PREFACE

A-LG-007-000/AF-010 Military Administrative Law Manual is issued under the authority of the Judge Advocate General.

The primary purpose of this manual is to provide Commanding Officers and staff officers with a consolidated reference that outlines many of the principles of military administrative law. It will also serve as a resource for the other members of the Canadian Forces who are most affected by the application of policies and the interpretation of law.

The Department of National Defence and the Canadian Forces are writing and re-writing policies at an unprecedented rate, due largely to our efforts to replace Canadian Forces Administrative Orders (CFAO) with Defence Administrative Orders and Directives (DAOD). As these policies evolve, so too will this manual. If this manual conflicts with a current law, regulation, order or directive, then the law, regulation, order or directive will govern.

Individual circumstances will sometimes require a greater degree of analysis than is provided here. This manual complements, but does not substitute, advice from a lawyer. Unit legal advisors remain available to assist in the interpretation and explanation of CF policies.

The responsibility for updating this publication will fall to the Canadian Forces Military Law Centre. Please therefore address any comments or questions relating to its content or currency to:

Director
Canadian Forces Military Law Centre
Canadian Defence Academy
PO Box 1700 Station Forces
18 Vérité Avenue
Kingston, ON K7K 7B4
PART I – THE PARAMETERS OF ADMINISTRATIVE LAW IN THE CF

CHAPTER 1 – LEGAL AND POLITICAL FRAMEWORK AFFECTING THE CF

Section 1 - The Rule of Law ................................................................. 1-1
  General ........................................................................................ 1-1

Section 2 - The Canadian Political System .................................. 1-2
  Form of Government .................................................................. 1-2
  Legislative Branch of Government ........................................... 1-3
  Parliamentary Government ...................................................... 1-3
  The Governor General .............................................................. 1-3
  The Senate ................................................................................ 1-3
  The House of Commons ........................................................... 1-4
  Executive Branch of Government .............................................. 1-4
  Prime Minister ......................................................................... 1-5
  Ministers: With Portfolio ......................................................... 1-5
  The Cabinet ............................................................................. 1-5
  The Governor General in Council ............................................. 1-6
  The Judiciary ............................................................................ 1-6
  The Supreme Court of Canada ............................................... 1-6
  The Federal Courts of Canada ................................................. 1-6
  The Court Martial Appeal Court of Canada ......................... 1-7
  Provincial Courts .................................................................... 1-7

Section 3 - Provincial Governments ............................................. 1-7
  Provincial Legislatures .............................................................. 1-7

Section 4 - The Department of National Defence and Canadian Forces 1-8
  General ..................................................................................... 1-8
  Department of National Defence .............................................. 1-8
  Canadian Forces ...................................................................... 1-8
  Minister of National Defence ................................................... 1-9
  Deputy Minister of National Defence ...................................... 1-9
  Chief of the Defence Staff ....................................................... 1-10
  Judge Advocate General ......................................................... 1-10
  Canadian Forces Legal Advisor .............................................. 1-10
  National Defence Headquarters .............................................. 1-10
  Context .................................................................................... 1-10

Section 5 - Canadian Legal Framework ....................................... 1-11
  Constitution Act, 1867 ............................................................. 1-11
  Canadian Charter of Rights and Freedoms ............................ 1-12
  Statutes ................................................................................... 1-13
  Regulations ............................................................................. 1-13
  Orders in Council ..................................................................... 1-14
  Orders, Directives and Instructions ......................................... 1-14

Section 6 - Legal Framework of DND and the CF ......................... 1-14
  General ..................................................................................... 1-14

Section 7 - Obligations and Conditions of Service ....................... 1-16
  Concepts of Service and Active Service .................................. 1-16

Section 8 - References ................................................................. 1-17
  Legislation ............................................................................... 1-17
  Regulations ............................................................................. 1-17
  Orders, Directives and Instructions ......................................... 1-18
  Jurisprudence ......................................................................... 1-18
  Secondary Material ................................................................. 1-18
CHAPTER 2 – ADMINISTRATIVE LAW IN THE CF

Section 1 - Nature of Administrative Law ................................................................. 2-1
Section 2 - Judicial Review ......................................................................................... 2-2
  Judicial Review of Administrative Action – General ............................................. 2-2
  Legal Status of CF Decision-Makers .................................................................. 2-3
  Judicial Remedies ................................................................................................. 2-4
  Standard of Review ............................................................................................. 2-4
Section 3 - General Principles of Procedural Fairness ......................................... 2-5
  Historical Development of Natural Justice and the Duty to be Fair .................. 2-5
  Canadian Application of Procedural Fairness ...................................................... 2-6
Section 4 - Procedural Fairness in the CF ................................................................. 2-7
  Reasonable Apprehension of Bias ....................................................................... 2-8
  Notice .................................................................................................................... 2-9
  Right to Make Representations .......................................................................... 2-9
  Disclosure ............................................................................................................ 2-11
  Duty to Give Reasons ......................................................................................... 2-11
  Standard of Proof for Decision-Makers .............................................................. 2-12
Section 5 - Applying Procedural Fairness to CF Decision-Making ....................... 2-12
Section 6 - References ............................................................................................. 2-14
  Legislation ........................................................................................................... 2-14
  Regulations .......................................................................................................... 2-14
  Jurisprudence – Administrative Law: General ................................................. 2-14
  Jurisprudence – Administrative Law: CF-related ............................................. 2-15
  Secondary Material ............................................................................................. 2-16
PART II – INSTITUTIONAL LEGAL ISSUES IN THE ADMINISTRATION OF THE CF

CHAPTER 3 – ADMINISTRATIVE INVESTIGATIONS

<table>
<thead>
<tr>
<th>Section 1 - Introduction</th>
<th>3-1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary Purpose Test</td>
<td>3-1</td>
</tr>
<tr>
<td>Section 2 - Informal Investigations</td>
<td>3-2</td>
</tr>
<tr>
<td>Section 3 - Summary Investigations</td>
<td>3-3</td>
</tr>
<tr>
<td>General</td>
<td>3-3</td>
</tr>
<tr>
<td>Terms of Reference</td>
<td>3-4</td>
</tr>
<tr>
<td>Review by Legal Adviser</td>
<td>3-5</td>
</tr>
<tr>
<td>Investigator(s)</td>
<td>3-5</td>
</tr>
<tr>
<td>Interviewing Witnesses</td>
<td>3-7</td>
</tr>
<tr>
<td>Recording Information</td>
<td>3-7</td>
</tr>
<tr>
<td>Adverse Evidence</td>
<td>3-8</td>
</tr>
<tr>
<td>Summary Investigation Report</td>
<td>3-8</td>
</tr>
<tr>
<td>Section 4 - Harassment Investigations</td>
<td>3-9</td>
</tr>
<tr>
<td>General</td>
<td>3-9</td>
</tr>
<tr>
<td>Section 5 - References</td>
<td>3-9</td>
</tr>
<tr>
<td>Legislation</td>
<td>3-9</td>
</tr>
<tr>
<td>Regulations</td>
<td>3-10</td>
</tr>
<tr>
<td>Orders, Directives and Instructions</td>
<td>3-10</td>
</tr>
<tr>
<td>Jurisprudence</td>
<td>3-10</td>
</tr>
<tr>
<td>Secondary Material</td>
<td>3-10</td>
</tr>
</tbody>
</table>

CHAPTER 4 – BOARDS OF INQUIRY

<table>
<thead>
<tr>
<th>Section 1 - Introduction</th>
<th>4-1</th>
</tr>
</thead>
<tbody>
<tr>
<td>General</td>
<td>4-1</td>
</tr>
<tr>
<td>Legal Authority</td>
<td>4-2</td>
</tr>
<tr>
<td>Section 2 - Terms of Reference</td>
<td>4-2</td>
</tr>
<tr>
<td>General</td>
<td>4-2</td>
</tr>
<tr>
<td>Review by Legal Adviser</td>
<td>4-3</td>
</tr>
<tr>
<td>Primary Purpose Test</td>
<td>4-4</td>
</tr>
<tr>
<td>Administrative Support</td>
<td>4-5</td>
</tr>
<tr>
<td>Communications Strategy</td>
<td>4-5</td>
</tr>
<tr>
<td>Public Attendance</td>
<td>4-5</td>
</tr>
<tr>
<td>Family Attendance</td>
<td>4-6</td>
</tr>
<tr>
<td>Section 3 - Board of Inquiry Composition</td>
<td>4-7</td>
</tr>
<tr>
<td>Advisers to the Board</td>
<td>4-9</td>
</tr>
<tr>
<td>Legal Adviser</td>
<td>4-10</td>
</tr>
<tr>
<td>Subsequent Incapacity of a Board Member</td>
<td>4-10</td>
</tr>
<tr>
<td>Section 4 - Board of Inquiry Powers and Procedures</td>
<td>4-11</td>
</tr>
<tr>
<td>Powers of a Board of Inquiry</td>
<td>4-11</td>
</tr>
<tr>
<td>Summoning Witnesses</td>
<td>4-11</td>
</tr>
<tr>
<td>Ordering Production</td>
<td>4-12</td>
</tr>
<tr>
<td>Administering Oaths</td>
<td>4-12</td>
</tr>
<tr>
<td>Section 5 - Collection of Evidence</td>
<td>4-13</td>
</tr>
<tr>
<td>Preliminary Interviews</td>
<td>4-13</td>
</tr>
<tr>
<td>Receiving Evidence</td>
<td>4-13</td>
</tr>
<tr>
<td>Witness Testimony</td>
<td>4-14</td>
</tr>
<tr>
<td>Qualifying Experts</td>
<td>4-15</td>
</tr>
<tr>
<td>Conduct of Hearings</td>
<td>4-15</td>
</tr>
<tr>
<td>Adverse Evidence</td>
<td>4-15</td>
</tr>
<tr>
<td>Legal Counsel</td>
<td>4-16</td>
</tr>
<tr>
<td>Recording Evidence</td>
<td>4-17</td>
</tr>
</tbody>
</table>
CHAPTER 5 – MEMORANDA OF UNDERSTANDING

Section 1 - Introduction ................................................................. 5-1
Section 2 - Development of Memoranda of Understanding .......... 5-1
Section 3 - Additional Guidance .................................................. 5-3
Section 4 - References ................................................................. 5-3
   Orders, Directives and Instructions ........................................ 5-3
   Secondary Material ................................................................. 5-3

CHAPTER 6 – NON-PUBLIC PROPERTY

Section 1 - Introduction to Non-Public Property ......................... 6-1
   General .................................................................................. 6-1
   Morale and Welfare ................................................................. 6-2
Section 2 - National Defence Act and Legal Issues .................... 6-3
   National Defence Act .............................................................. 6-3
   Legal Issues – General .......................................................... 6-3
   Liability of Commanding Officers ......................................... 6-4
   Taxation ................................................................................. 6-4
   Legal Advice ........................................................................... 6-4
Section 3 - Unit Non-Public Property .......................................... 6-4
Section 4 - Messes and Institutes ................................................. 6-5
   General .................................................................................. 6-5
   Mess Membership .................................................................. 6-5
   Alcohol Policy ......................................................................... 6-6
   Smoking Policy ....................................................................... 6-7
   Mess Accounts ........................................................................ 6-7
Section 5 - Miscellaneous Matters Related to Non-Public Property 6-7
   Consolidated Insurance Program .......................................... 6-7
   Base and Station Funds – Regular Force ................................ 6-8
   Unit Funds – Reserve Force .................................................. 6-8
   Branch, Regimental and Group Funds .................................... 6-8
   Write-off of Non-Public Property ........................................... 6-9
   Recreation .............................................................................. 6-9
Section 6 - References ................................................................. 6-9
   Legislation .............................................................................. 6-9
   Regulations ............................................................................ 6-9
Orders, Directives and Instructions ........................................... 6-10
Jurisprudence ........................................................................... 6-11
Secondary Material ..................................................................... 6-11

CHAPTER 7 – PROVISION OF DEFENCE RESOURCES

Section 1 - Introduction ........................................................................................................ 7-1
  Purpose ......................................................................................................................... 7-1
  General ......................................................................................................................... 7-1
Section 2 - Provision of Services ....................................................................................... 7-2
  General ......................................................................................................................... 7-2
Section 3 - Real Property .................................................................................................... 7-5
  General ......................................................................................................................... 7-5
Section 4 - Loans of Materiel .............................................................................................. 7-6
  General ......................................................................................................................... 7-6
Section 5 - References ........................................................................................................ 7-9
  Legislation .................................................................................................................... 7-9
  Regulations .................................................................................................................. 7-9
  Orders, Directives and Instructions .............................................................................. 7-9
  Secondary Material ...................................................................................................... 7-9

CHAPTER 8 – LIABILITY FOR PUBLIC AND NON-PUBLIC PROPERTY

Section 1 - Introduction ........................................................................................................ 8-1
  General ......................................................................................................................... 8-1
  Purpose ......................................................................................................................... 8-1
  Theft, Loss or Damage ................................................................................................. 8-1
Section 2 - Statute and Regulations ..................................................................................... 8-2
  National Defence Act ................................................................................................... 8-2
  Queen’s Regulations and Orders ................................................................................. 8-2
  Joint Negligence .......................................................................................................... 8-2
Section 3 - Administrative Deductions ............................................................................... 8-2
  General ......................................................................................................................... 8-2
  Procedural Fairness ....................................................................................................... 8-3
  Investigations ................................................................................................................ 8-3
  ‘Wilfulness’ and ‘Negligence’ ....................................................................................... 8-3
  Limitations Concerning Amount of Administrative Deductions .................................... 8-5
  Improper Purchases at Public Expense ....................................................................... 8-5
  Kit Deficiencies ............................................................................................................. 8-5
  Married Quarters .......................................................................................................... 8-6
  Loss Incurred Where Member is an Occupant ............................................................. 8-6
  Public Funds – Loss, Deficiency, or Overage ............................................................... 8-6
  Non-Public Property ..................................................................................................... 8-7
  Limitations on the Power to Impose Administrative Deductions .................................... 8-7
  Joint Negligence .......................................................................................................... 8-9
  Member From Another Unit ......................................................................................... 8-9
  Voluntary Reimbursement ........................................................................................... 8-10
  Miscellaneous Provisions ............................................................................................. 8-10
Section 4 - National Defence Claims Regulations, 1970 .................................................... 8-10
Section 5 - Write-Off .......................................................................................................... 8-10
Section 6 - References ...................................................................................................... 8-11
  Legislation .................................................................................................................... 8-11
  Regulations .................................................................................................................. 8-12
  Orders, Directives and Instructions .............................................................................. 8-12
  Secondary Material ...................................................................................................... 8-12
CHAPTER 9 – ACCESS TO INFORMATION AND PRIVACY

Section 1 - Introduction ........................................................................................................... 9-1
Section 2 - Access to Information Act .................................................................................... 9-1
  Exclusions and Exemptions .................................................................................................. 9-3
  Mandatory Exemptions ........................................................................................................ 9-4
  Discretionary Exemptions ..................................................................................................... 9-9
  Disclosure ............................................................................................................................. 9-9
  Complaints and Offences ..................................................................................................... 9-6
Section 3 - Privacy Act ............................................................................................................ 9-6
  Exclusions and Exemptions .................................................................................................. 9-8
  Mandatory Exemptions ........................................................................................................ 9-8
  Discretionary Exemptions ..................................................................................................... 9-9
  Disclosure ............................................................................................................................. 9-9
  Complaints ........................................................................................................................... 9-10
Section 4 - Additional Guidance .......................................................................................... 9-10
Section 5 - References .......................................................................................................... 9-11
  Legislation ............................................................................................................................ 9-11
  Regulations .......................................................................................................................... 9-11
  Orders, Directives and Instructions ...................................................................................... 9-11
  Jurisprudence ...................................................................................................................... 9-11
  Secondary Material ............................................................................................................. 9-12

CHAPTER 10 – ELECTIONS

Section 1 - Introduction ......................................................................................................... 10-1
Section 2 - Eligibility to Vote and Service Voting Procedures ........................................... 10-1
  Statement of Ordinary Residence ...................................................................................... 10-3
  Special Voting Procedures ................................................................................................. 10-4
  Role of Liaison Officer ....................................................................................................... 10-5
  Duties of Commanding Officer ......................................................................................... 10-5
Section 3 - Additional Guidance ......................................................................................... 10-8
Section 4 - References .......................................................................................................... 10-8
  Legislation ............................................................................................................................ 10-8
  Regulations .......................................................................................................................... 10-8
  Orders, Directives and Instructions ...................................................................................... 10-8
  Jurisprudence ...................................................................................................................... 10-9
  Secondary Material ............................................................................................................. 10-9

CHAPTER 11 – SERVICE ESTATES

Section 1 - Introduction ......................................................................................................... 11-1
Section 2 - General ................................................................................................................ 11-1
  Service Estate ...................................................................................................................... 11-1
  Personal Belongings .............................................................................................................. 11-2
  Committee of Adjustment ................................................................................................. 11-2
Section 3 - Commanding Officer's Responsibilities ............................................................ 11-4
  Death of a Member ................................................................................................................ 11-4
  Missing Member .................................................................................................................... 11-4
  Member Released with Unsound Mind .............................................................................. 11-5
Section 4 - Additional Guidance .......................................................................................... 11-6
Section 5 - References .......................................................................................................... 11-6
  Legislation ............................................................................................................................ 11-6
  Regulations .......................................................................................................................... 11-6
  Orders, Directives and Instructions ...................................................................................... 11-6
  Jurisprudence ...................................................................................................................... 11-7
  Secondary Material ............................................................................................................. 11-7
PART III – CAREER ADMINISTRATION IN THE CF

CHAPTER 12 – ENROLMENT

Section 1 - Introduction ........................................................................................................ 12-1
Section 2 - Regular Force .................................................................................................... 12-1
  General ............................................................................................................................... 12-1
  Enrolment Criteria ........................................................................................................... 12-1
  Rank on Enrolment .......................................................................................................... 12-2
Section 3 - Primary Reserve – Officers ............................................................................... 12-3
  Authorities ........................................................................................................................ 12-3
  Enrolment Criteria ........................................................................................................... 12-3
  Rank .................................................................................................................................. 12-4
Section 4 - Primary Reserve – Non-Commissioned Members .............................................. 12-4
  Authorities ........................................................................................................................ 12-4
  Enrolment Criteria ........................................................................................................... 12-4
  Rank .................................................................................................................................. 12-5
Section 5 - Component Transfers ....................................................................................... 12-5
  General ............................................................................................................................... 12-5
  Transfer from Reserve Force to Regular Force ............................................................. 12-5
  Transfer from Regular Force to Reserve Force ............................................................. 12-6
Section 6 - Re-enrolment ..................................................................................................... 12-6
  Regular Force .................................................................................................................... 12-6
  Reserve Force Officers ..................................................................................................... 12-7
  Reserve Force Non-Commissioned Members ................................................................. 12-7
Section 7 - Re-instatement .................................................................................................. 12-8
Section 8 - References ........................................................................................................ 12-9
  Legislation .......................................................................................................................... 12-9
  Regulations ........................................................................................................................ 12-9
  Orders, Directives and Instructions .................................................................................. 12-9
  Secondary Material .......................................................................................................... 12-10

CHAPTER 13 – UNIVERSALITY OF SERVICE

Section 1 - Introduction ........................................................................................................ 13-1
Section 2 - Medical Standards ............................................................................................ 13-1
  Medical Categories ........................................................................................................... 13-1
  Medical Employment Limitations .................................................................................... 13-2
Section 3 - Universality of Service ...................................................................................... 13-3
Section 4 - Application of the CHRA to the CF ................................................................. 13-4
Section 5 - References ........................................................................................................ 13-5
  Legislation .......................................................................................................................... 13-5
  Regulations ........................................................................................................................ 13-5
  Orders, Directives and Instructions .................................................................................. 13-6
  Jurisprudence .................................................................................................................... 13-6
  Secondary Material .......................................................................................................... 13-6

CHAPTER 14 – ADMINISTRATIVE ACTION

Section 1 - Introduction ........................................................................................................ 14-1
  Career Management versus Administrative Sanction .................................................... 14-1
Section 2 – Remedial Measures .......................................................................................... 14-3
Section 3 - Relief From Performance of Military Duty ...................................................... 14-5
  Relief From Performance of Military Duty – General ..................................................... 14-5
  Considerations When Deciding Whether to
CHAPTER 14 – MILITARY ADMINISTRATIVE LAW MANUAL

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Removal From Command</td>
<td>14-8</td>
</tr>
<tr>
<td>5</td>
<td>References</td>
<td>14-9</td>
</tr>
</tbody>
</table>

Legislation ........................................................................ 14-9
Regulations .......................................................................... 14-9
Orders, Directives and Instructions ........................................... 14-9
Jurisprudence ........................................................................ 14-10
Secondary Material .................................................................. 14-10

CHAPTER 15 – PERSONNEL EVALUATION REPORTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Introduction</td>
<td>15-1</td>
</tr>
<tr>
<td></td>
<td>General</td>
<td>15-1</td>
</tr>
<tr>
<td></td>
<td>Purpose</td>
<td>15-1</td>
</tr>
<tr>
<td>2</td>
<td>Legislation, Regulations and Policy</td>
<td>15-1</td>
</tr>
<tr>
<td></td>
<td>Canadian Human Rights Act</td>
<td>15-1</td>
</tr>
<tr>
<td></td>
<td>Regulations and Policy</td>
<td>15-1</td>
</tr>
<tr>
<td>3</td>
<td>Additional Guidance</td>
<td>15-2</td>
</tr>
<tr>
<td>4</td>
<td>References</td>
<td>15-5</td>
</tr>
<tr>
<td></td>
<td>Legislation</td>
<td>15-5</td>
</tr>
<tr>
<td></td>
<td>Regulations</td>
<td>15-5</td>
</tr>
<tr>
<td></td>
<td>Orders, Directives and Instructions</td>
<td>15-6</td>
</tr>
<tr>
<td></td>
<td>Secondary Material</td>
<td>15-6</td>
</tr>
</tbody>
</table>

CHAPTER 16 – PROMOTION

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Introduction</td>
<td>16-1</td>
</tr>
<tr>
<td>2</td>
<td>Regular Force Officers</td>
<td>16-1</td>
</tr>
<tr>
<td></td>
<td>Authorities</td>
<td>16-1</td>
</tr>
<tr>
<td></td>
<td>Conditions for Promotion</td>
<td>16-2</td>
</tr>
<tr>
<td></td>
<td>Acting Rank</td>
<td>16-3</td>
</tr>
<tr>
<td>3</td>
<td>Regular Force Non-Commissioned Members</td>
<td>16-4</td>
</tr>
<tr>
<td></td>
<td>Authorities</td>
<td>16-4</td>
</tr>
<tr>
<td></td>
<td>Conditions for Promotion</td>
<td>16-4</td>
</tr>
<tr>
<td></td>
<td>Acting Appointments and Rank</td>
<td>16-5</td>
</tr>
<tr>
<td>4</td>
<td>Primary Reserve Officers</td>
<td>16-6</td>
</tr>
<tr>
<td></td>
<td>Authorities</td>
<td>16-6</td>
</tr>
<tr>
<td></td>
<td>Conditions for Promotion</td>
<td>16-6</td>
</tr>
<tr>
<td></td>
<td>Acting Rank</td>
<td>16-7</td>
</tr>
<tr>
<td>5</td>
<td>Primary Reserve Non-Commissioned Members</td>
<td>16-7</td>
</tr>
<tr>
<td></td>
<td>Authorities</td>
<td>16-7</td>
</tr>
<tr>
<td></td>
<td>Conditions for Promotion</td>
<td>16-8</td>
</tr>
<tr>
<td></td>
<td>Acting Rank</td>
<td>16-8</td>
</tr>
<tr>
<td>6</td>
<td>Additional Guidance</td>
<td>16-9</td>
</tr>
<tr>
<td>7</td>
<td>References</td>
<td>16-9</td>
</tr>
<tr>
<td></td>
<td>Legislation</td>
<td>16-9</td>
</tr>
<tr>
<td></td>
<td>Regulations</td>
<td>16-9</td>
</tr>
<tr>
<td></td>
<td>Orders, Directives and Instructions</td>
<td>16-9</td>
</tr>
</tbody>
</table>

CHAPTER 17 – OCCUPATIONAL TRANSFERS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Regular Force</td>
<td>17-1</td>
</tr>
<tr>
<td></td>
<td>Introduction</td>
<td>17-1</td>
</tr>
<tr>
<td></td>
<td>Officer Occupational Transfers</td>
<td>17-1</td>
</tr>
</tbody>
</table>
CHAPTER 18 – LEAVE

Section 1 - Introduction ..............................................................................18-1
Section 2 - Types of Leave .................................................................18-1
Long Leave .........................................................................................18-1
Annual Leave ................................................................................18-2
Short Leave ................................................................................18-2
Compassionate Leave .....................................................................18-3
Maternity Leave ........................................................................18-4
Parental Leave .............................................................................18-4
Section 3 - Calculation of Leave on Transfer from Reserve Force to
Regular Force ................................................................................18-5
Section 4 - Recall From Leave ...........................................................18-6
Section 4 - Additional Guidance .......................................................18-7
Section 5 - References ........................................................................18-7
Regulations ................................................................................18-7
Orders, Directives and Instructions .............................................18-7
Jurisprudence ........................................................................18-8
Secondary Material ........................................................................18-8

CHAPTER 19 – RELEASE

Section 1 - Introduction .................................................................19-1
Obligation to Serve ........................................................................19-1
Purpose ........................................................................................19-1
Entitlement to Release and the Exception ..................................19-2
Section 2 - Compulsory Release .....................................................19-2
Procedural Fairness .........................................................................19-2
Section 3 – Common Release Issues ..............................................19-4
Authorities ................................................................................19-4
Date of Release ........................................................................19-4
Release Items ...............................................................................19-5
Non-Effective Members .................................................................19-7
Voluntary Release During Restricted Release ................................19-8
Reinstatement ...............................................................................19-9
Section 4 - References ........................................................................19-13
Legislation ....................................................................................19-13
Regulations ...............................................................................19-13
Orders, Directives and Instructions ............................................19-14
Jurisprudence ........................................................................19-15

