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**The Impact of Cohesion on
The Combat Performance of Military Units**

by

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PART IVASSISTING OFFICER RESPONSIBILITIESSUMMARY TRIALS

Reference: QR&O - Article 108.03.

1. Since the proclamation of the Canadian Charter of Rights and Freedoms on 17 April 1982, it is mandatory for an Assisting Officer to be appointed in all cases when an accused is to be tried by way of Summary Trial. In exceptional circumstances, a non-commissioned member above the rank of Sergeant may be detailed as an Assisting Officer. An accused person may request that a specific Assisting Officer be detailed and if the exigencies of the Service permit and if the officer requested is willing to act in that capacity, the accused's request will be complied with.

2. Put shortly, it is the task of the Assisting Officer to ensure that the rights of the accused are safeguarded. This means that the Assisting Officer not only advises the accused what his legal rights are, but he must also satisfy himself that the accused is aware of and understands what takes place during both the pre-trial stage as well as during the Summary Trial itself.

3. It must be emphasized that the Assisting Officer is not a Defending Officer and he does not actually "represent" the accused at a Summary Trial. With the proclamation of the Charter and of the reference, the role of the Assisting Officer has been expanded. Pursuant to the reference, the Assisting Officer shall be informed by unit authorities of the evidence against the accused regarding witnesses, evidence and any other matter arising out of the charges or trial and be permitted to assist the accused during the Summary Trial to the extent requested by the accused. Effectively, this means that an Assisting Officer, when so requested by the accused, can do anything on behalf of the accused at the Summary Trial that the accused properly can do himself. In view of this, the Assisting Officer's main function now takes place not only during the pre-trial stage, but also during the trial itself. He must assist the accused in the preparation of his defence and be prepared to advise him on a variety of matters, and in order to be able to do this, he must pull out QR&O Vol II and do his homework.

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4. The Assisting Officer should advise the accused on the following matters:

a. Right to Counsel

The accused should be told that there is no right to legal counsel (a lawyer) to represent him at a Summary Trial. However, if he will be responsible for any expenses incurred, the matter should be brought up before the outset of the Summary Trial and the officer conducting the Summary Trial has the discretion to either permit representation by legal counsel, proceed without representation by legal counsel or apply for disposal of the charges against the accused by court martial. Notes C and D to QR&O Art. 108.03 should be carefully reviewed with the accused.

b. Attendance at Summary Trial of the Public

Explain to the accused that the public is entitled to attend his trial, but that the public may be excluded if the accused requests and trying officer agrees.

c. Insufficient Time to Prepare Case

Advise the accused of the option of requesting more time to prepare his case.

d. Review the Evidence

As the Assisting Officer is to be informed of the evidence against the accused, and in most cases, supplied with copies of all the pertinent material, he must discuss it with the accused to determine its relevance and applicability to the charge.

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e. Explain the Nature of the Charge

He should explain to the accused exactly what he is being charged with. What is the specific act complained about? What is required to prove the charge? E.g., on a charge under Section 104 NDA, the notes set out that to establish a charge for stealing, it must be proven that the article in question was capable of being stolen, it was in fact stolen and it was stolen by the accused.

f. The Possibility of Electing Trial by Court Martial

The Assisting Officer must review QR&O Vol II, Art. 108.31 to determine if the charge gives the accused an automatic right to elect trial by Court Martial. If there is an automatic right to elect, a determination must be made as to whether it would be in the accused's best interests to proceed by way of Court Martial or to appear before the Commanding Officer. Things to be considered would be the complexity of the charge, possible defences and possible punishments. If there was not an automatic right to elect and the Commanding Officer informs an individual he has the right to be tried by Court Martial, different considerations come into play. The Assisting Officer must say to himself: "The only reason he gave the accused the right to elect is because he is considering that if he finds the accused guilty, a punishment of detention, reduction in rank or a fine in excess of \$200 would be appropriate". With this in mind, the Assisting Officer must advise the accused of this strong possibility and bring to his attention the aspect that a Court Martial may or may not award a similar type of punishment. As a minimum, the Assisting Officer shall explain that:

- (1) a Court Martial has greater powers of punishment than an officer conducting a Summary trial;
- (2) an accused is entitled to be represented by legal counsel at a Court Martial and not at a Summary Trial;

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Introduction and Purpose

The purpose of this paper is to discuss the effects of cohesion on the performance of soldiers in combat. Cohesion, as it will be later defined, is the source of individual and collective motivation that causes soldiers to overcome danger, fear, and hardship and advance with great motivation and skill. In the first portion of the paper, the significance of such cohesion is related with definition and examples to very basic reasons why men fight. Succeeding portions identify and describe factors and conditions that promote or implicitly hinder the development of military cohesion. The focus here will be on factors influencing horizontal cohesion, or cohesion among soldiers within a military unit. Also described are factors basic to the development of vertical cohesion between leaders and soldiers. Finally, the significance and pervasiveness of commonly held broad societal values and rules that guide and control individual behavior are discussed as a broad requisite necessary for the development of cohesive units.

Why Soldiers Fight

Traditionally the "quality" of soldiers in combat or the human element in warfare has been referred to in such terms as morale, esprit de corps, or elan. Various analysts have emphasized these terms differently, but they have all tended to refer to the motivation of the individual soldier and his willingness to fight.

Such investigations of why men fight usually focus on individual and unit performance in combat in terms of courage, discipline, enthusiasm, and willingness to endure hardship. Such explanation does not adequately explain the factors involved in the endurance of a modern professional army. The phenomenon is more complex.

According to Morris Janowitz (1964), "even in the smallest unit there is an 'iron framework' of organization which serves as a basis of social control. The single concept of military morale must give way, therefore, to a theory of organizational behavior in which an array of sociological concepts is employed" (Janowitz and Little, 1965; George, 1967; Moskos, 1980; Kellett, 1982).

The literature on military motivation suggests a number of explanations for human behavior in combat. These approaches treat the primary group and its relationship to the organization in explaining combat behavior. Beginning with Shils and Janowitz in their study of cohesion and disintegration in the Wehrmacht, small-group cohesion, interaction within the group, and organization have been increasingly emphasized.

By the term *primary group*, investigators refer to the concept of *Gemeinschaft* (small, intimate, community relationships). More specifically, primary groups have been conceptualized as being

characterized by intimate face-to-face association and cooperation. They are primary in several senses, but chiefly in that they are fundamental in forming the social nature and ideals of the individual. The result of intimate association . . . is a certain fusion of individualities into a common whole, so that one's very self, for many purposes at least, is the common life and purpose of the group. Perhaps the simplest way of describing this wholeness is by saying it is a "we."¹

Research indicates that the soldier is strongly bound to the primary group as long as it is capable of satisfying his major physiological and social needs. Shils and Janowitz reported that as long as the Wehrmacht soldier had the necessary resources and as long as the primary group met his essential personal needs, he was "bound by the expectations and demands of its other members." Molnar (1965) cites similar evidence discussion soldiers

bound to some degree by social role and status patterns common to a primary group. Shils and Janowitz state:

It appears that a soldier's ability to resist is a function of the capacity of his immediate primary group [his squad or section] to avoid social disintegration. When the individual's immediate group, and its supporting formations, met his basic organic needs, offered him affection and esteem from both officers and comrades, supplied him with a sense of power and adequately regulated his relations with authority, the element of self-concern in battle, which would lead to disruption of the effective functioning of his primary group, was minimized.²

Supporting this basic hypothesis, Shils and Janowitz also note:

For the ordinary German soldier the decisive fact was that he was a member of a squad or section which maintained its structural integrity and which coincided roughly with the social unit which satisfied some of his major primary needs. He was likely to go on fighting, provided he had the necessary weapons, as long as the group possessed leadership with which he could identify himself, and as long as he gave affection to and received affection from the other members of his squad and platoon. In other words, as long as he felt himself to be a member of his primary group and therefore bound by the expectations and demands of its other members, his soldierly achievement was likely to be good.³

Additional factors also impact upon the cohesiveness of the primary group and its influence on the behavior of the soldier. Many investigators have pointed out that the concept of the primary group takes on an added sharpness under combat conditions. In considering the primary group as a dependent variable, the mere fact that a combat situation entails an increase in solidarity in response to an external threat is a phenomenon that has been verified many times. When a threat and the responsibilities for coping with it are shared, an increase in group solidarity and a reduction of internal group conflict usually occur. Observers of men in combat have called attention "again and again to the fact that the most significant persons for the combat soldier are the men who fight by his side and share with him the ordeal of trying to survive."⁴ S. L. A. Marshall, an observer of

men in combat in numerous wars, observes: "I hold it to be one of the simplest truths of war that the thing which enables an infantry soldier to keep going with his weapon is the near presence or the presumed presence of a comrade."⁵

Another variable that seems to increase primary group cohesion in combat is the soldier's calculation of his chances for escape from the threatening situation. If he is bound to the primary group by isolation from surrounding groups, by anxiety-producing doubts about his ability to leave his unit successfully, and by other such ambiguities, he sees his best chance of survival as resting with one or two buddies or with the other members of his primary group (Little, 1964).

Other factors influencing primary group cohesiveness are the past social experiences of the members. Common religion, race, ethnic group, social class, age, geographical region, and history appear to contribute to the communications necessary for intimate interpersonal relationships common to a primary group (Janowitz and Little, 1965; Shils and Janowitz, 1948; Emerson, 1967; Kohn, 1932; George, 1967).

Another influence shaping primary group solidarity is the member's commitment to his sociopolitical system, ideology, secondary group symbols, and causes, such as common awareness and resentment of the nation's colonial history (George, 1976). In this concept of "latent ideology," Moskos attributes some importance to broad sociopolitical values in explaining why men fight (Moskos, 1975). Indoctrination induces commitment to secondary symbols by establishing preconditions for primary group cohesion. Indoctrination themes generally stress the legitimacy of war aims and justify fighting for such aims (George, 1967). While recognizing the impact of secondary groups on the individual soldier, Shils and

Janowitz maintain that their influence is slight, compared to that of the primary group.

They quote a German soldier in support of their position:

The company [military unit] is the only truly existent community. This community allows neither time nor rest for a personal life. It forces us into its circle, for life is at stake. Obviously compromises must be made and claims be surrendered. . . . Therefore the idea of fighting, living, and dying for the fatherland, for the cultural possessions of the fatherland, is but a relatively distant thought. At least it does not play a great role in the practical motivations of the individual.⁶

The honor and romanticism involved in fighting a war often appeal to the young soldier who experiences the need for asserting manliness or toughness. The coincidence of these personal needs with similar group norms and military codes also serves to reinforce group solidarity (Shils and Janowitz, 1948; Stouffer et al., 1949; Moskos, 1970).

This discussion has emphasized the influence of the primary group in shaping the behavior of the soldier. However, a significant question remains. Will the primary group produce behavior by the soldier that is congruent with the goals of the organization? Many investigators have noted that the primary group cohesiveness that emerges in the small combat unit can militate either for or against the goals of the formal military organization (Etzioni, 1961; Janowitz and Little, 1965; George, 1967). For example, in discussing problems of "Negro" US Army units during World War II, Janowitz and Little point out:

Primary groups can be highly cohesive and yet impede the goals of military organizations. Cohesive primary groups contribute to organizational effectiveness only when the standards of behavior they enforce are articulated with the requirements of formal authority.⁷

Still other investigators have found small group behavior in combat situations that is deviant from the organization's point of view (Shils and Janowitz, 1948; George, 1967; Little, 1964). Shils and Janowitz, in their investigation of cohesion and disintegration in the

Wehrmacht, found that units that surrendered as a group were led by "soft-core," non-Nazi comrades to whom organizational goals were relatively unimportant.⁸

The performance of the group in meeting organizational goals is largely dependent upon the effectiveness of the leader. Research suggests that a capable leader can manipulate primary group members through a wide range of organizational mechanisms, psychological techniques, and indoctrination themes in order to shape primary group norms and attitudes that are compatible with organizational objectives. He can accomplish this task because he has been accepted as the natural leader of the small group. Men who fight modern wars must be convinced that their leaders have their welfare in mind, and leaders must continually demonstrate expertise and set the example in adhering to group norms before men will follow them (Dollard, 1943; Homans, 1946; Marshall, 1947; Shils and Janowitz, 1948; Stouffer, 1949; Little, 1964; George, 1967; Van Creveld, 1982).

Primary group behavior, whether deviant or desirable from the organization's point of view, is the result of norms formed by primary group interaction. The primary group is therefore a major factor in explaining man's behavior (positive or negative) in combat.

A recent and convincing study comparing the "fighting power" or human capabilities of the World War II German and US armies reinforces the major conclusions in the above review of the literature on why soldiers fight. In the study, Martin Van Creveld notes:

. . . [The soldier] fought for the reasons that men have always fought: because he felt himself a member of a well-integrated, well-led team whose structure, administration, and functioning were perceived to be . . . equitable and just.⁹

In studying the Israeli Defense Forces in all of their wars, including the war in Lebanon, Reuven Gal distinguishes between combat and preparation for combat in discussing why soldiers fight. His research indicates that in actual combat soldiers fight

because of the desire to survive and because of the cohesive effects of the small group and its leadership. In preparing for combat, group cohesion and leadership are again very significant along with two other factors: the confidence the individual has in himself as a soldier within the context of his training, weapons, and ability to meet any anticipated situation and the perceived legitimacy of the "war" within the public and unit. However, legitimacy was not requisite. As noted previously, in Lebanon, as long as Israeli troops had confidence in their leaders at the company level and below and as long as cohesion was strong, they continued the advance, even if they disagreed with the immediate objective or questioned the overall legitimacy of the "invasion."¹⁰

The preceding factors, often used to explain why soldiers fight, are combined with other factors by many analysts, under the broader concept of military cohesion, to better explain the behavior of the human element in combat.

Definition of Cohesion

Currently, in referring to the human element in warfare, the favored term, *cohesion*, is given a broader and more definitive meaning. Recognizing that small-group norms can militate against the organization, some analysts prefer to use the term "military cohesion" to signify that small-unit norms are in congruence with army objectives and goals. More specifically, military cohesion has been defined as

the bonding together of members of an organization/unit in such a way as to sustain their will and commitment to each other, their unit, and the mission.¹¹

Even more specifically,

cohesion is defined as existing in a unit when the primary day-to-day goals of the individual soldier, of the small group with which he identifies, and of unit leaders are congruent -- with each giving his primary loyalty to the group so

that it trains and fights as a unit with all members willing to risk death to achieve a common objective.¹²

Cohesion, as described above, is the determining factor in assessing and comparing the human element of opposing armies. The nature of modern war indicates that small-unit cohesion is the only force capable of causing soldiers to expose themselves consistently to enemy fire in pursuit of an army's goals. The confusion, danger, hardship, and isolation of the modern battlefield have caused a pronounced de-emphasis on strict orders, rote training, and coercive discipline. At the same time, there has been a significant shift downward in the control of soldiers in combat. Accompanying these changes has been increased emphasis on controlling soldiers through an internalization of values and operating rules congruent with the objectives, goals, and values of the organization. The need for these changes has been recognized to some degree within most armies, but especially by the Vietnamese and the Chinese. Early in the organization of their armies, they realized their need to rely on the human element in view of their inferiority in weapons and technology. Mao preached:

In all armies, obedience of the subordinates to their superiors must be exacted . . . but the basis for soldier discipline must be the individual conscience. With soldiers, a discipline of coercion is ineffective, discipline must be self-imposed, because only when it is, is the soldier able to understand completely why he fights and how he must obey. This type of discipline becomes a tower of strength within the army, and it is the only type that can truly harmonize the relationship that exists between officers and soldiers.¹³

It was recognized that in modern war the individual soldier is alone except for two or three close comrades on his right and left. The formal organization of the army has no means even to keep the soldier in view, much less closely supervise his behavior. For this reason, the significance of the small unit to which the soldier belongs can hardly be

overstated. The small group develops strong rules of behavior and expectations about individual conduct on the basis of face-to-face relationships and thereby becomes the immediate determinant of the soldier's behavior. In a unit that is properly led and controlled by its leaders, all other influences become secondary. As noted in the preceding pages, such overwhelming influence of the small group in war as well as peace has been documented in many armies.¹⁴

The Significance of Military Cohesion

The outcomes of battle and wars are greatly influenced and often determined by the "human element" involved. By all traditional methods of measuring military power, the United States and its allied forces should have had little difficulty defeating the North Vietnamese during the second Vietnamese war (1965-1972). At the height of its involvement in Vietnam, the United States was spending in excess of \$25 billion a year. The US Army had committed 40 percent of all its combat-ready divisions. They were supported by 50 percent of US tactical air power and one-third of US Naval Forces.¹⁵ Combined with allied contributions, US forces overwhelmed the North Vietnamese numerically in all traditional categories of military power. However, by the early 1970's, sharp contrasts between the US Army and the North Vietnamese and Vietcong forces in soldier morale, unit cohesion, and the resulting combat powers of the opposing armies were readily apparent. In the US Army "combat refusals," "fraggings," or the hand grenading of leaders by their soldiers, a high incidence of open drug abuse, and other symptoms of widespread deterioration of discipline were common. As the dysfunctional effects of these trends had their burgeoning impact, the combat power of the US units eroded significantly.

Aggressive search-and-destroy missions were no longer ordered, and the US Army by 1971 largely assumed a defensive posture with only local patrolling in the vicinity of US bases. The primary motivation of many individual soldiers during this period was to take no risks, or to "stay alive, finish your year, and go home." Many soldiers who volunteered for repeat tours in Vietnam were "attracted by the additional combat pay, the availability of cheap drugs, or the slacker discipline."¹⁶ The human fabric of the US Army had unravelled, cohesion was non-existent, and the US Army was in a shambles.

In sharp contrast to this picture of organizational decay was the steadfast cohesion and endurance of the North Vietnamese forces. The North Vietnamese soldier was not an unbeatable guerrilla fighter motivated by a mystically potent combination of communism and nationalism. Instead, the Vietnamese soldier was individually much like the US soldier who suffered under the stress and hardship of combat. Fear, danger, lack of sleep, rain, heat, and fatigue affected the Vietnamese soldiers much the same as they did the Americans. However, a vital difference between the two armies was their internal organization, procedures, and the North Vietnamese strategy for winning that was almost entirely dependent upon the human element.

The North Vietnamese fielded an army in the south that was inferior in strength and significantly inferior in logistical support, firepower, and mobility.¹⁷ Never before had such massive firepower been concentrated against an opposing army in such a limited area for such an extended period of time. In view of the overwhelming military power opposing it, North Vietnam had to rely on the human factor. Van Tien Dung, Army Chief of Staff, outlined their strategy:

Our arms and equipment were weaker than the enemy's, thus we could only develop moral superiority (within the army) and only then have the courage to attack the enemy, only then dare to fight the enemy resolutely, only then

could we stand solidly before all difficult trials created by the superior firepower that the enemy had brought into the war.¹⁸

Following this strategy, the North Vietnamese Army maintained its cohesion and endured while the US Army lost its cohesion, unravelled, and retired from the battlefield.

With some validity, conventional wisdom in the United States attributes the North Vietnamese "victory" to the rapid decline in public support for the US war effort after the Tet Offensive in 1968. The US public determined that further efforts were not worth the costs. This change in public attitude soon transferred into policy, and the United States withdrew.

This, of course, is only a partial explanation and it ignores historical examples of armies that endured and maintained their cohesion despite the withdrawal of public support for war, such as the French Army in North Africa in the late 1950's and the Israeli Army in Lebanon in the early 1980's. A more complete explanation includes how the North Vietnamese Army endured the most concentrated firepower ever directed against an army for seven continuous years. When Van Tien Dung spoke of "moral superiority" within the ranks of the North Vietnamese Army, he was referring to what many analysts consider the creation of one of the most cohesive armies ever fielded. The attention paid within that army to organization, leadership, care of the soldier, and development of military cohesion within the smallest units was not equalled by the US Army. The North Vietnamese Army was able to endure some of the greatest stress of combat and hardship because of its extensive development of the human element.¹⁹

Remarkable as it may seem, the North Vietnamese experience is not unique. Strategists such as Clausewitz, Napoleon, and Mao Tse Tung preceded Ho Chi Minh in recognizing the effect and importance of the human element in warfare. Examples can be

protection against their own men. The lack of cohesion within the Argentine Army was a major reason for the Argentine loss.

Characteristics of a Cohesive Army

Cohesion in an army occurs at the small-unit level among the intimate, face-to-face groups that emerge in peacetime as well as in war. As already defined, military cohesion involves the bonding of members of a unit in such a way as to sustain their will and commitment to each other, the organization, and the mission. In view of the general consensus of what a cohesive army is, any ordering of characteristics of such an army must consider the following areas: the overall organizational structure, which includes the government, organization of the armed forces and other sources of goals, policy, and support; the "human element" or the small intimate groups that control and motivate soldiers through their norms; and the influence of the leader on the small group and the resulting commitment of the individual soldier toward achieving army goals.

The only level in an army where these three factors simultaneously occur is that point at which the organization, the small group, and the leader come together in an army. This is at the lower levels of the organization, at the squad, platoon, and company level units.

Organizational Characteristics

A primary function of the organization is to provide purpose to the cohesive unit in the form of goals and objectives. If the purpose of war is the achievement of political ends, then the overall organization of an army must serve to transmit these political goals through

a "chain of command" to those specific units ultimately charged with accomplishing the goals.²¹ In this way, the broad, political purposes of a party or a nation penetrate the small cohesive group.

Another function of organizational top management is to provide the varied support required by lower-level cohesive units. Personnel and logistical support, as well as organizational policies designed to promote cohesion, are of immense importance in the creation of cohesive units and their ability to perform well in combat.

A final function of the organization is to prescribe structural characteristics for the small unit that will promote cohesion. The purpose of these structural characteristics is to de-emphasize individualism within the soldier. Instead, the small unit is structured to promote responsibility. The soldier is constantly reminded of his responsibilities to his buddies, to his leaders, to the squad, to the platoon, and ultimately to the nation through the social norms and operational rules that control behavior in cohesive units.

Certain organizational characteristics are thus important: the size of the group, for example, takes on added significance, because cohesion is inversely proportional to the numbers in the group. Several armies, in fact, have determined that the ideal size is up to nine men, with some armies choosing a three-man unit or military cell, which becomes the basic personnel building block of the army. Another factor is the soldier's belief about the duration of his commitment to the unit. Cohesion is promoted the longer the soldier anticipates remaining in his unit. And the frequency and proximity with which soldiers associate with each other is also important. The greater the frequency of association in pursuit of common purposes, the greater the cohesion. Finally, the more fully structured the associations among soldiers within the group become, the more influence the unit will

have over the soldiers. Structured associations, often on the basis of unspoken but widespread and strong agreement on basic values, also serve to establish boundaries around the group and form a clear distinction between members and nonmembers, or between "us" and "them."²²

Small Group and Unit Characteristics

Small, cohesive units usually have several discernible group characteristics which are often referred to organizationally as horizontal cohesion, or cohesion among the soldiers of a unit. The unit serves as a basic, tactical, fire-and-maneuver or service unit. The cohesive unit must function as a strong "buddy group" capable of satisfying basic physiological and social needs for the individual soldier. Another characteristic is the presence of dominant norms, which control the day-to-day behavior of the soldier. The leader operates within this group to ensure that group norms or expectations of behavior are congruent with organizational objectives. A further characteristic is the existence of an accepted observation-and-reporting system that is self-correcting for deviance from group norms by mobilizing peer groups or leadership pressures in order to correct individual behavior.

