

BRIEF FOR THE COMMISSION OF INQUIRY  
INTO  
THE DEPLOYMENT OF THE CANADIAN FORCES TO SOMALIA

MILITARY JUSTICE

AIM

1. The aim of this brief is to provide the Commission with a synopsis of the Canadian Forces system of military justice.

BACKGROUND

2. Military law, of which the military justice system is a part, may be defined in very general terms as the law regulating the military establishment. In Canada, the Canadian Constitution, including the Canadian Charter of Rights and Freedoms (the Charter), and the National Defence Act, a legislative enactment of the Parliament of Canada, are the primary sources of military law. The Canadian Human Rights Act, the Criminal Code of Canada, and the Narcotic Control Act are examples of other federal legislation which impact upon military law and the military justice system.
3. Discipline in the Canadian Forces is maintained in part through the military justice system, and in particular by service tribunals (courts martial and summary trials). The military justice system is provided for in the National Defence Act at Parts IV to IX called the Code of Service Discipline. The Code of Service Discipline describes the various features of the military justice system and is its statutory basis. Further amplification is contained in the Queen's Regulations and Orders for the Canadian Forces.
4. From its origins as a Court of Chivalry established by William the Conqueror to administer military law, and progressing through the Court of the Constable and the Marshal, the court martial has evolved into a highly formal trial separate and distinct from that found in the civilian community. The court martial is the highest form of service tribunal, and a major strength of the Canadian military

trial separate and distinct from that found in the civilian community. The court martial is the highest form of service tribunal, and a major strength of the Canadian military justice system is found in the law and the regulations governing its proceedings.

5. In addition to the more formal trial by court martial, history demonstrates that there has always been a need for the expeditious and uncomplicated adjudication of breaches of discipline. Furthermore, the power to dispense this summary justice has been concentrated primarily in the hands of line officers. The system of summary justice has evolved over time to what is known, now, as the summary trial. The summary trial system is the predominant forum for the trial of service offences in the Canadian Forces. It provides speedy, uncomplicated proceedings and is administered by officers holding positions in the chain of command who are not only directly responsible for the maintenance of discipline in the Canadian Forces, but who also must lead in armed conflict.

6. From an historical perspective, prior to the first Mutiny Act passed by the British Parliament in 1869, a series of Articles of War given under the hand of the sovereign governed, amongst other things, the conduct and duties of soldiers and prescribed punishments for offences. The Mutiny Act (which established a standing army and provided for its discipline), and successive iterations of that Act, formed the basis of a succession of Army Acts, passed annually by the British Parliament. In 1868 the Parliament of the new Dominion of Canada passed the Militia Act making the Army Act of the United Kingdom applicable in Canada, with minor variations. The British model of military justice was adopted by Canada and the first National Defence Act (1950) operated largely in that mould. Similar military justice systems to that of Canada, based upon the British tradition, are found in the United States of America, New Zealand, Australia, and many other countries where English common law is applied. The coming into force in Canada of the Canadian Bill of Rights and the Charter have served as a catalyst for setting new standards for the administration of justice, including military justice, in Canada.

7. There are many features unique to the military justice system. Illustrative examples follow. The National Defence Act and Queen's Regulations and Orders give the Minister of National Defence very broad powers to act in an administrative and quasi-judicial manner within the military justice system. A review of these powers is attached as Annex "A". Military Police authorities do not charge a member with having committed a service offence, rather that

responsibility is left to the accused's commanding officer or persons appointed by the commanding officer for that purpose (*Queen's Regulations and Orders*, Article 106.01). Military trial judges who preside at courts martial are appointed by the Minister of National Defence for fixed periods of time of up to four years (*Queen's Regulations and Orders*, Article 4.09). Custom and practice, amplified by appellate court decisions, provide that in disciplinary matters the decision of a commanding officer to proceed or not proceed with charges must be taken without interference or influence from any superior and that they not act in a manner that may be seen as drawing the administration of justice into disrepute. As well, there is no preliminary hearing before a court martial is convened, rather an accused is provided a synopsis (*Queen's Regulations and Orders*, Article 109.02) which sets out the evidence and witnesses to be called by the prosecution. Furthermore, an accused person may make a written statement directly to the authority who convenes or directs a court martial (*Queen's Regulations and Orders*, Article 109.03).

This statement is not admissible at trial and is considered by the convening authority in determining whether to convene the court martial, dismiss the charges, or to refer the matter to another authority for disposition.

8. And while there are differences between the military justice system and the civilian criminal justice system, so too are there similarities. The *Charter* applies to the Canadian military justice system. A person arrested, charged and tried in the Canadian military justice system has the same fundamental rights as a person arrested, charged and tried in the Canadian criminal justice system with only one exception. Section 11(f) of the *Charter*, which is the constitutional basis for the military justice system to use service tribunals rather than jury trials for serious offences (there being no constitutional right to a jury trial in Canada for less serious offences), provides:

except in the case of an offence under military law [to be] tried before a military tribunal, to the benefit of trial by jury where the maximum punishment is imprisonment for five years or a more severe punishment.

9. There are several distinctive and impressive building blocks for the military justice system in Canada. The first is that the formal discipline and control of the Canadian Forces is exercised pursuant to written law; the second is that this law was established not by a head of state or a field commander, but rather by the Parliament of Canada; the third is the application of the *Charter*; and the fourth is

that an appeal or appellate process into the civilian arena exists. This establishes that the Canadian Forces and the military justice system are, and remain, under civilian control and authority.

## DISCUSSION

### Introduction

10. To appreciate the significance of some of the different features of the military justice system mentioned above, and to understand their impact upon the effective functioning of military discipline, it is necessary to provide some preliminary comments about the nature of the military hierarchy and the roles of those within and outside the chain of command.

11. All persons subject to the Code of Service Discipline have a commanding officer to whom they are accountable in matters of discipline. Service members are required to obey the orders and instructions of their superiors, except if such orders or instructions are manifestly unlawful. These superiors are themselves accountable to their commanding officer for their actions. Commanding officers in turn are responsible to their superiors for all matters of discipline within their units or for the persons under their command. At each level of the military hierarchy there is an anticipation that a 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.

12. The commanding officer is the key player in the maintenance of discipline. By statute, regulation, and custom and practice of the service, the commanding officer has been given the power and authority to investigate allegations of service offences, including the power to issue warrants to search for evidence; to arrest and detain suspects; to lay, or to have laid, charges; to initiate trial proceedings in respect of service offences either by way of summary trial or to recommend that the matter be disposed of by summary trial by a superior officer or by court martial; and where the commanding officer tries an individual by summary trial, to hear the evidence, decide upon guilt or innocence, and to impose a punishment if warranted. To assist in carrying out those disciplinary duties, the commanding officer can call upon a number of persons for advice and assistance. The commanding officer can direct the Military Police to investigate a service offence, and to that end can issue to the police a search warrant or directions on pre-trial custody of an accused.

In determining whether or not to initiate disciplinary proceedings against an accused, or in determining the charges to be laid, the commanding officer can seek the advice of a legal officer.

13. In certain circumstances, a commanding officer can or must refer a matter to his or her superiors for disposal. In some cases, the charges laid by or on behalf of the commanding officer require that the accused appear for summary trial before a superior commander who is normally a formation commander. In other cases, the commanding officer will apply to the commander of the command through the formation commander, to have a case tried by court martial. While the formation commander or the commander of the command may hold their own views on the proper disposal of any charges at either a summary trial by superior commander or by court martial, and while they, in exceptional circumstances, may decide to dismiss the charges, they cannot themselves lay charges or cause them to be laid as can a commanding officer. It should be noted that no one outside the chain of command within a unit, including the Military Police supporting the commanding officer, can lay a charge involving a service offence without the authorization of the commanding officer.

14. The Judge Advocate General and the legal officers of the Canadian Forces Legal Branch have no executive authority in respect of initiating disciplinary action against a member of the Canadian Forces. The role and function of the Judge Advocate General and his officers are to provide legal advice and services to the commanding officer who seeks such advice. Should a matter proceed to court martial, the officer who convenes the court martial appoints a legal officer to act as the prosecutor.

15. The hallmark of the military justice system is the chain of command. The effectiveness of the military justice system relies heavily upon those within the chain of command, and in particular, commanding officers and commanders of higher formations, who must perform the key functions, ranging from charging through to trial and ultimately punishment of service offenders.

### Jurisdiction

16. Jurisdiction in respect of the military justice system is provided for by the Code of Service Discipline and by appellate court decisions.

17. The Code of Service Discipline describes what is a service offence as well as who is subject to trial by

military service tribunals. Service tribunals can try only persons subject to the Code of Service Discipline. There are two categories of service tribunals:

- a. summary trials which are conducted by superior commanders, commanding officers or their delegates; and
- b. courts martial.