CHAPTER 20 – CF PENSION AND OTHER BENEFITS

Section 1 - Introduction .................................................................20-1
Section 2 - Benefits Under the Canadian Forces Superannuation Act ........................................................................20-1
Vesting .........................................................................................20-2
Improved Survivor Benefits .........................................................20-3
Pension Coverage for Reserve Force ........................................ 20-3
Section 3 – Additional Benefits .............................................. 20-3
Summary of Death Benefits .................................................. 20-3
Summary of Benefits Available for Injuries ......................... 20-4
Section 4 - References .......................................................... 20-5
Legislation ........................................................................... 20-5
Orders, Directives and Instructions .................................. 20-5
Secondary Material ......................................................... 20-5

CHAPTER 21 – CF DRUG CONTROL PROGRAM

Section 1 - Introduction ....................................................... 21-1
Section 2 – Categories of Testing .......................................... 21-2
Deterrent Testing ............................................................... 21-2
High Risk Safety Positions Testing .................................. 21-2
Accident or Incident Testing ............................................. 21-2
Testing for Cause ............................................................. 21-3
Control Testing ............................................................... 21-5
Blind Testing ................................................................. 21-6
Section 3 – Administrative Procedures ................................ 21-6
Testing Order .................................................................... 21-6
Taking and Testing of Samples ........................................ 21-7
Review of Test Results ..................................................... 21-7
Section 4 – Consequences of Positive Test Result ............... 21-8
Release ............................................................................ 21-8
Counselling and Probation .............................................. 21-8
Medical Assessment .......................................................... 21-9
Section 5 - References ........................................................ 21-9
Legislation ........................................................................ 21-9
Regulations ...................................................................... 21-9
Orders, Directives and Instructions ................................. 21-10
Jurisprudence ................................................................ 21-10
Secondary Material ......................................................... 21-10
PART IV – PERSONAL ADMINISTRATIVE ISSUES IN THE CF

CHAPTER 22 – HARASSMENT

Section 1 - Introduction .................................................................................................................. 22-1
   General ................................................................................................................................. 22-1
   Purpose ................................................................................................................................. 22-1
   Historical Development ........................................................................................................ 22-1

Section 2 - Legislation, Regulations and Case Law ................................................................. 22-2
   Criminal Code .................................................................................................................. 22-2
   National Defence Act ......................................................................................................... 22-3
   Canadian Human Rights Act .............................................................................................. 22-3
   DAOD 5012-0 (Harassment Prevention and Resolution) .................................................. 22-3
   CFAO 19-40 (Human Rights – Discrimination) ................................................................ 22-4
   Policies and Guidelines ....................................................................................................... 22-4
   Potential CF Liability Where Superiors Harass Their Subordinates .................................. 22-4

Section 3 - Harassment Investigations ....................................................................................... 22-5
   Harassment – Resolution versus Discipline ..................................................................... 22-6
   Responsible Officers .......................................................................................................... 22-7
   Harassment Investigators .................................................................................................... 22-7
   Terms of Reference ............................................................................................................ 22-8
   Stages of the Harassment Investigation ............................................................................ 22-9
   Witnesses ............................................................................................................................ 22-10
   Harassment Investigator’s Report ....................................................................................... 22-10
   Responsible Officer’s Decision and Administrative Closure .......................................... 22-11

Section 4 - Additional Guidance ............................................................................................. 22-12
   Harassment Prevention and Alternative Dispute Resolution ........................................... 22-12
   Invoking the CF Harassment Process ................................................................................ 22-12
   Mental Element ................................................................................................................ 22-13
   Use of Assistants ............................................................................................................... 22-13
   Disclosure ........................................................................................................................ 22-14
   Representations ................................................................................................................. 22-14
   Making Findings ................................................................................................................ 22-15
   Concurrent Complaint Procedures .................................................................................... 22-15
   Repercussions of Violating the CF Harassment Policy ....................................................... 22-15
   Other Issues ...................................................................................................................... 22-16

Section 5 - References .............................................................................................................. 22-17
   Legislation ........................................................................................................................ 22-17
   Regulations ....................................................................................................................... 22-17
   Orders, Directives and Instructions .................................................................................... 22-17
   Jurisprudence .................................................................................................................... 22-18
   Secondary Material .......................................................................................................... 22-18

CHAPTER 23 – SEXUAL MISCONDUCT

Section 1 - Introduction .............................................................................................................. 23-1
Section 2 - Sexual Misconduct at the Unit Level ..................................................................... 23-1
Section 3 - Additional Guidance ............................................................................................ 23-4
Section 4 - References .............................................................................................................. 23-4
   Legislation ........................................................................................................................ 23-4
   Regulations ....................................................................................................................... 23-4
   Orders, Directives and Instructions .................................................................................... 23-5
   Secondary Material .......................................................................................................... 23-5
CHAPTER 24 – MISUSE OF ALCOHOL

Section 1 - Introduction ........................................................................................................... 24-1
  General ................................................................................................................................. 24-1
  Purpose ................................................................................................................................. 24-1

Section 2 - Legislation and Regulations .................................................................................. 24-1
  Criminal Code ...................................................................................................................... 24-1
  National Defence Act ........................................................................................................... 24-2
  CFAO 19-31 (Misuse of Alcohol) ......................................................................................... 24-2
  Policies and Guidelines ....................................................................................................... 24-2

Section 3 - Additional Guidance ............................................................................................ 24-2

Section 4 - References ............................................................................................................ 24-4
  Legislation ............................................................................................................................ 24-4
  Regulations ........................................................................................................................... 24-4
  Orders, Directives and Instructions ....................................................................................... 24-4
  Secondary Material .............................................................................................................. 24-4

CHAPTER 25 – RACIST CONDUCT

Section 1 - Introduction .......................................................................................................... 25-1
  General ................................................................................................................................. 25-1
  Purpose ................................................................................................................................. 25-1
  Background ........................................................................................................................ 25-1

Section 2 - Legislation ............................................................................................................. 25-2
  Canadian Charter of Rights and Freedoms ......................................................................... 25-2
  Criminal Code ..................................................................................................................... 25-2
  National Defence Act .......................................................................................................... 25-3
  Canadian Human Rights Act .............................................................................................. 25-3

Section 3 - Additional Guidance ............................................................................................ 25-3
  Investigation ......................................................................................................................... 25-3
  Making Findings .................................................................................................................. 25-4
  Repercussions of Violating the CF Racist Conduct Policy ................................................... 25-5
  Other Issues ........................................................................................................................ 25-5

Section 4 - References ............................................................................................................ 25-6
  Legislation ............................................................................................................................ 25-6
  Regulations ........................................................................................................................... 25-6
  Orders, Directives and Instructions ....................................................................................... 25-7
  Jurisprudence ....................................................................................................................... 25-7
  Secondary Material .............................................................................................................. 25-7

CHAPTER 26 – FAILURE TO SETTLE PRIVATE DEBTS

Section 1 - Introduction .......................................................................................................... 26-1

Section 2 - General ................................................................................................................ 26-1
  Authority .............................................................................................................................. 26-1
  Commanding Officer’s Responsibilities ............................................................................. 26-1

Section 3 - References ............................................................................................................ 26-2
  Legislation ............................................................................................................................ 26-2
  Regulations ........................................................................................................................... 26-2
  Orders, Directives and Instructions ....................................................................................... 26-3
  Jurisprudence ....................................................................................................................... 26-3

CHAPTER 27 – RELATIONSHIPS

Section 1 - Introduction .......................................................................................................... 27-1

Section 2 - Personal Relationships and Fraternization ......................................................... 27-1
CHAPTER 28 – CONFLICT OF INTEREST

Section 1 - Introduction ................................................................. 28-1
Section 2 - Relevant Legislation ..................................................... 28-1
  Criminal Code ........................................................................... 28-1
  National Defence Act ............................................................... 28-3
  Financial Administration Act ..................................................... 28-4
Section 3 - Conflicts of Interest ...................................................... 28-4
  General ......................................................................................... 28-4
  Standards While Serving in the CF ............................................ 28-4
  Authorities .................................................................................. 28-5
  Key Definitions ........................................................................... 28-6
  Assets, Liabilities and Trusts ....................................................... 28-6
  Principles of Conduct ................................................................. 28-8
Section 4 - Contracts ................................................................. 28-9
  Follow-up Actions .................................................................... 28-11
Section 5 - Post Employment Standards ......................................... 28-11
  Relevant Jurisprudence ............................................................ 28-13
Section 6 - Acceptance of Gifts, Hospitality and Other Benefits ........... 28-13
Section 7 - Sponsorship and Donations ........................................... 28-15
Section 8 - Additional Guidance ................................................... 28-17
Section 9 - References ............................................................... 28-17
  Legislation .................................................................................. 28-17
  Regulations ................................................................................. 28-17
  Orders, Directives and Instructions ........................................... 28-18
  Jurisprudence ........................................................................... 28-18
  Secondary Material ................................................................. 28-18

CHAPTER 29 – POLITICAL ACTIVITIES

Section 1 - Introduction ................................................................. 29-1
Section 2 - Political Activities on Defence Establishments .................. 29-1
Section 3 - Additional Guidance ................................................... 29-4
Section 4 - References ............................................................... 29-4
  Legislation .................................................................................. 29-4
  Regulations ................................................................................. 29-5
  Jurisprudence ........................................................................... 29-5
  Secondary Material ................................................................. 29-5

CHAPTER 30 – LEGAL PROCEEDINGS

Section 1 – Attendance at Civilian Court .......................................... 30-1
  General ......................................................................................... 30-1
  Member’s Status While Attending Court .................................... 30-1
Financial Arrangements and Compensation ........................................... 30-2
Service of Legal Documents ................................................................. 30-2
Jury Service .......................................................................................... 30-3

Section 2 – Criminal Proceedings ......................................................... 30-3
General .................................................................................................. 30-3
Duty of Members to Report When Arrested ......................................... 30-4
Duty to Detail Attending Officer ............................................................ 30-4
Duties of Attending Officer ................................................................. 30-5
Sureties ................................................................................................. 30-5
Post Conviction Action ......................................................................... 30-6

Section 3 - Affidavits and Statutory Declarations ............................... 30-6
General .................................................................................................. 30-6
Affidavits and Statutory Declarations .................................................. 30-7
Misuse of Affidavits or Statutory Declarations ...................................... 30-9

Section 4 - References .......................................................................... 30-9
Legislation .............................................................................................. 30-9
Regulations ........................................................................................... 30-9
Orders, Directives and Instructions ...................................................... 30-10
Jurisprudence ......................................................................................... 30-10
Secondary Material ................................................................................ 30-10

CHAPTER 31 – GARNISHMENTS AND FAMILY SUPPORT ORDERS

Section 1 - Introduction ........................................................................ 31-1
Section 2 - Compulsory Payments ...................................................... 31-1
Section 3 - Family Support Orders ....................................................... 31-3
Section 4 - Garnishee Summons for Judgment Debts .......................... 31-4
Section 5 - Additional Guidance ......................................................... 31-5
Section 6 - References .......................................................................... 31-5
Legislation .............................................................................................. 31-5
Regulations ........................................................................................... 31-6

CHAPTER 32 – LEGAL ASSISTANCE TO CF MEMBERS

Section 1 - Introduction ........................................................................ 32-1
Purpose .................................................................................................. 32-1
General ................................................................................................. 32-1
Section 2 - Legal Assistance by CF Legal Officers .............................. 32-1
Section 3 - Indemnification of Legal Fees and the Provision of Legal Assistance .............................................................. 32-3
Section 4 - Additional Guidance ......................................................... 32-5
Section 5 - References .......................................................................... 32-5
Legislation .............................................................................................. 32-5
Regulations ........................................................................................... 32-5
Orders, Directives and Instructions ...................................................... 32-5
Secondary Material ................................................................................ 32-5
PART V – REDRESS AND RESOLUTION PROCESSES FOR THE CF

CHAPTER 33 – ADMINISTRATIVE REVIEW

Section 1 - Introduction ........................................................................................33-1
General ............................................................................................................33-1
Section 2 - Administrative Review Process ..........................................................33-1
Section 3 - Procedural Fairness .............................................................................33-3
Section 4 - References ..........................................................................................33-4
Legislation ........................................................................................................33-4
Regulations ......................................................................................................33-4
Orders, Directives and Instructions ...................................................................33-4
Jurisprudence ....................................................................................................33-5
Secondary Material ........................................................................................33-5

CHAPTER 34 – CF GRIEVANCES

Section 1 - Introduction ........................................................................................34-1
Section 2 - General ................................................................................................34-1
Authority ...........................................................................................................34-1
Assistance to Grievor .......................................................................................34-2
Section 3 – Grievance Process/Levels ................................................................34-3
Initial Authority ..................................................................................................34-3
Initial Authority’s Duties and Responsibilities ..................................................34-4
CF Grievance Board ..........................................................................................34-5
Final Authority Level ........................................................................................34-5
Suspension of Grievance ....................................................................................34-6
Section 4 - Judicial Review ..................................................................................34-7
Section 5 - References ..........................................................................................34-8
Legislation ........................................................................................................34-8
Regulations ......................................................................................................34-8
Orders, Directives and Instructions ..................................................................34-9
Jurisprudence ....................................................................................................34-9
Secondary Material ........................................................................................34-10

CHAPTER 35 – CLAIMS BY AND AGAINST THE CROWN

Section 1 - Introduction ........................................................................................35-1
Section 2 - General ................................................................................................35-1
Authority ...........................................................................................................35-1
Section 3 - Claims Procedure .............................................................................35-2
Reporting ..........................................................................................................35-2
Investigation .......................................................................................................35-3
Claims Assessment – Information Required ....................................................35-3
Resolution ..........................................................................................................35-4
Compensation Claims for Lost or Damaged Personal Property of Members ....35-4
Indemnification of Members ............................................................................35-6
Section 4 - References ..........................................................................................35-6
Legislation ........................................................................................................35-6
Regulations ......................................................................................................35-6
Orders, Directives and Instructions ..................................................................35-6
Jurisprudence ....................................................................................................35-7
Secondary Material ........................................................................................35-7

xvii
CHAPTER 36 – OTHER ADMINISTRATIVE PROCESSES

Section 1 - Introduction .................................................................36-1
Section 2 - Alternative Dispute Resolution ........................................36-1
  General .......................................................................................36-1
  Confidentiality and Privilege in the ADR Process..............................36-2
Section 3 - Office of the Ombudsman ................................................36-6
  General .......................................................................................36-6
  Co-operation with the Ombudsman .................................................36-7
  Investigations by the Ombudsman ..................................................36-8
  Information and Reports ...............................................................36-9
  Confidentiality and the Ombudsman .................................................36-9
Section 4 - References .................................................................36-9
  Legislation ....................................................................................36-9
  Regulations ..................................................................................36-10
  Orders, Directives and Instructions ................................................36-10
  Jurisprudence ..............................................................................36-10
  Secondary Material .......................................................................36-10

CHAPTER 37 – EXTERNAL ADMINISTRATIVE PROCESSES

Section 1 - Introduction .................................................................37-1
Section 2 - Human Rights: The Act, The Commission and
  The Tribunal ................................................................................37-1
  Canadian Human Rights Act .......................................................37-1
  Canadian Human Rights Commission ...........................................37-3
  Canadian Human Rights Tribunal ................................................37-4
Section 3 - Privacy Commissioner ..................................................37-6
  Introduction ..................................................................................37-6
  Authority ......................................................................................37-6
  Responsibilities – Complaints .......................................................37-6
  Responsibilities – Investigations ...................................................37-7
  Investigative Powers ..................................................................37-8
Section 4 - Official Languages Commissioner ..................................37-9
  Introduction ..................................................................................37-9
  Authority ......................................................................................37-9
  Responsibilities ............................................................................37-10
  Complaints ..................................................................................37-10
  Investigations ..............................................................................37-10
  Investigative Powers ..................................................................37-11
  Post-Investigation .......................................................................37-11
Section 5 - References .................................................................37-13
  Legislation ....................................................................................37-13
  Regulations ..................................................................................37-13
  Orders, Directives and Instructions ................................................37-13
  Jurisprudence ..............................................................................37-13
  Secondary Material .......................................................................37-14
CHAPTER 1

LEGAL AND POLITICAL FRAMEWORK AFFECTING THE CF

SECTION 1

THE RULE OF LAW

General

1. The military in a democracy is unique in that the military power of the state is concentrated in the hands of a relatively small number of non-elected government officials. This unique status inevitably leads to a variety of laws designed not only to control the use of force by an armed force, but also to assist in ensuring that societal values are reflected in the manner in which the military conducts its affairs, generally. Indeed, one of the dangers to any civilian government is an armed force that it does not adequately control and which does not identify with broader societal goals.¹

2. The Canadian Forces (CF) has historically played a significant role both domestically and internationally in assisting with the maintenance of what is referred to as the ‘rule of law.’ The very nature of the military as an instrument for carrying out government direction, and the fact that the military is subordinate to the civil authority, necessitates that military leaders fully understand the principles of the rule of law and then actively integrate them into all aspects of their decision-making.

3. Canadian society as a whole functions under the rule of law. As indicated in Leadership in the Canadian Forces: Conceptual Foundations,² the rule of law is more than a set of laws:

   Under the rule of law, the law is the means by which social order is established. Laws not only set out the structural framework for the governance of society; they also express and codify the central values of society. Competing forms of social control, such as rule by arbitrary power or force, offer little protection for the rights and security of individuals.³

4. There are various definitions of the rule of law. One definition notes that the rule of law includes the following principles:

   a. powers exercised by officials must be based upon authority conferred by law;

   b. the law itself must conform to certain standards of justice, both substantial and procedural;

   c. there must be a substantial separation of powers between the executive, the legislative and the judicial function;

   d. the judiciary should not be subject to the control of the executive; and

   e. all legal persons are subject to the rule of law, which are applied on the basis of equality.⁴

---

¹ B-GG-005-027/AF-011, Military Justice at the Summary Trial Level, at 1-2.
² A-PA-005-000/AP-004; see also Colonel P.J. Olson, Promoting the Rule of Law – A Value Apart (2005) 7 NSSC Canadian Forces College.
³ Ibid., at 36.
5. The Supreme Court of Canada (SCC) has repeatedly discussed the importance of the rule of law. For the SCC, the rule of law includes three requirements: the first recognizes that “the law is supreme over officials of the government as well as private individuals and thereby preclusive of the influence of arbitrary power”…the second requires the “creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order” (i.e., laws must exist)…the third requires that “the relationship between the state and the individual…be regulated by law.”

6. At its core, the rule of law means that the law applies to all members of society equally including the government and its officials. Power must be exercised in accordance with the law, not arbitrarily. This rule obviously applies to leaders and decision-makers within the Department of National Defence (DND) and the CF as much as to any other government official.

7. Therefore, Government officials must act and decide matters in accordance with the laws of Canada. Administrative law is the branch of law that concerns the laws and procedures applicable to governmental organizations. This manual outlines the administrative law applicable to the CF.

SECTION 2
THE CANADIAN POLITICAL SYSTEM

Form of Government

8. Canada is a constitutional monarchy, meaning that the head of state is a monarch whose powers are limited by a constitution. Canada is also a parliamentary democracy in which the functions of executive government devolve from the titular head of state to the political executive. This means that in practice, executive decisions in Canada take place in the context of Canada’s system of ‘responsible government.’ At its heart, responsible government in Canada means that the ministry (the effective pinnacle of the executive branch) is drawn from the legislature (at the federal level, almost always the elected House of Commons and only occasionally from the unelected Senate). Through this mechanism, the ministry is always accountable to the elected House and must maintain the confidence of a majority of its members to remain in power.

9. Canada is a federal state, in that jurisdiction is shared between two orders of government: federal (or central) and provincial. The Constitution Act, 1867 sets out the federal structure and establishes the federal Parliament and provincial legislatures. Importantly, the Constitution Act, 1867 assigns each order of government, federal and provincial, exclusive authority to legislate in respect of certain subjects. A rich court jurisprudence has developed, interpreting this division of powers.

10. On the whole, most matters can be fit into one of the listed federal or provincial powers. In rare circumstances, however, courts have concluded that a matter is not anticipated by the list included in the Constitution Act, 1867. In these uncommon situations, the courts have left the matter to be legislated by the federal Parliament, pursuant to its overarching power to legislate “for the Peace, Order and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.”

---

6 Constitution Act, 1867, s. 9.
7 Constitution Act, 1867, ss. 91-92.
Legislative Branch of Government

11. The legislative branch is the major forum for the debate of political ideas and options. Its classic function is to pass laws and to scrutinize the activities of the executive branch. In the Canadian system of government, the legislative branch is the only ‘sovereign’ entity. In the British tradition, Parliament could pass whatever law it wished and was supreme over the other branches of government. In Canada, absolute parliamentary supremacy has been curbed by the division of powers between the federal and provincial levels and by the Charter. Nevertheless, so long as it does not violate one of these constitutional limitations on its sovereignty, Parliament may pass whatever law it deems appropriate.

Parliamentary Government

12. The Canadian parliamentary system finds its roots in the traditions of the British Parliament. Under the Constitution, the federal legislature (i.e., Parliament) is composed of the Queen (represented by the Governor General (GiC)), and the two houses: the House of Commons and the Senate. The consent of all three is necessary for the passage of legislation.

13. Legislation passed by Parliament is issued in the form of statutes, such as the National Defence Act (NDA), which provides for the establishment of the CF and DND.

The Governor General

14. As has been mentioned, the monarch is the head of state for Canada. The monarch is represented in Canada federally by the GiC, appointed by the Queen on the advice of Canada’s Prime Minister.

15. The GiC’s legislative branch duties include giving royal assent to bills passed by the House of Commons and the Senate.

The Senate

16. The Senate, or upper house of Parliament, ordinarily consists of 105 senators appointed by the GiC on the advice of the Prime Minister. There are a fixed number of Senate appointments allocated by region of the country, a system originally intended to ensure that each province and territory had a proportionate voice in the Senate. The Senate currently plays four main roles on the Canadian political scene, all of which are complementary to the functions of the House of Commons: (1) legislative; (2) investigation; (3) regional representation and (4) protection of linguistic and other minorities. The Senate has been granted the power to initiate bills, amend bills proposed by the House of Commons, or reject them. No bill can become law until the Senate has given its approval.

---

10 Ibid., s.14.
11 Ibid., s. 3.
12 The GiC is represented provincially by Lieutenant Governors, appointed by the federal executive.
13 As the Monarch’s representative in Canada at the federal level, the GiC has executive branch duties as well, including reading the Speech from the Throne, signing state documents, summoning, opening and ending sessions of Parliament, dissolving Parliament for an election and presiding over the swearing-in of the Prime Minister, the Chief Justice of Canada and cabinet ministers, and serving as the Commander-in-Chief of the Canadian Forces.
14 Investigations are by Special Senate Committee, into issues of social or economic importance to the country.
16 Except bills providing for the expenditure of public money or imposing taxes.
The House of Commons

17. The House of Commons, or lower house of Parliament, is currently composed of 308 elected Members of Parliament, each representing one of the country's electoral districts or ridings. Although the population of ridings varies, the make up of the House of Commons approximates representation by population: with some exceptions, seats are assigned to provinces in keeping with their proportion of the Canadian population and then riding boundaries are assigned to ensure reasonable parity in riding population size. The Canadian Constitution requires the election of a new House of Commons at least every five years. The House of Commons has the power to initiate a bill dealing with any subject matter properly within the legislative competence of Parliament and to amend or reject bills proposed by the Senate. In fact, most proposed federal laws, including all bills that involve raising revenue or spending money, are introduced in the House of Commons.

Executive Branch of Government

18. As has been discussed, the federal executive branch of government in Canada consists of the Queen, represented by the GiC. The Constitution Act, 1867 also anticipates a Queen’s Privy Council of Canada to aid and assist the GiC. By constitutional convention, however, the powers of the Privy Council are in fact exercised by the federal Cabinet, a collective body comprising the Prime Minister and Ministers. Further, by constitutional convention, the monarch and the GiC almost never exercise their powers unilaterally, instead responding to the instruction of Cabinet (or occasionally the Prime Minister alone for some responsibilities). Thus, as a practical reality, Cabinet lies at the pinnacle of the federal executive. The Prime Minister’s special role flows in large measure from his or her authority to determine the composition of the ministry (that is, to instruct the GiC to appoint or dismiss people from ministerial posts). The Prime Minister is also the member who calls the meetings of Cabinet and eventually defines the Cabinet ‘consensus.’

19. As noted, the function of the executive branch is, broadly speaking, to implement the laws of Canada. The executive branch has the authority to make decisions and to develop government policies relating to those matters over which the federal Parliament has legislative authority always bearing in mind that because of the mechanism of responsible government, the ministry (i.e., the Prime Minister and his or her Ministers) must maintain the confidence of the House of Commons in respect of those decisions and policies. The executive branch performs the majority of its duties through the intermediary of the federal departments and agencies, special boards, commissions and state-owned, or ‘Crown’ corporations.