The only force on the battlefield strong enough to make a soldier advance under fire is his loyalty to such a group and the group's expectation that he will advance. This behavior is the consequence of strong personal or moral commitment. It represents the internalization of strong group values and norms that causes the soldier to conform to unit expectations even when separated from the unit. The soldier with a strong moral commitment to his unit sees himself in battle or even in day-to-day routine as part of a

small, intimate group, represented by a few buddies on his right and left or in the same vehicle, with a sergeant or junior officer who is always near. The normative power of the group causes the strong personal commitment on the part of the soldier that he ought to conform to group expectations, that doing so is the responsible thing to do, and that conformity is expected in spite of the fact that he might personally prefer to be doing something else. Such commitment is often referred to as a calling or, at the small-unit level, as "not letting your buddies down." This is the strongest possible type of motivation for soldiers to endure the danger and hardship of war.

To achieve the combat performance indicated above, it is of the utmost importance that the small unit is the dominant primary group for the individual soldier. Primary social affiliation within the unit is an extremely significant indicator of cohesion because it means that the small military unit has replaced other influences, such as the family, as the primary determinant of the soldier's day-to-day behavior. In such a unit, the soldier becomes bound by the expectations and needs of his fellow soldiers. Such relationships completely overshadow other obligations and claims on his loyalties. It is not necessary that the primacy of the unit be formally recognized. The soldier merely recognizes that more immediate considerations and relationships have displaced family, parents, and friends as the prime determinant of his behavior. Despite the intensity of the relationship, it is not usually seen as permanent but as one that is limited to a specific period or to the duration of the conflict. However, any influence or value which hinders such bonding is also an influence against cohesion and combat effectiveness.

Such devotion to a cohesive unit does not, of course, occur spontaneously. Besides reliable logistical support, a cohesive unit provides the major source of esteem and

recognition for unit members. Because a unit is able to meet this powerful need, the soldier tends to dedicate his time and energy to it, to its activities, and to its goals. Conversely, in units where these needs are not met, the soldier will seek them outside the unit, and often in groups with goals not congruent with those of the army. Leaders need to plan and create these conditions for cohesion systematically.

The cohesive unit also requires an environment that promotes a strong sense of mutual affection among unit members. The greater the degree of challenge, hardship, and danger, the greater the development of mutual affection and attraction among unit members. Such attraction can occur in peace as well as in combat. For a purpose to be perceived as worthwhile by the group, what seems to be necessary is common exposure to hardship, or to difficult training or to danger. Of course, the role of the leader in establishing the goals and in leading the formation of the unit members' opinion about the significance of those goals is paramount.

Finally, cohesive units discourage member soldiers from belonging to autonomous groups with possibly deviant norms. Such discouragement is accomplished by structuring army life to be an all-consuming experience, capable of satisfying all of the soldier's needs during the expected duration of his service.

Leadership in Cohesive Units

Leadership is the most important factor in achieving congruence between unit norms and organizational objectives. The achievement of congruence between organizational objectives, unit norms, and personal behavior is often referred to as vertical cohesion, or the strong cohesion which develops between soldiers and their leaders. For leaders to be

effective in influencing the emergence of norms compatible with organizational objectives, leadership must be based upon personal relationships between leaders and soldiers. Specific functions characterize effective leadership in a cohesive unit. The leader must transmit organizational goals or objectives effectively from the chain of command to the small, cohesive group. Then he must lead the unit in achieving these objectives through his personal influence and technical expertise. The leader must also maintain unit cohesion by ensuring continuous organizational support, adherence to dominant norms, and by the detection and correction of deviance from group norms. Finally, the leader assists in making or maintaining a professionally sound soldier by setting an example, by teaching, and by personally leading.

The effective leading of soldiers in combat and in peace is complex and difficult. The nature of modern war has dictated a significant shift over the past 100 years from methods of control dependent upon physical domination of the soldier to those that rely on internalized discipline within the soldier. Today's warfare no longer allows mass formations to attack under the watchful eyes and control of sergeants and officers. Modern leaders no longer bivouac well before darkness or during periods of fog or low visibility in order to prevent mass desertions. The requirements of leadership have changed significantly since the time when the armies of Frederick the Great marched in Europe. The many requirements for small and independent unit actions have de-emphasized strict discipline, rote training, and drill. The dispersion, confusion, danger, and hardship that characterize modern battlefields have made it essential to gain control of the individual soldier through the process of internalizing values and codes of behavior that cause the soldier to act as a reliable member of his unit in combat. Because the source of the

soldier's values and codes is the small group and because the only force strong enough to make the soldier willing to advance under fire is his loyalty to the small group and that group's expectation that he will advance, it becomes the primary task of the organization to control the small fighting group through its leaders.

Training and situation drills assist the leader in building cohesive units. The confidence that characterizes well-trained troops, especially that training validated in combat, is significant; the soldier needs to feel that he is part of a group that can successfully meet and survive most situations found on the battlefield. The drill aspect of training also contributes by helping the soldier overcome the often immobilizing fear experienced in combat operations (e.g., airborne) and by helping him take appropriate actions expected by the group. Outside threats perceived by the group also cause it to coalesce and pull together to face the common danger. It is leadership, however, that is the most critical factor in building cohesive units.²³

Characteristics of Leadership in Cohesive Units

Leadership that is most effective in building cohesive units has several characteristics. Of primary importance is that it is not managerial in approach. Instead, it emphasizes personal, empathic, and continuing face-to-face contact with all soldiers in the unit. Because the leader's ability to develop fully professional relationships is limited to a small number of soldiers, basic units must necessarily be small if leaders are to have maximum impact. An army's maximum leadership efforts must be focused at the small-unit level where the leader makes the link between the formal organization and the fighting soldier -- at the squad, platoon, and company level. Above these levels, more emphasis on a

managerial approach is required. The transition from leadership to managerial styles is a problem for some armies. The correct style depends primarily on the level of the organization being led or managed. Many armies tend to adopt one approach and apply it inflexibly at all levels. The most evident example is that of the French Army between the World Wars. Personal leadership and example, along with the spirit of the offense, under the slogan of "Elan!" were thought to be appropriate for all levels, especially among the field grade ranks. As a result, strategy and management were not adequately considered, resulting in the major debacle suffered by the French Army at the hands of the German Wehrmacht in World War II.

Leaders at the small-unit level in a cohesive unit have a degree of charisma -- not glibness, but the ability to guide the unit gracefully in repeatedly surviving difficult situations. In battle, nothing succeeds like success. Men in danger become acutely aware of the qualities of their leaders. They desire leadership so their immediate needs can be met and their anxieties controlled.²⁴ In this regard, well-trained and respected company grade officers and sergeants relay a sense of competence and security to their soldiers and, if successful over a period of time, gain a degree of influence and control over members of their units often associated with charismatic leaders. Above all, successful leaders must abide by and adhere to all of the dominant norms operative within their group or unit.

Casualties can significantly weaken group cohesion, especially casualties that are considered "wasteful" by soldiers in the unit and that are attributed to leadership failure or unreasonable missions. Such a situation puts the unit leader in a difficult position between his requirement to complete his assigned mission and his duty to maintain the integrity and welfare of the unit. In their linking function between soldier and organization, leaders

must be perceived by unit members as protecting them from harassment and unrealistic missions from above.

In addition to building upon success, the unit leader must act to neutralize the effects of failure. In success or failure, the leader uses the perception of outside threat or difficult challenges to mobilize and coalesce the unit. The effects of failure can vary considerably, depending upon whether the unit is in the front line or in the rear.²⁵ When cohesion has been seriously impaired, soldiers will still fight for survival, and this need can be used by the unit leader as a basis for rebuilding cohesion. The soldier's individual need for self-preservation affects his relations within his unit. He recognizes that his chances of survival are greater if he shares the danger within a limited range of tasks that must be accomplished to improve overall unit chances for survival.²⁶

On Understanding Leadership and Cohesion

Many approaches to and definitions of leadership have been offered. The purpose here is not to offer another but to relate leadership to cohesion in military units by synthesizing available knowledge about the individual soldier, the small group, the organization, and the leadership itself.

Military leadership involves enduring -- and primary -- personal relationships between a leader and soldiers. Many officers appear to believe that inspiring talks and appearances by brigadiers and colonels offer the best examples of leadership. On the contrary, the vital leadership role is consistent competence at the squad, platoon, and company levels by company grade sergeants and officers. It is at this level where the phenomenon of leadership takes place because it is here that the individual soldier is persuaded to pursue

goals that are often in direct conflict with his own best interests. The individual's need for cover from enemy fire, for example, is in direct conflict with the organizational requirement to advance toward an enemy position and defeat it. The primary function of small-unit leadership is to bring about congruence between the requirements of the organization and the needs of the individual soldier. The leader must bring about internalized values and discipline within the soldier to enable him to overcome his fear and expose himself to enemy fire. To accomplish this task, the leader must create and accommodate the soldier's needs by developing a group within his unit whose norms and procedures are strongly congruent with organizational objectives. Ideally, the soldier will pursue Army goals in satisfying his individual needs. The key is similarity of values among soldier, leader, and organization so that such values become the primary guide for the soldier's day-to-day behavior. Therefore, units organized on the basis of similar values have a much better chance at congruence with organizational objectives. If this is not possible, extensive efforts must be made to socialize all soldiers into the desired value system of the group. The greater the effectiveness of these efforts, the less formal controls will be required within the unit.²⁷

Sources of Leader Influence

Leaders of cohesive units have several bases of power that are the sources of the influence necessary to control and lead the group.²⁸ These may be placed into several categories evident at the squad, platoon, and company levels: (1) legitimate power, (2) reward and coercive power, (3) referent power, and (4) expert power.

Legitimate Power

Legitimate power in cohesive units may be defined as compliance with orders because of attitudes or beliefs that have their basis in a feeling of internalized "oughtness" -- a sense of what is right and wrong that, in turn, is based on learned cultural values firmly rooted in society. To the degree that all soldiers agree on the validity of such societal values and adhere to their resulting behavioral rules, cohesion in units will be promoted. Legitimate power tends to be the most impersonal source of power. It is dependent upon cultural value congruence among members of the unit and between leader and subordinates. Leader reliance on legitimate power is usually greater during the earlier period of a soldier's service or after defeat or extreme hardship when other sources of power are not as effective. In addition to arising from cultural values, legitimate power can also derive from the reputation of the organization the leader represents. For example, in Vietnam, an unknown US Army lieutenant tended to have more influence within the same unit than did an equally unknown Vietnamese lieutenant. Legitimate power reaches its most potent influence when the leader becomes a surrogate for authority figures held in greatest respect by unit members. Soldiers respond to legitimate power much in the same manner that citizens respond to a policeman or that a parishioner responds to a priest.

Reward and Coercive Power

Reward and coercive powers are available to all armies. They may be defined as the ability to exert influence in personal relationships based upon the ability to reward and punish. To be of maximum effectiveness in cohesive units, reward and punishment must be related to group norms. Both the action and the reward or punishment itself must be congruent with group norms. Material rewards and the ability to punish a soldier physically

should also be available to the leader, but such devices must be viewed as complementary to reward and punishment through the group. In other words, reward and punishment must be related to the soldier's relationship with the group. The leader's ability to focus group pressures and acceptance or sanctioning of an individual is a source of tremendous power. It can threaten or heighten the soldier's sense of security, and source of affection and recognition, in such a manner that significant pressures become focused on the soldier to conform to group rules and procedures. In cohesive armies, awards and commendations, as well as restriction and criticism, are rooted strongly within the group and are implemented within full view of the unit.

Referent Power

Referent power is most dependent on close, personal relationships between leaders and subordinate soldiers. Its great influence stems directly from the intense identification of the soldier with his immediate leader. Often, the leader approaches the stature of a loved and respected parent or of the charismatic leader who demonstrates consistently the Weberian quality of "grace," or the ability to consistently handle difficult situations well. Such referent power is based on the satisfaction of the soldier's personal needs for affection, recognition, and security through strong identification with a respected leader who has successfully led his unit through situations of danger and hardship. Leaders who maximize their referent power know the personal history and circumstances of all their subordinates. They know the aspirations, fears, capabilities, and attitudes of their soldiers in great detail and build relationships on these facts. In cohesive armies, the formation of such close ties between soldiers and leaders is not a matter of individual initiative or chance but of official

policies that promote the leader's referent power, which is the strongest source of a combat leader's influence over his soldiers.

Expert Power

Expert power may be defined as the soldier's compliance with a leader's orders because the leader is perceived as having superior knowledge and ability important to the soldier and his unit in the context of a current or expected situation. In hardship situations and in combat especially, leadership expertise that allows the leader to cope successfully with the situation is a significant source of power. The proven ability to carry out a tactical plan, to arrange for and adjust artillery, to demonstrate professional expertise with weapons, to navigate well, and to provide medical care and supplies are all significant sources of power. Just possessing information transmitted via radio, telephone, or messenger that is vital to the unit is a proven source of power. Armies desiring cohesive units must ensure that unit leaders are professionally trained and prepared. Leaders of front line units must be viewed as "men of steel" professionally equal to meeting all tasks demanded by the situation.

Societal Effects on Cohesion and Combat Performance

Common attitudes, values, and beliefs among members of a unit promote cohesion; in fact, some observers contend that similarity of attitudes contributes to group cohesion more than any other single factor.²⁹ They also point out that if such similarity does not exist and if cleavages that exist within a society manifest themselves within that society's Army, cohesion will be difficult to achieve, especially if the group is held together primarily by outside authority.

Attempts to alter incompatibility of attitudes and values among unit members through intense resocialization, organizational fiat, and leadership are usually at best only partially successful. Cohesion can be achieved far more quickly and to a far greater extent within a unit if a basic similarity already exists among soldiers' attitudes, values, and beliefs.³⁰

The population that supplies soldiers to an army also provides at the same time their beliefs and values. Soldiers in small units (primary groups) are drawn from an overall population, or secondary group, which can be defined as the pattern of impersonal relationships within a large organized group.³¹ A secondary group is too large to function on the intimate face-to-face basis of the cohesive small group, yet it also supports cultural norms and values, which guide the behavior and decisions of its members. Developing over time, these cultural values can be traced to such factors within the larger group as history, language, and religion, including strongly held views of what constitutes acceptable and proper behavior.

If soldiers in a small unit are from a relatively homogeneous secondary group, unit cohesion is likely to be enhanced. On the other hand, dissimilar characteristics within a unit, such as language, religion, race, history, and the values that accompany these characteristics, tend to hinder cohesion.

Consensus on Values Indicates Degree of Cohesion

Significant research has been accomplished on the relationship between the commonality of cultural values and the ease with which cohesive armies have been created.³²

Research reveals that the role of cultural values and beliefs is central to a nation's ability to coalesce and achieve a common national purpose, just as they are to explanations of cohesion in small combat units. The degree to which a strong commonality of such attitudes, values, and beliefs can be demonstrated between large secondary groups and much smaller primary groups will indicate the ease with which small cohesive military units can be created within a society.³³ A nation's potential for national unity and thereby the existence of the basic values and beliefs necessary for the promotion of cohesion in military units may be determined through an investigation of the cultural characteristics of the nation.

A significant factor contributing to national unity is a group's sense of a common and unique history and shared values. Generally, a people's history is a source of common values. It will be a force that draws a people together, especially if it includes a significant period of trial such as fighting and winning a revolutionary war or a war in defense of its boundaries. Even more significant is a people's expectation of a common future. Such a history rapidly becomes part of a people's culture. Legends and historical tales become part of every citizen's socialization. The telling and retelling of these experiences by teachers, grandparents, and friends perpetuates a group's history and also passes on cultural values to new generations.

A common language also promotes nationalism. It eases communication among a people for a wide variety of purposes, while also establishing firm boundaries that often distinguish the group from others.

A sense of belonging to a unique ethnic group or race, often with an accompanying religion and strong agreement on personal mores and rules of behavior, also contributes to national unity.

Leadership, too, is extremely important at the national level. It is essential that the nation is the primary loyalty among the elite of a people. An elite or leadership with loyalties divided between transnational parties, specific geographical regions, or particular ethnic groups or by intensely held opposing positions on social issues can be a significant hindrance to the emergence of national unity and ultimately to cohesion in that nation's army.

The individual soldier's commitment to his political system and to its ideology (such as democracy or communism) and related symbols also contributes to cohesion in small units. The issue of why soldiers fight cannot be reduced to one particular reason -- neither to small-group explanations nor to broader, fighting-for-a-cause explanations that are based in cultural or ideological causal roots. As Morris Janowitz states, "Obviously, we are dealing with an interaction pattern, but the primary group is essential for the realities of battle. If there is no social cohesion at this level, there is no possibility of secondary symbols accomplishing the task."³⁴

Most analysts agree, however, that compared to the influence of the small group, broad political and cultural values are not foremost in explaining why soldiers fight. Nevertheless, common cultural factors appear to a significant degree to be requisite for soldiers' motivation and, indirectly, for building and sustaining cohesion in small groups. Charles Moskos suggests, through his concept of "latent ideology," that broad cultural and ideological values can influence a soldier's behavior. These widely shared sentiments do

have concrete consequences for combat motivation. The belief system of soldiers "must therefore be taken into account in explaining combat performance."³⁵

A final indication of a group's potential for national unity is affected by all of the preceding indicators. It is the degree to which the overall population is aware that they are part of a nation with similar values and the priority they are willing to give that nation.

Just a bare outline of the principal factors affecting a nation's potential for national consensus on values has been presented here. The detailed work of Emerson, Kohn, and Cottam makes clear the degree to which national unity is rooted in the basic cultural characteristics of a nation and supports the thesis that common cultural values significantly promote cohesion among members of a small unit.

It is difficult to overemphasize the significance of military cohesion on the human element in warfare and the performance of units in combat. It should be recognized that the principles of war are autonomous -- they operate independently of any given political or social system. Neither democracy nor any other form of government is assured an army more capable than another. *Ceteris paribus* -- That nation that best succeeds in creating cohesive military units will prevail in war.

ENDNOTES

1. Charles H. Cooley, *Social Organization* (New York: Charles Scribner's Sons, 1908), introduction.
2. Edward A. Shils and Morris Janowitz, "Cohesion and Disintegration in the Wehrmacht in World War II," *Public Opinion Quarterly* 12(1948): 281.
3. Ibid., p. 284.
4. Alexander L. George, "Primary Groups, Organizations and Military Performance," *The Study of Leadership* (West Point: USMA Printing Plant, 1972), p. 19-3. For a broader discussion of combat motivation linking primary-group processes to individual self-concern and shared beliefs among soldiers, see Charles Moskos, "Surviving the War in Vietnam," Charles R. Figley and Seymour Leventman, *Strangers at Home: The Vietnam Veteran Since the War* (New York: Praeger, 1980), pp. 71-85.
5. S. L. A. Marshall, *Men Against Fire* (New York: William Morrow, 1947), p. 42.
6. Shils and Janowitz, "Cohesion and Disintegration in the Wehrmacht," p. 284.
7. Morris Janowitz and R. Little, *Sociology and the Military Establishment* (New York: Russell Sage Foundation, 1965), p. 78.
8. Shils and Janowitz, "Cohesion and Disintegration in the Wehrmacht," p. 287.
9. Martin Van Creveld, *Fighting Power: German and US Army Performance, 1939-1945* (Westport, Conn.: Greenwood Press, 1982), pp. 163-164.
10. Reuven Gal, "Unit Morale: Some Observations on Its Israeli Version," Department of Military Psychiatry, Walter Reed Army Institute of Research, Washington, DC, 1983.
11. John H. Johns et al., *Cohesion in the US Military* (Washington, DC: National Defense University Press, 1984), p. 9.
12. Henderson, *Why the Vietcong Fought*, pp. 3-18.
13. Mao Tse-tung, in *The Chinese Communist Army in Action* by Alexander George (New York: Columbia University Press, 1967), p. 25.
14. Martin Van Creveld, *Fighting Power* (Westport, Conn.: Greenwood Press, 1982). In a recent work that again demonstrates the significance of the small group, leadership, and military cohesion in combat, the author compares the internal personnel practices, policies,

and leadership of the Wehrmacht and the US Army in World War II and concludes that the Wehrmacht was a far superior army in its human capabilities.

15. U.S.G. Sharp and W.C. Westmoreland, *Report on the War in Vietnam* (Washington, DC: Government Printing Office, 1968), pp. 107-207.

16. The North Vietnamese Army included "Vietcong" Main Force Units formed from "Regroupees" who returned to the South after the defeat of the French and the failure to hold unifying elections. North Vietnamese control of Vietcong forces was firm in all areas, not only operationally but also including control of internal organization and policies within Vietcong Main Force Units. Soldiers from the North were always present in Vietcong units, and their numbers increased as the war continued.

17. Henderson, *Why the Vietcong Fought*.

18. Van Tien Dung, "On Experiences in Building the Revolutionary Armed Strength of Our Party." Taken from a paper presented at the American Political Science Association Convention in San Francisco, September 1975; "The Political Role and Development of the Peoples' Army of Vietnam," by William S. Turley, Southern Illinois University, Carbondale, Ill., 1975.

19. Wm. Darryl Henderson, *Why the Vietcong Fought: A Study of Motivation and Control in a Modern Army in Combat* (Westport, Conn.: Greenwood Press, 1979), pp. 119-35.

20. One of the few analysts to consider the "human element" in assessing the opposing forces in the Falklands war was William T. Taylor, Jr., in an article on the Falklands war, *Christian Science Monitor*, 17 June 1982, p. 1.

21. Karl von Clausewitz, *On War*, trans. Michael Howard and Peter Paret (Princeton: Princeton University Press, 1976), p. 87.

22. Richard T. LaPiere, *A Theory of Social Control* (New York: McGraw-Hill, 1954), pp. 130-188.

23. Amitai Etzioni, *A Comparative Analysis of Complex Organizations* (New York: Free Press, 1975), p. 61.

24. Anthony Kellett, *Combat Motivation, The Behavior of Soldiers in Battle* (Boston: Kluwer, Nijhoff Publishing, 1982), p. 327.

25. Ibid., p. 330.

26. Ibid., p. 332.

27. Henderson, *Why the Vietcong Fought*, p. 72.

28. John H. Johns et al., *Cohesion in the US Military* (Washington, DC: National Defense University Press, 1984), p. 69.

