

CANADIAN MILITARY LAW

SENTENCING UNDER THE *NATIONAL DEFENCE ACT*: PERSPECTIVES AND MUSINGS OF A FORMER SOLDIER

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The Canadian Charter of Rights and Freedoms recognizes the existence of the military justice system and its own tribunals operating in parallel to the Canadian criminal law system. Yet, there continues to be an absolute paucity of any reference works on military law and members of the Canadian military bar are seldom heard or read. This article aims at filling the void, at least in part. In writing this article, the author, who served for 34 years in general staff and command positions in the Canadian Forces, had two general purposes in mind: a) to present the general reader with a general overview of the history, customs, organization, and structure of the military personnel system, and b) to provide a reference work presenting a detailed view of the Code of Military Discipline, both in its contents and its workings. Finally, in light of the extensive changes in 1999 to the National Defence Act and the accompanying regulations, the author concludes by reviewing the nature and impact of each of the punishments that may be imposed by a military tribunal or the Court Martial Appeal Court of Canada to those who are subject to the Code of Service Discipline.

La Charte canadienne des droits et libertés reconnaît la co-existence d'un système de justice militaire avec ses propres tribunaux en parallèle avec le droit pénal canadien. Cependant, même si de nombreux livres ont décrit et interprété l'histoire militaire canadienne, il existe présentement aucun ouvrage sur le droit militaire et les praticiens de ce droit se font que très rarement entendre. Dans les pages de cet ouvrage, l'auteur vise à combler, du moins en partie, ce vide. L'auteur, qui a jadis servi dans les Forces armées pendant 34 ans et occupé divers postes de commandement et d'état-major, décrit l'organisation et la structure du personnel des Forces armées canadiennes, et y rassemble l'histoire, les coutumes et traditions du Code de discipline militaire telles qu'elles existent et qu'elles sont observées aujourd'hui. Finalement, à la lumière des changements sans précédent en 1999 de la Loi sur la défense nationale et des règlements qui en découlent, l'auteur présente un examen détaillé de chacune des punitions autorisées par le Code de service militaire et qui peuvent être imposées par soit un tribunal militaire ou la Cour martiale d'appel du Canada.

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I. Introduction

French Prime Minister Georges Clémenceau once said *military justice is to justice, what military music is to music*.² The form is similar, but the character is very different. The application of military law is sometimes

² As quoted in by C.M. Clode, *The Administration of Justice under Military and Martial Law*, (London: John Murray, 1874) at 1:

Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle

arbitrary and is heavily influenced by situations because it places the interests of service and group before the individual, and tends towards severe punishments.³

Yet a general recognition exists that military law is absolutely essential for the good government and effectiveness of armed forces, particularly during times of war or crisis when conventional sanctions no longer suffice. Lack of discipline portends potential defeat and disaster, conditions that can threaten the very fate and livelihood of a nation.⁴

Since the dawn of organized warfare, military history⁵ has been replete with examples of monarchs and field commanders exacting severe punishments on their soldiers to ensure blind obedience and iron discipline within the ranks of their armies.⁶ In the early days of our history, military law, as distinct from the ordinary law, only existed during war time.

order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it is to be intended that the soldiers should be kept in their duty and obedience. - *The Art of War*, by Louis de Gaya, 1678.

³ W. Winthrop, *Military Law and Precedents*. (Boston: Little, Brown and Company, 1896) provides at 5-11 an insightful review of the origins of the military law proper. While no written military codes remains from the times of the Greeks or Romans, some of the principal military offences familiar to our present law, as desertion, mutiny, cowardice, the doing of violence to a superior, and the sale or appropriation of arms, were recognized in their armies; and, of the punishments inflicted [...] such as decimation, [where regiments were concerned in misbehaviour before the enemy] denial of sepulture (in connection with the death penalty), maiming, exposure to the elements, taking of meals standing etc. have long ceased to be known, others such as dishonourable discharge, expulsion from the camp, labor on the fortifications, carrying of burdens, and servile or police duty, have come down to our day without substantial modification. [...] Of the written military laws of Europe the first authentic instance appears to have been those embraced in the Salic code [...] at the beginning of the fifth century [...] The date of the first French ordinance of military law is given as 1378, the first German *Kriegsartikel* are attributed in 1487. [...] The Articles of War of the Free Netherlands of 1590, [...] the elaborate Articles of Gustavus Adolphus framed in 1621, the Regulations of Louis XI, the Articles and Regulations of Czar Peter the Great of 1715 [...] and the Theresian penal code of the Empress Maria Theresa of 1768...

⁴ C. Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia*. (Vancouver: UBC Press, 1999) at 3.

⁵ In the Byzantine era, the main elements of Charlemagne's military system were contained in a series of five imperial ordinances, issued between 803 and 813, which were a form of field-service regulations. In these, Charlemagne prescribed the duties of vassals in preparing forces to be raised on call; the property basis for military call-ups of individual soldiers; the organization of units; the weapons, armour and equipment to be carried by each man and to be brought with each unit; lists of punishments for common offences, etc. R.E. Dupuy and T.N. Dupuy, *The Encyclopedia of Military History: from 3500 B.C. to the present* (Toronto: Fitzhery & Whiteside, 1970) at 209.

⁶ Sun Tzu's essays on the *Art of War*, written in China more than a thousand years ago, as translated by Samuel Griffith, *Sun Tzu: The Art of War*. (New York: Oxford University Press, 1973) at 35 tells us that in China, commanders who retreated without orders were

The general levy of Anglo-Saxon days (from which our militia has descended) was organized and governed by the ordinary law of the land; and, in later days, the existence of feudal levies was based on the ordinary law dealing with the tenure of land. When war broke out and the troops were called out for service, they were governed, while in the field, by Ordinances or Articles of War made by the Crown, or by the Commander-in-Chief under authority delegated to him by the Crown. These Articles only remained in force so long as the war lasted; and when the troops were disbanded, their operation ceased. Thus, in time of peace, there was no Military Law in those days.[...] On the establishment of a standing army after the Restoration of 1660, the necessity for special powers to keep this force in "an exact state of discipline" soon became felt, and on April 3rd 1689 the first Mutiny Act was passed to punish mutiny and desertion.⁷

Until Napoleon's arrival on the scene,⁸ discipline was maintained in European⁹ and American¹⁰ armies by the threat of corporal and capital¹¹

executed. If a section retired and its leader remained to fight, the four who had abandoned him were summarily beheaded. If a brigade or column commander withdrew without orders, he lost his head.

⁷ B.M. Singer and R.J.S. Langford, *Handbook of Canadian Military Law* (Toronto: The Copp Clark Company Ltd., 1941) at 6-7.

⁸ That Napoleon was one of the greatest generals in history is unquestioned, probably second to none and ranking alongside Caesar, Frederick the Great, Gustavus Adolphus, Marlborough and Wellington.

⁹ In the Roman Army, punishments consisted of corporal punishment (*castigatio*) consisting of whipping or, the pillory, etc. The death penalty was a deterrent used against desertion, mutiny or insubordination. Other punishments included: reduction in rank (*gradus delectio*) or dishonourable discharge from service (*missio ignominiosa*), monetary fine (*pecunaria multa*), added duty (*munerum indictio*), relegation to an inferior service (*militiae mutatio*), extra fatigue in making men spend the night outside the camp walls. Perhaps the most gruesome punishment of all known to the Roman army was that of decimation where entire units were punished for mutiny and cowardice. It generally was applied to entire cohorts and meant that every tenth man, randomly chosen by a draw of lots, was killed by being flogged, clubbed or stoned to death by his own comrades. Disbandment of an entire legion was also a means by which to punish mutinous troops. George E. Thibault, ed., *The Art and Practice of Military Strategy* (Washington, D.C.: National Defence University, Washington, D.C., 1984) at 408. Also, see online at: <http://p.v.v.ntnu.no/~madsb/war/romanarmy/romanarmy02.php3>: *The Roman Army: General Organization in Gaul: Divisions; Infantry in the Legions*.

¹⁰ Straggling was a constant problem with troops in the U.S. Confederacy Army and a form of punishment favoured by General Winder was "bucking" which involved tying a man's hands together, slipping them over his bent knees, and then running a pole beneath the man's knees and over his arms. "He couldn't move from his bent-over position and he must stay this way for a day. But there was more. Commanders practiced "gagging" and also tied miscreants up by their thumbs." John Bowers, *Stonewall Jackson: Portrait of a Soldier* (New York: William Morrow and Company Inc., 1989) at 266.

¹¹ For instance, in 1862:

In a pause between unholy battles, [Stonewall Jackson] cracked down on four deserters. [...] Early in the afternoon his division was assembled in a tree-sided formation [...] The

punishment, either formal flogging (as in the British army¹² and US army)¹³, branding or marking,¹⁴ or extemporised beating and punching by officers and non-commissioned officers (NCOs) as practised in the Russian and some German armies.¹⁵

"In general, the common soldier must fear his officer more than the enemy."¹⁶ This frank avowal of Frederick the Great's guiding principle of leadership appears both in the *Cavalry Instructions* of 1763 and the *Political*

condemned were led blindfolded into the center under heavy guard and then placed in a kneeling position beside an open grave. Twelve sharpshooters stood at attention twenty paces away, half with loaded muskets, half with blanks. A lieutenant read the sentences, then shouted, "Ready, aim, fire!" And, the rifles exploded; sending the deserters toppling back into the pits. Next, under Stonewall's orders, the regiments marched past the graves... *Ibid.* at 267.

¹² In 1868, in the United Kingdom and in Her Majesty's foreign dominions, corporal punishment was abolished for offences on shore in time of peace. However, it could be awarded by a court martial for the following offences which took place at sea or on active service: mutiny, insubordination, desertion, drunkenness on duty or on the line of march, disgraceful conduct, or any breach of the articles of war but no sentence of corporal punishment could exceed 50 lashes. See: T.F. Simmons and T.F. Simmons, *The Constitution and Practice of Courts Martial with a Summary of the Law of Evidence* (London: John Murray, 1875) at 56-57 and at 315-321.

¹³ In 1775, a court martial could impose the punishment of "whipping, not exceeding thirty-nine lashes". In the military code of 1806, the maximum punishment was fifty lashes. (Flogging was abolished in 1861). During the Revolutionary War, this punishment was not infrequent. [...] In Valley Forge, March 25, 1778, a soldier, convicted of attempting to desert to the enemy, is sentenced to "receive 100 lashes, 50 per day, two days successively," and "to be well washed with salt and water after he has received his last fifty. The Commander-in-chief, (Washington), approves, and orders the execution of the sentence "to-morrow a.m. at the head of his regiment." *Military Law and Precedents*, *supra* note 3 at 668-670.

¹⁴ The marking of deserters with the letter "D", dating back to the Roman law was authorized by the British *Mutiny Act*. Later that Act also authorized the marking of offenders discharged with ignominy, with the letters "B.C.", (Bad Character). Other markings imposed by military courts have been "H D" for habitual drunkard, "M" for mutineer, "W" for worthlessness, "C" for cowardice, "I" for insubordination, "R" for robbery and "T" for thief. Branding was done with a hot iron, the marking with India ink or gunpowder, usually pricked into the skin or tattooed. See: *Military Law and Precedents*, *ibid.* at 671.

¹⁵ The U.S. Government has seen fit to include the following provisions in section 855, article 55 of Chapter 47 of the 10 U.S. Uniform Code of Military Justice: 855. ART. 55. *Cruel and Unusual Punishments Prohibited*. Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited. (10 August 1956, ch. 1041, 70A Stat. 56.)

¹⁶ See: Christopher Duffy, *The Army of Frederick the Great* (New York: Hippocrene Books, Inc., 1974) at 63. This principle of subordination submits the soldier to his officer, the officer to his commander, the colonel to his general and the body of generals as a whole to the commander of the army. On 21 June 1749 Frederick had issued a circular to the regimental chefs which put at their disposal the complete range of punishments without reference to higher authority. Blows with sticks and fists already passed without mention, as being part of

Testament of 1768.¹⁷ This sentiment was straight from Sparta, but Frederick was persuaded to make it his own from what he knew of more recent history. Self-respect and esprit de corps were useful in themselves, but in Frederick's view they were no substitute for the knowledge that the officer's sword and the NCO's spontoon were pointing at your back. The kind of discipline that Frederick desired was nothing short of "blind obedience".

The memoirs and journals of the time, particularly those of Frederick the Great's Prussian Army, bring back to life the experiences (some of them quite appalling) of what may be accomplished by an army that is held on its course by fear and constraint rather than inner leadership. In the scale of punishments under Frederick's leadership, were various degrees of arrest and imprisonment, and minor corporal punishments such as:

Chaining to bedsteads. The Eselreithe (riding a sharp-backed wooden horse), and the painful process of Krummschliessen by which alternate arms and legs were bound tightly together by leather straps. Incorrigible thieves were branded deep on the hand with an "S" (for Spitzbube, rogue) and turned out of the regiment, while men involved in desertion plots sometimes had their noses and ears cut off in addition to other punishments that came their way. The worst offenders of all were usually hanged or shot, though at Potsdam in 1755 a private in the Garde who had killed an NCO was 'broken on the wheel, beginning with the lower limbs, 'so as to produce all the greater impression on the others'.¹⁸

Of all means of punishments, the Prussian authorities were most fond of running the gauntlet (*Gassenlaufen* or *Spiessruthen*), for it was susceptible to almost indefinite repetition according to the severity of the case, and it was a spectacular ceremony that involved a great number of men. In this carefully thought-out process, the offender was stripped to the waist and made to walk, at the sound of the drum, between two ranks of soldiers facing one another, each composed of 100 of his comrades, who lashed him with hazel wands soaked in water.

A sergeant walked backward with a Kurzgewehr levelled at the man's chest, to curb any inclination to break into a run, while corporals roamed behind the ranks of soldiers with sticks in their hands and beat any soldier who was not laying on hard enough. All the times the pipes and drums played a merry tune to drown the shrieks. [...] [t]he

the normal intercourse between a superior and the men under his command. They were laid on for 'spots of water on the gaiters, badly polished coat buttons, mishandling of the musket, or making a half-turn too early, too late or just without enough snap.

¹⁷ *Ibid.* at 62. See also Frederick the Great, *Die Instruction Friedrichs des Grossen für seine Generale von 1747* (Berlin: W. Frank, 1936).

¹⁸ Corporal punishment was abolished in the French army in 1789, and though shooting or transfer to penal units was the punishment for capital crimes, lesser offences merited only loss of rank or fatigues. See: Philip J. Haythornthwaite, *Napoleon's Military Machine* (New York: Hippocrene Books Inc., 1988) at 10.

punishment was so severe that the majority of those who were condemned to undergo thirty-six runs (which was spread over three days) actually died under the blows.¹⁹

Because of its lethal potential, the holding of the *Gassenlaufen* was a matter for the Chef or commandant. It was the stipulated punishment for soldiers who got drunk or argued on duty (*Raisonniren unter dem Gewehr*), but it really came into its own when there was a question of dealing with a deserter – the bane of the Prussian Army. By the articles of war, the foreign deserter was liable to twelve ‘runs’ for his first offence, twenty-four for the second attempt, and thirty-six for the third or complicity in a desertion plot.

Frederick the Great drew freely on his wide range of punishments and he did not hesitate to humiliate officers in front of their inferiors. An officer might consider himself fairly lucky if he was merely marched off parade under escort and placed under a brief arrest in the officers’ guardroom. However, there were more severe punishments, to wit:

Fortress arrest was usually a longer-term punishment, though one that was much less onerous or disgraceful than real imprisonment. Simple cashiering was a drastic but clean punishment which Frederick often meted out on the spot by telling the individual that he could “go to the devil”. More heinous offenders were ‘cashiered with disgrace’ (*infam kassiert*). The officer deserter was hanged in effigy, and his portrait was left nailed to the scaffold until it fell down in the course of time.²⁰

Students of military history and military psychology understand that several of the regimental traditions and concepts about ‘spit and polish’ ethos, which have moulded western armies to the present days, take their genesis in Frederick’s army.²¹ In the same vein, the Royal Navy, which developed its own reputation for harsh discipline, served as a model for several other navies.²² Even the French, who, retrospectively, appeared to have had a more enlightened and more democratic view of military discipline were quite

¹⁹ *The Army of Frederick The Great*, *supra* note 16 at 63.

²⁰ *Ibid.* at 37.

²¹ For instance, commenting on the origin of the modern form of court martial that instead of a judge sitting alone ensures the benefits of a trial by jury, in *The Constitution and Practice of Courts Martial with a Summary of the Law of Evidence*, *supra* note 12, Captain Simmons, Deputy Judge Advocate General, describes how this change came about at 2: This fundamental change may very possibly have recommended itself from the greater resemblance to the system of the common law, but it was most probably adopted from the “Articles and Military Laws” of Gustavus Adolphus and the military jurisprudence of Germany and the Low Countries where many of the principal commanders of the contending armies had gained their professional experience, and their knowledge of the “customs of war” which regulated their military tribunals.

²² In the 18th century, living conditions on board ships of all navies of the period were abominable. It is hard to imagine, for instance, how 1,000 men could exist in a 2,500-ton vessel carrying, in addition to ammunition, enough food and water for extended cruises of a year or more without entering port or reprovisioning. To these cruel living conditions was added even

strict in enforcing military discipline.²³

During the early twentieth century, Canada structured and organized its armed forces to assist Great Britain overseas and to protect imperial interests. Canadian troops fought alongside British and other colonial units in the Boer War and in the First World War. While legal staff were largely Canadian, British example and influence remained predominant throughout. During the Boer War, for instance, the British commander-in-chief, Kitchener, possessed exceptional powers which ran roughshod²⁴ over national control and accountability. For Kitchener, military law was an essential tool for maintaining overall discipline with the South African Field Force:

In my opinion strict punishment is very necessary to impress on officers their very serious duties, but at the same time it does no good to act with fullest inquiry and strictly legal lines. A hasty judgment creates a martyr and unless military law is strictly followed a sense of injustice having been done is the result.²⁵

II. Purpose

In writing this article, the author had two general purposes in mind: to present the general reader with a general sweep of the history, customs, organization and structure of the military administrative and discipline system and to provide a reference work presenting a detailed view of the Canadian *Code of Military Discipline*, in both its contents and its workings. The author then concludes by reviewing the nature and impact of each of the punishments which may be imposed by a Canadian Forces military tribunal or the *Court Martial Appeal Court of Canada* [CMAC] to those who are subject to the *National Defence Act*, R.S. c. N-4.

more cruel discipline. Punishments were atrocious. Commanders exercised almost unquestioned life-and-death authority over their men. This, of course, was probably the only of assuring obedience from men who to a large extent had not volunteered, but who had been impressed into service against their wills. As a social institution, the principal characteristics of the Royal Navy of this time have been aptly summed up by Winston Churchill: "*Rum, buggery, and the lash!*" *The Encyclopaedia of Military History: from 3500 B.C. to the present*, *supra* note 5 at 613-614.

²³ Appointed *aide-de-camp* to Maréchal Ney and promoted to Brigadier General by Napoleon, Jomini later deserted and served as a Lieutenant General in the Russian Imperial Army. Armed with the experience of serving in two empires, in his twilight years, Jomini wrote the celebrated *The Art of War* in which he listed twelve essentials conditions for "*making a perfect army*". His list includes: "5. A strict but not humiliating discipline, and a spirit of subordination and punctuality, based on conviction rather than on the formalities of service;" [. . .]. See: Baron de Jomini, *The Art of War*, trans. G.H. Mendell and W.P. Graghill (Philadelphia: J.B. Lippincott & Co., 1862).

²⁴ "To ride rough shod" to domineer, to treat without any consideration.

²⁵ PRO 30/57/22, Kitchener to Broderick, 25 January 1901.

III. Brief History of the Canadian Military Justice System²⁶

In the aftermath of the Boer War, the limitations of Canada's *Militia Act* – only slightly changed since its first enactment in 1868 – were glaringly apparent. Although Parliament had enacted earlier the *Naval Service Act*, which included provisions on naval discipline,²⁷ almost all such provisions were merely the British provisions with a coating of Canadian terminology. Each of the three Canadian services therefore had its own separate system of discipline, each adopting the British military law of that service.²⁸ However, it was not until 1950, that the Canadian army²⁹ and air force ceased to be governed by British military law.

The first Militia Act of Canada was passed in 1868 [...] as chapter 40 of the statutes of that year. The act has been revised on a number of occasions but there has been very little substantial change. [...] The Militia Act in its present form does not contain a code of discipline for the Canadian army but by reference incorporates into Canadian law the Army Act of the United Kingdom.[...] As in the case of the Canadian army, discipline in the air force is governed by the Air Force Act of the United Kingdom which was made a part of the air force law by incorporation. Experience gained during the last war showed clearly the need for more unified control and greater uniformity in the three services. Further, the present position and status of Canada makes it undesirable to depend for the discipline of our army and air force upon legislation enacted by a legislative body not responsible to the people of Canada.³⁰

²⁶ For an effective summary see: Martin L. Friedland, *Controlling Misconduct in the Military: A study prepared for the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (May 1996) (Ottawa: Minister of Public Works and Government Services Canada, 1997) at 76-78.

²⁷ On 16 May 1950, during a debate of the second reading of Bill 133, the Honourable Brooke Claxton, Minister of National Defence, referred to the *Naval Service Act* in the following words: The first Naval Service Act was passed in 1910 as chapter 43 of the statutes of that year. It remained in substantially the same form in which it was passed until 1944 when, by chapter 23 of the statutes of that year, a completely new act was passed. That statute introduced a Canada naval disciplinary code. This was the first Canadian code to apply to one of the three armed services, and it has been used as the basis for drafting many of the provisions of the present bill." See: *Debates House of Commons*, (1950) Vol. III at 2358.

²⁸ Gustavus Adolphus' Articles of War of 1621 are considered "a recognizable ancestor of the British Articles of War and the American Uniform Code of Military Discipline." Aldolphus's Articles of War of 1621 also formalized the recognition of the "four moral virtues necessary to any army: order, discipline, obedience and justice." Norman G. Cooper, "Gustavus Adolphus and Military Justice" (1981) 92 *Military L. Rev.* 134-137.

²⁹ For instance, as noted by Singer and Langford in *Handbook of Canadian Military Law*, *supra* note 7 at 11, the *Army Act* enacted by the Parliament of United Kingdom in 1881 was brought into operation annually in Canada by an Act of Parliament which, in 1941, was called: *The Army and Air Force Annual Act*.