18. Persons subject to the Code of Service Discipline include members of the Canadian Forces serving in the Regular Force, those serving with the Reserve Force in certain defined circumstances (such as when they are on exercise or on parade), and certain categories of civilians (such as family members accompanying service members on postings overseas or Department of National Defence school teachers) who by reason of their particular status or by agreement have rendered themselves liable to military justice. Civilians subject to the Code of Service Discipline can be tried only by courts martial. They cannot be tried by summary trial.

19. Service offences fall into three broad categories:

- a. offences listed in sections 73 to 129 of the *National Defence Act* which are offences of a military nature; for example, negligent performance of a military duty, or absence without leave;
- b. criminal offences created by other federal statutes such as the *Criminal Code of Canada* and the *Narcotic Control Act* which are incorporated into the Code of Service Discipline by section 130 of the *National Defence Act*, and are made punishable as service offences by this provision of the *National Defence Act*;
- c. offences under the law of the country where a service member is stationed (such as the importation of narcotics into Germany), are similarly punishable as service offences by the provisions of section 132 of the *National Defence Act*.

20. In addition to its prescribed applicability to certain persons, there are two other significant limitations on the jurisdiction of the military justice system. The *National Defence Act* provides for a three-year limitation period. If a charge is not laid and a trial commenced within three years of the offence occurring then, except in certain

limited circumstances such as absence without leave, military jurisdiction is time barred and the matter must be dealt with by civilian authorities or not at all. In addition, certain offences when committed in Canada are not triable by service tribunals, although they may be tried and dealt with under military law if the offences were committed outside Canada. These offences are murder, manslaughter, sexual assault and offences related to the kidnapping of children. While limitations may preclude trial by service tribunal, in appropriate circumstances a matter could be dealt with by a civilian criminal court.

21. In addition to the statutory limitations mentioned above, a further common law rule known as the doctrine of "military nexus" also operates to limit jurisdiction in certain cases. Essentially, military nexus requires an examination of the circumstances of a case, and a determination whether prosecution of the offence by service tribunal is required to meet the legitimate goals of military discipline, morale and efficiency. The purpose of the doctrine is best exemplified in respect of cases involving former service members who, now civilians, are tried for service offences committed while subject to the Code of Service Discipline. Through the combined effect of subsections 60(2) and 69(1) of the *National Defence Act* a former serving member continues to be liable under the Code of Service Discipline for a period of time after leaving the Canadian Forces; however, appellate court decisions have made it clear that subjecting such a person to military law is demonstrably justifiable only to the least extent dictated by disciplinary considerations essential to the maintenance of the morale and readiness of those remaining in the forces. The test applied in such circumstances is whether the accused's avoidance of punishment will adversely effect the general standard of discipline and efficiency of the Canadian Forces. In addition, the doctrine may be applied in cases of serving members where the commission of the offence bears little or no connection with military duties, such as where an accused commits a drinking and driving offence during off-duty hours without the presence of any indicia of military service.

#### The Role and Functions of the Military Police

22. Members of the Military Police are, pursuant to section 156 of the *National Defence Act*, designated "Specially Appointed Personnel". Section 2 of the *Criminal Code* defines "Peace Officer" to include officers and non-commissioned members of the Canadian Forces who have been appointed under section 156 of the *National Defence Act*. As a result, Military Police personnel have a special status

within the military justice system, and their status as peace officers is recognized as well by the civilian criminal justice system.

23. Military Police personnel are empowered to exercise their powers of investigation and arrest over all persons subject to the Code of Service Discipline, anywhere in the world. They exercise similar powers in respect of persons not subject to the Code of Service Discipline if they are investigating an offence or incident which occurred on or in relation to defence establishments or property. In respect of the latter types of offences involving persons not subject to the Code of Service Discipline, the Military Police may involve the local police in the investigation, or refer the matter entirely to them.

24. An investigation may be initiated by the Military Police whenever:

- a. a member of the Military Police observes or suspects the commission of any criminal or service offence;
- b. the Military Police receive a complaint from anyone alleging that a criminal or service offence has been committed; or
- c. a competent authority (such as a commanding officer, or a superior commander) directs that a matter for which they have responsibility requires the expertise of a Military Police investigation.

On completion of any investigation, the Military Police report the findings to the military superiors of the individual suspected of having committed a service offence, as well as to their own superiors within the Military Police hierarchy. The Military Police reports are distributed to the commanding officers of all affected parties and to higher headquarters. These reports are sometimes provided to the Judge Advocate General or his local representatives in cases where legal advice is likely to be solicited in respect of the actions to be taken. Normally, however, a Canadian Forces legal officer would receive the military police report from a commanding officer when the latter requests advice as to a proposed course of action.

25. While the Military Police are not the authority that lays a charge of a service offence against an accused, they may lay charges against persons not subject to the Code of Service Discipline in the civilian forum in their capacity as peace officers for the purposes of the *Criminal Code*. Ordinarily, these are charges of a routine nature such as



impaired driving, assault and narcotics charges where the offence was committed on a defence establishment. As mentioned earlier, in cases involving certain serious criminal offences, and particularly the offences of murder, manslaughter, sexual assault and child kidnapping which occur in Canada, the Military Police may investigate the offences in co-operation with civilian police authorities, or the case may be referred entirely to the civilian police, and it would be the civilian police who lay charges in these cases.

26. Military Police instructions provide that, to preserve the integrity of the military justice system, investigations and reports cannot be discontinued or cancelled without the knowledge and concurrence of senior Military Police officers at National Defence Headquarters. The Minister, the Chief of the Defence Staff, and the Deputy Chief of the Defence Staff (to whom the Military Police are responsible for their operations) may order the discontinuance or cancellation of any investigations.

27. Military Police personnel are individually accountable to:

- a. commanding officers and senior commanders for the efficient and effective attainment of police objectives, the maintenance of good order and discipline in support of military operations, and the well-being of their personnel;
- b. their superiors within the Military Police organization for the performance of law enforcement duties and the exercise of discretion, including,
  - (1) allocation discretion - determining which resources, objectives, and overall priorities will be assigned to the Military Police;
  - (2) supervisory discretion - overseeing the efficient deployment and use of Military Police resources to best achieve objectives and priorities, including establishing law enforcement methods and response thresholds; and
  - (3) enforcement discretion - selecting the most appropriate enforcement action in a particular case;

- c. issuing authorities such as courts and Justices of the Peace for the proper and lawful execution of any legal process such as a search warrant, and the associated collection, retention and disposal of evidence.

28. Military Police personnel form an integral part of Canadian Forces units and formations, and when so employed they are operationally responsible to the commanding officer or superior commander for the provision of effective police and security services and advice. Technical direction and specialized advice on the provision of Military Police services is provided by Military Police authorities as part of the duties they perform in the units to which they belong or to which they provide a support service.

29. Military Police personnel are subject to orders and instructions issued by or on behalf of superior commanders and commanding officers. Should such orders or instructions conflict or appear to interfere with their lawful Military Police duties, advice and instructions may be sought through the technical channel of communication from senior Military Police authorities at National Defence Headquarters. The role of these senior Military Police authorities is to ensure that Military Police investigations and activities are conducted in accordance with the law and Canadian Forces policies which reflect generally accepted Canadian police standards and practices. In particular, these policies and practices ensure that:

- a. Military Police personnel do not accord immunities and advantages to any person by reason of their rank or position; and
- b. Military Police investigation and law enforcement activities are conducted in a manner which facilitates and supports a military commander's legitimate mission and reinforces military values and customs.

Military Police personnel are also encouraged to seek the advice of legal officers when a situation so warrants.

#### Pre-Trial Matters

30. The Code of Service Discipline requires a commanding officer or person(s) acting under his or her authority to investigate any service offence that may have been committed by a person under his or her command. From the information gathered the commanding officer, or a person authorized by

him or her, determines if circumstances warrant the laying of a charge. The commanding officer has the authority to issue a warrant to authorize the search of a suspect's military quarters and personal property and the seizure of evidence. While the Code of Service Discipline permits any competent or qualified person to be assigned the task of investigating an offence, normally the Military Police are relied upon to do so, particularly when the case involves anything other than a very minor disciplinary infraction.