Henderson, *Why the Vietcong Fought*, p. 73. Much contemporary writing on leadership involves a redefinition of the phenomenon and then a suggested framework for analysis. To move beyond this, analysts must begin to relate and synthesize knowledge from other disciplines. This study attempts to relate a particular view of leadership to a broad body of knowledge about cohesion and its sources among soldiers in several different armies.

Many leadership approaches focus on the sources of the leader's power within the group. The categories of power used here rely primarily upon J.R.P. French, Jr., and B. Raven, "The Bases of Social Power," *The Study of Leadership* (West Point: USMA Printing Plant, 1970), pp. 7-3-7-17.

29. E.P. Hollander and R.G. Hunt, eds., *Current Perspectives in Social Psychology* (New York: Oxford Press, 1963), pp. 298-311.

30. John H. Johns et al., *Cohesion in the US Military* (Washington, DC: National Defense University Press, 1984), p. 69.

31. Alexander L. George, "Primary Groups, Organization and Military Performance," in *The Study of Leadership*, Vol. 11 (West Point: USMA Printing Plant, 1973), pp. 20-22--20-23.

32. John Biesanz and Mavis Biesanz, *Modern Society* (Englewood Cliffs: Prentice Hall, 1968), pp. 91-93.

33. George, "Primary Groups, Organization and Military Performance," *passim*.

34. Morris Janowitz, Letter, 22 February 1983.

35. Charles C. Moskos, Jr., "The American Combat Soldier in Vietnam," *Journal of Social Issues* 31 (1975): 27.

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H

OTHER FREE AND DEMOCRATIC SOCIETIES

Lieutenant-Colonel K.W. Watkin¹

The presence of one of our regular civilian judge-advocates in an army in the field would be a first-class nuisance.

W.T. Sherman: Memoirs, II, 1875²

1. INTRODUCTION

One method of assessing whether a proposed limit is justifiable is to consider "the legislative approaches taken in similar fields by other acknowledged free and democratic societies."³ Such an approach was followed by the Supreme Court of Canada in Ladouceur v. R⁴. The legislative approaches followed by other countries cannot be adopted as being definitive of the limits which should be justified under the Charter. As Mr. Justice McDonald states in Legal Rights in the Canadian Charter of Rights and Freedoms⁵: "foreign legislation cannot be "determinative" because it has not been and never will be scrutinized as to whether it offends that Charter right".⁶ However, an assessment of the use

¹ B.A. (Hon), LL.B., LL.M.

² R.D. Heinl, Jr., Dictionary of Military and Naval Quotations, (Annapolis: United States Naval Institute, 1966) at 168.

³ Re Southam Inc. and R (No.1) (1983), 3 C.C.C. (3d) 515 at 531 (Ont. C.A.).

⁴ (31 May, 1990) 20408 (S.C.C.).

⁵ D.C. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms (Toronto: The Carswell Co. Ltd., 1989).

⁶ Ibid.

of summary proceedings by other free and democratic societies will provide considerable insight into the necessity of those proceedings and the extent to which they are used in the military forces of those countries. It will also point to reform possibilities for the Canadian summary trial system.

The two countries which will be analyzed for comparative purposes are the United States of America and the United Kingdom.

It is significant that the military justice system in the United States, like that of Canada, has its roots in British military law. The assessment of the military justice system in the United States will indicate whether constitutionally guaranteed rights in that country have mandated a restricted or altered use of summary proceedings.

2. AMERICAN SUMMARY PROCEEDINGS

a. Background

The constitutional basis for the American military justice system is found in Article I, section 8 of the Constitution of the United States. That section authorizes Congress to "make Rules for the Government of the land and naval Forces". In a fashion similar to that adopted by the Supreme Court of Canada in MacKay v. R⁷ the United States Supreme Court interpreted the general grant of constitutional authority over military forces to include the power to set up a system of justice for the trial of military offenders which is independent of the judicial power found in the United

⁷ (1980), 54 C.C.C. (2d) 129 (S.C.C.)

States Constitution. In Parker v Levy⁸ the United States Supreme Court stated:

This Court has long recognized that the military is, by necessity a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." United States ex rel. Toth v Quarles, 350 U.S. 11, 17 (1955).⁹

Like the Canadian Forces the disciplinary process of all the armed services of the United States of America (eg. Army, Navy, Air Force, Marines and Coast Guard) are governed primarily by one statute: the Uniform Code of Military Justice [hereinafter the U.C.M.J.]. The U.C.M.J. includes offences which are the same or similar to offences under the ordinary criminal law as well as offences which are unique to military society.

Disciplinary infractions can be dealt with by means of non-punitive measures, non-judicial punishment and courts martial. Non-punitive measures are administrative in nature and closely parallel the administrative procedures available to Canadian military commanders.¹⁰ Non-judicial punishment and courts martial

⁸ 417 U.S. 733 (1974).

⁹ Ibid. at 743.

¹⁰ Manual for Courts Martial, United States, 1984, Part II, Rule 306 (c) (2) [hereinafter M.C.M.]. Administrative actions include corrective measures such as counselling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction or the administrative withholding of privileges.

are specifically provided for in the U.C.M.J. as the forums for the trial of breaches of that Code. There are three types of courts martial: the summary court martial, the special court martial and the general court martial.

The non-judicial punishment and summary court martial combined constitute the "summary" proceedings under the U.C.M.J. The special court martial and the general court martial represent the "formal" courts of the American military justice system. While there is no requirement that a military judge or legal counsel be appointed for a special court martial, they are invariably present at such a proceeding.¹¹ A military judge and legal counsel must be appointed for a general court martial.¹² In addition, there is an elaborate system of non-judicial review¹³ and an appeal¹⁴ process for the supervision of courts martial.

b. Non-judicial Punishment

Article 15 of the U.C.M.J. empowers military commanders to impose "non-judicial punishment". The basic framework for "non-judicial punishment" is provided in U.C.M.J., Article 15 and the Manual for Courts Martial, 1984, Part V. Each of the armed

¹¹ U.C.M.J. art. 26,27.

¹² Ibid.

¹³ The U.C.M.J. provides for review of courts martial by the convening authority (art. 66), a judge advocate (military lawyer) (art. 64) and in special circumstances by the Judge Advocate General of the service involved (art. 69).

¹⁴ There are two levels of appeal in the United States military appeal system. Those appellate courts are the Court of Military Review (U.C.M.J., art. 66) and the Court of Military Appeals (U.C.M.J., art. 67).

services have also exercised the discretion granted in the governing legislation to enact regulations providing procedures specifically tailored to the needs of that service. There are two basic types of Article 15 proceedings. All armed services use a "formal" Article 15 hearing, while the United States Army also uses a "summarized" Article 15 hearing. All Article 15 hearings are summary in nature and can be conducted by a commissioned officer or warrant officer who by virtue of that officer's grade (rank) and assignment exercises command over a military organization or prescribed territorial area. For example in the United States Army such command authority can include companies, troops, batteries, detachments, service schools, etc..¹⁵ The commander's discretion to impose an Article 15 punishment is personal and cannot be hampered by command influence. However, a superior commander can totally withhold or restrict the grant of authority to impose such punishments.¹⁶

As a general rule Article 15 punishment is only imposed for "minor" offences. There is no exact definition of a minor offence, however, it was held in United States v Moore¹⁷ that an offence carrying a penalty of confinement for more than one year or which permits imposition of discharge would equate to a felony and

¹⁵ Army Regulation 27-10, Chap. 3, Sect. II, para. 3-7(2). [hereinafter AR 27-10].

¹⁶ M.C.M., Part V, 2a.

¹⁷ 18 C.M.R. 311, 316-317 (1955). See also United States v Fretwell 29 C.M.R. 193 (1960). Guidance on what constitutes a minor offence is contained in M.C.M., Part V, 1.e.

therefore usually would not be considered to be a minor offence. The imposition of non-judicial punishment for any offence does not bar subsequent trial by court martial on that same offence.¹⁸

Unless an individual is attached or embarked on a vessel they may demand trial by court martial in lieu of Article 15 proceedings. This demand is the equivalent of a right to elect court martial under the Canadian military justice system. The demand for a trial can be made at any time prior to the imposition of punishment although the commander normally provides the opportunity to demand court martial at the beginning of the Article 15 hearing.¹⁹

The Commander is not bound by the rules of evidence and can consider any relevant evidence including unsworn statements and hearsay evidence. All Article 15 hearings are considered to be informal and non-adversarial.²⁰

The "formal" Article 15 hearing differs from the "summarized" Article 15 hearing in terms of the persons who are subject to those hearings, the punishments which can be imposed and the rights available during the hearing. "Formal" Article 15 hearings can

¹⁸ U.C.M.J. art. 15(f). See also United States v Fretwell, *supra*, note 16, and United States v Mahoney 27 C.M.R. 898 (1958).

¹⁹ For example see AR 27-10 Chap. 3, Sect. II, para. 3-18 d. The demand for court martial must be made within a reasonable time after notice of the right is given. M.C.M., Part V 3 b.(2).

²⁰ For example see AR 27-10, Chap. 3, Sect. II, para. 3-18 g (2). Article 15 hearings can be oral or written [see M.C.M., Part V, 4.c.(2)].

deal with cases involving commissioned officers, warrant officers and enlisted personnel. The punishments which can be awarded to officers and warrant officers are restrictions (similar to stoppage of leave²¹), arrest in quarters²² and forfeiture of pay. The punishments which can be awarded to enlisted personnel are restriction, extra duty, correctional custody (similar to confinement to ship or barracks²³), confinement on bread and water while embarked on a vessel, forfeiture of pay and reduction in grade. The amount of punishment which can be awarded to enlisted personnel depends upon the rank of the presiding officer. For example in the army a commander who has field grade (major or above) can award the punishment of correctional custody for a period of 30 days.

The rights which must be provided to the accused include the right to remain silent²⁴, the right to demand trial, the right to

²¹ Restriction is the least severe form of deprivation of liberty. The individual must remain within a specified area. Senior Officers Legal Orientation: Criminal Law Text (Charlottesville: The Judge Advocate General's School, 1990) at 4-8.

²² Arrest in quarters is reserved for commissioned officers and warrant officers. While on that status the individual may not exercise command authority. See Senior Officer's Legal Orientation, *supra*, note 20, at 4-9.

²³ Correctional Custody is the physical restraint of a person under close supervision, however, it is not considered to be confinement (equivalent of detention). Correctional Custody was "copied" from the punishment of confinement to ship or barracks found in Canadian military law. See Captain H.L. Miller, "A Long Look at Article 15" (1965) 28 Mil. Law Rev. 37 at 50. M.C.M. Part V 5(4).

²⁴ U.C.M.J., art. 31(b).

consult counsel²⁵, the right to request an open hearing, the right to a spokesperson, the right to call witnesses and the right to appeal. The record of proceeding for an Article 15 hearing (there is no transcript of the evidence) includes space to record that the accused acknowledges having been advised of those rights. There is no right to be represented by counsel at the hearing. An individual may be assisted by a spokesperson who can be an officer, warrant officer, enlisted person or a civilian lawyer. The involvement of the spokesperson is limited to the extent allowed by the commander.²⁶

The United States Army "summarized" Article 15 hearing is limited in jurisdiction to enlisted personnel. The punishments which can be imposed are extra duty, restrictions, oral reprimand and admonition. The rights of the person undergoing "summarized" Article 15 proceedings are limited in that there is no right to consult counsel or to be assisted by a spokesperson.²⁷

c. Summary Court Martial

The second type of summary proceeding is the summary court martial. It is the lowest level of trial court and is designed to dispose of less serious offences. The summary court martial may be

²⁵ United States Navy Regulations- Implementing and Supplementary Manual for Courts Martial, para 104a. does not provide for the right to consult counsel. If a lawyer is not involved then the non-judicial punishment cannot be entered at a subsequent court martial in order to obtain a higher punishment. AFR 111-9 6(j)(1) indicates the member should be encouraged to consult counsel.

²⁶ M.C.M., Part V 4. c.

²⁷ AR 27-10, Chap. 3, Sect II, para 3-16.

convened by any person who has authority to convene a general or special court martial, the commanding officer of a detached company, squadron or any other detachment of the army or air force or any commanding officer or other officer empowered by the Secretary of the service concerned.²⁸ The summary court martial presiding officer is not usually legally trained.

A summary court martial can only try enlisted personnel and only has jurisdiction over non-capital offences. The punishments which can be imposed are confinement for a period of one month (only to personnel in the grade E-4 and below), forfeiture of two-thirds of one month's pay and reduction in grade. The accused can object to any trial by summary court martial at which time the matter can be referred for trial by a special court martial or general court martial.²⁹ The opportunity to object to the summary court martial is usually provided to the accused prior to trial.³⁰ An accused is not entitled to be represented by counsel, however, the summary court officer may permit counsel to participate in the proceedings.³¹ Like the Article 15 hearing the summary court martial is considered to be non-adversarial.³²

d. Review and Appeal

²⁸ U.C.M.J., art. 24.

²⁹ U.C.M.J., art. 20.

³⁰ Senior Officers Legal Orientation, *supra*, note 20, Chap. 2 at 2-7.

³¹ Ibid.

³² Middendorf v. Henry 425 U.S. 25, 40 (1976).

Both Article 15 proceedings and summary courts martial are only subject to non-judicial review. Although the review of an Article 15 proceeding is called an "appeal" it is made to an officer within the chain of command. The person punished by an Article 15 hearing is advised the right to appeal to the presiding officer's next superior officer. Unlike a grievance under s. 29 of the National Defence Act this "appeal" does not go any higher up the chain of command. The person making the appeal can submit documents in support of the appeal. In certain cases the superior commander must forward the appeal for review by a legal officer.³³ The superior authority may suspend, remit, mitigate or set aside the punishment in whole or in part.³⁴

The findings and sentence of a summary court martial must be "reported" to the convening authority. The accused may also submit matters for consideration to that authority. The convening authority (or someone acting on behalf of the convening authority) can approve, disapprove, commute or suspend the sentence in whole or in part. In addition, that authority can dismiss any charge or specification or substitute a finding of guilty for a lesser offence.³⁵ The record of the court martial must also be reviewed by a judge advocate (legal officer).³⁶ It can also be reviewed,

³³ U.C.M.J., art. 15 .

³⁴ U.C.M.J., art. 15(d) and (e).

³⁵ U.C.M.J., art. 60.

³⁶ U.C.M.J., art. 64. There is no transcript of the proceedings.

under limited circumstances, by the Judge Advocate General.³⁷

e. General Considerations

Two other matters will be considered in respect of summary proceedings under American military law. Those matters are the legislated prohibition against command influence and the reliance placed on summary proceedings.

A unique feature to the American military justice system is the existence of a codified prohibition against command influence. Article 37 of the U.C.M.J. specifically prohibits any attempt to "coerce or by any unauthorized means, influence the action of a court martial or any other military tribunal or any member thereof...."³⁸ A breach of that article is punishable under military law.³⁹

In a manner similar to the Canadian Forces, the American military justice system relies heavily on summary proceedings to deal with disciplinary problems. For example, statistics published by the United States Army show that, in 1989, 95.4% of all disciplinary proceedings were Article 15 hearings while summary courts martial comprised 1.5% of those proceedings. Therefore it is evident that summary proceedings (Article 15 and summary courts martial) are an essential part of the justice system in the United

³⁷ U.C.M.J. art. 69(b).

³⁸ U.C.M.J., art. 37.

³⁹ U.C.M.J., art. 98.

States Army.⁴⁰

f. Judicial Support for Summary Proceedings

The United States Supreme Court has dealt with one constitutional challenge to the summary proceedings authorized under American military law. In Middendorf v. Secretary of the Navy et al. v Henry et al.⁴¹ that court ruled that five marines were not denied their constitutionally protected rights under the Fifth and Sixth Amendments to the Constitution of the United States (the right to due process and the right to counsel respectively) because they were not allowed to be represented by counsel at their summary courts martial.

It is not intended to enter into a detailed analysis of the Middendorf⁴² decision. While Mr. Justice LaForest, in R. v. Rahey⁴³ acknowledged that "it is natural and even desirable for Canadian Courts to refer to American constitutional jurisprudence in seeking to elucidate the meaning of Charter guarantees"⁴⁴ the Supreme Court of Canada has repeatedly warned that too close a comparison should not be drawn to the American constitutional

⁴⁰ Senior Legal Officers Orientation, supra, note 20 at 1-13. In 1989 there were 3985 courts martial of which 1365 were summary courts martial. During that same period there were 83,413 Article 15 hearings in the United States Army.

⁴¹ Supra, note 31 [hereinafter Middendorf].

⁴² Ibid.

⁴³ [1987] 1 S.C.R. 1045 (S.C.C.).

⁴⁴ Ibid. at 1075.

experience.⁴⁵ Concerns over a comparison between the Charter and its American counterpart have centred primarily over the lack of a parallel in the American Constitution to ss. 1 and 24 of the Charter. In the United States Constitution the lack of a provision similar to s. 1 means that "the balancing of the protection of rights and freedoms with the larger interests of the community, therefore must be done in the context of defining the right or freedom itself."⁴⁶ This is contrasted with the approach under the Charter of analyzing the right in question and then balancing that right separately with the "community" interests.⁴⁷

However, a common theme to both the American and Canadian approaches to analyzing rights under the respective constitutions is the application of "community standards" or "limits" which are balanced to ultimately determine if there has been a breach of a constitutionally guaranteed right. The requirements of the military, acknowledged by the United States Supreme Court in Middendorf⁴⁸, are also relevant to the question of the constitutionality of Canadian summary proceedings under the Charter.

⁴⁵ See Ref re S. 94(2) Motor Vehicle Act, *supra*, note , Videoflicks, *supra*, note, R v Smith, [1987] 1 S.C.R. 313 at 345 (S.C.C.), and Rahey, *supra*, note 42.

⁴⁶ Ref re Pub. Service Employee Rel. Act, [1987] 1 S.C.R. 313 at 345 (S.C.C.).

⁴⁷ For a complete review of the use of foreign constitutions and legislation in interpreting the Charter see McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms, *supra*, note 4, at 89-90.

⁴⁸ *Supra*, note 31.

Mr. Justice Rhenquist stated as follows:

In short, presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried. Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.⁴⁹

Mr. Justice Rehnquist also referred to Toth v. Quarles⁵⁰ where the United States had previously stated:

"[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.... [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."⁵¹

In acknowledging the need for a simple and expeditious form of justice, without the procedural complications of the civilian justice system, the United States Supreme Court recognized the very essence of the need in the military for "summary" proceedings.

⁴⁹ Ibid. at 45-46.

⁵⁰ 350 U.S. 11, 17 (1955).

⁵¹ Supra, note 31 at 46.

2. BRITISH SUMMARY PROCEEDINGS

a. Legislative Basis

The structure of the British military justice system has changed little since it constituted the disciplinary system applicable to the armed forces of Canada (prior to 1950). The principle legislation governing British military disciplinary proceedings are the Army Act 1955⁵², the Air Force Act 1955⁵³ and the Naval Disciplinary Act 1957⁵⁴. In keeping with its historical roots British military law has developed along two distinct paths. The law applicable to the Army and Royal Air Force has remained virtually identical, while naval law has continued to develop separately from those two services. Since the law applicable to the army and air force is practically identical reference will only be made to the Army Act 1955 and its subordinate legislation.

Both the army and naval law will be reviewed in general terms with respect to the overall structure of the disciplinary systems and more specifically in relation to those aspects of the summary proceedings which may potentially impact on Canadian military law.

b. Army Summary Proceedings

The legislation governing disciplinary proceedings in the Army provides for a two tiered system of military justice consisting of

⁵² (U.K.), 1955, 3 and 4 Eliz. 2, c. 18.

⁵³ (U.K.), 1955, 3 and 4 Eliz. 2, c. 19.

⁵⁴ (U.K.), 1957, 5 and 6 Eliz. 2, c. 53.

summary investigations⁵⁵ and courts martials. There are three types of summary investigations: investigations by subordinate commander⁵⁶, by commanding officer⁵⁷ and by an appropriate superior authority.⁵⁸ The types of courts martial which can try military personnel are the district court martial⁵⁹, general court martial⁶⁰ and field general court martial.⁶¹ There is a system of both non-judicial and judicial review which applies to court martial proceedings. The system of non-judicial review consists of confirmation⁶² and review proceedings⁶³, while judicial review is carried out in the form of an appeal to the Court Martial Appeal Court.⁶⁴

The features of army summary proceedings, which could impact on Canadian military law, will be assessed in terms of jurisdiction (over the person and the offence), the extended powers of

⁵⁵ In a fashion similar to the American hearing, the non-judicial punishment, the British legislation scrupulously avoids referring to summary proceedings as a trial.

⁵⁶ Army Act 1955, s. 82(3).

⁵⁷ Army Act 1955, s. 78.

⁵⁸ Army Act 1955, s. 79.

⁵⁹ Army Act 1955, s. 84.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Army Act 1955, s. 97.

⁶³ Ibid.

⁶⁴ Court Marital (Appeals) Act 1968, (U.K.), 1968, c. 20, s. 8.

punishment of commanding officers, the record of trial, the right to elect court martial and the grievance procedures.

Summary proceedings in the British Army are directed primarily towards enlisted personnel. A commanding officer can exercise summary powers over a non-commissioned officer or soldier⁶⁵, while a subordinate commander may try anyone below the rank of corporal⁶⁶. The only trying officer who has summary jurisdiction over officers is an appropriate superior authority who can try officers below the rank of lieutenant-colonel, and warrant officers.⁶⁷

Trying officers at summary proceedings are restricted primarily to hearing offences for which the maximum punishment provided in the governing legislation is imprisonment for two years or less.⁶⁸ Their jurisdiction over offences which are also offences under the civil law is restricted to less serious criminal offences.⁶⁹

As part of the pre-trial procedure a commanding officer has the power to order that the evidence be reduced in writing as a summary of evidence or an abstract of evidence. The summary of

⁶⁵ Army Act 1955, s. 77(2).

⁶⁶ Army Summary Jurisdiction Regulations, 1972., reg. 16(1) [hereinafter A.S.J.R.].

⁶⁷ Army Act 1955, s. 77(1).

⁶⁸ A.S.J.R., reg. 11 and 18.

⁶⁹ A.S.J.R., Schedule 1. eg. common assault, theft, destroying or damaging property, possession of a controlled drug, impaired driving, careless driving, etc..

evidence is prepared during a separate hearing where a written record of the evidence is prepared. A summary of evidence is ordered where the maximum punishment for the offence is death, the commanding officer considers it necessary in the interests of justice or where the accused requires in writing that a summary of evidence be taken.⁷⁰ In complicated cases the summary of evidence is prepared by a legal officer of the Army Legal Corps.⁷¹ The involvement of the legal officer usually occurs when it is considered that the matter may ultimately be dealt with by court martial. During the hearing the evidence against the accused is presented and the accused is given an opportunity to cross-examine any prosecution witness.⁷² The accused may call any witness in defence or testify in their own behalf. An accused or a defence witness cannot be cross-examined.⁷³ The record of the evidence may be in narrative form, however, any question put to a witness by the accused in cross-examination must be recorded verbatim.⁷⁴

An abstract of evidence consists of a signed statement, or a precis of the evidence of each witness necessary to prove the charge. The statements are provided to the accused who is then

⁷⁰ Rules of Procedure (Army), 1972., Rule. 7(2) [hereinafter R.P. (Army)].