20. The legislature is the only sovereign branch in Canada’s constitutional order. In comparison, the executive branch has much more limited powers, flowing almost exclusively from authority delegated to it by Parliamentary statute and, to a lesser extent, from the ‘Royal’ or ‘Crown’ Prerogative. In the main, the executive branch functions as per the authority conferred on it by statutes (i.e., laws passed by Parliament). However, for some functions, the Crown Prerogative remains important. For example, the conduct of foreign affairs, including the making of treaties and other acts of state in matters of foreign affairs, as well as decisions respecting the use of the CF, remain part of the Crown Prerogative power in Canada. The Crown Prerogative, which is not defined in any statute, but consists of the powers and privileges accorded to the Crown by the common law or judge-made law. Put another way, the Crown prerogative is the residue of powers once exercised by the monarch personally that have not been stripped away by subsequent Parliamentary statute law. As this definition suggests, the Crown Prerogative

---

17 A rough average is 100,000 Canadians per riding.
18 Constitution Act, 1982, s.4.
19 This part deals with the federal executive only. The provinces also have executive branches with different structures, and, of course, different players.
20 The courts have held that the division of executive power between the federal and provincial executives mirrors the division of legislative power set out in the Constitution Act, 1867.
persists only with the forbearance of the legislature. In decisions discussing the Crown prerogative, the courts have consistently held that the prerogative is confined to those areas of traditional executive government powers where no statute law has occupied the field.\textsuperscript{21}

**Prime Minister**

21. While the monarch is the head of state in Canada, the Prime Minister is the head of government. The Prime Minister is officially appointed by the GiC. By constitutional convention, the GiC appoints a person capable of securing the confidence of the House of Commons – that is, a majority of votes in that chamber. In practice, the GiC almost always selects the leader of the political party that holds the greatest number of seats in the House of Commons. Among other things, the Prime Minister recommends the appointment of cabinet ministers and determines the responsibility of these ministers when functioning in Cabinet. The Prime Minister also instructs the GiC on when Parliament will be dissolved for an election and when a reconstituted Parliament will be summoned into session following the election. Thus, the timing of elections is almost always a matter determined by the Prime Minister. Only when the incumbent ministry loses the confidence of the House of Commons, through the device of a ‘non-confidence vote,’ is the Prime Minister compelled to either resign his or her ministry or seek dissolution of Parliament, triggering an election.

**Ministers: With Portfolio**

22. The Prime Minister usually appoints ministers from among those elected to the House of Commons,\textsuperscript{22} although Canadian practice permits Senators to also hold ministerial posts. Ministers are usually appointed to carry out the powers, duties and functions of a specific portfolio related to a matter of public concern under federal jurisdiction. Such matters typically include health, foreign affairs, finance, industry, environment, national defence and immigration. By statute, parliament has usually created a government department in each of these (and other) areas and in that statute assigned particular responsibilities to the responsible Minister. For example, the *National Defence Act* designates the Minister of National Defence as the Minister who is responsible, answerable and accountable to the House of Commons for this portfolio.\textsuperscript{23}

**The Cabinet**

23. As has been mentioned, the Cabinet is, in political reality, the supreme executive authority in Canada. The Cabinet is composed of members of the House of Commons and an occasional Senator, typically around 30 in number, selected by the Prime Minister. Normally, the Prime Minister will appoint a Cabinet that consists of all those members of the House of Commons holding portfolios.\textsuperscript{24} By custom, when possible, there is at least one Cabinet minister per province.

24. The Cabinet stands or falls together, a concept also known as the ‘collective responsibility of the Cabinet.’ Most dramatically, a vote of non-confidence in the House of Commons precipitates the ‘fall of the government’, either by sparking new elections or the tendering of the ministry’s resignation with the GiC. For this reason, individual ministers must continually seek consensus for their goals, policies, programs, and means of implementation, as decisions often affect the whole Cabinet.\textsuperscript{25}


\textsuperscript{22} The Prime Minister will typically grant portfolios to MPs from his or her own party.

\textsuperscript{23} NDA, s.4.

\textsuperscript{24} Although this needn’t be the case: the Prime Minister may appoint MPs without portfolio, or senators, to Cabinet.

\textsuperscript{25} Prime Minister of Canada: *The Canadian Government*. 
The Governor General in Council

25. Many statutes and pieces of legislation require a decision to be made by the GiC. Technically, this is the GiC, as advised by the Privy Council of Canada. In practice and by constitutional convention, the Cabinet will make the decision and then send the "order" or the "minute" of the decision to the Governor General for signature. Although the Governor General technically has the power to refuse Cabinet's advice, by custom the Governor General's involvement in this process is ceremonial.

The Judiciary

26. Canadian courts are the guardians of the Constitution, charged with ensuring that the rule of law prevails. To accomplish this goal, and because in some cases the judiciary must evaluate the constitutionality and legality of legislative and executive actions and make a decision affecting the rights and obligations of government authorities, the judiciary must be independent of government. In Canada, the constitutional framework of the judicial branch of the federal government is set out in the Constitution Acts, 1867 and the Constitution Act, 1982. While the judicial branch is part of the state in the broadest sense of the word, in legal terms the judicial institutions act separately from both the legislative and executive branches of government.

The Supreme Court of Canada

27. The SCC is the highest court in Canada and is the final court of appeal. It is made up of nine judges appointed by the Governor General on the advice of the federal Cabinet. The SCC has jurisdiction over disputes in all areas of the law, including constitutional, criminal, administrative and civil matters. One of its principal functions is the interpretation of the Constitution, and its decisions assist in defining the limits of federal and provincial executive and legislative power. The right of appeal is not automatic: not all litigants have a right to have their case determined by the SCC. While the SCC will hear appeals from some types of court decisions as a matter of right, in the majority of instances the SCC must grant "leave" to file the appeal. Such leave will only be granted in special circumstances. Typically, the SCC will only grant leave for cases dealing with issues of significant national importance.

The Federal Courts of Canada

28. The FCC are courts created by the Federal Courts Act and, as such, they exercise only those powers specifically conferred on them by statute. The FCC are courts of law, equity and admiralty, divided into a Federal Court (i.e., a trial-level court) and the Federal Court of Appeal. The Federal Court (once known as 'Trial Division'), reviews disputed decisions of federal boards, commissions and tribunals to ensure their legality through a process of judicial oversight known as 'administrative judicial review.' It has jurisdiction over matters including inter-provincial and federal-provincial disputes, as well as other matters of Canada-wide application or importance.

29. The Federal Court of Appeal (once known as the 'Appeal Division'), hears appeals from the Federal Court, the Tax Court of Canada and performs a judicial review function in relation to certain formal federal administrative tribunals. While the Federal Courts are based in Ottawa, the judges of both courts may sit in locations across the country. Decisions of the Federal Court of Appeal may, in certain circumstances, be appealed to the SCC.

28 This is in contrast to the Superior Courts of the provinces, which are courts of inherent jurisdiction under the Constitution.
The Court Martial Appeal Court of Canada

30. The CMAC is made up of judges appointed by the federal executive, who may in law be drawn from the pool of judges who sit on the Federal Courts of Canada or provincial superior courts of criminal jurisdiction. The CMAC deals exclusively with appeals from decisions of courts martial. Subsequent appeals from the CMAC may, in certain circumstances, be made to the SCC.

Provincial Courts

31. Provinces have at least three levels of courts. Lower or Provincial Courts are trial courts of first instance for most criminal matters, and the vast majority of criminal trials take place at this level (including trials of all summary offences and certain indictable offences). Superior Courts (also called Supreme Courts or Courts of Queen’s Bench, depending on the province) have jurisdiction to hear civil or criminal matters in any area, and at any level, except for those matters reserved exclusively for the lower courts (the provincial courts). The decisions of these courts can be appealed to the provincial Court of Appeal, the highest court in the province. In certain cases, a decision rendered by a provincial Court of Appeal may be appealed to the SCC.

SECTION 3

PROVINCIAL GOVERNMENTS

Provincial Legislatures

32. Provincial legislatures are unicameral legislative assemblies (meaning one house, as opposed to the bicameral federal Parliament composed of two houses – the House of Commons and the Senate) of varying size in each of the ten provinces. (Canadian Territories are the responsibility of the federal government.) Provincial legislatures are headed by a Lieutenant Governor who is appointed by the Governor General of Canada. The position of Lieutenant Governor is now largely symbolic and such individuals wield little effective power in matters of provincial governance. The Premier of the province is the true decision-maker and leader of the government.

33. In the Constitution Act, 1867, the powers of government in Canada were divided between the federal and provincial levels. The Federal government was given the authority to legislate in areas of primarily national concern, such as defence, taxation and criminal law. Provinces were given responsibility for areas considered important in maintaining their specific identities, cultures and special institutions, as well as a number of other key areas such as education and healthcare. Provincial legislatures are therefore empowered to pass laws relating to those matters for which they have been granted jurisdiction under the Constitution. However, those laws have no effect outside the boundaries of the province.

---

29 NDA, s. 234.
30 Not all court martial decisions may be appealed: Section 230 of the NDA lists the grounds of appeal available to a person subject to the Code of Service Discipline (CSD).
31 Or low-level offences at Canadian federal criminal law. Summary offences should not be confused with ‘summary trials’ which take place under the CSD for a range of offences.
32 Constitution Act, 1867, ss. 91-92.
SECTION 4

THE DEPARTMENT OF NATIONAL DEFENCE AND CANADIAN FORCES

General

34. Passed by the Federal Parliament under the authority of the Constitution,\(^\text{33}\) the National Defence Act (NDA) establishes the organization and structure of the Department of National Defence ("DND")\(^\text{34}\) and the Canadian Forces ("CF")\(^\text{35}\). DND and the CF are two distinct but complementary organizations under the authority of the Minister of National Defence ("MND"). The MND, the Deputy Minister ("DM") and the Chief of the Defence Staff ("CDS") are accountable and responsible (in both legal and practical terms), for the use of the power and resources within these organizations with which they are entrusted by Parliament. The DND and CF work to implement (either individually or jointly), the decisions and direction received from the MND and Cabinet.

Department of National Defence

35. DND exists to provide advice on defence matters to the MND, and to support the CF. It works in a unified defence team with the CF to fulfill the defence mandate. As discussed, DND is ultimately accountable to Parliament and is also responsive to the so-called ‘central agencies’ of government such as the Privy Council Office (i.e., essentially, the Prime Minister’s department), Treasury Board Secretariat (TB) and the Department of Finance. DND is governed by the provisions of the NDA, but is also subject to the Financial Administration Act (FAA) and regulations passed by the TB.

The Canadian Forces

36. Established by statute\(^\text{36}\), the CF has as its primary duty the protection of Canada and its citizens from threats to national security.\(^\text{37}\) The CF is composed of up to three components: the Regular Force, the Reserve Force and the Special Force.\(^\text{38}\) Each of the components is formed of such units and other elements as are organized by and under the authority of the MND.\(^\text{39}\) The allocation of units and elements to formations and commands is at the discretion of the MND.\(^\text{40}\)

37. The Minister’s organizational power over the CF is enforced through the issuance of Ministerial Organization Orders ("MOO"). A MOO describes units, states whether the unit belongs to either the regular or reserve force and specifies to which command the unit is allocated. When applicable, a MOO may also specify the powers of the officer in command of an organization. It is under the authority of a MOO that the CDS can issue a Canadian Forces Organization Order ("CFOO"), which provides greater detail concerning the make-up of the unit and its chain of command.

38. The CF is a separate and distinct entity from DND. It has its own chain of command.

\(^{33}\) Constitution Act, 1867, s. 91(7) gives exclusive jurisdiction to the Parliament of Canada over matters related to Militia, Military and Naval Service and Defence.

\(^{34}\) NDA, at Part I.

\(^{35}\) Ibid., at Part II.

\(^{36}\) NDA, at Part II.


\(^{38}\) The Special Force is not a permanent component of the CF. The Governor-in-Council may establish the Special Force in specific circumstances. Refer to NDA s.16 for details.

\(^{39}\) NDA, s. 17.

\(^{40}\) Queen’s Regulations and Orders at art. 2.08.
Minister of National Defence

39. The MND is responsible for the management and direction of the CF and DND on all matters relating to national defence. The MND is the government's principle spokesperson for defence matters, both within Cabinet and externally on its behalf. Furthermore, the MND is responsible for the construction and maintenance of all defence establishments, works for the defence of Canada and defence research.

40. The MND is legally responsible and accountable to both the PM (and Cabinet) and Parliament for the decisions and actions of the DND and the CF pertaining to the following matters:

a. The administration of several laws such as the NDA, the Aeronautics Act, the Visiting Forces Act, the Canadian Forces Superannuation Act, the Garnishment Attachment and Pension Diversion Act, and the Pension Benefit Division Act;

b. The management and direction of the CF and all matters relating to national defence; and

c. The development and articulation of Canada's defence policy.

41. The Minister's role in developing defence policy is crucial. The MND's principal advisors are the Deputy Minister (senior civilian adviser) and the CDS (senior military adviser). The government's statement on defence policy may be set out in a defence "White Paper", in speeches and in parliamentary debates in the House of Commons. Once a government decision respecting defence has been made, it becomes the responsibility of DND and the CF to take the appropriate measures to give effect to the decision. The MND is supported by National Defence Headquarters ("NDHQ") staff and CF personnel.

42. While the MND has, technically, the defence portfolio, under the principle of collective responsibility of the Cabinet, the Minister must bring all significant changes in defence policy, new major operational commitments or capital acquisitions to the Cabinet for discussion and decision.

Deputy Minister of National Defence

43. The senior civilian public servant in the DND is the DM, who is appointed under the authority of the NDA. The DM is authorized to exercise all of the MND's powers over the DND except for the power to make regulations. As a result, the DM is first responsible to the MND but is also ultimately responsible to the PM (and Cabinet), the Treasury Board and the Public Service Commission.

44. The DM is the MND civilian adviser and is responsible for policy, finance, material, civilian personnel, infrastructure and environment, international defence relations and corporate services as well as supporting the MND's office administratively.
Chief of the Defence Staff

45. Appointed by the Governor in Council, the CDS is the senior military member of the CF and the MND’s military advisor. Subject to regulations and under the direction of the MND, the CDS is in charge of the command, control and administration of the CF.\(^{46}\)

Judge Advocate General

46. The NDA provides for the appointment of the JAG by the Governor in Council as well as the duties, powers and functions to be performed by the incumbent.\(^{47}\) In addition to being the legal advisor to the Governor General, the Minister, the DND and the CF in matters relating to military law, the JAG is also charged with superintending the administration of military justice in the CF.\(^{48}\)

Canadian Forces Legal Advisor

47. While the JAG is responsible to superintend the administration of military justice in the CF and to provide the Governor General, the Minister, the DND and the CF with legal advice in all matters related to military law, the DND/CF LA is responsible to the Minister of Justice for providing DND and the CF with legal advice on matters falling outside the JAG’s mandate. The staff of the DND/CF LA includes civilian lawyers from the Department of Justice Canada as well as military lawyers provided by the Office of the JAG. The Office of the DND/CF LA and the Office of the JAG cooperate to deliver legal services to DND and the CF. The drafting and coordination of legislation and regulations relating to military justice is a collaborative effort between the Offices of the DND/CF LA and the JAG.\(^{49}\)

National Defence Headquarters

48. Created in 1972, NDHQ is an integrated organization where military and civilian personnel work side by side in the management of Canada’s defence policies. NDHQ is home to Assistant Deputy Ministers and military Senior Advisors responsible to the DM or the CDS.\(^{50}\) Co-location enables efficient control and command. In addition to its advisory role, the main responsibilities of NDHQ are:

   a. to ensure that the military tasks and defence activities ordered by the executive are carried out effectively and efficiently;

   b. to provide cost effective organization for the acquisition and provision of material and other resources to the CF; and

   c. to ensure that government-wide policies and practices are followed in the management of DND and the CF.

Context

49. A general understanding of the Canadian political system is essential to understanding the overarching legal framework upon which the CF makes administrative law-related decisions.

---

\(^{46}\) NDA, s. 18.

\(^{47}\) NDA, s. 9.1

\(^{48}\) NDA, s. 9.1 & 9.2(1)


\(^{50}\) See Introduction to Defence Management (DCE 001, OPME, RMC Version 1) at p 36 to 46 for a precise summary of the roles and levels of authorities for these senior advisers. These senior advisers include ADM (Policy), ADM (Finance and Corporate Services), ADM (Material), ADM (Infrastructure and Environmental), DM Human Resources Group consisting of CMP and ADM (HR-Civ), the Chief of the Maritime Staff, Chief of the Land Staff, Chief of the Air Staff, and the JAG.
Without a firm understanding of the political and legal division of political power within the Canadian federal state, military commanders and legal advisors will not be able to fully understand the structure, dynamics or context upon which the political direction for the CF to lawfully make administrative decisions is given. Consequently, the ability to anticipate legal issues will be enhanced as a result of having considered this overview.

SECTION 5

CANADIAN LEGAL FRAMEWORK

Constitution Act, 1867

50. Laws passed by elected representatives and interpreted by the courts, govern the people of Canada. The Constitution is the supreme law of Canada. Any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. The Constitution takes precedence over all other legislation, including the National Defence Act (NDA), the key statute governing the CF. The Constitution specifies the powers and responsibilities of each level of government, as well as the necessary and inherent limitations that are needed to balance the needs of society and the rights of the individual.

51. The Constitution gives the federal Parliament the general authority to make laws with respect to matters that affect the nation as a whole where it provides that the federal Senate and House of Commons may “make laws for the Peace, Order and Good Government of Canada.” It also grants specific powers to the federal and provincial governments. In particular, subsection 91(7) of the Constitution assigns the federal government responsibility for “Militia, Military and Naval Service, and Defence.” This provision establishes the federal government’s ultimate authority to enact laws governing Canada’s military forces, such as the NDA.

52. Every action of the Government must comply with the Constitution and be predicated upon the rule of law. Governments have a duty to defend and uphold the Constitution and to ensure that they do not exceed their constitutional mandates.

53. The Constitution Act, 1867, the most foundational of Canada’s constitutional documents, is the fundamental source of political and legal authority in Canada. It establishes the basic structure of the Canadian state. Canada’s constitutional structure has several important qualities. Like many political systems worldwide, Canada can be thought to have a ‘separation of power’ between three branches of government. Broadly speaking, the legislative branch creates laws, the executive branch implements these laws and an independent judiciary adjudicates disputes by applying statutory, common law (in provinces outside Quebec) and constitutional principles.

52 NDA.
53 Constitution Act, 1867, s. 91.
54 Ibid., s. 91(7). Prior to 1982, Canadian constitutional law dealt almost exclusively with the division of powers between the federal and provincial governments. For example, if the federal government were to legislate in an area of exclusive provincial jurisdiction under the Constitution Act (i.e., in the area of property and civil rights), that legislation would be ultra vires and thus void.
55 Factum of the Attorney General of Canada in the matter of a Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada, question 1, The Canadian Constitutional Framework.
56 The Constitution Act, 1867, was originally named the British North America Act, 1867. It was renamed by the Constitution Act, 1982. It is the key document in the Canadian constitution.
Canadian Charter of Rights and Freedoms

54. In 1982, the Canadian Charter of Rights and Freedoms (Charter) was embedded into the Constitution. The Charter established a series of individual rights that have the effect of constraining the powers of Parliament and provincial legislatures, as well as their respective executive branches. No level of government can infringe upon these rights unless the infringement is a reasonable limit that can be demonstrably justified “in a free and democratic society.” In this regard, some of the Charter rights may be overridden by the use of invoking the "notwithstanding clause," a provision in the Charter allowing Parliament and the provincial legislatures to enact a law that persists notwithstanding a violation of certain Charter rights. In practice, the notwithstanding clause provision has only rarely been enacted in legislation.

55. Court cases often turn on the interpretation of the Constitution, the Charter, or other statutes and regulations made by government. In the Canadian legal system and especially in the common law jurisdictions, courts developed a series of legal precedents which then bind or at least influence subsequent decisions and ensure that decisions are made on a reasonably consistent basis.

56. In the absence of specific statutory or regulatory provisions governing a particular issue, court decisions provide a body of law upon which government administrators can rely. Because of their role interpreting legislation, the Constitution and developing legal precedent, the courts are generally viewed as the final arbiter of fair administrative decision-making in government. Of course, if non-constitutional court precedent develops in a fashion unwelcomed by the legislature, it may be supplanted by legislation. Constitutional court precedent, however, is less vulnerable to legislative reversal. In addition, Canada’s written constitution is very difficult to amend, usually requiring substantial support from both the federal and provincial levels of government.

57. For this reason, and because the Charter has given Canadian courts the constitutional authority to review the substance of legislation passed by Parliament and the provincial legislatures, courts now have an enormous impact on law and governance in Canada. More than scrutinizing legislation, the courts today insist that the executive branch of government apply the Charter standards when making administrative decisions.

58. The laws of Canada, including the Constitution and the Charter, remain at the core of all administrative decision-making. It is the court’s responsibility to interpret and apply the Constitution and the Charter, as well as all other laws enacted by Parliament and the provincial legislatures, in a manner consistent with the principles of fundamental justice. Thus, the principles of administrative law have provided individuals who are subject to government decision-making with the means to challenge decisions that they see as unfair.

Section 52 of the Constitution Act 1982 states:
(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
(2) The Constitution of Canada includes:
   (a) the Canada Act 1982, including this Act;
   (b) the Acts and orders referred to in the schedule; and
   (c) any amendment to any Act or order referred to in paragraph (a) or (b).
(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.


Stare decisis represents a policy of courts to stand by precedent and not disturb settled principle of law as applicable to a certain state of facts: Black’s Law Dictionary, 7th ed., s.v. “stare decisis.”

Constitution Act 1982, s. 24.
Statutes

59. A statute is a written law passed by a legislative body. By virtue of the limited time available and expertise of federal and provincial legislators, statutes are generally broad in scope, reflecting government policy at the highest level. Statutes derive their authority from the Constitution and as such, they are the “expression of the political will of the elected representatives of the population, articulated in the most lasting form available.”63 They must be authorized by, and be consistent with, the Constitution, including the division of powers between the federal and provincial level, and the Charter as interpreted by the Canadian courts.

60. Under the Constitution, statutes dealing with national, international and inter-provincial matters fall within the legislative powers of Parliament (the federal level), whereas matters of a local, municipal or provincial nature fall within the jurisdiction of the provincial legislatures. Since subsection 91(7) of the Constitution grants the federal government the exclusive authority over laws concerning the defence of Canada,64 the CF is primarily affected by federal law and, as a federal government institution, it is subject to the scrutiny of the superior courts.

Regulations

61. Parliament is a sovereign legislative body, empowered to pass laws of any sort, so long as these comply with constitutional limitations. In practice, however, the handful of legislators who comprise Parliament would be incapable of managing every aspect or detail of day-to-day operations of the executive branch of government through detailed parliamentary legislation. Therefore, statutes normally delegate a law-making function to the executive branch of government itself. These statutory provisions authorize the executive to introduce more detailed legislative rules in the form of ‘regulations.’

62. Regulations are laws that supplement and amplify the framework provided by legislation. High-level government authorities, such as the Governor in Council (GiC),65 the Treasury Board (TB), or a departmental minister promulgate them. Individual statutes specify which executive entities are authorized to make enabling regulations and the matters that are subject to regulation.

63. Regulations tend to contain much more detail than their authorizing, or enabling legislation. Ultimately, statutory regulations must be traceable back to an explicit statutory authority. As a form of subordinate legislation, regulations are inoperative (or ultra vires), if they are made without express statutory authority.

64. Regulations are of particular importance in the CF, where the day-to-day operation and administration of the military is controlled under the authority of such instruments as the Queen’s Regulations and Orders for the Canadian Forces (QR&Os). The QR&Os are statutory instruments, comprised of both regulations and orders, which amplify the subjects and procedures that are established by the parent statute – the NDA. The bulk of administrative law applicable to the CF focuses on the powers granted to various officials, positions and entities established by regulations, particularly the QR&Os. In QR&Os, for example, the statutory authority is identified at the end of each specific regulation. The letter “G” denotes the GiC; “TB” refers to the Treasury Board (TB); “M” identifies the Minister of National Defence (MND); and “C” indicates the Chief of the Defence Staff (CDS).66 The first three are authorized to issue

64 Constitution Act 1867, s. 91(7). The NDA is enacted pursuant to this source of legislative jurisdiction.
65 ‘Governor in Council’ (GiC) means the Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Queen's Privy Council for Canada: s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21.
66 Under ss. 12-13 of the NDA, the GiC, the MND and TB are authorized to prescribe regulations. Under s. 18(2) of the NDA, the CDS is authorized to issue orders and instructions to give effect to the directions of the GiC. For example,
regulations, while the CDS issues orders rather than regulations. Just as statutes must be consistent with the *Constitution*, regulations and orders must be consistent with all relevant statutes, as well as the *Constitution*.

**Orders in Council**

65. An Order in Council is a legal instrument made by the Governor in Council pursuant to a statutory authority or, less frequently, the royal prerogative. All orders in council are made on the recommendation of the responsible Minister of the Crown and take legal effect only when signed by the Governor General.\(^{67}\)

**Orders, Directives and Instructions**

66. The *NDA* charges the CDS with the “control and administration” of the CF. Unless otherwise directed by the GiC, all orders and instructions to the CF must be issued by or through the CDS “to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister [of National Defence].”\(^{68}\) This body of internal rules, orders and directives is generally contained in the Canadian Forces Administrative Orders (CFAOs), Defence Administrative Orders and Directives (DAODs), CF general distribution messages (CANFORGENs), as well as other directives and orders that are issued from time to time, by or under the authority of the CDS. The general authority to issue such directions is legislative in nature, as it is derived by the *NDA* and the regulations made pursuant to that Act, even though the specific orders, directives and rules are made without any legislative authority referring specifically to the subject of the directions.

67. Officers and NCMs, by virtue of their rank or position, may issue lawful orders to subordinates.\(^{69}\)

---

**SECTION 6**

**LEGAL FRAMEWORK OF DND AND THE CF**

**General**

68. In applying the law, it must always be remembered that DND and the CF are two distinct organizations, despite the integration of much of the organizational structure for their administration. DND is a civilian government department in the same way as Fisheries and Oceans or other departments. It is established in a separate part of the *NDA* from the CF. The laws governing its employees are those relating to public servants\(^{70}\) (e.g., the *Public Service Employment Act*). Its chain of authority runs from the MND to the Deputy Minister (DM).

