers, officers to whom commanding officers have delegated certain powers of trial and punishment (delegated officers)

GÉNÉRALITÉS

1. Le droit canadien reconnaît depuis longtemps la justice militaire en tant que système distinct et nécessaire. La sécurité des Canadiens dépend en grande partie de l'efficacité et de la discipline des Forces canadiennes. C'est pourquoi les militaires sont assujettis au *Code de discipline militaire* en plus des lois applicables à tous les Canadiens.

2. Le *Code de discipline militaire* est conçu pour traiter des infractions d'ordre militaire variant des infractions mineures aux infractions graves et criminelles. Deux catégories de tribunaux militaires traitent des infractions d'ordre militaire : le procès sommaire et la cour martiale. Le procès sommaire permet de rendre justice de façon prompte et équitable. Il juge les infractions d'ordre militaire relativement mineures ayant une incidence appréciable sur le maintien de la discipline et de l'efficacité militaire, au Canada et à l'étranger, en temps de paix ou de conflit armé.

3. La grande majorité des accusations portées sous le régime du *Code de discipline militaire* est traitée par voie sommaire. Avant la tenue d'un procès sommaire, mis à part certaines infractions disciplinaires où les circonstances relatives à l'infraction sont considérées comme mineures, tel que prévu à l'article 108.17 des ORFC (*Demande de procès devant une cour martiale*), l'accusé se voit généralement offrir la possibilité d'être jugé par une cour martiale.

OBJET

4. Ce guide explique le contexte dans lequel la demande de procès devant une cour martiale devrait être exercée et les nombreuses différences entre un procès sommaire et une cour martiale, représentant ainsi un outil privilégié mis à la disposition des accusés et des officiers désignés, leur permettant de prendre une décision en toute connaissance de cause. Il décrit de façon générale la compétence de certains officiers à présider un procès sommaire, le processus d'accusation, le rôle de l'officier désigné et le processus de communication de renseignements à l'accusé.

TYPES DE PROCÈS SOMMAIRE

5. Trois catégories d'officiers sont autorisées à présider un procès sommaire : un commandant, un officier à qui son commandant a délégué certains pouvoirs disciplinaires (*officier délégué*) et un

and superior commanders. The jurisdiction of these officers is determined by the offences that they may try, the rank and status of the individuals that they may try and the powers of punishment that they possess.

- a. **Commanding Officers.** A commanding officer, as defined in QR&O article 101.01 (*Meaning of "Commanding Officer"*), is authorized to try an officer cadet or a non-commissioned member below the rank of warrant officer who is a member of the unit or present in the unit. The offences that may be tried by a commanding officer are some of the less serious military offences under the *National Defence Act* (NDA) and a limited number of civil offences laid under section 130 of the NDA that are considered to have an important impact on the maintenance of internal unit discipline. These offences are listed in QR&O article 108.07 (*Jurisdiction — Offences*). The powers of punishment of a commanding officer are listed in the table to article 108.24 of QR&O (*Powers of Punishment of a Commanding Officer*). To learn more about the punishments that may be imposed by a commanding officer, refer to Annex A of this guide.
- b. **Delegated Officers.** A commanding officer may, within certain limitations, delegate powers of trial and punishment to officers not below the rank of captain who are serving under the commanding officer's command. Delegated officers may only try non-commissioned members below the rank of warrant officer and may not try civil offences punishable under section 130 of the NDA. The maximum powers of punishment of a delegated officer are listed in the table to article 108.25 of QR&O (*Powers of Punishment of a Delegated Officer*). To learn more about the punishments that may be imposed by a delegated officer, refer to Annex A of this guide.
- c. **Superior Commanders.** The following officers may conduct summary trials as superior commanders: officers of the rank of brigadier-general and above and officers appointed by the Chief of the Defence Staff. This includes officers other than general officers commanding a formation, including base commanders not below the

commandant supérieur. La compétence de ces officiers à présider un procès sommaire est déterminée par le type d'infraction, le grade et le statut des accusés ainsi que les pouvoirs de punition qui leur sont conférés.

- a. **Commandants.** Un commandant, au sens de l'article 101.01 des ORFC (*Sens de «commandant»*), est autorisé à juger un élève-officier et un militaire du rang de grade inférieur à celui d'adjudant de son unité ou qui s'y trouve. Un commandant peut juger les infractions d'ordre militaire moins graves prévues par la *Loi sur la défense nationale* (LDN), en plus d'un nombre restreint d'infractions civiles portées en vertu de l'article 130 de la LDN et qui ont une incidence appréciable sur le maintien de la discipline au sein de l'unité. Ces infractions sont énumérées à l'article 108.07 des ORFC (*Compétence - Infractions*). Les pouvoirs de punition attribués à un commandant sont énumérés au tableau ajouté à l'article 108.24 des ORFC (*Pouvoirs de punition attribués au commandant*). Pour en savoir plus sur les peines pouvant être infligées par un commandant, nous vous référons à l'annexe A du présent guide.
- b. **Officiers délégués.** Sous réserve des restrictions énoncées, un commandant peut déléguer ses pouvoirs de juger et de punir à des officiers servant sous ses ordres, du grade minimum de capitaine. L'officier délégué peut juger les militaires du rang d'un grade inférieur à celui d'adjudant mais il ne peut juger des infractions civiles punissables en vertu de l'article 130 de la LDN. Les pouvoirs maximum de punition attribués à un officier délégué sont énumérés au tableau ajouté à l'article 108.25 des ORFC (*Pouvoirs de punition attribués à l'officier délégué*). Pour en savoir plus sur les peines pouvant être infligées par un officier délégué, nous vous référons à l'annexe A du présent guide.
- c. **Commandants supérieurs.** Les officiers ayant au moins le grade de brigadier-général et les officiers nommés à ce titre par le chef d'état-major de la défense peuvent présider des procès sommaires à titre de commandants supérieurs. Sont inclus les officiers, autres que généraux, qui commandent une formation, y compris les commandants de base ayant au

rank of lieutenant-colonel, commanders of squadrons of Her Majesty's Canadian Ships and commanding officers of Her Majesty's Canadian Ships who do not have a superior commander on board or in company with the ship. These officers may try an officer below the rank of lieutenant-colonel or a non-commissioned member above the rank of sergeant in respect of any service offence referred to in QR&O paragraphs 108.07(2) and (3) (*Jurisdiction – Offences*). The powers of punishment of a superior commander are listed in the table to article 108.26 of QR&O (*Powers of Punishment of a Superior Commander*). To learn more about the sentences that may be imposed by a superior commander, refer to Annex A of this guide.

moins le grade de lieutenant-colonel et les commandants d'escadrons des navires canadiens de Sa Majesté ainsi que les commandants des navires canadiens de Sa Majesté qui n'ont pas de commandant supérieur à bord du navire ni de commandant supérieur accompagnant le navire. Ils ont compétence sur l'officier de grade inférieur à celui de lieutenant-colonel et sur le militaire du rang de grade supérieur à celui de sergent pour les infractions d'ordre militaire prévues aux alinéas 108.07(2) et (3) des ORFC (*Compétence – Infractions*). Les pouvoirs de punition attribués au commandant supérieur sont énumérés au tableau ajouté à l'article 108.26 des ORFC (*Pouvoirs de punition attribués au commandant supérieur*). Pour en savoir plus sur les peines pouvant être infligées par un commandant supérieur, nous vous référons à l'annexe A du présent guide.

6. Before superior commanders and commanding officers assume their duties, they must be trained in accordance with a curriculum established by the Judge Advocate General and certified as qualified to perform their duties in the administration of the *Code of Service Discipline* by the Judge Advocate General, pursuant to QR&O article 101.09 (*Training and Certification of Superior Commanders and Commanding Officers*).

6. Avant d'assumer leurs fonctions, les commandants supérieurs et les commandants doivent avoir reçu une formation selon le programme établi par le Juge-avocat général et une attestation de leur qualification à appliquer le *Code de discipline militaire* de la part du Juge-avocat général, conformément à l'article 101.09 des ORFC (*Formation et attestation des commandants supérieurs et des commandants*).

7. QR&O article 108.10 (*Delegation of a Commanding Officer's Powers*) also requires the same training and certification for delegated officers to perform their duties in the administration of the *Code of Service Discipline*.

7. L'article 108.10 des ORFC (*Délégation des pouvoirs du commandant*) aussi exige la même formation et la même attestation pour les officiers délégués afin qu'ils puissent appliquer le *Code de discipline militaire*.

THE CHARGING PROCESS

8. The decision whether or not to lay a charge under the *Code of Service Discipline* is made by a commanding officer, an officer or non-commissioned member authorized to do so by a commanding officer, or an officer or non-commissioned member of the Military Police assigned to investigative duties with the Canadian Forces National Investigation Service (see QR&O article 107.02 – *Authority to Lay Charges*). The facts surrounding the incident determine what, if any, charges are to be laid.

LE PROCESSUS D'ACCUSATION

8. La décision de porter ou non une accusation en vertu du *Code de discipline militaire* est prise par un commandant, par un officier ou un militaire du rang autorisé par un commandant ou par un officier ou militaire du rang de la police militaire à qui on a assigné une fonction d'enquête au sein du Service national des enquêtes des Forces canadiennes (voir l'article 107.02 des ORFC — *Pouvoir de porter des accusations*). Une accusation sera portée selon la nature et les circonstances de l'incident.

9. Generally speaking, it is the rule rather than the exception to seek legal advice before laying charges. Effectively, legal advice must be obtained, unless a person of or below the rank of sergeant is to be charged with one of five minor offences listed in

9. La pratique qui consiste à obtenir un avis juridique avant de porter une accusation constitue la règle plutôt que l'exception. En réalité, un avis juridique doit être obtenu dans tous les cas, sauf lorsqu'une personne détenant le grade de sergent ou un grade inférieur est

QR&O article 107.03 (*Requirement to Obtain Advice From Legal Officer — Charges To Be Laid*) and the charge would not give rise to an election.

10. A charge is laid when it is reduced to writing on a Record of Disciplinary Proceedings (RDP) and signed by a person authorized to lay charges. A copy of the RDP must be provided to the accused. This guide is not intended to provide detailed information concerning specific types of charges, including any alternative charges which may be laid. That information may be found in QR&O Chapter 103 (*Service Offences*) and article 107.05 (*Laying of Alternative Charges*).

THE ASSISTING OFFICER

11. In accordance with QR&O article 108.14 (*Assistance to Accused*), as soon as possible after a charge has been laid, a commanding officer shall appoint an officer to assist the accused. A non-commissioned member above the rank of sergeant may be appointed in exceptional circumstances. Normally, the assisting officer will be a member of the accused's unit. However, there may be circumstances where it would be more practical to appoint as an assisting officer, a member of another unit such as, for example, where the accused's trial is to be held by the commanding officer of another unit or where, due to the small size of the unit, no officer is available to assist. An accused may also request that a particular officer be appointed to act as the assisting officer and that officer shall be made available if the officer is willing to act and the exigencies of the service permit.

12. The role of the assisting officer is to assist the accused, to the extent that the accused desires, in the preparation and presentation of his case. Two important facets of the assisting officer's role are to assist the accused to understand the nature of the proceedings during both the pre-trial and trial stages and to assist the accused in making an informed election.

13. Prior to the accused making an election with respect to trial by court martial, the assisting officer shall ensure that the accused is aware of:

- a. the nature and gravity of any offence with which the accused has been charged; and

accusé de l'une des cinq infractions mineures indiquées dans les ORFC (voir l'article 107.03 des ORFC — *Obligation d'obtenir l'avis d'un avocat militaire — Accusations à être portées*) et l'accusation ne donnerait pas droit au choix d'être jugé devant une cour martiale.

10. Une accusation est portée dès qu'elle est consignée par écrit au procès-verbal de procédure disciplinaire (PVPD) et signée par une personne autorisée à la porter. Une copie du PVPD sera remise à l'accusé. Nous ne faisons pas ici une nomenclature des différentes accusations possibles ni des accusations subsidiaires. Ces renseignements se retrouvent au chapitre 103 des ORFC (*Infractions militaires*) et à l'article 107.05 des ORFC (*Formulation des accusations subsidiaires*).

L'OFFICIER DÉSIGNÉ POUR AIDER L'ACCUSÉ

11. Conformément à l'article 108.14 des ORFC (*Aide fournie à l'accusé*), dès que possible après qu'une accusation ait été portée, un commandant doit désigner un officier pour aider l'accusé. Un militaire du rang d'un grade supérieur à celui de sergent peut être désigné en raison de circonstances exceptionnelles. Normalement, l'officier désigné sera un militaire de l'unité de l'accusé. Cependant, à l'occasion, il peut s'avérer pratique de désigner un officier d'une autre unité, par exemple lorsque le procès de l'accusé doit être instruit par le commandant d'une autre unité ou si aucun officier n'est disponible pour assister l'accusé en raison de l'effectif réduit de l'unité. Un accusé peut également demander un officier en particulier. La demande sera accordée si l'officier en question accepte et si les exigences du service le permettent.

12. Le rôle de l'officier désigné consiste à aider l'accusé, dans la mesure où celui-ci le désire, à préparer et à présenter sa défense. Aider l'accusé à comprendre la nature des procédures au cours des étapes qui précèdent et pendant le procès, et l'aider à faire un choix éclairé concernant un procès devant une cour martiale, constituent deux aspects importants du rôle de l'officier désigné.

13. Avant que l'accusé ait fait un choix relatif au procès devant une cour martiale, l'officier désigné a l'obligation de s'assurer que l'accusé est mis au courant des éléments suivants :

- a. la nature et la gravité de toute infraction dont il a été accusé ; et

- b. the differences between trial by court martial and trial by summary trial, including the differences between:
- i. the powers of punishment of a court martial and a summary trial,
 - ii. the accused's rights to representation at a court martial and assistance at a summary trial,
 - iii. the rules governing reception of evidence at a court martial and a summary trial, and
 - iv. the accused's right to appeal the finding and sentence of a court martial and to submit a request for review of a summary trial.

PROVISION OF INFORMATION TO THE ACCUSED

14. Prior to the summary trial, the officer having powers of summary trial will, in accordance with QR&O article 108.15 (*Provision of Information to Accused*), ensure that the accused and the assisting officer are provided with or given access to any information to be relied on at the summary trial, including any information that tends to show that the accused did not commit the offence charged. The information will be made available in sufficient time to permit the accused to properly prepare for the summary trial and, where the accused is offered the right to elect to be tried by court martial, to consider the information in making the election (see QR&O article 108.17 — *Election To Be Tried by Court Martial*).

15. Information provided to the accused and the assisting officer would normally include a copy of the unit investigation report, a copy of any written statement made by a witness or the accused and a copy of any other documentary evidence that is not included in the unit investigation report. In the case of a military police report dealing with more than one individual or events not forming the basis of the charges to be heard, the accused would be provided only with those portions of the report containing the information that would be relied on at the summary trial or that would tend to show that the accused did not commit the offence charged.

- b. les différences qui existent entre un procès devant une cour martiale et un procès sommaire, notamment en ce qui concerne :
- i. les pouvoirs de punition d'une cour martiale et d'un officier présidant un procès sommaire ;
 - ii. les droits de représentation d'un accusé à une cour martiale et d'aide à un procès sommaire ;
 - iii. les règles régissant la réception de la preuve à une cour martiale et à un procès sommaire ; et
 - iv. les droits d'un accusé d'en appeler d'un verdict et d'une sentence d'une cour martiale et de faire une demande de révision d'un procès sommaire.

COMMUNICATION DE RENSEIGNEMENTS À L'ACCUSÉ

14. Avant le procès sommaire, conformément à l'article 108.15 des ORFC (*Communication de renseignements à l'accusé*), l'officier compétent pour instruire le procès sommaire s'assure que l'accusé et l'officier désigné pour l'aider obtiennent ou aient accès à tous les renseignements susceptibles d'être utilisés lors du procès sommaire, ainsi qu'à tous les autres renseignements qui tendent à démontrer que l'accusé n'a pas commis l'infraction dont il est accusé. Ils sont fournis à l'accusé suffisamment à l'avance pour lui permettre de préparer adéquatement sa défense avant le procès sommaire et, dans le cas où l'accusé a le droit de choisir d'être jugé devant une cour martiale, afin de lui permettre d'en tenir compte lorsqu'il prendra sa décision (voir l'article 108.17 des ORFC — *Demande de procès devant une cour martiale*).

15. Les renseignements communiqués à l'accusé et à l'officier désigné pour l'aider incluront normalement une copie de tout rapport d'enquête de l'unité, une copie de toute déclaration de l'accusé ou des témoins et une copie de tout autre document qui ne figure pas au rapport d'enquête de l'unité. Dans le cas d'un rapport de la police militaire concernant plus d'une personne ou qui porte sur des événements non pertinents aux accusations, il faudrait communiquer à l'accusé les parties du rapport renfermant uniquement les renseignements qui seront soumis au procès sommaire à l'appui de l'accusation ou qui tendent à démontrer que l'accusé n'a pas commis l'infraction faisant l'objet de l'accusation.

16. Examples of the kind of information normally provided to the accused is set out in Note B to QR&O article 108.15 (*Provision of Information to Accused*). A list of all information provided is also attached to the Record of Disciplinary Proceedings provided to the accused.

PRE-TRIAL CONSIDERATIONS

17. Certain steps related to the process of laying charges, where they are taken by officers having powers of summary trial, may have an impact on the officer's ability to proceed with the case. Except in very limited circumstances, an officer may not conduct the trial where the officer has carried out or has directly supervised the investigation of an offence, issued a search warrant with respect to the case or where the officer has laid or recommended the charges relating to the offence (see 108.09 – *Limitation on Jurisdiction – Investigations, Search Warrants and Charges*).

18. Before the commencement of the summary trial, the officer having jurisdiction in the matter must determine if he is precluded from trying the accused (see QR&O article 108.16 – *Pre-Trial Determinations*) due to:

- a. the accused's rank or status;
- b. any limitation on jurisdiction that would impede him from hearing the case, such as:
 - i. the type of offence (QR&O 108.07 - *Jurisdiction - Offences* and QR&O 108.125 - *Jurisdiction - Offences*);
 - ii. the passage of time since the alleged offence has been committed (QR&O 108.05 *Jurisdiction - Limitation Period*); and
 - iii. restrictions imposed by the commanding officer on a delegated officer's powers relating to the imposition of punishment (QR&O 108.10 - *Delegation of a Commanding Officer's Powers*);
- c. whether the officer's powers of punishment are inadequate having regard to the gravity of the alleged offence;

16. Des exemples du genre de renseignement qui est normalement fourni à l'accusé se retrouve à la note B de l'article 108.15 des ORFC (*Communication de renseignements à l'accusé*). Une liste des renseignements fournis est jointe au procès-verbal de procédure disciplinaire qui est remis à l'accusé.

DÉTERMINATIONS PRÉLIMINAIRES

17. Certaines démarches reliées au processus d'accusation, lorsqu'elles ont été menées par l'officier compétent pour instruire le procès sommaire, peuvent avoir une influence sur la capacité de l'officier quant à l'instruction de cette cause. S'il a mené ou supervisé directement l'enquête d'une infraction, a émis un mandat de perquisition propre à l'affaire en cause ou a lui-même porté ou recommandé les accusations relatives à l'infraction, alors l'officier concerné ne pourrait pas, en raison de ces circonstances très particulières, présider le procès (voir l'article 108.09 des ORFC — *Restriction à la compétence – Enquêtes, mandats de perquisition et accusations*).

18. Avant que ne débute le procès sommaire, l'officier qui a compétence en la matière doit déterminer s'il lui est impossible de juger l'accusé pour l'un ou l'autre des motifs suivants (voir l'article 108.16 des ORFC — *Déterminations préliminaires au procès*) :

- a. le grade ou le statut de l'accusé ;
- b. toute restriction à sa compétence qui l'empêche d'entendre la cause, telle que :
 - i. le type d'infraction (ORFC 108.07 – *Compétence – Infractions* et ORFC 108.125 *Compétence – Infractions*) ;
 - ii. la période écoulée depuis la prétendue perpétration de l'infraction (ORFC 108.05 *Compétence – Prescription*) ; et
 - iii. les restrictions imposées par le commandant aux pouvoirs d'un officier délégué relatifs au prononcé de la peine (ORFC 108.10 – *Délégation des pouvoirs du commandant*).
- c. si ses pouvoirs de punition sont insuffisants, eu égard à la gravité de l'infraction présumée ;

- d. whether there are reasonable grounds to believe that the accused is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence;
- e. whether it would be inappropriate to try the case having regard to the interests of justice and discipline; and
- f. whether the accused has elected to be tried by court martial.