³⁰ The Honourable Brooke Claxton, Minister of National Defence on 16 May 1950, moving the second reading of Bill 133 respecting National Defence *Debates House of Commons*, (1950), Vol. III at 2538-2539.

The *National Defence Act*³¹ of 1950 was designed, in part, to unify as much as possible the procedures for disciplining members of all three services. On 18 April 1950, while introducing Bill 133 in the House of Commons, the Honourable Brooke Claxton, Minister of National Defence specified that one of the purposes of the legislation was to consolidate in one statute all legislation relating to the Department of National Defence and the Canadian Forces with a single code of service:

The National Defence Act is an attempt to amalgamate in one statute all legislation relating to the Canadian Forces and to unify in so far as possible, having regard to differing conditions of service, the fundamental organization, discipline and administration of the three armed services.³²

Another important feature of the *National Defence Act* of 1950 was that it provided, for the first time, for a "right of appeal from findings and sentences of courts martials"³³ by the accused to the civilian Court Martial Appeal Board,³⁴ as it was then called, thus ensuring a standard of fairness in military courts commensurate with those of civilian tribunals.

However, during the debate on second reading of Bill 133, while applauding this initiative, one of Canada's most decorated soldiers – then and now – Major-General, the Honourable George R. Pearkes,³⁵ whose name has been given to the building now housing National Defence Headquarters at

³¹ On 4 April 1922, draft legislation (Bill 27 - *National Defence Act*) was introduced to create a department called the Department of National Defence over which a Minister of the Crown, called the Minister of National Defence, shall be charged with all matters relating to defence, including the Militia, the Military, Naval, Air and Police Services of Canada. See: *House of Commons Debates*, 1922, vol. I at 657-658.

Bill 27 received Royal Assent on 28 June 1922 and came into force on 1 January 1923. It provided also for the creation of a Deputy Minister of National Defence and of a Defence Council which, in accordance with Order-in-Council P.C. 163, dated 26th January 1923, was to be "solely of an advisory nature." See: James Eayrs, *In Defence of Canada: From the Great War to the Great Depression* (Toronto: University of Toronto Press, 1964) at 236 and 335.

Until 1922, each service had a separate civil administration: the Army was administered by the Department of Militia and Defence, the Navy by the Department of Naval Services, and the Air Force by the Air Board. W.J. Lawson, Brigadier General, Judge Advocate General, "Canadian Military Law" (1951) 29 Can. Bar Rev. at 247.

³² *Ibid.* At 249.

³³ See: *Debates of the House of Commons*, (1950), Vol. II at 1681-1682.

³⁴ The *National Defence Act* was amended in 1959 (1959, c. 5 s. 6(1)) effective 1 September 1959, by which the Court Martial Appeal Board was abolished and in its stead the Court Martial Appeal Board was appointed.

³⁵ In 1915, Major-General Pearkes enlisted in the Canadian Mounted Rifles as a Private. He rose quickly through the ranks and at the end of the First World War he was a Lieutenant-Colonel commanding the 116th Battalion Canadian Expeditionary Force. He was awarded the Victoria Cross for gallantry at Passchendaele in 1917. Major-General Pearkes was also awarded the Military Cross, the Distinguished Service Order for gallantry in action at Amiens and the Croix de Guerre, and he was Mentioned-in-Dispatches. After the First World War,

111 Colonel By, Ottawa – mused about the fact that in peacetime service personnel should be sent to civilian courts in preference to court martials:

One group of clauses in this act which I think will be welcomed are those which provide an opportunity of appeal from the ruling of the courts martial. [...] The appeals from decisions of courts martials will be referred to a special board composed of judges and non-service personnel. Many crimes which are of a military nature are also crimes which are dealt with in civilian life by the ordinary courts of law. I am not certain that it might not have been desirable to have restricted the number of military crimes, so that there would have been only those crimes which are essentially of a military nature to be dealt with by courts martial. Service personnel could be sent to the civilian courts during peacetime in preference to courts martial.³⁶

IV. Contemporary Canadian Forces Rules

A. Governing Statute

The NDA³⁷ is the basic law governing the Canadian military.³⁸ It contains at Part III a *Code of Service Discipline*. Persons subject to *Code of Service Discipline* are detailed at sections 60-65 of the NDA.

B. Regulations

There are a host of regulations issued under the NDA, including the four-volume *Queen's Regulations and Orders* (QR&Os), the *Court Martial Appeal Rules* (SOR/86-959), the *Military Rules of Evidence* (C.R.C., c. 1049), the *Defence Controlled Access Area Regulations* (SOR/86-957) etc. The QR&Os impose duties on military personnel to become acquainted with, observe and enforce the NDA, QR&Os and "all other regulations, rules and instructions that pertain to the performance of the officer's or member's duties."

Major-General Pearkes volunteered to serve in the permanent force, and in 1919 he was appointed to the Princess Patricia's Canadian Light Infantry. On the mobilization of the 1st Canadian Division at the outbreak, of the Second World War, Major-General Pearkes assumed command of the 2nd Canadian Infantry Brigade and led it overseas in 1939. He was promoted to Major-General in 1940, to command the 1st Division. In 1942, he was appointed to General Officer Commanding Pacific Command, and remained in this appointment until 1945. After World War II, Major-General Pearkes entered the political field as the Member of Parliament for Esquimalt-Saanish and continued to represent this riding until 1961. He was appointed Minister of National Defence from 1957 to 1961. Major General Pearkes was then appointed Lieutenant-Governor of British Columbia. He retired from this position in 1968. He died in 1984 at the age of 96.

³⁶ *Debates of the House of Commons*, (1950), Vol. III at 2541.

³⁷ The *National Defence Act*, R.S., 1985, c. N-5.

³⁸ Subsection 91(7) of the *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 provides that the exclusive legislative authority of the Parliament of Canada extends to all matters concerning militia, military and naval service and defence.

C. *Orders and Directives*

Further down the chain, there are a host of orders, primary among which are the *Defence Administrative Orders and Directives* (DAODs), which contain orders that apply to members of the Canadian Forces (CF), and directives that apply to employees of the Department of National Defence (DND). There are two types of DAODs: one to communicate policy, the other to communicate instructions on how to implement the policy. DAODs are issued on a range of subjects (i.e. administration of the access to information statute, delivery of the public affairs program, official languages policy, harassment-in-the-workplace policy).

There is also a comprehensive set of *Canadian Forces Administrative Orders* (CFAOs) issued by the Chief of the Defence Staff (CDS); they contain administrative policy, procedures and information of continuing effect, which supplement and amplify the QR&Os.

V. *Enrolment and promotion of CF members*

A. *Military Hierarchy*

Section 3.01 of the QR&Os confirms that the following ranks are approved for the Canadian Forces:³⁹

³⁹ In accordance with section 3.02 of the NDA, the ranks enumerated in 3.01 may be substantive; temporary; acting; or honorary.

3.03 – SUBSTANTIVE RANK

(1) The substantive rank of an officer is the officer's confirmed rank

(2) The substantive rank of a non-commissioned member is that rank below which the member cannot be reduced otherwise than by:

[...]

3.04 – TEMPORARY RANK

An officer or non-commissioned member who is on active service may be authorized, in accordance with orders issued by the Chief of the Defence Staff, to hold, in addition to the member's substantive rank, a higher temporary rank.

3.05 – ACTING RANK

(1) An officer or non-commissioned member may be granted an acting rank higher than the member's substantive rank:

[...]

(2) An officer or non-commissioned member granted an acting rank is liable to be posted or transferred in the member's substantive rank at any time.

3.06 – HONORARY APPOINTMENTS

(1) The Minister, on the recommendation of the Chief of the Defence Staff, may appoint an honorary colonel or an honorary lieutenant-colonel for a unit, element, combination of elements or an organization of officers and non-commissioned members of the Canadian Forces.

3.01 – RANKS AND DESIGNATIONS OF RANK

The ranks of officers and non-commissioned members shall be as set out in Column I of the Schedule to the National Defence Act, which provides:

OFFICERS				NON-COMMISSIONED MEMBERS		
	Rank Title				Rank Title	
1	General	Gen	4-star	12	Chief Warrant Officer	CWO
2	Lieutenant-General	LGen	3-star	13	Master Warrant Officer ⁴⁰	MWO
3	Major-General	MGen	2-star	14	Warrant Officer	WO
4	Brigadier-General	BGen	1-star	15	Sergeant	Sgt
5	Colonel	Col		16	Corporal ⁴¹	Cpl
6	Lieutenant Colonel	LCol		17	Private	Pte
7	Major	Maj		a.	Trained	Pte (T)
8	Captain	Capt		b.	Private Basic	Pte (B)
9	Lieutenant	Lt		c.	Private Recruit	Pte (R)
10	Second Lieutenant	[2Lt]				
11	Officer Cadet	Ocdt				

NAVAL RANK EQUIVALENTS

Officers: 1. Admiral [Adm] 2. Vice Admiral [VAdm] 3. Rear Admiral [RAdm] 4. Commodore [Cmdre] 5. Captain [Capt (N)] 6. Commander [Cdr] 7. Lieutenant Commander [LCdr] 8. Lieutenant [Lt] 9. Sub-Lieutenant [SLt] 10. Acting Sub-Lieutenant [A/SLt] 11. Officer Cadet [OCdt] NCMs: 12. Chief Petty Officer 1st class [CPO 1] 13. Chief Petty Officer 2nd class [CPO 2] 14. Petty Officer 1st class [PO 1] 15. Petty Officer 2nd class [PO 2] 16. Master Seaman [MS] 17. Leading Seamen [LS], Able Seamen Ordinary Seamen [OS].

3.07 – HONORARY RANK

(1) The Minister, on the recommendation of the Chief of the Defence Staff, may grant honorary rank to a person who has rendered distinguished service to the Canadian Forces or who, from an educational or administrative point of view, is likely to promote the general efficiency of the Canadian Forces.

⁴⁰ A MWO serving in an army unit is normally referred to as “sergeant-major” or “company sergeant-major” or the “C.S.M.”. A CWO serving in an army unit is mostly referred to as the “Regimental Sergeant-Major” or the “R.S.M.”. Traditionally, C.S.M. and R.S.M. appointments are responsible for ensuring discipline in army units and providing close-in supervision of the cadre of NCMs.

⁴¹ In artillery regiments, a corporal is known as a “Bombardier”.

Of note, section 3.08 of the NDA specifies that master-corporal is not an approved rank in the Canadian Forces. Indeed, the rank of a master corporal remains that of a corporal.

3.08 – MASTER CORPORAL APPOINTMENT

- (1) The Chief of the Defence Staff or such officer as he may designate may appoint a corporal as a master corporal.
- (2) The rank of a master corporal remains that of corporal.
- (3) Master corporals have seniority among themselves in their order of seniority as corporals.
- (4) Master corporals have authority and powers of command over all other corporals.

B. *Rank on enrolment and immediately following enrolment*

In accordance with subsection 20(2) of the NDA, individuals are normally enrolled in the CF as officer cadets or as private.⁴²

a. *Officers.* When a member has met the conditions for commissioning and is considered to be suitable in all respects for promotion, NDHQ will normally authorize the commissioning in the rank of second lieutenant and any subsequent promotion to the rank of lieutenant. Promotion to the rank of lieutenant is done on a non-competitive basis.

b. *Non-Commissioned Members.* NCMs are automatically advanced within the rank of private from private (recruit) to private (basic) to private (trained) to corporal after meeting certain minimum time requirements at each rank level. These promotions are not competitive.

Subject to section 22 of the NDA, and to the *Regulations*, officers and non-commissioned members may be subsequently promoted by the Minister or by such authorities of the CF as are prescribed in regulations made by the Governor in Council. QR& O 11.02 details the conditions governing promotion for both an officer and a NCM.

11.02 – CONDITIONS GOVERNING PROMOTION

- (1) Subject to paragraph (2), no officer or non-commissioned member shall be promoted to higher rank unless:
 - (a) there is an appropriate vacancy in the total establishment for the member's component;
 - (b) the member is recommended by the appropriate authority; and
 - (c) the member meets such promotion standards and such other conditions as the Chief of the Defence Staff may prescribe.

⁴² Other approved appellations of the private rank are: Gunner, Sapper; Signalman; Guardsman; Fusilier; Rifleman; Craftsman; Aircraftman; Trooper.

C. Subsequent career promotions⁴³

1. Promotion of officers⁴⁴

Subsequent promotion to the rank of colonel, lieutenant-colonel, major or captain⁴⁵ is competitive within each officer occupation (Military Occupation Code [MOC] ie. MOC Infantry, MOC Pilot, MOC Chaplain), at each rank level. Promotion to the rank of brigadier-general is competitive, while promotion to the rank of major-general or above is by selection by the Chief of the Defence Staff.

The conditions prescribed by the CDS for the promotion of officers are outlined in paragraph 4 of CFAO 11-6 – *Commissioning and Promotion Policy – Officers – Regular Force*. By and large, these conditions include:

- a. *Time-in-rank*.⁴⁶ These are specified periods of qualifying service to gain the experience and knowledge needed for the next higher rank and to provide time for proper assessment of suitability for promotion;
- b. *Qualifications*. Attainment of the professional military qualifications required for the applicable MOC;
- c. *Medical Fitness*. The officer must be medically fit and meet the minimum medical standards for the field of employment;
- d. *Not be obese*. The officer must be free of any career implications related to obesity;⁴⁷
- e. *Security clearance*. The officer must be in possession of the minimum security clearance; and

⁴³ Approving authorities for promotion to brigadier-general and above is the Minister of National Defence and for promotion to Colonel and below is either the CDS or someone delegated by him in Regulations.

⁴⁴ In accordance with paragraph 17 of CFAO 11-6 *Commissioning and Promotions – Officers*, all promotions are to substantive rank.

⁴⁵ Except for some minor exceptions for specialist officers such as Medical, Dental, Legal, Pharmacist officers who are normally automatically appointed to the rank of captain once they attain full professional status with a provincial or territorial licensing body.

⁴⁶ The minimum time an officer must serve in each rank before entering the promotion zone for the next higher rank is established to ensure that the necessary training and experience has been gained to efficiently perform the duties of the next higher rank. The period of time in each rank is calculated from the officer's date of seniority in his or her current rank.

⁴⁷ According to Major-General Terry Hearn, then acting Assistant Deputy Minister (Human Resources – Military) at National Defence Headquarters, this provision is no longer acted upon. What is now required of military members is that they be physically fit. Fitness is measured, in turn, by established physical fitness tests. (Telephone conversation the Author with Major General Hearn dated 20 July 2001).

f. *In competition with his peers.* Where promotion is on a competitive basis, the officer must meet these conditions and be ranked in competition with his peers based on:

1. individual merit, including potential for more senior rank,⁴⁸ and
2. the military requirement. (i.e. Unless and until there is a vacancy in his specific MOC, the officer will not normally be promoted.)

2. *Entry into Promotion Zones – Officers*⁴⁹

Promotion zones are established for officers in the ranks of second lieutenant to lieutenant-colonel for promotion to the next higher rank. Entry into a promotion zone [EPZ] does not imply that promotion to the next higher rank will automatically follow. An officer enters the promotion zone upon completion of a specified minimum time in the rank. The EPZ date is based on the seniority date, as adjusted for leave without pay, MOC training failure, MOC transfer i.e. from MOC Logistics to MOC Public Affairs, transfer from the Reserves, or re-enrolment.

As noted previously, promotion to the ranks of captain, major, lieutenant-colonel and colonel is competitive and is based on merit and service requirements within each military officer classification. Officers selected for such promotions must have first entered the promotion zone for promotion to the next rank on attaining the required number of years of seniority in their current rank as follows:

- a. as a lieutenant – two years, except that for those commissioned as a lieutenant under the University Training Plan for Non-Commissioned Members (UTPM) or the Commissioned from the Ranks Plan (CFRP) the period is three years,
- b. as a captain – four years,
- c. as a major – four years, or

⁴⁸ NDHQ Annual Merit Review Boards rate each candidate in accordance with two main criteria:

- a. On-the-job Performance, whose weight accounts for 80% of the total score given to a candidate. To accomplish this task, each member of the Merit Review Board reviews the totality of the Performance Evaluation Reports and Course Reports found on an officer's file, plus any other pertinent records;
- b. Potential, whose weight accounts for 20% of the total score given to a candidate. The potential of a candidate is evaluated, in subjective terms, by each member of a Merit Review Board, taking into account the following principal factors: age, time in rank, bilingual ability, education etc.

⁴⁹ Entry into the promotion zone date (EPZ date) means the date an officer completes a specified time in rank in the officer's current MOC which makes the officer eligible for consideration for promotion by the appropriate Officer Merit Board, presuming all other conditions for promotion have been met.

d. as a lieutenant-colonel – three years;

An officer remains in a promotion zone until the officer:

a. is promoted;

b. commences terminal leave;

c. commences an extension of service;

d. is transferred to the Reserve Force; or

e. no longer meets the conditions of promotion.

3. *Non-Commissioned Members*⁵⁰

In accordance with CFAO 49-4 – *Career Policy Non-commissioned Members Regular Force* – the term ‘promotion’ includes appointment as master corporal, granting of acting rank, and advancement within the rank of private from private (recruit) to private (basic) to private (trained). Also, paragraph 9 of CFAO 49-4 – *Career Policy Non-commissioned Members Regular Force* sets the promotion standards and other conditions for the promotion for non-commissioned members as follows:

a. must meet the training prerequisites and the following time-in-rank criteria:

	From	To	Minimum Time Requirements for EPZ
1	Private recruit	Private Basic	N/A
2	Private Basic	Private Trained	30 months qualifying service ⁵¹
3	Private Trained	Corporal	4 years qualifying service
4	Corporal	Master Corporal	2 years as Cpl
5	Master Corporal	Sergeant	2 years seniority as MCpl
6	Sergeant	Warrant Officer	3 years seniority as Sgt
7	Warrant Officer	Master Warrant Officer	3 years seniority as WO
8	Master Warrant Officer	Chief Warrant Officer	2 years seniority as MWO

⁵⁰ Entry into the promotion zone (EPZ) for NCMs means the date on which a member is eligible for consideration for promotion. The EPZ date is determined from the enrolment date adjusted by adding any leave without pay granted on enrolment, plus the minimum promotion time prerequisite for the next higher rank, minus the time credit for promotion, if applicable, but it is never earlier than the enrolment date; or on promotion it is determined from the seniority date plus the minimum time prerequisite for the next higher rank.

⁵¹ Qualifying service means the service required for entry into the promotion zone (EPZ) or for promotion to the next higher rank.

b. when appointment is to Master Corporal or promotion to a rank higher than Corporal, the NCM will be selected based on:

1. individual merit, in competition with his peers⁵² within his own trade or occupation group,⁵³ as determined by a merit board, and
2. the military requirement.

VI. *Seniority in Rank*

A. *Background*

During the seventeenth century many commoners served as officers in the Prussian and French armies. The following century, however, saw the gradual exclusion of these elements as aristocratic birth became a requirement for entry into all branches of the military service except the technical arms of the artillery and engineers. In England, aristocracy also prevailed. But it was an aristocracy of wealth rather than birth or status. In the British army, the purchase of office was the means of both entry and advancement in all branches except the technical services.

The high price of office, the low pay which made it virtually impossible to live on an officer's salary and the lack of any system for pension or retirement caused commissions in peacetime to be monopolized by the younger sons of country gentry who possessed private income. In war the officer corps was expanded by raising new regiments in which commissions might be purchased by virtually anyone who had the necessary funds.⁵⁴

Feudal aristocratic elements continued to supply the cadres of the military profession in European armies as it evolved in the nineteenth century. Indeed, the nobility fought to maintain their social position by monopolizing officership until their numbers ran out, and until they were displaced by the ever-increasing need for technical experts.

⁵² There are minor exceptions such as the one contained in paragraph 3 to CFAO 49-4 – *Career Policy Non-Commissioned Members – Regular Force*.

Promotion for Meritorious Service or Gallantry

3. A member may be promoted in recognition of meritorious service or an act of gallantry; such promotions require the approval of the Minister of National Defence.

⁵³ Trades and occupations are grouped into three categories, which are used for pay purposes: A. Standard Occupations; B. Specialist 1. Trades. C. Specialist 2. Trades. See Annex E which provides a comprehensive listing of the various CF Trades and Occupations.

⁵⁴ S.P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (New York: Vintage Books, 1957) at 22-23.

Under feudalism, because of a primitive skill structure and a relatively static organization, military leadership and authority could be based on tradition, custom, and most important of all, on social position. The feudal military establishment had a strongly ascriptive hierarchy. Ascription meant that an individual's position in the military depended on his social characteristics, not on his personal achievements. Men were born in the officer class, or they were excluded. Seldom could they earn such a position through performance.⁵⁵

However, in 1808, the Prussian government issued a decree on the appointment of officers which set forth the two basic professional standards for title to an officer's commission: in time of peace, education and professional knowledge; in time of war, distinguished valour and perception. This led to a movement that saw most nations establish institutions of initial military education, relax the entry bars to the officer corps, and overhaul the processes of selection and promotion.⁵⁶ The establishment of professional standards for advancement within the corps followed by the establishment of professional standards for entry into the officer corps. In general, the new advancement system took the form of promotions by seniority tempered by selection.

1. Prussia

In Prussia [...] promotion up to the rank of captain generally followed seniority although unusually able officers [...] might be advanced more quickly. Above the rank of captain promotion was within the arm or corps and seniority was followed more rigidly. An officer who was passed over, when his turn for promotion by seniority appeared, was expected to resign. Most officers might expect to be advanced in turn to the rank of major, the great weeding out taking place in the promotions from that post to colonelcies.⁵⁷

2. United States

Yet in the United States armed forces promotion by strict seniority, on the basis of age and service, was the keystone of the persistence of an ascriptive hierarchy. In peacetime seniority was the key to a higher standard of living and the emoluments of military life. The professional officer corps was not merely segregated as to rank. Within each rank, date of appointment, down to the specific day of the month, was a matter of crucial concern. From the allocation of housing to the assignment of seating arrangements, captains and majors had to be sorted out in terms of their date of rank. [...] Decisions as to who would be assigned command were also crucially influenced by

⁵⁵ M. Janowitz, *The Professional Soldier: A Social and Political Portrait*. (New York: The Free Press of Glencoe, 1964) at 60-61.

⁵⁶ *The Soldier and the State: The Theory and Politics of Civil-Military Relations*, *supra* note 54 at 30-41.