69. By comparison, the CF represent the armed forces of Her Majesty and are governed by the laws set out in the *NDA*, including the *Code of Service Discipline* (CSD). The chain of authority runs from the MND through the CDS. At times, the DM and the CDS authorize personnel in the other organization to exercise authority over personnel within their organization. They may also issue joint orders (CDS) or directions (DM) that are then applicable to both

---

\(^{67}\) Government of Canada, Privy Council Office *About OICs*, online: <http://www.pco-bcp.gc.ca/oic-ddc/about.asp>.

\(^{68}\) *NDA* s. 18, and QR&O 1.23 (Authority of the Chief of the Defence Staff to Issue Orders and Instructions).

\(^{69}\) *Ibid.*, s. 2 ‘Superior officer’ means “any officer or non-commissioned member who, in relation to any other officer or non-commissioned member, is by this Act, or by regulations or custom of the service, authorized to give a lawful command to that other officer or non-commissioned member.” See also QR&O 19.015 (Lawful Commands and Orders) and QR&O 103.16 (Disobedience of Lawful Command).

\(^{70}\) R.S., 1985, c. P-33.
organizations, such as DAODs. When dealing with members or employees, care must be taken to apply the appropriate law.

70. The line of legal authority that establishes DND and the CF is straightforward. It can be traced from subsection 91(7) of the *Constitution* to the *NDA*, from the *NDA* to its subordinate regulations, as embodied in the *QR&Os* and other regulations, and then finally to orders, instructions and directives that are issued under the overarching legislative authorities. In effect, this structure is the legal authority that duly authorizes every aspect of the management and operations of the CF.

71. The *NDA* sets out the powers of the GiC to make regulations for the “organization, training, discipline, efficiency, administration and good government” of the CF. The *NDA* further authorizes the MND to make regulations for the “organization, training, discipline, efficiency, administration and good government” of the CF. Lastly, the statute also authorizes the TB to make regulations prescribing the rates and conditions of issue of pay and allowances of officers and non-commissioned members. There are, however, express limits placed on the MND’s capacity to make regulations affecting the CF. For example, the MND cannot make regulations that are within the purview of the GiC or the TB.

72. The *NDA* also provides the legal authority for establishing the organization of the CF, its components, units and other elements. In particular, the CF can only consist of units or elements that are authorized by or under the authority of the MND. The notion of components, units or other elements is important to the determination of a commanding officer’s (CO) actual powers since a CO is specifically defined as:

   a. except when the CDS otherwise directs, an officer in command of a base, unit or element; or

   b. any other officer designated as a commanding officer, by or under the authority of the CDS.

73. Ministerial Organization Orders (MOOs) are orders from the MND. They are the authority for the creation, amalgamation or disbandment of units of the CF. MOOs also determine the component of the CF to which the unit will belong. In addition, MOOs are used to establish commands and formations and assign units to particular commands and formations. MOOs are approved by the MND and published by DGSP for each command, formation, unit or other element of the CF.

74. Canadian Forces Organization Orders (CFOOs) are orders from the CDS, promulgated to formalize the organization of the CF. They are organizational documents and are not intended for use as an authority for other than organizational purposes. They are published by the Director General Strategic Planning (DGSP), under the authority of the CDS, for each command, formation, unit or other element of the CF. CFOOs normally describe a unit or other element’s role, command and control relationships, language designation, support services relationships and channels of communication.

75. *QR&Os* amplify this organizational concept by prescribing that command shall be exercised by:

---

72 *Ibid.*, s. 12(3).
75 *Ibid.*, s. 17.
76 *NDA* s. 17.
77 *QR&Os* 1.02 (Definitions).
a. the senior officer present;
b. in the absence of an officer, the senior non-commissioned member present; or
c. any other officer or non-commissioned member, where specifically authorized by the CDS, an officer commanding a command or formation, or a commanding officer.  

76. The preceding examination of CF legal authorities underscores the point that the rule of law is more than a nebulous abstraction. It governs every aspect of the functioning of the CF. It is essential that CF authorities be able to identify and rely upon the legal authorities and principles that allow them to make administrative decisions.

SECTION 7

OBLIGATIONS AND CONDITIONS OF SERVICE

The QR&Os identify the legal obligations of military personnel. All officers and non-commissioned members (NCMs) must be familiar with, observe and enforce the NDA, the QR&Os and all other regulations, rules and orders that relate to the performance of their duties. They must ensure the proper care and maintenance, and prevent the waste of, all public property. They must care for the welfare of subordinates in addition to reporting contraventions of the previously mentioned statutes, regulations or directives.  

QR&O Chapter 19 (Conduct and Discipline), which requires all officers and NCMs to obey all commands that are not "manifestly unlawful," confirms these duties in a more general context.

Concepts of Service and Active Service

77. The NDA also addresses the duties, obligations and liabilities that apply to members of the CF. All officers and NCMs of the regular force are “at all times liable to perform any lawful duty.” Reserve force officers and NCMs may be ordered to train or be “called out on service to perform any lawful duty other than training” under the regulations or direction of the GIC. Even the notion of duty is defined in general terms by the NDA as it “means any duty that is military in nature and includes any duty involving public service authorized under [NDA] section 273.6.”

78. Similarly, the GIC may place the CF, or a constituent component, unit or element on active service, in or outside Canada, if there is an emergency in the defence of Canada, or pursuant to any action under the Charter of the United Nations, the North Atlantic Treaty, or similar collective defence mechanism. For example, in 1989, the GIC placed all regular force members, in or beyond Canada, and all reserve members outside of Canada, on active service for the purposes of fulfilling Canada’s commitments under the North Atlantic Treaty as a member of the North Atlantic Treaty Organization (NATO). Consequently, reserve force members on ‘active service’ may be required to serve on full time continuous service and, where necessary, may be retained for up to one year after hostilities cease. Such reserve force members are

---

78 QR&O 3.20 (Command Generally).
79 QR&O 4.02 (General Responsibilities of Officers) and QR&O 5.01 (General Responsibilities of Non-commissioned Members).
80 The definition of a ‘manifestly unlawful’ order is provided in R. v. Finta, [1994] 1 S.C.R. 701 at para. 239 (QL), 112 D.L.R. (4th) 513, namely: “one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong.”
81 QR&O 19.015 (Lawful Commands and Orders).
82 NDA, s. 33(1).
83 Ibid., s. 33(2).
84 Ibid., s. 33(4).
85 Ibid., s. 31(1).
subject to the CSD at all times, including the potential of increased penalties for disciplinary infractions, if any.

79. In effect, besides setting out the organization of DND and the CF, the NDA establishes and reflects the core values and precepts of military service, namely:
   a. the concepts of duty and the unlimited liability assumed by regular force members and reserve force members on active service;
   b. subordination and obedience to authority;
   c. the strict obligation to obey lawful commands;
   d. individual and collective discipline; and
   e. the obligation to promote the welfare of subordinates.\textsuperscript{87}

\textbf{SECTION 8

REFERENCES

Legislation


Regulations

QR&O 1.02 (Definitions).

QR&O 1.23 (Authority of the Chief of the Defence Staff to Issue Orders and Instructions).

QR&O 3.20 (Command Generally).

QR&O 3.21 (Command of Commands).

QR&O 4.02 (General Responsibilities of Officers).

QR&O 5.01 (General Responsibilities of Non-commissioned Members).

QR&O 19.015 (Lawful Commands and Orders).

QR&O 103.16 (Disobedience of Lawful Command).

\textsuperscript{87} A-PA-005-000/AP-004, at 38.
Orders, Directives and Instructions


Jurisprudence


Secondary Material


B-GG-005-027/AF-011, Military Justice at the Summary Trial Level, Ver. 2.0.


Factum of the Attorney General of Canada in the matter of a Reference by the Governor in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada.

Colonel P.J. Olson, Promoting the Rule of Law – A Value Apart (2005) 7 NSSC Canadian Forces College.
CHAPTER 2
ADMINISTRATIVE LAW IN THE CF

SECTION 1
NATURE OF ADMINISTRATIVE LAW

1. Administrative law is an expansive and complex subject area that focuses on the “the statutes, principles and rules that govern the operations of government.” It is concerned with ensuring that government decision-makers act with authority in a valid manner when making decisions that affect people’s interests. Within the context of Canadian society, a government is precluded from acting without being properly authorized by the Constitution, statutes or the Crown Prerogative.

2. Parliament, through its legislation, delegates powers to specific entities that are tasked to execute governmental functions. These entities include the Cabinet, ministers, particular civil servants and, in the CF, various military authorities. These entities must remain accountable for the powers they exercise, even though other government officials may make the actual decisions or take actions on their behalf. There are several reasons why this authority is exercised by government officials at various levels:

   a. the sheer magnitude of the business of government means not everything can be dealt with by Parliament or a legislature;

   b. much of governmental activity is technical in nature and only broad principles should be contained in legislation;

   c. delegating power to an administrator allows greater flexibility in applying broad statutory provisions to changing circumstances;

   d. it may not be possible to devise a general rule to deal with all cases, which may be more conveniently determined by the exercise of discretion by a delegate;

   e. the need for rapid governmental action may require faster administrative response than can be accommodated by the necessity of legislative amendment;

   f. innovation and experimentation in solving social problems may not be possible if legislation is required;

   g. someone actually has to apply legislation and that person has to have the authority to do so; and

   h. emergencies may require broad delegation of powers with respect to a wide range of matters which would normally be dealt with by legislation.

3. CF authorities and DND officials both derive their appointments and powers from statutory authority largely contained in the National Defence Act. The objective of administrative

---

1 David J. Mullan, Administrative Law (Toronto: Irwin Law, 2001) at 3.
2 Ibid., at 3.
4 D. Jones, Q.C. & A. de Villars, Q.C., Principles of Administrative Law, 4th ed. (Toronto: Thomson Canada Limited, 2004) at 3. The Crown, or “Royal” Prerogative is a limited set of residual powers bestowed upon the Crown, which can be exercised by the Governor in Council, without Parliamentary consent. One example is the power to declare war.
5 Ibid., at 4.
law, vis-à-vis the CF, is to ensure that those powers are exercised in an appropriate manner. CF commanders, leaders and supervisors make decisions each day that affect their personnel. These decisions may fall within the ambit of administrative law, notwithstanding the fact they are often made without any specific reference to the law or the underlying legal principles contained therein. All of these decisions, however, remain within the purview of administrative law and are potentially subject to judicial review by the courts.

SECTION 2
JUDICIAL REVIEW

Judicial Review of Administrative Action

4. Canadian courts have the jurisdiction to determine the legality of administrative action. Judicial review refers to submitting “a decision or action to judicial scrutiny” whereby the decision or action may be set aside.7 Even though many administrative processes have safeguards to ensure the integrity of bureaucratic decision-making (i.e., the disclosure requirements within the CF grievance process), judicial review represents the highest authority in any administrative process. This potentially means that the Supreme Court of Canada (SCC) could ultimately adjudicate an administrative decision made by any military authority, ranging from a unit CO to the CDS.

5. Judicial review is not an appeal. As a general rule in judicial review cases, the courts cannot evaluate the merits of a lawful administrative decision and substitute their own judgment.8 Rather, the role of the courts is to look at the means by which a decision has been made and determine whether the power exercised through that decision falls within the ambit of a valid statutory provision. Administrative law concerns itself not with the minutiae of a decision, but rather with the decision-making process as a whole and whether the decision falls within its duly authorized legal boundaries. Generally, judicial review is available only after all other avenues of internal redress have failed.

6. The judicial review of administrative action usually focuses on whether decision-makers have acted within their scope of powers, as authorized by the legislation. Judicial review could occur for any of the following ‘defects,’ in that the decision-maker:

a. acted without jurisdiction (e.g., a CO orders a forfeiture of pay as an administrative action against a member);

b. refused to exercise jurisdiction (e.g., a CO refuses to receive a member’s application for redress of grievance);

c. failed to respect the principles of natural justice, procedural fairness or any other procedure required by law (e.g., a member is compulsorily released without receiving any notice of intent to recommend release);9

d. erred in law in making the decision;

e. made the decision on an erroneous finding of fact that the decision-maker made in a perverse or capricious manner or without regard to the submitted material (e.g., in recommending that a junior officer should not be considered for a

7 Mullan at 544.
8 Jones & de Villars at 6.
9 ‘Natural justice’ includes two basic components: the right to be heard and the right to an unbiased decision-maker. The basic purpose of ‘fairness’ is to ensure that persons are given a meaningful opportunity to participate in a decision-making process that affects their rights or entitlements. These concepts are dealt with in greater detail in ss. 3-5 of this chapter.
promotion, the CO refers to the fact that the officer drives a motorcycle, an activity the CO considers “unseemly for an officer of Her Majesty”;

f. made the decision by reason of fraud or perjured evidence (e.g., after denying an application for recognition of common-law status, it comes to light that, in making the decision, the CO relied upon a false statement by the member’s former spouse that they are still married); or

g. acted in any other way that was contrary to law (e.g., the CF denies a specialist officer’s request for a voluntary release at the expiration of the officer’s terms of service on the grounds that there is no suitably qualified person to replace the member).10

7. It is possible for judicial review cases to be heard in both federal and provincial superior courts. In general, the level of government that established the administrative body or enacted the legislation will determine the venue. Therefore, the Federal Court of Canada (FCC) will normally supervise administrative bodies established by Parliament or under federal legislation, and the provincial courts will deal with administrative bodies that are established by provincial legislation.11

Legal Status of CF Decision-Makers

8. Section 18 of the Federal Courts Act (FCA) gives “exclusive jurisdiction” to the FCC to deal with all applications related to any “federal board, commission or other tribunal.”12 A “federal board, commission or other tribunal” is defined as any “body, person or persons who exercises powers that are granted by an Act of Parliament or the Crown Prerogative.”13 This means that CF decision-makers, acting under the authority of the NDA, could ultimately have their decision or actions examined by judicial review.

9. In respect of the CF grievance process, judicial review usually occurs subsequent to a decision by a Final Authority. The general implication is that a CF member would only be able to apply for the judicial review of a decision or action once the grievance process has been exhausted. The FCC has periodically affirmed this disposition. In Anderson v. Canada (Armed Forces)14, the FCC asserted that the CF grievance process provided “an adequate alternative remedy” and, having failed to use the grievance process, the applicant’s application for judicial review was dismissed.15 However, it may be that a decision-maker’s decision at a lower level in the grievance process (e.g., the Initial Authority), may be considered final and binding vis-à-vis the applicant. The FCC in Anderson ruled:

The fact that he was entitled to pursue the matter up the chain of command did not render the decision any less final or binding at that stage despite the fact that it might conceivably be overturned at the next step by another redress authority.16

10. The underlying implication is that administrative decision-makers at all levels should reach their decisions on the basis of natural justice and the requirements of procedural fairness.

---

10 Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1(4) [FCA].
11 S. Blake, Administrative Law in Canada, 2nd ed. (Toronto: Butterworths Canada Ltd., 1997) at 141.
12 FCA, ss. 18(1)(a)-(b).
13 Ibid., s. 2(1).
Such practices satisfy the societal principle of adhering to the rule of law and the CF’s enunciated principles of fairness and equity.

Judicial Remedies

11. In terms of an application for judicial review, the FCC has the authority to order a “board, commission or other tribunal” to:

   a. do any act or thing that it has unlawfully failed or refused to do, or has unreasonably delayed in doing;

   b. declare invalid or unlawful, the decision of the board, commission, or tribunal;

   c. quash, set aside, or set aside and refer the decision back to the board, commission, or tribunal with directions, as deemed appropriate; or

   d. prohibit, or restrain the decision, order, act or proceeding of the board, commission, or tribunal. 17

12. In most administrative contexts, including those applicable to the CF, judicial review is a process of last resort for challenging decisions. The proper functioning of the various CF administrative processes, including the grievance system, should properly explain and justify a decision, thereby precluding the necessity for individual CF members to resort to judicial review. Nevertheless, judicial review is a legal remedy that is available to permit appropriate judicial and public scrutiny and ensure governmental adherence to the rule of law.

Standard of Review

13. Historically, the courts have confined judicial reviews to procedural matters and have generally refrained from re-examining the details of a given decision in order to substitute its own judgement. The degree of deference the courts will show decision-makers will be determined on the basis of a “pragmatic and functional” 18 approach to each case.

14. This examination will entail the court’s analysis of four categories or questions:

   a. whether there is a clause that “declares that decisions of the tribunal are final and conclusive from which no appeal lies and all forms of judicial review are excluded” 19;

   b. the relative expertise of the decision-maker. 20

---

17 FCA, ss. 18.1(3)(a)-(b). S. 18.1(3) of the FCA complements the more traditional legal terms explicitly identified by s. 18. Jones & de Villars, at 10-11, provides detailed explanations of the following legal terms. Certiorari is an order from a court compelling a statutory delegate to give up the record of its proceedings to permit the court to determine their lawfulness. If a review of the decision reveals that it is unlawful, the court will quash the decision and send it back to the statutory delegate to be made according to law. Prohibition is a court order similar to certiorari, except that it occurs prior to the conclusion of a proceeding and prohibits the statutory delegate from exceeding its powers in a manner that would prove unlawful. Mandamus is a command directed by the court requiring a statutory delegate to fulfil a particular statutory obligation. Habeas corpus is an unusual court order compelling a statutory delegate holding an applicant in detention to bring the applicant before the court in order to review the lawfulness of the detention. Under s. 18(2) of the FCA, a writ of habeas corpus may only be issued on judicial review for a CF member serving outside of Canada. Quo warranto, another unusual remedy, requires a statutory delegate to demonstrate the authority underlying a particular statutory office.


19 Pushpanathan at para. 30. This is the SCC’s definition of a “privative clause.”

20 Ibid., at paras. 33-34. There are three dimensions to this element: what is the expertise of the tribunal in question; what is the expertise of the court relative to the tribunal; and what is the nature of the specific issue relative to this expertise?
the purpose of the act that authorizes the decisions and actions of the board commission or other tribunal;\textsuperscript{21} and

d. the nature of the question or problem (i.e., is it a question of law or fact). \textsuperscript{22}

15. The degree of deference a court will show to an administrative decision-maker will be determined by the court's selected standard of review. The standard of review refers to how exacting a court will be regarding the administrative decision. In order to determine the standard of review, the courts have adopted a 'pragmatic and functional approach.' There are three standards of review applied by the courts. They range from 'patent unreasonableness' at the more deferential end of the spectrum, to 'reasonableness simpliciter,' and then finally, to 'correctness' at the more exacting end of the spectrum. \textsuperscript{23} If the decision deals with strictly legal issues, then the court will nearly always require the decision-maker to be correct in their conclusions. Other types of decisions, depending on the court's analysis of the issues, may only need to be 'reasonable' given the circumstances of the case. The court may also be highly deferential in that it will only reject an administrative decision if it is 'patently unreasonable.'

16. In terms of the CF, the majority of administrative decisions submitted for judicial review are analyzed in terms of their reasonableness or their patent unreasonableness. The SCC explained 'reasonableness' as asking the following question: "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?"\textsuperscript{24} The reason for a decision should flow logically from law, equity and policy and should fully explain and justify the decision taken. A 'patently unreasonable' defect is one where there is "no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as 'clearly irrational' or 'evidently not in accordance with reason.'"\textsuperscript{25}

17. In summary, the FCC will approach an application for judicial review by determining the degree of deference that will be afforded the administrative decision-maker and it will judge the decision accordingly. In this regard, the FCC's determinations will generally focus on the degree of procedural fairness that has been afforded the CF member.

SECTION 3

GENERAL PRINCIPLES OF PROCEDURAL FAIRNESS

Historical Development of Natural Justice and the Duty to be Fair

18. The development and expansion of government and statutorily authorized administrative tribunals has resulted in an evolving array of case law that ensures a minimum level of protection from unjust decision-making procedures for those affected. The key legal concepts embodied by the jurisprudence are natural justice and the duty to be fair.

19. Historically, the lower courts consisted of justices of the peace who carried out both judicial and administrative decisions of the state, and their administrative decisions thereby took on judicial elements.\textsuperscript{26} Administrative decisions were regularly rendered in a trial setting, and the role of the superior courts was to oversee them and quash proceedings that were deemed

\textsuperscript{21} Ibid., at para. 36.
\textsuperscript{22} Canada v. Mossop, [1993] 1 S.C.R. 554 at 599-600, 100 D.L.R. (4th) 658, L'Heureux-Dubé J., cited in Pushpanathan at para. 37: "In general, deference is given on questions of fact because of the 'single advantage' enjoyed by the primary finder of fact. Less deference is warranted on questions of law, partly because the finder of fact may not have developed any particular familiarity with issues of law...in some cases, even where courts might not agree with a given interpretation, the integrity of certain administrative processes may demand that deference be shown to that interpretation of law."
\textsuperscript{24} Ibid., at para. 47.
\textsuperscript{26} Jones & de Villars at 203.
procedurally invalid. As British government administration became more complex and expanded beyond this traditional paradigm into the realm of independent government bodies, so did the concept of natural justice, which extended to 'judicial' and 'quasi-judicial' decision-makers at every level of government.

20. By the late 19th century, the House of Lords in England began to apply principles of administrative law, which were similar to those the courts apply today. The landmark case of Cooper v. Wandsworth Board of Works confirmed that individuals affected by significant administrative decisions must be given notice of such decisions and must have the opportunity to be heard. The House of Lords also tacitly recognized that all decisions significantly affecting individual rights, and not simply those made in a traditional court setting, are subject to judicial review. Despite the progressive nature of these decisions, there remained the key distinction between 'judicial,' 'quasi-judicial' and 'executive' decisions.

21. During the first part of the 20th century, these classifications contributed to "an erosion of natural justice" as the courts became increasingly focused on the nature of the tribunal as determining the requisite procedure and the corresponding degree of deference that should be shown to the decision-maker. Over time, this approach led to inconsistent and inequitable decisions premised on the court’s willingness to examine the decision of tribunals that were formally given "the duty to act judicially."

22. By the 1960s, the courts began to recognize that the nature of the tribunal should not determine the availability of judicial review (except in the case of purely legislative decisions). The impact of a decision on the rights, privileges and interests of the individual subject to it then became the critical factor.

Canadian Application of Procedural Fairness

23. The SCC began to recognize that the approach (i.e., basing judicial review exclusively on the type of the tribunal involved), had resulted in inconsistent decisions from the court. In the landmark case of Nicholson v. Haldmand-Norfolk Commissioners of Police, the SCC ruled that:

The classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

24. Hence, the SCC recognized and began to apply a more practical and justice-oriented approach to administrative decision-making in government. The SCC expanded on this principle in Cardinal v. Kent Institution by stating:

…there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.

25. As a result of this practical and justice-oriented approach, administrative decision-makers need not concern themselves with determining whether they are making 'judicial,' 'quasi-judicial,'

---

28 "Quasi-judicial" means "seemingly" or "almost" judicial (and, therefore, appropriate to a law court).
29 Jones & de Villars at 207.
30 Ibid., at 208.
or ‘executive’ decisions. Government decision-makers, however, must focus on whether their decisions are made in a fair manner. The SCC has further ruled that procedural fairness is context driven:

The concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case. It is not, however, purely subjective. The closeness of the administrative process to the judicial process should indicate how much of the principles governing the judicial process should be imported into the realm of administrative decision-making.  

26. Even though procedural fairness is “flexible and variable,” a court that is reviewing an administrative decision must assess the entire context of “the particular statute and the rights affected.” In order to determine the specific content of procedural fairness, a court will examine several factors, such as the:

   a. nature of the decision being made and process followed in making it;
   b. nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
   c. importance of the decision to the individual or individuals affected;
   d. legitimate expectations of the person challenging the decision; and
   e. choice of procedures made by the agency itself.

27. The NDA and the QR&Os provide authority for commanders, COs and supervisors to make administrative decisions ranging from routine career management to extraordinary, career-ending action. Although a court would assess the minimum required degree of procedural protections afforded to an individual on a case-by-case basis, it will generally be assessed proportionately to the seriousness and urgency of the decision (i.e., a decision to deny a CF member leave will not be as closely scrutinized as a decision to involuntarily release a member). It is incumbent on CF decision-makers to incorporate a minimum standard of procedural fairness for each administrative decision.

SECTION 4

PROCEDURAL FAIRNESS IN THE CF

28. The requirement for procedural fairness in CF administrative decision-making has been established in several court cases at the FCC level. The majority of these judicial review applications have pertained to cases where members have been compulsorily released from the CF. The decisions of the courts have confirmed the overall duty of fairness owed to CF members and provided guidance as to the content of procedural fairness in each case.

29. Decision-makers, at all levels within the CF, must exercise their discretion fairly in arriving at any administrative decision. It represents one of the “essential tenets of the rule of law”:

   It requires that when decisions are made in applying the law, the decision-maker must act in good faith and must not abuse his or her powers or exercise them dishonestly or arbitrarily, or to achieve an improper purpose. The decision-maker must consider only relevant information and must not discriminate on any inappropriate basis.

30. It is trite to suggest that CF leaders and supervisors who make administrative decisions should do so fairly. That said, the duty to act fairly will vary depending upon the circumstances. An administrative order to impose one day’s forfeiture of pay for every day a member is guilty of being absent without leave engenders no duty of fairness because the law specifies the result: no discretion is involved.\(^{37}\) In contrast, most discretionary decisions that adversely affect a member, such as whether to revert a non-commissioned member who has been convicted by a civil authority, will engage a duty to act fairly.\(^{38}\) An overview of some of the basic elements that contribute to fair procedures will assist CF leaders and supervisors in making administrative decisions fairly.