31. Under the Code of Service Discipline a suspect may be arrested by anyone authorized by the *National Defence Act* to effect an arrest. This includes any officer who may arrest someone of equal rank or of a lower rank and any non-commissioned member who may arrest someone of lower rank. Subject to certain conditions, a non-commissioned member may arrest someone of equal or higher rank to themselves and officers may arrest someone of a higher rank to themselves. In addition, Military Police have special powers of arrest and can arrest officers and non-commissioned members of any rank. Civilians subject to the Code of Service Discipline may be arrested by any member of the Canadian Forces, but in practice are usually arrested only by the Military Police. Only the Military Police can arrest civilians not subject to the Code of Service Discipline if they are found committing offences on a military establishment, for example at National Defence Headquarters, and these persons are promptly turned over to civilian police. Upon arrest or being detained every person must be informed of their Constitutional rights and specifically of their rights to retain and instruct counsel and to remain silent. They also have the opportunity, either within or outside Canada, to immediately call, at no expense to themselves, either a military or a civilian duty counsel.

32. Once placed under arrest, the accused's commanding officer (or in the case of a civilian subject to the Code of Service Discipline, their designated commanding officer) is required to be notified of the circumstances of the case and he or she, or an authorized delegate, must decide whether the individual is to be released from custody or not. The presumption is to release unless continued custody is necessary. Custody may be open or close. Open custody involves a restriction of the freedom of movement of the individual but the arrested person is not lodged in a jail cell. Close custody is the retention of the arrested person in a cell. If the person is retained in custody, the *National Defence Act* requires that the continued detention in custody be reviewed at specified times, and that the individual be released from custody as soon as circumstances no longer require continued detention. After being held in custody for 28 days, the person is entitled to petition the

Minister of National Defence to be released from custody.

33. Under the Code of Service Discipline, the sole authority with discretion to decide whether charges are laid is the commanding officer of the accused. In practical terms, the commanding officer will ordinarily delegate that authority to senior members of the unit. The facts surrounding the incident determine the charge. In all but minor, routine cases a military legal officer is usually consulted to advise as to the correctness of the charges to be laid. Charges are laid when they are written down on a charge report which is signed by a person authorized to do so. A copy must be served on the person charged. As soon as this is done that person is assigned an assisting officer. The assisting officer is a general service officer, not a legal officer, who has the obligation to assist the accused person with the conduct of his or her summary trial.

#### Summary Trials

34. The trying officers at summary trials have a broad jurisdiction to deal with service offences. Commanding officers and superior commanders can, in theory, try all service offences while the delegated officer is restricted to a less extensive but still significant list. While the jurisdiction is broad it is evident from the limited powers of punishment available to those trying officers that summary proceedings are intended to deal with less serious cases. The summary trial is meant to be corrective with the goal of socializing members to the habit of discipline, while at the same time fostering morale, esprit de corps, group cohesion, good order, and operational effectiveness and capability. This service tribunal is not designed to try more serious military offences. The summary trial is the most widely used disciplinary process in the Canadian Forces and the number of such trials conducted far exceeds, by anywhere from 2500-4000 cases in a given year, the number of courts martial. The provisions with respect to summary trials are contained in *Queen's Regulations and Orders*, Chapter 108.

35. A summary trial is a less formal procedure where the accused does not plead guilty or not guilty; the Military Rules of Evidence do not apply; and there is no right to be represented by legal counsel but only to the assistance of an assisting officer. There is a requirement that witnesses are called to prove facts; documents are presented; and the accused may speak in his or her own defence and question witnesses. A decision must be made on the evidence presented. The process must be fair and comply with the

fundamental principles of natural justice but it does not have the formality and procedural guarantees of a court martial.

### The Transition To Courts Martial

36. A summary trial of non-commissioned members up to and including the rank of sergeant may be held by a commanding officer or delegated officer if the charges are of a relatively minor nature and the punishment upon conviction would not involve incarceration or loss of rank and any fine would not exceed \$200. A commanding officer may also try an officer cadet summarily. If the charges are of a more serious nature as listed in regulations, or the punishment upon conviction would include detention, reduction in rank or a fine in excess \$200, then the accused person must be allowed to decide whether he or she wishes to exercise the right to be tried by court martial. If the accused person decides he or she does not want trial by court martial then, if convicted, he or she faces a maximum punishment of ninety (90) days detention. The differences between the process and consequences of a court martial and summary trial must be explained to an accused person by his or her assisting officer.

37. Summary trials of non-commissioned members above the rank of sergeant and officers up to and including the rank of Lieutenant-Colonel may be conducted by officers who have been appointed superior commanders. The same rules regarding election to court martial apply. For those convicted the maximum punishment, however, is a severe reprimand and 60% of the convicted person's monthly basic pay. However, an offence by a very senior non-commissioned officer or an officer of the rank of major and above which deserves imprisonment has serious career consequences, and the matter would normally be dealt with by a court martial.

38. In addition to an accused person electing a court martial, a commanding officer may decide to refer the matter to higher authority with a recommendation for court martial because of the seriousness of the offence or because the commanding officer believes it is otherwise required in the interests of justice. As well, after a charge has been laid and the investigation received, a commanding officer may dismiss the charge.

### Courts Martial

39. Before a matter goes to court martial, the accused must be given a copy of the charges on a document called a Charge

Sheet along with a Synopsis of the evidence. The accused may elect the language of the trial, and the accused is also offered a choice of being represented either by a military defending officer (at no expense), or a civilian counsel of his or her own choice (at his or her own expense), or, finally, of representing himself or herself. The accused is also offered an opportunity to make a statement directly to the authority who will decide whether or not to convene a court martial. That statement cannot be used at any subsequent trial.

40. The convening of courts martial is done by authorities, designated as such by the Minister of National Defence, who are higher in the chain of command than the commanding officer. The Minister of National Defence, the Chief of the Defence Staff and the Commanders of Commands are such convening authorities as well as certain other senior officers who are specifically so designated. The convening authority to whom a matter has been referred makes the decision to direct trial by court martial based on information provided by the commanding officer including any statement made by an accused person. The convening authority may also dismiss the charges or return the matter to the commanding officer for further investigation or for disposition. These are decisions which may not be interfered with by authorities higher in the chain of command. As a matter of doctrine and practice the Minister of National Defence and the Chief of the Defence Staff do not become involved in convening courts martial.

41. There are four types of courts martial, each of which addresses the specific needs of different cases which may arise under military law. The type of court martial chosen by the convening authority will be dependent, to some degree, on the rank or position of the accused and will reflect the seriousness of the charges and the limitations placed on the various types of courts martial to deal with certain offenders.

42. A General Court Martial consists of five officers, the senior of whom acts as the President of the court martial. A Judge Advocate, who is a military trial judge, is appointed to act essentially as a judge in a jury trial. The military trial judge decides issues of law and mixed law and fact, and also provides direction and instruction to the members of the court martial. A General Court Martial may try any person, including a civilian, who is liable to be charged, dealt with and tried on a charge of having committed any service offence. A General Court Martial can award the full range of punishments set out in the *National Defence Act* Ss. 139(1). (See paragraph 48 hereunder.)

43. A Disciplinary Court Martial consists of three officers, the senior of whom acts as the President of the court martial. A Judge Advocate, who again is a military trial judge, is appointed to act essentially as a judge in a jury trial performing the same functions as at a General Court Martial. A Disciplinary Court Martial may not try a civilian or any officer of or above the rank of major. This type of court martial can award a range of punishments including a fine or imprisonment for less than two years.

44. A Standing Court Martial consists of a military trial judge, appointed by the Minister to be the President. That officer presides alone over the trial. A Standing Court Martial cannot pass a sentence higher than imprisonment for less than two years. A Standing Court Martial cannot try a civilian and cannot try an officer of or above the rank of colonel. A Standing Court Martial has powers of punishment similar to those of a Disciplinary Court Martial.

45. A Special General Court Martial consists of a Presiding Judge appointed by the Minister of National Defence. A Special General Court Martial may try only a civilian. A Special General Court Martial can award a sentence of death (but only if prescribed in the offence section), a fine or imprisonment.

46. As a matter of analogy with civilian criminal courts, the General and Disciplinary Courts Martial may be compared to trials by judge and jury, while the Standing and Special General Courts Martial have the appearance of trial by judge alone. The members of General and Disciplinary Courts Martial are selected at random from among serving officers in the Canadian Forces. While they may look as if they are a jury, the members of these courts martial do not comprise a jury as that is understood in civilian courts. For example, they need not be unanimous on a finding of guilt, there need be only a majority. They also determine and pass sentence, after hearing evidence in mitigation of punishment, the summation of both counsel and the address of the Judge Advocate.

47. The actual trial process at courts martial is substantially similar to that at civilian criminal trials. The notable exception is that there exists no formal preliminary inquiry in the military justice system. In virtually all other respects the rules of procedure and evidence that govern civilian trials are similar to the rules that govern trial by court martial. The accused is represented by counsel at courts martial and has available all the defences found in both civilian criminal and military law. The Charter applies equally within the military justice system as it does elsewhere throughout the

Canadian criminal justice system. A "Military Justice Flowchart" is attached as Annex "B" hereto.