⁵⁷ *Ibid.* at 45.

date of rank. The manipulation of promotion dates became a device for protecting favourites, and maintaining the hold of service academy graduates on key assignments.⁵⁸

3. *Britain*

Only slowly during the nineteenth century were politics and purchase eliminated from the British Army. [...] [T]he example of the superior efficiency of the Prussian military machine in the war with France enabled Lord Cardwell to secure the abolition of purchase in 1871. [...] With reluctance Parliament conceded [...] and authorized the government to buy up the commissions of its officers and institute a system of promotion based on seniority and selection according to merit.⁵⁹

4. *France*

In France, previous to the Revolution, military appointments and promotion were wholly subject to the rules of nobility, certain grades in the army belonging of right to certain grades of the noblesse; merit and service being excluded from consideration. The constituent assembly changed this order of things, establishing the rule that promotions and appointments would be governed as follows: "captains and lieutenants by seniority; the colonels and lieutenant-colonels: two thirds by seniority and one third by selection; *maréchaux-de camp* and lieutenant-generals one half by seniority and one-half by selection."⁶⁰

The French law of 1818 was a bold attempt to exclude non-professional factors from advancement. It requires that two-thirds of all promotions up to the rank of lieutenant-colonel should be by seniority. The remaining one-third of the promotions in the lower ranks and all appointments of colonels and general officers were by selection. The law, however, placed too much reliance on seniority, required too lengthy terms of service in the lower grade, and did not entirely prevent aristocratic favouritism.⁶¹

However, under Napoléon, military talent and military service, not nobility, were the recognized claims for promotion,

the "baptism of blood", as it was called, having equalized all grades. [...] Bonaparte, in leaving Egypt, paid no attention to seniority of rank.⁶²

⁵⁸ *The Professional Soldier: A Social and Political Portrait*, *supra* note 55 at 61-62.

⁵⁹ *The Soldier and the State: The Theory and Politics of Civil-Military Relations*, *supra* note 54 at 47.

⁶⁰ See: H. W. Halleck, *Elements of Military Art and Science* (Westport, Conn.: Greenwood Press, 1971) at 400.

⁶¹ *The Soldier and the State: The Theory and Politics of Civil-Military Relations*, *supra* note 54 at 45.

⁶² *Elements of Military Art and Science*, *supra* note 60 at 402.

In the wake of the Second World War, the U.S.⁶³ too abandoned seniority-based promotions in favour of a merit promotion system.

With the strong support of General Eisenhower and the Army staff, Congress passed the Officer Personnel Act of 1947 (H.R. Rep No. 640, 80th Congress, 1st Session. 3 (1947)), which abandoned seniority-based promotions in favour of a merit promotion system [...] which sought to improve the overall caliber of the officer corps by requiring that each officer affirmatively be selected for promotion to the next higher grade. [...] "At the heart of this merit promotion system, and crucial to its effective functioning" was the requirement that officers twice passed over for promotion be discharged from the service.⁶⁴

B. *Forfeiture of seniority*

At one time, the factor of seniority played a big role in the conduct of military and naval operations ⁶⁵ and the career management of military personnel by delaying one's promotion to higher rank and, on a more mundane level, by resulting in a loss of several privileges associated with time-in-rank. As noted by Professor Desmond Morton, a military historian, in a 1997 report commissioned in the wake of the Somalia scandal by the then Minister of National Defence, "seniority" has now been replaced by "merit" as the predominant factor for advancement:

In the half-forgotten past, seniority was the operating principle: unblemished service plus longevity finally brought an officer or NCO to the top of a corps, branch or regimental list and the next vacancy was his. Only "a bloody war or a sickly season"

⁶³ The rich lore of military history teaches us that "military knowledge and education are not the only requisites for military success; youthful enterprise and efficiency are equally important and leaders must be very careful not to destroy their influence by loading it down with the dead weights of effete seniority." *Ibid.* at 386.

⁶⁴ N.L. Ellis, "The judicial review of promotions in the military." (1982) 98 *Military L. Rev.* at 130-131.

⁶⁵ It did at one time, particularly in the Royal Canadian Navy (RCN). For instance, during the Second World War, ships escorting a convoy to Britain would often each be commanded by an officer holding the same rank. Under such conditions, command was automatically vested to the senior naval officer in command of a ship. Should a new escort ship joined the convoy mid-course, change of command would take place if the newly arrived captain was senior by virtue of his date of rank, whether or not the captain belonged to the RCN or the RN. The *King's Regulations for the government of his Majesty's Canadian Naval Service*, 1945.

3.35 COMMAND OF A FLOTILLA, GROUP, TASK FORCE OR OTHER BODY OF SHIPS

(1) When in the order creating the flotilla, group, task force, or other body of ships, the officer in command is not named, the Senior Officer of the body shall command and succession to command shall be in order of seniority.

accelerated the process. Beyond predictability and a certain fairness, the system had few virtues. No wonder merit was preferred.⁶⁶ Advancement would come to those with energy, initiative and success in meeting professional and personal criteria. The worthy would be promoted before the years had blunted them; the unworthy would eventually recognize their limitations and seek other careers.⁶⁷

Despite the fact that Note D to article 104.11 of QR& O cautions that "in some cases, the punishment of loss of even one day's seniority may be quite severe",⁶⁸ my own personal military experience and abundant research in this specific field indicate that the punishment of forfeiture of seniority is an anachronism.⁶⁹ Strangely, therefore, even though "seniority" per se no longer has any real or meaningful impact upon one's career, or for that matter in the day-to-day operation of the Canadian Forces, "forfeiture of seniority" is still very much recognized in statute⁷⁰ and regulations.⁷¹

⁶⁶ The current CF promotion system is based on an annual evaluation report prepared by an individual's supervisor, which provides both an assessment of actual performance in relation to one's peers and an assessment of potential. Reports are reviewed by commanding officers who are responsible for their correct and timely completion. Evaluation reports are then passed on to NDHQ merit boards which assess relative performance and potential and prepare a ranking of personnel for each trade and rank level.

⁶⁷ "What to tell the Minister", 1997, *Report to the Minister of National Defence* by Professor Desmond Morton, McGill University, Montréal, Q.C.

⁶⁸ Officers of the same rank receiving exactly the same numerical ratings by a NDHQ Merit Review Board are subsequently merit listed vis-à-vis one another according to their seniority. Under such a scenario, the loss of any seniority by an officer could result in his having an inferior position on the Merit List in relation to his peers. In the advent of limited promotions for that year, his loss of seniority could have an immediate and "severe" impact.

⁶⁹ As will be discussed later, at best, however, a loss of seniority has no tangible effect upon a CF member. At worse, a sentence of loss of seniority means that the CF member may be pushed outside the promotion zone for an equivalent period of time.

⁷⁰ Section 144 of the NDA reads as follows:

144. FORFEITURE OF SENIORITY. Where a court martial imposes a punishment of forfeiture of seniority on an officer or non-commissioned member, the court martial shall in passing sentence specify the period for which seniority is to be forfeited.

⁷¹ The notes to section 104.11 of QR& O read as follow:

104.11 – FORFEITURE OF SENIORITY [...]

- (A) An offender cannot, by a punishment of forfeiture of seniority, be deprived of ore seniority than that held in rank at the time of the imposition of the punishment.
- (B) Where a punishment of forfeiture of seniority is imposed, the period of forfeiture must be expressed in terms of years, months and days, as applicable.
- (C) The punishment must not include any reference to the place to which the offender is relegated in a seniority list.
- (D) The current seniority list should be consulted to determine the effect of any proposed punishment of forfeiture of seniority. In some cases, the punishment of loss of even one day's seniority may be quite severe.
- (E) If the effect of a punishment of forfeiture of seniority would be to place an offender among others whose seniority dates from the same day, the relative seniority as between the offender and those other persons is determined under article 3.11 (Seniority from Same Date).

C. Officers

CFAO 11-6 – *Commissioning and Promotion Policy – Officers – Regular Force*, defines seniority date as ‘the date from which an officer reckons time in the new rank for seniority purposes’. In accordance with paragraph 24 of the same CFAO, seniority in rank is determined as follows:

a. *Second Lieutenant*. Seniority in rank varies depending on the commissioning plan favoured by the new entrant:

1. *ROTP (Regular Officer Training Plan)*. The effective date of commissioning and seniority is based on the last semester attended prior to graduation.

2. *DEU (Direct Entry Officer)*. The seniority date in the rank of second lieutenant is the date of enrolment.

3. *OCTP (Officer Cadet Training Plan)*. The effective date of commissioning and the seniority date in the rank of second lieutenant is the date of successful completion of the required training or nine months from the date the officer was appointed to or enrolled in the rank of officer cadet, whichever is earliest.

4. *UTPM (University Training Plan for non commissioned members)*. Seniority is on commissioning to the rank of second lieutenant.

5. *CFRP (Commissioned From the Ranks Plan)*. An officer whose rank is warrant officer or below immediately prior to commissioning, and who has not completed the Senior Leaders Course (SLC) is commissioned in the rank of second lieutenant with simultaneous promotion to the rank of lieutenant effective the date of successful completion of the required basic officer training. An officer in the rank of second lieutenant, on attaining one year of seniority in that rank, is promoted to lieutenant.

b. *Lieutenant*. Except as provided above, seniority date is normally the effective date of promotion to the rank of lieutenant.

c. *Captain, Major, Lieutenant-Colonel or Colonel*. Seniority date is 1 January of the year of promotion.

d. *Brigadier-General or Above*. Seniority date is the date of promotion.

D. *Non-commissioned members*

CFAO 49-4 – *Career Policy Non-commissioned Members Regular Force* defines seniority date as the date of promotion to substantive rank or in the case of a person who holds the rank granted on enrolment, the date of enrolment.

a. *Seniority on Enrolment or Transfer from the Reserves.* On enrolment or transfer from the Reserves, seniority in rank is calculated from the enrolment date adjusted by any Leave Without Pay (LWOP) granted on enrolment and by any seniority granted as part of the terms of enrolment. When a rank granted on enrolment (other than Private) is to acting/lacking qualification or provisional status, the enrolment date granted on enrolment is the seniority date until such time as the acting/lacking qualification or provisional rank is converted to substantive rank. Upon attaining substantive rank, the enrolment seniority date is adjusted by the seniority granted as part of the terms of enrolment offer

b. *Seniority on Promotion.* On promotion, seniority is calculated as follows:

1. *Promotion to Corporal.* Seniority in the rank of corporal is calculated from the date of promotion to substantive rank.

2. *Promotion to Master Corporal and above.* When appointment is to Master Corporal or promotion to substantive rank higher than Corporal, seniority is calculated from the first day of January of the year in which the promotion was effective.

c. *Seniority after reduction in rank.* Paragraph 2 to Annex F to CFAO 49-4 – *Career Policy Non-commissioned Members Regular Force* stipulates that when a NCM is reduced in rank that member is eligible to count for seniority in the lower ranks together with all previous service in the higher rank or ranks together with all previous continuous service in the lower rank.⁷²

The first merit board convened following the date of promotion determines eligibility for subsequent promotion.⁷³

⁷² For example, a sergeant with 4 years in rank is promoted to the rank of warrant officer where he serves for three years before being promoted again to the rank of master warrant officer. After serving two years in the rank of master warrant officer, the latter is reduced in rank to the rank of sergeant. His seniority in his new rank of sergeant will consist of nine years of service.

⁷³ Merit Review Boards are convened annually at NDHQ to determine a merit list position for all MOC qualified officers and NCMs eligible for consideration as follows:

a. those in a promotion zone;

b. those who will enter a promotion zone during the promotion year concerned; and

VII. *Compensation*⁷⁴

A. *General*

At the risk of destroying a well-known myth,⁷⁵ – which has had and is having a continuing beneficial domino effect on the pay of all CF members, including of course superior officers (Generals and Colonels) – members of the Canadian military are, by any standard, well paid! Additionally, as I shall explain later, CF members are blessed with an array of allowances that compensate them for the risks and isolation which service in the military necessarily entails. A significant benefit is also the fact that a military member can retire with an unreduced annuity, at a relatively young age: i.e. a member serving in the rank of Lieutenant-Colonel and below can retire when the member completes 28 years of service versus 30 years for Colonel and above. (This point will be discussed in further detail below.) Also, and of note, the years spent by an officer cadet at the Canadian Military College to obtain an academic degree are also pensionable.

B. *Pay*

1. *Officers*

Except for the most senior ranks whose pay consists of an annual salary (within a given range) plus a performance bonus,⁷⁶ salaries⁷⁷ for military members are calculated on a monthly basis for members of the Regular Force

c. those recommended for accelerated promotion.

The task of the merit board is to compile a merit list for each rank and trade from which personnel will be selected during the ensuing calendar year for promotion.

⁷⁴ The Honourable John McCallum, then Minister of National Defence, announced that effective April 1, 2003, a 2.5 percent pay increase for non-commissioned members; and a 2.5 percent increase for general service officers and pilots (Lieutenant-Colonel and below), and medical and dental officers (Lieutenant and Second Lieutenant).

⁷⁵ The myth was propagated when it was found that some corporals posted in high-cost living areas such as Calgary and Vancouver were required to hold a second job in order to maintain a decent standard of living. As shown in the following tables, the fact remains that a corporal (Corporals and privates form the bulk of any army. They are made up of young, single, robust individuals capable of sustaining the shocks of war) is well compensated after having accumulated a few short years of service. In fact, even in the absence of post-secondary education or any other readily marketable skill, the typical CF corporal earns far in excess of the majority of young university graduates. Further, should the same corporal be detailed to serve in a peacekeeping mission, abroad, as many do, his overall compensation would be increased dramatically by a tax-free foreign duty allowance. [I am not arguing here the merits of such a compensation level, only the fact that in Canada we have chosen to use "pay and benefits" as the principal incentive tool to both recruit and retain soldiers in peace and war vs. an appeal to more patriotic ideals.]

⁷⁶ The salary for General Officers and Colonels consists of an annual base salary, as shown above, and a performance award or bonus. For Colonels and Brigadier-Generals, lump

and on a daily basis for members of the Reserves.⁷⁸

ANNUAL RATES OF PAY (in dollars)

General Officers – April 2003⁷⁹

NOTE: Rates do not include performance pay/bonus.

RANK	MINIMUM	MAXIMUM
General ⁸⁰	Approx. \$207,100- \$238,500.	
Lieutenant-General	\$136,700.	\$160,900.
Major-General	\$119,900.	\$141,100.

ANNUAL RATES OF PAY (in dollars)

Brigadiers Generals and Colonels – April 2003

NOTE: Rates do not include annual performance pay/bonus.

RANK	MINIMUM	MAXIMUM
Brigadier-General ⁸¹	\$98,600.	\$116,000.
Colonel	\$86,100.	\$101,300.

sum bonus payments for the achievement of key commitments may range from zero to ten percent (0 to 10%) of the individual's salary. For Major-Generals and above, lump sum bonus payments for the achievement of key commitments may range from zero to 15 per cent (0 to 15%). See: *Salary Administration Instructions for the Performance Management Program for the Executive (EX) Group* — April 1, 2001.

⁷⁷ Meaning of salary. Originally: soldier's salt money (*sal* salt; *ary* belonging to). Source: Oxford Concise Dictionary.

⁷⁸ For ease of presentation, only Regular Force members are considered; there is a different pay regime for members of the Reserves.

⁷⁹ Table to article 204.205 in QR&Os.

⁸⁰ The *Advisory Committee on Senior Level Retention and Compensation* is currently reviewing the compensation level for this GIC (DM-2 level) appointment. *Order in Council 2001-0915/00*, approved on 22 May 2001, appoints Lieutenant-General Raymond Roland Henault, of Ottawa, Ontario, as Chief of the Defence Staff, at the rank of General, effective 28 June 2001.

⁸¹ Pay rates for medical, dental, and legal officers at the rank of Brigadier General and below are higher than those of GSO's. Pay rates for pilots and navigators officers at the rank of Lieutenant Colonel and below are also higher than the GSO's. For example:

ANNUAL PAY RANGE – Colonels (Specialist Officers)

Specialist officers	MINIMUM	MAXIMUM	Pay adjusted as of
Medical and Dental officer	\$141,589.	\$163,987.	March 2000
Legal officer	\$93,935.	\$139,000.	April 2002
Military judge	Chief Military Judge \$147,135.	Others \$141,716.	April 2001

Officers in the rank of Lieutenant Colonel and below are paid at the basic rate set for their rank, on promotion to that rank. Besides any economic increase which they may receive as a result of a pay raise, these officers also receive an incentive pay increase each year following their promotion until they reach the maximum pay level set for their rank.⁸²

ANNUAL RATES OF PAY (in dollars) –
General Service Officers (GSOs) – April 2003

RANK	Basic Rate	Last annual Increment
Lieutenant- Colonel	\$93,492.	\$99,492.
Major	\$80,652.	\$90,420.
Captain	\$59,412.	\$78,852.
Lieutenant ⁸³	\$47,052.	\$74,436.
Second Lieutenant	\$43,176.	\$64,080.
Officer Cadet	\$15,072.	\$52,404.

2. Non-commissioned members

After recruit training, NCMs are assigned to a trade category (see Annex E – *NCMs Trade Groupings* - which list each trade under the headings of Standard, Specialist 1 and Specialist 2) which, depending on its complexity and the economic opportunities for such a set of trade skills in the civilian marketplace, may be in one of three pay categories. On promotion, NCMs

⁸² Paragraphs 3 and 6 of the CFAO 204-2 – *Incentive Pay – Regular Force and Reserve Force* read as follows:

3. The only criteria upon which to base the award or deferment of incentive pay are job performance and personal effectiveness. Incentive pay shall be granted to members who have maintained a satisfactory degree of proficiency and effectiveness. The following points must be considered in determining whether the performance standards have been met:

- a. incentive pay shall not be deferred solely as the result of an offence for which a member has been tried and convicted. However, an offence related to duties should be considered within the context of job performance; and
- b. probation does not automatically defer incentive pay unless it is related to job performance or personal effectiveness.

6. Seniority has no bearing on entitlement to incentive pay. Time served in rank, qualifying time awarded on commissioning or promotion and, subject to NDHQ approval, any qualifying service authorized pursuant to QR&O 204, are the determining factors.

⁸³ There are a host of pay rates for officers serving as Lieutenant, Second Lieutenant and Officer Cadet. These rates account for the fact, *inter alia*, that military members might have been previously serving in the ranks, ie. corporal, immediately before commissioning. His or her monthly pay rate as a lieutenant or second-lieutenant is adjusted upwards from that of the GSO's so as to avoid a reduction in pay upon commissioning.

are paid at the basic rate set for their rank. Besides any economic increase which they may receive as a result of a pay raise, these NCMs also receive an incentive pay increase each year following their promotion until they reach the maximum pay level set for their rank.

ANNUAL PAY RATES (in dollars)
Warrant Officers – April 2003⁸⁴

RANK	Pay	Trade categories		
		Standard	Specialist 1	Specialist 2
Chief Warrant Officer	Basic Max	\$70,128.	\$70,128.	\$70,128.
Master Warrant Officer	Basic Max	\$63,180.	\$64,908.	\$66,240.
Warrant Officer	Basic Max	\$57,252.	\$60,036.	\$62,328.
Sergeant	Basic Max	\$51,384.	\$55,440.	\$58,752.
Master Corporal	Basic Max	\$48,608.	\$50,064.	\$52,920.
Corporal	Basic Max	\$44,736.	\$48,216.	\$51,060.
Private	Basic Max	\$26,616. \$39,096.		

C. Allowances

Additional financial compensation, in the form of allowances, is provided to members of the Canadian Forces for various purposes. In particular, members whose military duties involve sporadic or continuous exposure to adverse environmental conditions, including hazards which are not normally experienced by other members, qualify for special environmental allowances. These allowances are intended to serve as an incentive to attract and retain properly motivated personnel under such conditions.

For the sake of presentation, I have chosen to illustrate only certain of these allowances so as to give a flavour as to their level of economic importance in the overall compensatory scheme.

⁸⁴ Table to article 204.30 of the QR&Os.

a. *Universal.*

Clothing Upkeeping Allowance⁸⁵
 Maternity and Parental Benefits

QR&O 205-54
 DAOD 5001-2

b. *On posting*

Accommodation Assistance Allowance
 Foreign Service Allowance
 Posting Allowance⁸⁶
 Removal of Furniture and effects benefits
 Local Move Allowance
 Family Separation expense
 Shipment in mobile homes
 Storage of private motor vehicle and related
 Transportation and Travelling Expenses
 Foreign Duty⁸⁷

CFAO 205-30
 CFAO 205-5
 CFAO 205-31
 CFAO 205-24
 CFAO 209-6
 CFAO 209-3
 CFAO 209-1

 CFAO 209-47
 CFAO 205-9

⁸⁵ Monthly rates: \$17.03 (men) and \$20.73 (women).

⁸⁶ Pursuant to QR&O 205.42, an officer or non-commissioned member who has attained career status is entitled to a Posting Allowance when he or she is posted from one place of duty to another such place of duty in circumstances that entitle the member to move his or her dependants at public expense. In the case of a member who moves his or her dependants, the amount of the allowance is an amount equal to his or her pay for one month.

⁸⁷ Foreign Duty Allowance (FDA) is intended to provide an incentive for members to serve outside Canada on peace-keeping, truce supervising and similar duties, normally under the auspices of the UN, and to recognize the hardship conditions in the area where these duties are performed. FDA includes a bonus for the second and third tour of duty and for the fourth and subsequent tours of duty. In accordance with article 205.44 of the QR&Os, an officer or non-commissioned member posted for duty to a country outside Canada with this article shall be paid a Foreign Duty Allowance at the rate prescribed in the table below.

TABLE TO ARTICLE 205.44 – Foreign Duty Allowance

COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5
Foreign Duty Post Rating Level	Monthly Rate – First 6 months	Monthly Rate – From 7th to 12th Month	Monthly Rate – From 13th to 18th Month	Monthly rate – For each month in Excess of 18 months
I	\$103.	\$176	\$251.	\$325.
II	\$192.	\$265.	\$340.	\$413.
III	\$225.	\$300.	\$373.	\$447.
IV	\$280.	\$352.	\$427.	\$502.
V	\$325.	\$398.	\$472.	\$547.

Military Foreign Service Premium⁸⁸

CFAO 205-5

c. *Environmental Allowances* A monthly environmental allowance is payable to members whose exposure is continuous and substantial. This is defined to be the exposure level of those members whose full-time job or primary function involves exposure to the specific conditions for which the allowance is paid. Where exposure is unevenly distributed within a group exposed to conditions for which an allowance is payable, a daily or per incident allowance is paid.