ELECTION TO BE TRIED BY COURT MARTIAL

19. An accused person charged with a service offence triable by summary trial must be offered an election to be tried by court martial unless the offence is contrary to (see QR&O art. 108.17 – *Election to be Tried by Court Martial*):

- a. section 85 (Insubordinate Behaviour);
- b. section 86 (Quarrels and Disturbances);
- c. section 90 (Absence Without Leave);
- d. section 97 (Drunkenness); and
- e. section 129 (Conduct to the Prejudice of Good Order and Discipline), but only where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment.

20. Even where the offence is contrary to one of the provisions in paragraph 19 above, the presiding officer must offer the accused an election where he or she determines that detention, reduction in rank or a fine in excess of 25% of monthly basic pay could reasonably be imposed if the accused is found guilty of the offence (see QR&O 108.17 - *Election to be Tried by Court Martial*).

21. Where an accused has been offered the right to elect to be tried by court martial, the assisting officer must ensure that the accused is aware of the following:

- a. the nature and gravity of any offence with which the accused has been charged; and

- d. s'il existe des motifs raisonnables de croire que l'accusé est inapte à subir son procès ou était atteint de troubles mentaux au moment de la perpétration de l'infraction reprochée ;
- e. s'il n'est pas mieux de ne pas juger la cause eu égard à l'intérêt de la justice et de la discipline ; et
- f. si l'accusé a choisi d'être jugé devant une cour martiale.

DEMANDE DE PROCÈS DEVANT UNE COUR MARTIALE

19. Un accusé qui peut être jugé sommairement à l'égard d'une infraction d'ordre militaire a le droit de se voir offrir d'être jugé devant une cour martiale, sauf s'il s'agit de l'une des infractions suivantes (voir article 108.17 — *Demande de procès devant une cour martiale*) :

- a. article 85 (Acte d'insubordination) ;
- b. article 86 (Querelles et désordres) ;
- c. article 90 (Absence sans permission) ;
- d. article 97 (Ivresse) ; et
- e. article 129 (Comportement préjudiciable au bon ordre et à la discipline), mais seulement lorsque l'infraction se rapporte à la formation militaire, à l'entretien de l'équipement personnel, des quartiers ou du lieu de travail, ou à la tenue et au maintien.

20. Même quand l'infraction a été commise contrairement à l'une de celles mentionnées au paragraphe 19, l'officier président doit demander à l'accusé s'il veut être jugé devant une cour martiale dans le cas où il détermine que, si l'accusé était déclaré coupable de l'infraction, une peine de détention, de rétrogradation ou une amende dépassant 25 pour cent de la solde mensuelle de base serait justifiée (voir ORFC 108.17 – *Demande de procès devant une cour martiale*).

21. Dans tous les cas où un accusé a le droit de demander d'être jugé devant une cour martiale, l'officier désigné doit s'assurer que ce dernier est informé de ce qui suit:

- a. la nature et la gravité de toute infraction dont il est accusé ; et

- b. the differences between a summary trial and a court martial (see paragraph 29).

22. An accused person will be given a reasonable period of time to make an election. That period, which shall not in any case be less than 24 hours, is intended to be of sufficient length to permit the accused to consider the charge and the information provided, to contact legal counsel if the accused wishes to do so, to decide whether to elect to be tried by court martial and to make the accused's decision known in the manner prescribed by the presiding officer. Should the accused not be able to make an election within the prescribed period, an extension may be requested. The accused will be required to record this decision on the Record of Disciplinary Proceedings in the presence of a witness in the manner prescribed by the officer having summary trial jurisdiction or in accordance with directions issued for that purpose within the unit.

23. The accused's refusal to make an election will be interpreted as an election to be tried by court martial, and the accused will be so advised.

24. Where an accused has elected to be tried by court martial, the accused may withdraw the election at any time before charges are preferred by the Director Military Prosecutions (DMP). After charges have been preferred by the DMP, the election may only be withdrawn with the consent of the DMP.

LEGAL ADVICE

25. An officer exercising summary trial jurisdiction has a duty to ensure that the accused is provided with a reasonable opportunity, during the period given to make the election, to consult with legal counsel concerning the making of the election. Of course, the decision whether or not to actually consult counsel will be left up to the accused. As noted in paragraph 22 above, an accused may request additional time to make an election.

26. The assisting officer and the accused may consult legal counsel concerning the making of an election to be tried by court martial. Legal counsel from the office of the Director of Defence Counsel Services (DDCS) has been mandated to provide legal advice in these circumstances (see QR&O article 101.20(2)(c) – *Duties and Functions of Director of Defence Counsel Services*). They are available, normally by telephone, at no expense to the accused.

- b. les différences entre un procès sommaire et une cour martiale (voir le paragraphe 29).

22. Un délai raisonnable, et dans tous les cas d'au moins 24 heures, est accordé à l'accusé pour qu'il fasse son choix. Ce délai doit être suffisant pour lui permettre d'étudier l'accusation et les renseignements qu'on lui a transmis, de communiquer avec un avocat s'il le désire, de faire son choix entre la cour martiale et le procès sommaire et de faire connaître sa décision selon la manière prescrite par l'officier présidant. Si le choix ne peut être fait dans le délai imparti, l'accusé peut demander une prolongation. L'accusé doit confirmer par écrit sa décision sur le procès-verbal de procédure disciplinaire devant un témoin, selon les directives de l'officier compétent pour présider le procès sommaire ou en conformité avec les directives émises à cette fin au sein de son unité.

23. Dans le cas où l'accusé refuserait de faire un choix, cela serait interprété comme une décision d'être jugé devant une cour martiale, et l'accusé doit être informé de ce fait.

24. Un accusé ayant demandé d'être jugé devant une cour martiale peut retirer son choix en tout temps avant la prononciation de la mise en accusation par le Directeur des poursuites militaires (DPM). Après la prononciation de la mise en accusation par le DPM, ce choix ne sera retiré qu'avec le consentement de ce dernier.

CONSULTATION JURIDIQUE

25. L'officier qui exerce son pouvoir de juger sommairement doit s'assurer que l'accusé a une occasion raisonnable de consulter un avocat relativement à la demande de procès devant une cour martiale, durant la période de temps qui lui est accordée pour faire ce choix. Évidemment, il appartiendra à l'accusé de décider de consulter ou non un avocat. Tel qu'indiqué au paragraphe 22, un accusé peut demander un délai additionnel pour faire un choix.

26. L'officier désigné pour aider l'accusé et l'accusé peuvent consulter un avocat concernant la décision de choisir d'être jugé devant une cour martiale. Les avocats du bureau du Directeur du service d'avocats de la défense (DSAD) ont été mandatés pour fournir des conseils juridiques dans ces circonstances (voir article 101.20 (2)(c) des ORFC — *Fonctions du Directeur du service d'avocats de la défense*). Ils sont disponibles par téléphone, sans frais pour l'accusé. Un accusé peut

An accused may consult civilian legal counsel at his or her own expense.

27. Instructions for contacting DDCS counsel for advice concerning the making of an election will ordinarily be available within each unit. In the event that those instructions are not available within the unit, the accused or the assisting officer should contact the nearest Office of the Judge Advocate General. In addition, on the JAG'S Web site, you can find the phone number to reach the DDCS at the following address:

http://jag.dwan.dnd.ca/mj_directorate_e.html#top

RIGHTS OF ACCUSED AT A SUMMARY TRIAL

28. At any summary trial, an accused has the right:

- a. to have the trial conducted in English, French or both official languages;
- b. to have an officer appointed to assist him or her to the extent he or she desires;
- c. to admit any of the particulars of the charge;
- d. to request the presence of witnesses whose attendance may, having regard to the exigencies of the service, reasonably be procured without issuing a summons;
- e. to present evidence;
- f. to remain silent, meaning that the accused is not required to testify, unless he or she so desires;
- g. to ask relevant questions of any witness;
- h. to be found not guilty in respect of a charge, unless the presiding officer is convinced beyond a reasonable doubt that the accused committed the offence charged or any other related, attempted or less serious offence for which the accused may be found guilty on that charge; and
- i. if found guilty, to present evidence and make representations concerning the severity of the sentence.

aussi consulter un avocat civil à ses frais.

27. Les instructions pour contacter un avocat du DSAD en vue d'obtenir des conseils au sujet du choix seront ordinairement disponibles au sein de chaque unité. Si ces instructions ne sont pas disponibles au sein de l'unité, l'accusé ou l'officier désigné pour l'aider peuvent contacter le Cabinet du juge-avocat général le plus près.

De plus, vous pouvez retrouver le numéro de téléphone pour rejoindre le DSAD sur le site Web du JAG à l'adresse suivante :

http://jag.dwan.dnd.ca/mj_directorate_f.html - info

DROITS DE L'ACCUSÉ AU PROCÈS SOMMAIRE

28. Au procès sommaire, l'accusé possède les droits suivants :

- a. d'avoir un procès en français, en anglais ou dans les deux langues officielles, à son choix ;
- b. qu'un officier soit désigné pour l'aider dans la mesure qu'il ou qu'elle juge nécessaire;
- c. d'admettre un ou des détails de tout chef d'accusation ;
- d. de demander la présence de témoins si elle peut raisonnablement être obtenue, compte tenu des exigences du service et sans la délivrance d'une citation à comparaître ;
- e. de présenter des éléments de preuve ;
- f. de garder le silence, c'est-à-dire qu'il n'est pas obligé de témoigner, sauf s'il le désire ;
- g. de poser des questions pertinentes aux témoins;
- h. être déclaré non coupable d'une accusation à moins que l'officier présidant ne soit convaincu hors de tout doute raisonnable de sa culpabilité à l'égard de cette accusation ou de toute autre accusation moindre et incluse ou la tentative de commettre ces infractions ; et
- i. s'il est déclaré coupable, de présenter des éléments de preuve et de faire des représentations concernant la peine à lui être imposée.

- j. to request a review of a finding of guilt on the ground that it was unjust and/or the sentence imposed on the ground that it was unjust or too severe.

DIFFERENCES BETWEEN SUMMARY TRIALS AND COURTS MARTIAL

29. The following summary highlights the important differences between a summary trial and a court martial:

- a. **Right to legal counsel.** At a summary trial, an accused does not have the right to be represented by legal counsel, but may be represented at his or her own expense by civilian legal counsel at the discretion of the officer trying the case (see Note B to QR&O article 108.14). At a court martial, the accused has a right to be represented by legal counsel. He may hire civilian legal counsel at his or her own expense or he may have legal counsel appointed by the Director Defence Counsel Services at no expense to the accused. Legal counsel prepares the defence case for trial, cross-examines prosecution witnesses, presents defence witnesses, and acts on behalf of the accused at all stages of the court martial.
- b. **Powers of punishment.** A court martial has significantly greater powers of punishment than an officer conducting a summary trial. See Annex A for a comparison of the punishments that may be imposed at a summary trial and at a court martial.
- c. **Right to challenge officers conducting the trial.** No provision is made for an accused to object to being tried by the officer presiding at a summary trial. However, the accused may bring this issue to the attention of the presiding officer by raising it before or during the summary trial. At court martial, the accused has the right to object to being tried by the members of the court martial panel and/or the military judge.
- d. **Appointment of prosecutor.** At a summary trial, exclusively the presiding

- j. de demander une révision du verdict en raison de son caractère injuste et/ou une révision de la sentence en raison de son caractère injuste ou trop sévère.

DIFFÉRENCES ENTRE UN PROCÈS SOMMAIRE ET UNE COUR MARTIALE


29. Le résumé qui suit souligne les différences importantes qui existent entre un procès sommaire et une cour martiale:

- a. **Droit à un avocat.** Au procès sommaire, l'accusé n'a pas le droit d'être représenté par un avocat, mais l'officier chargé de présider le procès peut, à sa discrétion, permettre que l'accusé soit représenté par un avocat civil à ses frais (voir la note B ajoutée à l'article 108.14 des ORFC). Devant une cour martiale, l'accusé a le droit d'être représenté par un avocat. Il peut retenir à ses frais les services d'un avocat civil ou il peut, sans frais, retenir les services d'un avocat désigné par le Directeur du service d'avocats de la défense. L'avocat prépare la cause de la défense en vue du procès, contre-interroge les témoins de la poursuite, présente les témoins de la défense et agit pour le compte de l'accusé à toutes les étapes du procès devant la cour martiale.
- b. **Pouvoirs de punition.** Une cour martiale dispose de pouvoirs de punition nettement plus importants que ceux d'un officier au procès sommaire. Voir l'annexe A pour une comparaison entre les peines qui peuvent être imposées au procès sommaire et à la cour martiale.
- c. **Droit de s'opposer à l'officier chargé de présider le procès.** Au procès sommaire, aucune disposition ne prévoit que l'accusé puisse s'opposer à être jugé par l'officier présidant le procès sommaire. Par contre, cette question peut quand même être portée à l'attention de l'officier présidant en la soulevant avant ou pendant le procès sommaire. Devant une cour martiale, l'accusé peut formellement s'opposer à être jugé par les membres du comité d'une cour martiale et/ou le juge militaire.
- d. **Nomination du procureur de la poursuite.** Au procès sommaire, les accusations sont

officer deals with the charges. At a court martial, a legal officer is appointed as prosecutor by the Director of Military Prosecutions. The prosecutor presents evidence by calling and examining witnesses, introducing documents etc., and argues the prosecution case at all stages of the trial.

- e. **Charges.** At a summary trial, the presiding officer will proceed on all charges contained in the Record of Disciplinary Proceedings. Where an accused elects trial by court martial, the case will be further assessed by a prosecutor and may be further investigated. Based on that further analysis and investigation, charges may be amended or added.
- f. **Procurement of witnesses.** The officer exercising summary trial jurisdiction will arrange for the attendance of all military witnesses at trial. That officer will also try to obtain the attendance of civilian witnesses, by seeking their cooperation, bearing in mind that he does not have authority to issue a summons to compel civilian witnesses to attend a summary trial. At a court martial, a military judge, the Court Martial Administrator or the court martial may, by summons, compel the attendance of any witness, civilian or military.
- g. **Reception of evidence.** At a summary trial, proceedings will be conducted under oath, although the *Military Rules of Evidence* will not apply. The officer presiding at the summary trial will hear and consider all evidence that the officer determines to be relevant in deciding whether or not the accused committed the offence charged and, where applicable, imposing an appropriate sentence. At a court martial, the *Military Rules of Evidence* apply and evidence will only be admitted in accordance with those rules.
- h. **Right to appeal.** There is no appeal from the findings and sentence of a summary trial. However, the accused may challenge the findings and/or the sentence of a summary trial by submitting a request for

traitées exclusivement par l'officier président. Devant une cour martiale, un avocat militaire est désigné à titre de procureur de la poursuite par le Directeur des poursuites militaires. Ce dernier présente les éléments de preuve en citant et en interrogeant les témoins, en déposant les documents, etc., et il plaide la cause de la poursuite à toutes les étapes du procès.

- e. **Accusations.** Au procès sommaire, l'officier président examine la preuve à l'égard de toutes les accusations qui figurent au procès-verbal de procédure disciplinaire. Lorsqu'un accusé choisit d'être jugé devant une cour martiale, l'affaire sera évaluée plus en détail par un procureur de la poursuite et elle peut faire l'objet d'une enquête plus approfondie. À la suite de cette analyse et de cette enquête, il se peut que des accusations soient modifiées ou ajoutées.
- f. **Comparution des témoins.** L'officier qui exerce sa compétence de juger sommairement prendra les mesures requises pour s'assurer de la présence des militaires qui doivent témoigner au procès. Il tentera aussi d'obtenir la présence des témoins civils en sollicitant leur coopération, compte tenu du fait qu'il n'a pas le pouvoir d'assigner des témoins civils ni de les contraindre à être présents à un procès sommaire. En cour martiale, un juge militaire, l'administrateur de la cour martiale ou la cour martiale peuvent, au moyen d'une citation à comparaître, contraindre un témoin, civil ou militaire, à être présent. 
- g. **Réception de la preuve.** Au procès sommaire, les procédures sont faites sous serment, malgré le fait que les *Règles militaires de la preuve* ne s'appliquent pas. L'officier qui préside au procès sommaire peut recevoir et considérer tout élément de preuve qu'il juge pertinent pour déterminer si l'accusé a commis l'infraction et, s'il y a lieu, pour infliger la sentence appropriée. Devant une cour martiale, les *Règles militaires de la preuve* s'appliquent et la preuve ne peut être admise qu'en conformité avec ces dernières.
- h. **Droit d'appel.** Il n'est pas possible de faire appel du verdict et de la sentence à l'issue d'un procès sommaire. Toutefois, l'accusé peut contester le verdict et/ou la sentence rendue à l'issue d'un procès sommaire en

review, together with a statement of the relevant facts and reasons why a finding is unjust or a punishment is unjust or too severe, to the appropriate review authority within 14 days of the termination of the summary trial (for more details, see *QR&O article 108.45 — Review of Finding or Punishment of Summary Trial*).

The assisting officer must inform the accused of the right to submit a request for review. If requested by the offender, the commanding officer shall appoint an officer or non-commissioned member above the rank of sergeant to assist in the preparation of the offender's request for review. Where an offender has been sentenced to detention, the submission of a request for review shall result in a suspension of the carrying out of the sentence until such time as the review has been completed.

In the case of a court martial, the accused, or the Minister of National Defence may appeal the findings or sentence, or both, to the Court Martial Appeal Court. In addition, where a sentence of imprisonment or detention has been imposed at a court martial, the accused may ask to be released from imprisonment or detention, pending the appeal, by applying to the court martial that imposed the sentence or to the Court Martial Appeal Court. In some circumstances, the accused may be entitled to legal counsel appointed at public expense, to assist with the appeal of the decisions of the court martial.

CONCLUSION

30. The Officer responsible for this publication is the Director of Law/Military Justice Policy & Research. Questions concerning the content of this publication or recommendations for improvement should be forwarded to the nearest Office of the Judge Advocate General or to the following address:

Office of the Judge Advocate General
National Defence Headquarters
Constitution Bldg.
305 Rideau Street, 11th floor
Ottawa ON K1A 0K2

Attention to Directorate of Law/Military Justice
Policy & Research

présentant une demande de révision, accompagnée d'un énoncé des faits pertinents et des motifs démontrant le caractère injuste du verdict ou le caractère injuste ou trop sévère de la peine. La demande de révision doit être soumise à l'autorité de révision dans les 14 jours suivant la fin du procès sommaire (pour plus de détails, voir l'art. 108.45 des ORFC — *Révision du verdict ou de la peine d'un procès sommaire*).

L'officier désigné doit informer l'accusé de son droit de présenter une demande de révision. Si le contrevenant le requiert, le commandant désigne un officier ou militaire du rang d'un grade supérieur à celui de sergent pour l'aider à formuler sa demande. Si une peine de détention a été infligée, l'autorité de révision suspend l'exécution de la peine de détention jusqu'à ce que la révision soit complétée.

Dans le cas d'une cour martiale, l'accusé ou le ministre de la Défense nationale peut interjeter appel du verdict ou de la sentence devant la Cour d'appel de la cour martiale. En outre, lorsqu'une cour martiale a imposé une peine d'emprisonnement ou de détention, l'accusé peut demander à la cour martiale qui a imposé la peine ou à la Cour d'appel de la cour martiale d'être mis en liberté pendant l'appel. Dans certaines circonstances, l'accusé peut avoir droit à un avocat, aux frais de l'État, pour l'aider dans son appel logé à l'encontre des décisions d'une cour martiale.

CONCLUSION

30. Cette publication a été préparée par le Directeur juridique/Justice militaire Politique & Recherche. Pour toute question concernant son contenu ou toute proposition d'amélioration, vous pouvez communiquer avec le bureau du Cabinet du Juge-avocat général le plus proche ou vous adresser à :

Cabinet du Juge-avocat général
Quartier général de la Défense nationale
Édifice Constitution
305 rue Rideau, 11^e étage
Ottawa ON K1A 0K2

A l'attention du Directeur juridique/Justice militaire
Politique & Recherche

ANNEX A
POWERS OF PUNISHMENT – SERVICE
TRIBUNALS

The following table shows the powers of punishment of commanding officers, delegated officers and superior commanders and those of General and Standing Courts Martial.