### Sentences

48. The Code of Service Discipline provides for a range of punishments which generally parallel those available to civilian criminal courts. There are some differences, however, which reflect the military environment. For example, the National Defence Act provides for punishments such as forfeiture of seniority, dismissal from the service and reduction in rank in addition to some of the sentences found in the civilian criminal law. Further, the sentence passed by a court martial may, in certain circumstances, include more than one punishment.

49. The scale of punishments, as set out in National Defence Act sub-section 139(1) include:

- (a) death,\*
- (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) reprimand,
- (j) fine, and
- (k) minor punishments.

\*- Instruction has been given to take steps to remove this punishment from the National Defence Act.

50. The minor punishments are set out in Queen's Regulations and Orders, Volume II as:

- (a) confinement to ship or barracks,
- (b) extra work and drill,



- (c) stoppage of leave,
- (d) extra work and drill not exceeding 2 hours a day, and
- (e) caution.

### Appeals

51. An accused who is convicted at a court martial has the right to have the legality of the conviction and the sentence reviewed on appeal by the Court Martial Appeal Court. He or she may also, with leave of the Court Martial Appeal Court, appeal the severity of the sentence imposed at the court martial. The Court Martial Appeal Court consists of judges of the Federal Court of Canada and judges from the Superior Courts of criminal jurisdiction of the provinces. From the decision of the Court Martial Appeal Court the accused may, in certain circumstances, appeal to the Supreme Court of Canada.

52. The Minister of National Defence may also appeal the decision of a court martial to the Court Martial Appeal Court. A further appeal can be taken by the Minister of National Defence to the Supreme Court of Canada in certain circumstances.

53. The decision of a summary trial can be challenged, by way of a redress of grievance, through the military chain of command and ultimately to the Minister of National Defence, if the person initiating the grievance does not receive the redress to which he or she considers himself or herself entitled. As well, decisions of summary trials may be subject to review by the Federal Court Trial Division and Provincial Superior Courts.

### Related Supreme Court of Canada Decisions

54. The Supreme Court of Canada, in its judgment in R v Généreux, [1992] 1 S.C.R. 259, spoke about the necessity for a separate system of military tribunals. The Chief Justice in delivering the majority judgement stated:

"The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against

threats to the nation's security. 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. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse 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. I agree, in this regard, with the comments of Cattnach J. in MacKay v. Rippon, [1978] 1 F.C. 233 (T.D.), at pages 235-36:

"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 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."

55. The foundation on which this military justice system is based is the requirement for discipline. It is discipline which is essential for any true military force not only to ensure the effective and efficient completion of assigned missions but also to ensure that troops do not misapply the force which they are authorized to use. As Ritchie J., in an earlier decision, Mackay v. the Queen, [1978] 1 F.C. 233 (CA), affirmed [1980] 2 S.C.R. 370, at 400, stated:

" When the National Defence Act is considered as a whole it will be seen that it encompasses the rules of discipline necessary to the maintenance of morale and efficiency among troops in training and at the same time envisages conditions under which service offences may be committed outside of Canada by service personnel stationed abroad. The Act also reflects the rules governing members of the armed services in the discharge of the duties required of them when acting in Aid of the Civil Power (Section 232 to Section 242) whereunder they may be required to act on short notice in the controlling of riots at the behest of a provincial attorney general. In my view these are some of the factors which make it apparent that a separate code of discipline administered within the services is an essential ingredient of service life."

56. On 1 June, 1995 the Supreme Court of Canada dismissed, without reasons, the application by Private Brown for leave to appeal from the decision of the Court Martial Appeal Court which upheld his conviction arising out of the death of a Somali national. While many of the grounds advanced in support of the application were case specific, two of the grounds were systemic: first, the issue of majority vote by members for conviction as opposed to unanimity in the civilian criminal jury trial; and second, the lack of availability of a jury trial. The opportunity to revisit the military justice system was presented and it was declined.

## CONCLUSION

57. The law in Canada is rapidly growing in volume, scope and complexity and the military justice system continues to evolve as part of Canadian law. Changes have been made to the *National Defence Act* and to *Queen's Regulations and Orders for the Canadian Forces* in respect of courts martial, and regulations and procedures regarding summary trials are presently being revisited.

58. The military justice system is recognized as a necessary part of the Canadian legal system and an integral part of military law.

ANNEX A  
 BRIEF FOR THE COMMISSION OF INQUIRY  
 INTO THE CANADIAN FORCES DEPLOYMENT  
 SOMALIA ON MILITARY JUSTICE  
 JUNE 1995

MND INVOLVEMENT IN THE MILITARY JUSTICE SYSTEM		
ACTION	NDA Section	QR&O Article
<b>PRE-TRIAL</b> Summary Trials and Courts Martial		
Petition to Minister after 28 days pre-trial custody	159(2)	105.29
Ministerial/other authority decision to maintain pre-trial custody after 90 days	159(3)	105.29
Summary Trials		
Designate colonels as approving authorities	163(3)	108.38
Appoint officer below rank of brigadier-general to be superior commander	164(1)	110.01
<b>Courts Martial</b>		
Convene courts martial and appoint military authorities to so act	165	111.05
Appointment of Standing Court Martial President	177	113.54
Appointment of Special General Court Martial President	178	113.05
Direct trial of a civilian by Special General Court Martial and appoint military authorities to so act		113.06
<b>POST-TRIAL</b> Summary Trials		
Decides redress of grievance on results of summary trials if not resolved at lower level	29	29.26
<b>Courts Martial</b>		
Approve punishment of dismissal or dismissal with disgrace and appoint military authorities to so act	206(2)	114.08
Quash findings and appoint military authorities to so act	208	114.09

ANNEX A  
 BRIEF FOR THE COMMISSION OF INQUIRY  
 IN THE CANADIAN FORCES DEPLOYMENT  
 TO MALIA ON MILITARY JUSTICE  
 14 JUNE 1995

Substitute findings or appoint military authorities to so act	209(1)	114.17
Set aside verdict and direct new trial on advice of JAG	210(1)	
Dispense with such a new trial	210(3)	
Substitute legal punishment for an illegal punishment and appoint military authorities to so act	211	114.25
Mitigate, commute and remit punishments and appoint military authorities to so act	212	114.27
Suspend orders of detention and imprisonment and appoint military authorities to so act	215	114.35
Appoint military authorities to act as committing authorities	219	114.40
Right to appeal through counsel to Court Martial Appeal Court	230.1	115.03
Right to appeal through counsel to Supreme Court of Canada	245	115.27

ANNEX B  
BRIEF FOR THE COMMISSION OF INQUIRY  
INTO THE CANADIAN FORCES DEPLOYMENT  
TO SOMALIA ON MILITARY JUSTICE  
14 JUNE 1995

MILITARY JUSTICE FLOWCHART  
(1995 EDITION)

6.	Report made to unit.	QR&O Art.	107.02	The report contemplated is preliminary and exploratory designed to enable unit authorities to decide whether there are grounds to justify laying a charge.
7a.	No action.			
7b.	Administrative but no disciplinary action.	CFAO 26-17 QR&O Art.	101.11	Junior non-commissioned members may be administered a Recorded Warning or Counselling and Probation. A Reproof may be administered to Senior NCOs and Officers.
7c.	Laying of charge.	QR&O Art.	106.01 - 106.095	A charge must be in writing and signed by an officer or non-commissioned member authorized by the Commanding Officer to lay charges. It is prepared in a prescribed form (charge report) and referred to an officer who has been delegated by the Commanding Officer to conduct summary trials, or to the Commanding Officer.
8.	Service of charge report on accused.	QR&O Art.	106.04(7)	A copy of the charge report must be provided to the Accused as soon as practicable after it is laid.
	8a. Representation of the Accused.	QR&O Art.	108.03	An assisting officer must be appointed by the Commanding Officer as soon as possible after the laying of the charge to assist the Accused in understanding the charge and preparing for summary trial, or to understand the implications of an election to be tried by court martial.



Investigation of the charge.

QR&O Art. 107.04  
107.05

After a charge has been laid a further investigation must be made to determine whether the charge is to proceed. The purpose of the investigation is to establish whether sufficient evidence exists to proceed and also that no relevant matter has been overlooked in the initial investigation. The degree of detail involved in this investigation varies greatly depending on the seriousness of the charge and the completeness of the pre-charge investigation. This investigation may be done by unit personnel if the charge involves a relatively straight-forward minor disciplinary offence. In other cases of more serious criminal offences the investigation may involve further action by the military police with direction provided by a legal officer.

.0a.

Charge is referred to a delegated officer.