Aircrew	CFAO205-25
	QR&O 205.32
Air Duty	CFAO 205-25
Civilian Clothing Allowance – Special Investigation Unit	QR&O 205.55
Civilian Clothing Allowance – Special Cases	QR&O 205.56

FDA is payable to members posted unaccompanied for duty with the following organizations at the locations indicated, in accordance with the designated Foreign Duty Rating Level:

ORGANIZATION

FOREIGN DUTY RATING LEVEL

United Nations Truce Supervisory Organization Palestine (UNTSO)	IV
United Nations Disengagement Observer Force, Syria (UNDOF)	III
The Canadian Contingent, United Nations Middle East (UNME)	IV
The Canadian Contingent Multinational Force and Sinai Observers (CCMFO)	III
The Canadian Contingent United Nations Mission for the Referendum V in Western Sahara	

NOTE: Pursuant to CFAO 205-9, FDA is not subject to income tax, unemployment insurance contributions, or deductions for pension contributions.

⁸⁸ Members serving in the former Yugoslavia are paid under the *Military Foreign Service Regulations* which were approved by T.B. Minute 810755 of 30 March, 1989 and amended under T.B. Minute 825546 of 11 December 1997. These regulations provide for the payment, *inter alia*, of a monthly Operations Service Premium (OPS FSP) which, in accordance with paragraph 17 of CFAO 205-5 *Military Foreign Service Regulations*, is a non-taxable allowance payable to a member as an incentive to foreign service and, as such, recognizes that there are disutilities and disincentives, some of which may be financial, resulting from service outside Canada. The rate of FSP varies according to the member's family status, location and length of service outside Canada ranging between \$398 and \$1,544 per month. (Formulas are too complex and lengthy to be summarized here but in essence the MFSR benefits are more generous than the amounts provided under the FDA.) In addition to the OPS FSP members serving aboard may be paid a Hardship Allowance ranging from \$124 to \$1,116 per month as well as a Risk Allowance ranging from \$124 to \$744 per month in addition to the applicable daily operational allowances (Sea Duty Allowance, Submarine Allowance or Field Operations Allowance).

Dental Officer Direct Entry Recruitment Allowance	QR&O 205.53
Diving	CFAO 205-25
Exceptional Hazard – (EOD)	CFAO 36-31
Field Operations (Army) ⁸⁹	CFAO 205-25
Joint Task Force II. Allowance	QR&O 05.385 ⁹⁰
Medical and Dental Officer Specialist Allowance	CFAO 205-33
Medical Officer Direct Entry Recruitment Allowance	QR&O 205.52
Pilot Terminable Allowance	QR&O 205.51
Paratroop allowance ⁹¹	CFAO 205-25
Rescue specialist ⁹²	CFAO 209-25

⁸⁹ QR&O 205.39 authorizes the payment of a daily field duty allowance of \$16.41 when the member is on duty for a period of not less than 24 consecutive hours on a field operation away from the permanent facilities normally occupied by his base or other unit or element.

⁹⁰ Joint Task Force II Allowance. Table to QR&O 205. 385

Years of Accumulated Eligible Service	Hazard Level 1 Monthly Rate	Hazard Level 1 Monthly Rate	Hazard Level 3 Monthly Rate
less than 5 years	\$413.	\$752.	\$1,197.
5 years or more	\$481.	\$819.	\$1,271.

⁹¹ Table to article 205.30 QR&'Os authorizes the following rates for the paratroop allowance:

· YEARS OF ACCUMULATED ELIGIBLE SERVICE - MONTHLY RATE

Less than 3 years	\$207.
3 years or more	\$228.
6 years or more	\$251.
9 years or more	\$277.
12 years or more	\$305.

⁹² Table to article 205.31 authorizes the following rates for a rescue specialist:

ACCUMULATED TIME AS A RESCUE SPECIALIST - MONTHLY RATE

Less than 5 years	\$405.
5 years or more	\$445.
9 years or more	\$493.
12 years or more	\$543.
15 years or more	\$573.
18 years or more	\$613.

Sea Duty ⁹³	CFAO 205-25
Special allowance – CFS Alert ⁹⁴	CFAO 205-28
Submarine	CFAO 205-25
Submarine specialty allowance	CFAO 205-29

d. *Casual*. A casual allowance is payable to members whose exposure to danger is sporadic.

Hypobaric chamber	CFAO 205-25
Isolation	CFAO 205-7
Kilts	CFAO 210-4

Personal requirements – persons in Service custody	CFAO 205-18
Special allowance – Regular Force members performing training or duty with the Reserve Force	CFAO 205-26
Stress allowance for test participants	CFAO 205-25
Survey	CFAO 205-25

e. Recruiting allowances⁹⁵ QR&O 205.51

⁹³ Table to article 205.35 of the QR&Os authorizes the following sea duty allowance:

YEARS OF ACCUMULATED ELIGIBLE SERVICE - MONTHLY RATE

Less than 5 years	\$254.
5 years or more	\$361.
9 years or more	\$467.
12 years or more	\$566.
15 years or more	\$602.
18 years or more	\$640.

⁹⁴ Table 205.49 of the QR&Os authorizes the following allowance for service at CFS Alert:

ACCUMULATED TIME SERVED AT CFS ALERT - MONTHLY RATE

Less than 7 months	\$ 95.
07 months or more but less than 13 months	\$195.
13 months or more but less than 19 months	\$292.
19 months or more but less than 25 months	\$387.
25 or more months	\$483.

⁹⁵ The following recruiting allowances have been approved:

Pilot Terminable Allowance	\$ 75,000 QR&O 205.51
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f. Others

Travelling expenses:

CFAO 209-14

Use of private motor car for temporary duty

CFAO 209-7

D. Leave

Not unlike his civilian counterpart in the Public Service, a member of the Canadian Forces is entitled to Annual Leave, Sick Leave (technically, a CF member does not accumulate sick leave credits and there is no upper limit to the number of sick days which may be granted to an injured/sick CF member).

Accumulated Leave, Leave without Pay, and Short Leave benefits for the military person are very much like those granted to public servants. However, there are some significant differences in entitlements to annual vacation leave as indicated below:

ANNUAL VACATION LEAVE - QR&O 16.14

Annual leave entitlements	Years of service required	
	Public Service (i.e. CR, AS and PM collective agreements)	Canadian Forces
15 working days	less than 8 years	Following enrolment, CF members are entitled to a total of 20 days of annual vacation leave
18 working days	less than 17 years	
20 working days	18 years or more	
25 working days	after 20 years	CF members with between 5 and 28 years of military service are entitled to a total of 25 days of annual vacation leave.
28 working days	after 28 years	
30 working days	after 29 years	CF members with 28 years or more of military service are entitled to 30 days of annual vacation leave.

Medical Officer Direct Entry Recruiting

Allowance

\$225,000 QR&O 205.52

Dental Officer Direct Entry Recruiting Allowance

\$ 25,000 QR&O 205.53

Post Secondary Diploma Certificate - NCMs

\$ 10,000 QR&O 205.531

Civilian Trade Qualified

\$ 20,000 QR&O 205.532

Military Occupation Qualified - NCMs

\$ 20,000 QR&O 205.533

Engineering Officer

\$ 40,000 QR&O 205.535

E. Eligibility for an immediate unreduced annuity

It is trite to say that a career in the profession of arms demands unlimited commitment. One could be ordered to deploy on a dangerous mission on a moment's notice and serve under abnormal and hazardous conditions for extended periods. Besides the rigorous training, experience and discipline, a military member needs to have robust mental and physical health, be physically fit and be capable of sustaining exposure to stress and risks over prolonged periods. In return, military members are blessed with the possibility of taking early retirement whose threshold points vary depending upon the conditions of service negotiated at the time of entry into the Canadian Forces.

At the risk of simplifying a cumbersome and complex series of retirement plans for military personnel, it is safe to say that, normally, a career military person would serve until he reaches either the minimum amount of years for eligibility to an immediate unreduced annuity or the compulsory retirement age set for his rank, whichever comes the earlier. (In reality, very few actually serve to the compulsory retirement age.)

a. Years of service:

- | | |
|---------------------------------|----|
| 1. Colonel or above | 30 |
| 2. Lieutenant Colonel and below | 28 |
| 3. Sergeant and above | 30 |
| 4. Corporal and below | 25 |

b. Compulsory retirement age:

COMPULSORY RELEASE AGES – OFFICERS

See Tables A, B, C and G to article 15.17 QR&O

RANKS	General Service Officers (See Note)	Specialist Officers	Officers Commissioned from the Ranks	Officers who commenced service as an officer of the Regular Force on or after 1 April 1976
Brigadier Gen. and above	55	60	55	55
Colonel	55	58	55	55
Lieutenant-Colonel	51	55	50	55
Major	47	55	50	55
Captain and Lieutenant	45	50	50	55

NOTE: Facing a serious recruiting and retention shortfall, the Canadian Forces have increased the compulsory retirement age to age 60.⁹⁶

COMPULSORY RELEASE AGES -- NON-COMMISSIONED MEMBERS		
See Tables A and D to article 15.31QR&O		
RANKS	Commenced his/her service as a non-commissioned member of the Regular Force on or after 1 February 1968 but prior to 1 April 1978	Commenced his/her service as a non-commissioned member of the Regular Force on or after 1 April 1978
Sergeant and above	50	55
Corporal and below	44	55

VIII. *Military Discipline*⁹⁷

In applying sanctions, a Canadian military leader has recourse to two broad, overlapping systems: the administrative system and the statutory system. The administrative system tends to be remedial, consisting of actions taken to correct or improve a member's performance rather than punish a bad conduct, as is the case through the formal disciplinary system. Administrative sanctions, for example, would normally be taken to correct the early stages of drug (soft) and alcohol abuse by a senior and experienced

⁹⁶ On the surface, this seems to go against conventional wisdom which normally sees military service as the province of the youth:

[...] most great generals of ancient and modern times have gained their laurels while still young [...] Philip of Macedon ascended to the throne at the age of twenty-two [...] At the age of forty-five he had conquered all of Greece [...] Alexander the Great had defeated the celebrated Theban Band at the battle of Cheronea and gained a military reputation at the age of eighteen. [...] Julius Caesar commanded the fleet sent to blockade Mitylene where he greatly distinguished himself before the age of twenty-two. [...] He had twice crossed the Rhine, and conquered all Gaul, and had twice passed over to Britain, before the age of forty-five. [...] Hannibal joined the Carthaginian army in Spain at the age of twenty-two and was made commander-in-chief at twenty-six. [...] Charlemagne conquered Aquitania at twenty-eight, made himself master of France and the greater part of Germany at twenty-nine [...] Saxe at twenty-four was made *maréchal-de-camp* [...] Napoléon was commander-in-chief of the army of Italy at twenty-six [...]” See *Elements of Military Art and Science*, *supra* note 59 at 386-396.

⁹⁷ Discipline is defined as: “an attitude of respect for authority which is developed by leadership, precept and training. It is a state of mind that leads to a willingness to obey an order no matter how unpleasant the task to be performed.” James B. Fay, “Canadian Military Criminal Law: An examination of Military Justice.” (1975) 23:1 *Chitty's L.J.* at 123.

member of a unit or against a junior military member who has a history of family and financial difficulties impacting on his availability for deployment on foreign missions.

Administrative sanctions are not a substitute for disciplinary action. However, a given incident might give rise to both an administrative action (i.e. compulsory release from the Canadian Forces or non-eligibility for promotion while serving under a counselling and probationary period) and statutory sanction(s) (fine or reprimand, or both).

A. Administrative Sanctions

Administrative or career sanctions. Administrative sanctions can, and often do, have as severe an impact upon a member's career as that which may be awarded through the disciplinary process – and, there is no appeal *per se*. Administrative sanctions can be directed against either officers or NCMs. In an ascending order of severity, they are as follows:

a. *Verbal warning.* This is normally directed against junior personnel. A verbal warning has but a short-term impact on one's career in that it might have a negative influence on the member's annual performance evaluation report.

b. *Recorded warning (NCMs only)* ⁹⁸ or, *Report of Shortcomings* (Officers only)⁹⁹. The *Recorded Warning* or the *Report of Shortcomings* is placed on a member's performance evaluation file at NDHQ for a specified period. Members of Merit Review Boards, which are convened annually by NDHQ, will have access to this document and weigh its importance and significance when ranking the member subject to a warning, against peers, on the merit list for promotion in the coming year.

c. *Counselling and Probation (C&P).* CFAO 26-17 – *Recorded Warning and Counselling and Probation* apply to instances of recorded warning and counselling and probation [C&P] initiated in respect of an officer or non-commissioned member who has shown unacceptable deficiencies in performance or conduct, short of warranting disciplinary action. This CFAO applies specifically to cases that relate to any of the following deficiencies in a CF member:

1. Misuse of alcohol.
2. Unauthorized use of drugs or other involvement with drugs.
3. Harassment.
4. Indebtedness.

⁹⁸ CFAO 26-17. *Recorded Warning and Counselling and Probation – Other Ranks.*

⁹⁹ CFAO 26-21 *Career Shortcomings – Officers.*

5. Racism.

6. Sexual Misconduct.¹⁰⁰

The period of probation envisioned by CFAO 26-17 would normally extend from 6 to 12 months. On completion of the probationary period, a special Performance Evaluation Report is normally requested of the applicable supervising officer. When the individual under probation has been unable to satisfactorily correct the deficiencies during the probationary period, a recommendation for compulsory release from the Canadian Forces would normally follow.

d. *Suspension from duty*. Section 215 of the NDA and QR&O 19.75 deal with suspension from duty as well as CFAO 208-6 *Suspension from Duty – Members Held in Civil Custody Awaiting Trial by Civil Tribunal*.

e. *Compulsory Release from the Canadian Forces*. Where the member fails to raise performance or conduct to an acceptable standard, the Commanding Officer or higher authority may take remedial action such as requiring further training, placing the member on C&P or, in exceptional circumstances, initiating release proceedings in accordance with CFAO 15-2 *Release – Regular Forces*. Compulsory release proceedings may also be initiated when a member's medical category is permanently downgraded to a level indicating that the member is disabled and unfit for military service, in the case of illegal absentees, or members who were irregularly enrolled or transferred. Recommendations for compulsory release are also normally made when a member (including one on leave without pay or on terminal leave), is imprisoned by a civil court or when a member is serving a sentence in a service prison, detention barracks or a unit detention room.

¹⁰⁰ Sexual misconduct is defined in CFAO 19-36 – *Sexual misconduct* as an act which has a sexual purpose or is of a sexual or indecent nature and which constitutes an offence under the Criminal Code or the Code of Service Discipline. Examples of sexual misconduct dealt with under the provisions of this order would include, but are not limited to, sexual activity between consenting adults under prohibited circumstances, sexual abuse of a child, incest, sexual assault, aggravated sexual assault, indecent exposure and bestiality. Where conduct is alleged that could constitute sexual harassment but is not an offence under the Criminal Code (e.g. lewd comments), it is dealt with pursuant to CFAO 19-39 – *Personal Harassment*.

In the U.S. military, adultery is a military crime and is regularly prosecuted as such. For instance, between 1992 and 1996 over 858 service members were charged with having committed adultery. However, not all acts of adultery are punishable under the U.S. *Code of Military Discipline*. To obtain a conviction, the prosecution must show that the accused engaged in sexual intercourse with another person (1) at the time when one of the two was married to another and (2) under circumstances that were service discrediting or prejudicial to good order and discipline. Service-discrediting conduct must be of the type to injure the armed forces' reputation. Michael J. Davidson, *A Guide to Military Criminal Law* (Annapolis: Naval Institute Press, 1999) at 87.

B. *Statutory sanctions*

1. *Service Tribunals*¹⁰¹

There are two types of service tribunals: summary trials and courts martial.¹⁰²

Summary trials are service tribunals designed to handle less serious offences at the unit level where unit discipline is directly at stake. Summary trials are designed for minor service offences, where the likely punishments are not too severe. The object is to deal with the offences quickly, within the unit, and to return the member to the unit as soon as possible. They provide fewer, if any, procedural protections compared to a court martial. Summary trials are conducted primarily by commanding officers, their delegates or a superior military authority.

Of the four types of court martial, two are presided over by a military judge sitting alone. As such the judge performs all of the functions of a judge sitting alone in the civilian criminal justice system, including sentencing. Both a General Court Martial and a Disciplinary Court Martial, however, are composed of a panel of officers analogous to a jury. A military judge officiates at the court martial but it is the panel that determines the verdict and performs the sentencing function. The table below indicates, in general terms, the organization and jurisdiction of CF tribunals.

¹⁰¹ Section 2 of the NDA defines 'service tribunal' as a court martial or a person presiding at a summary trial.

¹⁰² Simmons in *The Constitution and Practice of Courts Martial with a Summary of the Law of Evidence*, *supra* note 11 at B1 and B2 reports that Courts Martials, as then held in the British Army, succeeded in name, for the most part, to the jurisdiction of the marshall's court, or court-marshall of ancient military organizations:

In the Latin of the parliament rolls in the time of King Henry IV, the marshall court was called "curia militaris (the knights's court, or court of the chivalry), from miles, chevalier or knight. The change to "martial" points to men who had heard more the gods of ancient Rome than of the dignities of feudal England; and the same false etymology (Mars, Martialis), which has misled even judges and counsel learned in the law, affected the spelling of "marshall law," "judge marshall," and "provost marshall." This last appears as "provost martial" so late as the Articles of William III and Queen Anne; and, on the other hand, "martial law" may be found as early as 1547 in the letters patent of Sir Anthony St. Leger as Lord Deputy of Ireland — "secundum legem et consuetudinem Marescalciae . . . (vocatam, martial Law) [...]"

At B2, *supra* note 11, Simmons writes also about the constitutional origins of court martials: These courts formerly derived their authority exclusively from the crown, in right of the supreme government of the army, and for the first time received a statutory recognition at the Revolution of 1688. Although recourse was then had to parliament for more ample powers than were known to the common law, the act then passed and many other mutiny acts were afterwards allowed to expire, courts martial the meantime depending only on custom and the power of the crown to establish articles of war.

A. JURISDICTION OF SERVICE TRIBUNALS

Summary Trials

Court Martial Trials

B. COMPOSITION OF SERVICE TRIBUNALS

	General	Disciplinary	Standing	Special
	NDA s. 166	NDA s. 169	NDA s. 173	NDA s. 176
<i>Tried by C.O. or a delegated officer:</i>	Any person who is liable to be charged, dealt with and tried on a charge of having committed a service offence.	Any officer of or below the rank of major or any non-commissioned member who is liable to be charged, dealt with and tried on a charge of having committed a service offence.	Any officer or NCM who is liable to be charged, dealt with and tried on a charge of having committed a service offence.	Any person, other than an officer or NCM who is liable to be charged, dealt with and tried on a charge of having committed a service offence.
The accused is either an officer cadet or a NCM member below the rank of warrant officer.				
<u><i>Tried by Superior Officer:</i></u>				
The accused is an officer below the rank of lieutenant colonel or a NCM above the rank of sergeant.				

SUMMARY TRIALS

COURT MARTIAL TRIALS

	General	Disciplinary	Standing	Special
	NDA s. 167(1)	NDA s. 170(1)	NDA s. 174	NDA s. 177
Depending on the rank of the accused, the summary trial may be conducted by the Commanding officer or his delegated officer, or a Superior Officer.	Military judge and a panel of five members.	Military judge and a panel of three members.	Every military judge is authorized to preside and a military judge who does so constitutes the Standing Court Martial.	Every military judge is authorized to preside and a military judge who does so constitutes the Special General Court Martial.

C. LIMITATIONS ON SENTENCE BY A SERVICE TRIBUNAL

SUMMARY TRIALS

COURT MARTIAL TRIALS

	General	Disciplinary	Standing	Special
	NDA s. 167(1)	NDA s. 172	NDA s. 175	NDA s. 178
NDA ss. 163(3), 163(4) ¹⁰³ (c) minor punishments and 164(4) ¹⁰⁴				
In accordance with NDA ss. 163(3), a C.O. may pass one or more of the following sentences: (a) detention for a period not exceeding 30 days; (b) reduction in rank by one rank; (c) severe reprimand, (d) reprimand, (e) a fine not exceeding basic pay for one month, and (f) minor punishments.	No limitation	May not pass a sentence that includes a punishment higher in the scale of punishments than dismissal with disgrace from Her Majesty's service. <i>NDA s. 172</i>	May not pass a sentence that includes a punishment higher in the scale of punishments than dismissal with disgrace from Her Majesty's service. <i>NDA s. 175</i>	May only pass a sentence that includes a punishment of imprisonment or a fine.

¹⁰³ A Commanding Officer may, subject to regulations made by the Governor in Council and to the extent that the commanding officer deems fit, delegate powers to try an accused person by summary trial to any officer under the commanding officer's command, but an officer to whom powers are delegated may not be authorized to impose punishments other than the following:

- (a) detention not exceeding fourteen days;
- (b) severe reprimand;
- (c) reprimand;
- (d) a fine not exceeding basic pay for fifteen days; and

¹⁰⁴ A superior commander at a summary trial may pass a sentence in which any one or more of the following punishments may be included:

- (a) severe reprimand;
- (b) reprimand; and

D. RIGHT OF APPEAL

SUMMARY TRIALS

No right of appeal

COURT MARTIAL TRIALS

By Person Tried. NDA s. 230 grants every person subject to the Code of Service Discipline the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters:

- (a) with leave of the Court or a judge thereof, the severity of the sentence, unless the sentence is one fixed by law;
- (b) the legality of any finding of guilty;
- (c) the legality of the whole or any part of the sentence;
- (d) the legality of a finding of unfit to stand trial or not responsible on account of mental disorder;
- (e) the legality of a disposition made under section 201, 202 or 202.16; or
- (f) the legality of a decision made under subsection 196.14(1) or 196.15(1).

By the Minister. Pursuant to NDA s. 230, the Minister has the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters:

- (a) with leave of the Court or a judge thereof, the severity of the sentence, unless the sentence is one fixed by law;
- (b) the legality of any finding of not guilty;
- (c) the legality of the whole or any part of the sentence;
- (d) the legality of a decision of a court martial that terminates proceedings on a charge or that in any manner refuses or fails to exercise jurisdiction in respect of a charge;
- (e) the legality of a finding of unfit to stand trial or not responsible on account of mental disorder;
- (f) the legality of a disposition made under section 201, 202 or 202.16; or
- (g) the legality of a decision made under subsection 196.14(1) or 196.15(1).