**Reasonable Apprehension of Bias**

31. Procedural fairness cannot occur if the decision-maker has a pre-determined or biased disposition toward the issue or individual. The decision-maker who has a personal or financial interest in a matter under consideration might also be reasonably perceived as having a real or apprehended bias.\(^{39}\) There cannot be either a ‘real bias’ on the part of the decision-maker or ‘a reasonable apprehension of bias’ of the decision-maker.

32. The standard to determine a reasonable apprehension of bias may vary from case to case.\(^{40}\) The leading Canadian case in which the application of bias was considered is *Committee for Justice & Liberty v. Canada (National Energy Board)*, which stated the test concerning a "reasonable apprehension of bias" in the following terms:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. [T]hat test is: “what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.” \(^{41}\)

33. The test for bias is not only whether an actual bias exists, but whether a fully-informed, reasonable third party viewing the situation would apprehend that the decision-maker in question is likely to make a decision that is not entirely based on the admissible evidence before him.

34. Sometimes a reasonable apprehension of bias can be perceived through the manner in which procedural fairness is applied. In the case of *McClennan v. Canada (Minister of National Defence)*, LS McClennan was provided with a notice of intent to recommend release. He was afforded an opportunity to make representations but, it “was done in a fashion suggesting that the [CO] had already made up his mind, after the applicant was told to prepare to leave [his ship] and after the message to…Headquarters that he was being released [had been sent].”\(^{42}\) The judge quashed the CO’s decision because procedural fairness could not be “said to [have been] met when these representations are made after a *de facto* decision has been made.”\(^{43}\) It is appropriate to state that, in this fact scenario, a fully informed and reasonable person would likely have an apprehension of bias with respect to the CO’s decision to release LS McClennan, considering the CO’s course of action before LS McClennan was actually given the right to make representations.

---

\(^{37}\) See QR&O 208.30(1) (Forfeitures – Officers and Non-Commissioned Members).

\(^{38}\) See QR&O 11.11 (Reversion upon Conviction by a Civil Authority).

\(^{39}\) B-GG-005-027/AF-011 *Military Justice at the Summary Trial Level* at 4-2. The legal principle is *nemo judex in causa sui* (i.e., no one is to be the judge in their own case).


\(^{41}\) [1998] F.C.J No. 839 at para. 27, 150 F.T.R. 96 (T.D.) [*McClennan*]. It is important to note that this case is the only one in which a judge did not dismiss a judicial review application when the member did not submit a grievance previously. The judge condemned the CO for denying assistance to the member to make a grievance.

\(^{42}\) *Baker* at paras. 46-47.

Notice

35. The *McClennan* case also highlights the procedural fairness requirement that an individual should be informed of the case to be met and provided sufficient time to make representations. This principle was reinforced in the FCC decision of *Gayler v. Canada (Director Personnel Careers Administration Other Ranks, National Defence Headquarters)*.\(^{44}\)

36. Cpl Gayler was interviewed by the military police in the course of an investigation into illicit drug use. She heard nothing further for several months until the Base Comptroller informed her that the Director of Personnel Careers Administration (DPCA) had issued a message placing Cpl Gayler on counselling and probation (C&P) due to drug involvement, during which time she would be subject to urinalysis testing at any time.

37. The decision to place Cpl Gayler on C&P was made on the basis that she had been present when someone else was smoking marijuana. No substantiation was provided for this allegation until months later, when she was informed that a military police (MP) investigation report contained a questionable witness statement that claimed three individuals had smoked marijuana at Cpl Gayler’s residence. On that basis, she had allegedly contravened *QR&O* 20.04 (Prohibition), the CF’s prohibition against unauthorized drug involvement.\(^{45}\)

38. The FCC took the following into consideration:

a. the MP report was never released to Cpl Gayler;

b. the decision to place Cpl Gayler on C&P was an administrative action;

c. the procedures outlined by *QR&O* 20.15(4) required that she be given an opportunity to make representations to the appropriate authority prior to the commencement of administrative action;

d. there was an employer/employee-like relationship between the DPCA and Cpl Gayler; and

e. the decision affected the applicant’s livelihood and prospects in that relationship by precluding her from eligibility for training selection and promotion, incentive pay and postings during the probation period.

39. The Court determined that the DPCA had breached basic principles of procedural fairness by failing to give Cpl Gayler notice of the case against her and an opportunity to respond to the evidence before the decision to place her on C&P was made. The court set aside the decision to place her on C&P and ordered that all related documents be removed from her personnel file.\(^{46}\)

Right to Make Representations

40. The *Gayler* case highlights an important requirement for procedural fairness for all serious administrative decisions. This important feature is encapsulated by the Latin maxim *audi alteram partem* (i.e., to hear both sides). By meeting this elementary requirement, the administrative decision-maker provides the individual who may be affected by the decision with an opportunity to make representations regarding their situation. Logically, this could also provide information to the decision-maker that will result in a more informed and rational decision.


\(^{45}\) See *QR&O* 20.04 (Prohibition) Note (A).

\(^{46}\) *Gayler* at 39.
41. As written by the judge in Gayler:

Even if the applicant was not entitled to an oral hearing, since the decision was one of an administrative nature, she should have had a fair opportunity to respond to the case against her, including correcting or explaining any relevant information, before the decision was made...

42. The opportunity for a CF member to make representations, however, does not necessarily mean that an individual must be allowed direct access to the decision-maker or is entitled to an oral hearing. In the case of Hawco v. Canada (Attorney General) the applicant, Cpl Hawco, applied for judicial review of a decision by the Director General Personnel Career Other Ranks (DGPCOR) to release him for reasons related to chronic alcohol abuse. Cpl Hawco raised several issues in his application, including the fact that he ought to have been given direct access to the DGPCOR, as opposed to submitting his representations to the Career Review Board (CRB). The judge dismissed the application for judicial review and concluded:

…that procedural fairness in the circumstances of this case does not require that the applicant be given an opportunity to make submissions directly to the decision-maker, so long as he or she is able to make submissions to the Career Review Board, and those submissions are before the decision-maker.

43. Nor is there always a requirement for a CF member to be granted an oral hearing. In Rockman v. Canada (Attorney General), a CF corporal applied for judicial review of the decision of the Director General of Military Careers (DGMC) to release him. Cpl Rockman was arrested for possession of marijuana by the MP and faced the imminent prospect of criminal charges. Ultimately, the charges were not laid for evidentiary reasons.

44. Cpl Rockman subsequently applied for voluntary release under the Force Reduction Plan (FRP) in 1996. If he had been released under the FRP, he would have received several financial advantages, including a pension. However, after Cpl Rockham submitted his voluntary request for release, a CRB changed the applicable release item to “unsuitable for further service,” thereby disqualifying him from the FRP and its associated benefits. Cpl Rockman applied for judicial review, in part, on the grounds that he had not been allowed to address the decision-maker prior to the change of his release item and he was not given the reasons for the CRB’s recommendation.

45. The judge in the Rockman case ruled:

In the end result, the cases relied upon by Cpl Rockman do not go so far as to confer a right to make submissions directly to the Release Authority once the Career Review Board recommendations are known. They do support the proposition that a person whose rights are to be affected must be given a chance to be heard, though not necessarily in person. In this case, Cpl Rockman’s representations and those of his counsel were before the Career Review Board and before the Release Authority. While one can understand why Cpl Rockman would wish to deal with the Release Authority directly, it is not a failure of natural justice that he was not able to do so as long as his representations reached the

---

47 Ibid., at para. 35.
52 Ibid., at para. 21.
Cpl Rockman’s application for judicial review was ultimately dismissed. Even though there had been technical breaches of the duty of fairness, the judge decided that Cpl Rockman was given substantial reasons for the CRB’s decision and was given an opportunity to respond to the decision-maker, albeit not directly.

Disclosure

The Rockman case also addressed issues related to the disclosure of documents that would enable an individual to make appropriate representations. Cpl Rockman’s judicial review application argued that he did not receive procedural fairness because he had received “a heavily edited version of the military police report while the CRB had an unedited version of the same report.”

The FCC judge rejected this argument because the applicant failed to show that the document would have assisted his case:

When a matter is sent back on the basis of a failure of disclosure of a document, it is the possibility of the applicant making some use of the document which justifies the rehearing of the matter. Where the document has been disclosed as part of the judicial review process, it is no longer a question of possibilities. The document is available and its deficiencies are available to be exposed. There is no reason for this Court to order a new hearing if the applicant does not show that there is reason to question the evidentiary value of the document...I would therefore decline to send the matter back for a new hearing.

Disclosure is a context driven issue. Accordingly, the guiding principle is that decisions having potentially serious consequences for a CF member require a greater degree of procedural fairness than those concerning less serious outcomes. Certain CF administrative procedures (i.e., C&P, Notice of Intent to Recommend Release, harassment decisions and grievances), stipulate that disclosure is to occur so that the decision-maker may receive appropriate information in order to facilitate their decision. Decision-makers should ensure that documents and information that will be relied on to formulate a decision are disclosed to the affected individual in a timely manner and that no other, extraneous considerations are taken into account when making a decision.

Duty to Give Reasons

An examination of relevant case law also establishes the principle that reasons for a decision must be given to the affected individual:

Reasons, it has been argued, foster better decision-making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for a decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned or considered on judicial review.

54 Ibid., at para. 2.
55 Ibid., at para. 20.
56 Hawco at paras. 22-23. See also Miller.
57 Baker at para. 39.
51. The duty to give reasons will only be satisfied when the reasons are adequate. The existence of an adequate written decision, where appropriate, facilitates the review of a decision by higher-level authorities in the chain of command, particularly if a grievance is submitted.

**Standard of Proof for Decision-Makers**

52. Those CF personnel who have completed the Presiding Officer Certification Training (POCT) course have been exposed to the concept of applying a 'standard of proof' when making a decision with significant consequences to the subject of the decision. As emphasized in that course, an individual cannot be convicted of a criminal or service offence unless the presiding officer is convinced "beyond a reasonable doubt" that the accused committed the offence. In civil cases, the standard is somewhat lower (i.e., the decision-maker(s) must be satisfied on a 'balance of probabilities' that an incident occurred). An equivalent phrase that is used is 'based on the preponderance of evidence.' Generally, this is the standard that is to be applied in most administrative decisions.

53. There is an intermediate standard of proof, falling between the criminal standard and the civil standard, that applies to decisions that are administrative in nature but, nevertheless, have serious implications for the individual:

The standard of proof required in cases such as this is high. It is not the criminal standard of proof beyond a reasonable doubt. But it is something more than a bare balance of probabilities. The authorities establish that the case against a professional person on a disciplinary hearing must be proved by a fair and reasonable preponderance of credible evidence. The evidence must be sufficiently cogent to make it safe to uphold the findings, with all of the consequences for the professional person’s career and status in the community [having been taken into account].

54. In Gayler, the FCC determined that the only basis of the decision to place Cpl Gayler on C&P had been the MP report, and there was no evidence therein to indicate that she had knowledge of, and consented to, people smoking drugs in her apartment. Accordingly, the FCC found that this discretion had been exercised based on insufficient evidence.

**SECTION 5**

**APPLYING PROCEDURAL FAIRNESS TO CF DECISION-MAKING**

55. The modern concept of procedural fairness that has emerged from Canadian legal jurisprudence is a fundamentally underpinning of CF personnel administration. Although natural justice pervades public administration regardless of specific statutory provisions, many CF regulations and administrative orders do contain provisions reflecting and reinforcing the requirements of procedural fairness.

56. CF decision-makers are required by law to ensure that a bureaucratic decision significantly affecting the career of another individual takes into account the gravity of the
situation and provides a level of procedural fairness commensurate to the potential effect of the decision on the individual concerned. Whether a decision is considered ‘fair’ will depend on the following circumstances:

a. the nature of the decision;

b. the relationship existing between the decision-maker and the affected individual; and

c. the effect of that decision on the individual’s rights.61

57. One of the fundamental challenges of administrative law is determining the degree to which the right to notification and opportunity to respond is to be afforded to the individual. As one legal scholar observed, the application of these principles requires great flexibility of approach:

Sometimes, all that is required is that the person be advised verbally of the gist of the proposed decision and the reasons for it and be permitted to respond verbally. In some cases, written notice and an opportunity to make written submissions will suffice. The extent of written submissions may reach from a single letter stating one’s position through the exchange of correspondence in which the issues are fully discussed, to a formal application supported by documentary evidence and the reports of experts. Sometimes a person cannot adequately answer the case without an oral hearing. The nature of the hearing required may vary from an informal interview with an agent of the decision maker, to a round table discussion with the tribunal, or a formal proceeding similar to a civil trial…The main consideration, in deciding which of these procedures is appropriate, is whether the procedure is fair to the parties affected.62

58. Nevertheless, it is incumbent on all CF decision-makers to ensure that the appropriate degree of procedural fairness is applied to each decision. The case law mentioned in this chapter provides useful guidance. Generally, decision-makers will often:

a. investigate and research the issue to be determined;

b. confirm that they have the proper authority to decide the issue, either by virtue of the NDA, QR&Os, or some other order, directive or instruction;

c. ensure that they are not biased and that there would be no reasonable apprehension of bias;

d. follow all of the procedures outlined in the NDA, QR&Os, or other orders, directives or instructions that apply to the issue being decided;

e. give appropriate notice to the affected CF member that a decision will be made, when required to do so;

f. assign an assisting officer to assist the affected CF member, when required to do so;

61 Knight at para. 24 (QL).
62 Blake at 10-11.
g. disclose to the affected CF member, information that will be provided to the decision-maker, subject to an appropriate vetting process as may be required by law;

h. receive representations from the affected CF member before a final decision is made; and

i. provide reasons for the decision.

59. Administrative decision-making pervades every aspect of the CF. Decisions directly affecting individual CF members are made on a daily basis from the ministerial level downward. Therefore, the role of individual decision-makers must be understood in terms of ensuring that administrative law principles are applied throughout the decision-making process. Administrative decisions must be made according to certain legal standards, such as the duty of fairness. Throughout the remainder of this manual, these legal standards will be articulated and explained in the context of the day-to-day application of CF administrative policies and decisions. Administrative law embodies a set of principles, requirements, processes and remedies that, together, require ministers, COs and other DND and CF decision-makers to exercise their statutory powers with even-handedness, fairness and diligence.

SECTION 6

REFERENCES

Legislation


Regulations

QR&O Chapter 7 (Grievances).

QR&O 20.04 (Prohibition).

QR&O 108.20 (Procedure).

Jurisprudence - Administrative Law: General


Jurisprudence - Administrative Law: CF-related


Secondary Material


B-GG-005-027/AF-011, Military Justice at the Summary Trial Level, Ver. 2.0.

S. Blake, Administrative Law in Canada, 2nd ed. (Toronto: Butterworths Canada Ltd., 1997).


CHAPTER 3
ADMINISTRATIVE INVESTIGATIONS

SECTION 1
INTRODUCTION

1. Commanders at all levels must be able to conduct investigations for the effective and efficient administration of their units. In general, these investigations are categorized as administrative investigations. While the term ‘administrative investigation’ is not defined in either the NDA or the QR&Os, administrative investigations are used to investigate issues related to the command, control and administration of the CF. Four types of administrative investigations are most often used in the CF:
   a. informal investigations;
   b. summary investigations (SI);
   c. harassment investigations; and
   d. boards of inquiry (BOI).¹

2. The NDA only addresses the convening of a BOI to inquire into any matter that is connected to the government, discipline, administration or functions of the CF, as well as any matter that affects an officer or NCM.² QR&O 21.01 (Summary Investigations – General) authorizes and defines an SI as “an investigation, other than a board of inquiry, ordered by the CDS, an officer commanding a command or formation, or a commanding officer.” Harassment investigations are ordered pursuant to the statutory authority of the CDS to control and administer the CF.³ The notion of an informal investigation is premised on the residual command authority vested in those who command units, formations or elements within the CF.⁴ Informal investigations do not have terms of reference (TOR) like an SI or BOI. They permit a CO to maintain situational awareness until an appropriate course of action is determined (i.e., the required type of investigation is ascertained).

Primary Purpose Test

3. The decision to conduct an SI or a BOI must be premised on the “Primary Purpose Test” that is articulated in DAOD 7002-1 (Boards of Inquiry) and DAOD 7002-2 (Summary Investigations). Neither an SI nor a BOI can be convened “if the sole or primary purpose is to obtain evidence for a disciplinary purpose or to assign criminal responsibility.”⁵ The TOR cannot require determinations of criminal liability and information obtained from an individual must not be premised on being able to obtain self-incriminating evidence.⁶

4. Administrative investigations must be clearly distinguished from disciplinary investigations which have the primary purpose of:
   a. determining whether a service offence has been committed;
   b. identifying the alleged offender(s); or

¹ BOIs will be addressed in Chapter 4 (Boards of Inquiry) found in Part 2 of this manual.
² National Defence Act, R.S.C. 1985, c. N-5, s. 45 (1) [NDA].
³ NDA s. 18(1).
⁴ See QR&O 3.20 (Command Generally) to QR&O 3.34 (Command When Commonwealth Forces Are Serving Together or Acting In Combination), inclusive. See also QR&O Chapter 4 (Responsibilities and Duties of Officers).
⁵ DAOD 7002-1 (Boards of Inquiry) and DAOD 7002-2 (Summary Investigations).
⁶ DAOD 7002-1 (Boards of Inquiry).
Disciplinary investigations are initiated for two main purposes: to enforce the Code of Service Discipline (CSD) and to conduct criminal investigations under the aegis of the Criminal Code and other federal statutes.\(^7\) Canadian criminal and military law therefore govern how disciplinary investigations in the CF are carried out.\(^8\) The type of disciplinary investigation conducted (i.e., military police (MP), National Investigative Service (NIS), or a unit disciplinary investigation), will depend upon the nature of the offence and the gravity or sensitivity of the matter. Again, NIS investigations, MP investigations and unit disciplinary investigations are distinct in purpose from administrative investigations.

5. When conducting an administrative investigation, if the investigator or board encounters evidence relating to a possible criminal or disciplinary offence, the investigator must stop the investigation and consult with the unit legal adviser in order to avoid potential difficulties that otherwise might ensue. For example, in order to avoid a perception of bias, a limitation exists on the summary trial jurisdiction of any CO who “directly supervises the investigation of the offence.”\(^9\) It should be noted that a CO ordering an administrative investigation, such as ordering a drug test for cause, is, in fact, supervising the conduct of an investigation. Consequently, in the event one or more offences arise out of a subsequent disciplinary investigation, the CO would also be precluded from conducting the summary trial of these offences, as this could lead to a perception of bias.\(^10\)

SECTION 2

INFORMAL INVESTIGATIONS

6. An informal administrative investigation may be ordered to inquire into any matter for which investigation by either a BOI or an SI is not required.\(^11\) Accordingly, informal investigations are those inquiries conducted for administrative purposes for which the formal requirements of other investigations are not required. Military authorities on their own initiative may undertake an informal investigation, or it may be initiated on the basis of verbal or written direction from a higher authority. An example of the former situation would be a chief clerk directing a subordinate clerk to find out why a member’s pay allotment did not start on the expected date. An example of the latter would be a memo from a CO directing the unit quartermaster to look into unexpectedly high expenditures of training ammunition and requiring the quartermaster to report back to the CO.

7. The purpose of informal administrative investigations is the timely gathering of essential information necessary for a decision to be made or action to be taken. An informal investigation may be selected as the appropriate form of inquiry when the following considerations do not require or permit a more formal investigation:

a. an immediate or expedited response is required;

b. the matter is not anticipated to be complicated; or

c. the information sought is readily available (although collection, organization and/or analysis may be required).

8. It is important that decision-makers choose the appropriate investigative tool at the earliest opportunity. Decision-makers should use the information uncovered in an informal investigation as input to a more formal investigation. It is equally important for decision-makers to use the results of a formal investigation to improve the performance and effectiveness of their informal investigations.

\(^7\) R.S.C. 1985, c. C-46.
\(^8\) For additional information concerning disciplinary investigations, see B-GG-005-027/AF-011, Military Justice at the Summary Trial Level, Ver. 2.0, c. 5 and QR&O Chapter 106 (Investigation of Service Offences).
\(^9\) NDA s. 163(2)(a).
\(^10\) B-GG-005-027/AF-011, Military Justice at the Summary Trial Level, Ver. 2.0, c. 11, paras 51-53.
\(^11\) DAOD 7002-0 (Boards of Inquiry and Summary Investigations), marginal note: Policy Direction/Context.
investigation to determine whether a more formal investigation would be more appropriate. Caution must be exercised to ensure that the form of investigation used is clearly distinguished.

SECTION 3

SUMMARY INVESTIGATIONS

General

9. SIs are provided for in QR&Os. \(^{12}\) An SI is defined as “an investigation, other than a board of inquiry, ordered by the Chief of the Defence Staff, an officer commanding a command or formation, or a commanding officer.” \(^{13}\)

10. The CDS may order an SI when there is a requirement for information “on a matter connected with the control and administration of the CF” and where a BOI is not legally required by the regulations. \(^{14}\) An officer commanding a command or formation, or a CO may order an SI when:

   a. they require to be informed on any matter connected with their command or affecting any service member under their command;
   
   b. a BOI is not explicitly required by the regulations; and
   
   c. a BOI or an SI has not been convened or ordered to be convened by a superior authority. \(^{15}\)

11. An SI is normally used to investigate and report on “matters of a minor, straightforward and uncomplicated nature.” Regulations that specify the investigation of certain classes or types of incidents will also typically state that military authorities may order a summary investigation or convene or order the convening of a BOI. \(^{16}\) Accordingly, most cases will require an assessment as to whether an SI is the appropriate investigative process considering the gravity and complexity of the matter to be investigated. DAOD 7002-3 (Investigative Matters and References) provides a list of the most common investigative matters and the corresponding orders and instructions. Generally, SIs are the most appropriate means to investigate lost or damaged equipment for write-off purposes, conflicts of interest, or claims by or against the Crown. Even though an SI may be used to investigate incidents involving death or serious injury, a BOI should be conducted where it is practicable to do so. An informal investigation might be used to assess the appropriate investigative tool.

12. The specific purpose of an SI will be set out in the TOR issued by the authority ordering the SI. While the general format of an SI report is mandated in regulations and orders, the TOR will usually provide specific instructions on the exact format and content for the SI report. General direction concerning the form of an SI report is provided in regulations and orders and includes the following guidance:

   a. an SI report may be in synopsis form; \(^{17}\)
   
   b. an SI report shall be submitted in typewritten, memorandum form; \(^{18}\)
   
   c. depending on the seriousness or complexity of the matter investigated, it may be appropriate to support the information in an SI report by the attachment of signed

\(^{12}\) QR&O Chapter 21 (Summary Investigations and Boards of Inquiry).
\(^{13}\) QR&O 21.01(1)-(2).
\(^{14}\) QR&O 21.01(2)(a).
\(^{15}\) QR&O 21.01(3)(a).
\(^{16}\) DAOD 7002-2 (Summary Investigations).
\(^{17}\) QR&O 21.01(4).
\(^{18}\) DAOD 7002-2 (Summary Investigations) provides a sample report of an SI.
statements, memoranda, or other forms of evidence that may be available and relevant; and

d. SI reports shall contain findings, recommendations and all information that would normally be contained in minutes of a BOI where the nature of the matter or the TOR require that specific findings be made.\(^{19}\)

13. Where an SI will be forwarded to higher headquarters, the officer who ordered the SI shall include their recommendations for consideration by superior authorities in addition to the comments provided by the investigating officer(s).\(^{20}\)

14. The use of the word ‘summary’\(^{21}\) indicates the nature of these administrative investigations, which is reflected in their purpose and procedures. The formal procedures and requirements for an SI are therefore limited in scope and are intended to produce an investigative process with the following characteristics:

a. expediency;

b. brevity;

c. flexibility;

d. easily accomplished through the efforts of a single investigator; and

e. a minimum requirement of administrative support.

The above characteristics justify the use of an SI as an appropriate investigative tool in order to investigate and report on matters of a “minor, straightforward and uncomplicated nature.”\(^{22}\)

Terms of Reference

15. Before deciding to order an SI, military authorities must consider whether it would be appropriate to refer the matter to higher authority for either of the following reasons:

a. the unavailability of qualified or unbiased investigators within the unit or command; or

b. a reasonable expectation that the officer who would otherwise order the SI might be adversely affected by the findings or recommendations of the investigation.\(^{23}\)

16. At a minimum, the following criteria for TOR of an SI are:

a. they must be written, detailed and explicit;

b. they must clearly identify the CF member(s) appointed as the investigator(s); and

   i. to determine the cause(s) for the matter under investigation; and

   ii. to make recommendations to prevent a recurrence.\(^{24}\)

---

\(^{19}\) QR&O 21.01(5).

\(^{20}\) QR&O 21.01(4).

\(^{21}\) ‘Summary’ is defined as follows: dispensing with needless details or formalities; without customary legal formalities. Oxford Canadian Dictionary (Toronto: Oxford University Press, 1998) s.v. “summary.”

\(^{22}\) DAOD 7002-2 (Summary Investigations).

\(^{23}\) DAOD 7002-2 (Summary Investigations).
17. In addition, all TOR must contain specific paragraphs that provide direction pertaining to evidence that relates to allegations of potential service offences and the possible conduct of disciplinary investigations. Conversely, disciplinary investigations must not be commenced with the issue of formal TOR, similar to those of an SI. Such TOR could cause a disciplinary investigation to be misconstrued as an SI. This, in turn, might preclude the contents of the disciplinary investigation from being entered as evidence at summary trial.