QR&O Art. 106.095  
107.12

The delegated officer makes a preliminary determination whether the results of the investigations into the charge are adequate, and whether he or she is precluded from trying the Accused.

b.	Accused appears before delegated officer.	QR&O Art.	108.10 - 108.16	Delegated officers may only deal with certain Accused and certain charges. They have no authority to offer an election to be tried by court martial. Their powers of punishment may be prescribed by the Commanding Officer, and in any event cannot exceed the powers set out in the Table to QR&O Art. 108.11. Delegated officers cannot dismiss charges; to take such action the delegated officer must refer the charge to the Commanding Officer.
1a.	Charge is referred to the Commanding Officer.	QR&O Art.	106.095 107.12 108.24 - 108.28	The Commanding Officer makes a preliminary determination whether the results of the investigations into the charge are adequate, and whether he or she is precluded from trying the Accused. The charge may be dismissed by the Commanding Officer at this stage. The Commanding Officer is required to determine if he or she should try the case summarily having regard to the charge, the rank of the Accused, his or her powers of punishment, or the interests of justice generally. The Commanding Officer may refer the charge back to a delegated officer, decide to try the case summarily, offer the Accused the right to be tried by court martial, or refer the case directly to court martial.

b.

Accused appears before the  
Commanding Officer.

QR&O Art. 108.29 -  
108.33

The Commanding Officer conducts a summary trial in accordance with regulations and follows the regulatory directions appropriate to the case.

11b(i) Summary trial  
without election

The Commanding Officer may proceed directly to hearing the charge, but cannot award a punishment of a period of detention, reduction in rank or a fine in excess of \$200.

11b(ii) Summary trial with election

When the Commanding Officer offers the Accused the right to elect trial by court martial the summary trial is adjourned for at least 24 hours to enable the Accused to seek advice from his or her assisting officer, and if the Accused elects to be tried summarily, the Commanding Officer may award a punishment including reduction in rank, a maximum of 90 days detention, or a fine to a maximum of 60% of the basic monthly pay of the Accused.

11b(iii) Referral to higher authority  
after election, or at discretion  
of Commanding Officer

When the Accused elects to be tried by court martial the Commanding Officer must refer the matter to higher authority. If the Commanding Officer determines that in the circumstances the case should be tried by court martial he shall inform the Accused of that decision. In either event no evidence is heard at the summary trial.

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| 12. | Application is made to higher authority to dispose of the charges.                               | QR&O Art. | 106.10 -<br>106.15<br>109.02 -<br>109.04 | A charge sheet and synopsis of the evidence are produced and served on the Accused. Not less than 24 hours after being served the Accused is offered an opportunity to make his or her own statement to the higher authority in answer to the charge and synopsis. The Commanding Officer is required to send to the higher authority a number of prescribed documents, including the charge sheet, synopsis and the statement, if any of the Accused. The Commanding Officer informs higher authority if the referral results from his own initiative or the election of the Accused, and makes a recommendation to the higher authority that the case be tried by court martial or summarily by a superior commander. |
| 13. | Higher authority receives the application for disposal of the charges and decides how to proceed | QR&O Art. | 109.05                                   | <p>The higher authority may:</p> <ol style="list-style-type: none"> <li>1. seek further information;</li> <li>2. forward the application to another higher authority who has power to convene a court martial;</li> <li>3. dismiss the charge; or</li> <li>4. convene a court martial.</li> </ol>   |
| 14. | Higher authority convenes a court martial.   | QR&O Art. | 109.05<br>111.05<br>111.07               | When an authority with power to convene a court martial directs that the Accused be so tried, he or she endorses the charge sheet with their direction. The Convening Authority specifies the type of court martial which is to try the Accused.  |

15.	Convening Authority chooses type of court martial	QR&O Art.	111.16 111.35 & 111.36 113.02 - 113.04 113.51 - 113.53 & 113.565	The choice of type of court martial will generally depend on the seriousness of the offence, the status or position of the Accused, and the anticipated severity of sentence if a conviction is registered.
	15a. General Court Martial	QR&O Art.	111.16 111.17	The General Court Martial has jurisdiction over any person subject to the Code of Service Discipline and has no limitation in awarding a punishment except that it cannot award a minor punishment.
	15b. Disciplinary Court Martial	QR&O Art.	111.35 111.36	The Disciplinary Court Martial cannot try an officer above the rank of captain, and cannot pass a sentence which includes a minor punishment or is higher on the scale of punishments than imprisonment for less than two years.

15c. Special General Court Martial

QR&O Art. 113.02 -  
113.04

The Special General Court Martial may only try civilians subject to the Code of Service Discipline. The punishments which may be passed are limited and do not include any peculiar to the military; it can imprison an Accused, and award a maximum fine of \$500. Where the Accused is charged with a *Criminal Code* offence, or where imprisonment may be imposed if convicted, the Minister must concur in the direction that the Accused be tried by Special General Court Martial.

15d. Standing Court Martial

QR&O Art. 113.51 -  
113.53 &  
113.565

The Standing Court Martial cannot try a civilian, or an officer of or above the rank of colonel. It cannot try certain service offences which are of a disciplinary nature (unless these offences are charged in the alternative), and it essentially has the same powers of punishment as a Disciplinary Court Martial.

16. Appointment of Members of Courts  
Martial

16a. General and Disciplinary Courts	QR&O Art.	111.051
Martial		111.052
		111.06
		111.18 -
		111.21
		111.37 -
		111.40

1. The Convening Authority informs the Chief Military Trial Judge (CMTJ), the officer designated to appoint members of courts martial, in writing of requirements for officers to preside as president and members for a type of court martial (GCM or DCM). He must specify particulars of accused, the rank and language requirements of the president and members of the court martial.
2. The Convening Authority, in consultation with the CMTJ, arranges a suitable trial date and publishes a Convening Order. CMTJ appoints a Judge Advocate.
3. The CMTJ randomly selects a sufficient number of officers and sends the order appointing the officers to the Convening Authority and the Judge Advocate General. No person directly connected with the conduct of the court martial or with the investigation of the offence shall sit as a member of the court martial.
4. The General Court Martial consists of five members, the senior of whom is the President. The Disciplinary Court Martial has three members and the senior is the President. Two alternate members are selected for each court martial.

16b.	Special General Court Martial	QR&O Art.	113.561 113.05	The Special General Court Martial is composed of a Presiding Judge sitting alone. The Chief Military Trial Judge assigns the Presiding Judge upon the request of the Convening Authority. The Presiding Judge is a person designated for that purpose by the Minister. He or she may be a military trial judge, a judge of a superior court in Canada, or a barrister or advocate of at least ten years standing.
16c.	Standing Court Martial	QR&O Art.	113.561 113.54	The Standing Court Martial is composed of a President sitting alone. The Chief Military Trial Judge assigns the President upon the request of the Convening Authority. Presidents of Standing Courts Martial are appointed by the Minister; they must be barristers or advocates of at least three years standing.
17.	Appointment of other court martial participants	A number of other personal are appointed pursuant to regulations or orders for the conduct of courts martial.		
17a.	Prosecutor	QR&O Art.	111.24 111.43 113.107 113.60 112.56	A Prosecutor is appointed by or under the authority of the Convening Authority. The Prosecutor is normally a qualified legal officer, but with the concurrence of the Judge Advocate General, may be a civilian counsel. By regulation the Prosecutor is to conduct himself with complete fairness toward the Accused.



17b.	Defence	QR&O Art. 111.60	Every Accused is entitled to be represented a military defending officer (at no expense), civilian counsel (at the personal expense of the Accused), or the Accused may defend himself with or without the help of an assisting officer. An Accused is also entitled to an adviser to assist in respect of any technical or specialized aspect of the case.
17c.	Court staff	CFAO 111-1	The Commanding Officer of the Accused is responsible to appoint an officer of the court, escort and court orderlies for the efficient administration of the court martial.
17d.	Court reporter	QR&O Art. 112.17 112.66	The Chief Military Trial Judge assigns a court reporter to record and transcribe the minutes of proceedings.
18.	Documents are served on the Accused	QR&O Art. 111.50 - 111.53	When a Convening Authority directs trial by court martial he or she must serve on the Accused, the President, the judge advocate, and the Prosecutor, at least 24 hours prior to the commencement of the trial a number of documents including an endorsed charge sheet, and convening order or notice of trial.