ANNEXE A
POUVOIRS DE PUNITION – TRIBUNAUX
MILITAIRES

Le tableau suivant présente les pouvoirs de punition des commandants, des officiers délégués et des commandants supérieurs ainsi que ceux des cours martiales générales et permanentes.

SUMMARY TRIAL	PROCÈS SOMMAIRE
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COMMANDING OFFICER

A **commanding officer** may impose the following punishments (for more details concerning the conditions that apply to these punishments, see QR&O art. 108.24):

- a. detention (to a maximum of 30 days);
- b. reduction in rank, but for one substantive rank only;
- c. reprimand;
- d. fine (to a maximum of 60% of member's monthly basic pay);
- e. confinement to ship or barracks (to a maximum of 21 days);
- f. extra work and drill (to a maximum of 14 days);
- g. stoppage of leave (to a maximum of 30 days); and
- h. caution.

DELEGATED OFFICER

A **delegated officer** may impose the following punishments, subject to limitations that may be imposed by the commanding officer in writing (for more details concerning the conditions that apply to these punishments, see QR&O art. 108.25):

- a. reprimand;
- b. fine (to a maximum of 25% of the member's monthly basic pay);
- c. confinement to ship or barracks (to a maximum of 14 days);
- d. extra work and drill (to a maximum of 7 days);
- e. stoppage of leave (to a maximum of 14 days); and
- f. caution.

COMMANDANT

Un **commandant** peut infliger les peines suivantes (pour plus de détails concernant les conditions applicables à ces peines, voir l'art. 108.24 des ORFC) :

- a. détention (maximum de 30 jours) ;
- b. rétrogradation, mais d'un grade effectif seulement ;
- c. réprimande ;
- d. amende (maximum équivalant à 60 p. 100 de la solde mensuelle de base de l'accusé) ;
- e. être consigné au navire ou au quartier (maximum de 21 jours) ;
- f. travaux et exercices supplémentaires (maximum de 14 jours) ;
- g. suppression de congé (maximum de 30 jours) ; et
- h. avertissement.

OFFICIER DÉLÉGUÉ

Un **officier délégué** peut infliger les peines suivantes, subordonnées aux restrictions pouvant être imposées par le commandant par écrit (pour plus de détails concernant les conditions applicables à ces peines, voir l'art. 108.25 des ORFC) :

- a. réprimande ;
- b. amende (maximum équivalant à 25 p. 100 de la solde mensuelle de base de l'accusé) ;
- c. être consigné au navire ou au quartier (maximum de 14 jours) ;
- d. travaux et exercices supplémentaires (maximum de 7 jours) ;
- e. suppression de congé (maximum de 14 jours); et
- f. avertissement.

ANNEX A**SUPERIOR COMMANDER**

A **superior commander** may impose the following punishments (for more details concerning the conditions that apply to these punishments, see QR&O art. 108.26):

- a. severe reprimand;
- b. reprimand; and
- c. fine (to a maximum of 60% of the member's monthly basic pay).

ANNEXE A**COMMANDANT SUPÉRIEUR**

Un **commandant supérieur** peut infliger les peines suivantes (pour plus de détails concernant les conditions applicables à ces peines, voir l'art. 108.26 des ORFC) :

- a. blâme ;
- b. réprimande ; et
- c. amende (maximum équivalant à 60 p. 100 de la solde mensuelle de base de l'accusé).

COUR MARTIAL	COUR MARTIALE
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STANDING COURT MARTIAL

A **Standing Court Martial (SCM)** may impose any of the following punishments (see QR&O 104.02 – *Scale of punishments* and section 175 of the *National Defence Act*):

- a. imprisonment for life;
- b. imprisonment for two years or more;
- c. dismissal with disgrace from Her Majesty's service;
- d. imprisonment for less than two years;
- e. dismissal from Her Majesty's service;
- f. detention;
- g. reduction in rank;
- h. forfeiture of seniority;
- i. severe reprimand;
- j. reprimand;
- k. fine; and
- l. minor punishments*.

COUR MARTIALE PERMANENTE

Une **cour martiale permanente (CMP)** peuvent imposer les sentences suivantes (voir l'art. 104.02 des ORFC – *Échelles des peines* et l'article 175 de la *Loi sur la défense nationale*):

- a. emprisonnement à perpétuité;
- b. emprisonnement de deux ans ou plus;
- c. destitution ignominieuse du service de Sa Majesté;
- d. emprisonnement de moins de deux ans;
- e. destitution du service de Sa Majesté;
- f. détention (maximum de 90 jours);
- g. rétrogradation;
- h. perte de l'ancienneté;
- i. blâme;
- j. réprimande;
- k. amendes; et
- l. peines mineures*.

GENERAL COURT MARTIAL

A **General Court Martial (GCM)** may impose any of the punishments listed above (see QR&O 104.02 – *Scale of punishments* subject to section 166.1 of the *National Defence Act*).

COUR MARTIALE GÉNÉRALE

Une **cour martiale générale (CMG)** peut imposer l'une des peines ci-haut mentionnées (voir l'art. 104.02 des ORFC – *Échelles des peines* sous réserve de l'article 166.1 de la *Loi sur la défense nationale*).

* All courts martial may impose a minor punishment (see QR&O art. 104.13 – *Minor punishments*), subject to the same limitations imposed upon a commanding officer (see QR&O art. 108.24 – *Powers of punishment of a commanding officer*).

Toutes les cours martiales peuvent imposer des peines mineures (voir l'art. 104.13 des ORFC – *Peines mineures*), selon les mêmes modalités que celles prévues pour un commandant (voir l'art. 108.24 des ORFC – *Pouvoirs de punition attribués au commandant*).

ANNEX A

ANNEXE A

WARRANT FOR ARREST

To _____
and all others whom he may call upon to assist him in the execution of
this warrant

I, _____, an officer
having, under section 157 of the *National Defence Act*, authority to issue a warrant for arrest, hereby
authorize you and all others upon whom you may call to arrest

(service number, rank (if applicable) and name)

who is alleged to have committed a service offence, that is to say,

(specify offence)

AND you are to place this person in custody and

(Strike out
words that
do not apply)

(bring him to this unit)
(take him to the nearest unit or other element of the Canadian Forces)
(take him to the nearest civil jail)

in order that the person may answer for the said offence and be further dealt with according to law.

(Although _____
(name of alleged offender)

(Subsection
157(2) of the
*National
Defence Act*)

holds a higher rank than mine, I certify that the exigencies of the service require me to issue this
warrant authorizing his arrest.)

Whereas there are reasonable grounds to believe that the alleged offender is or will be present in

(Complete only if
applicable and
where the
requirements of s.
34.1 of the
*Interpretation
Act* have been
satisfied.)

(describe dwelling-house)

**This warrant is also issued to authorize you to enter the dwelling-house for the purpose of
arresting or apprehending the alleged offender, subject to the condition that you may not enter the
dwelling-house unless you have, immediately before entering the dwelling-house, reasonable
grounds to believe that the person to be arrested or apprehended is present in the dwelling-house.**

GIVEN under my hand this _____ day of _____, _____
(month) (year)

(signature)

(service number, rank and name)

(appointment and unit)

ACCOUNT IN WRITING

To: _____
(officer or non-commissioned member i/c guard or guard-room)

(service number, rank (if applicable) and name of person arrested)

was arrested by me at _____ hours on _____ and is committed by me
(time) (date)

to your custody at _____ hours on _____ for the following reasons:
(time) (date)

At _____ hours on _____ I determined that the arrested person should be retained in custody
(time) (date)

having regard to all the circumstances, including those set out in article 105.12 (*Release of Arrested Person Unless Conditions for Retention in Custody Are Met*) of the *Queen's Regulations and Orders for the Canadian Forces*, specifically because:

(see Note)

Time of Delivery
of account in writing: _____ hours

Date: _____

(officer or non-commissioned member committing the arrested person, name, appointment and unit)

NOTE

As this account in writing may be the only information available at the time the decision to retain the arrested person in custody is reviewed, these reasons should be given in as much detail as possible having regard to the circumstances, including those set out in paragraph (1) of article 105.12 (*Release of Arrested Person Unless Conditions Necessary For Retention in Custody Are Met*) of the *Queen's Regulations and Orders for the Canadian Forces*.

SAMPLE ACCOUNT IN WRITING

To: Sgt B.A. Smith
(officer or non-commissioned member i/c guard or guard-room)

D12 234 678 Pte B. Brown
(service number, rank (if applicable) and name of person arrested)

was arrested by me at 2030 hours on 18 Jul 06 and is committed by me to
(time) (date)

your custody at 2045 hours on 18 Jul 06 for the following reasons:
(time) (date)

*While intoxicated he struck Cpl. R. Butler, a superior officer in the Junior Ranks Mess
this evening at 2015 hours.*

At 2035 hours on 18 Jul 06 I determined that the arrested person should be
(time) (date)

retained in custody having regard to all the circumstances, including those set out in article 105.12 (*Release of Arrested Person Unless Conditions for Retention in Custody Are Met*) of the *Queen's Regulations and Orders for the Canadian Forces*, specifically because:

(see Note)

*Pte Brown was still under the influence of alcohol.
He remained belligerent, and I was concerned that he would repeat the offence.*

Time of Delivery
of account in writing: 2045 hours

Date: 18 Jul 06

(signed) J.P. Robert, MCpl, Duty Corporal, 3 RCR
(officer or non-commissioned member committing the arrested person, name, appointment and unit)

NOTE

As this account in writing may be the only information available at the time the decision to retain the arrested person in custody is reviewed, these reasons should be given in as much detail as possible having regard to the circumstances set out in paragraph (1) of article 105.12 (*Release of Arrested Person Unless Conditions Necessary For Retention in Custody Are Met*) of the *Queen's Regulations and Orders for the Canadian Forces*.

DIRECTION ON RELEASE FROM CUSTODY

I direct that _____ be released:
(service number, rank (if applicable) and name of person arrested)

(Delete (a)
or (b) as
applicable)

a. without conditions, or

b. on the condition that the person comply with all of the following conditions:

(1) remain under military authority;

(2) report at _____ to _____ ;
(specified times) (specified military authority)

(3) remain within the confines of _____ ;
(specified defence establishment or location within a geographical area)

(4) abstain from communicating with _____ ;
(witness or specified person)

(5) refrain from going to _____ ; and
(specified place)

(6) _____
(other reasonable conditions as are specified)

Date: _____

(Rank, name, appointment and unit of custody review officer)

I, _____ acknowledge and
(service number, rank (if applicable) and name of arrested person)

agree to comply with the above conditions as a condition of my release from arrest.

Date: _____

(signature of arrested person)

(name of witness to signature of arrested person)

SAMPLE OF A DIRECTION ON RELEASE FROM CUSTODY

I direct that D11 222 333 Cpl A.B. Robert be released:
(service number, rank (if applicable) and name of person arrested)

(Delete (a)
or (b) as
applicable)

- a. ~~without conditions, or~~
b. on the condition that the person comply with all of the following conditions:

- (1) remain under military authority;
- (2) report at 0700, 1800 and 2200 hours to the Base Duty Officer ;
(specified times) (specified military authority)
- (3) remain within the confines of CFB Edmonton ;
(specified defence establishment or location within a geographical area)
- (4) abstain from communicating with Miss Lucy Gendron ;
(witness or specified person)
- (5) refrain from going to: any mess or other facility serving alcohol ; and
(specified place)
- (6) abstain from the consumption of alcohol .
(other reasonable conditions as are specified)

Date: 17 Jun 06

Maj B. McDonald, D/CO, 460 Sqn
(Rank, name, appointment and unit
of custody review officer)

I, D11 222 333 Cpl A.B. Robert , acknowledge and agree to comply
(service number, rank (if applicable) and name of arrested person)

with the above conditions as a condition of my release from arrest.

Date: 17 Jun 06

“A.B. Robert”
(signature of arrested person)

“CWO T. Blais”
(name of witness to signature of arrested person)

FORM OF DIRECTION AND UNDERTAKING
(Subsection 159.4(1) of the *National Defence Act*)

Part I: Direction

It is directed that _____
(service number, rank (if applicable) and full name of person in custody)

be released from custody upon signing the undertaking in Part 2. It is further directed that this form be presented to the person in custody without delay.

Date: _____

Military Judge

Part 2: Undertaking

I, _____ undertake,
(service number, rank (if applicable) and full name of person in custody)

as a condition of my release from custody, to comply with the following conditions:

- (a) remain under military authority;
- (b) report at _____ to _____ ;
(specified times) (specified military authority)
- (c) remain within the confines of _____ ;
(specified defence establishment or location within a geographical area)
- (d) abstain from communicating with _____ ;
(witness or specified person)
- (e) refrain from going to _____ ; and
(specify place)
- (f) _____ .
(other reasonable conditions as are specified)

Date: _____

(signature of person in custody)

(witness to signature of person in custody)

CHAPTER 2

ANNEX H

MILITARY POLICE DISCRETION

SCOPE AND APPLICATION

1. **Aim.** The aim of this policy is to provide guidelines for Military Police (MP) to follow when exercising investigation discretion.

2. **General.** The exercise of discretion lies at the heart of the policing function. It is undeniable that there is only one law for all: and it is right that this should be so. But it is equally well recognized that successful policing depends on the exercise of discretion on how the law is enforced. Discretion is the art of suiting action to particular circumstances.

POLICY

3. **Statement of Policy.** Discretion is a central and important feature of every decision by a MP to charge or prefer a charge against a person. MP must consider issues such as fairness, justice, accountability, consistency and wider CF interests and expectations when deciding whether or not to prefer a charge or no charge. By virtue of their appointment all MP are accountable for such decisions. The decision should not display arbitrary and inexplicable differences in the way that different people are treated by the MP. Upon

CHAPITRE 2

ANNEXE H

POUVOIR DISCRÉTIONNAIRE DE LA POLICE MILITAIRE

PORTÉE ET APPLICATION

1. **But** Le but de la présente politique est de fournir à la police militaire (PM) des lignes directrices qu'elle doit suivre lorsqu'elle exerce son pouvoir discrétionnaire en matière d'enquête.

2. **Généralités** L'exercice du pouvoir discrétionnaire est au cœur de la fonction du maintien de l'ordre. La loi est indéniablement la même pour tous, et il est bien que cela soit ainsi. Toutefois, il est également reconnu que l'efficacité du maintien de l'ordre dépend de l'exercice du pouvoir discrétionnaire à l'égard de l'application de la loi. Le pouvoir discrétionnaire est l'art d'adapter les interventions aux circonstances particulières.

POLITIQUE

3. **Énoncé de politique** Le pouvoir discrétionnaire est un élément important et central de la décision de l'agent de la PM de porter une accusation contre une personne. Pour décider s'il portera ou non une accusation, l'agent de la PM doit tenir compte d'aspects comme l'équité, la justice, la responsabilité, la cohérence ainsi que les attentes et les intérêts généraux des FC. De par les fonctions qu'ils assument, tous les agents de la PM sont tenus de rendre compte de leurs décisions. Les décisions de la PM ne devraient pas montrer de

making a decision the MP must then ensure consistency and accordance with statutes and policies.¹

4. Principles. The methods of managing police discretion involve more than the creation of rules. Consideration must be given to all methods, which a police manager has available at his disposal including: the development of guiding principles; training; supervisor evaluations; disciplinary actions; and supervision.³

INVESTIGATION DISCRETION

5. Investigation General. Pursuant to QR&O article 106.02, all complaints alleging that a criminal or service offence may have been committed shall be investigated except where a complaint is determined to be frivolous or vexatious. Not all investigations need to be conducted by the MP. The decision to continue an investigation or not should be established in accordance with the factors listed at Appendix 1. The factors set out in Appendix 1 must be considered when considering whether or not to continue an investigation and need to be continually

différences arbitraires et inexplicables entre les différents cas traités. Lorsqu'un agent de la PM prend une décision, il doit s'assurer qu'elle est cohérente et en conformité avec les lois et les politiques en vigueur.²

4. Principes La gestion du pouvoir discrétionnaire de la police ne se limite pas à l'établissement de règles. Le gestionnaire doit également envisager toutes les autres méthodes à sa disposition, notamment : l'élaboration de principes directeurs, la formation, les évaluations par les superviseurs, les mesures disciplinaires, et la supervision.⁴

POUVOIR DISCRÉTIONNAIRE EN MATIÈRE D'ENQUÊTE

5. Enquêtes – Généralités
Conformément à l'article 106.02 des ORFC, s'il y a raison de croire qu'une infraction criminelle ou d'ordre militaire a été commise, une enquête doit normalement être menée, sauf si la plainte est jugée futile ou vexatoire. Les enquêtes ne doivent pas nécessairement être faites par la PM. La décision de poursuivre une enquête ou non doit être prise sur la base des facteurs cités à l'appendice 1. Les facteurs cités à l'appendice 1 doivent être pris en considération lorsqu'on cherche à savoir s'il faut poursuivre ou non une enquête

¹ . Bordner, Diance. "Routine Policing, Discretion, and the Definition of Law, Order, and Justice in Society." *Criminology*, Vol 21, No.2, May 1983, pp. 294-304.

² . Bordner, Diance, « Routine Policing, Discretion, and the Definition of Law, Order, and Justice in Society », *Criminology*, vol. 21, n° 2, mai 1983, p. 294-304.

³ Domonoske, Clair. "Towards an integrated theory of police management." *International Journal of Police Science and Management*, Vol. 8, No. 4, 2006, pp. 326-341.

⁴ Domonoske, Clair, « Towards an integrated theory of police management », *International Journal of Police Science and Management*, vol. 8, n° 4, 2006, p. 326-341.

reassessed throughout the investigation.

6. Final Authority. The final authority to decide not to investigate an incident reported to the MP rests with the MP Detachment Commanders. They retain this responsibility unless written direction to the contrary is received from the MP members superior in rank and in the direct or technical chain of command of those mentioned above.

CHARGE LAYING DISCRETION

7. CFNIS. The authority to lay an *NDA* charge for an officer or non-commissioned member of the MP assigned to investigative duties with the CFNIS is found at QR&O article 107.02 (c).⁵ Prior to laying a charge, the CFNIS investigator is required to consult with their chain of command and obtain legal advice in most circumstances. Where the CFNIS investigator disagrees with the legal opinion provided, the matter will be referred to the CFNIS and prosecution chains of command for resolution.

8. Priorities listed at Appendix 2 may influence the decision to lay or not a

et doivent continuellement être réévalués pendant l'enquête.

6. Pouvoir final de décision Le pouvoir final pour décider s'il faut mener une enquête ou non sur un incident rapporté à la PM appartient aux commandants de détachement de PM. Ils conservent cette responsabilité tant qu'un ordre écrit stipulant le contraire n'est pas émis par les membres de la PM supérieurs en grade et dans la chaîne de commandement directe ou technique des personnes mentionnées ci-dessus.

POUVOIR DISCRÉTIONNAIRE DE MISE EN ACCUSATION

7. SNEFC Le pouvoir de mise en accusation en vertu de la *Loi sur la défense nationale* (LDN) d'un officier ou d'un militaire du rang de la PM affecté à des tâches d'enquête au Service national des enquêtes des Forces canadiennes (SNEFC) est décrit dans l'alinéa 107.02(c) des ORFC⁶. Avant de porter une accusation, l'enquêteur du SNEFC doit consulter la chaîne de commandement et, la plupart du temps, recevoir des conseils juridiques. Quand l'enquêteur du SNEFC est en désaccord avec l'opinion juridique fournie, le dossier est renvoyé aux chaînes de commandement du SNEFC et de la poursuite pour résolution.

8. Les priorités énoncées à l'appendice 2 peuvent influencer la décision de porter

⁵ NOTE: There must be an actual belief on the part of the person laying a charge that the accused has committed the alleged offence and that belief must be reasonable. A "reasonable belief" is a belief, which would lead any ordinary prudent and cautious person to the conclusion that the accused is probably guilty of the offence alleged.