2. Court Martial Appeal Court

The *Court Martial Appeal Court of Canada* [CMAC] is a court established by Parliament for the better administration of the laws of Canada pursuant to section 101 of the *Constitution Act*, 1867.¹⁰⁵ It is created by section 234 of the NDA and is a superior court of record identical in function and status to the provincial superior courts having appellate jurisdiction in criminal matters. Section 234 of the NDA provides:

¹⁰⁵ *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

234. (1) There is hereby established a Court Martial Appeal Court of Canada, which shall hear and determine all appeals referred to it under this Division.
- (2) The judges of the Court Martial Appeal Court are not less than four judges of the Federal Court to be designated by the Governor in Council and such additional judges of a superior court of criminal jurisdiction as are appointed by the Governor in Council.
- (3) The Governor in Council shall designate one of the judges of the Court Martial Appeal Court to be the Chief Justice thereof, who shall preside, when present, at any sittings of the Court and shall, subject to subsection (4), appoint another judge to preside at any sittings of the Court at which the Chief Justice is not present.
- (4) Where the office of Chief Justice is vacant, or the Chief Justice is absent from Canada or is unable or unwilling to act, his powers shall be exercised and his duties by the senior judge who is in Canada and is able and willing to act.

As noted earlier, the *National Defence Act of 1950* provided, for the first time in Canadian military law, a system of appeal for service personnel to an outside tribunal, roughly analogous to the civilian system of justice. The *Court Martial Appeal Board*¹⁰⁶ could hear appeals from courts martial by service personnel, against convictions or against the legality of sentences. There was also a further possibility of appeal to the *Supreme Court of Canada* on matters of law, with leave where the members of the Board were unanimous, or as of right where one member dissented. The Minister of National Defence (representing the Crown before courts martial) had no right of appeal.¹⁰⁷

The next major development came in 1991 amendments to the *National Defence Act*, which altered the jurisdiction of the Court and made it more closely analogous to other civilian courts of criminal appellate jurisdiction. Until that time the power of the Court to sentence was limited to referring the

¹⁰⁶ This Board was to be chaired by a judge of the Exchequer Court (the predecessor of the Federal Court of Canada) or a judge of some other superior court, and to have two or more other members who were to be either active or retired superior court judges or barristers of at least five years standing. The first chairman was the Honourable John C.A. Cameron, a judge of the Exchequer Court.

¹⁰⁷ The next step in "civilianising" the appeal process came in 1959 when Parliament replaced the Court Martial Appeal Board with the Court Martial Appeal Court. The Court was made a superior court of record and its head was designated as President. It was to be composed solely of superior court judges, to be designated by the Governor in Council from the Exchequer Court or from superior courts of the provinces. Its jurisdiction remained essentially the same as that of the Board, and Mr. Justice Cameron became the first President of the Court. He was succeeded in 1964 by Mr. Justice Hugh Gibson of the Exchequer Court, who was in turn succeeded in 1982 by Mr. Justice Patrick Mahoney of the Trial Division of the Federal Court of Canada (which had replaced the Exchequer Court in 1971). By statute the title of the head of the Court was changed in 1984 to that of Chief Justice of the Court Martial Appeal Court and Mr. Justice Mahoney became the Court's first Chief Justice.

matter to the Minister of National Defence for review. Moreover, the Crown had no right of appeal in respect of either conviction or sentence. In 1991 the Court was given full powers to review the severity of sentences and to substitute new sentences. Further, the Crown, as represented by the Minister of National Defence, was given the right to appeal both sentence and conviction. In the case of either the Crown or the individual, an appeal against sentence can be brought only with leave of the Court. Appeals to the *Supreme Court of Canada* remain available on the same basis as before.¹⁰⁸

The Governor in Council appoints the judges of the Court from among incumbent trial and appellate judges of the provincial superior courts and the *Federal Court of Canada*.¹⁰⁹ The Federal Court of Canada provides

¹⁰⁸ Other modern developments have affected the work of the Court. The advent of the *Canadian Charter of Rights and Freedoms* in 1982 has resulted in many more constitutional issues being raised before the Court. The *Charter* has also impacted on the work of the military courts, requiring in them a greater degree of institutional independence from the command structure of the Armed Forces. Among other changes, this has resulted in members of the *Court Martial Appeal Court* serving on committees designed to strengthen the independence and security of tenure of the military judges who serve on the courts martial. For instance, the present Chief Justice, Mr. Justice Strayer of the *Federal Court of Appeal*, appointed in 1994, also serves as Chairman of the *Military Justice Stakeholders Committee*, made up of representatives of the various interests concerned with the military justice system, which serves as a forum for the general discussion of military justice policy.

¹⁰⁹ Judges of the *Court Martial Appeal Court* as of September 2003:

Hon. James K. Hugessen	Hon. William Philip McKeown	Hon. François Lemieux
Hon. Benjamin Hewak	Hon. Frederick E. Gibson	Hon. Karen Sharlow
Hon. Jacques Vaillancourt	Hon. Sandra J. Simpson	Hon. Carol Mahood Huddart
Hon. Louis-Philippe Landry	Hon. Marc Nadon	Hon. Ross Goodwin
Hon. Paul Rouleau	Hon. Danièle Tremblay-Lamer	Hon. Elizabeth A. Roscoe
Hon. Edward C. Malone	Hon. John D. Richard	Hon. Elizabeth A. Bennett
Hon. Arthur J. Stone	Hon. Kenneth M. Lysyk	Hon. John A. O'Keefe
Hon. Yvon Pinard, P.C.	Hon. Guy A. Richard	Hon. J. D. Denis Pelletier
Hon. Max M. Teitelbaum	Hon. Walter R.E. Goodfellow	Hon. Eleanor R. Dawson
Hon. W. Andrew MacKay	Hon. Karen M. Weiler	Hon. Dolores Hansen
Hon. Alice Desjardins	Hon. Eugene Glen Ewaschuk	Hon. Elizabeth Heneghan
Hon. Elizabeth McFadyen	Hon. Thérèse Rousseau-Houle	Hon. J. Brian D. Malone
Hon. Joanne B. Veit	The Hon. Perry Meyer	Hon. Edmond P. Blanchard
Hon. Robert Décary	Hon. André Biron	Hon. Michael A. Kelen
Hon. Allen M. Linden	Hon. Roland Durand	Hon. Michel Beaudry
Hon. J. Armand DesRoches	Hon. William Roy Matheson	Hon. Luc Martineau
Hon. Julius A. Isaac	Hon. Douglas R. Campbell	Hon. Layden-Stevensen
Hon. Gilles Létourneau	Hon. Allan Lutfy	Hon. Simon Noël
Hon. Donna McGillis	Hon. J. Edgar Sexton	Hon. Judith A. Snider
Hon. Marshall E. Rothstein	Hon. Pierre Blais, P.C.	Hon. Johanne Gauthier
Hon. Marc Noël	Hon. John Maxwell Evans	Hon. James O'Reilly
		Hon. James Russell

administrative support. An appeal can be heard anywhere in Canada or elsewhere. It is the Court's policy to hear every appeal at the location most convenient to the individual party where suitable facilities are available.

Every person who has been tried and found guilty or unfit to stand trial or not responsible on account of mental disorder may appeal in respect of the legality of that finding and of the sentence or disposition consequent upon it. The Minister of National Defence may appeal in respect of the legality of any finding of not guilty as well as the legality of the sentence or finding of unfit to stand trial or not responsible on account of mental disorder or the disposition consequent thereon. Either may, with leave of a judge or the Court, appeal the severity of the sentence.¹¹⁰

¹¹⁰ The following relevant legislative provisions found in the NDA concerning the *Court Martial Appeal Court* are reproduced below for convenience sake:

Powers on appeal against finding of guilty

- 238. (1)** On the hearing of an appeal respecting the legality of a finding of guilty on any charge, the Court Martial Appeal Court, if it allows the appeal, may set aside the finding and
- (a) enter a finding of not guilty in respect of the charge; or
 - b) direct a new trial on the charge.

Effect of setting aside finding of guilty

- 238. (2)** Where the Court Martial Appeal Court has set aside a finding of guilty and no other finding of guilty remains, the whole of the sentence ceases to have force and effect.

Sentence where findings partly set aside

- 238. (3)** Where the Court Martial Appeal Court has set aside a finding of guilty but another finding of guilty, the Court may, except where it allows an appeal under section 240.1,
- a) affirm the sentence imposed by the court martial if the court martial could legally have imposed that sentence on the finding of guilty that remains; or
 - b) substitute for the sentence imposed by the court martial a sentence that is warranted in law.

Substitution of finding

- 239(1).** Where an appellant has been found guilty of an offence and the court martial could, on the charge, have found the appellant guilty under section 133, 134 or 136 of some other offence or could have found the appellant guilty of some other offence on any alternative charge that was laid and, on the actual finding, it appears to the Court Martial Appeal Court that the facts proved the appellant guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the finding of guilty made by the court martial a finding of guilty of that other offence.

Sentence on substituted finding

- 239(2).** On the substitution of a finding of guilty under subsection (1), the Court Martial Appeal Court may, except where it allows an appeal under section 240.1,
- (a) affirm the sentence imposed by the court martial if the court martial could have imposed that sentence on the substituted finding of guilty; or
 - (b) substitute for the sentence imposed by the court martial a sentence that is warranted in law.

240.1 On the hearing of an appeal respecting the severity of a sentence, the Court Martial Appeal Court shall consider the fitness of the sentence and, if it allows the appeal, may, on such evidence as it thinks fit to require or receive, substitute for the sentence imposed by the court martial a sentence that is warranted in law.

An appeal must be disposed of by a majority of a panel of three judges. Any other matter before the Court may be disposed of by a single judge.

3. *Offences*

Annex A – *Statutory Offences and Accompanying Punishments* - presents, in a table form, the various statutory offences together with their accompanying punishments which may be awarded by a military tribunal. Of note, in accordance with section 70 of the NDA a service tribunal may not try certain offences:

Offences not triable by service tribunal

70. A service tribunal shall not try any person charged with any of the following offences committed in Canada:

- (a) murder;
- (b) manslaughter; or
- (c) an offence under any of sections 280 to 283 of the Criminal Code.
- (d) to (f) [Repealed, 1998, c. 35, s. 22]

C. *Punishments*

Article 139(1) of the NDA enumerates the scale of punishments in respect of service offences. Each of the punishments shown below is a punishment less than every punishment preceding it.

1. *Imprisonment for life.*

The NDA makes the following specific provisions for the punishment of imprisonment for life:

Substitution of new sentence where illegal sentence set aside

240. On the hearing of an appeal respecting the legality of a sentence imposed by a court martial, the Court Martial Court, if it allows the appeal, may substitute for the sentence imposed by the court martial a sentence that is warranted in law.

Appeal against severity of sentence

240.1 On the hearing of an appeal respecting the severity of a sentence, the Court Martial Appeal Court shall consider the fitness of the sentence and, if it allows the appeal, may, on such evidence as it thinks fit to require or receive, substitute for the sentence imposed by the court martial a sentence that is warranted in law.

Sentence of imprisonment for life

140.3 (1) Where a court martial imposes a punishment of imprisonment for life, the sentence to be pronounced shall be

- (a) in respect of a person who has been convicted of having committed traitorously an offence of misconduct in the presence of an enemy contrary to section 73 or 74, an offence related to security contrary to section 75 or an offence in relation to prisoners of war contrary to section 76, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;
- (b) in respect of a person who has been convicted of an offence of high treason or an offence of first degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;
- (c) in respect of a person who has been convicted of an offence of second degree murder if that person has previously been convicted of culpable homicide that is murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;
- (d) in respect of a person who has been convicted of an offence of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or any greater number of years, not being more than twenty-five, that has been substituted under subsection (2);¹¹¹ and
- (e) in respect of a person who has been convicted of any other offence, that the person be sentenced to imprisonment for life with normal eligibility for parole.

Provisions of Criminal Code apply

140.3(2) Sections 745.1 to 746.1 of the Criminal Code apply, with any modifications that the circumstances require, to a sentence of life imprisonment imposed under this Act, and

(a) a reference in sections 745.2 and 745.3 of the Criminal Code to a jury is deemed to be a reference to the panel of a General Court Martial; and

(b) a reference in section 745.6 of the Criminal Code to the province in which a conviction took place is deemed, in respect of a conviction that took place outside Canada, to be a reference to the province in which the offender is incarcerated when the offender makes an application under that section.

¹¹¹ Section 140.3 of the NDA provides, where an accused is sentenced to life imprisonment, for the imposition of parole ineligibility by a court martial. This section incorporates the parole ineligibility provisions of the Criminal Code to ensure that there is no disparity of treatment between service prisoners and civil prisoners in regards to parole ineligibility, sentence recommendations, ability to apply for judicial review where convicted of murder or high treason having served 15 years, and eligibility for day parole.

¹¹² However, section 140 of the NDA provides that, where the punishment of imprisonment for life is not mandatory, imprisonment for a shorter term may be awarded by the tribunal.

The following offences under the NDA, call for a punishment of life imprisonment:¹¹²

NDA	OFFENCES
73	Misconduct of Commanders in Presence of Enemy
74	Misconduct of 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 spy
79 and 80	Mutiny
81	Offences related to mutiny
82	Advocating governmental change by force
83	Disobedience of lawful command
84	Striking or offering violence to a superior officer
98	Malingering, aggravating disease or infirmity or injuring self or another
106	Disobedience of captain's orders
107	Wrongful acts in relation to aircraft or aircraft material
127	Injurious or destructive handling of dangerous substances

There is nothing unique-to-the-military about this particular sentence. What is of significance and importance, however, is that a Court Martial¹¹³ may, in addition, to the punishment of imprisonment for life, impose the following accompanying punishments:

a. a punishment of dismissal with disgrace or dismissal in accordance with subsection 140(1) of the NDA:

Accompanying punishments

140.1 (1) Where a court martial imposes a punishment of imprisonment for life or for two years or more on an officer or a non-commissioned member, the court

Imprisonment for shorter term

140. Every person who, on conviction of a service offence, is liable to imprisonment for life, other than as a minimum punishment, or for a term of years or other term may be sentenced to imprisonment for a shorter term.

¹¹³ See: *Military Law and Precedents*, *supra* note 2 at 62. A court-martial has been called a "court of honour," and this designation, though less employed than formerly, is still applicable to it, for the reason that it punishes dishonourable conduct where the same affects the reputation or discipline of the army. It may try an officer for not being also a gentleman - a dereliction not cognizable by any other species of tribunal.

martial may in addition, notwithstanding any other provision of this Division, impose a punishment of dismissal with disgrace from Her Majesty's service or a punishment of dismissal from Her Majesty's service.

b. a punishment of reduction in rank in accordance with section 140.2 of the NDA.

Reduction in rank as accompanying punishment

140.2 Where a court martial imposes a punishment of imprisonment on an officer or a non-commissioned member, the court martial may in addition, notwithstanding any other provision of this Division, impose a punishment of reduction in rank, that may be

(a) in the case of an officer, to the lowest commissioned rank; and

(b) in the case of a non-commissioned member, to the lowest rank to which under the regulations the non-commissioned member can be reduced.

The impact of these accompanying punishments will be discussed in considerable detail below.

2. Imprisonment for two years or more.

There is also nothing unique-to-the-military about this particular punishment. What is of significance, and is often the norm, is that the Court Martial may, in addition, to the punishment of imprisonment for two years or more, impose the following accompanying punishments:

a. dismissal with disgrace or dismissal in accordance with subsection 140(1) of the NDA.

Accompanying punishments

140.1 (1) Where a court martial imposes a punishment of imprisonment for life or for two years or more on an officer or a non-commissioned member, the court martial may in addition, notwithstanding any other provision of this Division, impose a punishment of dismissal with disgrace from Her Majesty's service or a punishment of dismissal from Her Majesty's service.

b. reduction in rank in accordance with subsection 140.2 of the NDA.

Reduction in rank as accompanying punishment

140.2 Where a court martial imposes a punishment of imprisonment on an officer or a non-commissioned member, the court martial may in addition, notwithstanding any other provision of this Division, impose a punishment of reduction in rank, that may be

- (a) in the case of an officer, to the lowest commissioned rank; and
- (b) in the case of a non-commissioned member, to the lowest rank to which under the regulations the non-commissioned member can be reduced.

The impact of these accompanying punishments will be discussed below.

3. Dismissal with disgrace from Her Majesty's service. (See Annex B – Punishments: Dismissal or Release for Misconduct)

Under subsection 141(1) of the NDA, the punishment of dismissal with disgrace from Her Majesty's service can be imposed as such or can be accompanied with a punishment of imprisonment for less than two years.

Dismissal with disgrace

141. (1) Where a service tribunal imposes a punishment of dismissal with disgrace from Her Majesty's service on an officer or non-commissioned member, the service tribunal may in addition, notwithstanding any other provision of this Division, impose a punishment of imprisonment for less than two years.

In addition, under subsection 140(1) of the NDA, the punishment of dismissal with disgrace can be added to an imprisonment for life or for two years or more.

Dismissal as accompanying punishment

140.1 (1) Where a court martial imposes a punishment of imprisonment for life or for two years or more on an officer or a non-commissioned member, the court martial may in addition, notwithstanding any other provision of this Division, impose a punishment of dismissal with disgrace from Her Majesty's service or a punishment of dismissal from Her Majesty's service.

Effective date of dismissal

141(1.1) A punishment of dismissal with disgrace from Her Majesty's service or dismissal from Her Majesty's service is deemed to be carried out as of the date on which the release of an officer or a non-commissioned member from the Canadian Forces is effected.

Consequences

141(2) A person on whom a punishment of dismissal with disgrace from Her Majesty's service has been carried out is not, except in an emergency or unless that punishment is subsequently set aside or altered, eligible to serve Her Majesty again in any military or civil capacity.

The following offences make specific provisions for a punishment of dismissal with disgrace:

NDA	OFFENCES
73	Misconduct of Commanders in Presence of Enemy (other than acting traitorously or from cowardice)
77	Offences related to operations
80	Mutiny
85	Insubordinate behaviour
92	Scandalous conduct by officers
104	Losing, stranding or hazarding vessels
124	Negligent performance of duties
129	Prejudice to the good order or discipline

In simpler days,¹¹⁴ when the bulk of Canada's population was rural in nature, the punishment of dismissal with disgrace or release for misconduct had little long-term impact upon the future employability of the disgraced soldier or officer. At worse, his reputation, prestige, and standing in his own community was tarnished after being branded as unfit for service to Queen and country. However, if he relocated to some other part of the continent, with or without an assumed alias, he could live out his existence in relative anonymity, tranquillity and even comfort. Such a scenario is very unlikely today in an age of electronic mass communications and regulatory intervention by the state in several aspects of modern life.

Annex B presents, in a summary form, the principal consequences of such a punishment not the least of which is a bar from future employment in

¹¹⁴ *The Constitution and Practice of Courts Martial with a Summary of the Law of Evidence*, *supra* note 11 at B1 ranks the punishments of "cashiering" and "dismissal" in the following order: Discharged with ignominy.

Cashiering (see note below), accompanied by a declaration that the prisoner is unfit, or unworthy, or totally unfit and unworthy to serve in any military capacity to which has sometimes been added, that the prisoner's sword to be broken over his head, or his shoulder boards or other insignia of ranks be cut off publicly in the presence of the command to which he is attached. (i.e. Capt. Albert Dreyfus, French Army, January 1895.)

Cashiering simply

Dismissal.

NOTE. "Dismissal" and "cashiering" were formerly regarded as quite distinct in military law; the latter involving, in addition to a dishonourable separation from the services, a disability to hold military office and thus constituting a more severe punishment than the former. *Military Law and Precedents*, *supra* note 3 at 618.

the public service. Most obviously, the punishment is severe and has lifelong consequences. Moreover, the shame and opprobrium associated with such a punishment is likely to be haunting the CF member's descendants for many generations.

4. Imprisonment for less than two years.

When a court martial imposes a punishment of imprisonment for less than two years, subsection 140.1(1) of the NDA makes provisions for an accompanying punishment of dismissal and/or reduction in rank.

Dismissal as accompanying punishment

140.1(2) Where a court martial imposes a punishment of imprisonment for less than two years on an officer or a non-commissioned member, the court martial may in addition, notwithstanding any other provision of this Division, impose a punishment of dismissal from Her Majesty's service.

Reduction in rank as accompanying punishment

140.2 Where a court martial imposes a punishment of imprisonment on an officer or a non-commissioned member, the court martial may in addition, notwithstanding any other provision of this Division, impose a punishment of reduction in rank, that may be

- (a) in the case of an officer, to the lowest commissioned rank; and
- (b) in the case of a non-commissioned member, to the lowest rank to which under the regulations the non-commissioned member can be reduced.

As noted above, there is nothing peculiar for a military member to be sentenced to a term of imprisonment for two years or less; the consequences are the same as those imposed on civilians. The same cannot be said, however, if the term of imprisonment is accompanied by a punishment of dismissal from Her Majesty's service. These consequences are covered in Annex B to this paper.

5. Dismissal from Her Majesty's service. (See Annex B)

Dismissal with disgrace from Her Majesty's service can be imposed on an officer or non-commissioned member as an accompanying punishment where the officer of the NCM is sentenced to life imprisonment or to imprisonment for two years or more. Dismissal without disgrace is a sentencing option which can be imposed on an officer or an NCM, as an accompanying punishment, where the officer of the NCM is sentenced to a term of imprisonment of less than two years.

The following relevant provisions in the NDA read as follows:

Dismissal as accompanying punishment

140.1 (1) Where a court martial imposes a punishment of imprisonment for life or for two years or more on an officer or a non-commissioned member, the court martial may in addition, notwithstanding any other provision of this Division, impose a punishment of dismissal with disgrace from Her Majesty's service or a punishment of dismissal from Her Majesty's service.

Dismissal as accompanying punishment

140.1(2) Where a court martial imposes a punishment of imprisonment for less than two years on an officer or a non-commissioned member, the court martial may in addition, notwithstanding any other provision of this Division, impose a punishment of dismissal from Her Majesty's service.

Effective date of dismissal

141(1.1) A punishment of dismissal with disgrace from Her Majesty's service or dismissal from Her Majesty's service is deemed to be carried out as of the date on which the release of an officer or a non-commissioned member from the Canadian Forces is effected.

As noted above, dismissal brings upon the head of the accused severe consequences, most of which have a lifelong impact for the member. A summary of these consequences is presented at Annex B.

6. Detention. (Annex C – Punishment: Reduction in Rank)

Of note, paragraph 142(1)(b) of the NDA provides that an officer may not be sentenced to detention.