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| 19.  | The Accused is entitled to the opportunity to prepare his or her case.  | QR&O Art. 111.61 - 111.64    | The Commanding Officer is required to permit the Accused full opportunity to prepare his or her defence, including private communication with the defending officer or counsel. The Accused has the right to the names of all prosecution witnesses and a summary of their evidence. Subject to the exigencies of the service, the attendance of any defence witnesses who are not deemed to be frivolous or vexatious must be ensured by the Commanding Officer, Convening Authority or President of the court martial. At his or her own expense, the Accused may have summoned any other witnesses required. |
| 20.  | Unless otherwise directed by the Judge Advocate, the court martial assembles at the time and place stated in the Convening Order. | QR&O Art. 112.03 112.05(5.1) | Before a trial by General or Disciplinary Court Martial commences, the President is required to verify that none of the proposed members of the court is disqualified from sitting.   |
| 20a. | Pre-trial Applications and Motions  | QR&O Art. 112.04 112.06      | The Judge Advocate at GCsM/DCsM, or the President at SCsM, or the Presiding Judge at SGCsM may hear and determine pre-trial motions and applications involving any question of law or mixed law and fact. The party bringing the motion or application must provide sufficient and reasonable notice to the Judge Advocate and the opposing party.  |

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| 21. | The trial commences   | QR&O Art. | 112.05(2)<br>112.10 | The Prosecutor, the Defence and the Court assemble and the Accused is brought before the Court. The Court Martial is open to the public unless a direction is made by the Convening Authority or the President that in the interests of public safety, national defence or public morals the public should be excluded in whole or in part from the proceedings.   |
| 22. | The Accused and Prosecutor are asked if they object to the trial being conducted by the members of the Court. | QR&O Art. | 112.05(3)<br>112.14 | The Prosecutor or Accused may object the President, other members, or Judge Advocate for any reasonable cause. Evidence may be called by either party to support or rebut an objection, and the parties may submit arguments in support of their position to the court. An objection to the Judge Advocate is determined by the Judge Advocate alone. An objection to the President or another member, after hearing evidence and submissions by the Prosecutor and the defence, the Judge Advocate instructs the President and members. The President and members (other than the person objected to) vote on the objection. If an objection to the President or Judge Advocate is allowed, the proceedings are adjourned to permit the appointment of a new President or Judge Advocate. If an objection is allowed in respect of an other member, an alternate member replaces that member. |

23.	The President, members of the Court, Judge Advocate and Court Reporter are sworn.	QR&O Art.	112.05(4) 112.15 - 112.17	No objection can be taken of the Court Reporter.
24.	The Accused may object to any interpreter.	QR&O Art.	112.05(4)(d) 112.18	The objection can be made on the basis of partiality or competence. After hearing evidence and submissions the Judge Advocate determines the issue. If an objection is allowed, the Court may appoint another interpreter.
25.	The interpreter is sworn.	QR&O Art.	112.05(4)(e) 112.19	
26.	The charge sheet is read to the Accused.	QR&O Art.	112.05(5)(a)	
27.	The Accused is asked if he or she applies for an adjournment.	QR&O Art.	112.05(5)(b) 112.22	The request for adjournment at this stage must be based on an inability to prepare the defence because the particulars of the charge are inadequate or not sufficiently clear. If granted the court is adjourned and the matter reported to the Convening Authority who may dismiss the charge, amend the particulars and order the trial to proceed on the amended charge, dissolve the court martial, or direct the court martial to proceed on any other charges and convene a new court martial to deal with the amended charge.

28.	The Accused may object to the trial being proceeded with.	QR&O Art. 112.05(5)(c) 112.24	A plea in bar of trial may be made on the basis of lack of jurisdiction, that no service offence is disclosed by the charge, that the charge or a substantially similar one was dismissed previously, or that the Accused was previously tried and found guilty or not guilty of a substantially similar charge.
	28a. The plea in bar is granted to all charges.		The proceedings are terminated and the matter sent back to the Convening Authority. If the defect can be remedied, a new court martial may be convened.
	28b. The plea in bar is granted to certain charges.		The court martial continues on those charges not barred by the plea and after the conclusion of the Court Martial a report is made to the Convening Authority on the charges to which the plea in bar of trial was granted.
	28c. The plea in bar of trial is denied.		
29.	The Accused may apply for separate trials.	QR&O Art. 112.05(5)(d)	The application may be made if the charge sheet contains more than one charge and is made on the basis that the Accused will be embarrassed in his or her defence if not tried separately. If the application is granted the Court will direct in which order the charges will be tried.

30.	The Accused is asked to plead to each charge.	QR&O Art.	112.05(5)(e) & (f)	The only permitted pleas are "guilty" and "not guilty". If the Accused refuses to plead he or she is deemed to have pleaded not guilty.
	30a. The Accused pleads guilty to all charges.	QR&O Art.	112.05(6) 112.05(6a)(a) 112.25 112.27	Guilty pleas are recorded but not accepted until after the Court has followed a procedure in which the Accused is advised of the nature of the charges, the maximum penalty that may be passed, the difference in procedure to be followed from a full trial, and the Accused is asked if the particulars of the charge are accurate. The Accused will be offered an opportunity to reverse his or her pleas. Only if satisfied that the pleas are freely offered by the Accused, and understood by the Accused will the Court accept the guilty pleas. The Prosecutor, after acceptance of the guilty pleas, informs the Court of the circumstances surrounding the commission of the offence. Thereafter the trial proceeds as if guilty findings had been made by the Court. If the charges to which the Accused has pleaded guilty have been laid in the alternative, the Court shall direct a stay of proceedings in respect of the alternative charges.
	30b. The Accused pleads guilty to some charges and not guilty to other charges.	QR&O Art.	112.05(6) 112.05(6a)(d)	The procedures relating to acceptance of guilty pleas and alternative charges are followed before the trial on any charges to which the Accused has pleaded not guilty.

	30c. The Accused pleads not guilty to all charges.	QR&O Art.	112.05(6a)(c)	
31.	The Accused is asked if he or she wishes an adjournment on the basis that he or she has had insufficient time to prepare their defence.	QR&O Art.	112.05(7) 112.62	If the application is granted the Court adjourns to a specified time.
32.	The Judge Advocate at General and Disciplinary Courts Martial addresses the Court.	QR&O Art.	112.05(4a)	The Judge Advocate addresses the Court on such matters, including the law relating to the charge, that he deems necessary or desirable. The address normally includes remarks concerning the role of the Court as finders of fact, the application of the Military Rules of Evidence, and instructions on how evidence is to be heard.
33.	The Prosecutor may be asked by the Court to make an opening address.	QR&O Art.	112.05(7a)	This rarely is requested of the Prosecutor.
34.	The Prosecutor presents the case for the prosecution.	QR&O Art.	112.05(8)	The Prosecutor calls witnesses in the order he or she sees fit. The witnesses are sworn, and then examined in chief by the Prosecutor. The Accused is permitted to cross-examine prosecution witnesses. The Prosecutor may re-examine a witness in respect of matters raised in cross-examination.

34a. Objections	QR&O Art. 112.31	Objections to the form or substance of questions put to a witness are ruled on by the Judge Advocate, or in the absence of a judge advocate, by the President or Presiding Judge.
34b. Questions posed by the Court.	QR&O Art. 112.05(8)(d) & (e)	The President, Judge Advocate or members of the Court may put further questions to a witness. Normally questions are limited to clarification of evidence previously tendered by the witness. When such questions are put to the witness by the Court, the Prosecutor and the Accused are permitted to ask further questions arising out of the questions posed by the Court.
34c. Trials within the trial.	QR&O Art. 112.06 112.605	The Judge Advocate at General and Disciplinary Courts Martial determines questions of law or mixed law and fact in the absence of the members of the Court. The ruling of the Judge Advocate becomes the ruling of the Court in the main trial. The trial within a trial procedure is used to determine such questions as the admissibility or exclusion of evidence, pleas in bar of trial, or motions for a Charter remedy.
35. The Prosecutor informs the Court that the case for the prosecution is closed.	QR&O Art. 112.05(9)	



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| 36. | A motion of no <i>prima facie</i> case may be made. | QR&O Art. 112.05(10)           | Such a motion may be raised by the Accused, or the Judge Advocate at General and Disciplinary Courts Martial. The Judge Advocate hears arguments from the Accused and the Prosecutor, and any reply by the Accused, before determining the issue. The Judge Advocate's ruling becomes the ruling of the Court. The motion may be denied, granted in part, or granted in full. If the motion is successful in respect of all charges, the Accused is found not guilty of those charges. If the motion succeeds in respect of some, but not all, of the charges, the Accused is found not guilty on those charges in respect of which the motion was successful, and the trial continues on the remaining charges. |
| 37. | The Accused may make an opening statement.          | QR&O Art. 112.05(11)<br>112.29 | The address may be oral or in writing. It may not contain any assertion that the Accused does not intend to substantiate by evidence. It should not be detailed, but could briefly outline the nature and effect of the evidence the Accused proposes to call in defence.  |
| 38. | The Accused presents the case for the defence.      | QR&O Art. 112.05(12) &<br>(13) | The Accused calls witnesses in the order he or she sees fit. The witnesses are sworn, and then examined in chief by the Accused. The Prosecutor is permitted to cross-examine defence witnesses. The Accused may re-examine a witness in respect of matters raised in cross-examination.   |