⁶ REMARQUE : La personne qui porte une accusation doit croire que l'accusé a commis l'infraction en question et la croyance sur laquelle elle s'appuie doit être raisonnable. L'expression « croyance raisonnable » fait référence à la croyance qui amènerait une personne ordinairement prudente à conclure que l'accusé est probablement coupable de l'infraction reprochée.

charge. For a priority one offence, for example, if the elements of the offence can be proven then a charge shall be normally laid. As such, the exercise of discretion is severely limited for priority one offences. For priority two and three offences there is significantly more latitude for the MP to exercise discretion. Where viable administrative options exist, the CFNIS may consider referring the matter back to the unit with recommendations for remedial or disciplinary action. If unit administrative/disciplinary action is considered the better options, this recommendation must be clearly articulated in the CFNIS report or covering letter. The unit has no obligation to accept a recommendation for administrative or disciplinary follow-up. Therefore, the priority of the offence and the screening criteria must be carefully considered prior to referring matters back to unit level for disposal. For priority three offences that have been investigated by the CFNIS, consideration should be given to the fact that normally the best judge of the effect of a particular incident on the discipline of a unit will be the CO of the unit. CFNIS supervisors in the direct chain of command of the investigator have both the responsibility and the authority to monitor this discretion and, if necessary override the decision of the investigator. The final authority to decide whether or not a charge within the purview of the CFNIS shall be laid rests with the OCs of CFNIS Detachments or those MP superior in rank and in the direct or technical chain of command. If a CFNIS member decides to lay a charge they must always personally have the **reasonable belief** that the accused committed the offence.

ou non une accusation. Dans le cas d'une infraction de première priorité, par exemple, si l'on peut prouver les éléments de l'infraction, il faut normalement porter une accusation. L'exercice du pouvoir discrétionnaire est considérablement limité à l'égard de cette catégorie d'infraction. La latitude de la PM est beaucoup plus grande en ce qui concerne les infractions de deuxième et de troisième priorité. Lorsqu'il existe des solutions viables sur le plan administratif, le SNEFC peut choisir de renvoyer le dossier à l'unité, en recommandant des mesures correctives ou disciplinaires. Si des mesures correctives ou disciplinaires par l'unité sont considérées comme la meilleure solution, le rapport du SNEFC ou la lettre d'accompagnement doit le stipuler clairement. L'unité n'est pas tenue d'accepter une recommandation de suivi administratif ou disciplinaire. On doit soigneusement prendre en compte la priorité de l'infraction et les critères de sélection avant de renvoyer la question au niveau de l'unité pour traitement. Dans le cas des infractions de troisième priorité pour lesquelles le SNEFC a mené une enquête, il faut tenir compte du fait que la personne généralement la mieux placée pour juger des répercussions d'une infraction sur la discipline d'une unité est le cmdt de l'unité. Les superviseurs du SNEFC dans la chaîne de commandement directe de l'enquêteur ont à la fois la responsabilité et le pouvoir de surveiller la discrétion exercée et, au besoin, de renverser la décision de l'enquêteur. La décision de porter ou non une accusation dans les dossiers traités par le SNEFC revient en dernier lieu aux cmdt de détachement du SNEFC ou au supérieur en grade dans la chaîne de commandement directe ou technique de

la PM. Si un membre du SNEFC décide de porter accusation, il doit toujours avoir une **crovance raisonnable** que l'accusé a commis l'infraction reprochée.

MP Discretion – Non-CFNIS MP Members.

9. **General.** MP operate within a complex environment, consisting of, among other things, the nature of the CF and local community, federal and provincial legislation, policies, procedures and programs, resources and mission. These impact on MP decision-making and police work; thus discretion is at the heart of the MP decision making process.

10. Given these organizational imperatives, it is vital that the individual MP discretion be exercised in an enlightened and informed manner. The existence of discretion can place MP in a situation where they might be tempted to abuse their powers.⁷

11. Unlike an MP assigned to CFNIS investigative duties the MP Detachment member does not have charge laying authority for offences under the NDA. For offences that will be processed through the civilian courts the MP can prefer a charge and swear an information or proceed through the local crown (civil prosecution) for advice before prosecution through the

Pouvoir discrétionnaire de la PM – Membres de la PM ne faisant pas partie du SNEFC

9. **Généralités** La PM travaille à l'intérieur d'un cadre complexe où elle doit notamment prendre en compte la nature des FC et de la collectivité locale, les lois, les politiques, les méthodes et les programmes fédéraux et provinciaux ainsi que ses ressources et sa mission. Ces facteurs agissent sur la prise de décision et le travail policier de la PM; le pouvoir discrétionnaire est donc au cœur du processus de prise de décision de la PM.

10. Étant donné ces exigences organisationnelles, il est vital que chaque agent de la PM exerce son pouvoir discrétionnaire d'une manière éclairée et informée. Il pourrait en effet être tenté d'en abuser dans certaines situations.⁸

11. Contrairement aux agents de la PM qui sont affectés à des tâches d'enquête au SNEFC, les membres des détachements de PM n'ont pas le pouvoir de porter des accusations relativement à des infractions à la LDN. Dans le cas des infractions traitées par les tribunaux civils, les agents de la PM peuvent porter une accusation et faire une dénonciation sous serment ou

⁷ Marin, René. *Policing In Canada: Issues For The 21st Century*. Aurora: Canada Law Book Inc., 1997.

⁸ Marin, René, *Policing In Canada : Issues For The 21st Century*, Aurora, Canada Law Book Inc., 1997.

civilian justice system.⁹ The final authority to decide whether or not a charge within the purview of the MP shall be laid rests with the MP Detachment Commanders or those MP superior in rank and in the direct or technical chain of command. If a MP member decides to prefer or lay a charge they must **always** personally have the **reasonable** belief that the accused committed the offence.

JURISDICTIONAL CONCERNS

12. MP are to be cognizant of the fact that except for cases of drinking and driving occurring on Defence Establishments, the default will normally be to deal with offences through the Military Justice System. The simple fact that a civilian is involved in a matter does not automatically dictate that it should be referred to the civilian system.

MP Notebook/SAMPIS

13. Any intervention by the MP technical chain of command shall be recorded in the MP notebook and an entry entered on the applicable GO within SAMPIS. This applies to both the CFNIS investigator and the MP Detachment member.

demandeur conseil au procureur de la Couronne local (poursuite civile) avant de transmettre l'affaire au système judiciaire civil.¹⁰ La décision de porter ou non une accusation dans les dossiers traités par la PM revient en dernier lieu aux cmdt de détachement de PM ou au supérieur en grade dans la chaîne de commandement directe ou technique de la PM. Si un agent de la PM décide de porter accusation, il doit **toujours** avoir une croyance **raisonnable** que l'accusé a commis l'infraction reprochée.

PROBLÈMES DE COMPÉTENCE

12. Tous les agents de la PM doivent savoir que, sauf dans les cas d'alcool au volant se produisant dans les établissements de défense, les infractions normalement seront traitées par le système judiciaire militaire. Le simple fait qu'un civil est impliqué n'entraîne pas automatiquement le renvoi de l'affaire au système civil.

Carnet de notes de la PM/SISEPM

13. Toute intervention de la chaîne de commandement technique de la PM doit être consignée dans le Carnet de notes de la PM et faire l'objet d'une entrée dans l'événement général applicable du Système d'information – Sécurité et police militaire (SISEPM). Cette règle vaut autant pour l'enquêteur du SNEFC que pour le membre d'un détachement de PM.

⁹ Refer to local Provincial Crown Regulations for preferring a Charge within your Jurisdictional Area. Provinces such as British Columbia, New Brunswick and Quebec require a 'Pre-Charge Screening.'

¹⁰ En ce qui concerne le dépôt d'accusations dans votre domaine de compétence, consultez les règlements de la Couronne provinciale. Les provinces comme la Colombie-Britannique, le Nouveau-Brunswick et le Québec exigent une « vérification préalable à la mise en accusation ».

Appropriate/Inappropriate Discretion

14. For a priority one offence, for, example if the elements of the offence can be proven then a charge shall normally be recommended. As such, the exercise of discretion is severely limited for priority one offences. For priority two and three offences there is significantly more latitude for the MP to exercise discretion. Where viable administrative options exist, the MP member may consider referring the matter back to the unit with recommendations for remedial or disciplinary action. If unit administrative/disciplinary action is considered the better option, this recommendation must be clearly articulated in the MP report or covering letter.

15. MP must consider issues such as fairness, justice, accountability, consistency and wider CF/community interests and expectations when deciding whether or not to charge. Factors such as sex, race, ethnic origin or colour will not influence the discretionary process of the MP.

Caractère approprié/inapproprié du pouvoir discrétionnaire

14. Dans le cas d'une infraction de première priorité, par exemple, si l'on peut prouver les éléments de l'infraction, il faut normalement porter une accusation. L'exercice du pouvoir discrétionnaire est considérablement limité à l'égard de cette catégorie d'infraction. La latitude de la PM est beaucoup plus grande en ce qui concerne les infractions de deuxième et de troisième priorité. Lorsqu'il existe des solutions viables sur le plan administratif, l'agent de la PM peut choisir de renvoyer le dossier à l'unité, en recommandant des mesures correctives ou disciplinaires. Si des mesures correctives ou disciplinaires par l'unité sont considérées comme la meilleure solution, l'agent de la PM doit le stipuler clairement dans son rapport ou sa lettre d'accompagnement.

15. Pour décider s'il portera ou non une accusation, l'agent de la PM doit tenir compte d'aspects comme l'équité, la justice, la responsabilité, la cohérence ainsi que les attentes et les intérêts généraux des FC et de la collectivité. Il ne doit pas se laisser influencer par des facteurs comme le sexe, la race, l'origine ethnique ou la couleur.

16. There may be rare cases whereby matters referred to the MP involving personnel who are subject to the *Code of Service Discipline* would be better dealt with outside of the Military Justice System, but the decision to do so will occur as the result of consultation and decision making at the Senior MP Advisor level.

CONCLUSION

17. It cannot be overstated that everyone who has committed an offence does not have to be charged with that particular offence. Discretion is an inescapable element of MP employment arising from the ever-present reality of scarce resources and the ambiguity of the law. Care must be used in the exercise of discretion to ensure it is done with fairness and consistency.

16. Il peut se présenter, en de rares occasions, des cas où les dossiers soumis à la PM au sujet de membres du personnel assujettis au *Code de discipline militaire* seraient mieux traités en dehors du système judiciaire militaire, mais une telle voie sera choisie seulement après consultation du conseiller supérieur de la PM, qui prendra la décision finale.

CONCLUSION

17. On ne saurait trop insister sur le fait qu'il n'est pas nécessaire de porter une accusation contre toute personne qui commet une infraction. Le pouvoir discrétionnaire est un élément incontournable des fonctions de policier militaire dans le contexte toujours actuel de ressources limitées et d'ambiguïté de la loi. Il faut exercer son pouvoir discrétionnaire prudemment, afin d'agir de manière juste et cohérente.

ANNEX H
APPENDIX 1

EXERCISE OF INVESTIGATIVE
DISCRETION

ANNEX H
APPENDIX 2

PRIORITY OF INVESTIGATION

ANNEXE H
APPENDICE 1

EXERCICE DE POUVOIR
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PRIORITÉ DES ENQUÊTES

CHAPTER 2

ANNEX H

Appendix 1

EXERCISE OF INVESTIGATIVE DISCRETION

CATEGORIES OF FACTORS TO CONSIDER

1. Mandate

- a. Jurisdiction
- b. CFNIS Mandate
- c. Trivial, Vexatious, Bad Faith
- d. Require Specialist Skills
- e. Location of Offence

2. Resources needed

- a. Human resources
- b. Material resources
- c. Other expenditures

3. Expediency

- a. Minor offence
- b. Need to interview a suspect

4. Solvability Factors

- a. suspects known
- b. Identifiable suspect vehicle or license plate
- c. Identifiable suspect description
- d. Investigative leads known
- e. Witness to Crime
- f. Physical evidence present
- g. Multiple occurrences with same MO (Serial offence)
- h. Public sentiment requires immediate action

5. DND Specific Factors

- a. Impact on unit morale or cohesion
- b. Superior / Subordinate Relationship
- c. Whether the rank or position of subject makes it important to pursue
- d. High monetary value of crime
- e. Military Exigency
- f. Prejudice good order and discipline

Alternative means of resolution (administrative action, unit investigation, harassment policy)

CHAPITRE 2

ANNEXE H

Appendice 1

EXERCICE DU POUVOIR DISCRÉTIONNAIRE EN MATIÈRE D'ENQUÊTE

CATÉGORIES DE FACTEURS À PRENDRE EN COMPTE

1. Mandat

- a. Compétence
- b. Mandat du SNEFC
- c. Plainte frivole ou vexatoire, plaignant de mauvaise foi
- d. Compétences spécialisées exigées
- e. Lieu de l'infraction

2. Ressources nécessaires

- a. Ressources humaines
- b. Ressources matérielles
- c. Autres dépenses

3. Opportunité

- a. Infraction mineure
- b. Nécessité d'interroger un suspect

4. Facteurs influant sur la résolution

- a. Suspects connus
- b. Véhicule ou plaque d'immatriculation du suspect identifiable
- c. Description d'un suspect identifiable
- d. Pistes d'enquête connues
- e. Témoin du crime
- f. Existence de preuves matérielles
- g. Infraction commise plusieurs fois en utilisant le même mode d'exécution (infraction en série)
- h. Opinion publique exigeant une action immédiate

5. Facteurs spécifiques au MDN

- a. Incidence sur le moral ou la cohésion de l'unité
- b. Relation entre les supérieurs et les subordonnés
- c. Grade ou poste de la personne visée rendant la poursuite importante
- d. Valeur monétaire élevée du crime
- e. Urgence du point de vue militaire
- f. Conduite préjudiciable au bon ordre et à la discipline

Autres moyens de résolution (mesures administratives, enquête de l'unité, politique en matière de harcèlement)

CHAPTER 2**ANNEX H****APPENDIX 2**

Priority of Investigation	Types of Offences	Comments
Priority One	Serious, Indictable, Crimes against Persons	The most serious of offences, very little latitude for exercise of discretion. All effort should be made to bring before courts.
Priority Two	Dual Procedure, Non Electable Courts Martial	Considerable latitude for exercise of discretion. Discretionary decisions must be clearly articulated in terms of provided screening criteria and should be consistent with regards to each type of offence.
Priority Three	Summary Offences	Exercise of discretion is encouraged and invites participation from Units for minor disciplinary matters.

CHAPITRE 2**ANNEXE H****APPENDICE 2**

Priorité des enquêtes	Type d'infraction	Commentaires
Première priorité	Crimes contre la personne et actes criminels graves et passibles de poursuites	Ce sont les crimes les plus graves; ils offrent très peu de latitude pour exercer un pouvoir discrétionnaire. Tous les efforts nécessaires doivent être déployés pour amener leurs auteurs devant les tribunaux.
Deuxième priorité	Infraction mixte, non justiciable d'une cour martiale	Latitude considérable pour l'exercice du pouvoir discrétionnaire. On doit expliquer clairement les décisions discrétionnaires, en fournissant des critères d'examen, et ces décisions doivent être uniformes pour chaque type d'infraction.
Troisième priorité	Infraction punissable par voie de déclaration sommaire de culpabilité	L'exercice du pouvoir discrétionnaire est encouragé, et il est souhaitable que les unités participent au processus pour les infractions disciplinaires mineures.

Guide for Referral Authorities

Guide à l'intention des autorités de renvoi



November / novembre 2002

Office of the Judge Advocate General

Cabinet du Juge-avocat général



National
Defence

Défense
nationale

Canada

GUIDE FOR REFERRAL AUTHORITIES
GUIDE À L'INTENTION DES AUTORITÉS DE RENVOI

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BACKGROUND

1. The reforms to the *National Defence Act*, that came into force on 1 September 1999 sought to establish a clear separation between the system's investigative, charge laying, and prosecutorial functions. In furtherance of this objective, the amendments to the *National Defence Act* established the positions of Director of Military Prosecutions and Court Martial Administrator, and redefined the role of the chain of command in the court martial convening process. In doing so, it was necessary to ensure that the court martial convening process reflects Canadian legal norms in the performance of this quasi-judicial function by the Director of Military Prosecutions, while at the same time recognizing and protecting the vital role of the chain of command in the military justice system.

2. The senior officer, who in the past was acting as a convening authority, is now referred to as a referral authority. Since the coming in to force of the reformed system, the referral authority no longer convenes courts martial, but rather must refer charges to the Director of Military Prosecutions with a recommendation as to whether or not the charge(s) should be dealt with by court martial.

3. Upon receipt of the referral authority's recommendation, the Director of Military Prosecutions determines whether or not a charge will be "preferred" for trial by court martial. Where such a decision is made, the charge sheet is signed by the DMP or one of the Regional Military Prosecutors and sent to the Court Martial Administrator. Upon receipt of the preferred charge, the Court Martial Administrator is required by law to convene a court martial.

A. PURPOSE

4. The purpose of this guide is to:

- provide a ready reference to referral authorities dealing with an application for disposal of charges;
- set out the roles and responsibilities of referral authorities in the referral process; and
- provide guidance to referral authorities in the performance of the referral function.

GÉNÉRALITÉS

1. Les réformes de la *Loi sur la défense nationale* qui sont entrées en vigueur le 1^{er} septembre 1999 ont cherché à clairement séparer le processus d'enquêtes, le dépôt des accusations et les fonctions de la poursuite. Afin d'atteindre cet objectif, les positions du directeur des poursuites militaires et de l'administrateur de la cour martiale ont été établies par les amendements à la *Loi sur la défense nationale*, et le rôle de la chaîne de commandement a été redéfini en ce qui a trait au processus de convocation des cours martiales. En faisant cela, il fallait s'assurer que le processus de convocation des cours martiales reflète les normes juridiques canadiennes dans l'interprétation de cette fonction quasi-judiciaire exercée par le directeur des poursuites militaires, tout en reconnaissant et protégeant le rôle vital de la chaîne de commandement au sein du système de justice militaire.

2. L'officier supérieur qui agissait autrefois comme autorité de convocation, est devenu une autorité de renvoi sous le nouveau système. Depuis l'entrée en vigueur de la réforme, l'autorité de renvoi ne convoque plus la cour martiale mais doit plutôt renvoyer les accusations qui lui ont été référées au directeur des poursuites militaires en recommandant leur traitement ou non en cour martiale.

3. Sur réception de la recommandation de l'autorité de renvoi, le directeur des poursuites militaires détermine si une accusation sera traitée devant la cour martiale. Lorsque qu'il prononce la mise en accusation, l'acte d'accusation est signé par le DPM ou par l'un des procureurs militaires régionaux et envoyé à l'administrateur de la cour martiale. Lorsque la mise en accusation est reçue par ce dernier, il est légalement requis de convoquer la cour martiale.

A. OBJET

4. Le but de ce guide est de :

- fournir une référence apte à répondre aux autorités de renvoi aux prises avec une demande de connaître d'une accusation ;
- exposer les rôles et les responsabilités des autorités de renvoi dans la procédure de renvoi;
- fournir un guide aux autorités de renvoi dans l'interprétation de la fonction de renvoi.

GUIDE FOR REFERRAL AUTHORITIES
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B. DEFINITION

5. **Referral Authority (QR&O article 109.02).** The Chief of the Defence Staff and any officer having the powers of an officer commanding a command are the officers that can forward an application for disposal of a charge to the Director of Military Prosecutions.

**APPLICATION FOR DISPOSAL OF A
CHARGE**

A. AUTHORITIES MAKING THE APPLICATION

6. An application to a referral authority for disposal of a charge may be made by a commanding officer, a superior commander or an officer or non-commissioned member of the National Investigation Service.

**I. COMMANDING OFFICERS AND SUPERIOR
COMMANDERS**

**i. Decision from the commanding officer or
the superior commander to make the
application**

7. When a charge is brought before a commanding officer or superior commander, a decision as to whether or not to proceed with that charge has to be made. Where the decision is made to proceed with the charge, the procedure as outlined in QR&O chapter 108 must be followed (see QR&O article 107.09(3)). Thereafter, and before the commencement of a summary trial, the officer having jurisdiction in the matter must determine if he is precluded from trying the accused (see QR&O article 108.16 – *Pre-Trial Determinations*) due to:

- a. the accused's rank or status;
- b. any limitation on jurisdiction that would impede him from hearing the case, such as:
 - i. the type of offence (QR&O 108.07 - *Jurisdiction - Offences* and QR&O 108.125 - *Jurisdiction - Offences*);
 - ii. the passage of time since the alleged offence has been committed (QR&O 108.05 *Jurisdiction - Limitation Period*); or

B. DÉFINITION

5. **Autorité de renvoi (ORFC article 109.02).** Le chef d'état-major de la défense et tout autre officier ayant les pouvoirs d'un officier commandant un commandement sont les officiers qui peuvent transmettre des accusations au directeur des poursuites militaires.