Review by Legal Adviser

18. Although expediency is a key consideration when ordering an SI, there is significant value in consulting with the unit legal adviser prior to drafting TOR, notwithstanding the fact that SIs are normally used to investigate events or incidents of a “minor, straightforward and uncomplicated nature.” Such preparation may help to avoid the necessity of potentially having to initiate a new SI or BOI. While COs and commanders are best situated to know what information they need to effectively command, control and administer their particular unit or formation, the unit legal adviser can provide invaluable advice on:
   a. the adequacy of the TOR;
   b. special direction concerning the handling of witnesses; and
   c. identifying suitable thresholds for potential involvement by other investigative processes or agents (e.g., a BOI or MP/NIS investigation).

19. A legal consultation could also provide insight into systemic or base-wide recurring incidents (i.e., loss of accountable materiel, injuries to CF members or damage to public property). Such insight could prove valuable in drafting TOR and better equip the investigator(s) to provide effective recommendations to preclude the repetition of past errors. It is also useful for the chain of command to consult with the legal adviser if there is a potential claim against the Crown or where a significant incident occurred, particularly if a serious injury or death resulted. Only the Director of Claims and Civil Litigation (DCCL) at NDHQ, a regional Assistant Judge Advocate General (AJAG), or other designated legal officer, is authorized to settle claims against the Crown or initiate a claim by the Crown.

Investigator(s)

20. SI investigators should normally be commissioned officers or NCMs of the rank of WO or above. In circumstances where it is appropriate to appoint a team of two investigators, both investigators must conduct the SI together. The following considerations must also be taken into account when selecting investigators:
   a. any conflict of interest or appearance of conflict of interest (For example, in situations where the investigator(s) have had previous, direct or indirect involvement in the matter under investigation. If an issue of command within a unit is being investigated, an investigator external to the unit must conduct the SI);
   b. the experience of the potential investigator(s) in conducting investigations;
   c. the adverse effect on the chain of command (An investigator should not be appointed where it is reasonable to expect that superiors in the investigator’s chain of command may be adversely affected by the investigative report); and

24 DAOD 7002-2 (Summary Investigations); as an aid in drafting TOR for an SI, one can use the general format of the model TOR for a BOI in DAOD 7002-1 (Boards of Inquiry).
25 The exact wording for the two mandatory paragraphs is provided in DAOD 7002-1 (Boards of Inquiry).
26 See DAOD 7004-0 (Claims By or Against the Crown and Ex gratia Payments), and Chapter 35 of this manual.
27 DAOD 7002-2 (Summary Investigations).
d. whether the potential investigators(s) are MP (MP personnel should not be appointed to conduct SIs except in relation to MP unit or section matters). 20

21. Officers or NCMs appointed to carry out an SI have limited investigative powers. Commissioned officers however, retain their inherent authority and as such, can order uncooperative subordinates to submit to an interview and answer questions. The same is true of NCMs in that they can require any NCM to whom they are senior to be interviewed by the exercise of their military authority as provided under QR&O 3.20 (Command Generally). The TOR for the investigation may also give the investigating officer or NCM additional authority. For example, SI investigators may be authorized access to certain files or records to which they would not normally have access. Similarly, an SI investigator is implicitly authorized to interview and require statements from any and all military members who are under the authority of the officer who ordered the SI and appointed the investigator. 29 Should an occasion arise where key witnesses are not within the convening authority’s chain of command, every effort should be made to accommodate the investigation by the CO with authority over the witness. 30

22. While the authority of an SI investigator over military personnel may be relatively clear, the same is not true with respect to authority over civilians. An SI investigator may request that a civilian witness provide a statement or submit to an interview. However, the investigator has no power to compel a civilian, even a public service employee in DND, to provide statements. Conversely, CF members shall provide statements to an SI investigator upon the request of the investigator. "A CF member providing oral or written information to an SI investigator may consult with an advisor who may be of any rank, or a civilian." 30

23. The role of an SI investigator is to conduct an investigation of the matter described in the TOR and within the limits prescribed by those TOR. The investigator shall make only those findings and recommendations that are specified in the TOR by the authority ordering the SI. Occasionally, the circumstances may require findings and recommendations that are beyond the scope of the TOR. In these cases, the investigating officer should consult with the officer who ordered the SI to determine if the TOR should be amended to cover the additional subject(s) or whether the investigation findings and recommendations should be restricted to the original TOR requirements. While it is clear that an SI investigator is an official agent of the CO or commander who ordered the SI, all SIs should be conducted in such as way as to promote confidence in the accuracy and validity of the investigation’s outcome. As such, investigators should:

   a. not pre-judge the outcome of the investigation but, rather, make their findings based on the information gathered;
   b. within allowed time constraints, and any other parameters prescribed in the TOR, make all reasonable efforts to gather all available information that is relevant to the matter being investigated; and
   c. make only those findings and recommendations that can be supported by the information gathered and required under their TOR.

24. Where the investigator concludes that the officer who ordered the SI may be adversely affected by the findings or recommendations of the SI, the investigator shall suspend the SI immediately, inform the officer who ordered the investigation, and refer the matter directly to that officer’s superior. 31

20 Ibid.
29 DAOD 7002-4 (Examination of Witnesses).
30 Ibid.
31 DAOD 7002-2 (Summary Investigations), marginal note: Model Terms of Reference/Investigator.
Interviewing Witnesses

25. Few military members receive formal training in interviewing techniques. However, given the fact that the most common source of information for an SI is witnesses, an investigator’s ability as an effective interviewer may be the determining factor in the usefulness and validity of an SI.

26. Because SI investigators are not empowered to administer oaths or solemn affirmations, they must rely on “unsworn” information from witnesses. The fact that witnesses are able to provide information through this more informal process only increases the need for SI investigators to carefully assess the witnesses and the information obtained from each in order to determine:

   a. **relevance** - how the information provided relates to the matter being investigated;

   b. **reliability** - how well was the witness able to perceive the events about which they are relating; and

   c. **credibility** - to what degree may the information be tainted by bias or individual motive(s) of a witness.

Recording Information

27. SI investigators are not required to tape record and transcribe the information obtained from witnesses. Nevertheless, SI investigators are expected to record all information received in the course of an investigation to a high standard of accuracy and completeness. In the course of an SI, information from a witness will normally come to the investigator by one of these three means:

   a. via the provision of written statements;

   b. by making oral responses to questions; and

   c. through the provision of documents.

28. The investigator will obtain information in a variety of forms and from a variety of sources and, given that witness interviews will rarely be recorded verbatim, the ultimate reliability and validity of the investigator’s findings and recommendations will depend directly on:

   a. effective interviewing technique;

   b. accurate note-taking (or other methods of primary, information recording);

   c. the memory of the investigator(s); and

   d. astute assessment of the information and its sources by the investigator(s).

29. Ideally, all witnesses should be requested to provide a written statement setting out their knowledge of the matter under investigation. Once a statement has been provided, the investigator will typically ask follow-up questions to elicit more information or to clarify information already provided. Regulations and orders do not require the use of recording equipment by SI investigators, but their use is permitted. It will either be a matter of direction, as contained in the TOR, or a judgment call on the part of the SI investigator as to whether recording devices should be used when interviewing witnesses. In the event an investigator uses recording devices to

---

32 A witness who has not been placed “under oath” is not liable to a charge of perjury for any false or deliberately misleading information conveyed. An officer conducting an SI does not have the authority to administer oaths for this purpose. Notwithstanding, persons subject to the CSD remain liable to disciplinary action for providing information that they know is false to an SI investigator.
conduct interviews, under no circumstances is this fact to be concealed from interviewees. The tapes or other media used to record interviews are documents and as such must be both retained and disclosed in the same manner as paper-based material, even if they are later transcribed.

**Adverse Evidence**

30. DAOD 7002-4 (Examination of Witnesses) is explicit in its direction concerning adverse evidence. If an SI investigator determines that a CF member, DND employee or any other person appears "likely to be adversely affected by the evidence," the investigator must:

a. provide written notice to the person that they are likely to be adversely affected by the evidence;

b. advise the person as to whether they will be requested to provide a statement to the SI investigator; and

c. include with the written notice, a copy of the SI’s TOR.

31. An adverse finding with respect to a person must be supported by relevant, adverse evidence. ‘Adverse evidence’ refers to evidence that:

a. suggests professional misconduct or incompetence;

b. suggests that an offence under the *Criminal Code* or the *CSD* has occurred; or

c. otherwise harms a person’s reputation.\(^{33}\)

32. If a CF member, DND employee or any other person may be adversely affected by an SI, the investigator shall:

a. give the person the opportunity to review all relevant evidence;

b. allow the person to make a written statement to the investigator in response to all relevant evidence; and

c. advise the person of the right to request that:

   i. any witness previously interviewed be re-interviewed;

   ii. additional questions be put by the investigator to any witness;

   iii. additional witnesses be interviewed; and

   iv. a letter of closure be provided by the approving authority (see the block “Letter of Closure” in DAOD 7002-1 (Boards of Inquiry).\(^{34}\)

**Summary Investigation Report**

33. The report of an SI must be delivered in typewritten, memoranda form to the officer who ordered the SI.\(^{35}\) Whether other records such as witness statements, interview notes, or other documents will be attached to the report is an issue normally specified in the TOR. An SI report is normally prepared in 'synopsis form,’ providing a summary of information received and presenting findings and recommendations without lengthy substantiation.\(^{36}\) In the case of a

---

\(^{33}\) DAOD 7002-4 (Examination of Witnesses), marginal note: Adverse Evidence and Incriminating Statements/Adverse Evidence.

\(^{34}\) *Ibid.*

\(^{35}\) DAOD 7002-2 (Summary Investigations).

\(^{36}\) *QR&O* 21.01(4).
lengthy or complicated investigation, the format prescribed for BOI minutes may be used and adapted, as necessary.37

34. An SI report is a government record and is subject to the provisions of the Privacy Act (PA)38 and Access to Information Act (AIA).39 While there are provisions in the AIA authorizing the exemption of “ongoing investigations” from disclosure, once an SI has concluded and the SI report has been submitted to the officer who ordered the investigation, it should be assumed that much of the report might be disclosed to the public. SI investigators should also be aware that ‘other information’ obtained and recorded during the investigation, even if it is not submitted as part of the SI report, is part of a government record and subject to the same laws regarding retention and disclosure. ‘Other information’ includes notes made by the SI investigator(s). In this regard, notes made by an investigator are not considered personal notes as they are made in the course of conducting government business.

Harassment Investigations

35. Harassment investigations are administrative investigations that are initiated in response to a harassment complaint after informal resolution and mediation of a workplace conflict has failed.40 Harassment investigations are conducted in order to gather and analyse facts with a view to determining whether harassment has occurred.

36. A harassment investigation is distinct from both SIs and BOIs. Unlike these other administrative investigations, the authority to order a harassment investigation does not derive from QR&O Chapter 21 (Summary Investigations and Boards of Inquiry). Rather, subsection 18(2) of the NDA authorises the CDS to issue orders and instructions to the CF. Under this authority, DAODs have been promulgated, including DAOD 5012-0 (Harassment Prevention and Resolution). In turn, this DAOD directs ROs to carry out the responsibilities outlined in the Guidelines. It is from the Guidelines, therefore, that authority to initiate harassment investigations is derived.41

37. The requirements of a Harassment Investigation are explained in detail by the Guidelines and care should be taken to ensure that such investigations are carried out with diligence and sensitivity. Chapter 22 (Harassment) of this manual further addresses the issue of harassment.

SECTION 5
REFERENCES

Legislation


37 A sample SI report is provided in DAOD 7002-2 (Summary Investigations).
41 See Guidelines at part 6.

**Regulations**

QR&O Chapter 3 (Rank, Seniority, Command and Precedence).

QR&O 3.20 (Command Generally).

QR&O 3.34 (Command When Commonwealth Forces Are Serving Together or Acting In Combination).

QR&O Chapter 4 (Responsibilities and Duties of Officers).

QR&O Chapter 21 (Summary Investigations and Boards of Inquiry).

QR&O Chapter 106 (Investigation of Service Offences).

QR&O 108.45 (Review of Finding or Punishment of Summary Trial).

QR&O 116.02 (Review Authorities – Summary Trials).

QR&O Volume IV, Appendix 1.3 (Military Rules of Evidence).

**Orders, Directives and Instructions**

DAOD 5012-0 (Harassment Prevention and Resolution).

DAOD 7002-0 (Boards of Inquiry and Summary Investigations).

DAOD 7002-1 (Boards of Inquiry).

DAOD 7002-2 (Summary Investigations).

DAOD 7002-3 (Investigative Matters and References).

DAOD 7002-4 (Examination of Witnesses).

**Jurisprudence**


**Secondary Material**


B-GG-005-027/AF-011, *Military Justice at the Summary Trial Level, Ver. 2.0*.


CHAPTER 4
BOARD OF INQUIRY
SECTION 1
INTRODUCTION

General

1. Boards of Inquiry (BOIs) represent the most comprehensive and significant internal investigative tool available to commanders at all levels. They are used to address a broad spectrum of matters related to the control and administration of the CF. The BOI investigative process has been reviewed in recent years by the Federal Court of Canada (FCC) and the Ombudsman’s Office. In response, the CF conducted a review of the BOI process in 2005 that resulted, among other things, in the creation of the Administrative Investigations Support Centre (AISC) and training for board members. In addition, there have been other recent orders and directives designed to improve the process. This chapter will relate the important features of conducting a BOI with practical insights designed to avoid the more common pitfalls.

2. Generally, BOIs are used to investigate and report on matters of unusual significance or complexity that are of interest to the chain of command. In some circumstances, as set out in QR&O 21, an administrative investigation is mandatory although in almost all of these cases, command has the discretion to investigate an incident either by way of a summary investigation (SI) or a BOI, giving consideration to the complexity or unusual significance of the occurrence. Only with respect to aircraft accidents is a BOI mandatory. In addition, the chain of command always has the discretion to convene a BOI where it wishes to be informed on a particular matter. Other regulations or orders generally specify those circumstances when a BOI is appropriate. DAOD 7002-3 (Investigative Matters and References) provides a list of the most common investigative matters and the corresponding orders and instructions.

3. It has been recommended by a variety of sources that BOIs should be convened following any unexpected, non-combat deaths. While the provisions of the QR&O require the convening of either a BOI or an SI for examining such deaths, it is recommended that a BOI be convened whenever feasible. A BOI will be able to address the matter with sufficient resources, focus and attention to detail, and possesses the power to compel documentation and testimony. It will also underscore the importance of the matter to family members of the injured or deceased member.

4. BOIs have substantial powers compared to other forms of administrative investigations. These powers underscore a BOI’s distinctive elements. The powers of a BOI include the power to:

   a. summon any person to appear before the board as a witness;

   b. compel witnesses to give oral or written evidence;

   c. require a witness to produce documents and other things under that person’s control to the board;

---

2 See CANFORGEN175/05 regarding duties of AISC
3 QR&O 21.46 (Investigation of Injury or Death).
4 CANLANDGEN 047/06 Instruction on BOI now directs that investigations shall be conducted in many instances of death and serious injury.


d. administer oaths and solemn affirmations;

e. receive any evidence or other information that it deems relevant to the purpose of the board, regardless as to whether such evidence or information would be admissible in a court of law; and

f. examine any record and make any inquiry into any matter that the board considers necessary.\(^5\)

5. There may be significant legal issues that arise during the conduct of a BOI by virtue of the subject matter being investigated. BOIs that are convened to investigate incidents involving Her Majesty’s Canadian Ships or aircraft, injuries or death, claims by or against the Crown, or harassment and sexual misconduct, will invariably involve legal issues for which appropriate guidance should be sought.

**Legal Authority**

6. Subsection 45(1) of the *NDA* provides the legal authority for the conduct of a BOI:

> The Minister, and such other authorities as the Minister may prescribe or appoint for that purpose, may, where it is expedient that the Minister or any such other authority should be informed on any matter connected with the government, discipline, administration or functions of the Canadian Forces or affecting any officer or non-commissioned member, convene a board of inquiry for the purpose of investigating and reporting on that matter.

7. Pursuant to this ministerial authority, *QR&O* 21.06(2) empowers the following authorities to convene a BOI:

a. the MND;
b. the CDS;
c. an officer commanding a command;
d. an officer commanding a formation; and
e. a CO.

**SECTION 2**

**TERMS OF REFERENCE**

**General**

8. In the sequence of events surrounding a BOI, the issuing of a convening order, which will contain terms of reference (TOR), occurs after considerable analysis and administrative preparation has taken place. In every case, there will be some incident, accident or other matter about which the chain of command requires additional information for the purpose of rendering a decision concerning preventative action, supplementary procedures, changes in policy or any other decision relating to the better command, control and administration of the CF. When a convening authority has determined that a BOI is the appropriate investigative procedure, TOR

---

\(^5\) *National Defence Act*, R.S.C. 1985, c. N-5, s. 45(2) [*NDA*].
must be drafted. It should be noted that a BOI is not ‘convened’ until the TOR are signed and issued by a convening authority.  

9. At the outset, TOR represent the most critical component of the conduct of a BOI. The direction and quality of a BOI will largely be reflected in the clarity and conciseness that is manifest within its TOR. Therefore, TOR are supposed to establish, at a minimum, the:
   a. nature of the investigation to be undertaken;
   b. information required by the chain of command;
   c. matters on which findings and recommendations of the board are expected; and
   d. security classification of the matter being investigated.

10. The TOR cannot be issued until the board president and remaining members of the board have been selected and determined suitable. This will be discussed in more detail later in this chapter. Accordingly, there is a requirement for concurrent activity during the TOR production process. Draft TOR should be prepared by the convening authority in sufficient detail as to provide the parameters by which potential board members can be identified. Once identified, potential board members can be screened to determine their eligibility, availability and suitability.

11. It is also required that the convening authority and the newly appointed board president contact the AISC for best practises and lessons learned prior to commencing the investigation. Contact before the TOR are issued is strongly advised.

Review by Legal Adviser

12. The legal adviser to the convening authority should review the TOR before they are issued because there are often inherent legal issues with respect to matters that are to be investigated by a BOI. Where judicial reviews of BOIs have occurred, they have almost always focussed on the wording of the TOR as this document sets out the scope and mandate of the investigation. Although TOR can be amended by the convening authority, it is important to ensure the terms are correct and appropriate before they are first signed.

13. A legal review of the TOR will focus on:
   a. ensuring that the TOR are in accordance with, and fulfill all the requirements of, regulations and orders;
   b. verifying that the TOR contain the mandatory paragraphs relating to:
      i. evidence concerning allegations of service offences; and
      ii. the propriety of a military police (MP) investigation or MP conduct; and
   c. ensuring that the BOI is not a substitute for a disciplinary or criminal investigation and that the administrative nature of the inquiry is ascertainable from the TOR.

14. Incidents involving potential claims by or against the Crown are sometimes overlooked in TOR. It is therefore imperative that DAOD 7004-1 (Claims and Ex gratia Procedures) be

---

6 Persons authorized to convene a BOI are listed in QR&O 21.06(2).
7 QR&O 21.09 (Terms of Reference) and DAOD 7002-1 (Boards of Inquiry).
8 CANFORGEN175/05.
9 The exact wording for the two mandatory paragraphs is provided in DAOD 7002-1 (Boards of Inquiry).
10 DAOD 7002-1 (Boards of Inquiry), marginal note: Commencement/Primary Purpose Test.
considered and followed for significant incidents, particularly if they involve an injury or death. It may be appropriate to incorporate a clause in the TOR to ensure that the claims-related concerns are addressed and that the primary purpose of the investigation is clearly stated. The unit legal adviser should be consulted accordingly.

15. If a unit becomes aware of an incident that could lead to a claim against the Crown, then the CO of the unit must contact the Director of Claims and Civil Litigation (DCCCL) and the regional AJAG (or, alternatively, the legal adviser assigned on a deployed operation, as appropriate), as soon as possible, in order to obtain advice on the appropriate level of investigation. Investigations for claims purposes may take place in addition to any other investigation required by regulations or orders made under the NDA.

16. Where potential claims are foreseeable, consideration must be given to the requirement that “investigations for claims purposes shall be conducted in contemplation of litigation.” This means that their contents should be protected by solicitor-client or litigation privilege. The following phrase in TOR would be helpful in asserting the privileged status: “This investigation is being conducted for claims purposes in contemplation of litigation and its contents are protected by solicitor-client/litigation privilege.”

**Primary Purpose Test**

17. The decision to convene a BOI must be premised on the ‘primary purpose test’ that is articulated in DAOD 7002-1 (Boards of Inquiry). A BOI must not be convened “if the sole or primary purpose is to obtain evidence for a disciplinary purpose or to assign criminal responsibility.” Notwithstanding that the NDA provides that a BOI may be used to investigate and report on “…any matter connected with the government, discipline, administration or functions of the CF…,” convening a BOI for a criminal or disciplinary purpose remains problematic because compelled evidence would not be admissible in a disciplinary proceeding.

18. DAOD 7002-1 (Boards of Inquiry) addresses the above concerns by prescribing the inclusion of two specific paragraphs in the TOR. The first requisite paragraph relates to the uncovering of evidence that indicates a service offence may have been committed:

Should the BOI receive evidence that it reasonably believes relates to an allegation of a criminal act or a breach of the Code of Service Discipline, the BOI shall adjourn, the convening authority shall be notified, and the matter shall be referred to the nearest JAG representative for advice.

19. The second paragraph outlines the standard expected of a BOI vis-à-vis the MP:

A BOI must inquire into all matters referred to it for investigation. If, during the course of an investigation, a matter arises which raises issues involving the propriety of a military police investigation or other military police-related conduct, the matter shall be forwarded to the convening authority for further disposition.

---

11 At marginal note: Reporting of an Incident/Serious Injury or Death. See also QR&O 21.19 (Where Claim By or Against the Crown Appears Likely) and QR&O 21.48 (Claims for Compensation Arising From Injury or Death), which require that the convening authority of the BOI be informed in the event of a potential claim against the Crown.
12 DAOD 7004-1 (Claims and Ex gratia Procedures), marginal note: Investigation of an Incident/Commencing Investigation.
13 Ibid., marginal note: Investigation of an Incident/Solicitor-Client Privilege.
14 Ibid.
15 DAOD 7002-1 (Boards of Inquiry), marginal note: Commencement/Primary Purpose Test.
16 DAOD 7002-1 (Boards of Inquiry), cited in DAOD 7002-2 (Summary Investigations).
17 NDA s. 45(1) [emphasis added].
Administrative Support

20. Concurrent with the production of the TOR and selection of the board members, the convening authority should make administrative arrangements that will permit the board to complete its mandate efficiently and expeditiously, such as providing a financial code and:
   a. providing office space for board members;
   b. providing necessary office equipment for the BOI;
   c. arranging transportation needs of the board;
   d. selecting staff support for the board (i.e., secretarial, evidence reporters, transcription services, etc.);
   e. reserving space to hold hearings;
   f. identifying specialist support (e.g., advisers to the board, etc.) that is likely to be required, if any; and
   g. making travel and accommodation arrangements for prospective witnesses.

21. The provision of secretarial and administrative support is among one of the most important elements to ensure successful conduct of a BOI. Consideration must be given as to whether the nature of the investigation will likely require additional staff support. For example, a significant BOI into an aircraft accident or fire, that is anticipated to involve hundreds of documents, may require a ‘documents team’ to retrieve all relevant documents and then review, record and manage the vast amounts of information compiled. Such BOIs may also require a larger membership on the board.

Communications Strategy

22. Whether executed by the convening authority, the board or jointly, an essential component of any significant BOI is a communications strategy. Where the cooperation and support of other parts of the CF will be required, the board members should be prepared to personally visit those bases or locations in order to explain their mandate and confirm their commitment to investigate fully. While this may only be necessary on rare occasions, such activities can pay major dividends. Consideration should also be given to appointing a public affairs officer as an adviser to the board for such activities.

Public Attendance

23. Inquiries conducted under the Inquiries Act are normally open to the public. However, BOIs are internal investigations and, as such, the public and the media are almost always excluded. This exclusion of the public and the media from BOI hearings is subject to the discretion of the convening authority. The FCC has favourably ruled upon this issue. In the case of Travers v. Canada (Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia), the FCC ruled that the BOI pertaining to the mission of the CF Airborne Regiment in Somalia in 1993 was not a decision-making body but rather, an internal investigative body. In his reasoning, the trial judge summarized the issue:

The fact that the constitution [TOR] of the enquiry was made public does not change its nature—a decision-making body. It is not, I repeat, not involved in the individual

---

18 The Croatia BOI is an example where visits to bases across Canada raised awareness of the issues, gained the trust of the soldiers whose co-operation was critical and facilitated the gathering of information.
conduct of certain members of the battle group which, we all recognize, is what provoked the media’s attention and what in turn created a highly politicized atmosphere both inside and outside Parliament.20

24. In Travers, the decision to conduct the BOI in a setting closed to the public was a policy decision that the convening authority was legally entitled to make. The Federal Court of Appeal (FCA) subsequently affirmed this decision.21 The FCA ruled that the CF can conduct a BOI that is closed to the public, but there nevertheless may be a need to balance the legitimate public interest with other competing interests, such as maintaining a non-intimidating atmosphere in order to facilitate witness candour. In at least one case, this balance was achieved by making available the daily transcripts of witness testimony on a BOI Internet web site (i.e., after severances were made in accordance with the Privacy Act (PA)22 and Access to Information Act (AIA)).23

25. More recently, the FCC once again addressed these issues in the case of Gordon v. Canada (Minister of National Defence).24 The prime issue in this case was whether the BOI, concerning the fire and subsequent death of an officer onboard the submarine HMCS Chicoutimi, was engaged in a process that would require the BOI to be open to the public. The court determined that the HMCS Chicoutimi BOI was not “carrying out any judicial or quasi-judicial functions” because the BOI was not conducting a hearing in a judicial sense or determining the rights and obligations of individuals. Moreover, the process was not adversarial.25

26. The second issue was whether the board president “properly exercised his discretion” in denying access to the CBC because it did not have a ‘direct and substantial interest’26 while, at the same time, nevertheless allowing family members of a deceased service member to attend these same proceedings. The board president had pointed out in his initial decision that: “[p]ublic access would cause delays as it would require me to take additional steps to ascertain when witnesses and information could be heard in the presence of the public.”27 The FCC found that the board president had exercised his discretion in accordance with the TOR by making information available to the public (i.e., by posting information on the DND website, granting interviews with the media and providing printed material).28 The FCC approved this approach as an appropriate balance of public and CF interests.