38a. Objections	QR&O Art.	112.31	Objections to the form or substance of questions put to a witness are ruled on by the Judge Advocate, or in the absence of a judge advocate, by the President or Presiding Judge.
38b. Questions posed by the Court.	QR&O Art.	112.05(8)(d) & (e)	The President, Judge Advocate or members of the Court may put further questions to a witness. Normally questions are limited to clarification of evidence previously tendered by the witness. When such questions are put to the witness by the Court, the Prosecutor and the Accused are permitted to ask further questions arising out of the questions posed by the Court.
38c. Trials within the trial.	QR&O Art.	112.06 112.605	The Judge Advocate at General and Disciplinary Courts Martial determines questions of law or mixed law and fact in the absence of the members of the Court. The ruling of the Judge Advocate becomes the ruling of the Court in the main trial. The trial within a trial procedure is used to determine such questions as the admissibility or exclusion of evidence, pleas in bar of trial, or motions for a Charter remedy.
39. The Accused informs the Court that the case for the defence is closed.	QR&O Art.	112.05(14)	

40.	Rebuttal by the Prosecutor	QR&O Art.	112.05(15)	With the permission of the President, the Prosecutor may call or recall any witness to rebut any new matter raised by a defence witness.
41.	The Court may call or recall any witness.	QR&O Art.	112.05(16) 112.05(17)	At any time during the trial, and before it makes a finding, the Court may call or recall a witness and put questions to that witness. The Prosecutor and the Accused may, with permission of the President, put questions to the witness relative to the answers to the Court's questions.
42.	After the defence closes its case the Prosecutor may address the Court as to findings.	QR&O Art.	112.05(18)(a) 112.05(18)(b)	The Prosecutor may apply for an adjournment to prepare his or her address.
43.	The defence may address the Court as to findings.	QR&O Art.	112.05(18)(c) 112.05(18)(d)	The defence may apply for an adjournment to prepare his or her address.
44.	The Judge Advocate shall advise the Court on the law relating to the case; may sum up the evidence and will advise the Court on any special findings it may make.	QR&O Art.	112.05(18)(e) 112.42 112.54(3) and Notes.	The Judge Advocate, in his or her address will advise on the law. The advice cannot be disregarded except for very weighty reasons which must be indicated on the record. No special finding can be made if to do so would prejudice the Accused person.

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| 45. | The Court closes to determine its findings.                          | QR&O Art. | 112.05(18)(f)<br>114.41(1)<br>112.41(2) | The finding is determined by a vote of the majority of the members. The members vote orally beginning with the junior in rank. If there is an equality of votes the Accused is found not guilty.  |
| 46. | The Court may reopen to seek further advice from the Judge Advocate. | QR&O Art. | 112.41(3)<br>112.41(4)<br>and Note B.   | The Court may reopen and after stating the facts it finds to be proven by the evidence ask the Judge Advocate to give his or her opinion as to whether they are sufficient in law to constitute the offence of which the Accused is charged or any other offence of which the Accused may be found guilty on the charge. The Court may reopen to seek further advice upon applicable law or direct any portion of the recorded evidence to be read aloud or recall and question any witnesses or call and question further witnesses. This latter option can only be exercised in exceptional circumstances and not to cure a defect in the prosecution's case. |

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| 47. | The Court may make special findings.  | QR&O Art. 112.42(1)                      | When a service tribunal concludes that the facts proved differ materially from the facts alleged in the statement of particulars on the charge sheet but still are sufficient to prove the commission of the offence charged and that this difference has not prejudiced the Accused in any way in presenting his or her defence, then it may make a special finding of guilty and in so doing shall state the differences between the facts proven and those alleged in a statement of particulars. |
| 48. | The Court may find the Accused guilty of an attempt, or of a related or less serious offence. | QR&O Art. 112.42(2)<br>103.62<br>103.63. | When a service tribunal finds an Accused guilty of attempt or on a related or less serious offence, then the finding on such a charge shall include a statement of the offence of which the Accused has been found guilty.   |

9. The Court may direct that the issue of fitness of the accused to stand trial be tried, or may make a finding of not responsible on account of mental disorder

QR&O Art. 119.03 to 119.19  
119.32 to 119.43

An accused found unfit to stand trial is liable to a disposition order which effectively puts him within a provincial secure medical facility. Periodic hearings, in accordance with that province's law, are held to review the accused's condition to determine whether the unfitness continues. At the same time a periodic review of the prosecution case is done by a Standing Court Martial to determine whether a *prima facie* case against the accused continues to exist. When an accused is found to have committed an offence while suffering from a mental disorder which rendered him incapable of appreciating the nature of his actions or of knowing that it was wrong, a further disposition hearing is held by the court martial and an order made with similar consequences as those found unfit to stand trial; i.e., periodic reviews under provincial law of their competency while detained in a provincial secure medical facility.

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| 0.  | The Court reopens to deliver its findings.  | QR&O Art. 112.05(18)(g) and 112.40 | The Court shall find the Accused person not guilty unless it concludes the evidence proves beyond a reasonable doubt the Accused committed the offence charged; attempted to commit the offence charged or committed a related or less serious offence as prescribed in regulations. Except where a special finding is made, the finding on each charge shall be guilty or not guilty without the addition of other words. If the Court finds the Accused guilty on a charge it shall direct a stay of proceedings on any alternative charge. |
| 51. | If he or she deems it necessary the Judge Advocate may advise the Court once more as to what findings in his or her opinion are open to it and the Court shall then close to reconsider its findings. | QR&O Art. 112.05(19)(h)            | It is used if the Judge Advocate is of the opinion that the Court Martial has made a finding of guilty or a special finding which is contrary to the law.   |
| 52. | If the Accused is found not guilty on all charges, the Court will terminate proceedings in respect of the Accused.  |                                    |   |

53. If the person is convicted of one or more charges, then the Prosecutor is required to inform the Court of the convicted person's disciplinary background, pay account and military record of service.
- QR&O Art. 112.05(19) and (20)
- The Prosecutor is required to provide the Court with factual background information on the character and circumstances of the convicted person as disclosed by military records. The information includes the age, rank, history of the convicted person, any decorations he/she received, the length of time spent in pre-trial custody, any previous civilian or military convictions on the convicted person's conduct sheet and any other related but not recorded civilian convictions together with any reproof given during the last 12 months. This information can be provided by a document signed by or on behalf of the Chief of the Defence Staff or the convicted person's Commanding Officer, or if that is not practical by calling witnesses who are subject to examination, cross-examination and re-examination.
54. The Prosecutor may call other evidence to prove any other matter which is relevant to the severity of the sentence.
- QR&O Art. 112.05(20)(d)
- The Prosecutor may call witnesses who are subject to examination, cross-examination and re-examination.



55.	The defence calls evidence on any matter which relates to the severity of sentence including rebuttal of the information contained in the documents introduced by the Prosecutor, the character of the convicted person and in mitigation of punishment.	QR&O Art.	112.05(20)(d)	The defence may call witnesses who are subject to examination, cross-examination and re-examination.
56.	The Prosecutor may, with the permission of the Court, call evidence in rebuttal of the evidence called by the defence as to the character of the convicted person and in mitigation of punishment.	QR&O Art.	112.05(20)(e)	These witnesses are subject to examination, cross-examination and re-examination.
57.	The Prosecutor may address on punishment.	QR&O Art.	112.05(21)(a)(i)	
58.	The Defence may address on punishment.	QR&O Art.	112.06(21)(a)(ii)	

59.	The convicted person or the defence counsel may request the Court take into consideration, for the purpose of sentencing other service offences similar in character to that which the Accused has been found guilty.	QR&O Art. 112.05(21)(b) 112.48.	A Court Martial if it accepts the request of the convicted person may not sentence the convicted person to any punishment higher in the scale of punishment than the punishment which might be imposed for the offences he or she was convicted of at trial. The Court must also record in the minutes of proceedings whether it has accepted or rejected such a request.
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| 60. | After such reasonable adjournment as he or she requires, the Judge Advocate shall address the Court on sentencing. | QR&O Art. | 112.05(21)(c)<br>112.49<br>112.50 | The Judge Advocate shall advise the Court as to the law relating to the imposition of sentence, including the direction as to sentence. The direct as to sentence require that only one sentence shall be imposed on an offender. They further require that the Court shall, in determining the severity of sentence, take into account any indirect consequence of the finding or punishment, i.e., consequential release or career restrictions and impose a punishment commensurate with the gravity of the offence and the previous character of the offender. The Judge Advocate may also explain the method of determining sentence which is by the members of the Court voting orally in succession, beginning with the junior in rank and that a vote of the majority of members shall determine the sentence and in the case of an equality of votes the President shall have a second and casting vote. The Judge Advocate when requested by the President shall sum up the evidence relating to the imposition of a sentence. |
| 61. | The Court shall close to determine its sentence.   | QR&O Art. | 112.05(21)(d)<br>112.49<br>112.50 |  |