⁷¹ R.P. (Army), Rule 9, Note 4 and E.J.D. McBrien, "An Outline of British Military Law", (1983) 22 Mil. Law and Law of War Rev. 10 at 33.

⁷² R.P. (Army), Rule 9(b).

⁷³ R.P. (Army), Rule 9(e) and (f).

⁷⁴ R.P. (Army), Rule 9(h).

given an opportunity to make a statement and provide an abstract of the statements of defence witnesses.⁷⁵

A summary or abstract of the evidence must be provided on any charge against an officer or warrant officer (for an investigation of the case by an appropriate superior authority) or in any other case remanded for trial by court martial.⁷⁶ If after the receipt of the summary or abstract of evidence the commanding officer decides to deal with the case summarily those documents can be used at the trial.⁷⁷ The summary of evidence appears to rarely requested by an accused or used as the basis of a trial by a commanding officer or subordinate commander.⁷⁸

The powers of punishment available to trying officers are restricted by both the Army Act 1955 and its subordinate legislation. A commanding officer can award the punishments of detention, a fine, severe reprimand, reprimand, reversion from acting rank, reversion to the ranks (for Lance Corporals only), stoppages of pay, an admonition, restriction of privileges and extra guard or piquet. The maximum power of punishment normally available to a commanding officer is 28 days detention. Detention can only be awarded to private soldiers. If the commanding officer does not hold field rank (major) then the punishment of detention

⁷⁵ R.P. (Army), Rule 10.

⁷⁶ R.P. (Army), Rule 13.

⁷⁷ R.P. (Army), Rule 11.

⁷⁸ Information provided in conversations with legal officers at the Directorate of Army Legal Services, United Kingdom.

cannot, except under special circumstances exceed 7 days detention.

In 1976, provision was made for an extension of the powers of punishment of a commanding officer from a maximum of 28 days to 60 days detention. This was done specifically to reduce the number of courts martial, ensure a speedier disposal of cases and allow the accused to avoid the stigma of being convicted by court martial.⁷⁹ A request for the use of these extended powers is made to higher authority prior to the commencement of the trial. Included with that request is a summary or abstract of the evidence where the accused has had an opportunity to put forward their case.⁸⁰ Even if approval for the use of the extended powers is granted the accused may veto the use of those powers if the accused indicates an intention to dispute "the material facts against him".⁸¹

There is no requirement for rules of evidence to be applied at a summary investigation. There is also no right to representation by legal counsel or an assisting officer. Regulations do provide that all soldiers be made aware of their rights as explained in a pamphlet "The Rights of a Soldier Charged with an Offence under the Army Act 1955". That pamphlet is also "to be made available to them in case of need."⁸² The information provided in the pamphlet sets out the pre-trial, trial and post-trial procedures in a plain

⁷⁹ U.K., "Special Report from the Select Committee on the Armed Forces Bill" (1976), at vi, para. 10.

⁸⁰ R.P.(Army), Rules 9 and 10.

⁸¹ R.P.(Army), Rule 11A(9). If the material facts are not disputed then the accused in effect pleads guilty.

⁸² Queen's Regulations, Reg. 5.203.

language format.

The right to elect court martial is provided by the commanding officer, subordinate commander and superior commander in every case where a finding of guilty will result in a financial loss or detention.⁸³ A right to elect court martial does not have to be given for a minor punishment such as restriction of privileges.⁸⁴ The punishment of restriction of privileges is similar to confinement to ship or barracks under Canadian military law.

As Professor P.J. Rowe noted in "Military Justice Within the British Army"⁸⁵ it is rare for a soldier to elect trial by court martial. That fact may not be particularly surprising since published statistics show that the lowest level of court martial, the district court martial, only has legal counsel or a judge advocate take part in the proceedings in about one third of the cases.⁸⁶ Regimental officers act as the prosecutor and defence counsel and the President of the court is often a serving officer

⁸³ Army Act 1955, s. 78 and s.79.

⁸⁴ Manual of Military Law, Army Act 1955, s. 78, note 21, at 368.

⁸⁵ (1981) 94 Mil. Law Rev. 99.

⁸⁶ In 1979 out of a total of 1068 general and district courts martial only 310 Judges Advocate were appointed to advise the president of the court. Since a judge advocate had to be appointed for the 32 general courts martial that means there were judges advocate present at only 26% of the district courts martial held in that year (see Mc Brien, "British Military Law", *supra*, note 70 at 43). In 1985, in the British Army, accused were represented by lawyers funded by the legal aid scheme (the primary means of paying for legal counsel) in 36% of all courts martial (P.J. Rowe, Defence: The Legal Implications (London: Brassey's Defence Publishers, 1987) at 20.

who is assigned as a permanent president for a posting.⁸⁷ Legally trained personnel are only involved in the most serious cases with the participation of civilian lawyers being controlled to a large extent by the power of the Directorate of Army Legal Services to authorize legal aid certificates.⁸⁸ Therefore, in electing court martial the accused may in effect be opting for a more formal "summary" proceeding which has greater powers of punishment than a presiding officer at a summary investigation.

The right to elect court martial is given after the presiding officer has heard the evidence, but before the finding and sentence is pronounced. The procedures for the conduct of summary proceedings are not significantly more detailed than those set out under Canadian military law. However, the Rules of Procedure (Army) 1972 specifically state that "the accused shall be allowed to cross-examine any prosecution witness".⁸⁹ A summary investigation having permission to award extended detention and an investigation by an appropriate superior authority require a record of proceeding outlining the procedural steps taken during the conduct of the hearing.⁹⁰ If an appropriate superior authority hears any evidence which was not included in the summary or abstract of evidence then

⁸⁷ See McBrien, "British Military Law", *supra*, note 70, at 21-22.

⁸⁸ *Ibid.* at 35-36.

⁸⁹ R.P. (Army), Rule 8(b).

⁹⁰ R.P. (Army), Sch. 2A and 3.

it must be reduced to writing and appended to the record of trial.⁹¹ Therefore, any accused who is an officer or warrant officer dealt with by an appropriate superior authority or a private soldier who may receive more than 28 days detention will have some record of the evidence relied on by the trying officer.

Finally, there is no appeal from summary proceedings. The route of "appeal" is by way of a redress of grievance.⁹² Section 115 of the Army Act 1955 provides for the review of summary proceedings. That review can be done as a result of a grievance, a periodic administrative review of unit records or automatically in the case of the use of the Extended Powers Procedure.⁹³

c. Naval Summary Proceedings

The Naval Discipline Act 1957 also provides for a two tiered system of justice: summary trials and courts martial. Summary jurisdiction is centred in the hands of the commanding officer⁹⁴ with varying degrees of delegated powers given to the executive officer⁹⁵, delegated officers⁹⁶, officers of the Day or Watch and other officers.⁹⁷ There are two types of courts martial: the

⁹¹ R.P. (Army), Sch. 3, para. 5.

⁹² Army Act 1955, s. 180 and s. 181.

⁹³ McBrien, "British Military Law", *supra*, note 70, at 32.

⁹⁴ Naval Discipline Act 1957, s. 49.

⁹⁵ Naval Disciplinary Regulations 1981, Reg. 5 [hereinafter N.D.R.].

⁹⁶ N.D.R., Reg. 4.

⁹⁷ N.D.R., Reg. 11.

disciplinary court⁹⁸ and the court martial.⁹⁹ For courts martial there is provision for non-judicial review¹⁰⁰ and an appeal to the Court Martial Appeal Court.¹⁰¹

Summary proceedings under naval law differ significantly from those provided for in the army legislation. The difference is primarily in terms of jurisdiction and powers of punishment available to the commanding officer. Only enlisted personnel (ratings) can be tried by summary trial. The powers of punishment available to a commanding officer include the power to award a sentence of dismissal with disgrace from Her Majesty's Service or a sentence of imprisonment or detention for any term not exceeding three months.¹⁰² A summary trial can try any offence under the Naval Discipline Act 1957 other than an offence punishable by a sentence of death or murder.¹⁰³ Unlike the Army and RAF the election for trial by court martial is provided at the commencement of the trial.

There is no requirement for a record of the trial beyond the charging document and the recorded results of the trial (finding and sentence). The accused has no right to be represented by a

⁹⁸ Naval Discipline Act 1957, s. 50. This court is only used "in time of war."

⁹⁹ Naval Discipline Act 1957, s. 53.

¹⁰⁰ Naval Discipline Act 1957, s. 70.

¹⁰¹ Courts Martial (Appeals) Act 1968, s. 8.

¹⁰² Naval Discipline Act, s. 49(3).

¹⁰³ Ibid.

lawyer. However, the accused may request the assistance of "any officer or other person in the offender's ship or establishment who is reasonably available."¹⁰⁴ There is no requirement that formal rules of evidence be applied at a summary trial. The procedure to be followed at a summary trial is not set out in detail, however, the accused "is to be given the opportunity to cross-examine all witnesses" called by the complainant.¹⁰⁵ Any rating (enlisted person) who might receive the punishment of imprisonment, dismissal, detention or disrating has the right to elect court martial.¹⁰⁶

There is provision for the approval of some punishments by means of a punishment warrant.¹⁰⁷ In addition, the accused can get a review of summary proceedings by submitting a complaint.¹⁰⁸

d. General Considerations

There are two general considerations which will be addressed with respect to the British military justice system. The first matter relates to the manner in which the punishment of detention is served. The second consideration involves the potential effect

¹⁰⁴ N.D.R., Reg. 42.

¹⁰⁵ N.D.R., Reg. 43.

¹⁰⁶ N.D.R., Reg. 24.

¹⁰⁷ N.D.R., Reg 28, 29, 30. There is also provision for the Officer of the Watch, or Day to find an accused guilty and then refer the offender to the Executive Officer for punishment. The Executive Officer in exercising summary powers can also find an accused guilty and then refer the case to the commanding officer for punishment.

¹⁰⁸ Naval Discipline Act 1957, s. 70.

of the European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter European Convention on Human Rights].

Unlike Canadian military law the British armed forces have maintained a distinction between detention and imprisonment. As was intended when detention was introduced in 1929 that punishment has continued to be regarded as a largely remedial sentence rather than a punitive one. As is indicated by H. Stanhope in The Soldiers: An Anatomy of the British Army¹⁰⁹ the emphasis for detention has been on retraining soldiers. In discussing the Military Corrective Training Centre at Colchester, England, Stanhope states:

There are two wings at Colchester. At "A" Wing the emphasis is on military training to prepare servicemen for their eventual return to their regiment or RAF station (the Royal Navy has a place of its own). The training is organized in three stages, each one easier than the last. Progress from one to the other depends upon good conduct. 'D' Wing takes all members of the Forces who are being discharged after release, and the idea is to rehabilitate them for civilian life.¹¹⁰

The Royal Navy has not been as involved in a rehabilitative programme, however, personnel receiving detention, and who are also going to be discharged, are sent to 'D' Wing at Colchester.¹¹¹

¹⁰⁹ (London: Hamish Hamilton Ltd., 1979).

¹¹⁰ Ibid. at 234. See also Q.R. Art 5.202 b(1), where it states that detention "served at a military corrective centre is intended to be remedial".

¹¹¹ Royal Navy Detainees are only sent to the Military Corrective Training Centre, Colchester if they are over 17 1/2 years of age and are sentenced to dismissal. All other detainees serve their sentence at the Royal Navy Detention Quarters, Portsmouth, England.

Although British law is not subject to a domestic written constitution, however, that does not mean it is free from the constraints of human rights legislation. The European Convention on Human Rights has the potential to have considerable impact on the manner in which summary proceedings are conducted in the British armed forces.

The European Convention on Human Rights has many provisions similar to those found in the Charter. In particular, Article 5 of that convention guarantees the right to liberty and security of the person, while Article 6 guarantees the right to a fair trial within a reasonable time. Unlike the Charter there is no limitation clause similar to s. 1. The limitations on each right are incorporated directly into the article setting out that right. In addition Article 15 of the Convention provides that in "time of war or other public emergency threatening the life of the nation" measures can be taken derogating from the obligations of the convention. However, since declarations of war have not, in recent history, been used on an international level, and the declaration of a "public emergency" carries with it considerable political baggage, it is unlikely that Article 15 will be used with any frequency. France is the only country that has entered a reservation concerning the non-application of Articles 5 and 6 of the European Convention on Human Rights to French military law dealing with discipline.¹¹² As a result the provisions of the

¹¹² Rowe, "British Military Justice", *supra*, note 84, at 120, note 92.

European Convention on Human Rights apply to the British military justice system.¹¹³ At the present time, however, no one subject to British military law has filed a complaint concerning their treatment under that law.

The European Court of Human Rights in Engel and others Case¹¹⁴ provides insight into the potential effect of that Convention on British summary proceedings. It also serves as an indication of how the Canadian Charter might impact on the Canadian military justice system.

The Engel¹¹⁵ case involved a challenge to Dutch military law that it breached the accused's rights under Articles 5, 6, 10 (freedom of expression), 11 (freedom of association) and 14 (equality). There were five applicants, all non-commissioned personnel, who were tried by their respective commanding officers. The penalties imposed were light arrest, aggravated arrest, strict arrest and committal to a disciplinary unit. Light and aggravated arrest were similar to the Canadian punishment of confinement to ship or barracks while strict arrest and committal to a disciplinary unit were much like detention. The applicants appealed to a "complaints" officer and then to the Supreme Military

¹¹³ It appears that no one in the British government referred the Convention to the Ministry of Defence for consideration of a reservation similar to that entered by France. The United Kingdom ratified the convention on March 8, 1951. See Rowe, "British Military Justice", ibid.

¹¹⁴ 1976 Council of Europe Yearbook of the European Convention on Human Rights (The Hague: Martinus Nijhoff, 1977) at 490.

¹¹⁵ Ibid.

Court which confirmed the decision of the commanding officer.¹¹⁶ In its judgment the European Court of Human Rights found that there was no breach of Articles 10, 11 or 14 of the convention. With respect to the deprivation of liberty (Article 5) the court held that the notion of liberty had to be analyzed in the context of military service. Light and aggravated arrest were not a deprivation of liberty when imposed on a member of the armed forces even though a similar punishment might be a deprivation of liberty when imposed on a civilian. Strict arrest and committal to a disciplinary unit were held to be a deprivation of liberty.¹¹⁷ However, Article 5(1)(a) of the European Convention of Human Rights permits detention if it results from a conviction by a competent court. The confirmation of the punishment of committal to a disciplinary unit by the Supreme Military Court was considered to be the imposition of the punishment de novo. Therefore, there was no breach of the Convention with respect to that punishment. The punishment of strict arrest was not saved by the appeal to the Supreme Military Court because, unlike committal to a disciplinary unit, there was no suspension of the operation of strict arrest on appeal. Therefore, the Supreme Military Court did not impose a "new" punishment with respect to strict arrest.¹¹⁸

In determining whether the applicant's right to a fair trial

¹¹⁶ Ibid. at 498.

¹¹⁷ Ibid. at 494.

¹¹⁸ Rowe, "British Military Justice", *supra*, note 84, at 123-124.

(Article 6) was breached the court embarked on an effort to distinguish a "criminal" charge from a purely "disciplinary" charge. The court had problems, similar to those outlined in Chapter 4, in determining what constituted a criminal as opposed to a disciplinary offence. It was finally determined that criminal charges are those which by their nature, duration or manner of execution are appreciably detrimental to an accused.¹¹⁹ The final determination of the fairness of the military proceedings rested on the hearing held by the Supreme Military Court. Those proceedings met the requirements of Article 6 except that they were held as in camera proceedings.

The significance of Engel¹²⁰, in terms of assessing potential deficiencies under Canadian and British law, rests primarily in the need which the European Court on Human Rights saw for a supervisory court in cases where detention is imposed. Rowe indicates that it may be necessary to withdraw all "criminal" jurisdiction from the commanding officer and remove the power to award detention at summary proceedings. Alternatively, a service member could "have the right of appeal, by the way of rehearing, to a court martial."¹²¹ Engel¹²² also indicates that minor deprivations of liberty may be more easily justified in military society than is tolerated in civilian society. Barring any major changes to the

¹¹⁹ Engel, *supra*, note 119 at 496.

¹²⁰ Ibid.

¹²¹ Rowe, "British Military Justice", *supra*, note 84 at 133.

¹²² *Supra*, note 114.

British military justice system (eg. development of an appeal by trial de novo) the defence to a challenge under the European Convention on Human Rights may have rely primarily on the right to elect court martial as a form waiver of rights under the Convention.

4. LESSONS LEARNED FROM FOREIGN LEGISLATION

The review of the legislation governing American and British summary proceedings provides considerable insight into the role, structure and procedures of such proceedings in the military forces of a free and democratic society.

It is evident that summary proceedings in both Britain and the United States of America are an essential part of the military justice systems of those two countries. In terms of jurisdiction, summary proceedings are directed at disciplinary problems involving junior officers (in the United States of America, Article 15 hearings apply to officers below the rank of the commander) and enlisted personnel. There are restrictions on the offences which can be dealt with by summary proceedings. Even in the Royal Navy, where the commanding officer has a broad jurisdiction over service offences, the summary trial cannot try offences with a maximum penalty of death.

Summary proceedings are conducted primarily by officers who are positioned directly within the chain of command. The procedure for the conduct of summary proceedings is largely left to the discretion of the trying officer. There is no requirement for the

application of rules of evidence, however, the accused is generally provided the right in the governing regulations to cross-examine adverse witnesses. There is no right to be represented by legal counsel at any summary proceeding. Instead, in all summary proceedings, except those employed by the British Army (and RAF), there is assistance provided by a commissioned officer or other member of the forces. In the British Army (and RAF) there is a regulatory requirement that an accused be informed of their rights and a pamphlet outlining those rights is made available to the accused.

In terms of powers of punishment the power to inflict a punishment involving a significant loss of liberty (detention or confinement¹²³) is restricted primarily to 30 days. The significant exception to this general rule is found in the Royal Navy (maximum punishment of 90 days imprisonment) and the British Army with the extended powers of punishment for commanding officers. It is interesting to note that the United States Navy does not seem to require similarly large powers of punishment to be exercised summarily by its commanders in order to maintain discipline. The disciplinary legislation of Britain and the United

¹²³ The American legislation does not provide for a punishment similar to detention. However, the United States armed forces have also used remedial programmes as part of their confinement process (see S. Brodsky & N. Eggleston ed., The Military Prison (Carbondale: Southern Illinois Press, 1970) although the United States Army changed the mission of its "Retraining Brigade" from one of primarily rehabilitating prisoners for return to military duty to preparation of inmates for transition to civilian life (see Senior Officers Legal Orientation, *supra*, note 20 at 7-11.

States of America also provides for punishments similar to confinement to ship or barracks (eg. restriction of privileges and corrective custody).

The right to elect court martial is an integral part of the summary proceedings of the armed forces of both countries. Unlike Canadian military law the right to elect court martial is generally provided to an accused at all levels of summary hearings. The American legislation provides the broadest right to opt for court martial, however, even the more restrictive approach under British military law provides the right to elect court martial when there is a potential financial penalty.

The governing legislation of neither country provides for a right of appeal to an independent and impartial court. Instead the review of summary proceedings is conducted by personnel within the military chain of command. The "appeal" process from Article 15 hearings is unique in that it is directly linked to the summary proceeding and is therefore easily identifiable and accessible to the offender. It also provides for an expeditious resolution of the review process in that the "appeal" is decided by the commander's next superior officer.

Finally, with respect to the challenges to summary proceedings, based on the Constitution of the United States and the European Convention on Human Rights, there has been a judicial recognition that the maintenance of discipline in military forces requires a separate type of legal proceeding which cannot guarantee the same liberties available to civilians.

I



AIDE-MEMOIRE
ON
CONDUCT OF SUMMARY TRIALS
FOR
COMMANDING OFFICERS & DELEGATED OFFICERS
CANADIAN FORCES

Revised Edition by:

Lieutenant-Colonel D. Couture
Director of Law/Defence and Training
Office of the Judge Advocate General
May 1991

INDEX

- PART I - CO's Initial Action Checklist
- PART II - Summary Trial Checklist - Delegated
Officer
- PART III - Summary Trial Checklist - Commanding
Officer
- PART IV - Assisting Officer - Responsibilities

The material contained in this booklet was originally the result of the hard work and dedication of the Office of the Deputy Judge Advocate, Petawawa and was published in April 1986.

Due to substantial amendments to the National Defence Act and QR&Os, the Aide Memoire was revised a few months after its publication. In December 1986, Lieutenant-Colonel D.B. Murphy, Director of Law/Defence and Training, published a revised edition of the Aide-Memoire.

This booklet is the 3rd edition of the Aide-Memoire on Conduct of Summary Trials for Commanding Officers & Delegated Officers in the Canadian Forces. Some necessary amendments have been made to the English version, in addition to a complete review of the French version.

We would recommend that you keep a copy of this Aide-Memoire along with your QR&O Volume II, while keeping in mind that it does not replace the former. If there are any discrepancies between this booklet and QR&O or the National Defence Act, the latter publications are to be followed.

For more information, do not hesitate to call your local AJAG or DJA offices.

Lieutenant-Colonel Denis Couture
Director of Law/Defence and Training

1 May 1991

PART ICO'S INITIAL ACTION CHECKLISTUNIT RESPONSIBILITIES

A. ARREST AND CUSTODY

1. QR&O Art. 105.11 Information on Arrest.
2. QR&O Art. 105.16 When Custody Advisable
3. QR&O Art. 105.18 Report of Custody to
105.19 Superior Authority
4. QR&O Art. 105.32 Conditions of Close Custody
105.34 Persons permitted to see a person
held in close custody controlled by
CO.
5. QR&O Art. 105.21 Subsequent Disposition of Persons
105.22 in Custody
105.23 May be released by CO or officer
designated by him.
6. QR&O Art. 105.35 Conditions of Open Custody
CO sets conditions of reporting,
duties and movement.

B. INSPECTION, SEARCH AND SEIZURE

1. QR&O Art. 19.76 Preserves right of CO or a non-
commissioned member authorized by the
CO to conduct normal military
inspections for the purposes of
maintaining standards of health,
hygiene, safety, security,
efficiency, dress and kit in any
controlled area or any quarters under
the control of the CF in accordance
with the custom and practice of the
service.