27. The FCC further determined that the board president exercised his discretion in a reasonable manner by striking a balance between the public being kept informed and the interests of “national security, privacy and other issues.”29 According to the FCC, it was not the only solution, but it was a reasonable one.

Family Attendance

28. A BOI that is investigating the unexpected, non-combat related death or serious injury of a service member must consider the issue of a specific form of public attendance. An extremely important interest might be that of the family who has lost a relative due to a service-related incident. Families of injured or deceased members often wish to attend the resulting BOI either in whole or in part. The appropriate inclusion of a family representative in the BOI process has been

25 Ibid., at para. 30.
26 The words ‘direct and substantial interest’ were inserted into the TOR and became the focus of the judicial review; hence the importance of care in drafting the TOR cannot be understated.
27 Ibid., at para. 45.
28 Ibid., at paras. 40-43.
29 Gordon at para. 45.
recognized as an important component in assisting the CF family in their time of grief. Current
direction is that the board president, with the concurrence of the convening authority, shall
determine, subject to legislative, security and operational limitations, whether it would be
appropriate for a family representative to attend all or part of the proceedings, and if that person
is not able to attend, then to keep the family representative informed of the progress of the BOI.  

SECTION 3

BOARD OF INQUIRY COMPOSITION

29. Upon making a determination that a BOI is required, a convening authority must address
the question of who will constitute the board. While certain mandatory requirements regarding
the make-up of BOIs are set out in regulations, there remains a good deal of latitude to structure
a board with the appropriate balance of experience and skills to conduct an inquiry in the most
effective manner. It is now mandatory that all members appointed to a BOI receive up to two days
training provided by AISC before the members commence their investigation.  

This training, dealing with all aspects of BOI procedure including procedural fairness, investigative procedures
and practical advice is aimed at generating BOIs that are effective, legally and procedurally
compliant, and meet the needs of the CF. Convening authorities should also ensure that key BOI
members have the necessary experience to perform their duties, and that they are properly
supported by technical experts, where appropriate.

30. QR&O 21.08(1) specifies that a BOI, at a minimum, shall consist of the following:
   a. two or more officers; or
   b. two or more officers, together with one or more NCMs above the rank of Sgt.

The normal and recommended practice is to appoint a minimum of 3 members to a BOI as 2
member boards will cease to have the minimum composition should one member not be able to
continue as a member. Also, where the 2 members disagree with each other, they therefore will
be unable make a definitive finding on the disputed point.

31. In determining the individual make-up of the BOI panel, the following considerations
apply:
   a. where practical, the board president shall be an officer not below the rank of
      Capt;  
   b. where practical, the board president should be an officer equal or senior in rank
to any officer whose reputation may be affected as a result of the BOI;  
   c. no members of the board can be senior in rank to the board president;  
   d. where the investigation is likely to deal with matters requiring technical or
      professional knowledge or skills, at least one member with the appropriate
      qualifications should be appointed;  
   e. no NCM should be appointed as a member of a BOI where findings may result in
disciplinary action being taken against a CF member above the rank of Sgt.

__________
30 CANFORGEN 047/06 Attendance of Family and Seriously Injured Members at a BOI.
31 CANFORGEN 175/05 Interim Directive on the Conduct of BOI and SI
32 QR&O 21.08(2)(a).
33 QR&O 21.08(2)(b).
34 QR&O 21.08(2)(c).
35 QR&O 21.08(2)(f).
36 QR&O 21.08(2)(e).
32. It is important to note that the wording of the phrase “not appoint a non-commissioned member as a member of a BOI where the findings may result in disciplinary action being taken against a member above the rank of sergeant” [emphasis added] in QR&O 21.08(2)(e), should be interpreted to mean disciplinary action that is taken as a direct result of a finding of a BOI. This provision will not be an impediment to the investigation, providing that the TOR for the BOI includes instructions to the effect of: the board shall not make any finding alleging the commission of a service offence, nor shall it make any recommendation concerning disciplinary action against any individual. The fact that a disciplinary investigation was commenced, re-opened or continued on the basis of information brought to light by a BOI would not constitute an infringement of the regulation.

33. The QR&O also permits the appointment of civilians to BOIs in the following exceptional circumstances, such as where:
   a. the matter to be investigated involves a civilian employee;\(^{37}\)
   b. the convening authority is of the opinion that one or more civilians should form part of the board;\(^{38}\) or
   c. in the case of an inquiry having been convened by the MND, a civilian may be appointed as Board president.\(^{39}\)

34. Before the composition of the BOI is finalized and before the convening authority issues the TOR, it is necessary to screen potential members to ensure that they are appropriate appointees. Regulations require that no person may be appointed as a member of a BOI if they:
   a. are officially connected with the investigation;
   b. have a personal interest in the investigation; or
   c. are likely to be called as a witness before the BOI.\(^{40}\)

35. The sensitivity of screening potential board members may cause a convening authority to request that a legal adviser participate in the screening process. ‘Personal interest,’ as referred to above, can be either a pecuniary or a non-pecuniary interest in the outcome of the investigation and could give rise to a real or reasonable apprehension of bias. The appointment of an inappropriate board member could give rise to an application for judicial review in the civil courts, either before the fact, in order to quash the appointment(s) of the board, or after the fact, in order to overturn the findings of the BOI.\(^{41}\)

36. It is the role of a BOI to conduct an objective and full investigation of the matter(s) described in the TOR for the purpose of providing the convening authority with a report containing:
   a. a comprehensive record of all the evidence gathered;
   b. the findings of the board based on the evidence; and
   c. any recommendations of the board.

---

\(^{37}\) QR&O 21.08(3).

\(^{38}\) QR&O 21.08(4).

\(^{39}\) QR&O 21.08(5).

\(^{40}\) QR&O 21.08(2)(d).

\(^{41}\) Personal interest is one form of bias. The test for determining whether a reasonable apprehension of bias exists is set out in Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716.
37. Members of a BOI must perform their duties in a way that, having regard to the special nature of their functions, does not give rise to a real or reasonable apprehension of bias. A lack of bias should not be interpreted to mean total disinterest. As professional military officers, it is to be expected that board members will have the interests of the CF and its service members in mind when conducting their investigation. However, while maintaining a standard of objectivity, the board is expected to direct the investigation and make findings based solely on the evidence introduced at the BOI.

38. Where a concern is raised about potential bias on the part of members of an administrative investigation, the case law on judicial review indicates that the standard for determining a reasonable apprehension of bias may be applied flexibly. In the case of Beno v. Canada (Chairman of Commission of Inquiry into the Deployment of Canadian Forces to Somalia), the former commander challenged the Commission of Inquiry into the CF Deployment to Somalia (Somalia Inquiry) on the grounds that certain statements made by the commissioners, both in and outside of hearings, indicated a bias against BGGen Beno.

39. While Beno was successful in the trial division, on appeal, the FCA overturned the FCC decision stating:

A commissioner should be disqualified for bias only if the challenger establishes a reasonable apprehension that the commissioner would reach a conclusion on a basis other than the evidence. In this case, a flexible application of the reasonable apprehension of bias test requires that the reviewing court take into consideration the fact that the commissioners were acting as investigators in the context of a long, arduous and complex inquiry.

40. Nevertheless, board members must remember that they have an obligation not only to remain objective in the conduct of their investigation, but also to maintain confidence in their objectivity by ensuring that their communications and actions do not give rise to a reasonable apprehension of bias. Accordingly, when expressing themselves in public, or even in circumstances that they may consider private, BOI members should exercise care and not make any statements that could be interpreted as having pre-judged the matter they are investigating.

Advisers to the Board

41. It is recognized that a BOI may require specialized advice or expertise in the conduct of an inquiry. In addition to legal advice, there may be specific requirements for advice in technical matters, environmental issues, medical matters and public affairs. Advisers to a BOI can assist by developing appropriate lines of inquiry, identifying potential witnesses and questions for the witnesses. They can also assist in the examination of forensic evidence and interpret specialist reports for the board. Often, because of their expertise, they are useful in identifying relevant documentation for the board members. In addition, the nature of the investigation may call for chaplains or social workers to assist the board as advisers, particularly if witnesses may experience significant emotional or physical stress by having to testify about traumatic events.

42. Advisers are not members of the board and are not technically subject to the regulation concerning conflict of interest. Nevertheless, it is advisable to determine what interests, if any, a potential adviser may have in the matter under inquiry before deciding on the suitability of that person to be appointed as a specialist adviser to the board. Depending on the anticipated degree of involvement, the convening authority may appoint a civilian or military specialist as an adviser to the board for the entire duration of the inquiry. Conversely, if the adviser's role is expected to

43 Ibid. See also Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities), [1992] 1 S.C.R. 623 at para. 27 (QL), 89 D.L.R. (4th) 289.
be somewhat limited in nature and scope, appropriate arrangements may be made for a specialist to attend and provide advice for a specific phase of the inquiry, as required.\(^{44}\)

43. The work product of the advisors is not in itself evidence. As will be discussed, the intent is that wherever possible, the board obtain testimony under oath or solemn affirmation. Only in exceptional circumstances would an advisor provide such testimony in addition to being an advisor for reasons of procedural fairness. Thus, one consideration in the appointment of specialist advisors is to assess whether the person may best serve the interest of the board by acting as an expert witness rather than as an advisor.

Legal Adviser

44. It is common for a legal adviser to be appointed to a BOI and often are named in the TOR. Such appointments are made in situations where it is anticipated that certain legal issues will have to be properly addressed at one or more phases of the inquiry. As with all specialist advisers, the extent of the legal officer’s involvement should be discussed between the board president and the legal officer(s) appointed, near the outset of the process. In some cases, it may be necessary to have the legal adviser present throughout each phase of the BOI. In others, it may be sufficient to have the legal adviser available to the board by phone, and present only as required. Where feasible, attendance of the advisors, including the legal advisor, to the AISC training is recommended.

45. The role of the legal adviser to a BOI can be distinguished from that of ‘commission counsel’ at a commission of inquiry created under the Inquiries Act\(^{45}\) (formerly called ‘Royal Commissions’). The role of the commission counsel is to assist the commissioners in their inquiries and it is often the commission counsel who make the decisions about which witnesses will be called to testify, what questions will be asked, and often leads the direct examination of witnesses. The commission counsel is also entitled to make submissions to the commissioners, advocating a particular interpretation of the evidence. By way of comparison, the legal adviser to a BOI normally plays an ‘advisory’ role, procedurally, and does not make submissions as such, or participates in the direct examination or cross examination of witnesses. The legal adviser should be prepared to provide legal advice to the board on matters relating to:
   a. their powers;
   b. the inquiry process, including aspects of procedural fairness; and
   c. evidentiary matters.

46. During the hearings phase of a BOI, it would only be in rare and exceptional circumstances that a legal adviser would directly examine witnesses as part of their testimony before the board. The legal advisers do, however, routinely ensure that oaths are properly administered, that witnesses have been properly informed of their rights and protections under the Charter, the NDA and the Canada Evidence Act (CEA),\(^{46}\) that persons who may be adversely affected by evidence are permitted to participate in accordance with the provisions of the regulations\(^{47}\) and generally, that the principles of procedural fairness are applied.

Subsequent Incapacity of a Board Member

47. Regulations require a BOI to be composed of “two or more officers, or two or more officers together with one or more [NCMs] above the rank of Sergeant.”\(^{48}\) If a member of the BOI

\(\text{QR&O 21.14 (When Adviser to Board of Inquiry Permitted).}\)
\(\text{R.S.C. 1985, c. P-21.}\)
\(\text{R.S.C. 1985, c. C-5.}\)
\(\text{QR&O 21.10(4)-(6).}\)
\(\text{QR&O 21.08 (1).}\)
becomes permanently unable to perform board duties, that member of the board can be permanently removed by the convening authority amending the board’s TOR.

48. However, the case of a board member who is, or is expected to be, temporarily absent is more problematic. It raises the issue of whether there can be a quorum in a BOI. This is most likely to become an issue for a lengthy BOI where adverse findings may be at issue. Generally, as a rule, all board members must be present during the taking of evidence at BOI proceedings. Consequently, what does happen if one or more board members are temporarily absent from the hearing? QR&O Chapter 21 (Summary Investigations and Boards of Inquiry) does not address the issue of what constitutes a quorum.

49. In such situations, the procedural fairness rule of ‘he who decides must hear’ is the applicable, guiding legal principle. This rule means that the person who makes the decision must conduct the hearing upon which the decision is based. If a board member must be absent, the BOI should be delayed until all board members can be present. If, for whatever reason, a member ceases to continue to sit on the board, then this individual should be removed from the board by the convening authority. In the case of a commission of inquiry, “if it were established that one or more of the commissioners took no [or an incomplete] part in the inquiry, but [nevertheless] signed the report as a matter of form,” the validity of the findings could be challenged. The same principle applies to the conduct of BOIs.

SECTION 4
BOARD OF INQUIRY POWERS AND PROCEDURES

Powers of a Board of Inquiry

50. A BOI has substantial powers to carry out its inquisitorial mandate. These powers are set out in the NDA. It can:
   a. summon any person before the board and compel the person to give oral or written evidence on oath and to produce any documents and things under the person’s control that it considers necessary for the full investigation and consideration of that matter;
   b. administer oaths;
   c. receive and accept, on oath or by affidavit or otherwise, any evidence and other information that the board sees fit, whether the evidence or information is, or would be, admissible in a court of law; and
   d. examine any record and make any inquiry that the board considers necessary.

Summoning Witnesses

51. Military witnesses can be summoned to appear before a BOI. More typically, however, serving military personnel are ordered to appear before the board by order of the board president. In practical terms, the board president and the CO of a witness will normally resolve in advance any potential conflicts that might arise relating to the appearance of a witness before the board. Civilian witnesses can be issued a summons, pursuant to paragraph 45(2)(a) of the NDA.

49 ‘Quorum’ is defined as “the minimum number of members of an assembly or society that must be present at a meeting to make the proceedings valid.” Concise Oxford Dictionary, 11th ed., s.v. “quorum.”
51 NDA s. 45(2).
Civilian witnesses are entitled to witness fees and reimbursement of expenses. DND employees and CF members are entitled to reimbursement of expenses, but not witness fees.

52. A failure to obey a summons issued under the NDA is an offence, punishable on summary conviction, which carries a maximum possible fine of $500 or a maximum of six months imprisonment. However, a BOI has no powers of arrest to bring witnesses before them. Enforcing an NDA summons against a person not subject to the Military Code of Service Discipline requires the involvement of a civilian crown attorney to bring the matter before a civilian criminal court. If such a problem is encountered or anticipated, early consultation with the board’s legal adviser is recommended.

53. There is no specific form for a summons prescribed by either the NDA or QR&O Chapter 21 (Summary Investigations and Boards of Inquiry). A sample summons is set out in DAOD 7002-4 (Examination of Witnesses). Legal advisers should be consulted and involved in the production of any summons, as well as the coordination for ensuring that any summons is properly served. As a practical matter, a briefing provided either in advance or concurrently with the summons as to the role of the BOI and the reason for the requested participation of the person will usually encourage positive participation in the process.

### Ordering Production

54. Under the NDA, witnesses can be required to produce to the board, documents and other things under the person’s control. ‘Other things’ can include the production of physical evidence such as military records, electronic information storage media (such as a computer hard drive), physical things and personal property of the witness (e.g., diaries and field message pads). Whether the record or thing to be produced is ‘under the person’s control’ will usually be a question of fact (i.e., does the person have the care and custody of the record or thing). Witnesses in positions of authority, such as COs, will be deemed to have control over all records and things in their unit, other than the personal property of another person. In some cases, it may be that the witness who has been ordered or issued a summons to appear before the board no longer has control over the record or thing sought. This situation occasionally occurs in cases involving military personnel who have been posted or transferred to other duties subsequent to the occurrence of the incident under investigation. When this occurs, the board must contact the CO of the unit in possession of the record or thing in question and arrange for the witness to be granted temporary access to it. This process will, therefore, enable the witness to make production of the record or thing as evidence before the board, as required.

### Administering Oaths

55. Unless the board president directs otherwise, all testimony before a BOI shall be taken under oath or solemn affirmation. The oath serves to remind both witnesses and observers of the seriousness of the proceedings. Evidence may also be submitted to the board by way of affidavit, declarations and solemn affirmations. The discretionary authority of the board president to permit un-sworn evidence normally only applies in the case of a witness who is under the age of 14 years or a person whose mental capacity to understand the nature of the oath is in

---

52 QR&O 210.60 (Witness Fees and Allowances) and CFAO 210-1 (Civilian Witnesses – Fees and Expenses). The witness fees provided for in QR&O 210.60 (Witness Fees and Allowances) are tied to witness fees for the FCC. The legal adviser should provide the tariff to the board.

53 DAOD 7002-4 (Examination of Witnesses), marginal note: Witnesses and Advisors/Witnesses.

54 NDA s. 302(a). If, in fact the person is subject to the Military Code of Service Discipline, the potential punishment under s118 NDA is substantially higher.

55 DAOD 7002-4 (Examination of Witnesses).

56 NDA s. 45(2)(a).

57 QR&O 21.10(2)-(3).

58 An affidavit is a written statement supported by the oath of the writer as sworn before a person authorized by law to administer and attest oaths.
In addition, for persons not subject to Canadian jurisdiction such as foreign military members and civilians from other countries, they may have concerns as to providing sworn testimony due to their own legal concerns within their own country.

SECTION 5

COLLECTION OF EVIDENCE

Preliminary Interviews

56. In an effort to organize the appearance of witnesses and reduce unnecessary repetition of evidence, it is an acceptable practice to conduct preliminary interviews in advance of hearings. Advisors can and do sometimes participate in this screening process. Such preliminary interviews can permit the board to:

a. establish the relevance of each witness’ evidence, as well as the extent of their knowledge of the matter under investigation;

b. determine the order in which witnesses should be called to testify, thereby allowing the evidence to unfold in a chronological sequence that will assist in recreating the event or events;

c. prepare the primary questions that should be asked of each witness;

d. canvass each witness prior to the day of their testimony to determine whether they have any documents or visual aids that they wish to put into evidence (i.e., time is saved by allowing copies to be made in advance, thereby avoiding the need to recall a witness merely to enter exhibits into evidence); and

e. identify potential problems with any witnesses or their evidence, in order to seek timely legal advice, where necessary.

57. Preliminary interviews are also good opportunities to caution witnesses not to discuss any of their evidence with anyone, including other witnesses, before they have testified. Preliminary interviews can be accomplished in many ways. Board members may conduct phone interviews, have witnesses submit written statements or have them complete questionnaires. In one case, a type of preliminary interview was conducted when board members gathered together key witnesses and visited a military training area in order to ‘walk the ground’ while receiving a general description of a fatal training accident. In that case, a re-enactment of the incident was carried out and videotaped. This videotape helped the board members visualize the scene of the accident and better relate the testimony of each witness.

Receiving Evidence

58. There is a requirement for BOI presidents and members to take an oath or make a solemn affirmation concerning the discharge of their duties. After swearing itself in, a board may receive evidence that is sufficient to establish relevant facts, either taken alone or considered with other evidence. However, the board should only give any piece of evidence the weight that is warranted by its reliability. Direct evidence is preferred and, in this regard,

---

59 Note to QR&O 21.07 (Powers of Boards of Inquiry). The CEA s. 16, permits the examination of a witness under 14 years to determine if the witness understands the nature of the oath or, if not, if they are able to testify upon promising to tell the truth.

60 NDA s. 251. While a specific form of oath/affirmation for a BOI is not provided for in regulations, the oath at QR&O 112.16 (Oath to be Taken by Judge Presiding at Court Martial) and affirmation at QR&O 112.21 (Affirmation In Lieu of Oath), as used by CF military judges, can easily be adapted by substituting the expressions “president” or “member of the board” in place of “military judge.”
witnesses who have first-hand knowledge of the facts at issue should be called to testify. As is the case at summary trials, the Military Rules of Evidence (MRE) do not apply at a BOI.

**Witness Testimony**

59. There can be little debate that a critical phase of any inquiry is the period during which the board hears testimony from witnesses. This evidence is often the foundation on which the board will make its subsequent findings. It is the time when the board is most likely to run into legal issues such as perjury, self-incrimination, allegations of offences and adverse evidence. Managing witnesses and receiving testimony in an orderly fashion can be a challenge even for experienced trial judges. Ensuring that all of the rights and entitlements of witnesses are respected is often a significant challenge for board members.

60. A witness log should be established, indicating the name and order in which witnesses testified, as well as the time and duration of each person's testimony. This can be particularly useful when reviewing or referring back to recordings of the evidence. Wherever practical, witnesses should testify in a logical sequence that will assist in re-creating the event or events. Witnesses shall be excluded from the hearing room when they are not testifying, except as provided for in QR&O 21.12 (Meetings Not Open to the Public). Each witness should be called into the hearing room from the waiting room and brought forward to the witness table. Ideally, it will have been determined in advance if a witness wishes to swear an oath or give a solemn affirmation. Witness taking the oath should be directed to hold the book appropriate to their religion (i.e., Bible, Koran, Old Testament, etc.) in their right hand and read the following oath from a card:

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

61. For witnesses who object to swearing an oath in the above manner, they may take an oath "in such manner and form and with such ceremonies, as the witness declares it to be binding on the person's conscience." Alternatively, witnesses may read the following solemn affirmation:

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

62. Following the oath or affirmation, each witness must be identified for the record. CF members should be asked to state their service number, rank and name. Civilian witnesses should provide their name and address. Once the swearing-in and identification have been completed, it is appropriate to elicit initial evidence by inviting the witness to describe, in narrative form, what they know of the events in question. The evidence should be introduced in accordance with the example provided DAOD 7002-1 (Boards of Inquiry). Following each witness' narrative evidence, the members of the board may then question the witness to clarify the evidence given and resolve specific issues. To this end, board members may find it useful to establish ahead of time an order of questioning among themselves for each respective witness. Additionally, it is important to note that any documents to which a witness refers or introduces in evidence must be made exhibits of the BOI. Use of an exhibit stamp and the creation of an exhibit log are recommended.

61 BGG-005-027/AF-011 Military Justice at the Summary Trial Level, c. 13, s. 4, provides a useful summary on evidentiary issues for board members. Although it pertains to evidence at summary trials, it provides useful guidance on evidentiary issues that the members of a BOI are likely to encounter.

62 Additional guidance concerning the examination of witnesses is provided in DAOD 7002-4 (Examination of Witnesses).

63 QR&O 21.10(3)(a).

64 QR&O 21.10(3)(b). In one case, the church space was used to conduct the inquiries. A witness' legal counsel objected to his client having to swear an oath in front of the cross.

65 QR&O 21.10(3)(c).
Qualifying Experts

63. While it is not necessary to qualify expert witnesses appearing before a BOI in the same, formal manner in which they are qualified in a civilian court, it is nevertheless helpful to briefly review, on the record, their qualifications and experience before they commence providing actual testimony. This evidence will assist in determining the appropriate weight to be given to their expert opinions. Wherever possible, expert witnesses should be requested to provide the BOI with a copy of their curriculum vitae, in order that they can be marked and filed as exhibits.

Conduct of Hearings

64. Regulations provide that the board president shall fix the date, time and place where sittings (hearings) of the BOI will take place and cause notice of this information to be given to other members of the board, witnesses and all other interested persons. BOIs are often mandated to investigate matters that are controversial or of interest to the public. As a result, there have been several instances where the press has requested access to hearings of the BOI. Unless a convening authority directs otherwise, a BOI shall exclude all persons from its meetings except:

- a. a witness, while giving evidence;
- b. an officer or NCM whose presence is permitted under QR&O 21.10(4);
- c. a person whose attendance is required by the president (i.e., such as any advisers to the board or family members); and
- d. counsel, while the client is giving evidence.

Adverse Evidence

65. QR&O 21.10(4) to (6) provide that if the board president determines that the evidence given at any time during the sitting of a BOI appears likely to adversely affect an officer or non-commissioned member, the board president, in addition to receiving the evidence of a witness, may permit the member in question to:

- a. examine any evidence taken before being called as a witness;
- b. be present during the remainder of the inquiry;
- c. make a statement;
- d. request that the president ask a witness further questions; and
- e. request that the president call further witnesses.

66. DAOD 7002-4 (Examination of Witnesses) is more explicit in its direction. If a BOI determines that “a CF member, DND employee or any other person appears likely to be adversely affected by the evidence,” the BOI president must:

- a. provide written notice to the person that he or she is likely to be adversely affected by the evidence;

66 QR&O 21.11(1).
67 QR&O 21.12.
b. advise the person as to whether he or she will be called as a witness by the BOI or requested to provide a statement; and

c. include, with the written notice, a copy of the board’s TOR. \(^{68}\)

67. An adverse finding with respect to a person must be supported by relevant adverse evidence. Adverse evidence refers to evidence that:

a. suggests professional misconduct or incompetence;

b. suggests malfeasance; or

c. otherwise harms a person’s reputation. \(^{69}\)

68. Therefore, if a person may be adversely affected by a BOI, the board president shall:

a. give notice to the adversely affected person;

b. give the person, prior to being called as a witness, the opportunity to review all relevant evidence heard by, or documents submitted to, the BOI;

c. allow the person to be present for the remainder of the investigation;

d. allow the person to make a concluding statement to the BOI; and

e. advise the person of the right to request that:

i. any witness previously heard be recalled;

ii. additional questions be put to any witness called by the BOI;

iii. additional witnesses be called; and

iv. a letter of closure be provided by the approving authority (i.e., see the sample, “Letter of Closure” in DAOD 7002-1 (Boards of Inquiry)). \(^{70}\)

Legal Counsel

69. Regulations permit a lawyer to be present when a client is giving evidence before a BOI. \(^{71}\) If legal counsel accompanies a witness, there may be an issue as to the extent of the lawyer’s participation. The board president, who is charged with the responsibility of controlling the board’s process, will ultimately determine the extent of counsel’s participation.