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| 62. | The Court shall reopen and after verification of the legality of the proposed sentence by the Judge Advocate pronounce sentence.  | QR&O Art. 112.05(21)(e)<br>112.51 | The Judge Advocate must state the proposed sentence is legal before it is pronounced. Where the Judge Advocate informs the Court the proposed sentence is not legal he or she will provide such further advice to the Court as he or she deems necessary and the Court shall again close to reconsider sentence until the Judge Advocate informs the Court the proposed sentence is legal. |
| 63. | If the Court has not awarded detention or imprisonment it will terminate the proceedings in respect of the offender and inform the Convening Authority and Accused's Commanding Officer of the results. |                                   |  |

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| 64. | If the Court has imposed a sentence which includes detention or imprisonment then it must ensure the date and the time at which the punishment is imposed is recorded in the minutes of proceedings and then follow the procedure which provides for an application for release pending appeal. | QR&O Art. | 112.05(21)(F)<br>112.05(21)(G)<br>112.051<br>118.03<br>118.05 | Immediately after a court martial awards a sentence which includes detention or imprisonment it shall ask the offender if he/she wishes to make an application for release pending appeal pursuant to QR&O 118.03. If the convicted person does not deliver an application to the Court Martial immediately after sentencing then the Court must advise the convicted person he/she must comply with the 24 hour time limitation if he/she wishes to make an application under QR&O 118.03; terminate the proceedings with respect to the convicted person subject to a QR&O 118.03 application; remain available until it has ensured an application has not been made within 24 hours and then inform the Convening Authority and the Commanding Officer of the convicted person of the outcome of the Court Martial. |
| 65. | The convicted person does not deliver an application for release pending appeal pursuant to QR&O 118.03 within 24 hours of the sentence of detention or imprisonment being imposed.   | QR&O Art. | 112.051<br>118.10   | The convicted person has the option of making an application for release pending appeal to a judge of the Court Martial Appeal Court of Canada if no application has been made under QR&O 118.03.   |

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| 66. | The convicted person delivers an application for release pending appeal pursuant to QR&O 118.03 within 24 hours of the sentence of detention or imprisonment being imposed. | QR&O Art. 112.051<br>118.03 to<br>118.09 | On receipt of an application, the President of the Court Martial shall notify the Convening Authority of the fact; determine in consultation with counsel the earliest practical time to hear the application and once decided upon, cause all the interested parties to be notified of the time and place of the hearing. The Applicant's counsel, followed by the Prosecutor may make an opening statement. The Applicant and then the Prosecutor may call witnesses on the application. The witnesses are subject to examination, cross-examination, re-examination and questioning by the Court. The Court may call witnesses if it desires to hear additional evidence. The Applicant's counsel and then the Prosecutor may address the Court Martial. The Court Martial shall close to determine whether the Applicant has established, on a balance of probabilities, the existence of the conditions necessary for his or her release as required by QR&O 118.08. |
| 67. | The Court Martial denies the application.   | QR&O Art. 118.04 to<br>118.09            |   |

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| 68. | The Court Martial grants the application and directs the Applicant be released pursuant to the Applicant's undertaking to comply with statutory conditions imposed upon him or her and such other conditions as are stipulated by the Court Martial. | QR&O Art. 118.04 to 118.09 | The Applicant is required to establish on a balance of probabilities that he or she intends to appeal; that he or she will surrender him/herself into custody when directed to do so; and that his or her detention or imprisonment is not necessary in the interests of the public or the Canadian Forces. In addition, if the Applicant pleads guilty, he/she is required to establish that it would cause him/her unnecessary hardship if he/she were placed or retained in detention or imprisonment. If the Applicant succeeds, then the Court Martial may direct he or she be released upon giving an undertaking that he/she will remain under military authority; surrender him/herself into custody when directed to do so and comply with such other conditions as are stipulated by the Court Martial. These other conditions may include e.g., keeping the peace; not contacting specified individuals; not driving and not consuming alcohol. |
| 69. | The person having the convicted person in custody shall forthwith release the convicted person on receipt of his or her giving the undertakings required by QR&O 118.09.   | QR&O Art. 118.09           | On receipt of the completed form of direction and undertaking from the convicted person it shall be delivered to the President of the Court Martial. A copy shall also be delivered to the Judge Advocate General, the applicant and his or her Commanding Officer.  |

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| 70. | If the convicted person has not made an application for release pending appeal to the Court Martial who sentenced him/her within 24 hours then he/she may make an application to a judge of the Court Martial Appeal Court pursuant to QR&O 118.10. | QR&O Art. 118.10 to 118.14. | The procedure followed before the judge of the Court Martial Appeal Court is essentially the same as that before the court martial. The convicted person, in addition to establishing the matters set out in Serial 83 is also required to establish that the appeal is not frivolous. |
| 71. | A person released pursuant to a direction for release pending appeal shall return to duty unless the Chief of the Defence Staff or an officer designated by him or her otherwise directs.   | QR&O Art. 118.15 19.75.     | Pursuant to regulations, the Chief of the Defence Staff or an officer designated by him or her may suspend the convicted person from duty until his or her appeal is heard.  |
| 72. | The conditions of an undertaking may be varied by the Court Martial Appeal Court.   | QR&O Art. 118.16            | On application by the person who gave the undertaking or by counsel for the Canadian Forces, the Court Martial Appeal Court may after review confirm the conditions of release, vary the conditions; or substitute any other conditions if sees fit.                                   |



73. An application may be made to an appropriate tribunal if a person who is released pending appeal breaches, or is likely to breach an undertaking, for a direction cancelling the release pending appeal.

QR&O Art. 118.19 to  
118.29.

When a direction for release pending appeal was granted by a Court Martial, then a request may be made in the case of a member of the Canadian Forces, to appoint a Standing Court Martial to hear an application to cancel the release direction. The person who has been released pending appeal must be notified of such a request. The request is considered by a person who has power to convene a court martial. If the request is granted then a hearing is conducted. The Respondent is entitled to representation by a Defending Officer or legal counsel (as at a Court Martial) and procedures similar to those applicable at Courts Martial apply. Evidence is taken under oath and the burden rests on the Applicant to establish that the Respondent has breached or is likely to breach an undertaking. If the Applicant succeeds in establishing that, then the Court Martial must determine whether to cancel the direction that authorized the person to be released and direct he or she be detained in custody or direct a new undertaking be given as a condition of remaining at liberty. If the original direction was made by the Court Martial Appeal Court then an application to cancel must be heard by that Court.

74.	A copy of the Minutes of Proceedings of the GCM must be forwarded as soon as practical after the conclusion of the trial to the Convening Authority, and if the Accused was found guilty on any charge to the Accused.	QR&O Art.	112.66 115.02	
75.	The Convening Authority reviews the Minutes of Proceedings and considers whether he or she wishes to exercise the power to quash findings or mitigate, commute or remit the sentence.	QR&O Art.	114.15 to 114.36.	
76.	The convicted person appeals only the severity of the sentence.	QR&O Art.	115.02 115.03	
77.	The convicted person appeals the legality of the findings of the Court Martial, or the legality of the sentence to the Court Martial Appeal Court of Canada.	QR&O Art.	115.03 to 115.07	The National Defence Act and the Court Martial Appeal Court Rules set out the method of filing appeals. An Appellant may apply for the appointment of counsel to represent him or her pursuant to the Court Martial Appeal Court Rules.

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| 78. | The decision of the Court Martial Appeal Court can be appealed to the Supreme Court of Canada in accordance with the provisions of the National Defence Act.        | QR&O Art. | 115.08           |  |
| 79. | If the convicted person does not appeal his or her conviction, then the Judge Advocate General must review the minutes of proceedings to certify them for legality. | QR&O Art. | 116.01<br>116.02 | Pursuant to section 246 of the National Defence Act if the Judge Advocate General certifies any finding or punishment is not legal, the Minutes of Proceedings are referred to the Chief of the Defence Staff for such action as he or she deems fit. The Chief of the Defence Staff has the power under regulations to quash findings, or mitigate, remit or commute punishments. |

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Annex C  
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