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2. QR&O Art. 19.77 New regulation authorizing search of persons subject to Code of Service Discipline and their personal property as condition of access to controlled property.
3. QR&O Art. 107.06 Authorizes the conduct of searches of quarters under the control of the CF including lockers and storage space or any personal property of persons subject to the Code of Service Discipline where it is believed on reasonable grounds that there has been either the commission of a service offence or something exists that is intended to be used to commit a service offence.
4. QR&O Art. 107.07 Authorizes CO to issue a Search Warrant for searches of locations and property mentioned in QR&O Art. 107.06.
5. QR&O Art. 107.08 Information for Search warrant.
6. QR&O Art. 107.095 Specimen Search Warrant.
7. QR&O Art. 107.10 Execution of Search Warrant.

C. PREPARATION OF CHARGES

1. QR&O Art. 106.01 Meaning of Charge - Officer or non-commissioned member laying charges must be authorized by CO to lay charges preferably authorized in writing i.e. all W.O.s and above.
2. QR&O Art. 107.04 A investigation shall be conducted after the charge is laid.
3. QR&O Art. 107.05 Mode of Investigation.
4. QR&O Art. 107.12 Preliminary Disposition of Charges - Only CO can dismiss charge.

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D. SUMMARY TRIALS

1. QR&O Art. 108.03 Officer to Assist Accused - Representation of accused. Rules if accused wants lawyer.
2. QR&O Art. 108.10 Delegation of a Commanding Officer's Powers
3. QR&O Art. 101.01 Commanding Officer - Detachment Commander
4. QR&O Art. 108.29 General Rules for Trial by Commanding Officer. Summary trial checklist.
5. QR&O Art. 108.31 Election to be Tried by Court Martial
6. QR&O Art. 108.27 Powers of Punishment
7. QR&O Art. 108.40 Punishment Warrants
8. QR&O Chap. 109 Application for Disposal of Charges by Higher Authority

E. POST-TRIAL

1. QR&O Art. 114.55 Power to Quash and Alter Findings and Sentence
2. QR&O Art. 114.15 Substitution of Findings
3. QR&O Art. 114.17 Illegal Punishments
4. QR&O Art. 114.25 Mitigation Commutation and Remission
5. QR&O Art. 114.27 Mitigation, commutation et remise de peines.
6. QR&O Art. 114.35 Authority to Suspend

PART II

SUMMARY TRIAL CHECKLIST

DELEGATED OFFICERS

TABLE OF CONTENTS

Checklist

- Annex A - List of Offences over which the Delegated Officer has Jurisdiction
- Annex B - Powers of Punishment of Delegated Officer

SUMMARY TRIAL CHECKLIST - DELEGATED OFFICERS1. PRE-TRIAL

- A. Ensure you are designated in writing as a delegated officers - (QR&O Art. 108.10(2)).
- B. Jurisdiction
- (1) Rank of accused. Must be a non-commissioned member below rank of Warrant Officer (QR&O Art. 108.10(1)).
- (2) Type of offence. See Annex A (QR&O art. 108.10(1)). These are the only offences over which you have jurisdiction. You can never offer the right to elect court martial.
- C. Review charge report to ensure your powers of punishment are adequate.
- (1) See Annex B (QR&O Art. 108.11).
- (2) Powers of punishment may be further limited by the Commanding Officer.
- D. If you do not have jurisdiction or you feel powers of punishment are inadequate refer to CO. (QR&O Art. 108.12).
- E. Ensure language election has been made.
- F. Ensure assisting officer has been appointed (QR&O Art. 108.03).
- G. Legal Counsel: See notes (C) and (D) to QR&O Art. 108.03.

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2. TRIAL

A. Ensure proper attendance:

- (1) accused,
- (2) assisting officer,
- (3) public.

B. Remember, if during the trial, you determine that your powers of punishment are inadequate or for any other reason lack jurisdiction, you do not pronounce a finding. Refer matter to CO or to delegated officer with greater powers of punishment. (QR&O - Art. 108.14).

C. Cause part one of the charge report to be read to the accused (QR&O - Art. 108.13(1)(a)).

D. Ask accused if he requires more time to prepare his case - grant reasonable adjournment. (QR&O - Art. 108.13(1)(b)).

E. Ask accused if he wishes to admit the particulars of the charge and advise him that any admissions will be accepted as proof without any further evidence being called. (QR&O - Art. 108.13(1)(c)).

F. Direct evidence be taken under oath or ask accused if he wishes evidence to be taken under oath. Solemn affirmation may be used instead of oath (QR&O - Art. 108.13(1)(d)).

- (1) OATH:

I swear the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth. So help me God.

- (2) AFFIRMATION:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.

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- G. Hear witnesses, each witness should testify separately in the absence of all other witnesses, and receive other relevant evidence. (e.g., Leave Forms, Affidavits, etc.) (QR&O Art. 108.13(1)(e)) - allow the accused (or assisting officer) to question those witnesses or challenge documents and other relevant evidence.
- H. Hear accused if he wishes to be heard and any other relevant witnesses and documentary evidence presented on behalf of the accused (QR&O Art. 108.13(1)(f)).
- J. Receive any other further relevant facts and hear any relevant submission by or on behalf of accused. (QR&O Art. 108.13(1)(g)).
- K. Unless case is referred to CO with either recommendation that charge be dismissed or inadequate powers of punishment, make finding (QR&O Art. 108.13(1)(h)).
- M. Hear evidence pertaining to sentence (QR&O Art. 108.15(2)).
- N. Pass sentence (See Annex B).

3. POST-TRIAL

- A. Ensure Part II of charge report is property completed.
- B. Cause entry to be made on accused's conduct sheet.
- C. Charge report is placed on accused's unit file except if found not guilty. However, regardless of outcome copy of charge report passed to next superior officer in matters of discipline for review purposes. (CFAO 114-2.
- D. If accused is found not guilty of all charges, the copy of charge report and all other information related to the charge in possession of trying officer is destroyed.
- E. If accused asks, remind him that appeal from summary trial is by redress of grievance.

ANNEX A
PART II

LIST OF OFFENCES OVER WHICH THE
DELEGATED OFFICER HAS JURISDICTION

<u>NDA ARTICLE #</u>	<u>DESCRIPTION OF OFFENCE</u>
83	Disobedience of Lawful Command,
84	Violence to a Superior Officer, except striking or using violence to a superior officer,
85	Insubordinate Behaviour,
86	Quarrels and Disturbances,
87	Resisting or escaping from arrest or custody,
89	Connivance at Desertion,
90	Absence Without Leave,
91	False Statement in Respect of Leave,
93	Cruel or Disgraceful Conduct,
95	Abuse of Subordinates,
96	False Accusations or Statements or Suppressing Facts,
97	Drunkenness,
98 a) et b)	Malingering, aggravating disease or infirmity or injuring self or another, except when on active service or under orders for active service,
100	Setting free without authority or allowing or assisting escape,
101	Escape from Custody,
102	Hindering arrest or confinement or withholding assistance when called on,
103	Withholding delivery over or assistance to civil power,

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A2

NDA ARTICLE #	DESCRIPTION OF OFFENCE
106	Disobedience of Captain's Orders (Ship),
107	Wrongful Acts in Relation to Aircraft or Aircraft Material, except when the act or omission is wilful,
108	Signing Inaccurate Certificates,
109	Low Flying,
110	Disobedience of Captain's Orders (Aircraft),
111(1)(c)	Permitting Vehicle to be Driven by Impaired Person,
112	Improper Use of Vehicles,
113	Fires, except when the act or omission causes fire or is wilful
116	Destruction, Damage, Loss or Improper Disposal,
117	Miscellaneous Offences,
118(2)	Contempt of Service Tribunals,
120	Ill-Treatment or Non-Payment of occupant or person on whom billeted,
121	Fraudulent Enrolment,
122	False Answers or False Information,
123	Assisting Unlawful Enrolment,
124	Negligent Performance of Duties,
125	Offences in Relation to Documents,
126	Refusing Immunization, Tests, Blood examination or Treatment,
127	Injurious or Destructive Handling of Dangerous Substances, except when the act or omission is wilful,
129	Conduct, Act or Neglect to the Prejudice of Good Order and Discipline.

ANNEX B
PART IIPOWERS OF PUNISHMENT OF
DELEGATED OFFICER

TABLE TO ARTICLE 108.11

A	B	C	D	E	F	G	H	I	J
Punishment Number	Authorized Punishment	Maximum Amount	Applicable to	Right to Elect Trial by Court Martial because of Nature of Punishment (See QR&O 108.31)	Approval Required (See QR&O 108.33)	Obligatory Accompanying Punishments	Optional Accompanying Punishments	Consequential Penalties	QR&O References
1	Severe Reprimand		NCOs only	No	No	Nil	3	Nil	
2	Reprimand		NCOs only	No	No	Nil	3	Nil	
3	Fine	\$200.00	All men below warrant officer	No	No	Nil	4, 5, 6 and 7	Nil	108.47
4	Confinement to ship or barracks	14 days	Privates only	No	No	Nil	Nil	Includes extra work and drill for an equal term	108.50
5	Extra work and drill	7 days	Privates only	No	No	Nil	Nil	Nil	108.48
6	Stoppage of leave	30 days	All men below warrant officer	No	No	Nil	Nil	Nil	108.49
7	Extra work and drill not exceeding two hours a day	7 days	Privates only	No	No	Nil	Nil	Nil	108.52
8	Caution		All men below warrant officer	No	No	Nil	Nil	Nil	108.53

PART IIISUMMARY TRIAL CHECKLISTCOMMANDING OFFICERTABLE OF CONTENTS

Checklist

- Annex A - Powers of Punishment of a Command Officer
- Annex B - List of offences which require a mandatory right of election
- Annex C - List of offences not requiring a mandatory right of election
- Annex D - Expanded Checklist
- Annex E - Record of Pre-Trial Procedure

CHECKLIST1. PRE-TRIAL

- A. Jurisdiction (QR&O Art. 108.25).
- B. Pre-trial - Custody - QR&O Chap 105 (if applicable)
- C. Ensure language election has been made
- D. Ensure Assisting Officer has been appointed
- E. Review Charge Report to determine the following:
 - (1) Powers of punishment are adequate (See Annex A),
 - (2) Determine if right to elect court martial is mandatory (See Annex B),
 - (3) Determine if you wish to give right to elect court martial, if not mandatory (See Annex C),
 - (4) Determine if you carried out or directly supervised investigation, and
 - (5) Determine whether you have issued search warrant on same matter.
- F. If you feel your powers of punishment are inadequate or it is necessary in interests of justice refer to higher authority.
- G. If a charge has been referred to you by a delegated officer you may:
 - (1) Dismiss the charge,
 - (2) Refer the charge back to delegated officer, or another delegated officer,
 - (3) Try the accused, if appropriate to do so and it is in your power,
 - (4) Refer the case to higher authority -

NOTE: if accused is warrant officer or above notify NDHQ/DPLS in accordance with CFAO 114-3.

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2. TRIAL

- A. Ensure proper attendance:
- (1) accused,
 - (2) assisting officer,
 - (3) public.
- B. Cause Part I of the Charge Report to be read to the accused.
- C. Right to elect court martial (See Annexes B and C).
- D. If right is given, give accused at least 24 hours to make decision.
- E. If at any subsequent stage of proceedings up until a finding is made you determine your powers of punishment are inadequate or it is necessary in interests of justice, refer to higher authority.
- F. Ask accused if he requires more time to prepare his case - Grant reasonable adjournment.
- G. Ask accused if he wishes to admit the particulars of the charge and advise him that any admissions will be accepted as proof without any further evidence being called.
- H. Direct evidence be taken under oath or ask accused if he wishes evidence to be taken under oath (use Bible).

OATH:

I swear that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth, so help me God.

AFFIRMATION:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.

- J. Hear witnesses and receive other relevant evidence (E.g., MP Reports, leave forms, affidavits, etc.). Witnesses should testify one at a time and in the absence of any other witness except the accused.

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- K. Allow accused (or assisting officer) to question those witnesses or challenge documents.
- M. Hear accused if he wishes to be heard and any other relevant witnesses and documentary evidence presented on behalf of accused.
- N. Determine finding.
 - (1) Dismiss the charge,
 - (2) Make a finding of guilty, not guilty, or
 - (3) Remand the charge to higher authority, anytime during trial before finding, if co even after hearing some or all of evidence concludes powers of punishment inadequate or in interests of justice.
- P. Hear evidence pertaining to sentence.
- Q. Pass sentence.
 - (1) where accused is an NCO and detention or reduction in rank is considered do not pass sentence - submit punishment warrant (QR&O Art. 108.33(3)).
 - (2) where accused is a private and detention in excess of 30 days is imposed submit punishment warrant for approval of period of detention in excess of 30 days (QR&O Art. 108.33(4)).
 - (3) Form of sentence (See NOTE B to QR&O Art. 108.33).

3. POST-TRIAL

- A. Ensure charge report is properly completed.
- B. Cause entry to be made on accused's conduct sheet.
- C. Ensure action taken on unit's personnel data transaction (if required).
- D. Charge report is placed on accused's unit file except if found not guilty. However, regardless of outcome copy of charge report passed to next superior officer in matters of discipline for review purposes.

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- E. If accused is awarded sentence of reduction of rank, NDHQ is notified by message. (CFAO 19-25, para 24).
- F. If accused is acquitted of all charges, the charge report and all other information related to those charges in possession of trying officer is destroyed.
- G. If accused is sentenced to detention in detention barracks ensure committal order is prepared and arrange financial support to accused's dependants.
- H. If accused requests, assign officer to assist him in preparing redress of grievance.

ANNEX A
PART IIIPOWERS OF PUNISHMENT OF A COMMANDING OFFICER

TABLE TO ARTICLE 108.27

A	B	C	D	E	F	G	H	I	J
Punishment Number	Authorized Punishment	Maximum Amount	Applicable to	Right to Elect Trial by Court Martial because of Nature of Punishment (See art. 108.31.)	Approval Required (See art. 108.33.)	Obligatory Accompanying Punishments	Optional Accompanying Punishments	Consequential Penalties	QR & O References
1	Detention	90 days	All non-commissioned members below warrant officer	Yes	Yes, except when 30 days or less imposed upon a non-commissioned member below rank of corporal	2 for NCOs only	3, and 6 when 14 days or less imposed, to a maximum of \$50 for NCOs and \$25 for non-commissioned members below the rank of corporal, and 9	(a) Forfeiture of pay for period of detention. (b) Possible loss for pension purposes of time spent in detention as specified in Parts I-IV of the Defence Services Pension Continuation Act and under Regulation 8 of the Canadian Forces Superannuation Regulations. (c) Possible forfeiture of entitlement to, or time toward, any medal awarded for good conduct. (d) Possible effect on pay field.	104.08
2	Reduction in rank	See article 104.09	NCOs only	Yes	Yes	Nil	Nil	(a) Possible effect on pay field. (b) Possible forfeiture of entitlement to, or time toward, any medal awarded for good conduct.	104.09
3	Forfeiture of seniority	3 months	Subordinate officers only	No	No	Nil	Nil	Nil	104.10
4	Severe reprimand		Subordinate officers and NCOs	No	No	Nil	6	Nil	
5	Reprimand		Subordinate officers and NCOs	No	No	Nil	6	Nil	
6	Fine	60% of monthly basic pay	Subordinate officers and all non-commissioned members below warrant officer	Yes if fine would exceed \$200.00	No	Nil	7, 8, 9 and 10	Nil	108.47 203.065

ANNEX A
 PART III

POWERS OF PUNISHMENT OF A COMMANDING OFFICER

TABLE TO ARTICLE 108.27 (Cont'd)

A	B	C	D	E	F	G	H	I	J
Punishment Number	Authorized Punishment	Maximum Amount	Applicable to	Right to Elect Trial by Court Martial because of Nature of Punishment (See art. 108.31.)	Approval Required (See art. 108.33.)	Obligatory Accompanying Punishments	Optional Accompanying Punishments	Consequential Penalties	QR&O References
7	Confinement to ship or barracks	21 days	Privates only	No	No	Nil	Nil	Includes extra work and drill for an equal term	108.50
8	Extra work and drill	14 days	Privates only	No	No	Nil	Nil	Nil	108.48
9	Stoppage of leave	30 days	All men below warrant officer	No	No	Nil	Nil	Nil	108.49
10	Extra work and drill not exceeding two hours a day	7 days	Privates only	No	No	Nil	Nil	Nil	108.52
11	Caution		Subordinate officers and all men below warrant officer	No	No	Nil	Nil	Nil	108.53

ANNEX B
 PART III

LIST OF OFFENCES WHICH REQUIRE A
 MANDATORY RIGHT OF ELECTION

The following are the offences for which a mandatory right of election must be given:

NDA ARTICLE #	DESCRIPTION OF OFFENCE
73	Offences by Commanders when in Action,
74	Offences by any Person in Presence of Enemy,
75	Offences Related to Security,
76	Offences Related to Prisoners of War,
77	Offences Related to Operations,
78	Offence of Being a Spy,
79	Mutiny With Violence,
80	Mutiny Without Violence,
81	Offences Related to Mutiny,
82	Advocating Governmental Change by Force,
84	Violence to a Superior Officer, but only where striking or using violence to a superior officer is charged,
88	Desertion,
92	Scandalous Conduct by Officers,
94	Traitorous or Disloyal Utterances,
98	Malingering, Aggravating Disease or Infirmity or Injuring Self or Another, but a & b only when on active service or under orders for active service,
99	Detaining Unnecessarily or Failing to Bring Up for Investigation,

.../B2

- B2 -

LDN ARTICLE #	DESCRIPTION OF OFFENCE
104	Losing, Stranding or Hazarding Vessels,
105	Offences in Relation to Convoys,
107	Wrongful Acts in Relation to Aircraft or Aircraft Material, but only when the act or omission is wilful,
111(1)a & b	Improper Driving,
113	Causing Fires, but only when the act or omission causes fire or is wilful,
114	Stealing,
115	Receiving,
119	False Evidence,
128	Conspiracy,
130	Offences Against Other Canadian Law,
132	Offences Against Foreign Law.

ANNEX C
 PART III

LIST OF OFFENCES NOT REQUIRING A MANDATORY RIGHT OF ELECTION

The following are the offences for which there is no mandatory right of election. However, the CO or superior commander must give a right of election where he considers that detention, reduction in rank or a fine in excess of \$200 may be appropriate should the accused be found guilty.

NDA ARTICLE #	DESCRIPTION OF OFFENCE
83	Disobedience of Lawful Command,
84	Violence to a Superior Officer, except striking or using violence to a superior officer,
85	Insubordinate Behaviour,
86	Quarrels and Disturbances,
87	Resisting or Escaping from Arrest or Custody,
89	Connivance at Desertion,
90	Absence Without Leave,
91	False Statement in Respect of Leave,
93	Cruel or Disgraceful Conduct,
95	Abuse of Subordinates,
96	Making False Accusations or Statements or Suppressing Facts,
97	Drunkenness,
98 a) & b)	Malingering, Aggravating Disease or Infirmary or Injuring Self or Another, except when on active service or under orders for active service,
100	Setting Free Without Authority or Allowing or Assisting Escape,
101	Escape from Custody,
102	Hindering Arrest or Confinement or Withholding Assistance when Called On,

.../C2

- C2-

<u>NDA</u> <u>ARTICLE #</u>	<u>DESCRIPTION OF OFFENCE</u>
103	Withholding Delivery or Assistance to Civil Power,
106	Disobedience of Captain's Orders (Ship),
107	Wrongful Acts in relation to Aircraft or Aircraft Material, except when the act or omission is wilful,
108	Signing Inaccurate Certificates,
109	Low Flying,
110	Disobedience of Captain's Orders (Aircraft),
111(1)c)	Permitting vehicle to be Driven by Impaired Person,
112	Improper use of Vehicles,
113	Fires, except when the act or omission causes fire or is wilful,
116	Destruction, Damage, Loss or Improper Disposal,
117	Miscellaneous Offences,
118(2)	Contempt of Service Tribunals,
120	Ill-Treatment or Non-Payment of Occupant or Person on Whom Billeted,
121	Fraudulent Enrolment,
122	False Answers or False Information,
123	Assisting Unlawful Enrolment,
124	Negligent Performance of Duties,
125	Offences in Relation to Documents,
126	Refusing Immunization, Tests, Blood Examination or Treatment,
127	Injurious or Destructive Handling of Dangerous Substances, except when the act or omission is wilful,
129	Conduct, Act or Neglect to the Prejudice of Good Order and Discipline).

ANNEX D
PART IIIEXPANDED CHECKLIST1. PRE-TRIAL

A. Jurisdiction (QR&O - Art. 108.25)

- (1) You may in your discretion try by summary trial a subordinate officer (officer cadet) or a non-commissioned member below the rank of Warrant Officer.
- (2) Any other officer or a non-commissioned member above the rank of Sergeant must be referred to higher authority (Chap. 109).
- (3) In order to try a subordinate officer you must be of the rank of Major or above (QR&O Art. 108.25(2)).
- (4) If you have participated in the investigation of or are a witness to the incident which led to charges or you have issued a search warrant in respect of the same matter, you should not be the trying officer and should refer the matter to another CO. (QR&O Art. 108.25(1.1)).

B. Ensure language election has been made.

- (1) If accused elects a Summary Trial in an official language other than that of the CO, you can do the following:
 - (a) refer the case to a CO fluent in the language of the trial elected by the accused, or
 - (b) have a translator available to translate evidence. The translator must be fluent and preferably a Senior NCO or an Officer,

.../D2

- D2 -

- C. Ensure assisting officer has been appointed (QR&O Art. 108.03).
- (1) Assisting Officer can be an officer or in exceptional circumstances a Senior NCO,
 - (2) Accused may request a specific Assisting Officer, but the final decision rests with the CO. A specific officer may not be available because of exigencies of the service or he is unwilling or unable to act in that capacity.
- D. Review charge reports to determine the following:
- (1) Powers of Punishment are adequate (See Annex A or QR&O Art. 108.27).
 - (2) Determine if Right to Elect Court martial is Mandatory (See Annex B or QR&O Art 108.31).
 - (a) Art. 108.31(2) sets out those service offences for which there is no discretion on the part of the CO as to whether the accused must be given the right to elect court martial. Generally these offences are considered to be the most serious military offences and include those Section 130 and 132 NDA offences which are also offences under civilian law.
 - (b) Care should be taken that a factual situation which falls within the provisions of one of the offences set out in sections 63 to 128 NDA is not charged under s.129 NDA. The danger of using s.129 NDA in such cases is that this might be an attempt to avoid giving an accused the right to elect court martial.
 - (c) If the accused elects summary trial and if found guilty he can be given any punishment up to and including a CO's full powers of punishment (Art. 108.27 or see Annex A).

.../D3

- D3 -

(3) Determine if you wish to give right to elect court martial if not mandatory (See Annex C) (Art. 108.31(1)(b)).

(a) If the accused is not charged with an offence listed in Art. 108.31(2) then you must consider whether you would give the accused a punishment greater than a fine of \$200. should he be found guilty. If that is the case you must (subject to the exception set out below) give the accused the right to elect court martial.