Detention

142. (1) The punishment of detention is subject to the following conditions:

[...]

(b) no officer may be sentenced to detention.

However, in cases where this punishment can be imposed, paragraph 142(1)(a) limits the term of detention to a maximum of 90 days.

Detention

142. (1) The punishment of detention is subject to the following conditions: detention may not exceed ninety days and a person sentenced to detention may not be subject to detention for more than ninety days consecutively by reason of more than one conviction;

While undergoing detention, a NCM is automatically reduced in rank to the rank of private. However, the NCM reverts to his former rank on completion of his sentence.

Reduction in rank during detention

142(2) If a non-commissioned member above the rank of private is sentenced to detention, that person is deemed, for the period of the detention, to be reduced to the rank of private.

The financial consequences of a term of detention are principally of a short-term nature, in that the pay of the member is reduced to that of a private for the duration of his detention. The following table indicates the immediate financial impact upon a NCM for such a punishment.

FINANCIAL IMPACT OF A 30-DAY DETENTION ON A NCM

RANK		On a monthly basis	
	Monthly salary	Salary during detention	Loss of income
Chief Warrant Officer	\$5,844.	\$3,258.	\$2,586.
Master Warrant Officer	\$5,265.		\$2,007.
Warrant Officer	\$4,771.		\$1,513.
Sergeant	\$4,282.		\$999
Master Corporal	\$3,884.		\$626.
Corporal	\$3,728		\$470.

Depending on the circumstances, there might be also be a negligible impact on the annuity¹¹⁵ of the CF member as well as the member's qualifying time for receiving his good (long) service medal i.e. the Canadian Decoration. (See Annex C for a further discussion.)

¹¹⁵ Given that an annuity under the CFSA is based on the "best six years" in terms of salary, the worst-case scenario sees a Chief Warrant Officer sentenced to a 3-month detention period in the final year of his service. Assuming the CWO who has already accumulated 35 years of pensionable service retires immediately after completing his 90- day detention period, his annuity would be reduced by a total of approximately \$810. per year.

Sentenced to detention?	Annual salary						Annuity
	1997	1998	1999	2000	2001	2002	
NO	\$52,000.	\$61,000.	\$63,000.	\$65,000.	\$66,000.	\$68,000.	\$43,650.
YES	\$52,000.	\$61,000.	\$63,000.	\$65,000.	\$66,000.	\$68,000.	\$42,840.

7. *Reduction in rank.* (Annex C)

Whether awarded as a punishment on its own or as an accompanying punishment, the punishment of reduction in rank bears significant financial consequences most of which are of a lasting nature. However, in a document titled "Sentencing in the Services Justice Systems: a short guide", issued in December 1997, the U.K. Ministry of Defence notes that it is wrong to consider this punishment purely in financial terms:

A reduction in rank is also a reduction in responsibility. The all important question when a court is considering this punishment is whether the offender has demonstrated that he is unfit to hold his present rank by committing this offence. Whether he is reduced to the ranks or allowed to retain some lesser rank than his present one will depend on how seriously the court views his conduct and the mitigating factors.¹¹⁶

Additionally, aside from the obvious and serious economic hardship, and reduction in responsibility, a military person reduced in rank experiences immediate and widespread opprobrium in a society where one's rank and status is, literally, worn on one's sleeve, and in his subordination to former subordinates.¹¹⁷

Anecdotaly, however, not every reduction in rank brings about nasty consequences. For instance, a colonel reduced in rank to lieutenant colonel or below gains the advantage of being two years closer to the retirement gate for an unreduced annuity. As discussed earlier, a CF member serving in the rank of lieutenant-colonel or below qualifies for an immediate unreduced annuity at the 28 year service mark. An officer serving in the rank of Colonel must accumulate 30 years service before being permitted to retire on an unreduced annuity and avoid the consequential financial penalties for early retirement.

8. *Forfeiture of seniority*¹¹⁸

As discussed earlier, in the 19th century seniority used to play a dominant role in the promotion and ranking of officers among themselves. Seniority

¹¹⁶ As quoted recently by the U.K. Court Martials Appeal Court in *R v. Atkinson*, [2000] E.W.J. No. 1833 (QL) (C.M.A.C.) Rose LJ, Sullivan and Silber JJ.

¹¹⁷ *R. v. Fitzpatrick*, [1995] C.M.A.J. No. 9 (QL) (C.M.A.C.) Reed, Richard and Goodfellow JJ.A: The sentence of reduction in rank is a serious sentence. It carries with it career implications, considerable financial loss, plus social and professional standing loss within the services. It is a truism that rank has its privileges, and to reduce one to the lowest rank is a giant step backwards which undoubtedly serves not only as a deterrent to the individual but also a very visible and pronounced deterrent to others. There are occasions when a sentence in the military context justifiably departs from the uniform range in civic street and certainly the reduction in rank is a purely military sentence

¹¹⁸ The second edition of the *Oxford English Dictionary* defines seniority as: "Priority or precedence in office or service; esp. Mil. Superiority in standing to another of equal rank by

was also relied upon in making a selection between officers holding the same rank for a specific command or administrative appointment. Not surprisingly, the forfeiture of seniority was therefore a meaningful punishment:¹¹⁹

Loss of Relative Rank or Files, or Reduction in Grade. This species of punishment, in substance legalized by the British code, is with us, sanctioned by the established usage of the service. [...] The effect of this punishment is to deprive the officer of such relative right of promotion, as well as relative right of command and precedence on courts or boards and in choosing quarters, etc. as he would have had, had he remained at his original number. It cannot, however, affect his right to pay and allowances.¹²⁰

Of more recent vintage, the 1941 *Handbook of Canadian Military Law*,¹²¹ discusses briefly, the punishment of loss of seniority upon an officer serving in the Canadian Army:

Forfeiture of seniority of rank either in the army or in the corps¹²² to which the offender belongs, or in both, or, in the case of an officer whose promotion depends upon length of service, forfeiture of all or any part of his service for purposes of promotion. The forfeiture in either case, however, should not exceed twelve months seniority of service as the case may be."

reason of earlier entrance into the service or an earlier date of appointment". For the word "senior" the same authority gives: "That ranks before others in virtue of longer service or tenure of a position". The *Macquarie Dictionary* gives for "senior": "of higher standing, esp. by virtue of longer service"; for "seniority": "priority or precedence in age or service". See: *Re: William Moore Gould Kerr*, [1989] 88 ALR 125 (Federal Court of Australia), Gallop, Jenkison and Beaumont JJ.

¹¹⁹ The *Handbook of Canadian Military Law*, supra note 6, at 232-233, reproduces section 44 of the *Army Act* which provides for a punishment of forfeiture of seniority of rank: 44. Punishments may be inflicted in respect to offences committed by persons subject to military law and convicted by court martial -

In the case of officers according to the scale following:

[...]

(f) Forfeiture in the prescribed manner of seniority of rank, either in the army or in the corps to which the offender belongs, or in both; or, in the case of an officer whose promotion depends upon the length of service, forfeiture of all or any part of his service for the purposes of promotion;

In the case of soldiers, according to the scale following:

[...]

(m) In the case of a non-commissioned officer, reduction to the ranks or to a lower grade, or forfeiture in the prescribed manner, of seniority of rank;

¹²⁰ *Military Law and Precedents*, supra note 3 at 630.

¹²¹ *Supra* note 7 at 69.

¹²² The then Canadian Army was made up of corps and regiments. For example, the Corps of Infantry was made of several infantry regiments such as the Royal 22e Régiment and the Royal Canadian Regiment. Each regiment was made up, in turn, of a number of battalions i.e. The First Battalion, Royal Canadian Regiment (1 RCR); The Second Battalion, Royal Canadian Regiment (2 RCR) and so on.

Today, at worst, the forfeiture of seniority might have a slight impact upon a CF member by delaying one's entry into a given promotion zone.¹²³ On rare occasions, seniority could come into play, say for ceremonial or protocol reasons, but the impact could amount to no more than a bruised ego. Otherwise, it is a concept devoid of any real meaning for establishing standing among military members within a given rank level.

Before closing the discussion on this unique punishment, the reader may wish to give an eye to the following QR&Os provisions which provide some blights to the obvious concerning the concept of seniority in the Canadian military:

3.09 – ORDER OF SENIORITY

- (1) An officer takes seniority over all non-commissioned members.
- (2) Subject to article 3.10 (Seniority Between Types of Rank), officers take seniority among themselves and non-commissioned members among themselves in accordance with the order of ranks prescribed in article 3.01 (Ranks and Designations of Rank). [...]

3.10 – SENIORITY BETWEEN TYPES OF RANK

- (1) Officers and non-commissioned members who hold acting rank have no seniority in that rank. They have seniority among themselves in their order of seniority in their substantive rank.
- (2) When any part of the Canadian Forces is on active service, substantive and temporary ranks shall be regarded as equal for purposes of determining seniority.

3.11 – SENIORITY FROM SAME DATE

- (1) Where officers and non-commissioned members hold the same substantive rank with the same date of seniority, their seniority among themselves shall be determined:
 - (a) by their seniorities in their next lower rank;
 - (b) when their seniorities in the next lower rank are the same, by date of birth; or
 - (c) if they have no next lower rank, by the Chief of Defence Staff.

- (2) Unless the Chief of the Defence Staff otherwise directs, the order in which the names of officers appear in the current Canadian Forces Officers' List is evidence of their relative seniorities.

9. *Severe reprimand.*¹²⁴ (See Annex D – *Ordinary Punishments*)

Depending on the circumstances giving rise to the Reprimand, this punishment might lead directly to separate administrative sanctions being

¹²³ Major-General Terry Hearn, then acting Assistant Deputy Minister (Human Resources – Military) at National Defence Headquarters, responsible confirms this assessment. (Telephone conversation the Author with Major General Hearn dated 20 July 2001).

¹²⁴ At one time, Court Martials were forbidden by the Queen's Regulations to award a

taken against the punished member. In such an instance, a Career Review Board would likely be convened at NDHQ, leading, for instance, to a recommendation for the early compulsory release of the reprimanded member.

However, as is the norm, this punishment might have only a mild and temporary impact upon the career of the punished member. Alternatively, given that the Reprimand remains indefinitely on the individual career's file at NDHQ (unless a pardon is granted), documentary evidence of the Reprimand might well result in stagnation in the current rank of the individual until retirement, particularly if succeeding Merit Review Boards take a dim view of the facts leading up to the reprimand.

10. *Reprimand*. (See Annex D)

Try as I might, I cannot differentiate between a reprimand and a severe reprimand.¹²⁵ According to Winthrop, in *Military Law and Precedents*,¹²⁶ a court-martial in imposing a reprimand, may direct that it be either public – before the command or published in General Orders – or be given, in private, by way of personal reproof by the commanding officer in the absence of witnesses.

At one time, for NCMs, the punishment of Severe Reprimand entailed an entry on the regimental conduct sheet of the individual while a punishment of Reprimand entailed an entry only on the company conduct sheet.¹²⁷ [Recording of punishments will be discussed below in the penultimate part].

11. *Fine* (See Annex D)

The NDA makes the following provisions for the punishment by a fine.

Fine

145. (1) A fine must be imposed in a stated amount.

sentence of reprimand to a non-commissioned officer. *The Constitution and Practice of Courts Martial with a Summary of the Law of Evidence*, *supra* note 12 at 58.

¹²⁵ In *The Constitution and Practice of Courts Martial with a Summary of the Law of Evidence*, *supra* note 12 at 116, Simmons notes that a reprimand could vary in degree from public and severe to private. At 280, he notes that when public, a reprimand may be administered at the head of a regiment, brigade or division, paraded for the purpose of being present; or it may be conveyed in general orders. A private reprimand is usually given by the commanding officer of a regiment or brigade, at his quarters, in the presence of the officers of the regiment; or of the officers of equal and superior rank only, or simply in the presence of a staff officer.

¹²⁶ *Supra* note 3, at 632.

¹²⁷ Citing KR&O 1518 and 1523, the *Handbook of Canadian Military Law*, *supra* note 6 at 60.

Terms of payment

145(2) The terms of payment of a fine are in the discretion of the service tribunal that imposes the fine.

Variation of terms of payment

145(3) The terms of payment of a fine may be varied, in the case of a summary trial, by the officer who conducted the trial, and in the case of a court martial, by the military judge who imposed the fine or a military judge designated by the Chief Military Judge.

12. *Minor punishments (See Annex F)*

Article 146 of the NDA reads as follows:

Minor punishments

146. Minor punishments shall be such as are prescribed in regulations made by the Governor in Council.

Section 104.13 of the QR&O's goes on to amplify section 146 of the NDA in the following terms:

104.13(2) The following minor punishments may be imposed in respect of service offences:

- (a) confinement to ship or barracks;
- (b) extra work and drill;
- (c) stoppage of leave; and
- (d) caution.

D. *Career consequences of a military sentence*

Before closing, the reader may wish to be appraised of the fact that a CF member sentenced by a service tribunal will also face the following consequences

a. *Recording of convictions upon a CF Member's Conduct Sheet maintained at the unit level.* DAOD 7006-0 *Conduct Sheets* stipulates that conduct sheet containing entries of convictions and meritorious conduct shall be maintained on a member's unit personnel record. Also, DAOD 7006-01 *Preparation and Maintenance of Conduct Sheets*, requires that an entry be made on a member's conduct sheet, form CF 459, for convictions under the Code of Service Discipline, or by a civil court in Canada, or a foreign court or tribunal; changes to a recorded punishment; and, meritorious conduct.

b. *Canadian Forces Decoration.* The C.D. is awarded to officers and men of the Canadian Forces who have completed a period of twelve years' service

in accordance with the regulations.¹²⁸ Clasps are awarded for every subsequent period of ten years' qualifying service. Personnel of whatever rank awarded the decoration are entitled to the initial "C.D." immediately after their name. However, pursuant to paragraph 7 of CFAO 18-9 – *The Canadian Forces' Decoration*, a member must have a record of good conduct in order to be eligible for the CD, or a clasp:

7. To be eligible for the CD or a clasp the member must have a record of good conduct. No member shall be considered to have a record of good conduct if during the last eight years of claimed service he has been awarded a punishment by a service tribunal other than a fine or a minor punishment listed in QR&O 104.13 -Minor Punishments. [. .]

Recording of punishments on a CF's member's conduct sheet

In accordance with DAOD 7006-1 – *Preparation and Maintenance of Conduct Sheets*, an entry shall be removed from a member's conduct sheet when:

Quashed on appeal

- a. a review or appeal quashes a finding of guilty;

Minor sentences

b. the entry relates to a conviction which has resulted in a fine of \$200 or less, or a minor punishment, for example, seven days confinement to barracks, shall be removed from a member's conduct sheet, upon completion of the later of:

1. six months service from the date of enrolment or re-enrolment; or
2. the member's initial military occupation training;
3. upon completion of any period of 12 months during which no conviction has been entered;
4. upon promotion to sergeant or when an officer cadet or a non-commissioned member commissioned rank; or
5. prior to release from the CF of a member, who is to be released without having completed initial military occupation training.

Major sentences

- c. a pardon of the offence to which the entry relates is granted under the *Criminal Records Act* (see DAOD 7016_0);

¹²⁸ *Order in Council PC 1953-319* of 5 Mar 53 as amended by *PC 1953-1869* of 3 Dec 53, *PC 1969-2019* of 21 Oct 69, *PC 1976-2599* of 21 Oct 76, *PC 1977-1748* of 23 Jun 77 and *PC 1981-2310* of 19 Aug 81, establishes the Canadian Forces Decoration stipulating that it may be awarded to officers and men of the Canadian Forces who, in an approved capacity, have completed a period of twelve years' service in accordance with the regulations

Foreign sentences

d. the CDS determines that the entry resulting from a conviction by a foreign court or tribunal is no longer required. Normally, this will not be considered *before completion* of a period of 72 months during which the member has:

1. been of good conduct; and
2. not been convicted of an offence other than one for which a pardon has been granted.

Punishments other than fine or minor punishments will have impact on the CF Decoration

In accordance with paragraph 8 of CFAO 18-9 *The Canadian Forces' Decoration*, CF member forfeits one year of service for each 12-month period in which he is sentenced to a punishment other than a fine or a minor punishment.¹²⁹

8. [...] member shall forfeit one year of service for each 12-month period in which a punishment, other than a fine or minor punishment, is awarded by a service tribunal.

[...]

Summary

In closing, the following table presents, in a summary form, the impact of the punishments authorized by the NDA upon the pay and benefits of military members.

¹²⁹ In accordance with CFAO 18-23 – *Service Pin*, all members of the CF who are in possession of the Canadian Forces Decoration (CD) at the time of their release from either the Regular or Reserve Force and who were released on or after 1 Feb 86 (date of unification) are eligible for the Service Pin.

PUNISHMENT		IS THERE ANY IMPACT ON THE FOLLOWING PAY AND BENEFITS? (Read down)				
	PAY	ANNUITY/ SEVERANCE PAY		Eligibility for Employment in Public service	OTHER BENEFITS	
		CFSA ¹³⁰	Severance		Removal Benefits	UI
1 Imprisonment for life	Loses pay	NO	YES because the member will likely be released under item 1 b (misconduct) or 2b (unsatisfactory conduct) under QR&O 15.01	Eligibility is not affected once sentence is served	NO	See foot- note 131
2 Imprisonment for 2 years or more		NO			NO	
3 Dismissal with Disgrace			YES	YES	Loses most benefits	YES
4 Imprisonment for 2 years or less		NO	YES because the member will likely be released under item 1 b or 2b under QR&O 15.01	Eligibility is not affected once sentence is served	NO	See foot- note 83
5 Dismissal		NO	YES	YES	Loses most benefits	YES
6 Detention	YES	Limited	NO	NO	NO	NO
7 Reduction in rank	YES	YES	YES	NO	NO	NO
8 Forfeiture of seniority	NO	NO	NO	NO	NO	NO
9 Severe Reprimand	NO	NO	NO	NO	NO	NO
10 Reprimand	NO	NO	NO	NO	NO	NO
11 Fine	NO	No impact		NO	No impact	
12 NO	Minor	NO	NO	NO	NO	NO

¹³⁰ Canadian Forces Superannuation Act, R.S., 1985, c. C-17 as amended.

IX. Conclusion

Conceptually, the NDA contains rules and principles that regulate the intercourse and acts of individuals in a large army of citizen-soldiers during the carrying on of war and operations by Canada against hostile nations or peoples. The military code of service discipline and the scale of punishments it contains was originally tailored to address serious crimes committed, either in the presence of the enemy (i.e. section 73 of the NDA which carries the offence of Misconduct of Commanders in Presence of Enemy¹³² or against the good order and discipline of the army and capable of putting the nation at risk or undermining its fighting spirit and morale. Court-martial sentences, therefore, attempt to achieve two things: first, to punish service personnel for the criminality of their conduct and, second, to deal with them also on a disciplinary basis. In that they are unique: members of other professions and occupations who transgress the law of the land are dealt with quite separately, by the civilian criminal courts, followed, if appropriate by disciplinary proceedings before their own professional bodies. This would be so, for example, in the case of lawyers, doctors, dentists, accountants, nurses, architects and engineers.

Additionally, in a closely-knit and inherently hierarchical organization such as the armed forces, there is also a lasting perception, in that there is a particular need to mark criminal conduct that is inimical to trust or to discipline with a substantial form of punishment especially where the offender enjoys NCM or officer rank, because the question of an exemplary or deterrent sentence demands consideration.

In assessing whether sentences imposed in the future by a court martial are wrong in principle or manifestly excessive, the reader may wish to bear in mind the cautionary tone expressed by Létourneau J.A. in *R. v. St. Jean*,¹³³ recognizing that the following excerpt from Lamer C.J. in *R. v. Généreux*¹³⁴

¹³¹ *Eligibility is not affected once sentence is served and the other qualifying criteria are met.*

¹³² *By way of example, in The Constitution and Practice of Courts Martial with a Summary of the Law of Evidence, supra note 12 at 90, Captain Simmons notes that in 1640 the following article of war, whose maxim was that a post must be defended to the last extremity, was established by the Earl of Northumberland for the King's army: "If any town, castle or fort be yielded up without the utmost necessity, the governor thereof shall be punished with death."*

At 91, Simmons also notes that two centuries later in France, the *Décret impérial*, 24 décembre 1811 declared the necessity which could alone reconcile the surrender of a place with honour:

Tout commandant de place forte ou bastionnée, qui la rendra à l'ennemi avant qu'il y ait brèche accessible, et praticable au corps de la dite place, et avant que le corps de place ait soutenu au moins un assaut, si toutefois il y a un retranchement intérieur derrière la brèche, sera puni de mort, à moins qu'il ne manque de munitions ou de vivres.

¹³³ [2000] C.M.A.J. No. 2 (QL) (C.M.A.C.).

¹³⁴ [1992] 1 S.C.R. 259 at 293.

was cited and relied upon with regularity by Court Martial judges:¹³⁵

The purpose of a separate system of military tribunals is to allow the armed forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the armed forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct.

According to Justice Létourneau, more severe punishment than that which would be awarded by a civilian tribunal is warranted only when there is a breach of military discipline:

[...] it is worth re-emphasizing that Lamer C.J. did not say that more severe punishment is required in every case. In addition, there has to be a breach of military discipline. The chief purpose of military discipline is the harnessing of the capacity of the individual to the needs of the group. I have no doubt that Lamer C.J., when he referred to breaches of military discipline, contemplated breaches of the imposed discipline which is necessary to build up a sense of cooperation and forgo one's self-interest. He would also have contemplated a breach of self-discipline in the context of a military operation or one which affects the efficiency, the operational readiness, the cohesiveness and, to some extent, the morale of the Armed Forces. I do not think, however, that he intended the rule to apply to offences punishable by ordinary law, such as Criminal Code offences, where these offences are committed outside the military context, in what I would call civilian-like circumstances. The fact that these offences are made part of the Code of Service Discipline by section 130 of the Act and that the offender is a member of the military does not necessarily mean that these offences pose a challenge to "military discipline".¹³⁶

Blessed since the mid-1950's with a prolonged period of peace, Canada has restricted the employment of its armed forces to civil (1970 FLQ Crisis and the 1976 Olympic Games in Montreal) or quasi-civil purposes (peacekeeping missions which are, on the whole, constabulary in nature). As a result, most if not all of the offences tried by CF courts martial since the Korean conflict have tended to be related to crimes of violence against civilians or CF members, or personal misbehaviour such as abuse of illicit substances, fraud and theft very much akin to those found in the common law and having little to do with violations of the military law or customs of war affecting strategy, tactics, discipline, morale and *esprit de corps*. However, although parity and

¹³⁵ Mr. Justice Létourneau noted that the excerpt from Lamer C.J. in *Généreux* had become a stereotyped assertion in just about every sentencing case before military tribunals: It is often difficult to determine what is being made of the underlined quote and the impact it has on the severity of the sentence imposed. This case is no exception.