**LA DEMANDE DE CONNAÎTRE D'UNE
ACCUSATION**

**A. AUTORITÉS POUVANT EFFECTUER LA
DEMANDE**

6. Une demande à l'autorité de renvoi de connaître d'une accusation peut être effectuée par un commandant, un commandant supérieur ou par un officier ou un militaire du rang du Service national des enquêtes.

**I. COMMANDANTS ET COMMANDANT
SUPÉRIEURS**

**i. Décision du commandant ou du
commandant supérieur de faire la
demande**

7. Lorsqu'une accusation est référée au commandant ou au commandant supérieur, une décision d'y donner suite ou non doit être prise. Dans le cas où il y ait donné suite, le procès doit être instruit en conformité avec le chapitre 108 des ORFC (voir l'article 107.09(3) des ORFC). Par la suite, et avant que ne débute le procès sommaire, l'officier qui a compétence pour juger l'accusé doit déterminer s'il lui est impossible de le juger pour l'un ou l'autre des motifs suivants (voir l'article 108.16 des ORFC — *Déterminations préliminaires au procès*) :

- a. le grade ou le statut de l'accusé ;
- b. toute restriction à sa compétence qui l'empêche d'entendre la cause, telle que :
 - i. le type d'infraction (ORFC 108.07 – *Compétence – Infractions* et ORFC 108.125 *Compétence – Infractions*) ;
 - ii. la période écoulée depuis la prétendue perpétration de l'infraction (ORFC 108.05 *Compétence – Prescription*) ; ou

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- | | |
|---|--|
| <p>iii. restrictions imposed by the commanding officer on a delegated officer's powers relating to the imposition of punishment (QR&O 108.10 - <i>Delegation of a Commanding Officer's Powers</i>);</p> <p>c. whether the officer's powers of punishment are inadequate having regard to the gravity of the alleged offence;</p> <p>d. whether there are reasonable grounds to believe that the accused is unfit to stand trial or was suffering from a mental disorder at the time of the commission of the alleged offence;</p> <p>e. whether it would be inappropriate to try the case having regard to the interests of justice and discipline; and</p> <p>f. whether the accused has elected to be tried by court martial.</p> | <p>iii. les restrictions imposées par le commandant aux pouvoirs d'un officier délégué relatifs au prononcé de la peine (ORFC 108.10 – <i>Délégation des pouvoirs du commandant</i>).</p> <p>c. si ses pouvoirs de punition sont insuffisants, eu égard à la gravité de l'infraction présumée ;</p> <p>d. s'il existe des motifs raisonnables de croire que l'accusé est inapte à subir son procès ou était atteint de troubles mentaux au moment de la perpétration de l'infraction reprochée ;</p> <p>e. s'il n'est pas mieux de ne pas juger la cause, eu égard à l'intérêt de la justice et de la discipline ; et</p> <p>f. si l'accusé a choisi d'être jugé devant une cour martiale.</p> |
|---|--|

8. If a commanding officer or superior commander determines that he is precluded from trying the accused for one of the reasons listed at paragraph 7 of the Guide, that commanding officer or superior commander shall proceed with an application to a referral authority for disposal of a charge (see QR&O 108.16(3)).

8. Si un commandant ou un commandant supérieur conclut qu'il lui est impossible de juger l'accusé pour l'un des motifs énoncés au paragraphe 7 du présent guide, ce commandant ou ce commandant supérieur doit alors procéder à une demande à l'autorité de renvoi de connaître d'une accusation (ORFC 108.16(3)).

ii. Election to be tried by court martial

ii. Demande de procès devant une cour martiale

9. An accused person charged with a service offence triable by summary trial must, in most cases, be offered an election to be tried by court martial. QR&O paragraph 108.17(1) acts as an exception to this general rule. It spells out the offences and circumstances in which the accused does not have the right to elect court martial. This regulation must be reviewed prior to giving the accused the option to elect court martial.

9. Un accusé qui peut être jugé sommairement à l'égard d'une infraction d'ordre militaire doit, dans la plupart des cas, se voir offrir d'être jugé devant une cour martiale. L'alinéa 108.17(1) des ORFC agit à titre d'exception à cette règle générale. Il énonce les infractions et les circonstances pour lesquelles l'accusé n'a pas le droit de demander d'être jugé devant une cour martiale. Cette règle doit être examinée avant de donner à l'accusé l'option de choisir d'être jugé devant une cour martiale.

10. In cases where in the alleged offence is contrary to one of the provisions outlined in QR&O subparagraph 108.17(1)(a), the presiding officer must offer the accused an election if he or she determines that detention, reduction in rank or a fine in excess of 25% of monthly basic pay could reasonably be imposed should the accused be found guilty of the offence (see QR&O 108.17(1)(b) - *Election to be Tried by Court Martial*).

10. Dans les cas où l'une des infractions reprochées est contraire à celles énoncées au sous-alinéa 108.17(1)(a), l'officier présidant doit demander à l'accusé s'il veut être jugé devant une cour martiale dans le cas où il déterminerait que, si l'accusé était déclaré coupable de l'infraction, une peine de détention, de rétrogradation ou une amende dépassant 25 pour cent de la solde mensuelle de base serait justifiée (voir ORFC 108.17(1)(b) – *Demande de procès devant une cour martiale*).

11. When an accused elects to be tried by court martial

11. Quand un accusé choisit d'être jugé devant une

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and the charge is to be proceeded with, then a commanding officer or a superior commander shall initiate an application to the appropriate referral authority for disposal of the charge (see QR&O 108.19 and 108.195).

12. Should the accused refuse to make an election, the refusal will be treated as an election to be tried by court martial, and the accused will be so advised.

13. Where an accused has elected to be tried by court martial, the accused may withdraw the election at any time before the Director Military Prosecutions (DMP) prefers charges. After charges have been preferred by the DMP, the election may only be withdrawn with the consent of the DMP.

II. OFFICERS AND NON-COMMISSIONED MEMBERS OF THE NATIONAL INVESTIGATION SERVICE

i. Decision of the commanding officer or the superior commander not to proceed with the charge

14. A commanding officer or a superior commander receiving a charge laid by an officer or non-commissioned member of the National Investigation Service, may decide not to proceed with it. If this decision is made, then the commanding officer or the superior commander, as the case may be, shall communicate this decision in writing to the member of the National Investigation Service who laid the charge. (QR&O article 107.12 (*Decision not to proceed with charges laid by National Investigation Service*)).

15. Following the review of the reasons given for not proceeding with the charge, the officer or non-commissioned member of the Canadian Forces National Investigation Service, if he still considers that the charge should be proceeded with, may make an application for disposal of the charge directly to the referral authority under whose jurisdiction the charge would normally be referred. (QR&O 107.12 – *Decision not to proceed – charges laid by National Investigation Service*).

B. FORMAT OF THE APPLICATION

16. An application to a referral authority for disposal of a charge shall be in the form of a letter and forwarded directly to the appropriate referral authority (see QR&O 109.03(1)).

cour martiale et qu'il est donné suite à l'accusation, un commandant ou un commandant supérieur devra effectuer une demande à l'autorité de renvoi de connaître d'une accusation (voir ORFC 108.19 et 108.195).

12. Dans le cas où l'accusé refuserait de faire un choix, cela sera traité comme une décision d'être jugé devant une cour martiale, et l'accusé doit être informé de ce fait.

13. Un accusé ayant demandé d'être jugé devant une cour martiale peut retirer son choix en tout temps avant le prononcé de la mise en accusation par le Directeur des poursuites militaires (DPM). Après le prononcé de la mise en accusation par le DPM, ce choix ne pourra être retiré qu'avec le consentement de ce dernier.

II. OFFICIERS OU MILITAIRES DU RANG DU SERVICE NATIONAL DES ENQUÊTES

i. Décision du commandant ou du commandant supérieur de ne pas donner suite à l'accusation

14. Un commandant ou un commandant supérieur saisi d'une accusation portée par un officier ou un militaire du rang du Service national des enquêtes, peut décider de ne pas procéder avec l'accusation. S'il prend cette décision, le commandant ou le commandant supérieur, selon le cas, doit alors la communiquer par écrit au militaire du Service national des enquêtes qui l'a portée. (ORFC article 107.12 (12 – *Décision de ne pas donner suite à l'accusation- Accusation portées par le Service nation d'enquêtes*)).

15. Suite à la révision des motifs fournis pour ne pas procéder avec l'accusation, l'officier ou militaire du rang du Service national des enquêtes qui estime qu'il y aurait lieu de donner suite à l'accusation portée, peut demander de connaître de l'accusation directement à l'autorité de renvoi sous la juridiction pour laquelle l'accusation aurait normalement fait l'objet d'un renvoi. (ORFC 107.12 – *Décision de ne pas donner suite à l'accusation- Accusation portées par le Service nation d'enquêtes*).

B. FORME DE LA DEMANDE

16. La demande de connaître d'une accusation à une autorité de renvoi doit être soumise sous forme de lettre, et envoyée directement à l'attention de l'autorité de renvoi appropriée (voir ORFC 109.03 (1)).

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C. CONTENT OF THE APPLICATION

17. The application shall include:

- a. the reasons supporting the application;
- b. a short summary concerning the facts related to the commission of the alleged offence and the evidence supporting the charge as demonstrated by the investigation report;
- c. any recommendation concerning the disposal of the charge.

18. Additionally, the letter should refer to the fact that the accused has been informed of the right to legal counsel, and indicate the accused's desires, if any, with respect to legal representation at court martial. (see QR&O 109.04 – *Right to legal counsel*).

D. DOCUMENTS

19. In order for the referral authority to provide appropriate recommendations when forwarding an application to the DMP, the following documents must accompany the application:

- a. the original Record of Disciplinary Proceedings (RDP);
- b. a copy of any investigation report (police, unit or other);
- c. the conduct sheet of the accused, if any (if there is not, it should be indicated in the letter);
- d. the record of service or a certified copy of the certificate of service of the accused, if available (commonly referred to as the Personal Record Resume "PRR"); and
- e. where the application is made by an officer or non-commissioned member of the National Investigation Service, a copy of the decision of the commanding officer or superior commander not to proceed with the charge.

E. FORWARDING THE APPLICATION

I. INFORMATION TO THE ACCUSED

20. When an application is forwarded to the referral authority for disposal of a charge, the commanding

C. CONTENU DE LA DEMANDE

17. La demande doit inclure:

- a. les motifs qui sont à l'appui de la demande ;
- b. un court exposé des faits relatifs à la commission présumée de l'infraction et sur la preuve à l'appui, tel que démontré par le rapport d'enquête ;
- c. toute recommandation relative à la manière de disposer de l'accusation.

18. De plus, la lettre devrait faire référence au fait que l'accusé a été informé de son droit à un avocat, et indiquer, s'il y a lieu, le désir de l'accusé d'être représenté par un avocat lors de la cour martiale. (voir ORFC 109.04 – *Droit à l'avocat*).

D. DOCUMENTS

19. Afin que l'autorité de renvoi soit en mesure de fournir des recommandations appropriées lors de la transmission d'une demande au DPM, les documents suivants doivent accompagner la demande:

- a. l'original du procès-verbal de procédure disciplinaire (PVPD) ;
- b. une copie de tout rapport d'enquête (police, unité ou autre) ;
- c. la fiche de conduite de l'accusé, s'il y a lieu (s'il n'y en a pas, cela devrait être indiqué dans la lettre) ;
- d. l'état de service ou une copie certifiée du certificat de service de l'accusé, s'il est disponible (communément appelé Sommaire des dossiers personnels des militaires «SDPM ») ;
- e. une copie de la décision du commandant ou commandant supérieur de ne pas donner suite à l'accusation, lorsque la demande est effectuée par un officier ou militaire du rang du Service national des enquêtes.

E. ENVOI DE LA DEMANDE

I. INFORMATION À L'ACCUSÉ

20. Lorsque une demande est acheminée à l'autorité de renvoi afin de connaître d'une accusation, le

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officer must cause the accused to be advised of the application, and if not already ascertained, determine the accused's desires, if any, with respect to legal representation.

commandant doit en informer l'accusé, et si cela n'est déjà fait, lui demander s'il désire être représenté par un avocat.

II. INFORMING THE CHAIN OF COMMAND

II. INFORMER LA CHAÎNE DE COMMANDEMENT

21. In situations in which the referral authority is not the next superior officer in matters of discipline, all superior officers below the referral authority in the disciplinary chain of command shall be provided with an information copy of the application (see QR&O 109.03(3)).

21. Dans les cas où l'autorité de renvoi n'est pas le prochain officier supérieur en matière de discipline, tous les officiers supérieurs sous l'autorité de renvoi dans la chaîne de commandement disciplinaire doivent recevoir une copie de la demande à titre informatif (voir ORFC 109.03(3)).

22. If the application for disposal of a charge is made by an officer or non-commissioned member of the National Investigation Service, the commanding officer or the superior commander that decided not to proceed with the charge must be provided with a copy of the application, as must all superior officers within disciplinary chain of command of the commanding officer or superior commander. Additionally, if the commanding officer of the accused at the time the application is made is not the officer who initially dealt with the charges, a copy of the application must also be provided to the former commanding officer.

22. Si la demande de connaître d'une accusation est effectuée par un officier ou un militaire du rang du Service national des enquêtes, le commandant ou le commandant supérieur qui a décidé de ne pas donner suite à l'accusation doit recevoir une copie de la demande ainsi que les officiers supérieurs dans la chaîne de commandement disciplinaire du commandant ou commandant supérieur. Dans le cas où le commandant de l'accusé n'est plus, au moment de la demande, celui qui a initialement décidé de ne pas y donner suite, il est aussi essentiel d'en faire parvenir une copie à l'ancien commandant à titre d'information (voir ORFC 109.03(5)).

**ACTIONS TO BE TAKEN BY A REFERRAL
AUTHORITY UPON RECEIPT OF AN
APPLICATION**

**DISPOSITIONS A PRENDRE PAR
L'AUTORITÉ DE RENVOI SUR RÉCEPTION
DE LA DEMANDE**

A. VERIFICATION

A. VÉRIFICATION

23. Upon receipt of an application for disposal of a charge, the referral authority must confirm that the application is complete, i.e. the letter contains all the information mentioned at paragraphs 17 and 18 of the present guide, as well as the documentation listed at paragraph 19. If the application is incomplete, the referral authority must request the missing information from the commanding officer or superior commander who initiated the application, prior to considering the application.

23. Sur réception d'une demande de connaître d'une accusation, l'autorité de renvoi doit, avant toute autre chose, vérifier si la demande est complète, c'est-à-dire si la lettre contient toute l'information mentionnée aux paragraphes 17 et 18 du présent guide, ainsi que les documents énumérés au paragraphe 19. Si la demande est incomplète, l'autorité de renvoi doit faire une demande pour obtenir l'information manquante auprès du commandant ou du commandant supérieur qui a initié la demande avant de procéder à son analyse.

B. LEGAL ADVICE

B. CONSEILS JURIDIQUES

24. There is no obligation for a referral authority to obtain legal advice prior to considering an application for disposal of a charge. However, in light of the legal

24. Il n'existe aucune obligation pour une autorité de renvoi d'obtenir un avis juridique avant de disposer d'une demande de connaître d'une accusation.

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nature of the application, and the importance of the recommendations in the decision making process within the Director of Military Prosecutions, legal advice is recommended.

Cependant, considérant la nature de la demande et les recommandations à caractère juridique qui pourraient être formulés dans le processus décisionnel du directeur des poursuites militaires, un avis juridique est recommandé.

C. OPTIONS

25. Upon receipt of an application for disposal of a charge, a referral authority has the following options:

- direct the commanding officer or superior commander to try the accused by summary trial if,
 - the charge was referred because the commanding officer or superior commander considered that his or her powers of punishment were inadequate, and
 - the referral authority does not share this opinion, or
- forward the application to the Director of Military Prosecutions together with any recommendation concerning the disposal of the charge that the referral authority considers appropriate.

C. OPTIONS

25. Dès la réception d'une demande de connaître d'une accusation, l'autorité de renvoi a les options suivantes:

- ordonner au commandant ou commandant supérieur de juger l'accusé par voie de procès sommaire si,
 - l'accusation a fait l'objet d'un renvoi car le commandant ou le commandant supérieur a considéré que ses pouvoirs de punition étaient inadéquats, et
 - l'autorité de renvoi ne partage pas cet avis, ou
- envoyer la demande au directeur des poursuites militaires avec toute recommandation concernant la demande de connaître des accusations que l'autorité de renvoi considère appropriée.

D. FORWARDING THE APPLICATION

I. CONTENT

i. Recommendations to DMP

26. The referral authority plays a unique and vital role in ensuring that the military justice system fulfills its mandate of maintaining discipline, efficiency and morale in the Canadian Forces. The referral authority's letter is intended to assist the Director of Military Prosecutions in putting the alleged offence into the specific military context from which it originates. The Director of Military Prosecutions requires this contextual analysis to assist in making a decision on whether to prefer the charge to court martial, refer the matter back to the unit for disposal by summary trial or to not proceed with the charge at all. The letter represents the referral authority's best opportunity to set out why he or she believes that the matter ought or ought not to be preferred. It is important to note that, as with the other actors involved in the military justice process, there is a duty imposed to the referral authority by section 162 NDA to deal with the charge as expeditiously as the

D. TRANSMISSION DE LA DEMANDE

I. CONTENU

i. Recommandations au DPM

26. L'autorité de renvoi joue un rôle unique et vital en s'assurant que le système de justice militaire rempli son mandat de maintenir la discipline, l'efficacité et le moral dans les Forces canadiennes. La lettre de l'autorité de renvoi a pour but d'aider le directeur des poursuites militaires à mettre l'infraction alléguée dans le contexte militaire dans lequel elle s'est produite. Le directeur des poursuites militaires exige cette information afin de l'aider à prendre une décision concernant, soit le prononcé de la mise en accusation, soit le fait de déférer l'accusation afin qu'elle soit jugée par procès sommaire, soit le fait de ne pas donner suite à l'accusation. La lettre représente la meilleure opportunité pour l'autorité de renvoi d'expliquer pourquoi elle croit que la mise en accusation doit ou ne doit pas être prononcée. Il est important de noter qu'au même titre que les autres acteurs impliqués dans le processus de la justice militaire, il y a un devoir imposé

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circumstances permit.

27. Upon receipt of the file from the referral authority, the Director of Military Prosecutions conducts a review of the charges and makes a determination as to whether the charges laid, or any other charge, should proceed to court martial. In applying the publicly available charge screening policy, prosecutors must consider two main issues when deciding whether or not to proceed with a court martial:

- First, is the evidence sufficient to justify the continuation of charges as laid or the prefferal of other charges? (i.e. Is there a reasonable prospect of conviction?); and
- Second, if it is, does the public interest require a prosecution to be pursued?

28. There are three legal tests to be met prior to a charge being laid, proceeded with and then preferred to Court Martial. First, there must be an actual belief on the part of the person laying a charge that the accused has committed the alleged offence and that belief must be reasonable. A "reasonable belief" is a belief, which would lead any ordinary prudent and cautious person to the conclusion that the accused is probably guilty of the offence alleged. Second, where the Commanding Officer or the Superior Commander disposes of the charge, the legal test is whether based on admissible evidence, a service tribunal acting reasonably could convict the accused. At the third stage involving sufficiency of evidence and public interest, the DMP must undergo a more onerous and legal analysis than those noted at the first two stages. The criteria for the exercise of discretion to prosecute cannot be reduced to something akin to a mathematical formula. The breadth of factors to be considered in exercising this discretion clearly demonstrates the need to apply general principles to individual cases and to exercise good judgment in so doing.

29. Where it is determined that there is both a reasonable prospect of conviction and it is in the public

à l'autorité de renvoi en vertu de l'article 162 LDN d'agir à l'égard de l'accusation avec toute la célérité que les circonstances permettent.