(b) If the accused is an NCO or subordinate officer, you can give him a reprimand or a severe reprimand without giving him the right to elect court martial even though these are higher on the scale of punishments than a fine (See Art. 104.02). These punishments result in an entry not being removed from a conduct sheet after one year of good behavior.

E. If you feel your powers of punishment are inadequate or it is necessary in the interests of justice refer to higher authority (Art. 108.28).

(1) If you feel that you may not have sufficient powers of punishment you may wish to phone the local AJAG or DJA to get advice on what range of punishments might be given at court martial.

(2) The "interests of justice" may require a referral to higher authority when the case involves complicated legal issues, but not simply because the accused wants a lawyer to represent him at the summary trial. (See QR&O Art. 108.33 NOTES (C) and (D)).

(3) If you determine a charge should be referred to higher authority, it is recommended that you contact the local AJAG or DJA. They may wish to review the wording of the charge and in fact in most cases will prefer to prepare the Charge Sheet and synopsis. AJAG/DJA Telephone nos. _____.

.../D4

- D4 -

F. If a charge has been referred to you by a delegated officer you may (QR&O Art. 108.24):

- (1) Dismiss the charge,
- (2) Refer the charge back to a delegated officer or another delegated officer,
- (3) Try the accused, if appropriate to do so and is in your power,
- (4) Refer the case to higher authority. (QR&O Chap. 109).

2. TRIAL

A. Ensure proper attendance - Accused, Assisting Officer, Public. (QR&O Art. 108.29(1) and (4)).

- (1) The following personnel shall be at the trial:
 - (a) accused,
 - (b) assisting officer.
- (2) The public, military and civilian, will be allowed to attend the trial to the extent that accommodation permits except:
 - (a) The accused requests that the public be excluded and you grant the request; or
 - (b) Classified information is being discussed and spectators do not have appropriate security clearance or need to know (exclusion can just be for portion of trial where matter is discussed).

B. Cause Part I of Charge Report to be read to the accused (QR&O Art. 108.29(1)(a)).

- (1) Correct any minor typographical errors which may appear on the Charge Report (e.g., SIN No. or spelling error) (See QR&O Art. 101.06 - deviation from procedure).

.../D5

- D5 -

- C. Right to elect court martial (QR&O Art. 108.31).
- (1) If the accused is charged with an offence listed in QR&O Art. 108.31(2) (See Annex B) then it is mandatory that he be given the right to elect court martial.
 - (2) If the offence is not listed in Art. 108.31(2) (See Annexes B and C) then you must extend the right to elect court martial if you are considering a punishment in excess of a \$200. fine (exception - a reprimand or severe reprimand can be given to an NCO or subordinate officer without extending the right to elect court martial).
 - (3) If you initially did not consider it necessary to extend the right to elect court martial for an offence not under QR&O Art. 108.31(2) (See Annex C) you can do so during the trial at any time prior to making a finding of guilty or not guilty if you determine you may want to give a fine in excess of \$200. reduction in rank or detention.
- D. If right to elect is given, adjourn trial for at least 24 hours (QR&O Art. 108.31(3)).
- (1) Ensure that the assisting officer understands his responsibility under QR&O Art. 108.03 to explain to the accused the differences between a summary trial and a court martial.
 - (2) If the accused refuses to elect he shall be deemed to elect court martial.
 - (3) If the accused elects court martial then he may withdraw that election at any time prior to the convening of a court martial (QR&O Art. 111.65). If a court martial is convened he may withdraw the election only with the approval of the convening authority. Once he has re-elected summary trial he has no further right to elect court martial. However, the CO may still refer the matter to court martial for his own reasons. QR&O Art. 108.31(5) states that once an accused "elects not to be tried by court martial, the commanding officer shall proceed with summary trial".

.../D6

- D6 -

- E. If at any stage in the proceedings you subsequently determine your powers of punishment are inadequate or it is necessary in the interests of justice, refer to higher authority.
- (1) As the trial proceeds you may discover that the evidence indicates that the act was of sufficient severity that your maximum punishment of 90 days is insufficient.
 - (2) You may also discover that the issues raised at the summary trial are either too complicated or of sufficient severity that they may be best dealt with at court martial.
 - (3) You should advise the accused of your decision and inform him that you are making an application for the charges to be dealt with by higher authority. At no time state to the accused that the charges are "dismissed". If you feel you must say something, simply say the charges are being put "on hold".
 - (4) You may wish to consult with the local AJAG/DJA concerning the referral to higher authority. AJAG/DJA telephone nos. _____.
- F. As the accused if he requires more time to prepare his case - Grant reasonable adjournment (QR&O Art. 108.29(1)(c)).
- G. Ask accused if he wishes to admit any particulars of the charge and advise him that any admissions will be accepted as proof without any other evidence being called (QR&O Art. 108.29(1)(d)).
- (1) This will allow the accused to narrow down some of the issues before the trier of fact if he wishes.
 - (2) An accused cannot plead guilty or not guilty, however, he could admit all of the particulars of the charge.

.../D7

- D7 -

H. Direct evidence be taken under oath or ask accused if he wishes evidence to be taken under oath (Use Bible). (QR&O Art. 108.29(1)(e)).

(1) OATH (use Bible)

I swear that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth, so help me God.

(2) AFFIRMATION

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.

(3) You could either have the oath or affirmation printed on a card for the witness to read or could ask the accused to repeat the words after you. The witness should place his hand on the Bible when he is saying the oath.

J. Hear witnesses and receive other relevant evidence (E.g., MP reports, leave forms, affidavits, etc.).

(1) If witnesses are not readily available you may consider receiving their evidence by other means such as:

- a. telephone (conference call),
- b. affidavit.

(2) Witnesses should testify one at a time and not hear each other's testimony. Of course the accused must be present for the whole trial.

(3) If you are hearing evidence under oath then a MP familiar with the case will have to swear as to the validity and accuracy of the MP report before it is relied upon as documentary evidence. It is recommended that MP reports only be relied upon when witnesses with first hand knowledge cannot be obtained.

.../D8

- D8 -

- K. Allow accused (or assisting officer) to question witnesses or challenge documents.
- M. Hear accused if he wishes to be heard and any other relevant witnesses and documentary evidence on behalf of the accused.
- (1) You do not have to hear evidence which you consider to be frivolous or vexatious.
 - (2) An accused must be able to fully answer the charges against him, but he should not be allowed to delay or confuse the proceedings by such means as attempting to call an inordinate number of witnesses who will testify to seeing the same events.
 - (3) The accused does not have to testify at any time during the summary trial and should first be asked if he wishes to do so before any questions are put to him. If accused declines to testify he cannot be questioned.
- N. Determine Finding - The following must be done (QR&O Art. 108):
- (1) Dismiss the charge,
 - (2) Make a finding of guilty, or
 - (3) Refer the charge to higher authority,
 - (4) The offence must be proved "beyond a reasonable doubt". This means you must have a decided conviction or a moral certainty that the accused committed the offence. If there is a reasonable doubt, then you must find the accused not guilty.
 - (5) In certain circumstances the accused can be convicted of an offence other than the one as alleged on the charge report. The following should be noted:
 - (a) QR&O Art. 103.62 Conviction of Related or Less Serious Offences.

.../D9

- D9 -

- (b) QR&O Art. 103.63 Conviction of Attempt to Commit an Offence.
 - (c) QR&O Art. 103.64 Special Finding.
- (6) If during the trial you determine your powers of punishment are inadequate or it is in the best interests of justice you may wish to refer to higher authority. This must be done before a finding is made.
- P. Hear evidence pertaining to sentence:
- (1) In addition to the evidence of immediate superiors who may be in attendance at the trial, it may be useful to review any course reports and letters of assessment which the accused may have on his file.
 - (2) It is common practice to have a brief adjournment to consider the sentence prior to passing the sentence.
 - (3) If you have any doubt with respect to the range of punishments commonly given at summary trial, you may wish to phone the local AJAG/DJA.
- Q. Pass sentence (QR&O Art. 108.33, 108.27, 108.40) (see also Annex A).
- (1) Where accused is an NCO and detention or reduction in rank is considered do not pass sentence. Submit punishment warrant.
 - (a) You must ensure that where you are contemplating a sentence of reduction in rank or detention for an accused who is an NCO, that you:
 - i. Do not pass sentence,
 - ii. Inform accused sentence contemplated requires approval by higher authority,
 - iii. Pass sentence when decision is made by higher authority.

.../D10

- D10 -

- (2) Where accused is a Private and detention in excess of 30 days is imposed submit punishment warrant for approval of period of detention in excess of 30 days.
- (a) When detention in excess of 30 days is passed for a Private you must:
- i. Pass sentence,
 - ii. Explain to accused period of detention in excess of 30 days requires approval,
 - iii. Commit the accused in accordance with Section 7 of Chapter 114,
 - iv. Apply for approval with punishment warrant.
- (3) Where it is impractical to prepare a punishment warrant and wait for its return prior to committing an accused, you should seek approval by telephone or message and then follow up that approval with a punishment warrant. When seeking approval by telephone or message you should pass on to the approving authority all the same information required in the punishment warrant so that the approving authority can properly exercise her discretion.
- (4) Before passing sentence it is suggested that you review the table to QR&O Art. 108.27 (See Annex A). It sets out the punishments applicable to various rank levels as well as optional and obligatory accompanying punishments and consequential penalties.

.../D11

- D11 -

3. POST-TRIAL

- A. Ensure charge report is properly completed.
- (1) You should ensure that if a right to elect is given to an accused the time and date of both the commencement and the end of the adjournment are clearly set out on the back of the Charge Report. It is recommended that the total time of adjournment be at least 10 minutes more than 24 hours in order to avoid any subsequent argument with respect to time.
 - (2) When signing the back of the Charge Report you should include both your rank and appointment (e.g., CO). This will make the review process by the JAG lawyer much easier.
 - (3) Ensure that you sign opposite every entry which is made on the Charge Report. If it is necessary to make an amendment to the front of the Charge Report, you should initial next to that amendment.
- B. Cause entry to be made on accused's conduct sheet.
- C. Ensure action taken on unit's personnel data transaction (if required).
- D. Charge Report is placed on accused's unit file except if found not guilty of all charges. However, regardless of outcome copy of Charge Report passed to next superior officer in matters of Discipline for review purposes.
- (1) All Charge Reports are reviewed by JAG officers. The purpose of that review is to ensure the following:
 - (a) That the procedural requirements such as jurisdiction, a 24 hour adjournment for an election, proper punishment, etc. are met; and

.../D12

- D12 -

- (b) That the charge as drafted discloses a service offence.
- (2) If the JAG officer determines there is an irregularity on the Charge Report, he will advise what action should be taken.
- E. If accused is awarded sentence of reduction of rank, NDHQ is notified by message.
 - F. If accused is acquitted of all charges, the Charge Report and other relevant info in possession of trial officer is destroyed.
 - G. If accused is sentenced to detention in detention barracks ensure committal order is prepared and arrange financial support to accused's dependants.
 - H. If accused requests, assign officer to assist him in preparing redress of grievance.
 - (1) There is no right of appeal as is provided for an accused in a court martial. The redress of grievance from a summary trial is staffed in the same manner as any other redress.

ANNEX E
PART III

RECORD OF PRE-TRIAL PROCEDURE

LANGUAGE

1. I, _____
(SIN) (RANK) (SURNAME & INITIALS)
_____, request that any disciplinary proceedings
(UNIT)
taken against me be conducted in the _____ language.

RECEIPT OF CHARGE REPORT

2. I have been informed that I have been charged under
Section(s) _____ of the NDA.

(Statement of Offence(s))

3. ASSISTING OFFICER (Delete subpara not applicable)

A. I request that _____
(SIN) (RANK) (NAME & INITIALS)
be appointed my Assisting Officer.

OR

B. I do not request that a specific individual act as
my Assisting Officer and agree with the appointment of

(SIN) (RANK) (NAME AND INITIALS)

4. I wish the trial to be open/closed to the public.

(Date of Signature)

(Signature of accused)

(Signature of witness)

- 4 -

- (3) the Military Rules of Evidence are applied only at a Court Martial;
- (4) an offender may appeal the legality of the finding or legality of the sentence of a Court Martial to the Court Martial Appeal Court; and
- (5) the only "appeal" from a Summary Trial is a Redress of Grievance.

g. Trial Procedure

The assisting Officer should brief the accused as to what takes place during a Summary Trial by reviewing with him QR&O Art. 108.13 and 108.29. The accused should be advised:

- (1) he has the right to admit any of the particulars of the charge(s) if he so desires, but that he is not required to make any admissions. It shall be pointed out to the accused that if he does make any admissions, they may be accepted as proof of any particular without any evidence being presented on that particular matter.
- (2) he has the right to have evidence taken under oath, rather than by way of documentary evidence;
- (3) he has the right to give evidence if he so desires, but that he need not testify;
- (4) he has the right to ask any witnesses relevant questions;
- (5) he has the right to request the presence of witnesses to testify on his behalf;
- (6) he has the right to request the Assisting Officer to assist him with the above; and
- (7) he has the right, should he be found guilty, to put forth such evidence as he wishes in respect to sentencing.

.../5

- 5 -

h. Determine whether to call witnesses on behalf of the accused.

j. Formulate Questions to be asked Witnesses

Prior to trial, prepare a written list of questions to ask certain witnesses. This way, they will not be forgotten during the Summary Trial.

k. Maximum and Minimum Punishments

The Assisting Officer must explain to the accused what possible punishments could be awarded should he be found guilty of the charge(s). The Assisting Officer must determine this, not only for a summary Trial, but also for a Court Martial, should the accused so elect. He does this by reviewing past punishments awarded, the accused's conduct sheet and his work record.

m. Mitigation Evidence

All Assisting Officers must be prepared in case the accused is found guilty as charged. The Assisting Officer should be prepared to call witnesses to testify as to the accused's character and performance. he should also review the accused's Pers' file.

5. An important thing to be remembered by the Assisting Officer is that all of the above must be done before the Summary Trial.

3rd Ed. June 1991

2900-Aide-Memoire
OPI - DLaw/Ops&T
OCI - DLaw/P&A

J

Statistics

Summary Trials

<u>Year</u>	<u>D.O.</u>	<u>C.O.</u>	<u>Sup Comd</u>	<u>Total</u>
1986	3749	1911	47	5707
1987	3077	1472	37	4586
1988	2744	1443	58	4245
1989	2837	1386	46	4269
1990	-----	-----	---	-----
1991	2250	912	51	3213

D.O.- Delegated Officer
 C.O.- Commanding Officer
 Sup Comd- Superior Commander

Statistics for 1990 were unreliable.

PERCENTAGE OF TOTAL DISCIPLINARY PROCEEDINGS

<u>Year</u>	<u>C.M.</u>	<u>S.T.</u>	<u>Total</u>	<u>% S.T.</u>
1986	124	5707	5831	97.8
1987	121	4586	4707	97.4
1988	95	4245	4342	97.8
1989	97	4269	4366	97.7
1990	74	-----	-----	-----
1991	72	3213	3285	97.8

K

RIGHTS

1. In making your decision whether to accept nonjudicial punishment, you are entitled to be provided with a brief summary of the information upon which the allegations of misconduct are based or you may request to examine the available statements and evidence.
2. If you demand trial by court-martial, charges could be preferred against you and referred for trial by a summary, special, or general court-martial. However you may not be tried by summary court-martial if you object to that proceeding. If charges are referred for trial by special or general court-martial, you may be tried over your objection. In a trial by court-martial, you have the right to be represented by a lawyer.
3. If you elect to accept nonjudicial punishment, you are entitled to make a full presentation in writing or in person or both. Your presentation may include matters of defense, mitigation, or extenuation. You do not have to give any information or say anything about the offense(s) alleged. If you do, it may be used against you in either this action or in a trial by court-martial.
 - (a) If you elect a personal presentation, you may appear before the commander who offered you nonjudicial punishment, except when such appearance is prevented by unavailability of the commander or by extraordinary circumstances, in which case you may appear before a person designated by that commander. You would be entitled to be informed orally or in writing of the evidence against you relating to the misconduct alleged, and be allowed to examine any documents or physical objects on which the commander intends to rely in deciding whether or how much punishment to impose. At a personal appearance: (1) you may have present relevant witnesses who are reasonably available and can be presented without legal process (that is, without subpoena or payment of witness fees); (2) you may present evidence; and (3) you may be accompanied by a person to speak on your behalf. However, there is no requirement that a lawyer be made available to accompany you. If you request the personal appearance be made open to the public, it will be, unless military exigencies or security considerations prevent. If you do not request that it be open to the public, your commander is authorized to open it anyway at his or her discretion.
 - (b) If you make either a written presentation appearance or both, the final decision as to whether to impose punishment and, if so, the amount of punishment will be decided only after the imposing commander considers the matters you present.
4. You must reply to this notification. Initial the appropriate blocks in paragraph 5, attach any written presentation you desire to be considered, and return it along with this notification within 3 duty days (72 hours) of the time and date you received it. If you desire more time, you must make a written request to your commander.

NOTES

1. If the space provided in Item 1 is insufficient for all offenses considered, insert the following after that item: "that you committed the offenses listed in Attachment 1," and state them in full in a "List of Offenses" appended as Attachment 1.
2. The member will indicate his or her decision by initialing the block in front of the option chosen. The member then will sign at the bottom of paragraph 5.
3. Offenses determined not to have been committed will be lined out and initialed by the commander. If the imposing commander decides not to impose any punishment, the member will be notified.
4. See Format of Nonjudicial Punishments, Attachment 4, AFR 111-9.
5. After being informed of the punishment, the member will elect whether or not to appeal by initialing the block in front of the option chosen. The member then will sign at the bottom of block 8. If the member appeals, this form, all written evidence considered by the imposing commander, and any written matters submitted by the member will be forwarded to the superior authority through the staff judge advocate by an indorsement to this form. The indorsement may state the imposing commander's rationale for imposing punishment and the commander's recommendation for action on the appeal.

If the member refuses to sign or make his or her elections in blocks 4, 5, 8, or 11, the commander, or his designee, will write "Member refused to sign (or elect)" in that block and sign and date underneath.

If additional space is needed, use 8 1/2 x 11" bond sheets, and identify the item expanded by the item number.

MAXIMUM PERMISSABLE PUNISHMENTS

If the commander imposing punishment is a:

1. General Court-Martial Convening Authority or General Officer and you are:
 - a. An officer - The commander may impose a reprimand; 30 days arrest in quarters or 60 days restriction; and, forfeiture of one-half of one month's pay per month for two months.
 - b. Enlisted - The commander may impose a reprimand; 30 days correctional custody or 45 days extra duties and/or 60 days restriction; forfeiture of one-half of one month's pay per month for two months; and, if serving in the grade of E-4 (Sgt) through E-9, reduction to the next inferior grade, or if serving in the grade of E-2 through E-4 (SrA), reduction to the lowest grade. (If serving in the grade of E-8 or E-9, reduction may be imposed only by MAJCOM commanders or commanders to whom promotion authority has been delegated (AW AFR 39-29).)
2. Special Court-Martial Convening Authority, Colonel or Lieutenant Colonel and you are:
 - a. An officer - The commander may impose a reprimand and 30 days restriction.
 - b. Enlisted - The commander may impose a reprimand; 30 days correctional custody or 45 days extra duties and/or 60 days restriction; forfeiture of one-half of one month's pay per month for two months; and, if serving in the grade of E-4 (Sgt) through E-7, reduction to the next inferior grade, or if serving in the grade of E-2 through E-4 (SrA), reduction to the lowest enlisted grade.
3. Major and you are serving in the grade of E-1 through E-7, the commander may impose a reprimand; 30 days correctional custody or 45 days extra duties and/or 60 days restriction; forfeiture of one-half of one month's pay per month for two months; and, if serving in the grade of E-4 (Sgt) through E-6, reduction to the next inferior grade, or if serving in the grade of E-2 through E-4 (SrA), reduction to the lowest enlisted grade.
4. Company Grade Officer and you are serving in the grade of E-1 through E-7, the commander may impose a reprimand; 7 days correctional custody or 14 days restriction and/or 14 days extra duties; forfeiture of 7 days pay; and, if serving in the grade of E-2 through E-5, reduction to the next inferior grade.

Restriction and extra duties may be combined to run concurrently, but the combination may not exceed the maximum imposable for extra duties

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SUMMARY TRIALS**PROCÈS SOMMAIRES****SECTION 1
GENERAL****SECTION 1
DISPOSITIONS GÉNÉRALES**

1. This order amplifies QR&O Chapters 106, 108 and 110.
2. A summary trial is a disciplinary proceeding under the Code of Service Discipline. It is a formal proceeding, but this formality should not be such that an accused person is inhibited from making full answer to the charges that are made against him. An accused person shall not be asked to plead to the charge but, rather, the evidence against the accused shall be produced and the accused shall then be given an opportunity to answer. The check lists in Annexes A, B and C have been prepared to assist a delegated officer, commanding officer (CO) or superior commander respectively, and to provide a guide as to the procedure to be followed.

1. La présente ordonnance complète les chapitres 106, 108 et 110 des ORFC.
2. Un procès sommaire est une procédure disciplinaire intentée en vertu du Code de discipline militaire. Il s'agit d'un procès à caractère formel, mais les formalités ne devraient pas empêcher l'accusé de réfuter les accusations portées contre lui. Un accusé n'enregistre pas de plaider; on doit plutôt déposer la preuve à l'appui de l'accusation et lui donner l'occasion de la réfuter. Les listes de contrôle qui figurent aux annexes A, B, et C ont été établies en vue d'aider tout officier délégué, commandant ou commandant supérieur et servent de guide en ce qui concerne la procédure à suivre.

REPRESENTATION OF THE ACCUSED**REPRÉSENTATION DE L'ACCUSÉ**

3. The assisting officer appointed for an accused shall be present at the summary trial, and shall be permitted to assist the accused during the trial to the extent requested by the accused (QR&O 108.03(5)).

3. L'officier désigné pour aider un accusé est présent au procès sommaire et est autorisé à l'aider dans la mesure jugée nécessaire par l'accusé (article 108.03(5) des ORFC).

DISCLOSURE**COMMUNICATION DE LA PREUVE**

4. All information contained in the investigation conducted pursuant to QR&O 107.02 shall be disclosed to the accused and the assisting officer as soon as possible after the accused has been charged and, in any event, not less than 24 hours prior to the commencement of the trial. Copies of all documentary evidence and all statements made in relation to the incident giving rise to the charge (including any statement of the accused) that may be used as evidence at trial, either for or against the accused, shall be disclosed, subject only to the need to protect national security or the interests of justice (eg, identity of informants).