¹³⁶ *Supra* note 133 at para. 38.

consistency in sentencing are important, still there are a variety of reasons why sentences in military and civilian contexts may differ. The differences between military and civilian sentencing – and they are important – are the practical ones (a) that an offence involving indiscipline¹³⁷ will in most cases be a serious aggravating feature and (b) that the range of prescribed penalties differs significantly from those in the civilian courts.

The issue of whether there is a service context should always be considered independently by the *Court Martial Appeal Court* when exercising its jurisdiction and deciding upon what particular penalty is required to maintain the discipline and efficiency of the CF. In *R. v. S.C.*¹³⁸, Rose L.J., Ognall and Burton J.J. of the U.K. Courts Martial Appeal Court noted, for instance, that it was entitled and bound to look at the total effect of sentences imposed and, in particular, whether there were alternative courses which could and, should, be adopted by a sentencing court. In doing so, it proposed a test that might be easily adapted to the Canadian context.¹³⁹

¹³⁷ *R. v. Atkinson*, [2000] E.W.J. No. 1833 (QL) (U.K.) (C.M.A.C.).

“Although, in relation to drugs offences, the supply of drugs may be more serious in a service context, one-off possession may call for similar treatment in a military and civilian context. Violence and sexual offences may call for similar treatment, whether in a military or civilian context, but, in the services the need for deterrence may be more significant if, for example, violence is used by a superior officer, or seniority in rank is abused when committing a sexual offence. Dishonesty may be treated similarly in both contexts, but breaches of trust by officers or senior NCO’s may be more serious because of the risk of setting a bad example to lower ranks”¹³⁸ [1999] E.W.J. No. 1481 (QL) (C.M.A.C.).

¹³⁹ At para. 36: “It appears to this court that a court-martial in sentencing and, in appropriate cases, this court on appeal may helpfully ask itself the following questions:

1. Is this a case where the offence merits loss of liberty, taking into account (i) the touchstone of what might occur in a civilian court (ii) any issue of service context rendering it the more serious (iii) the length and nature of service and record of the defendant?
2. What are the financial consequences of dismissal?
3. Is imprisonment necessary?
4. Is service detention, if available for the defendant, appropriate, taking into account the nature of the offence, the less serious nature of that punishment compared with imprisonment and, the lower remission available?
5. Is dismissal merited despite (if such be the case) the recommendation of a commanding that the defendant should be retained and notwithstanding the financial consequences of such dismissal?
6. If custody is necessary and service detention is available, and there would be severe financial consequences attendant on dismissal, should service detention be imposed, notwithstanding that imprisonment would be imposed in a civilian court?
7. If service detention is appropriate, what should be its duration bearing in mind the different consequences in relation to dismissal of a sentence of a year or more?

Annex A - Statutory Offences And Accompanying Punishments							
Service offences			Punishments				
NDA art.			Article 139(1) of the NDA provides for the following scale of punishments in respect of service offences. Not shown are the punishments of forfeiture of seniority, severe reprimand, reprimand, fine and minor punishments.				
			Selected key offences				
			Imprisonment for life	Imprisonment for 2 years or more	Dismissal with disgrace	Imprisonment for 2 years or less	Dismissal
							Detention
							Reduction in rank

MISCONDUCT OF COMMANDERS IN PRESENCE OF ENEMY												
73	Misconduct of Commanders in Presence of Enemy	Acted traitorously.	X									
		Acted from cowardice	X	Or less punishment								
		Any other case			X	Or less punishment ¹						
MISCONDUCT OF ANY PERSON IN PRESENCE OF ENEMY												
74	Misconduct of any Person in Presence of Enemy	Acted traitorously	X									

¹ Subsection 139(2) of the NDA defines "less punishments" as follows:

139. (2) Where a punishment for an offence is specified by the Code of Service Discipline and it is further provided in the alternative that on conviction the offender is liable to less punishment, the expression "less punishment" means any one or more of the punishments lower in the scale of punishments than the specified punishment.

Annex A - Statutory Offences And Accompanying Punishments										
Service offences			Punishments							
NDA art.	Selected key offences		Article 139(1) of the NDA provides for the following scale of punishments in respect of service offences. Not shown are the punishments of forfeiture of seniority, severe reprimand, reprimand, fine and minor punishments.							
			Imprisonment for life	Imprisonment for 2 years or more	Dismissal with disgrace	Imprisonment for less than 2 years	Dismissal	Detention	Reduction in rank	
		Any other case	X	Or less punishment						
SECURITY OFFENCES										
75	Offences related to security		Acted traitorously	X						
		Any other case	X	Or less punishment						
PRISONERS OF WAR										
76	Offences related to prisoners of war		Acted traitorously	X						
		Any other case	X	Or less punishment						
MISCELLANEOUS OPERATIONAL OFFENCES										
77	Offences related to operations		While on active service	X	Or less punishment					

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Selected key offences			Imprisonment for life	Imprisonment for 2 years or more	Imprisonment with probation	Imprisonment for 2 years or less	Dismissal

		Any other case			X	Or less punishment
SPIES FOR THE ENEMY						
78	Offence of being spy			X	Or less punishment	
MUTINY						
79	Mutiny	With violence		X	Or less punishment	
80		Mutiny without violence	Ringleader	X	Or less punishment	
			Everyone else who joins		X	Not exceeding fourteen years or to less punishment
81	Offences related to mutiny			X	Or less punishment	
SEDITIONOUS OFFENCES						
82	Advocating governmental change by force			X	Or less punishment	
INSUBORDINATION						

Annex A - Statutory Offences And Accompanying Punishments										
Service offences				Punishments Article 139(1) of the NDA provides for the following scale of punishments in respect of service offences. Not shown are the punishments of forfeiture of seniority, severe reprimand, reprimand, fine and minor punishments.						
NDA art.	Selected key offences			Imprisonment for life	Imprisonment for 2 years or more	Dismissal with disgrace	Imprisonment for less than 2 years	Dismissal	Detention	Reduction in rank
83	Disobedience of lawful command			X	Or less punishment					
84	Striking or offering violence to a superior officer			X	Or less punishment					
85	Insubordinate behaviour					X	Or less punishment			
86	Quarrels and disturbances						X	Or less punishment		
87	Resisting or escaping from arrest or custody						X	Or less punishment		
DESERTION										
88	Deserts or attempts to desert				X	A term not exceeding five years or to less punishment.				
89	Connivance at desertion						X	Or less punishment		
ABSENCE WITHOUT LEAVE										
90	Absents himself without leave						X	Or less punishment		
91	False statement in respect of leave						X	Or less punishment		

Annex A - Statutory Offences And Accompanying Punishments						
Service offences			Punishments			
			Article 139(1) of the NDA provides for the following scale of punishments in respect of service offences. Not shown are the punishments of forfeiture of seniority, severe reprimand, reprimand, fine and minor punishments.			
NDA art.	Selected key offences		Imprisonment for life	Imprisonment for 2 years or more	Imprisonment not exceeding 2 years	Detention

DISGRACEFUL CONDUCT						
92	Scandalous conduct by officers			X	Or dismissal from Her Majesty's service.	
93	Cruel or disgraceful conduct			X	For a term not exceeding five years or to less punishment.	
94	Traitorous or disloyal utterances			X	For a term not exceeding seven years or to less punishment.	
95	Abuse of subordinates				X	Or less punishment
96	Making false accusations or statements or suppressing facts				X	Or less punishment
97	Drunkenness	For everyone (See exception below)			X	Or less punishment

Annex A - Statutory Offences And Accompanying Punishments										
Service offences				Punishments						
Article 139(1) of the NDA provides for the following scale of punishments in respect of service offences. Not shown are the punishments of forfeiture of seniority, severe reprimand, reprimand, fine and minor punishments.										
NDA art.	Selected key offences			Imprisonment for life	Imprisonment for 2 years or more	Dismissal with disgrace	Imprisonment for less than 2 years	Dismissal	Detention	Reduction in rank
			Where the offence is committed by a non-commissioned member who is not on active service or on duty or who has not been warned for duty						Not in excess of 90 days	
98	Malingering, aggravating disease or infirmity or injuring self or another	On active duty	X	Or less punishment						
		Any other case	X	Imprisonment for a term not exceeding five years or to less punishment.						
OFFENCES IN RELATION TO SERVICE ARREST AND CUSTODY										
99	Detaining unnecessarily or failing to bring up for investigation					X	Or to less punishment.			
100	Setting free without authority or allowing or assisting escape		Wilfully		X	For a term not exceeding seven years or to less punishment				
			Any other case			X	Or to less punishment.			

Annex A - Statutory Offences And Accompanying Punishments

Service offences		Punishments						
NDA art.		Article 139(1) of the NDA provides for the following scale of punishments in respect of service offences. Not shown are the punishments of forfeiture of seniority, severe reprimand, reprimand, fine and minor punishments.						
Selected key offences		Imprisonment for life	Imprisonment for 2 years or more	Imprisonment with labour for 2 years	Imprisonment for less than 2 years	Detention	Reprimand	Forfeiture of seniority

101	Escape from custody				X	Or to less punishment.
101.1	Failure to comply with conditions				X	Or to less punishment.
102	Hindering arrest or confinement or withholding assistance when called on				X	Or to less punishment.
103	Withholding delivery over or assistance to civil power				X	Or to less punishment.

OFFENCES IN RELATION TO VESSELS

104	Losing, stranding or hazarding vessels			X	Or to less punishment.
105	Repealed				
106	Disobedience of Captain's orders	X			Or to less punishment.

OFFENCES IN RELATION TO AIRCRAFT

107	Wrongful acts in relation to aircraft or aircraft material	Willfully or negligently or by neglect of or contrary to regulations	X	Or to less punishment
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Annex A - Statutory Offences And Accompanying Punishments										
Service offences				Punishments Article 139(1) of the NDA provides for the following scale of punishments in respect of service offences. Not shown are the punishments of forfeiture of seniority, severe reprimand, reprimand, fine and minor punishments.						
NDA art.	Selected key offences			Imprisonment for life	Imprisonment for 2 years or more	Dismissal with disgrace	Imprisonment for less than 2 years	Dismissal	Detention	Reduction in rank

		During a state of war								
		Any other case					X			Or to less punishment.
108	Signing inaccurate certificate						X			Or to less punishment.
109	Low flying						X			Or to less punishment.
110	Disobedience of captain's orders			X	or to less punishment.					
OFFENCES IN RELATION TO VEHICLES										
111	Improper driving of vehicles				X	For a term not exceeding five years or to less punishment.				
112	Improper use of vehicles						X			Or to less punishment.
OFFENCES IN RELATION TO PROPERTY										
113	Causing fires						X			Or to less punishment.
114	Stealing				X	For a term not exceeding seven years or to less punishment.				

Annex A - Statutory Offences And Accompanying Punishments

Service offences		Punishments Article 139(1) of the NDA provides for the following scale of punishments in respect of service offences. Not shown are the punishments of forfeiture of seniority, severe reprimand, reprimand, fine and minor punishments.						
NDA art.	Selected key offences	Imprisonment for life	Imprisonment for 2 years or more	Dismissal with disgrace	Imprisonment for less than 2 years	Dismissal	Detention	Reduction in rank

115	Receiving or retaining in his possession any property obtained by the commission of any service offence.			X	For a term not exceeding seven years or to less punishment.	
116	Destruction, damage, loss or improper disposal				X	Or to less punishment.
117	Miscellaneous offences				X	Or to less punishment.
OFFENCES IN RELATION TO TRIBUNALS						
118	Contempt				X	Or to less punishment.
118.1	Failure to appear or attend				X	Or to less punishment.
119	False evidence			X	For a term not exceeding seven years or to less punishment.	
OFFENCES IN RELATION TO BILLETING						
120	Ill-treatment or non-payment of occupant or person on whom billeted				X	Or to less punishment.
OFFENCES IN RELATION TO ENROLMENT						
121	Fraudulent enrolment				X	Or to less punishment.

Annex A - Statutory Offences And Accompanying Punishments

Service offences		Punishments						
		Article 139(1) of the NDA provides for the following scale of punishments in respect of service offences. Not shown are the punishments of forfeiture of seniority, severe reprimand, reprimand, fine and minor punishments.						
NDA art.	Selected key offences	Imprisonment for life	Imprisonment for 2 years or more	Dismissal with disgrace	Imprisonment for less than 2 years	Dismissal	Detention	Reduction in rank

129	Prejudice to the good order or discipline			X	Or to less punishment.
OFFENCES PUNISHABLE BY LAW					
130 ²	Service trial of civil offences	Is punishable under Part VII, the <i>Criminal Code</i> or any other Act of Parliament	Impose a punishment in accordance with the enactment prescribing the minimum punishment for the offence		
		In any other case	Impose the punishment prescribed by Part VII, the <i>Criminal Code</i> or any other Act of Parliament, or		

² Subsections 130(3) and 130(4) of the NDA read as follows:

Code of Service Discipline applies

130(3) All provisions of the Code of Service Discipline in respect of a punishment of imprisonment for life, for two years or more or for less than two years, and a fine, apply in respect of punishments imposed under paragraph (2)(a) or subparagraph (2)(b)(i).

Saving provision

130(4) Nothing in this section is in derogation of the authority conferred by other sections of the Code of Service Discipline to charge, deal with and try a person alleged to have committed any offence set out in sections 73 to 129 and to impose the punishment for that offence described in the section prescribing that offence.

Annex B**PUNISHMENTS: DISMISSAL or RELEASE FOR MISCONDUCT****PART A - CIVIL CONSEQUENCES TO THE PUNISHMENT OF DISMISSAL OR RELEASE FOR MISCONDUCT****BAR FROM PUBLIC SERVICE**

Besides the stigma in military circles associated with the dismissal for disgrace or dismissal/release for misconduct, this punishment has a number of short and long-term financial implications for the member and his dependants. First among these consequences is his inability to serve Her Majesty again in any military or civil capacity:

141(2) Consequences. A person on whom a punishment of dismissal with disgrace from Her Majesty's service has been carried out is not, except in an emergency or unless that punishment is subsequently set aside or altered, eligible to serve Her Majesty again in any military or civil capacity.

UNEMPLOYMENT INSURANCE BENEFITS (UI)

A member of the Canadian Forces released for misconduct is disqualified from receiving any unemployment benefits. See Subsection 30(1) of the *Employment Insurance Act*, S.C. 1996, c. 23:

Disqualification - misconduct or leaving without just cause

30. (1) A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause,

PART B - ANNUITY AND RELATED BENEFITS**CANADIAN FORCES SUPERANNUATION ACT (CFSA)¹**

Not unlike a public servant, a member of the Canadian military is eligible for an unreduced annuity after accumulating a certain number of years of service (i.e. 30 years for a Colonel and 28 years for personnel below the rank of Colonel).

Until 1999, a CF member dismissed from the Canadian military for misconduct was not entitled to an annuity and instead received a return of contributions. Since then, such a consequence has been removed and a member released for misconduct is now entitled to receive an annuity if he otherwise meets the criteria for receiving the benefits payable on

¹ *Canadian Forces Superannuation Act*, R.S.C. 1982, c. C-9.

retirement as defined in section 16 of the *Canadian Forces Superannuation Act*, R.S., c. C-9, s. 1.

Benefits payable on retirement

16. A contributor who, having reached retirement age, ceases to be a member of the regular force for any reason other than a reason described in subsection 18(1) or (4) is entitled to a benefit determined as follows:

- (a) if he has served in the regular force for three years or less, he is entitled to a return of contributions;
 - (b) if he has served in the regular force for more than three years but less than ten years, he is entitled to
 - (i) a return of contributions, or
 - (ii) a cash termination allowance, whichever is the greater; and
 - c) if he has served in the regular force for ten or more years, he is entitled to an immediate annuity.
- R.S., c. C-9, s. 10.

18. (1) Retirement due to disability. A contributor who is compulsorily retired from the regular force by reason of having become disabled is entitled to a benefit determined as follows:

[...]

18(2) Retirement to promote economy or efficiency [...]

18(3) Retirement due to Misconduct. [Repealed, 1999, c. 34, s. 130]²

18(4) Definition of Contributor. [Repealed, 1999, c. 34, s. 130]

PART C - REMOVAL BENEFITS AND RELATED BENEFITS

A member of the Canadian military leads a very nomadic life and, at retirement, he or she would normally return to a community where they have family ties or where economic conditions are favourable to a second career. Conceptually, on retirement, a member having 10 years or more of

² Section 130 of Public Sector Pension Investment Board Act, S.C. 1999, c. 34, repealed subsection 18(3) which reads:

Retirement due to misconduct

18 (3) A contributor described in subsection (4) is entitled to a benefit determined as follows:

- (a) if he has served in the regular force for less than ten years, he is entitled to a return of contributions; or
- (b) if he has served in the regular force for ten or more years, he is entitled to
 - (i) a return of contributions, or
 - (ii) with the consent of the Treasury Board, the whole or any part specified by the Treasury Board of any annuity to which he would have been entitled under subsection 19(1) had he, at the time of his retirement, ceased to be a member of the regular force for a reason other than a reason described in subsection 17(1) or (2) or 18(1), (2) or (4), except that in no case shall the capitalized value thereof be less than the amount of the return of contributions referred to in subparagraph (i).

military service is entitled to relocate his dependants, furniture and effects anywhere in Canada. The member is also provided with a range of financial benefits permitting him to sell and purchase his residence at no cost. The following table shows the benefits accruing to a member honourably released versus those received by a member released for reason of misconduct.

CFAO 209-28 - Removal Benefits Movement of Dependants, And/or Furniture and Effects.

The following transportation and removal benefits are available to a member on release from the Canadian Forces

REASON FOR RETIREMENT	BENEFITS
<p>Honorably released</p> <p>Member with 10 years of more service and in receipt of an annuity</p>	<p>In accordance with QR&O 209.985, the member is entitled to move his dependants, or F&E, or both, from the last place of duty to which they were moved at public expense, to his selected place of residence in Canada. He is also entitled to:</p> <ul style="list-style-type: none"> (a) a house hunting trip; (b) interim lodgings, meals and incidentals up to a maximum of 21 days; (c) sale of home, including mortgage breaking penalties, temporary dual residence, residence assistance, return trip to finalize sale, attending fees and fees for a power of attorney may only be reimbursed through the customized component of the funding formula, (d) purchase of home. Attending fees, fees for a power of attorney, mortgage interest differential fees and interest from a short personal loan may only be reimbursed through customized component of the funding formula; (e) shipment of a mobile home.
<p>Misconduct</p> <p>For the member</p>	<p>In accordance with QR&O 209.72 – Transportation and Travelling Entitlements on Release for Misconduct – Regular Force, an officer or non-commissioned member of the Regular Force who is released under Item 1 (Misconduct) may be provided at public expense with tickets covering transportation at the least expensive rate by rail or ship and paid necessary meal expenses at the rates prescribed</p>

- (a) if enrolled in Canada, the place in Canada that he specified as his residence on enrolment in the Regular Force; or
- (b) if enrolled outside Canada, the nearest port of embarkation in Canada on the direct route to the country in which he was enrolled; or
- (c) any place in Canada, when the cost of the journey does not exceed the cost of the journey under subparagraph (a) or (b) of this paragraph.

In accordance with QR & O 209.845 –
Movement of Dependents, Furniture and Effects
– Personnel Released for Misconduct – Regular
Force:

For his
dependants,
furniture and
effects

- (a) his dependants may be provided at public expense with tickets covering transportation, and be paid necessary meal expenses, at the rates and under the conditions prescribed in article 209.72; and
- (b) the public may bear the cost of the amounts payable under paragraph (2) of article 209.84 (Shipment of Furniture and Effects) in respect of the shipment of his furniture and effects to the place authorized under article 209.72

As can be seen from the above, a member discharged/released for misconduct is provided with scant few financial benefits.³

³ QR & O 209.72 – Transportation and Travelling Entitlements on Release for Misconduct – Regular Force:

(1) Except as prescribed in article 209.73 (Transportation and Travelling Entitlements on Release – Alien Members – Regular Force), an officer or non-commissioned member of the Regular Force who is released under Item 1 (Misconduct) of the table to article 15.01 (Release of Officers and Non-commissioned Members) may be provided at public expense with tickets covering transportation at the least expensive rate by rail or ship and paid necessary meal expenses at the rates prescribed pursuant to paragraph (5) of article 209.30 (Travelling Expenses – Conditions and Entitlements) for the journey to: (1 May 1976)

- (a) if enrolled in Canada, the place in Canada that he specified as his residence on enrolment in the Regular Force; or
- (b) if enrolled outside Canada, the nearest port of embarkation in Canada on the direct route to the country in which he was enrolled; or
- (c) any place in Canada, when the cost of the journey does not exceed the cost of the journey under subparagraph (a) or (b) of this paragraph. (1 April 1973)

(2) The entitlements prescribed in paragraph (1) of this article shall be granted only when the officer or non-commissioned member applies within 30 days of his release from the Regular Force, or from incarceration, whichever is the later.

PART D - SEVERANCE PAY AND RELATED BENEFITS

Entitlement to severance pay is governed by QR&O 204.40. In general terms, all members of the Regular Force are eligible for severance pay which is calculated as one week of pay for each year of service not exceeding 30 years. However, in accordance with QR&O 204.40((3), a member released for misconduct has no entitlement for severance pay.

CFAO 204- 10 - Severance Pay

REASON FOR RETIREMENT	BENEFITS
Honorably released	In general terms, all members of the Regular Force are eligible for severance pay.
Misconduct	There is no entitlement to either severance pay or rehabilitation leave.

EXAMPLE: A Captain, aged 48, who retires in 2003 with 28 years service would receive the following severance pay benefit. If released for misconduct, the Captain would forego this benefit.

Annual salary at retirement	Average weekly salary	Total severance pay benefit 28 x average weekly salary on retirement
\$78,852.00	\$1,642.00	\$45,997

SECOND CAREER ASSISTANCE NETWORK (SCAN) BENEFITS

Transition assistance is provided to members of the Regular Force. This assistance takes varied forms, providing tangible benefits – even if not totally quantifiable in monetary terms – to the retiring military member and his dependants. However, it is made available only to those who are being honourably released on completion of service.