27. Sur réception du dossier acheminé par l'autorité de renvoi, le directeur des poursuites militaires procède à une révision des accusations et détermine si les accusations portées ou toute autre accusation méritent d'être présentées à la cour martiale. En appliquant la politique accessible et publique sur la vérification postérieure à la mise en accusation, les procureurs doivent considérer deux questions principales afin de décider de procéder ou non en cour martiale:

- Premièrement, est-ce que la preuve est suffisante pour justifier de continuer avec les accusations telles que portées ou le prononcé de la mise en accusation d'accusations différentes ? (En d'autres mots, y a-t-il une possibilité raisonnable de condamnation ?); et
- Deuxièmement, si c'est le cas, est-ce que l'intérêt public requière de poursuivre l'affaire ?

28. Il y a trois tests juridiques qui doivent être rencontrés préalablement à ce qu'une accusation soit portée, qu'il y soit donnée suite, et qu'elle fasse l'objet d'un prononcé de la mise en accusation. Premièrement, la personne qui porte une accusation doit croire que l'accusé a commis l'infraction en question et la croyance sur laquelle elle s'appuie doit être raisonnable. L'expression « croyance raisonnable » fait référence à la croyance qui amènerait une personne ordinairement prudente à conclure que l'accusé est probablement coupable de l'infraction reprochée. Deuxièmement, lorsque que le commandant ou le commandant supérieur dispose d'une accusation le test consiste à se demander s'il existe des éléments de preuve admissibles devant un tribunal militaire sur lesquels il pourrait se fonder pour condamner un accusé. À la troisième phase, qui implique la suffisance de la preuve et l'intérêt public, le DPM doit se soumettre à une analyse juridique plus exigeante que celle des deux premières phases. Le critère pour exercer la discrétion de poursuivre ne peut être réduit à une simple formule mathématique. L'ampleur des facteurs à considérer en exerçant cette discrétion démontre clairement le besoin d'appliquer des principes généraux à chaque cas et d'exercer un jugement approprié.

29. Lorsqu'il est déterminé qu'il y a à la fois, une possibilité raisonnable d'obtenir une condamnation et

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interest to proceed, the charge will be preferred by referring the charge sheet to the Court Martial Administrator who then convenes the court martial.

qu'il est dans l'intérêt public de poursuivre, le prononcé de la mise en accusation sera faite par le dépôt d'un acte d'accusation auprès de l'administrateur de la cour martiale qui convoquera une cour martiale.

**ii. Reasonable Prospect of Conviction
(Sufficiency of the evidence)**

ii. Possibilité raisonnable d'obtenir une condamnation (Suffisance de la preuve)

30. The referral authority must review the package of documentation with the application for disposal, including the investigation report, and, if the referral authority deems it appropriate, provide commentary regarding the evidence. Such commentary will be considered by the Director of Military Prosecutions when conducting a detailed legal analysis of the evidence to determine if there is a reasonable prospect of conviction, should the matter proceed to court martial, taking into consideration the *Military Rules of Evidence*, the *Canadian Charter of Rights and Freedoms* and the nature and character of the evidence etc. For example, while some facts on their face may be considered relevant, those facts may be inadmissible at trial if the collection of such information violated the rights of the accused.

30. L'autorité de renvoi doit réviser la documentation avec la demande de connaître d'une accusation, incluant le rapport d'enquête et, si l'autorité de renvoi le juge approprié, fournir des commentaires concernant la preuve. Ces commentaires seront considérés par le directeur des poursuites militaires, lorsqu'il procédera à une analyse juridique approfondie de la preuve afin de déterminer s'il existe une possibilité raisonnable de condamnation, si l'affaire doit être traitée en cour martiale, le tout en tenant aussi compte de l'application des *Règles militaires de la preuve*, de la *Charte canadienne des droits et libertés* et de la nature et du caractère de la preuve, etc. Par exemple, même si certains faits à leur face même peuvent être considérés pertinents, ceux-ci peuvent être considérés inadmissibles au procès si leur obtention constitue une violation des droits et libertés de l'accusé.

31. A reasonable prospect of conviction exists where there is a solid case of substance to present to the court. In determining whether this standard is satisfied, a prosecutor must estimate amongst other things, what evidence is likely to be admissible, the weight likely to be given to the admissible evidence, and the likelihood that viable, not speculative, defences will succeed.

31. La possibilité raisonnable de condamnation existe lorsqu'il y a une cause solide en substance à présenter à la cour. En déterminant si la norme est satisfaite, un procureur doit estimer, entre autres choses, quelle est la preuve probablement admissible, le poids probable à y être donnée et quelles sont les défenses fondées et réelles qui peuvent réussir.

32. As part of DMP's analysis, the prosecutor may be required to meet with the primary witnesses to assess their credibility and ascertain further details of their potential evidence. In addition, further NIS/police investigation may be required by the prosecutor to determine if potential defences are legitimate or can be disproved if raised at trial by the accused. This will enable the prosecutor to feel reasonably confident that all the elements of the offence can be proven when the matter proceeds to court martial.

32. À titre de partie prenante à l'analyse, le procureur peut demander de rencontrer les témoins importants afin d'évaluer leur crédibilité et de vérifier les autres détails de la preuve pouvant découler de cette rencontre. Au surplus, une enquête additionnelle du SNE/PM pourrait être requise par le procureur afin de déterminer si des moyens de défense potentiels sont fondés ou peuvent être contredits s'ils sont soulevés au procès par l'accusé. Cela permettra au procureur de se sentir raisonnablement confiant que tous les éléments de l'infraction peuvent être prouvés lorsque l'affaire procédera en cour martiale.

iii. Public interest

iii. Intérêt public

33. With respect to public interest, the comments of the referral authority greatly assist the Director of Military Prosecution's analysis regarding referral. It is therefore incumbent upon the referral authority to express the military interest in whether or not to proceed

33. Concernant l'intérêt public, les commentaires de l'autorité de renvoi aident grandement le directeur des poursuites militaires qui en tient beaucoup compte dans son analyse relative au prononcé de la mise en accusation. Il appartient donc à l'autorité de renvoi de

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to court martial (particularly the latter). Without this meaningful input, the Director of Military Prosecutions is placed in a very difficult position when assessing the public interest and putting the proposed charges in a military context.

34. A lengthy list of examples of relevant factors that should be considered when assessing the public interest is set out at Annex A to this guide. The list includes, among other things, the effect of prosecution, or failure to prosecute, on the maintenance of good order and discipline in the Canadian Forces, including the likely impact, if any, on military operations. This list should be reviewed and relevant factors addressed when referrals are made. It should be noted that this list is not exhaustive and that any other public interest factors may be included and considered. These factors are not identified in any order of priority or importance. Those factors that should **not** be considered when assessing the public interest are set out at Annex B to this guide.

35. To ensure fairness within the military justice system, the Referral letter will be disclosed to the accused as part of the prosecutor's disclosure package.

36. Upon completion of a review of the file and the referral letter, referral documents are to be forwarded to DMP at the following address:

Director of Military Prosecutions
National Defence Headquarters
305 Rideau Street
Constitution Bldg.
Ottawa ON K1A 0K2

fournir des explications concernant l'intérêt militaire à procéder ou non en cour martiale (particulièrement dans le dernier cas). Sans cette importante contribution, le directeur des poursuites militaires est placé dans une position difficile lorsque vient le temps de tenir compte de l'intérêt public et de proposer des accusations qui ont un lien avec un contexte militaire.

34. Une longue liste des facteurs pertinents qui devraient être considérés lors de l'évaluation de l'intérêt public se trouve à l'annexe A de ce guide. Cette liste inclut, notamment, l'effet de poursuivre ou non sur le maintien de l'ordre et de la discipline dans les Forces canadiennes, incluant les effets préjudiciables sur les opérations militaires, s'il y a lieu. On devrait réviser cette liste et traiter les facteurs pertinents au moment des renvois. Il est à noter que cette liste n'est pas exhaustive et que tout autre facteur d'intérêt public peut être inclus et considéré. Ces facteurs ne sont pas identifiés par ordre de priorité ou d'importance. Les facteurs qui **ne** devraient **pas** être considérés lors de l'évaluation de l'intérêt public se trouve à l'annexe B du présent guide.

35. Afin d'assurer l'équité au sein du système de justice militaire, la lettre de demande de renvoi sera communiquée à l'accusé comme faisant partie de la documentation divulguée par le procureur.

36. Lorsque la révision du dossier est complétée et que la lettre de demande de renvoi est prête, les documents pour fin de renvoi doivent être acheminés au DPM à l'adresse suivante:

Directeur des poursuites militaires
Quartier général de la Défense nationale
305 rue Rideau
Édifice Constitution
Ottawa ON K1A 0K2

FOLLOW-UP OF THE APPLICATION

A. DIRECTOR OF MILITARY PROSECUTIONS DECISION

I. PREFERRING THE CHARGE

37. When the decision of the Director of Military Prosecutions is to prefer the charge to court martial, or any other charge that is founded on facts disclosed by

SUIVI DE LA DEMANDE

A. DÉCISION DU DIRECTEUR DES POURSUITES MILITAIRES

I. PRONONCÉ DE LA MISE EN ACCUSATION

37. Lorsque le directeur des poursuites militaires décide de prononcer la mise en accusation de l'accusation pour qu'elle soit traitée en cour martiale, ou

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evidence in addition to or in substitution for the charge, the Director of Military Prosecutions will prepare a charge sheet. The charge sheet is forwarded to the Court Martial Administrator and two copies are provided to the commanding officer of the accused's unit, one for service on the accused and the second for retention in the Unit Registry of Disciplinary Proceedings. The referral authority, defence counsel and the local AJAG will also be provided with information copies of the preferral documentation.

38. The Court Martial Administrator will secure a date for trial, normally within 60 days of receipt of the charge sheet from the Director of Military Prosecutions. The convening order and a copy of the charge sheet will then be served to the accused and the Director of Military Prosecutions.

II. REFERRING THE CHARGE FOR DISPOSAL BY SUMMARY TRIAL

39. If the Director of Military Prosecutions decides that the matter should be returned to the accused's unit for disposal by way of summary trial, the Director of Military Prosecutions will return the documentation supporting the application to the appropriate CO or Superior Commander with a copy to the Referral Authority.

III. NOT PROCEEDING WITH THE CHARGE

40. When the Director of Military Prosecutions determines that there is insufficient evidence to support a reasonable prospect of conviction, or that it would not be in the public interest to proceed with the charge, then the Director of Military Prosecutions will forward the non-preferral documentation to the accused's unit for service on the accused and inform the referral authority of his decision.

CONCLUSION

41. The changes to charge referral and convening process within the military justice system have been designed to protect and enhance the principles of fair and efficient justice which protects the rights of the accused and serves the disciplinary needs of the chain of command. While the changes achieve these objectives, they have also resulted in an increased need for a detailed understanding of the respective roles of the key players and enhanced communications between the Director of Military Prosecutions and the referral authority.

de toute autre accusation qu'il ajoute ou substitue à celle-ci et fondée sur les faits révélés par la preuve, il prépare un acte d'accusation. L'acte d'accusation est transmis à l'administrateur de la cour martiale et deux copies sont fournies au commandant de l'unité de l'accusé pour que l'une lui soit remise et que l'autre soit versée au fichier des poursuites disciplinaires de l'unité. L'autorité de renvoi, l'avocat de la défense et l'AJAG de la région recevront aussi une copie de la documentation sur la mise en accusation, à titre d'information.

38. L'administrateur de la cour martiale fixera une date pour le procès, normalement, dans les 60 jours suivant la réception de l'acte d'accusation du directeur des poursuites militaires. Il fera alors signifier l'ordre de convocation et une copie de l'acte d'accusation à l'accusé et au directeur des poursuites militaires,

II. DÉFÉRER L'ACCUSATION POUR DISPOSITION PAR PROCÈS SOMMAIRE

39. Si le directeur des poursuites militaires décide que la question devrait être retournée à l'unité de l'accusé afin qu'elle soit traitée par procès sommaire, il retournera la documentation au soutien de la demande au commandant ou commandant supérieur approprié avec une copie pour l'autorité de renvoi.

III. DÉCISION DE NE PAS DONNER SUITE À L'ACCUSATION

40. Lorsque le directeur des poursuites militaires détermine qu'il n'y a pas suffisamment de preuve afin de soutenir une possibilité raisonnable de condamnation ou qu'il ne serait pas dans l'intérêt public de procéder avec l'accusation, alors le directeur des poursuites militaires fera parvenir la documentation relative à cette décision à l'unité de l'accusé afin qu'elle lui soit signifiée et informera l'autorité de renvoi de sa décision.

CONCLUSION

41. Les changements au renvoi des accusations et au processus de convocation au sein du système de justice militaire ont été conçus pour protéger et améliorer les principes qui sont l'équité et une justice efficace qui protège les droits de l'accusé et sert les besoins disciplinaires de la chaîne de commandement. Bien que ces changements rejoignent ces objectifs, il en a résulté un besoin accru pour une compréhension détaillée des rôles respectifs des joueurs clés et d'une communication améliorée entre le directeur des poursuites militaires et l'autorité de renvoi.

ANNEX A

PUBLIC INTEREST FACTORS TO CONSIDER

Public interest factors that may arise on the facts of a particular case include:

- a. the seriousness or triviality of the alleged offence;
- b. significant mitigating or aggravating circumstances;
- c. the accused's background and any extraordinary personal circumstances of the accused;
- d. the degree of staleness of the alleged offence;
- e. the accused's alleged degree of responsibility for the offence;
- f. the prosecution's likely effect on good order and discipline;
- g. the prosecution's likely effect on public confidence in military discipline or the administration of military justice;
- h. whether prosecuting would be perceived as counter-productive, for example, by bringing the administration of justice into disrepute;
- i. the availability and appropriateness of alternatives to military prosecution, such as, for example, prosecution by civilian authorities or administrative action by service authorities, and administrative or quasi-criminal action initiated by a jurisdiction other than the Canadian Forces;
- j. the prevalence of the alleged offence in the unit or military community at large and the need for general and specific deterrence;

ANNEXE A

LES FACTEURS RELATIFS À L'INTÉRÊT PUBLIC À CONSIDÉRER

Parmi les facteurs relatifs à l'intérêt public que peuvent faire jouer les faits d'une affaire donnée, citons :

- a. la gravité ou le caractère dérisoire de l'infraction présumée ;
- b. l'importance des circonstances atténuantes ou aggravantes ;
- c. les antécédents de l'accusé et la situation personnelle extraordinaire de l'accusé ;
- d. la caducité relative de l'infraction présumée ;
- e. le degré de responsabilité présumée de l'accusé dans l'infraction ;
- f. l'effet probable de la poursuite sur l'ordre public et la discipline ;
- g. l'effet probable de la poursuite sur la confiance du public sur la discipline et l'administration de la justice militaire ;
- h. la question de savoir si la poursuite sera perçue comme allant à l'encontre du but recherché, par exemple en jetant le discrédit sur l'administration de la justice ;
- i. la disponibilité et la pertinence de solutions de rechange à la poursuite militaire, comme une poursuite par des autorités civiles ou une poursuite administrative par des autorités militaires et une poursuite administrative ou quasi pénale intentée par une autorité autre que les Forces canadiennes ;
- j. la fréquence de l'infraction présumée dans l'unité ou l'ensemble de la collectivité militaire et la nécessité d'un effet dissuasif général et particulier ;

k. whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive, especially considering how other persons implicated in the offence or previous similar cases have been or likely will be dealt with;	k. la question de savoir si les conséquences d'une poursuite ou d'une condamnation seraient exagérément sévères ou abusives, surtout si l'on tient compte de la façon dont d'autres personnes impliquées dans l'infraction ou des affaires antérieures semblables ont été ou risquent d'être traitées ;
l. whether the alleged offence is of considerable public concern;	l. la question de savoir si l'infraction présumée préoccupe grandement le public ;
m. the attitude of the victim of the alleged offence to a prosecution, and any evident impact a decision to prosecute (or not prosecute) may have on him or her;	m. l'opinion de la victime de l'infraction présumée en ce qui concerne une poursuite, et toute répercussion évidente que la décision de poursuivre ou non pourrait avoir sur elle ;
n. the resources required or available to conduct the proceedings;	n. les ressources nécessaires ou disponibles pour mener l'instance ;
o. whether the accused agrees to cooperate in the investigation or prosecution of others, or the extent to which the accused has already done so;	o. la question de savoir si l'accusé accepte de collaborer à l'enquête ou à des poursuites intentées contre d'autres personnes, ou dans quelle mesure il a déjà collaboré ;
p. the likely sentence in the event of a conviction;	p. la sentence probable, s'il y a condamnation ;
q. whether prosecuting would require or cause the disclosure of information that would be injurious to international relations, national defence, or national security; and	q. la question de savoir si la poursuite nécessiterait ou entraînerait la divulgation de renseignements susceptibles de compromettre les relations internationales, la défense nationale ou la sécurité nationale ; et
r. the effect of prosecution, or failure to prosecute, on the maintenance of good order and discipline in the <i>Canadian Forces</i> , including the likely impact, if any, on military operations.	r. les conséquences de la poursuite, ou de l'omission de poursuivre, sur la maintien de l'ordre et de la discipline dans le Forces canadiennes, notamment l'incidence possible, le cas échéant, sur les opérations militaires.

ANNEX B

PUBLIC INTEREST FACTORS NOT TO BE CONSIDERED

A recommendation to DMP must clearly not be influenced by any of the following criteria:

- a. the rank, status or position of the accused in and of themselves;
- b. any personal characteristic of the accused, or any other person involved in the investigation, which constitutes a prohibited ground of discrimination under section 3 of the *Canadian Human Rights Act*;
- c. the Referral Authority personal feelings about the accused or the victim;
- d. possible or perceived political advantage or disadvantage to the Canadian Forces, the Department of National Defence, the government or any political group or party;
- e. the possible effect of the decision on the personal or professional circumstances of those responsible for the investigation or prosecution or any other member of the CF or DND.

ANNEXE B

LES FACTEURS RELATIFS À L'INTÉRÊT PUBLIC À NE PAS CONSIDÉRER

La décision de poursuivre ne doit aucunement être influencée par l'un des critères suivants :

- a. le rang, le statut ou le poste de l'accusé et entre eux-mêmes;
- b. toute caractéristique personnelle de l'accusé ou de toute autre personne mêlée à l'enquête, qui pourrait constituer un motif de distinction illicite aux termes de l'article 3 de la *Loi canadienne sur les droits de la personne*;
- c. les sentiments personnels de l'autorité de renvoi pour l'accusé ou la victime;
- d. l'avantage ou le désavantage politique éventuel ou perçu pour les Forces canadiennes, le ministère de la Défense nationale, le gouvernement ou tout groupe ou parti politique;
- e. l'effet possible de la décision sur la situation personnelle ou professionnelle des responsables de l'enquête ou de la poursuite ou de toute autre membre des FC ou de la Défense nationale.

Offences under Section 130 of the National Defence Act

Criminal Code offences

- Section 129 C.c. (Offences Relating to Public or Peace Officer)

129. Every one who

(a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

(b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so, or

(c) resists or wilfully obstructs any person in the lawful execution of a process against lands or goods or in making a lawful distress or seizure,

is guilty of

(d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(e) an offence punishable on summary conviction.

Sample Charge:

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, WILFULLY OBSTRUCTED A PEACE OFFICER IN THE EXECUTION OF HIS DUTY, CONTRARY TO SUBSECTION 129(A) OF THE *CRIMINAL CODE*.

Particulars: In that he, on or about (date), at (indicate place of offence), obstructed (rank and name) in the execution of his duty, by interfering with the lawful arrest of (rank and name).

- Section 266 C.c. (Assault)

266. Every one who commits an assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or

(b) an offence punishable on summary conviction.

Sample Charge:

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, ASSAULT, CONTRARY TO SECTION 266 OF THE *CRIMINAL CODE*.

Particulars: In that he, on or about (date), at (indicate place of offence), did commit an assault on (rank and name).

- **Section 267 C.c. (Assault with a Weapon or Causing Bodily Harm)**

267. Every one who, in committing an assault,
(a) carries, uses or threatens to use a weapon or an imitation thereof, or
(b) causes bodily harm to the complainant,
is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Sample Charges:

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, ASSAULT CAUSING BODILY HARM, CONTRARY TO SUBSECTION 267(1) OF THE *CRIMINAL CODE*.

Particulars: In that he, on or about (date), at (indicate place of offence), did in committing an assault upon (number, rank and name) cause bodily harm to him.