4. Tout renseignement obtenu à la suite d'une enquête menée en vertu de l'article 107.02 des ORFC doit être divulgué à l'accusé et à l'officier désigné pour l'aider. La divulgation de ces renseignements se fait le plus tôt possible après que l'accusation a été portée. Ce délai ne peut en aucun cas être inférieur à 24 heures avant le début du procès. Sauf pour une question de sécurité nationale ou si l'intérêt de la justice l'exige, comme par exemple pour sauvegarder l'identité des informateurs, on doit divulguer, par la production d'une copie, toute la preuve documentaire et toute déclaration qui a trait à l'incident à l'origine de l'accusation, y compris toute déclaration de l'accusé, et qui est susceptible d'être utilisée au procès, que ce soit au détriment ou en faveur de l'accusé.

CHARGE REPORT

5. When a member is alleged to have committed a service offence, the charge report shall be prepared in accordance with QR&O Chapter 106, Section 2.

6. Care must be taken to ensure that charges are properly drafted. Where there is doubt as to the correct drafting of a charge or where the alleged offence is one that gives an accused the right to elect trial by court martial under QR&O 108.31 or 110.055, the advice of the local representative of the Judge Advocate General (JAG) should be sought.

7. The statement of offence should be worded as closely as possible to the specimen charges set out in paragraph 2 of each article in QR&O Chapter 103 pertaining to an offence.

8. The statement of particulars for each charge shall disclose only the facts alleged for one offence and shall include sufficient details to enable the accused to know exactly the offence with which he is charged (see QR&O 106.06 and 106.08).

9. Where a person appears to have committed a number of offences arising out of the same incident or set of circumstances, it is neither necessary, nor desirable, to charge the person with all possible offences. Only the most serious offences need be charged if the evidence in support of these offences will inform the service tribunal of the most serious aspects of the conduct of the accused at the time of their alleged commission.

DIRECT EVIDENCE

10. Direct evidence is preferred and, in this regard, where practicable, witnesses who have first hand knowledge should be called. Pursuant to QR&O 106.04(9), all witnesses expected to testify must be listed on the charge report. Where these witnesses are military, their service numbers (SN) and ranks should be included.

PROCÈS-VERBAL D'ACCUSATION

5. Lorsqu'un militaire est accusé d'avoir commis une infraction d'ordre militaire, le procès-verbal d'accusation est préparé en conformité avec la section 2 du chapitre 106 des ORFC.

6. Les chefs d'accusation doivent être rédigés soigneusement. Si l'on doute de l'exactitude du libellé d'un chef d'accusation ou si l'infraction présumée est une infraction qui donne à l'accusé le droit de choisir un procès par cour martiale en vertu de l'article 108.31 ou 110.055 des ORFC, on devrait demander conseil à un avocat militaire.

7. L'énoncé de l'infraction est rédigé en suivant d'aussi près que possible les modèles d'actes d'accusation contenus à l'alinéa 2 de chaque article du chapitre 103 des ORFC qui traite d'une infraction.

8. L'exposé des détails de chaque accusation ne mentionne que les faits qui correspondent à une seule infraction. L'exposé doit donner suffisamment de précisions pour permettre à l'accusé de connaître exactement la nature de l'accusation portée contre lui (voir les articles 106.06 et 106.08 des ORFC).

9. Lorsqu'une personne est soupçonnée d'avoir commis plusieurs infractions résultant d'un même incident ou du même concours de circonstances, il n'est pas nécessaire ni souhaitable de l'accuser de toutes les infractions que l'on peut lui reprocher. Seules sont portées les accusations les plus graves pourvu que la preuve à l'appui de ces accusations renseigne le tribunal militaire sur les aspects les plus sérieux de la conduite de l'accusé au moment de la perpétration de l'infraction.

PREUVE DIRECTE

10. Une preuve directe est préférable et à cet égard, lorsque c'est possible, on doit convoquer des témoins qui ont une connaissance personnelle des faits. Conformément à l'article 106.04(9) des ORFC, tous les témoins susceptibles de témoigner figurent au procès-verbal d'accusation. Lorsqu'il s'agit d'un témoin militaire, son numéro matricule (NM) et son grade sont aussi indiqués.

DOCUMENTARY EVIDENCE

11. Documentary evidence is admissible and, if such evidence is to be produced, the word "documentary" shall appear on the charge report followed by the nature of the document and the SN, rank and name of its maker or custodian, eg, "WITNESS — documentary — military police report — A12 345 678 Sgt A.B. Lafleur." Documentary evidence stating the alleged facts, such as a police report may be received only where the evidence at the summary trial is not taken under oath.

12. An officer who conducts a summary trial should use the appropriate check-list included as annexes to this order. Those check-lists are:

- a. Annex A — delegated officer;
- b. Annex B — commanding officer, or
- c. Annex C — superior commander.

OFFICIAL LANGUAGES

13. Pursuant to the *Official Languages Act*, the accused has the right to elect that the summary trial be conducted in English or French or in both official languages. Accordingly, before commencement of any disciplinary proceedings, the accused shall be asked whether he wishes the trial to be conducted in English or French, or in both official languages and the accused shall record his choice in writing in a certificate to be produced locally as follows:

I, _____
(SN) (Rank)

(Surname & Initials) (Unit)

hereby request that any disciplinary proceedings taken against me be in:

- a. the _____ language;

PREUVE DOCUMENTAIRE

11. La preuve documentaire est acceptée. Si une telle preuve est présentée, on indique dans le procès-verbal d'accusation l'expression «preuve documentaire» suivie d'une mention de la nature du document ainsi que le NM, le grade et le nom de son auteur ou de la personne à qui on a confié la garde du document, par ex. : «TÉMOIN — preuve documentaire — rapport de la police militaire — A12 345 678 sgt A.B. Lafleur». Lors d'un procès sommaire, la preuve documentaire, tel qu'un rapport de police, est acceptée à la condition que la preuve ne soit pas présentée sous serment.

12. L'officier chargé d'instruire un procès sommaire devrait utiliser la liste de contrôle appropriée. De telles listes sont annexées à la présente ordonnance comme suit :

- a. annexe A — officier délégué;
- b. annexe B — commandant;
- c. annexe C — commandant supérieur.

LANGUES OFFICIELLES

13. Selon la *Loi sur les langues officielles*, l'accusé a le droit de choisir que son procès sommaire soit instruit en français, en anglais ou dans l'une et l'autre de ces langues officielles. Par conséquent, avant le début de toute procédure disciplinaire, on doit demander à l'accusé s'il désire que son procès soit instruit en français ou en anglais, ou dans ces deux langues officielles. L'accusé doit consigner son choix sur le certificat ci-après, lequel est reproduit sur place :

Je soussigné, _____
(NM) (Grade)

(Nom et initiales) (Unité)

demande, par la présente, que toute procédure disciplinaire intentée contre moi se déroule dans :

- a. la langue _____;

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- b. both official languages, English and French.

(Strike out either a. or b.)

(Date of Signature)

(Signature of Witness)

(Signature of Accused)

14. Pursuant to the *Official Languages Act*, the officer hearing the proceedings must be able to understand the official language or official languages in which the proceedings are to be conducted without the assistance of an interpreter. Consequently, where the accused has chosen either English or French for the proceedings, an interpreter shall be provided for witnesses wishing to testify in the official language not chosen by the accused or in any other language. Where the accused has chosen both official languages for the proceedings, an interpreter shall be provided only for witnesses wishing to testify in a language other than one of the official languages.

**SECTION 2
SUMMARY TRIAL BY COMMANDING
OFFICER OR DELEGATED OFFICER**

PRE-TRIAL PROCEDURE

15. When an officer receives a charge report, the officer shall determine whether he has jurisdiction, pursuant to QR&O 108.12 or 108.28, and whether it is appropriate for that officer to conduct the summary trial, having regard to:

- a. if the officer is a delegated officer, the officer's authorization in writing given pursuant to QR&O 108.10(2);
- b. the rank of the accused;
- c. the offence charged; and
- d. the officer's powers of punishment.

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- b. les deux langues officielles, française et anglaise.

(Selon le cas, biffer le point a. ou b.)

(Date de la signature)

(Signature du témoin)

(Signature de l'accusé)

14. Selon la *Loi sur les langues officielles*, l'officier qui préside le procès doit être en mesure de comprendre, sans l'aide d'un interprète, la ou les langues officielles du procès. Par conséquent, si l'accusé a choisi que son procès soit instruit en anglais ou en français, les services d'un interprète doivent être fournis au témoin qui désire rendre son témoignage dans la langue officielle que l'accusé n'a pas choisie ou dans toute autre langue. Si l'accusé a choisi que son procès soit instruit dans les deux langues officielles, les services d'un interprète doivent être fournis seulement si le témoin qui doit rendre témoignage le fait dans une langue autre que l'une des deux langues officielles.

**SECTION 2
PROCÈS SOMMAIRE DEVANT UN
COMMANDANT OU UN OFFICIER DÉLÉGUÉ**

PROCÉDURE AVANT LE PROCÈS

15. L'officier qui reçoit un procès-verbal d'accusation évalue, en vertu des articles 108.12 ou 108.28 des ORFC, s'il peut juger l'accusé et s'il convient qu'il mène le procès sommaire, compte tenu des facteurs suivants :

- a. l'autorisation écrite donnée en vertu de l'article 108.10(2) des ORFC, dans le cas où il est officier délégué;
- b. le grade de l'accusé;
- c. l'accusation portée;
- d. ses pouvoirs de punition.

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16. Where a delegated officer refers a case to another officer, the delegated officer shall indicate in Part II of the charge report the action taken.

17. Before proceeding with the trial, a determination must also be made as to whether the accused has the right to elect to be tried by court martial. A delegated officer is not allowed to extend to an accused the right to elect trial by court martial.

TRIAL PROCEDURE

18. If it is determined that the accused has the right to elect to be tried by court martial:

- a. the accused shall be informed of that right;
- b. the time and date the accused was informed of that right shall be recorded on the charge report;
- c. the trial shall be adjourned for not less than 24 hours to enable the accused to decide whether to elect trial by court martial; and
- d. the election of the accused, and the time and date the accused makes his election shall be entered on the charge report.

19. In accordance with QR&O 108.03, an assistant officer shall be detailed to assist the accused notwithstanding that no request has been made by the accused.

20. The following procedures apply to a summary trial by a CO or delegated officer:

- a. before commencing a summary trial, the accused shall be brought before the officer conducting the trial, under escort. The accused should be marched to a place approximately two paces in front of and facing the officer conducting the trial;
- b. the trial shall commence with the accused and escort standing to attention during the formal reading of the charge. The accused shall be stood at ease during the hearing of evidence at the trial and be brought to attention when the finding is to be made;
- c. if a finding of not guilty is made, the escort and the accused shall be dismissed separately, but, if a finding of guilty is made on any of the charges, the accused shall be marched out under escort;

16. L'officier délégué qui renvoie une affaire devant un autre officier indique la prise de cette mesure dans la partie II du procès-verbal d'accusation.

17. Avant d'instruire le procès, on détermine si l'accusé a le droit de choisir d'être jugé par une cour martiale. Un officier délégué ne peut offrir à un accusé le droit de choisir d'être jugé par une cour martiale.

PROCÉDURE DU PROCÈS

18. Si l'on détermine que l'accusé a le droit de choisir d'être jugé par une cour martiale, les mesures suivantes sont prises :

- a. informer l'accusé de ce droit;
- b. consigner au procès-verbal d'accusation l'heure et la date auxquelles l'accusé a été informé de ce droit;
- c. ajourner le procès pour une période d'au moins 24 heures afin de permettre à l'accusé de décider s'il choisit d'être jugé par une cour martiale;
- d. indiquer au procès-verbal d'accusation, l'heure, la date et le choix de l'accusé.

19. En conformité avec l'article 108.03 des ORFC, un officier est désigné pour aider l'accusé même si ce dernier ne l'a pas demandé.

20. La procédure qui suit s'applique à un procès sommaire devant un commandant ou un officier délégué :

- a. avant de commencer un procès sommaire, l'accusé est escorté au pas militaire et conduit à une distance approximative de deux pas devant l'officier qui préside le procès en lui faisant face;
- b. le procès débute par la lecture officielle de l'accusation pendant laquelle l'accusé et son escorte se tiennent au garde-à-vous. L'accusé se tient au repos pendant la présentation de la preuve et se met au garde-à-vous lorsque le verdict doit être rendu;
- c. si un verdict de non culpabilité est rendu, l'accusé et son escorte rompent les rangs séparément. Par contre, si l'accusé est déclaré coupable d'une ou de plusieurs accusations, il est reconduit sous escorte;

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- d. the accused shall conform to the movements of the escort during the trial; the escort is responsible for the movements of the accused until the accused has been dismissed or marched out;
- e. the appropriate dress for a summary trial is the dress of the day. Head-dress shall be worn by the officer conducting the trial, by the adjutant if present, and by the escort and military witnesses. The head-dress of the accused shall be removed for the period of the trial; and
- f. a summary trial may be adjourned at any time during the proceedings. Such an adjournment may be useful in dealing with new developments or to enable the officer conducting the trial to consider an appropriate punishment in the event that a finding of guilty has been made.

SENTENCE

21. When determining the sentence after a finding of guilty has been made, the officer conducting the trial should take into account all the relevant circumstances and factors surrounding the offence and, particularly:

- a. that one of the purposes of punishment is the maintenance of discipline;
- b. the possible consequences of a sentence on the career of the offender having regard to the offender's —
 - (1) rank,
 - (2) length of service, and
 - (3) character, background and military record, including any previous convictions;
- c. that the proper punishment is the least that will maintain discipline;
- d. that, when a fine is to be awarded, it should be of a reasonable amount having regard to the pay of the offender, but at the same time of an amount that will impress upon the offender the gravity of the offence;
- e. provocation, premeditation or extenuating or aggravating circumstances;

- d. l'accusé doit au cours du procès se conformer aux mouvements de l'escorte; l'accusé est placé sous la responsabilité de l'escorte jusqu'à ce qu'il ait rompu les rangs ou ait été reconduit au pas militaire;
- e. la tenue de mise pour un procès sommaire est la tenue de jour. Le port de la coiffure est obligatoire pour l'officier qui préside le procès, l'adjutant s'il est présent, l'escorte et les témoins militaires. Quant à l'accusé, il doit la retirer pendant la durée du procès:
- f. un procès sommaire peut être ajourné à n'importe quel moment au cours des débats. Un ajournement peut être utile afin de se prononcer sur des faits nouveaux ou de permettre à l'officier qui préside le procès de décider d'une peine appropriée après le prononcé d'un verdict de culpabilité.

SENTENCE

21. À la suite du prononcé du verdict, l'officier qui préside le procès sommaire détermine la sentence en tenant compte des circonstances et des facteurs qui entourent la commission de l'infraction et, en particulier :

- a. le fait que l'un des buts de l'imposition d'une peine est le maintien de la discipline;
- b. les conséquences possibles de la sentence sur la carrière du contrevenant en ce qui concerne, à la fois :
 - (1) son grade,
 - (2) la durée de son service,
 - (3) sa réputation, ses antécédents et son dossier militaire, y compris ses condamnations antérieures;
- c. le fait que la peine appropriée est la plus légère pour assurer le maintien de la discipline;
- d. la préoccupation que lorsqu'une amende est infligée, elle doit être à la fois raisonnable, compte tenu de la solde du contrevenant, et suffisamment sévère pour que ce dernier prenne conscience de la gravité de l'infraction;
- e. la provocation, la préméditation et les circonstances atténuantes ou aggravantes;

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- f. the prevalence of the offence; and
- g. any time spent in custody awaiting trial.

Reference should be made to Notes B, C, D, E and F to QR&O 112.49.

22. In ordinary circumstances and unless the offence is of a serious nature, the sentence for a first offender should be lenient. It is essential to differentiate between offences involving calculated and premeditated misconduct and those attributable to youth, hot temper, sudden temptation or inexperience.

23. Immediately following completion of the trial, the officer who conducted the trial shall prepare, in synopsis form, a record of procedures and evidence of the trial, which shall include the reasons for conviction and sentence. This record shall be signed and dated by the officer.

POST-TRIAL PROCEDURE

24. After a sentence has been passed on an accused, the proper entry shall be made:

- a. in Part II of the charge report;
- b. in the conduct sheet of the accused; and
- c. by Unit Personnel Data Transactions.

25. The original charge report and the reasons for conviction and sentence shall be placed on the offender's unit file, and a copy of the charge report and the reasons for conviction and sentence shall be passed for review purposes to the next superior officer to whom the officer who hears the case is responsible in matters of discipline in accordance with CFAO 114-2, *Review, Reports and Returns of Summary Awards of Service Tribunals*.

26. Lodger units shall pass a copy of the charge report to the base commander for information.

27. Where an accused has been awarded a sentence of detention or reduction in rank, NDHQ/Director Personnel Career Administration Other Ranks (DPCAOR) shall be notified of the sentence by message.

- f. la fréquence de l'infraction;
- g. le temps que l'accusé a passé en détention avant son procès.

Il faut se reporter aux notes B, C, D, E et F de l'article 112.49 des ORFC.

22. Dans des circonstances ordinaires et à moins que l'infraction ne soit grave, une sentence clémente devrait être infligée pour une première infraction. Il s'avère essentiel de différencier les infractions qui impliquent une mauvaise conduite préméditée de celles qui sont attribuables à la jeunesse, au caractère vif, à une tentation soudaine ou à l'inexpérience.

23. À la fin du procès, l'officier qui l'a présidé doit préparer un compte rendu, sous la forme d'un sommaire. Un tel document contient les procédures et la preuve présentée au procès, y compris les motifs à l'appui de la condamnation et de la sentence. L'officier doit signer et dater ce document.

PROCÉDURE APRÈS LE PROCÈS

24. Après le prononcé de la sentence, on porte la mention appropriée dans :

- a. la partie II du procès-verbal d'accusation;
- b. la fiche de conduite de l'accusé;
- c. le Mouvement des données du personnel de l'unité.

25. Le procès-verbal d'accusation original et les motifs à l'appui de la condamnation et de la sentence sont versés dans le dossier d'unité du contrevenant. Une copie du procès-verbal d'accusation et des motifs à l'appui de la condamnation et de la sentence est transmise aux fins de révision au supérieur immédiat de l'officier qui a entendu la cause et dont il relève en matière de discipline, en conformité avec l'OAFC 114-2, *Révision, rapports et relevés des sentences par voie de procès sommaires des tribunaux militaires*.

26. Les unités hébergées sont tenues de transmettre au commandant de la base, à titre d'information, une copie du procès-verbal d'accusation.

27. Si la sentence rendue comprend la détention ou la rétrogradation, le Directeur — Administration des carrières (Personnel non officier) (QGDN/DACPNO) doit en être averti, par voie d'un message.

**SECTION 3
SUMMARY TRIALS BY SUPERIOR
COMMANDER**

PRE-TRIAL PROCEDURE

28. When application for disposal of a charge is to be made to a superior commander, a charge sheet shall be prepared in accordance with QR&O Chapter 106, Section 3. The charge sheet shall contain the same allegations as were made on the charge report.

29. A synopsis shall be prepared in accordance with QR&O 109.02. When preparing the synopsis, the evidence of each witness shall be the subject of a separate paragraph. Each paragraph shall start by identifying the witness by name and, where applicable, by the service number and rank of the witness. To ensure that the substance of each paragraph contains only the evidence to be given by the witness, the words "will state that" should follow the witness's name.

30. When the charge sheet and synopsis have been completed, QR&O 109.03, concerning the appearance of an accused before a CO, shall be complied with.

31. When a CO applies to higher authority for disposal of a charge, the CO shall, in accordance with QR&O 109.04, address the application to the next superior officer to whom the CO is responsible in matters of discipline. The next superior officer for disciplinary purposes may be ascertained through the appropriate Canadian Forces Organization Orders.

32. On receipt of an application for disposal of a charge, a superior commander shall determine whether he has jurisdiction pursuant to QR&O 110.04 to hear the charge, or whether it is appropriate for him to do so, having regard to:

- a. the rank of the accused;
- b. the offence charged; and
- c. his powers of punishment as set out in QR&O 110.03.

**SECTION 3
PROCÈS SOMMAIRE DEVANT UN
COMMANDANT SUPÉRIEUR**

PROCÉDURE AVANT LE PROCÈS

28. Lorsqu'une demande de connaître d'une accusation est faite à un commandant supérieur, on prépare un acte d'accusation en conformité avec la section 3 du chapitre 106 des ORFC. L'acte d'accusation contient les mêmes allégations que celles qui figurent au procès-verbal d'accusation.

29. Un sommaire doit être rédigé en conformité avec l'article 109.02 des ORFC. Dans la préparation du sommaire, le témoignage de chaque témoin fait l'objet d'un paragraphe distinct et commence par l'identification du témoin en indiquant son nom et s'il y a lieu, son numéro matricule et son grade. Afin de s'assurer que chaque paragraphe contient le témoignage d'un seul témoin, la mention «déclare que» est indiquée à la suite de son nom.

30. Lorsque l'acte d'accusation et le sommaire ont été établis, on doit se conformer aux dispositions de l'article 109.03 des ORFC, concernant la comparution d'un accusé devant le commandant.

31. Lorsqu'un commandant demande à l'autorité supérieure de connaître d'une accusation, il est tenu d'adresser cette demande au supérieur immédiat dont il relève en matière de discipline conformément à l'article 109.04 des ORFC. On peut identifier le supérieur immédiat d'un commandant en matière de discipline en consultant l'ordonnance d'organisation des Forces canadiennes appropriée.

32. Sur réception d'une demande de connaître d'une accusation, le commandant supérieur évalue s'il peut juger l'accusé ou s'il convient qu'il entende la cause en conformité avec l'article 110.04 des ORFC, compte tenu des facteurs suivants :

- a. le grade de l'accusé;
- b. l'accusation portée;
- c. les pouvoirs de punition qu'on lui a attribués à l'article 110.03 des ORFC.

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33. A superior commander who receives an application for disposal of a charge shall also consider whether the case might be more conveniently handled by another officer having the powers and jurisdiction of a superior commander, and whether the case might be referred to that other superior commander in accordance with QR&O 109.05(1)(c)(iii).

TRIAL PROCEDURE

34. A superior commander shall conduct a summary trial in accordance with QR&O Chapter 110, and should use the check-list in Annex C.

POST-TRIAL PROCEDURE

35. When at the conclusion of a summary trial a finding of guilty has been made in respect of any charge, the superior commander shall pronounce sentence and cause an appropriate entry on the conduct sheet of the accused to be made.

36. The superior commander shall return the original conduct sheet to the accused's CO, who shall take the necessary action to effect the sentence.

37. The superior commander shall comply with CFAO 114-3, Conduct of Officers and Warrant Officers — Notification to NDHQ.

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33. Le commandant supérieur, qui reçoit une demande de connaître d'une accusation, examine si la cause est susceptible d'être mieux jugée par un autre officier ayant les pouvoirs et la juridiction d'un commandant supérieur et si la cause ne pourrait pas être confiée à ce commandant supérieur en conformité avec l'article 109.05 (1)(c)(iii) des ORFC.

PROCÉDURE DU PROCÈS

34. Un commandant supérieur instruit un procès sommaire en conformité avec le chapitre 110 des ORFC et devrait se servir de la liste de contrôle contenue à l'annexe C.