CFAO 56_20 - Second Career Assistance Network Program

The purpose of the Second Career Assistance Network (SCAN) Program is to assist military members in *planning, preparing and achieving* their personal and professional transition to the civilian environment.

REASON FOR RETIREMENT

BENEFITS

Honorably discharged

a. Individual Counseling including: identification of immediate and long range career objectives, benefits of counseling and job assistance needs; assistance in obtaining occupational certification; administration and interpretation of vocational and aptitude tests; providing information concerning the labor market and job search techniques; and assistance with psychological and sociological effects of transition.

b. Group Counseling workshops (e.g., job search techniques, interviewing practice, résumé preparation, entrepreneurial concerns, financial planning) and seminars which are designed to provide military personnel and their spouses with information from military and civilian experts concerning second career and retirement issues are conducted to focus on specific issues.

c. Preparation. Academic, technical and vocational upgrading and retraining programs, as well as trade accreditation and certification comprise the preparation service;

d. Referral. Assistance to identify potential placement opportunities is provided on a regional and national basis.

e. Evaluation. SCAN program evaluation is conducted routinely by analysis of post-transition seminar evaluation reports collected from SCAN clients.

Misconduct

No benefit

GROUP MEDICAL AND SURGICAL INSURANCE (GSMIP) COVERAGE POST-RETIREMENT

The GSMIP is a comprehensive plan providing full basic surgical and medical benefits as well as supplementary benefits and optional Hospital Expense Benefit Level I or II. On release, members may apply for extension of the benefits for themselves and their dependants during their retirement. A member released for misconduct is not eligible for benefits.

Given the increasing costs of medical care, particularly in retirement years, this is another significant penalty for a member discharged or released for misconduct.

CFAO 56-21 - Group surgical medical insurance plan

**REASON FOR
RETIREMENT**

BENEFITS

Honorably released

Former Members, Widows and Children in Receipt of a Pension, Annuity or Annual Allowance. A former member, a widow, or a child receiving a Pension, annuity or annual allowance may apply for participation in GSMIP. Where a member is compulsorily released under item 3 or 5 of the table to QR&O 15.01 without an annuity, he may, if his dependants were participants or if he is single member, at the time of his release, insure himself and retain coverage for his dependants (if any) for a period not exceeding one year from the last day of the month in which he is released.

Misconduct

Members and dependants are not eligible for benefits

**PART E - AWARDS AND DECORATIONS FOR
MILITARY SERVICE**

RECORD OF SERVICE⁴

A member dismissed with disgrace or dismissed/released for misconduct will have his record of service annotated accordingly providing not only a permanent record of his punishment but making it difficult for him to escape his part when seeking alternative employment in the civilian sector or relocation to a foreign land.

⁴ **15.01 - Release of Officers and Non-commissioned Members**

(4) Where an officer or non-commissioned member is released, the notation on his record of service shall be as follows:

- (a) if he is released under Item 1(a), the notation "Dismissed with Disgrace for Misconduct" or "Dismissed for Misconduct", as applicable;
- (b) if he is released under Item 1 for any reason other than Item 1(a), the notation "Released for Misconduct";
- (c) where he is released under Item 2, the notation "Service Terminated"; or
- (d) where he is released under Item 3, 4 or 5, the notation "Honourably Released".

PART ONE- RECORD OF SERVICE

QR&O 15.01 – Release of Officers and Non-commissioned Members

REASON FOR RETIREMENT

NOTATION ON RECORD OF SERVICE

Misconduct

(a) if he is released under Item 1(a), the notation “Dismissed with *Disgrace for Misconduct*” or “Dismissed for Misconduct”, as applicable; (b) if he is released under Item 1 for any reason other than Item 1(a), the notation “Released for Misconduct”.

FORFEITURE OF MEDALS AND AWARDS

As detailed in section 18.27 of the QR&Os, a member sentenced to dismissal with *disgrace* or released for misconduct must forfeit his decorations and medals.

18.27 – FORFEITURE AND RESTORATION OF DECORATIONS AND MEDALS OTHER THAN THOSE AWARDED FOR GALLANTRY AND WAR MEDALS

(1) An officer or non-commissioned member shall forfeit any decoration or medal awarded to the member or to which the member may be entitled for long service, good conduct, efficiency to *meritorious service* other than gallantry, where the members is:

- (a) sentenced to death;
- (b) sentenced to dismissal with *disgrace from Her Majesty's service*;
- (c) sentenced to dismissal from Her Majesty's service; or
- (d) released for misconduct;

(2) An officer or non-commissioned member may be ordered by the Minister to forfeit any decoration or medal awarded to the member or to which the member may be entitled for long service, good conduct, efficiency or *meritorious service* other than gallantry, where the member is:

- (a) convicted by a *civil authority of any serious offence*; or
- (b) convicted of an offence of treason, sedition, mutiny, cowardice, desertion or a *disgraceful offence against morality*;

18.28 – FORFEITURE AND RESTORATION OF WAR MEDALS AWARDED FOR SERVICE PRIOR TO THE SECOND WORLD WAR

(1) An officer or non-commissioned member may be ordered by the Minister to forfeit any war medal awarded to the member for service prior to the Second World War, where the member is:

- (a) sentenced to death;
- (b) sentenced to dismissal with *disgrace from Her Majesty's service*;
- (c) sentenced to dismissal from Her Majesty's service; or
- (d) released for misconduct.

18.29 – FORFEITURE AND RESTORATION OF CAMPAIGN STARS, WAR MEDALS AND CLASPS AWARDED FOR SERVICE DURING OR AFTER THE SECOND WORLD WAR

(1) An officer or non-commissioned member shall forfeit any campaign stars, medals and clasps thereof listed in the table to this article where the member is:

- (a) convicted of treason, sedition, mutiny, cowardice, desertion or a disgraceful offence against morality; or
- (b) sentenced to
 - (i) dismissal with disgrace from Her Majesty's service, or
 - (ii) dismissal from Her Majesty's service.

FORFEITURE OF RANK TITLE ON RETIREMENT

As detailed in section 15.07 of the QR&Os, a member sentenced to dismissal with disgrace or released cannot use his rank title or the designation of rank authorized to be used by him at the time of his release from the Canadian Forces.

15.09 – USE OF RANK TITLE AND WEARING OF UNIFORM AFTER RELEASE

[...]

(2) A former officer or non-commissioned member who was honourably released prior to or after the coming into force of this article after having served in the Canadian Forces for not less than 10 years, may use the rank title held by him or the designation of rank authorized to be used by him at the time of his release and, when so used, the word "(Retired)" or its abbreviation "(Ret'd)" shall be included.

Annex C

PUNISHMENT: REDUCTION IN RANK
PART A - LEGISLATIVE PROVISIONS**AUTOMATIC MOMENTARY REDUCTION IN RANK**

As stipulated in subsection 142(2) of the NDA, if a NCM above the rank of private is sentenced to detention, that person is deemed, for the period of the detention, to be reduced to the rank of private. Also, pursuant to subsection 142(1) of the NDA, detention may not exceed ninety days and a person sentenced to detention may not be subject to detention for more than ninety days consecutively by reason of more than one conviction. On completion of a sentence of detention, the NCM is returned to his previous rank. Finally, an officer may not be sentenced to detention.

Detention

142. (1) The punishment of detention is subject to the following conditions:

- (a) detention may not exceed ninety days and a person sentenced to detention may not be subject to detention for more than ninety days consecutively by reason of more than one conviction; and
- (b) no officer may be sentenced to detention.

Reduction in rank during detention

142. (2) If a non-commissioned member above the rank of private is sentenced to detention, that person is deemed, for the period of the detention, to be reduced to the rank of private.

ENDURING REDUCTION IN RANK

Section 143 of the NDA provides that the punishment of reduction in rank applies to officers above the rank of second lieutenant and to NCMs above the rank of private.

Reduction in rank

143. (1) The punishment of reduction in rank applies to officers above the rank of second lieutenant and to non-commissioned members above the rank of private.

Restrictions

143. (2) The punishment of reduction in rank does not

- (a) involve reduction to a rank lower than that to which under regulations the offender can be reduced; and
- (b) in the case of a commissioned officer, involve reduction to a lower than commissioned rank.

ACCOMPANYING PUNISHMENTS

Section 143 of the NDA provides that where a court martial imposes a punishment of imprisonment on an officer or a NCM, the court martial may, in addition, impose a punishment of reduction in rank that may be, in the case of an officer, to second lieutenant, and in the case of a NCM, to private.

140.2 Reduction in rank as accompanying punishment.

Where a court martial imposes a punishment of imprisonment on an officer or a non-commissioned member, the court martial may in addition, notwithstanding any other provision of this Division, impose a punishment of reduction in rank, that may be

- (a) in the case of an officer, to the lowest commissioned rank; and
- (b) in the case of a non-commissioned member, to the lowest rank to which under the regulations the non-commissioned member can be reduced.

PART B - IMPACT OF A SENTENCE OF REDUCTION IN RANK

As discussed earlier, in accordance with subsection 143 (1) of the NDA, the punishment of reduction in rank applies to officers above the rank of second lieutenant and to NCMs above the rank of private. As noted in *R. v. Fitzpatrick* by Reed, Richard and Goodfellow J.J.A., the sentence of reduction in rank is a severe sentence carrying serious career implications including loss of social and professional standing, prestige and authority as well as immediate and long-term psychological and financial consequences:

The sentence of reduction in rank is a serious sentence. It carries with it career implications, considerable financial loss, *plus social and professional standing* loss within the services. It is a truism that rank has its privileges, and to reduce one to the lowest rank is a giant step backwards which undoubtedly serves not only as a deterrent to the individual but also a very visible and pronounced deterrent to others. There are occasions when a sentence in the military context justifiably departs from the uniform range in civic street and certainly the reduction in rank is a purely military sentence.¹

The following table indicates the immediate financial impact upon a non-commissioned officer for such a punishment. For the purpose of this table, it is assumed that the non-commissioned officer is currently serving in the mid-range pay level for his rank and that he has been sentenced to 30 days in detention.

¹ [1995] C.M.A.J. No. 9 at para. 31.

RANK	On a monthly basis		
	Basic monthly salary	Monthly salary during detention	Loss of income
Chief Warrant Officer	\$5,844.	\$3,258.	\$2,586.
Master Warrant Officer	\$5,265.		\$2,007.
Warrant Officer	\$4,771.		\$1,513.
Sergeant	\$4,282.		\$999.
Master Corporal	\$3,884.		\$626.
Corporal	\$3,728.		\$470.

REDUCTION IN RANK

In an attempt to quantify the long-term financial consequences of such a punishment upon members of the military, I have chosen the following five specific scenarios:

- a. Colonel reduced in rank to Lieutenant Colonel;²
- b. Major reduced in rank to Lieutenant;³
- c. Master Warrant Officer reduced in rank to Sergeant;⁴
- d. Sergeant reduced in rank to Private;⁵
- e. Master Corporal reduced in rank to Private.⁶

The following table indicates the knock-on effect on pay, annuity and other retirement benefits of a reduction in rank. Each of the scenarios is based on the following assumptions:

1. Each individual continues to serve until eligible for an unreduced annuity.

² *R. v. Vanier*, [1999] C.M.A.J. No. 4 (QL).

³ *R. v. Sox*, [1996] C.M.A.J. No. 7 (QL).

⁴ In *R. v. Lyons*, [1993] C.M.A.J. No. 3 (QL) a Master Warrant Officer was reduced in rank to private.

⁵ *R. v. Blaquière*, [1999] C.M.A.J. No. 2 (QL).

⁶ *R. v. Martin*, [1995] C.M.A.J. No. 3 (QL).

Scenarios	Age	Years in Rank	Years of Service	Age eligible for indexed annuity	Salary prior to reductions in rank	Salary on reduction in rank	7 Loss of pay first year	Impact on retirement ⁸	
								Severance pay	Annuity
Colonel reduced in rank to Lieutenant Colonel	53	5	29 ⁹	As Colonel 54. As LCol, after 28 years of service	\$101,300. and bonus of \$9,700 = \$111,000	\$99,492.	\$1,808..	\$55,800 vice \$57,399 ¹⁰	\$55,800. vice \$54,600. ¹¹
Major reduced in rank to Lieutenant	36	4	18	40	\$86,280.	\$74,436.	\$11,844	\$38,254. ¹² vice \$31,452.	\$34,320. ¹³ vice \$ 37,840
Master Warrant Officer reduced in rank to Sergeant	46	6	28	48	\$67,488.	\$62,364.	\$4,854.	\$36,135. vice \$38,935.	\$36,000. ¹⁴ vice \$38,400.
Sergeant reduced in rank to Private	37	7	18	As Sgt = 49 As Pte = 44	\$60,888.	\$39,096.	\$21,792.	Assuming that these individual will continue serving until reaching their respective retirement ages, the impact will be minimal as he or she are most likely to be promoted again to their former ranks.	
Master Corporal reduced in rank to Private	28	4	8	45	\$57,048.	\$39,096.	\$17,952.		

⁷ Paragraph 4 to Annex A – Incentive Pay – Regular Force and Reserve Force on Class “C” Service to CFAO–*Incentive Pay–Regular Force and Reserve Force Members Reduced or Reverted in Rank or Who Relinquish Acting Rank* provides the authority for calculating the incentive pay level awarded to a member who is reduced or reverted in rank:

4. Pursuant to QR&O 204.015(5), where a member is reduced or reverted in rank or relinquishes an acting rank, the member is eligible to count for incentive pay in the lower rank, all qualifying service in the higher rank together with all previous qualifying service in the lower rank. However, if the member is again promoted to the same rank, except in the case of an appointment to master corporal, the member is entitled to receive only the basic rate for that rank on promotion. The member is not eligible to count that previous time in the rank to which he is again promoted.

⁸ A reduction in rank will also have an impact on the *Supplementary Death Benefit*, which is based on basic salary at retirement.

⁹ Strangely a reduction in rank from Colonel to Lieutenant Colonel could have some perverse benefit. Whereas an officer serving in the rank of Colonel cannot draw an unreduced annuity before having accumulated 30 years of service, the same officer can retire on a fully indexed unreduced pension at the 28-year mark if serving in the rank of Lieutenant-Colonel.

2. Three years after their reduction in rank, the individual is promoted one rank. (Privates are promoted to corporal and lieutenants are promoted to the rank of captain).
3. There is no pay increases beyond 2001.
4. Inflation is set at zero.

¹⁰ A. Without reduction in rank: Assuming a basic salary (without bonus) of \$101,300 ÷ 52 weeks x 30 years of service: \$58,269.

B. With reduction in rank: Salary: \$99,492 ÷ 52 weeks x 30 years of service: \$57,399.

¹¹ A. Without reduction in rank: Best six years: \$80,000; \$85,000; \$88,000; \$93,000 (incl. bonus); \$101,000 (incl. bonus); \$111,000 (incl. bonus). Average annual salary: \$93,000. Annuity: \$93,000. x 30 years x 2% = \$55,800.

B. With reduction in rank: Best six years: \$80,000; \$85,000; \$88,000; \$93,000 (incl. bonus); \$101,000 (incl. bonus); \$99,492. Average annual salary: \$91,000. Annuity: \$93,000 x 30 years x 2% = \$54,600.

¹² Assuming the individual would have reached the maximum pay for his rank prior to his retirement at age 40, his severance pay in would be approx \$90,420 x 20 = \$38,254. Retiring as a Lieutenant upon reaching age 40, his severance pay would be \$74,436 x 22 = \$31,492.

¹³ Had he continued to serve in the rank of major until his retirement, his average best six years would have totalled approximately, \$86,000. Serving the last four years of his service in the rank of lieutenant would lower that average salary to approximately, \$78,000.

¹⁴ Given the length of service, the impact upon his annuity will not be severe. The best six years of his salary as a Master Warrant Officer will dampen the impact of a sudden large decrease in his pay rate during his last two years of service. Nevertheless, for the purpose of calculating his pension benefit, I anticipate his average annual salary to be at the \$60,000 range vice \$64,000. had he retained his rank. (\$60,000 x 60% = \$36,000.) vs. (\$64,000 x 60% = \$38,000.).

Annex D**ORDINARY PUNISHMENTS**

Article 139(1) of the NDA provides for the following punishments in respect to service offences which, for the purpose of this paper, have been grouped under the title of 'ordinary punishments'. Ordinary punishments consist of the following:

- a.severe reprimand;
- b.reprimand;
- c.fine; and
- d.minor punishments.

As a general comment, it is safe to say that there is nothing particularly noteworthy about any one of these punishments which the Court Martial Appeal Board ought to be sensitive to in awarding or reviewing any of these punishments. Notwithstanding, I intend to discuss briefly each one in turn and offer pertinent comments.

MINOR PUNISHMENTS

Minor punishments are already defined in article 104.13 of the QR&Os.¹ The goal of minor punishments is to correct the conduct of service members who have committed service offence of a minor nature while allowing those members to continue to serve with their unit.

104.13 – MINOR PUNISHMENTS

- (2) The following minor punishments may be imposed in respect of service offences:
- (a) confinement to ship or barracks;²

¹ The administration of minor punishments is conducted under rules developed by the Commanding Officer which are tailored to meet unit requirements: i.e. the routine applicable to members serving those punishments; extra work and drill aimed at improving the military efficiency and discipline of unit members convicted of minor service offences; geographic limits within which a member undergoing the punishment of stoppage of leave or confinement to ship or barracks must remain; or, the frequency in which a member undergoing a punishment of stoppage of leave during a weekend to report to a specified authority.

² This punishment is normally reserved for recruits or officer cadets living in quarters or for privates serving on their first tour and living aboard their ship or in barracks. In yester- years, during mobilization or while deployed in theatre of operations, the punishment of 'confinement to ship or barracks' was significant because it denied a soldier a well-earned 'rest and recreation leave' or a furlough to say, see his fiancé prior to being redeployed with his unit or ship.

- (b) extra work and drill;³
- (c) stoppage of leave;⁴ and
- (d) caution.

FINE

Subsection 145(1) of the NDA, makes provision for the imposition of a fine. There is nothing unique or special about the imposition or the impact of a fine upon a member of the Canadian Forces and hence there is no need to discuss it further.

145(1) Fine. A fine must be imposed in a stated amount.

145(2) Terms of payment. The terms of payment of a fine are in the discretion of the service tribunal that imposes the fine.

145(3) Variation of terms of payment. *The terms of payment of a fine may be varied, in the case of a summary trial, by the officer who conducted the trial, and in the case of a court martial, by the military judge who imposed the fine or a military judge designated by the Chief Military Judge.*

REPRIMAND AND SEVERE REPRIMAND⁵

At worse, depending on the circumstances giving rise to a Reprimand, this punishment might give rise to separate administrative action being taken against the punished member. In such an instance, a Career Review Board would be created leading to a recommendation for the early, compulsory release of the member.

Depending on the facts giving rise to the Reprimand,⁶ this punishment might have only a mild and temporary impact upon the career of the punished member. Merit Review Boards which meet annually to

³ Again traditionally, this punishment is normally reserved for personnel undergoing basic training. Extra work takes the form of the proverbial 'washing and polishing of floors' or, anecdotally, the 'peeling of potatoes'. Extra drill *normally takes the form of a soldier attired in his full combat kit (weighing in excess of 45 lbs) having to conduct various chores and reporting to the Duty Officer or Duty Warrant Officer at various intervals during silent hours.*

⁴ This punishment is empty of any real meaning now that annual leave, terminal leave, *rehabilitation* – and perhaps even sick leave – is now a legal entitlement and no longer considered a privilege. However, other forms of leave such as special leave, or embarkation/disembarkation leave could still be stopped and bring to the sentenced person a real punishment.

⁵ A copy is normally placed on a member's performance evaluation file at NDHQ.

⁶ Normally, anytime a ship at sea is involved in an incident (i.e. a grounding) or accident (i.e. a collision while refuelling) or while otherwise underway (misfiring of

rank individuals among their peers in accordance with their performance and potential would take into account the Reprimand when evaluating the potential whose weight is 20% of the overall score awarded to each candidate reviewed by a board.

guns), disciplinary action is taken against the captain or commanding officer of the ship. Depending on the circumstances of the case, the captain could be sentenced by a Court Martial to any punishment including a Reprimand or a Severe Reprimand, loss of seniority etc. Unless gross negligence is found to be at play, there is sufficient anecdotal evidence available to indicate that a captain would normally survive such a sentence and continue to be promoted, including up to flag rank.

Annex E

NCMs TRADE GROUPINGS

STANDARD (70% of all trades)		SPECIALIST-ONE (27%)	SPECIALIST-TWO (3%)
• Artilleryman Air Defense	• Refrigeration & Mechanical Technician	• Naval Weapons Technician	• Flight Engineer
• Field Engineer Equipment Operator	• Naval Electronic Sensor Operator	• Airborne Electronic Sensor Operator	• Marine Engineering Artificer
• Aerospace Control Operator	• Tactical Acoustic Sensor Operator	• Search and Rescue Technician	
• Infantryman	• Vehicle Technician	• Geomatics Technician	
• Lineman	• Imagery Technician	• Aerospace Telecommunications & Information Systems Technician	
• Intelligence Operator	• Image Technician		
• Field Engineer	• Naval Communicator	• Land Communications & Information Systems Technician	
• Crewman	• Signal Operator		
• Artilleryman Field	• Materials Technician	• Communications Research	
• Electrical Distribution Technician	• Naval Electronics Technician		
• Meteorological Technician	• Electrical Generating Systems Technician	• Marine Engineering Technician	
• Weapons Technician (Land)	• Construction Engineering Superintendent	• Hull Technician	
• Marine Electrician	• Military Police	• Electrical Technician	
• Naval Combat Information Operator	• Preventative Medicine Technician	• Clearance Diver Technician	
• Plumbing and Heating Technician	• Mobile Support Equipment Operator	• Aircraft Structures Technician	

• Construction Technician	• Performance Oriented Electronics Training	• Biomedical Electronics Technician	
• Operating Room Technician	• Health Services Technician		
• Aero medical Technician	• Resource Management Support Clerk		
• Dental Clinic Assistant	• Medical Laboratory Technician		
• Boatswain	• Water, Fuel and Environmental Technician		
• Dental Hygienist	• Steward		
• X-Ray Technician	• Cook		
• Traffic Technician	• Fire Fighter		
• Supply Technician	• Ammunition Technician		
• Postal Clerk	• Musician		
• Medical Assistant	• Court Reporter		