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, ASSAULT WITH WEAPON, CONTRARY TO SUBSECTION 267(1) OF THE *CRIMINAL CODE*.

Particulars: In that he, on or about (date), at (indicate place of offence), did in committing an assault upon (number, rank and name) threaten to uses a weapon to wit a bayonet.

- **Section 270 C.c. (Assaulting a Peace Officer)**

270. (1) Every one commits an offence who
(a) assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;
(b) assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or
(c) assaults a person
(i) who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or
(ii) with intent to rescue anything taken under lawful process, distress or seizure.
(2) Every one who commits an offence under subsection (1) is guilty of
(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
(b) an offence punishable on summary conviction.

Sample Charge:

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, ASSAULT WITH INTENT TO RESIST ARREST, CONTRARY TO SECTION 270 (1) (B) OF THE *CRIMINAL CODE*.

Particulars: In that he, on or about (date), at (indicate place of offence), did assault (rank and name), with intent to resist the lawful arrest of himself.

- **Section 335 C.c. (Taking motor vehicle or vessel without consent)**

335. (1) Subject to subsection (1.1), every one who, without the consent of the owner, takes a motor vehicle or vessel with intent to drive, use, navigate or operate it or cause it to be driven, used, navigated or operated, or is an occupant of a motor vehicle or vessel knowing that it was taken without the consent of the owner, is guilty of an offence punishable on summary conviction.

(1.1) Subsection (1) does not apply to an occupant of a motor vehicle or vessel who, on becoming aware that it was taken without the consent of the owner, attempted to leave the motor vehicle or vessel, to the extent that it was feasible to do so, or actually left the motor vehicle or vessel.

(2) For the purposes of subsection (1), "vessel" has the meaning assigned by section 214.

Sample Charge:

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, TAKING A MOTOR VEHICLE WITHOUT CONSENT, CONTRARY TO SECTION 335 OF THE *CRIMINAL CODE*.

Particulars: In that he, on or about (date), at (indicate place of offence), did take a motor vehicle to wit (specify vehicle) without the consent of (rank and name), the owner thereof, with the intent to drive it.

• **Section 430 (Mischief)**

430. (1) Every one commits mischief who wilfully
- (a) destroys or damages property;
 - (b) renders property dangerous, useless, inoperative or ineffective;
 - (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
 - (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.
- (1.1) Every one commits mischief who wilfully
- (a) destroys or alters data;
 - (b) renders data meaningless, useless or ineffective;
 - (c) obstructs, interrupts or interferes with the lawful use of data; or
 - (d) obstructs, interrupts or interferes with any person in the lawful use of data or denies access to data to any person who is entitled to access thereto.
- (2) Every one who commits mischief that causes actual danger to life is guilty of an indictable offence and liable to imprisonment for life.
- (3) Every one who commits mischief in relation to property that is a testamentary instrument or the value of which exceeds five thousand dollars
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
 - (b) is guilty of an offence punishable on summary conviction.
- (4) Every one who commits mischief in relation to property, other than property described in subsection (3),
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
 - (b) is guilty of an offence punishable on summary conviction.
- (5) Every one who commits mischief in relation to data
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
 - (b) is guilty of an offence punishable on summary conviction.
- (5.1) Every one who wilfully does an act or wilfully omits to do an act that it is his duty to do, if that act or omission is likely to constitute mischief causing actual danger to life, or to constitute mischief in relation to property or data,
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
 - (b) is guilty of an offence punishable on summary conviction.
- (6) No person commits mischief within the meaning of this section by reason only that
- (a) he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment;
 - (b) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree on any matter relating to his employment; or
 - (c) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.
- (7) No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.
- (8) In this section, "data" has the same meaning as in section 342.1.

Sample Charge:

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, MISCHIEF NOT EXCEEDING \$5000, CONTRARY TO SUBSECTION 430(4) OF THE *CRIMINAL CODE*.

Particulars: In that he, on or about (date), at (indicate place of offence), did commit mischief by wilfully destroying without legal justification or excuse and without color of right property, to wit a bicycle of (rank and name) the value of which does not exceed \$5000.

- **Section 437 C.c. (False alarm of fire)**

437. Every one who wilfully, without reasonable cause, by outcry, ringing bells, using a fire alarm, telephone or telegraph, or in any other manner, makes or circulates or causes to be made or circulated an alarm of fire is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

Sample Charge:

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, FALSE ALARM OF FIRE, CONTRARY TO SECTION 437 OF THE *CRIMINAL CODE*.

Particulars: In that he, on or about (date), at (indicate place of offence), did wilfully without reasonable cause by using a fire alarm make an alarm of fire at (specify premises where fire purported to be).

Offences under the *Controlled Drugs and Substances Act*

- **Section 4(1) CDSA (Possession of Substance)**

4. (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

Sample Charge

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, POSSESSION OF A SUBSTANCE CONTRARY TO SECTION 4(1) OF THE *CONTROLLED DRUGS AND SUBSTANCES ACT*.

Particulars: In that he, on or about (date), at (indicate place of offence), did unlawfully possess a substance included in Schedule II of the *Controlled Drugs and Substances Act*, to wit Cannabis (marihuana).

PRESIDING OFFICER CHECKLIST (For Commanding Officers)¹

PRE-TRIAL DETERMINATIONS

1. When a charge has been referred to you by the officer/NCM who laid the charge in accordance with *QR&O* 107.09(1) determine whether or not the charge ought to be proceeded with in accordance with Chapter 108 (*QR&O* 107.09(3)).
 - ☐ Unit legal officer to be consulted when making this determination when the offence cannot be tried by summary trial, carries the right to elect Court Martial, or where accused is an officer or NCM above rank of sergeant (*QR&O* 107.11);
 - ☐ Any pre-trial decision you make not to proceed with one or more charges is recorded on RDP (Part 5); and
 - ☐ Where the decision not to proceed amounts to a final disposition of all charges the original RDP is placed on the Unit Registry of Disciplinary Proceedings (*QR&O* 107.13).
2. Where you have determined that the charge ought to be proceeded with in accordance with Chapter 108, determine if you have jurisdiction to act as a presiding officer and are not otherwise precluded from trying the accused:
 - ☐ You are a CO for the purposes of proceeding under the *Code of Service Discipline* (*QR&O* 101.01(1));
 - ☐ The offence is one that can be tried by Summary Trial (*QR&O* 108.06 and 108.07);
 - ☐ The accused is either an officer cadet or a NCM below the rank of warrant officer (*QR&O* 108.06 and 108.16(1)(a)(i));
 - ☐ You consider your powers of punishment adequate having regard to the gravity of the offence (*QR&O* 108.06 and 108.24);
 - ☐ The accused has the right to elect trial by court martial and has not elected to be so tried; (*QR&O* 108.06 and 108.16(3) and 108.17(1));
 - ☐ Reasonable grounds do not exist for believing the accused person is unfit to stand trial or suffered from a mental disorder at the time of the alleged offence (*QR&O* 107.10, 108.06, 108.16(1) and 119.02);
 - ☐ You have the required language ability to conduct the summary trial (*QR&O* 108.16 Note A);
 - ☐ The accused has not previously been dealt with by any other presiding officer or any other military tribunal or civil court (*QR&O* 108.11);
 - ☐ The limitation period of one year will not have expired by the time the summary trial commences (*QR&O* 108.05);

¹ This checklist is a guide only. It must be used in conjunction with the appropriate sections of the *QR&O* and the *Military Justice at the Summary Trial Level Manual*.

- ❑ You have not limited your power to try the offence by carrying out or directly supervising the investigation of the offence, by issuing a search warrant, or by laying the charge to be tried. (*QR&O* 108.16 and 108.09);
- ❑ It is not inappropriate to try this case in the interests of justice and discipline (*QR&O* 108.16(1)(a)).

3. **If** you lack jurisdiction or are otherwise precluded from trying the accused, refer the charge to another authority having summary trial jurisdiction or refer the charge to a referral authority for disposal together with any recommendations that you consider appropriate (*QR&O* 108.16(3)(a) and 109.03(2)).

4. **If** you are not precluded from presiding at the summary trial, continue the summary trial process. Ensure all pre-trial procedures have been completed:

- ❑ Copy of RDP provided to the Accused (*QR&O* 107.09);
- ❑ Assisting officer appointed and appointment recorded on the RDP (Part 1);
- ❑ The language of the proceedings chosen by the accused recorded on the RDP (Part 1); and
- ❑ Information provided to the accused. Information identified in a list attached IAW the RDP (Part 2). Copy of list provided to the accused. (*QR&O* 108.15).

ELECTION

5. Where the accused person has the right to elect trial by court martial, the following steps must be taken before conducting a summary trial:

- ❑ Cause the accused to be informed of the right to be tried by court martial (*QR&O* 108.17(1));
- ❑ Record the date and time the accused was informed of the right to elect Court Martial and the date and time the accused will be required to make the decision on the election known on the RDP (Part 3); and
- ❑ Provide a reasonable period of time of not less than 24 hours for the accused to:
 - ❑ Consult with legal counsel with respect to the election (*QR&O* 108.18);
 - ❑ Decide whether to elect to be tried by court martial; and
 - ❑ Make the accused's decision known.

Military legal officer numbers for elections are **(613) 992-2778** or toll free in North America **1-888-715-9636**.

6. Once the accused has decided on the election:

- ❑ Have the accused complete and sign Part 3 of the RDP (*QR&O* 108.17(3)); and
- ❑ Have the officer who received the election sign the RDP and indicate the date and time the election was received (Part 3).

7. **If** the accused elects trial by court martial, refer the charge to a referral authority for disposal (e.g. disposal by court martial), together with any recommendations that you consider appropriate (*QR&O* 108.16(3)(b) and 109.03(2)).

SUMMARY TRIAL PROCEDURE

8. Prior to conducting the summary trial consider whether a direction ought to be made to exclude members of the public from the trial or any part of the trial (*QR&O* 108.28).

9. At the commencement of a summary trial, the accused, accompanied by the assisting officer and escort (where applicable), will be brought before you (*QR&O* 108.20(1)).

10. You will take the following oath (*QR&O* art 108.27)²,

I swear that I will duly administer justice according to law, without partiality, favour or affection. So help me God.

Or make the following solemn affirmation³:

I solemnly affirm that I will duly administer justice according to law without partiality, favour or affection.

11. You will cause the charges to be read (*QR&O* 108.20(2)).

12. Prior to receiving any evidence, you will ask whether the accused:

- ☐ Requires more time to prepare the accused's case and grant any reasonable adjournment requested for that purpose;
- ☐ Ask whether the accused wishes to admit any of the particulars of any charge. (*QR&O* 108.20(3))

13. Hear the evidence against the accused.

- ☐ All witnesses must give evidence either under oath (*QR&O* 108.31)⁴,

I swear that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth. So help me God.

or solemn affirmation (*QR&O* 108.32):⁵

² To administer your oath, stand, remove your headdress, and hold the Bible in your right hand. If you do not wish to swear an oath on the Bible, a solemn affirmation must be given.

³ The form of a solemn affirmation will be made without a Bible.

⁴ To administer an oath to the witness, both you and the witness stand with headdress removed. The witness holds the Bible in his right hand.

⁵ If the witness does not wish to swear an oath on the Bible, a solemn affirmation must be given without a Bible.

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

- ❑ During the presentation of evidence against the accused, you and the accused (or the assisting officer on behalf of the accused) may question each witness. (*QR&O* 108.20(4)).

14. After you have heard the evidence against the accused, the accused may present evidence and testify.

- ❑ During the presentation of evidence for the accused, you and the accused (or the assisting officer on behalf of the accused) may question each witness. (*QR&O* 108.20(5)).
- ❑ You may **only** question the accused if the accused chooses to give evidence (*QR&O* 108.20(5)).

15. After the evidence on behalf of the accused has been heard, the accused (or the assisting officer on behalf of the accused) may make representations concerning the evidence received during the trial (*QR&O* 108.20(6)).

16. Consider the essential elements of each charge, the evidence received, the credibility of any witnesses heard and the representations of the accused. Determine whether it has been proven beyond a reasonable doubt that the accused committed the offence charged or any other offence of which the accused may be found guilty on that charge (*QR&O* 108.20 (7) and Note D). You will then:

- ❑ Pronounce the finding in respect of each charge and, where you pronounce a finding of guilty other than on the offence charged, inform the accused of that finding (*QR&O* 108.20(8));
- ❑ Where offences have been charged in the alternative and the accused has been found guilty of one of the alternative charges, direct that the proceedings be stayed on the alternative charge (*QR&O* 108.20(9)); and
- ❑ Record the findings on the RDP (Part 6).

17. Where the accused is found guilty in respect of any charge, you shall receive any evidence concerning the appropriate sentence to be imposed, including aggravating and mitigating factors (*QR&O* 108.20(10)).

- ❑ The offender may present evidence, testify on his own behalf and question each witness about any matter concerning the sentence;
- ❑ During the presentation of any evidence, you may question each witness, including the offender where the offender chooses to testify, on any matter concerning the sentence; and
- ❑ The offender (or the assisting officer on behalf of the accused) may make representations concerning the sentence.

18. Take into consideration the evidence heard in support of the charges and during the sentencing phase of the trial, the representations made regarding sentence, the factors affecting sentence as set out in Note to *QR&O* 108.20 and decide on appropriate punishment having regard to the Table to *QR&O* 108.24. Pronounce sentence and endorse the sentence passed on the RDP (Part 6). Inform the offender of the right to request a review of the finding or sentence as set out in *QR&O* 108.45.

POST-TRIAL PROCEDURES

19. Prepare a list to identify the witnesses heard and all documentary or physical evidence accepted at the summary trial. Attach the list to the RDP (*QR&O* 108.21 Note E).

20. Cause the original RDP, together with a copy of any report of investigation completed pursuant to *QR&O* 106, to be placed in the Unit Registry of Disciplinary Proceedings (*QR&O* 107.14(3) and 108.42(1)(a)).

21. If you are not the offender's CO, forward a copy of the RDP to the offender's CO for action and information(*QR&O* 108.42(1)(b)).

22. If you are the offender's CO:

- ☐ Take the necessary action to ensure that any sentence imposed is carried out (*QR&O* 108.42(2)(a));
- ☐ Cause the appropriate entries to be made on the offender's service records, including the conduct sheet (see DAOD 7006, Conduct Sheets);
- ☐ **If** you have imposed a punishment of detention or reduction in rank, cause NDHQ (DGMC) to be notified by message (*QR&O* 108.44); and
- ☐ Forward a copy of the RDP to the unit legal advisor, for review, when the monthly submissions of summary trial documentation are made (*QR&O* 107.15).

PRESIDING OFFICER CHECKLIST (For Delegated Officers)¹

PRE-TRIAL DETERMINATIONS

1. When a charge has been referred to you by the officer/NCM who laid the charge in accordance with *QR&O* 107.09(1) determine whether or not the charge ought to be proceeded with in accordance with Chapter 108 (*QR&O* 107.09(2)).

- ☐ Unit legal officer to be consulted when making this determination when the offence cannot be tried by summary trial, carries the right to elect Court Martial, or where accused is an officer or NCM above rank of sergeant (*QR&O* 107.11);
- ☐ The charge to be referred to the CO if, in your opinion, the charge should not be proceeded with (*QR&O* 107.09(2)).

2. Where you have determined that the charge ought to be proceeded with in accordance with Chapter 108, determine if you have jurisdiction to act as a presiding officer and are not otherwise precluded from trying the accused:

- ☐ You are a delegated officer, and your delegated powers are in writing (*NDA* s. 163(4) and *QR&O* 108.03 and 108.10(3));
- ☐ The offence is one that can be tried by Summary Trial (*QR&O* 108.06 and 108.07);
- ☐ You hold the rank of captain or above (*QR&O* 108.10(2)(a));
- ☐ The accused is an NCM below the rank of warrant officer (*QR&O* 108.10(2));
- ☐ The offence is not one that you are precluded from trying (*QR&O* 108.125 and 108.10(2)(c));
- ☐ You consider your powers of punishment, as provided in *QR&O* and as delegated in writing by your CO, adequate having regard to the gravity of the alleged offence (*QR&O* 108.25);
- ☐ The accused has the right to elect trial by court martial and has not elected to be so tried (*QR&O* 108.16(3));
- ☐ Reasonable grounds do not exist for believing that the accused person is unfit to stand trial or suffered from a mental disorder at the time of the alleged offence (*QR&O* 108.16(1) and 119.02;
- ☐ You have the required language ability to conduct the summary trial (*QR&O* 108.16 Note A);
- ☐ The accused has not previously been dealt with by any other presiding officer or any other military tribunal or civil court (*QR&O* 108.11);
- ☐ The limitation period of one year will not have expired by the time the summary trial commences (*QR&O* 108.05); and

¹ This checklist is a guide only. It must be used in conjunction with the appropriate sections of the *QR&O* and the *Military Justice at the Summary Trial Level Manual*.

- ☐ It is not inappropriate to try this case in the interests of justice and discipline (*QR&O* 108.16(1)(a)).
3. **If** you lack jurisdiction or are otherwise precluded from trying the accused, refer the charge to another authority having summary trial jurisdiction or refer the charge to a referral authority for disposal together with any recommendations that you consider appropriate (*QR&O* 108.16(3)(a) and 109.03(2)).
4. **If** you are not precluded from presiding at the summary trial, continue the summary trial process. Ensure all pre-trial procedures have been completed:
- ☐ Copy of RDP provided to the Accused (*QR&O* 107.09);
 - ☐ Assisting officer appointed and appointment recorded on the RDP (Part 1);
 - ☐ The language of the proceedings chosen by the accused recorded on the RDP (Part 1); and
 - ☐ Information provided to the accused. Information identified in a list attached IAW the RDP (Part 2). Copy of list provided to the accused. (*QR&O* 108.15).

ELECTION

5. Where the accused person has the right to elect trial by court martial, the following steps must be taken before conducting a summary trial:

- ☐ Cause the accused to be informed of the right to be tried by court martial (*QR&O* 108.17(1));
- ☐ Record the date and time the accused was informed of the right to elect Court Martial and the date and time the accused will be required to make the decision on the election known on the RDP (Part 3); and
- ☐ Provide a reasonable period of time of not less than 24 hours for the accused to:
 - ☐ Consult with legal counsel with respect to the election (*QR&O* 108.18);
 - ☐ Decide whether to elect to be tried by court martial; and
 - ☐ Make the accused's decision known.

Military legal officer numbers for elections are **(613) 992-2778** or toll free in North America **1-888-715-9636**.

6. Once the accused has decided on the election:

- ☐ Have the accused complete and sign Part 3 of the RDP (*QR&O* 108.17(3)); and
- ☐ Have the officer who received the election sign the RDP and indicate the date and time the election was received (Part 3).

7. **If** the accused elects trial by court martial, refer the matter to the CO for disposal.

SUMMARY TRIAL PROCEDURE

8. Prior to conducting the summary trial consider whether a direction ought to be made to exclude members of the public from the trial or any part of the trial (*QR&O* 108.28).

9. At the commencement of a summary trial, the accused, accompanied by the assisting officer and escort (where applicable), will be brought before you (*QR&O* 108.20(1)).

10. You will take the following oath (*QR&O* art 108.27)²,

I swear that I will duly administer justice according to law, without partiality, favour or affection. So help me God.

Or make the following solemn affirmation (*QR&O* 108.32).³

I solemnly affirm that I will duly administer justice according to law without partiality, favour or affection.

11. You will cause the charges to be read.

12. Prior to receiving any evidence, you will ask whether the accused:

- ❑ Requires more time to prepare the accused's case and grant any reasonable adjournment requested for that purpose; and
- ❑ Ask whether the accused wishes to admit any of the particulars of any charge. (*QR&O* 108.20(3)).

13. Hear the evidence against the accused:

- ❑ All witnesses must give evidence either under oath (*QR&O* 108.31)⁴,

I swear that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth. So help me God.

or solemn affirmation (*QR&O* 108.32):⁵

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

² To administer your oath, stand, remove your headdress, and hold the Bible in your right hand. If you do not wish to swear an oath on the Bible, a solemn affirmation must be given.

³ The form of a solemn affirmation will be made without a Bible.

⁴ To administer an oath to the witness, both you and the witness stand with headdress removed. The witness holds the Bible in his right hand.

⁵ If the witness does not wish to swear an oath on the Bible, a solemn affirmation must be given without a Bible.