PROCÉDURE APRÈS LE PROCÈS

35. Lorsqu'au terme d'un procès sommaire un verdict de culpabilité est rendu à l'égard d'une accusation, le commandant supérieur est tenu de prononcer la sentence et de la consigner à la fiche de conduite de l'accusé.

36. Le commandant supérieur doit retourner la fiche de conduite originale au commandant de l'accusé afin qu'il prenne les mesures nécessaires à l'exécution de la sentence.

37. Le commandant supérieur doit se conformer à l'OAF 114-3, Conduite des officiers et des adjudants — Avis au QGDN.

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**SUMMARY TRIAL BEFORE
DELEGATED OFFICER —
CHECK-LIST**

**PROCÈS SOMMAIRE DEVANT UN
OFFICIER DÉLÉGUÉ
LISTE DE CONTRÔLE**

PRE-TRIAL PROCEDURE

1. Check for jurisdiction in respect of:
 - a. authority as a delegated officer (see QR&O 108.10);
 - b. rank of accused (below the rank of warrant officer);
 - c. offence (see QR&O 108.10, Note B) (note also in QR&O 108.31(2) the restrictions to certain offences in respect of the right to elect court martial); and
 - d. powers of punishment (see QR&O 108.11).
2. Ensure that an assisting officer has been appointed (see QR&O 108.03).
3. Ensure that disclosure of information has been granted.
4. Ensure that language election has been made and recorded.

TRIAL PROCEDURE — QR&O 108.13

5. The following procedure applies:
 - a. trying officer swears the following oath: "I swear that I will duly administer justice according to law without partiality, favour or affection. So help me God."; and
 - b. if the trying officer does not wish to swear an oath, the officer may make the following affirmation: "I solemnly affirm that I will duly administer justice according to law without partiality, favour or affection."
6. Cause Part 1 of charge report to be read.
7. Ask the accused whether more time is required to prepare his case, and grant any reasonable adjournment requested for that purpose.

PROCÉDURE AVANT LE PROCÈS

1. Vérifier la juridiction, compte tenu des éléments suivants :
 - a. les pouvoirs en tant qu'officier délégué (voir l'article 108.10 des ORFC);
 - b. le grade de l'accusé (d'un grade inférieur à celui d'adjudant);
 - c. l'infraction (voir la note B de l'article 108.10 des ORFC) (voir aussi l'article 108.31 (2) des ORFC qui prévoit certaines restrictions en ce qui concerne le droit de choisir d'être jugé par une cour martiale);
 - d. les pouvoirs de punition (voir l'article 108.11 des ORFC).
2. S'assurer qu'un officier a été désigné pour aider l'accusé (voir l'article 108.03 des ORFC).
3. S'assurer qu'il y a eu communication de la preuve.
4. S'assurer que l'accusé a choisi la langue de son procès et que ce choix a été consigné par écrit.

**PROCÉDURE DU PROCÈS — ARTICLE 108.13
DES ORFC**

5. La procédure suivante s'applique :
 - a. l'officier qui préside le procès prête le serment suivant: «Je jure d'administrer dûment la justice en conformité de la loi, sans partialité, faveur ni affection. Ainsi, que Dieu me soit en aide.»;
 - b. l'officier qui préside le procès et qui ne désire pas prêter serment peut faire l'affirmation suivante: «Je déclare solennellement d'administrer dûment la justice, en conformité de la loi, sans partialité, faveur ni affection.».
6. Faire lire la partie I du procès-verbal d'accusation.
7. S'informer auprès de l'accusé s'il a besoin de plus de temps pour préparer sa cause et lui accorder tout délai jugé raisonnable à cette fin.

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8. Ask the accused if the accused wishes to admit any of the particulars of the charge or charges, and advise the accused that it is not required to make any admissions but, if the accused does so, the admission may be accepted as proof of any particular so admitted without further evidence being presented.

9. Either direct evidence to be taken on oath, or ask the accused if he wishes the evidence to be taken on oath, after informing the accused of his right to do so. The oath to be used is in QR&O 108.13(3)(a). When the oath is administered, both the witness and the trying officer shall stand with head—dress removed. The witness should hold the Bible in his right hand. If the witness objects to taking an oath, use the solemn affirmation prescribed in QR&O 108.13(3)(b).

10. Instruct witnesses to give their evidence.

11. Permit the accused or the assisting officer to question any witness if he so desires in accordance with QR&O 108.13(1)(f).

12. Permit the accused or the assisting officer to call any witness if he so desires in accordance with QR&O 108.13(1)(f).

13. Permit the accused to give evidence, if the accused so desires.

14. Determine finding (see QR&O 108.15) and if the finding is guilty, receive such evidence as the offender wishes to submit with respect to the sentence and any relevant evidence as to the character and previous conduct of the offender, determine and pronounce sentence and enter in Part II of charge report.

15. If finding is guilty, cause the appropriate entry to be made on conduct sheet (see CFAO 26-16, Conduct Sheets).

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8. Demander à l'accusé s'il désire admettre un ou des détails de toute accusation, l'aviser de sa liberté de faire une admission et lui préciser que toute admission peut être acceptée comme preuve de tout détail à l'égard de l'accusation en question et ce, sans preuve supplémentaire.

9. Ordonner que les témoignages soient rendus sous serment ou demander à l'accusé s'il désire que la preuve soit recueillie sous serment après l'avoir informé qu'il a le droit de demander que les témoignages soient rendus sous serment. La formule de serment à employer se trouve à l'article 108.13(3)(a) des ORFC. Lorsque le serment est prêté, le témoin et l'officier délégué se tiennent debout et ne portent pas la coiffure. Le témoin tient la Bible dans la main droite. Si le témoin refuse de prêter serment, on utilise la formule d'affirmation solennelle prescrite à l'alinéa 108.13(3)(b) des ORFC.

10. Demander aux témoins de témoigner.

11. Conformément à l'article 108.13(1)(f) des ORFC, permettre à l'accusé ou à l'officier désigné pour l'aider d'interroger tout témoin, s'il le désire.

12. Conformément à l'article 108.13(1)(f) des ORFC, permettre à l'accusé ou à l'officier désigné pour l'aider de faire comparaître des témoins, s'il le désire.

13. Permettre à l'accusé de témoigner, s'il le désire.

14. Déterminer le verdict (voir l'article 108.15 des ORFC) et s'il s'agit d'un verdict de culpabilité, recevoir la preuve que le contrevenant désire présenter en ce qui a trait à la peine et toute autre preuve pertinente qui concerne sa réputation et sa conduite antérieure. Déterminer la sentence et la consigner à la partie II du procès-verbal d'accusation.

15. S'il s'agit d'un verdict de culpabilité, faire l'inscription appropriée sur la fiche de conduite (voir l'OAFIC 26-16, Fiches de conduite).

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SUMMARY TRIAL BY COMMANDING OFFICER — CHECK-LIST

PROCÈS SOMMAIRE DEVANT UN COMMANDANT — LISTE DE CONTRÔLE

PRE-TRIAL PROCEDURE

1. Check for jurisdiction (see QR&O 108.25) in respect of:
 - a. previous involvement of CO in the case (see QR&O 108.25(1));
 - b. rank of accused (subordinate officer or a non-commissioned member below the rank of warrant officer);
 - c. powers of punishment (see QR&O 108.27);
 - d. gravity of offence; and
 - e. right to be tried by court martial (see QR&O 108.31).
2. Ensure that an assisting officer has been appointed (see QR&O 108.03).
3. Ensure that disclosure has been granted.
4. Ensure that language election has been made and recorded.

PROCÉDURE AVANT LE PROCÈS

1. Vérifier la juridiction (voir l'article 108.25 des ORFC), compte tenu des éléments suivants:
 - a. l'implication antérieure du commandant dans l'affaire (voir l'article 108.25 (1) des ORFC);
 - b. le grade de l'accusé (soit un officier subalterne ou un militaire du rang détenant un grade inférieur à celui d'adjudant);
 - c. les pouvoirs de punition (voir l'article 108.27 des ORFC);
 - d. la gravité de l'infraction;
 - e. le droit de choisir d'être jugé par une cour martiale (voir l'article 108.31 des ORFC).
2. S'assurer qu'un officier a été désigné pour aider l'accusé (voir l'article 108.03 des ORFC).
3. S'assurer qu'il y a eu communication de la preuve.
4. S'assurer que l'accusé a choisi la langue de son procès et que ce choix a été consigné par écrit.

TRIAL PROCEDURE — QR&O 108.29

PROCÉDURE DU PROCÈS — ARTICLE 108.29 DES ORFC

5. The following procedure applies:
 - a. trying officer swears the following oath: "I swear that I will duly administer justice according to law without partiality, favour, or affection. So help me God."; and
 - b. if the trying officer does not wish to swear an oath, the officer shall make the following affirmation: "I solemnly affirm that I will duly administer justice according to law without partiality, favour, or affection."
6. Cause Part I of charge report to be read.

5. La procédure suivante s'applique :
 - a. l'officier qui préside le procès prête le serment suivant: «Je jure d'administrer dûment la justice en conformité de la loi, sans partialité, faveur ni affection. Ainsi, que Dieu me soit en aide.»;
 - b. l'officier qui préside le procès et qui ne désire pas prêter serment peut faire l'affirmation suivante: «Je déclare solennellement d'administrer dûment la justice, en conformité de la loi, sans partialité, faveur ni affection.».
6. Faire lire la partie I du procès-verbal d'accusation.

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7. If QR&O 108.31 applies, advise the accused that he has the right to be tried by court martial. (Note the restrictions included in QR&O 108.31(2) in respect of certain *National Defence Act* (NDA) offences that are referred to in sections 84, 98(a) and (b), 107, 111, and 113.) Enter time and date on charge report.
8. If QR&O 108.31 applies, adjourn the trial for at least 24 hours.
9. If QR&O 108.31 applies, enter time and date of reappearance of the accused before the CO on the charge report.
10. If, after at least 24 hours, the accused elects to be tried by court martial, adjourn the case and follow the procedure set out in QR&O Chapter 109 (see QR&O 108.31(7)).
11. If, after at least 24 hours, the accused elects to be tried by summary trial:
- ask whether the accused requires more time to prepare the accused's case and grant any reasonable adjournment requested for that purpose;
 - ask if the accused wishes to admit any of the particulars of any charge in the charge report and advise the accused that it is not required to make any admissions but if the accused does so the admission may be accepted as proof of any particular so admitted without further evidence being presented; and
 - either direct that the evidence be taken on oath or inform the accused that the accused has the right to require that the evidence be taken on oath. The oath to be used is in QR&O 108.29(3)(a). When the oath is administered, both witness and CO shall stand with head-dress removed. The witness should hold the Bible in his right hand. If the witness objects to taking an oath, use the solemn affirmation in QR&O 108.29(3)(b).
12. Permit the accused or the assisting officer to question any witness if he so desires in accordance with QR&O 108.29(1)(g).
7. Si l'article 108.31 des ORFC s'applique, aviser l'accusé qu'il a le droit d'être jugé par une cour martiale (voir les restrictions pour certaines infractions de la *Loi sur la défense nationale* (LDN) qui sont comprises à l'article 108.31(2) et visées par les articles 84, 98 a) et b), 107, 111 et 113). Consigner cette information au procès-verbal d'accusation, ainsi que l'heure et la date auxquelles elle a été fournie.
8. Si l'article 108.31 des ORFC s'applique, ajourner le procès pour une période d'au moins 24 heures.
9. Si l'article 108.31 des ORFC s'applique, indiquer sur le procès-verbal d'accusation l'heure et la date de la nouvelle comparution de l'accusé devant le commandant.
10. Si, après une période d'au moins 24 heures, l'accusé demande à être jugé par une cour martiale, ajourner le procès et suivre la procédure énoncée au chapitre 109 des ORFC (voir l'article 108.31(7) des ORFC).
11. Si, après une période d'au moins 24 heures, l'accusé choisit d'être jugé sommairement :
- demander à l'accusé s'il a besoin de plus de temps pour préparer sa cause et lui accorder tout délai jugé raisonnable à cette fin;
 - demander à l'accusé s'il désire admettre un ou des détails de tout chef d'accusation énoncé au procès-verbal d'accusation et l'aviser qu'il n'est pas obligé de faire une admission, mais que s'il le fait, son admission peut être acceptée comme preuve de tout détail à l'égard du chef d'accusation en question et ce, sans qu'il soit nécessaire de présenter d'autre preuve;
 - ordonner que les témoignages soient rendus sous serment ou informer l'accusé qu'il a le droit de demander que les témoignages soient rendus sous serment. La formule de serment à employer se trouve à l'article 108.29(3)(a) des ORFC. Lorsque le serment est prêté, le témoin et le commandant se tiennent debout et ne portent pas la coiffure. Le témoin tient la Bible dans la main droite. Si le témoin refuse de prêter serment, on utilise la formule d'affirmation solennelle de l'article 108.29(3) (b) des ORFC.
12. Conformément à l'article 108.29(1)(g) des ORFC, permettre à l'accusé ou à l'officier désigné pour l'aider d'interroger tout témoin, s'il le désire.

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13. Permit the accused or the assisting officer to call any witness if he so desires in accordance with QR&O 108.29(1)(g).

14. Permit the accused to give evidence, if the accused so desires.

15. Determine finding and, if the finding is guilty, receive such evidence as the offender wishes to submit with respect to sentence and any relevant evidence as to the character and previous conduct of the offender (see QR&O 108.32).

16. If finding is guilty:

- a. if approval of sentence is not required, pronounce sentence and enter it in Part II of charge report; and
- b. if sentence proposed is subject to approval, comply with QR&O 108.33.

Notes: 1. If accused is a sergeant, master-corporal or corporal, do not pronounce sentence.

2. If accused is below the rank of corporal, pronounce sentence and, if necessary, explain approval procedure.

3. Prepare punishment warrant.

4. If punishment is approved, complete Part II of charge report and, if accused is above the rank of private, pronounce sentence.

17. If finding is guilty, cause the appropriate entry to be made on the conduct sheet (see CFAO 26-16).

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13. Conformément à l'article 108.29(1)(g) des ORFC, permettre à l'accusé ou à l'officier désigné pour l'aider de faire comparaître des témoins, s'il le désire.

14. Permettre à l'accusé de témoigner, s'il le désire.

15. Déterminer le verdict et, s'il s'agit d'un verdict de culpabilité, recevoir les preuves que le contrevenant désire présenter en ce qui a trait à la peine et toute représentation pertinente qui concerne sa réputation et sa conduite antérieure (voir l'article 108.32 des ORFC).

16. S'il s'agit d'un verdict de culpabilité :

- a. si l'approbation de la sentence n'est pas nécessaire, prononcer la sentence et la consigner à la partie II du procès-verbal d'accusation ;
- b. si la sentence prononcée doit être approuvée, se conformer à l'article 108.33 des ORFC.

Nota : 1. Si l'accusé est un sergent, un caporal-chef ou un caporal, ne pas prononcer de sentence.

2. Si l'accusé est d'un grade inférieur à celui de caporal, prononcer la sentence et lui expliquer les formalités d'approbation, si nécessaire.

3. Préparer un mandat de punition.

4. Si la peine est approuvée, remplir la partie II du procès-verbal d'accusation et, si l'accusé détient un grade plus élevé que celui de soldat, prononcer la sentence.

17. S'il s'agit d'un verdict de culpabilité, faire l'inscription appropriée sur la fiche de conduite (voir l'OAFIC 26-16).

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**SUMMARY TRIAL BEFORE
SUPERIOR COMMANDER —
CHECK-LIST**

PRE-TRIAL PROCEDURE

1. Check for jurisdiction in respect of:
 - a. authority as a superior commander (see QR&O 110.01);
 - b. rank of the accused (see QR&O 110.02);
 - c. powers of punishment (see QR&O 110.03); and
 - d. right to be tried by court martial (see QR&O 110.055).
2. Ensure all pre-trial procedures are completed in respect of:
 - a. charge sheet (see QR&O Chapter 106 Section 3);
 - b. synopsis (see QR&O 109.02); and
 - c. endorsement on synopsis (see QR&O 109.03, Note C).
3. Ensure that disclosure has been granted.
4. Ensure that language election has been made and recorded.

TRIAL PROCEDURE — QR&O 110.05

5. The following procedure applies:
 - a. trying officer swears the following oath: "I swear that I will duly administer justice according to law without partiality, favour or affection. So help me God."; and
 - b. if trying officer does not wish to swear an oath, the following affirmation shall be used: "I solemnly affirm that I will duly administer justice according to law without partiality, favour or affection."
6. Cause the charge sheet to be read.

**PROCÈS SOMMAIRE DEVANT UN
COMMANDANT SUPÉRIEUR — LISTE DE
CONTRÔLE**

PROCÉDURE AVANT LE PROCÈS

1. Vérifier la juridiction, compte tenu des éléments suivants :
 - a. les pouvoirs à titre de commandant supérieur (voir l'article 110.01 des ORFC)
 - b. le grade de l'accusé (voir l'article 110.02 des ORFC);
 - c. les pouvoirs de punition (voir l'article 110.03 des ORFC);
 - d. le droit d'être jugé par une cour martiale (voir l'article 110.055 des ORFC).
2. S'assurer que toutes les formalités précédant le procès ont été remplies en ce qui concerne :
 - a. l'acte d'accusation (voir la section 3 du chapitre 106 des ORFC);
 - b. le sommaire (voir l'article 109.02 des ORFC);
 - c. l'endos du sommaire (voir la note C de l'article 109.03 des ORFC).
3. S'assurer qu'il y a eu communication de la preuve.
4. S'assurer que l'accusé a choisi la langue de son procès et que ce choix a été consigné par écrit.

PROCÉDURE DU PROCÈS — ARTICLE 110.05

5. La procédure suivante s'applique :
 - a. l'officier qui préside le procès prête le serment suivant: «Je jure d'administrer dûment la justice en conformité de la loi, sans partialité, faveur ni affection. Ainsi, que Dieu me soit en aide.»;
 - b. l'officier qui préside le procès et qui ne désire pas prêter serment peut faire l'affirmation suivante: «Je déclare solennellement d'administrer dûment la justice, en conformité de la loi, sans partialité, faveur ni affection.».
6. Faire lire l'acte d'accusation.

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7. If QR&O 110.055 applies, advise the accused that he has the right to be tried by court martial (note the restrictions included in QR&O 110.055(2) in respect of certain NDA offences that are referred to in sections 84, 98(a) and (b), 107, 111 and 113), and remand the case for at least 24 hours. The date and time at which the accused is remanded are to be entered on the charge report, but not on the charge sheet.
8. If the accused elects trial by court martial, take action in accordance with QR&O 110.055(5) and QR&O 110.06(1).
9. If the accused elects to be tried by summary trial:
- ask whether the accused requires more time to prepare the accused's case and grant any reasonable adjournment requested for that purpose;
 - ask if the accused wishes to admit any of the particulars of any charge on the charge sheet and advise the accused that it is not required to make any admissions but if the accused does so the admission may be accepted as proof of any particular so admitted without further evidence being presented; and
 - either direct that the evidence be taken on oath (see QR&O 110.05(1)(e)) or inform the accused that the accused has the right to require that the evidence be taken on oath. The oath to be used is in QR&O 110.05(3)(a). When the oath is administered, both witness and superior commander shall stand with head-dress removed. The witness should hold the Bible in his right hand. If the witness objects to taking an oath, use the solemn affirmation in QR&O 110.05(3)(b).
10. Permit the accused or the assisting officer to question any witnesses called in accordance with QR&O 110.05 (1)(g).
11. Permit the accused or the assisting officer to call witnesses if he so desires in accordance with QR&O 110.05(1)(g).
12. Permit the accused to give evidence if the accused so desires.
7. Si l'article 110.055 des ORFC s'applique, aviser l'accusé qu'il a le droit d'être jugé par une cour martiale (voir les restrictions pour certaines infractions de la LDN qui sont comprises à l'article 110.055 (2) et visées par les articles 84, 98 a) et b), 107, 111 et 113). Ajourner le procès pour une période d'au moins 24 heures. La date et l'heure de l'ajournement sont consignées au procès-verbal d'accusation mais ne le sont pas à l'acte d'accusation.
8. Si l'accusé choisit d'être jugé par une cour martiale, prendre les mesures prévues aux articles 110.055 (5) et 110.06 (1) des ORFC.
9. Si l'accusé choisit d'être jugé sommairement :
- demander à l'accusé s'il a besoin de plus de temps pour préparer sa cause et lui accorder tout délai jugé raisonnable à cette fin;
 - demander à l'accusé s'il désire admettre un ou des détails de tout chef d'accusation énoncé à l'acte d'accusation et l'aviser qu'il n'est pas obligé de faire une admission, mais que s'il le fait, son admission peut être acceptée comme preuve de tout détail à l'égard du chef d'accusation en question et ce, sans qu'il soit nécessaire de présenter d'autre preuve;
 - ordonner que les témoignages soient rendus sous serment (voir l'article 110.05(1)(e)) ou informer l'accusé qu'il a le droit de demander que les témoignages soient rendus sous serment. La formule de serment à employer se trouve à l'article 110.05(3)(a) des ORFC. Lorsque le serment est prêté, le témoin et le commandant supérieur se tiennent debout et ne portent pas la coiffure. Le témoin tient la Bible dans la main droite. Si le témoin refuse de prêter serment, on utilise la formule d'affirmation solennelle de l'article 110.05 (3)(b) des ORFC.
10. Conformément à l'article 110.05(1)(g) des ORFC, autoriser l'accusé ou l'officier désigné pour l'aider à interroger les témoins.
11. Conformément à l'article 110.05(1)(g) des ORFC, permettre à l'accusé ou à l'officier désigné pour l'aider de faire comparaître des témoins, s'il le désire.
12. Permettre à l'accusé de témoigner, s'il le désire.

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13. Subject to QR&O 110.06 and 110.07, determine finding.
14. If finding is guilty, pronounce finding and receive such evidence as the offender wishes to submit with respect to sentence and any relevant evidence as to the character and previous conduct of the offender.
15. Pronounce sentence and endorse the charge sheet (see QR&O 110.08).
16. Cause the appropriate entry to be made on the member's conduct sheet (see CFAO 26-16).
17. Forward documents in accordance with CFAO 114-3.

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13. Déterminer le verdict, sous réserve des articles 110.06 et 110.07 des ORFC.
14. S'il s'agit d'un verdict de culpabilité, prononcer le verdict et recevoir la preuve que le contrevenant désire présenter en ce qui a trait à la peine et toute preuve pertinente qui concerne sa réputation et sa conduite antérieure.
15. Prononcer la sentence et la consigner à l'endos de l'acte d'accusation (voir l'article 110.08 des ORFC).
16. Faire l'inscription appropriée sur la fiche de conduite du militaire (voir l'O AFC 26-16).
17. Envoyer les documents en conformité avec l'O AFC 114-3.

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