- ❑ During the presentation of evidence against the accused, you and the accused (or the assisting officer on behalf of the accused) may question each witness. (*QR&O* 108.20(4)).

14. After you have heard the evidence against the accused, the accused may present evidence and testify.

- ❑ During the presentation of evidence for the accused, you and the accused (or the assisting officer on behalf of the accused) may question each witness. (*QR&O* 108.20(5)).
- ❑ You may **only** question the accused if the accused chooses to give evidence (*QR&O* 108.20(5)).

15. After the evidence on behalf of the accused has been heard, the accused or the assisting officer on behalf of the accused may make representations concerning the evidence received during the trial (*QR&O* 108.20(6)).

16. Consider the evidence received and the representations of the accused. Determine whether it has been proven beyond a reasonable doubt that the accused committed the offence charged or any other offence of which the accused may be found guilty on that charge (*QR&O* 108.20 (7), (8) and Note D). You will then:

- ❑ Pronounce the finding in respect of each charge and, where you pronounce a finding of guilty other than on the offence charged, inform the accused of that finding (*QR&O* 108.20(8));
- ❑ Where offences have been charged in the alternative and the accused has been found guilty of one of the alternative charges, direct that the proceedings be stayed on the alternative charge (*QR&O* 108.20(9)); and
- ❑ Record the findings on the RDP (Part 6).

17. Where the accused is found guilty in respect of any charge, you shall receive any evidence concerning the appropriate sentence to be imposed, including aggravating and mitigating factors (*QR&O* 108.20(10)).

- ❑ The offender may present evidence, testify on his own behalf and question each witness about any matter concerning the sentence;
- ❑ During the presentation of any evidence, you may question each witness, including the offender where the offender chooses to testify, on any matter concerning the sentence; and
- ❑ The offender (or the assisting officer on behalf of the accused) may make representations concerning the sentence.

18. Take into consideration the evidence heard in support of the charges and during the sentencing phase of the trial, the representations made regarding sentence, the factors affecting sentence as set out in Note to *QR&O* 108.20 and decide on appropriate punishment having regard to the Table to *QR&O* 108.24. Pronounce sentence and endorse the sentence passed on

the RDP (Part 6). Inform the offender of the right to request a review of the finding or sentence as set out in *QR&O* 108.45.

POST-TRIAL PROCEDURES

19. Prepare a list to identify the witnesses heard and all documentary or physical evidence accepted at the summary trial. Attach the list to the RDP (*QR&O* 108.21 Note E).
20. Cause the original RDP, together with a copy of any report of investigation completed pursuant to *QR&O* 106, to be placed in the Unit Registry of Disciplinary Proceedings (*QR&O* 107.14(3) and 108.42(1)(a)).
21. Forward a copy of the RDP to the offender's CO for action and information (*QR&O* 108.42(1)(b)).

PRESIDING OFFICER CHECKLIST (For Superior Commanders)¹

PRE-TRIAL DETERMINATIONS

1. When a charge has been referred to you in accordance with *QR&O* 107.09(3) determine whether or not the charge ought to be proceeded with in accordance with Chapter 108.

- ☐ Unit legal officer to be consulted when making this determination when the offence cannot be tried by summary trial, carries the right to elect Court Martial, or where accused is an officer or NCM above rank of sergeant (*QR&O* 107.11);
- ☐ Any pre-trial decision you make not to proceed with one or more charges is recorded on RDP (Part 5); and
- ☐ Where the decision not to proceed amounts to a final disposition of all charges the original RDP is placed on the Unit Registry of Disciplinary Proceedings (*QR&O* 107.13).

2. Where you have determined that the charge ought to be proceeded with in accordance with Chapter 108, determine if you have jurisdiction to act as a presiding officer and are not otherwise precluded from trying the accused:

- ☐ You are a superior commander (*NDA* s. 162.3 and *QR&O* 108.12 Note A);
- ☐ The offence is one that can be tried by Summary Trial (*QR&O* 108.06 and 108.07);
- ☐ The accused person is either an officer below the rank of lieutenant-colonel or an NCM above the rank of sergeant (*QR&O* 108.12);
- ☐ You consider your powers of punishment adequate having regard to the gravity of the alleged offence (*QR&O* 108.26);
- ☐ The offence is not one that you are precluded from trying (*QR&O* 108.125);
- ☐ The accused has the right to elect trial by court martial and has not elected to be so tried (*QR&O* 108.16(3));
- ☐ Reasonable grounds do not exist for believing that the accused person is unfit to stand trial or suffered from a mental disorder at the time of the alleged offence (*QR&O* 108.16(1) and 119.02);
- ☐ You have the required language ability to conduct the summary trial (*QR&O* 108.16 Note A);
- ☐ The accused has not previously been dealt with by any other presiding officer or any other military tribunal or civil court (*QR&O* 108.11);
- ☐ The limitation period of one year will not have expired by the time the summary trial commences (*QR&O* 108.05); and
- ☐ It is not inappropriate to try this case in the interests of justice and discipline (*QR&O* 108.16(1)(a)).

¹ This checklist is a guide only. It must be used in conjunction with the appropriate sections of the *QR&O* and the *Military Justice at the Summary Trial Level Manual*.

3. **If** you lack jurisdiction or are otherwise precluded from trying the accused, refer the charge to another authority having summary trial jurisdiction or refer the charge to a referral authority for disposal together with any recommendations that you consider appropriate (*QR&O* 108.16(3)(a) and 109.03(2)).
4. **If** you are not precluded from presiding at the summary trial, continue the summary trial process. Ensure all pre-trial procedures have been completed:
- ☐ Copy of RDP provided to the Accused (*QR&O* 107.09);
 - ☐ Assisting officer appointed and appointment recorded on the RDP (Part 1);
 - ☐ The language of the proceedings chosen by the accused recorded on the RDP (Part 1); and
 - ☐ Information provided to the accused. Information identified in a list attached IAW the RDP (Part 2). Copy of list provided to the accused. (*QR&O* 108.15).

ELECTION

5. Where the accused person has the right to elect trial by court martial, the following steps must be taken:
- ☐ Cause the accused to be informed of the right to elect court martial (*QR&O* 108.17(1));
 - ☐ Record the date and time the accused was informed of the right to elect Court Martial and the date and time the accused will be required to make the decision on the election known on the RDP (Part 3); and
 - ☐ Provide a reasonable period of time of not less than 24 hours for the accused to:
 - ☐ Consult with legal counsel with respect to the election (*QR&O* 108.18);
 - ☐ Decide whether to elect to be tried by court martial; and
 - ☐ Make the accused's decision known.
- Military legal officer numbers for elections are **(613) 992-2778** or toll free in North America **1-888-715-9636**.
6. Once the accused has decided on the election:
- ☐ Have the accused complete and sign Part 3 of the RDP (*QR&O* 108.17(3)); and
 - ☐ Have the officer who received the election sign the RDP and indicate the date and time the election was received (Part 3).
7. **If** the accused elects trial by court martial, refer the charge to a referral authority for disposal (e.g. disposal by court martial), together with any recommendations that you consider appropriate (*QR&O* 108.16(3)(b) and 109.03(2)).

SUMMARY TRIAL PROCEDURE

8. Prior to conducting the summary trial consider whether a direction ought to be made to exclude members of the public from the trial or any part of the trial (*QR&O* 108.28).

10. At the commencement of a summary trial, the accused, accompanied by the assisting officer and escort (where applicable), will be brought before you.

10. You will take the following oath (*QR&O* art 108.27)²;

I swear that I will duly administer justice according to law, without partiality, favour or affection. So help me God.

Or make the following solemn affirmation (*QR&O* 108.32).³

I solemnly affirm that I will duly administer justice according to law without partiality, favour or affection.

11. You will cause the charges to be read.

12. Prior to receiving any evidence, you will ask whether the accused:

- ☐ Requires more time to prepare the accused's case and grant any reasonable adjournment requested for that purpose;
- ☐ Ask whether the accused wishes to admit any of the particulars of any charge. (*QR&O* 108.20(3)).

13. Hear the evidence against the accused.

- ☐ All witnesses must give evidence either under oath (*QR&O* 108.31)⁴,

I swear that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth. So help me God.

or solemn affirmation (*QR&O* 108.32):⁵

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

² To administer your oath, stand, remove your headdress, and hold the Bible in your right hand. If you do not wish to swear an oath on the Bible, a solemn affirmation must be given.

³ The form of a solemn affirmation will be made without a Bible.

⁴ To administer an oath to the witness, both you and the witness stand with headdress removed. The witness holds the Bible in his right hand.

⁵ If the witness does not wish to swear an oath on the Bible, a solemn affirmation must be given without a Bible.

- ❑ During the evidence of any witness against the accused, you and the accused (or the assisting officer on behalf of the accused) can question the witness. (*QR&O* 108.20(4)).

14. After you have heard the evidence against the accused, the accused may present evidence and testify.

- ❑ During the presentation of evidence for the accused, you and the accused (or the assisting officer on behalf of the accused) may question each witness. (*QR&O* 108.20(5)); and
- ❑ You may **only** question the accused if the accused chooses to give evidence (*QR&O* 108.20(5)).

15. After the evidence on behalf of the accused has been heard, the accused or the assisting officer on behalf of the accused may make representations concerning the evidence received during the trial (*QR&O* 108.20(6)).

16. Consider the evidence received and the representations of the accused. Determine whether it has been proven beyond a reasonable doubt that the accused committed the offence charged or any other offence of which the accused may be found guilty on that charge (*QR&O* 108.20 (7), (8) and Note D). You will then:

- ❑ Pronounce the finding in respect of each charge and, where you pronounce a finding of guilty other than on the offence charged, inform the accused of that finding (*QR&O* 108.20(8));
- ❑ Where offences have been charged in the alternative and the accused has been found guilty of one of the alternative charges, direct that the proceedings be stayed on the alternative charge (*QR&O* 108.20(9)); and
- ❑ Record the findings on the RDP (Part 6).

17. Where the accused is found guilty in respect of any charge, you shall receive any evidence concerning the appropriate sentence to be imposed, including aggravating and mitigating factors (*QR&O* 108.20(10)).

- ❑ The offender may present evidence, testify on his own behalf and question each witness about any matter concerning the sentence;
- ❑ During the presentation of any evidence, you may question each witness, including the offender where the offender chooses to testify, on any matter concerning the sentence; and
- ❑ The offender (or the assisting officer on behalf of the accused) may make representations concerning the sentence.

18. Take into consideration the evidence heard in support of the charges and during the sentencing phase of the trial, the representations made regarding sentence, the factors affecting sentence as set out in Note to *QR&O* 108.20 and decide on appropriate punishment having regard to the Table to *QR&O* 108.24. Pronounce sentence and endorse the sentence passed on

the RDP (Part 6). Inform the offender of the right to request review of the finding or sentence as set out in *QR&O* 108.45.

POST-TRIAL PROCEDURES

19. Prepare a list to identify the witnesses heard and all documentary or physical evidence accepted at the summary trial. Attach the list to the RDP (*QR&O* 108.21 Note E).

20. Cause the original RDP, together with a copy of any report of investigation completed pursuant to *QR&O* 106, to be placed in the Unit Registry of Disciplinary Proceedings (*QR&O* 107.14(3) and 108.42(1)(a)).

21. Forward a copy of the RDP to the offender's CO for action and information (*QR&O* 108.42(1)(b)).

**Table of Punishments for Superior Commanders
(Table to QR&O 108.26)**

TABLE TO ARTICLE 108.26

AUTHORIZED PUNISHMENT	MAXIMUM AMOUNT	REMARKS
Severe Reprimand		May be accompanied by a fine.
Reprimand		May be accompanied by a fine.
Fine	60% of monthly basic pay, expressed in dollars	<i>(see articles 104.12 - Fine and 203.065 - Computation of Entitlements, Forfeitures and Fines - Reserve Force - Other Than Class "C" Reserve Service.)</i>

(G) (P.C.1997 - 1584 of 30 October 1997, effective 30 November 1997)

TABLEAU AJOUTÉ À L'ARTICLE 108.26

PEINE AUTORISÉE	MONTANT MAXIMAL	REMARQUES
Réprimande		Peut s'accompagner d'une amende.
Blâme		Peut s'accompagner d'une amende.
Amende	60% du solde mensuelle de base, exprimée en dollars	<i>(voir les articles 104-12 - Amende et 203.065 - Calcul des droits et des suppressions de solde et des amendes - force de réserve - service de réserve autre que celui de classe "C".)</i>

(G) (C.P.1997 - 1584 du 30 octobre 1997, en vigueur le 30 novembre 1997)

**Table of Punishments for Commanding Officers
(Table to QR&O 108.24)**

A	B	C	D	E	F	G
Punishment Number	Authorized Punishment	Maximum Amount	Applicable to	Optional Accompanying Punishments	Consequential Penalties	QR&O References
1	Detention	30 days	Sergeants, master corporals, corporals and privates	2 and 4	(a) Deemed reduction in rank to the rank of private for the period of detention (b) Pay as a private during the period of detention (c) Effect on pay field (d) Possible forfeiture of entitlement to, or time toward, any medal awarded for good conduct	104.09 208.30
2	Reduction in rank	One substantive rank	Sergeants, master corporals and corporals	Nil	(a) Effect on pay field (b) Possible forfeiture of entitlement to, or time toward, any medal awarded for good conduct	104.10
3	Reprimand		Officer cadets, sergeants, master corporals and corporals	4	Possible forfeiture of entitlement to, or time toward, any medal awarded for good conduct	
4	Fine	60% of monthly basic pay, expressed in dollars	Officer cadets, sergeants, master corporals, corporals and privates	5, 6 and 7	Nil	104.12 203.065
5	Confinement to ship or barracks	21 days	Officer cadets, master corporals, corporals and privates	Nil	Includes extra work and drill for an equal term	104.13 108.37
6	Extra work and drill	14 days	Officer cadets, master corporals, corporals and privates	Nil	Nil	104.13 108.35
7	Stoppage of leave	30 days	Officer cadets, sergeants, master corporals, corporals and privates	Nil	Nil	104.13 108.36
8	Caution		Officer cadets, sergeants, master corporals, corporals and privates	Nil	Nil	104.13 108.38

(G) (P.C. 2008-1015 of 5 June 2008 effective 5 June 2008)

**Table of Punishments for Delegated Officers
(Table to QR&O 108.25)**

A	B	C	D	E	F	G
Punishment Number	Authorized Punishment	Maximum Amount	Applicable to	Optional Accompanying Punishments	Consequential Penalties	QR&O References
1	Reprimand		Officer cadets, sergeants, master corporals and corporals	2	Possible forfeiture of entitlement to, or time toward, any medal awarded for good conduct	
2	Fine	25% of monthly basic pay, expressed in dollars	Officer cadets, sergeants, master corporals, corporals and privates	3, 4 and 5	Nil	104.12 203.065
3	Confinement to ship or barracks	14 days	Officer cadets, master corporals, corporals and privates	Nil	Includes extra work and drill for an equal term	104.13 108.37
4	Extra work and drill	7 days	Officer cadets, master corporals, corporals and privates	Nil	Nil	104.13 108.35
5	Stoppage of leave	14 days	Officer cadets, sergeants, master corporals, corporals and privates	Nil	Nil	104.13 108.36
6	Caution		Officer cadets, sergeants, master corporals, corporals and privates	Nil	Nil	104.13 108.38

(P.C. 2008-1015 of 5 June 2008 effective 5 June 2008)

REVIEW AUTHORITY (under QR&O 108.45) CHECKLIST¹

PRE-REVIEW CONSIDERATIONS

1. Has the offender's CO complied with the offender's request, if any, to have an officer of NCM above the rank of sergeant appointed to assist in the preparation of a request for review (QR&O 108.45(18)).
2. Before commencing a review, determine if you have jurisdiction to conduct the review. Have the following conditions been met:
 - ☐ If a delegated officer presided at the summary trial you are the CO of the unit (QR&O 108.45(2)(a));
 - ☐ If a CO presided at the summary trial you are the next superior officer to whom the CO of the unit is responsible in matters of discipline (QR&O 108.45(2)(b));
 - ☐ If a superior commander presided at the summary trial you are the next superior officer to whom the superior commander is responsible in matters of discipline (QR&O 108.45(2)(c)); and
 - ☐ It is not inappropriate for you to review this case having regard to the interests of justice and discipline (QR&O 108.45(3)).
3. If you determine that you have jurisdiction, ensure that the following procedures have been complied with:
 - ☐ The request for review is in writing, states the relevant facts and the reasons why the finding or sentence was unjust or the punishment too severe (QR&O 108.45(4));
 - ☐ The request was delivered within 14 days of the termination of the summary trial (QR&O 108.45(5)). This time limit may, in the interests of justice, be extended (QR&O 108.45(13));
 - ☐ A copy of the request for review has been delivered to the officer who presided at the summary trial (QR&O 108.45(5)); and
 - ☐ If the offender was sentenced to detention at summary trial, suspend the carrying into effect of the punishment of detention pending the completion of the review (QR&O 108.45(17)).

REVIEW PROCESS

4. Within 7 days of receiving the copy of the request for review the presiding officer must deliver comments concerning the request to you and a copy provided to the member making the request (QR&O 108.45(6)).

¹ This checklist is a guide only. It must be used in conjunction with the appropriate sections of the QR&O and the *Military Justice at the Summary Trial Level Manual*.

5. The offender may deliver further representations within 7 days of receiving a copy of the comments of the presiding officer (QR&O 108.45 (7)).
6. Within 21 days of receiving a request you must review the summary trial and determine whether to set aside any finding or alter any punishment (QR&O 108.45(10)).
7. Legal advice must be obtained before making a determination on the request (QR&O 108.45 (8)), but may not be provided by any legal officer who provided advice with respect to laying the charges or concerning any of the summary proceedings (QR&O 108.45(9)).
8. If you are unable to make a determination because additional information is required, you must:
 - ☐ Seek the necessary information;
 - ☐ Notify the offender that further information has been sought; and
 - ☐ Provide the offender with a copy of any subsequent information obtained (QR&O 108.45(11)).
9. Consider any further representations delivered by the offender within 7 days of being provided with the subsequent information referred to at paragraph 8 above (QR&O 108.45(12)).
10. When additional information has been requested in IAW QR&O 108.45(11) you have 35 days from the date of request to review the summary trial and make a determination (QR&O 108.45(13)).
11. When determining whether a finding is unjust, consider the following:
 - ☐ The consequences of any deviation from the required procedures for summary trials as set out in QR&O (QR&O 101.06);
 - ☐ Whether the evidence presented at summary trial established all the elements of the offence for which the offender was found guilty; and
 - ☐ Was the finding imposed as a result of an error or improper action.
12. When determining whether a punishment is unjust or too severe, consider the following:
 - ☐ Was the punishment illegal;
 - ☐ The consequences of any deviation from the required sentencing procedures as set out in QR&O (QR&O 101.06); and
 - ☐ Whether the punishment is consistent with the punishments usually given for that type of offence in those circumstances, having regard to the considerations set out in QR&O 108.20 Note F.

REMEDIES AVAILABLE

13. When the finding is found to be unjust, you may (QR&O 108.45 Note B):
- ☐ Quash the findings (NDA s.249.11) after noting the effect of doing so (QR&O 116.05); or
 - ☐ Substitute the finding with another finding (NDA s.249.12).
14. When the punishment is found to be unjust due to the fact that it was beyond the powers of the presiding officer to impose, you may substitute an appropriate punishment (NDA s.249.13), after considering the conditions applicable to new punishments (NDA s. 249.15).
15. When the punishment is not unjust, but is found to be too severe, you may alter the sentence by:
- ☐ Mitigating, commuting or remitting the punishment (NDA s.249.14); or
 - ☐ Suspending the punishment, in the case of a sentence of detention (QR&O 114.02(3)).

POST-REVIEW PROCEDURES

16. Inform the offender, the presiding officer and, where you are not the offender's CO, the offender's CO of your decision in writing (QR&O 108.45(14)(a)). The offender's CO will be required to cause the appropriate entries to be made to the offender's service records, including the conduct sheet, and take any other action necessary to give effect to the decision IAW QR&O 108.45(15)).
17. Comply with QR&O 107.14(b) by causing a copy of the decision to be placed on the Unit Registry of Disciplinary Proceedings on with the original RDP was placed.
18. Cause the appropriate entries to be made on the RDP (QR&O 108.45(14)(c)).