70. Since the proceedings are not adversarial in nature, counsel have no entitlement to make representations before a BOI. The only exception to this rule is in cases where a person has been provided with a Notice of Adverse Evidence (NOAE). Counsel who represent such persons may act on the client’s behalf which would include the powers as described above. \(^{72}\)

71. Witnesses who opt to retain legal counsel for a BOI will normally do so at their own expense. \(^{73}\) While regulations provide that military defence counsel from the Office of the Director

---

\(^{68}\) At marginal note: Adverse Evidence and Incriminating Statements/Notice.

\(^{69}\) Ibid., marginal note: Adverse Evidence and Incriminating Statements/Adverse Evidence.

\(^{70}\) Ibid., marginal note: Adverse Evidence and Incriminating Statements/Disclosure and Participation at BOI.

\(^{71}\) QR&O 21.12(b).

\(^{72}\) QR&O 21.10(4) and DAOD 7002-4 (Examination of Witnesses), marginal note: Adverse Evidence and Incriminating Statements/Adverse Evidence.

\(^{73}\) There is the possibility for BOI witnesses to apply for legal representation in accordance with the Treasury Board’s Policy on the Indemnification of and Legal Assistance for Crown Servants (Ottawa: TBS, 2004), online: Treasury Board

4-16
of Defence Counsel Services (DDCS) may provide legal advice to “a person who is the subject of an investigation” (including a BOI), it must be noted that, within the context of a BOI, the provision of DDCS legal services is limited to “legal advice.” 74 DDCS counsel are not mandated to act or appear on behalf of persons who are the subject of an administrative investigation, and are not normally made available to attend a BOI. 75

Recording Evidence

72. It is essential that all recording and transcription of evidence given before a BOI be accurate. Board members must therefore ensure that appropriate arrangements have been made to have the necessary recording capability in place (i.e., such as a stenographer, electronic equipment, or both), prior to the commencement of proceedings in order to ensure that an accurate recording is made of all orally presented evidence. In the case of a lengthy BOI, an experienced court reporter or civilian transcription service is the most efficient means of recording and transcribing testimony. Often, such professionally produced transcripts can be provided to board members within 48 hours of hearing a person’s evidence. In major cities, civilian transcription services are readily available. It should be noted that CF clerks and DND administrative assistants are not usually appropriate transcribers for BOI hearings. This particular function requires specific skills and equipment to produce an accurate and timely transcript of the record.

Disclosure

73. The extent of disclosure of information and evidence depends upon the nature of the BOI and the status of the person to whom disclosure will be made and whether a NOAE has been issued. Where the focus of a BOI is a service member, the board should, for reasons of procedural fairness, provide disclosure of all relevant information and evidence available to it before requiring the member to give evidence or make representations. As a matter of fairness, such a member should be treated to the same standard as a member likely to be affected by ‘adverse evidence.’

74. For ordinary witnesses who have limited or no personal interest in the outcome of the BOI, disclosure will normally be limited to copies of the board’s TOR and copies of any statements that the witnesses may have previously given to other investigators or in reports. A witness who has a greater interest in the proceedings can submit to the board president a request for expanded disclosure, providing justification for the request.

Compelling Testimony and Self-Incriminating Evidence

75. Witnesses testifying before a BOI cannot legally refuse to answer a question posed by the board on the grounds that it might incriminate them or subject them to a legal proceeding. The NDA provides that:

No witness shall be excused from answering any question relating to a matter before a board of inquiry when required to do so by the board of inquiry on the ground that the answer to the question may tend to criminate the witness or subject the witness to any proceeding or penalty. 76

76. Where a witness is reluctant to answer questions considered relevant to the proceedings of a BOI, it is important to note that such testimony and evidence cannot be used later against the

---

74 QR&O 101.20(2)(i).
75 DAOD 7002-4 (Examination of Witnesses), marginal note: Witnesses and Advisors/Director Defence Counsel Services.
76 NDA s. 45.1(1).
witness in a subsequent proceeding, except in the case of a prosecution for perjury or in a situation where the witness’ testimony is required for use in cross-examination on contradictory evidence.77 These protections in the NDA are consistent with the Charter and the CEA. In fact, prior to the amendment of the NDA section in 1998, the principle of compelling testimony at a BOI was affirmed in the FCC. In the case of Meade v. Canada, 78 the FCC considered whether a CF member, who was the subject of an MP investigation, could be compelled to testify before a BOI. The FCC ruled that the CF member could be compelled since:

Under the Board’s terms of reference, it is not constituted to make any final determinations affecting any member. Specifically, it does not make any determinations on any liability, criminal or otherwise, against any member of the Canadian Forces and cannot impose any penal sanctions.79

Moreover, the FCC also affirmed that the use of compelled testimony from the member would not be admissible in any subsequent criminal proceeding, and that evidence derived from the testimony would be reviewed and possibly excluded by a trial judge.80

While individuals are protected from having their evidence used against them in a subsequent proceeding, this does not apply to information that is voluntarily divulged during preliminary interviews conducted by unit or board members leading up to BOI hearings or during other activities considered preparatory to formally giving evidence before the BOI. Compelling persons to answer questions under such circumstances, however, without first advising them of their right to remain silent under the Charter, could render the evidence received inadmissible.

Where a BOI is dealing with a prospective witness who is, or potentially is, an accused, such a prospective witness should not be interviewed or compelled to give evidence before a BOI in relation to the subject matter of the police investigation or charge. The convening authority that ordered the BOI shall be notified and legal advice sought. Where the BOI is aware of the existence of an ongoing MP, National Investigative Service (NIS), RCMP, or other civilian police investigation concerning the same matter that is the subject of the BOI, the BOI must liaise with the other investigative agency for the purpose of screening witness names, so as not to prejudice the police investigation.

While witnesses are protected from self-incriminating testimony being used against them in a subsequent proceeding, this blanket protection does not necessarily apply to ‘derivative evidence’ (i.e., evidence that is obtained by following-up on information that came to light in the course of a witness testifying). For example, a witness may testify that he improperly disposed of public property by dumping it in a lake. Armed with such information, police may be able to locate and recover items that may constitute physical evidence against the witness in a disciplinary proceeding. As per the standard TOR direction, the BOI should adjourn and consult its legal adviser. While the witness’ BOI testimony is clearly inadmissible in a subsequent trial where the member is charged with an offence, the question of whether the derivative physical evidence will be admitted in the subsequent trial is for the trial judge or service tribunal to determine.

As stated above, witnesses are protected from self-incrimination to the extent that evidence given by them in a BOI cannot subsequently be used against them in a disciplinary proceeding. However, the workings and legal implications of such protection can be complicated. Accordingly, orders require that when a BOI receives evidence that relates to the commission of a service offence, the BOI shall be adjourned and the convening authority shall be notified so that the matter can be referred to a legal adviser for legal advice.81

[77] Ibid., s. 45.1(2).
[79] Ibid., at para. 9 (QL).
[80] Ibid.
[81] DAOD 7002-1 (Boards of Inquiry), marginal note: Commencement/Primary Purpose Test.
Opportunity to Make Representations

82. It would be unusual for an ordinary witness to request an opportunity to make representations to a board at the end of the proceedings. Most witnesses will not have a personal interest in an investigation and will be excluded from other board proceedings. Consequently, they will not be in a position to make representations to the board on how evidence should be interpreted or what findings the board should make. Witnesses will, however, often give their evidence in narrative form and may take advantage of that opportunity to make a ‘statement’ (i.e., to address some matter of concern to them). While such a statement should be given under oath or affirmation, the weight to be accorded to it will depend entirely on its direct relevance and, in particular, whether it contains information on events perceived by the witness or if it is a recounting of the witness’ own direct actions or utterances. Such statements may well lead to further questions of the witness by members of the board.

Exhibits

83. A BOI shall:
   a. Receive and record all available evidence that is relevant;
   b. Attach as exhibits to the original minutes all relevant documents produced; and
   c. Attach a certified true copy of each exhibit to each copy of the minutes.  

84. If a witness offers materials that are essential to establish the facts or to assist in explaining other evidence as part of their testimony, such materials should be received as exhibits while the witness is before the board giving their testimony. A few examples of such materials are maps, site plans, photographs, computer records, and models. The witness testimony should answer questions as to the origin, accuracy and relevancy of the exhibit. Exhibits should be numbered consecutively and continuously. If the witness refers to regulations, orders or instructions, then these should be identified as an exhibit and included in the minutes. It is recommended to have an exhibit stamp for marking all exhibits. Once a document or physical item has been marked and entered into the proceedings as an exhibit, multiple witnesses can then refer to it later.

85. It is important to note that a police report, or a report made under QR&O Chapter 106 (Investigation of Service Offences), cannot be received and marked as an exhibit at a BOI. A police report is normally not subject to release under the provisions of the AIA. However, the act of attaching a police report to the minutes of a BOI could change its nature, thereby making it potentially releasable. Consequently, police reports should be sent to the convening authority as a separate document that accompanies the Board’s minutes.

86. There are two other reasons why police reports are not accepted as exhibits before BOIs. First, a police report or investigation is normally regarded as constituting ‘after-the-fact’ observations, opinions and findings of the author, based on the evidence readily available to that person. Expressed another way, it is only the report of an investigator who likely did not observe the incident in question, ‘first-hand.’ It is the function of a BOI to assess first-hand evidence and then arrive at its own conclusions. This often entails applying a different standard of proof than the standard used in the course of conducting criminal or disciplinary investigations. Second, the primary purpose of a BOI, which is normally administrative in its nature, may be prejudiced if the board, inadvertently or otherwise, relies on information gathered during an investigation having a...
disciplinary or criminal nature. Accordingly, prior investigative reports should be viewed with caution and legal advice should be sought before attempting to enter any portion of such report into evidence.

87. In exceptional circumstances, a board may wish to receive into evidence a document or other item that cannot be identified or verified in accordance with the normal practice for exhibits. There is discretion vested in the board panel to receive “any evidence or other information the board sees fit,” regardless of whether such evidence or information would normally be inadmissible in a court of law. In such cases, the board will have to give serious consideration as to how much ‘weight’ (i.e., importance and significance), it assigns to the evidence given its uncertain origins, history and validity.

88. Similarly, information that the board obtains independently of the witnesses, such as documents collected during a unit records search and turned directly over to the board, should not be dealt with as exhibits. Where the board wishes to consider the information in any such document, it should be attached to the board’s report as an annex. The ‘Statement of the Board’ should explain the nature and substance of such annexes.

SECTION 6
MINUTES OF THE BOARD OF INQUIRY

89. The report of a BOI to the convening authority is described as the ‘Minutes of Proceedings.’ They are also commonly referred to as simply, ‘the minutes.’ Regulations provide that, upon completion of a BOI, the minutes shall be signed by the board president, as well all other members of the board and, unless otherwise directed by the convening authority, submitted by the board president to the convening authority or, in the case of a BOI convened under QR&O 21.56 (Investigation of Aircraft Accidents), to the CO. The board president must deliver the minutes to the convening authority by the due date specified in the TOR unless an extension has been granted by the convening authority.

90. Where board members are unable to reach a consensus on a matter to be addressed within their TOR, the dissenting member(s) shall prepare a ‘Dissenting Opinion,’ which must then be attached to the BOI minutes. Additionally, if a board member did not hear a particular piece of evidence, that member should clearly indicate which decision(s) or finding(s) of the BOI they specifically did, or did not, participate in.

91. The Minutes of Proceedings usually consist of the following components:
   a. form CF 485 - Board of Inquiry;
   b. an index;
   c. a narrative;
   d. a transcript of witness testimony;
   e. exhibits;
   f. annexes;
   g. a statement by the board;

---

86 NDA s. 45(2)(c).
87 QR&O 21.15(1).
h. the findings of the board; and
i. recommendations of the board, if any.\textsuperscript{88}

92. The aforementioned form and structure of the minutes is suggested in DAOD 7002-1 (Boards of Inquiry). Specific directions concerning the contents or organization of the minutes may also be included in the TOR. The board has discretion, however, in deciding the sequence of events in conducting the BOI. It may not always be possible for a BOI to conduct its proceedings in the most logical order.\textsuperscript{89} For example, witnesses may testify out of sequence before the BOI in terms of their involvement in the incident. However, once the proceedings are closed, the board members can organize the minutes in the manner they feel will best present the results of the inquiry to the convening authority. A brief description of the components listed above and their relative role in the minutes of a board, follows.

\section*{Annexes}

93. The first annex in the minutes will normally be the TOR issued by the convening authority. Other annexes may include copies of summons issued for witnesses, affidavits of service of summons, and any documents sufficiently relevant or important to the outcome of the BOI so as to warrant their inclusion. Other routine documents generated in the course of the BOI process (e.g., travel arrangements on behalf of board members), should be forwarded to the convening authority in a separate, BOI administrative file.\textsuperscript{90}

\section*{Statement}

94. A statement by the BOI is not always required. However, if the board president has knowledge of relevant information for which evidence is not available, a statement setting out the information should be included with the minutes. Statements can also be used to explain the circumstances of any unusual events or incidents that may have arisen out of the course of conducting proceedings (e.g., why certain witnesses did not testify, as perhaps initially anticipated).\textsuperscript{91}

\section*{Summary}

95. In complex investigations, it may be helpful to provide a summary of the evidence that was received by the board. The board president may direct that a summary be prepared for the purposes of:

a. assisting review authorities understand the evidence;

b. discussing theories of causation; or

c. explaining the testimony of expert witnesses.\textsuperscript{92}

\section*{Findings}

96. The findings made by a board must be supported by evidence contained in the minutes. In making findings, the board must pay particular attention to any findings that were mandated by the TOR. A board may make any other findings that it considers pertinent to the investigation, so long as these findings are founded on evidence contained within the minutes. Where conflicting evidence exists, and one version of the evidence is preferred over another, reasons should be

\textsuperscript{88} DAOD 7002-1 (Boards of Inquiry), marginal note: Minutes of Proceedings/Content.
\textsuperscript{89} DAOD 7002-1 (Boards of Inquiry).
\textsuperscript{90} Ibid., marginal note: Minutes of Proceedings/Annexes.
\textsuperscript{91} Ibid., marginal note: Minutes of Proceedings/Statement by the BOI.
\textsuperscript{92} Ibid., marginal note: Minutes of Proceedings/Summary of Evidence.
provided which sufficiently explain that preference. The findings of a BOI must not be expressed in the language of civil or criminal liability.  

Recommendations

97. The minutes of a board shall include specific recommendations when they are required to do so by regulations or orders, or are directed to do so by its TOR. A board may also make any recommendations it considers of assistance to the convening authority. A BOI must not recommend that a charge be laid or that the laying of a charge be considered.

Access to Board of Inquiry Minutes

98. Because they are government records, the minutes of a BOI are subject to the provisions of the PA and AIA. While there are exemption provisions in the AIA for “ongoing investigations,” once a BOI has concluded and the minutes have been submitted to the convening authority, it should be assumed that much of the information in the minutes may be released to the public unless the BOI was conducted and the minutes were prepared in contemplation of litigation. Board members should also be aware that information obtained and recorded at other stages of the proceedings, such as during preliminary witness interviews, as well as notes made by board members while preparing for the hearings and personal notes made during hearings, are also subject to the PA and AIA, even though they do not constitute part of the minutes. These are records made in the ordinary course of business and, as governmental records, must be retained.

After Action Requirements – Review and Approval Authorities

99. The review authority, which is normally the convening authority, shall endorse the minutes of the BOI by:

   a. concurring or not concurring with the findings and recommendations and, if not concurring, providing reasons therefore;

   b. stating the administrative, operational or technical action taken or contemplated, such as:
      i. write-off;
      ii. administrative deduction;
      iii. change in procedures;
      iv. Unsatisfactory Condition Report (UCR) action; and
      v. preventive measures;

   c. adding other pertinent comments including, where applicable, orders for dissemination of information that could prevent a reoccurrence of the incident giving rise to the BOI.

100. Legal review by the legal officer advising the first level review authority (the convening authority) is strongly recommended. Normally this legal officer will not be the same officer that directly advised the board. It is important to note that legal review can occur at each level of the review process although the first level review is often the most time consuming.

---

93 Ibid.
94 Ibid. See particularly, marginal note: Minutes of Proceedings/Recommendations.
95 DAOD 7002-1 (Boards of Inquiry), marginal note: Forwarding and Staffing Procedures/Endorsement of the Minutes of Proceedings by Review Authorities.
101. The review authority must forward the minutes to the next higher authority if:
   a. required by regulations, orders or higher authority; or
   b. the convening authority, or the higher authority through whom the minutes of
      proceedings are submitted, has no authority to approve the investigation or
      implement the recommendations made.¹⁶

When minutes are forwarded, the “Endorsement of the Minutes of Proceedings by Review
Authorities” portion of form CF 485 – Board of Inquiry, must be completed.

102. A review authority is required to ensure that:
   a. the BOI has been completed in accordance with its TOR;
   b. the evidence supports the findings and recommendations;
   c. if further evidence, correction or amendment is required, the BOI is
      reconvened;
   d. preventive measures are instituted as soon as possible; and
   e. only matters beyond local control are recommended to the next higher
      authority.¹⁷

103. The BOI panel must be informed if there are any “errors, omissions or shortcomings” in
      the BOI. The approving authority must:
      a. review the minutes of proceedings as outlined in the “Additional Duties of Review
         Authorities” portion of form CF 485 – Board of Inquiry;
      b. approve or disapprove of the findings and recommendations and, if disapproving,
         provide the reasons therefore; and
      c. give directions as required (i.e., the approving authority may direct the BOI to
         reconvene to investigate a particular issue in greater detail).¹⁸

104. Ultimately the last level of review that has the authority to deal with all the outstanding
      findings and recommendations is also the “approval “ authority. A BOI is not formally closed until
      the approval authority has reviewed the BOI and either approved or disapproved the Minutes of
      Proceedings.

105. The minutes of proceedings of a BOI shall be forwarded to NDHQ for approval, by or on
      behalf of the CDS, in the following matters:
      a. the death or serious injury of a CF member, or an injury that is likely to cause
         permanent disability;
      b. a missing CF member;
      c. an attempted suicide by a CF member;
      d. personnel or property matters of a force other than the CF;

¹⁶ Ibid., marginal note: Forwarding and Staffing Procedures/Additional Duties of Review Authorities.
¹⁷ Ibid.
¹⁸ Ibid., marginal note: Forwarding and Staffing Procedures/Approving Authority.
(e) the loss, misappropriation, or deficiency of public funds;

(f) the collapse or partial collapse of works or buildings;

(g) matters in which administrative action must be taken by the MND, the CDS or any other authority at NDHQ;

(h) a matter of interest to more than one command; or

(i) a matter that has:

   (i) been the subject of a ministerial inquiry;

   (ii) been discussed in Parliament; or

   (iii) received national prominence through the news media.\(^9\)

SECTION 7

REFERENCES

Legislation


Regulations

*QR&O Chapter 21 (Summary Investigations and Boards of Inquiry).*

*QR&O 21.07 (Powers of Boards of Inquiry).*

*QR&O 21.09 (Terms of Reference).*

*QR&O 21.12 (Meetings Not Open to the Public).*

*QR&O 21.14 (When Adviser to Board of Inquiry Permitted).*

*QR&O 21.19 (Where Claim By or Against the Crown Appears Likely).*

*QR&O 21.46 (Investigation of Injury or Death).*

*QR&O 21.48 (Claims for Compensation Arising From Injury or Death).*

QR&O 21.56 (Investigation of Aircraft Accidents).
QR&O Chapter 106 (Investigation of Service Offences).
QR&O 112.16 (Oath to be Taken by Judge Presiding at Court Martial).
QR&O 112.21 (Affirmation in Lieu of Oath).
QR&O 210.60 (Witness Fees and Allowances).

Orders, Directives and Instructions

CFAO 19-44 (Injuries or Death).
CFAO 24-6 (Suicide Prevention).
CFAO 55-19 (Graduate Aircrew Unsuit for Continued Flying Employment).
CFAO 210-1 (Civilian Witnesses – Fees and Expenses).
DAOD 7002-0 (Boards of Inquiry and Summary Investigations).
DAOD 7002-1 (Boards of Inquiry).
DAOD 7002-2 (Summary Investigations).
DAOD 7002-3 (Investigative Matters and References).
DAOD 7002-4 (Examination of Witnesses).
DAOD 7004-1 (Claims and Ex gratia Procedures).

Jurisprudence


Secondary Material

B-GG-005-027/AF-011, Military Justice at the Summary Trial Level.

CHAPTER 5
MEMORANDA OF UNDERSTANDING

SECTION 1
INTRODUCTION

1. DND and the CF may enter into non-binding arrangements called Memoranda of Understanding (MoU) with external organizations. Examples of these organizations include other federal government departments or agencies, provincial government bodies, private businesses or industry and foreign militaries or their governments.¹

2. An MoU is a non-legally binding arrangement. However, for administrative purposes, an MoU shall be treated as if it is legally binding. MoU are used when DND or the CF wish to enter into a cooperative relationship with another organization for the purposes of carrying out a project or program.²

SECTION 2
DEVELOPMENT OF MEMORANDA OF UNDERSTANDING

3. When it comes to understanding MoU, DAOD 7014-0 (Memorandum of Understanding (MoU)) and 7014-1 (Memorandum of Understanding (MoU) Development) should be consulted. These orders and directives explain the status of MoU, how MoU are prepared and who has the authority to sign them. Even though these particular DAODs should be consulted as the MoU is being prepared, legal advice should also be obtained to ensure that the MoU is the appropriate instrument to use in the given situation and that the MoU complies with the relevant law.

4. The MoU can be categorized as either ‘domestic’ or ‘international.’ A domestic MoU is used when entering into non-binding arrangements with other government departments, Crown corporations, provinces or Canadian industry. An international MoU is used when the other participant to the arrangement is a foreign government or foreign defence department.³

5. DAOD 7014-0 (Memorandum of Understanding (MoU)) states that “DND may conclude an MoU on behalf of the Government of Canada.”⁴ The CF or DND can conclude an MoU on behalf of the MND. If an MoU is to be concluded on behalf of the Government of Canada, the document must be signed by the Department of Foreign Affairs and International Trade (DFAIT) or the MND with specific cabinet approval.

6. When entering into an MoU, either domestic or international, various internal stakeholders must be contacted. The unit legal adviser and the National Defence Memoranda of Understanding Coordinator (NDMoUC)⁵ should be contacted for guidance on how to draft an MoU. Particularly, the NDMoUC should be consulted to determine whether an MoU already exists to cover the specific situation at issue. The NDMoUC may also seek legal advice to ensure that an MoU is the most appropriate instrument to utilize under the circumstances. If there are financial obligations under the MoU, the Director Financial Operations 3-3 (D Fin Ops 3-3) should also be consulted to ensure that contemplated financial arrangements are permissible under

¹ DAOD 7014-0 (Memoranda of Understanding (MoU)), marginal note: Definitions/Memoranda of Understanding (MoU).
² Ibid., marginal notes: Policy Direction/Policy Statement and Policy Direction/Requirements.
³ DAOD 7014-1 (Memorandum of Understanding (MoU) Development), marginal notes: Definitions/Domestic Memorandum of Understanding (MoU) and Definitions/International Memorandum of Understanding (MoU).
⁴ DAOD 7014-0 (Memoranda of Understanding (MoU)), marginal note: Policy Direction/Requirements.
⁵ The NDMoUC is located in the Office of the JAG.
legislative or government policy. The personnel noted above should be contacted before any step is taken in the preparation of the MoU.\textsuperscript{6}

7. When drafting an MoU, it is essential that the drafter consult DAOD 7014-1 (Memoranda of Understanding (MoU) Development). The MoU must be structured properly. Certain information must be included in each MoU. The following sections are mandatory:

   a. Introduction;
   b. Objectives and Scope;
   c. Financial Arrangements;
   d. Settlement of Disputes;
   e. Amendment;
   f. Duration, Withdrawal and Termination; and
   g. Effective Date and Signature.\textsuperscript{7}

Care must be taken to ensure that the MoU is not drafted in such a way that it would constitute a contract or appear to be a legally binding agreement.

8. Other sections are optional or are to be used if entering into an arrangement with industry. For instance, in DAOD 7014-1 (Memoranda of Understanding (MoU)), a legal disclaimer is to be added if an MoU is being drafted to create a non-binding arrangement with industry. Optional sections include work-sharing, taxes, customs duties and similar charges, status of personnel, logistic support, security and access to establishments to name a few.\textsuperscript{8} A complete list of optional sections can be found in DAOD 7014-1 (Memoranda of Understanding (MoU)). The number of optional sections included in the MoU will depend on the complexity of the arrangement itself. The Memoranda of Understanding (MoU) Writing Guidelines provide suggestions on what to include in both the mandatory and optional sections. This document should be consulted as the MoU is being drafted.

9. Once an MoU is drafted, it must then be reviewed, signed and distributed. The NDMoUC will review all MoU. An identification number will be assigned, the MoU will then undergo a legal review and, if the document is considered acceptable, the MoU will be recorded in the DND MoU database.\textsuperscript{9}

10. If there are financial implications on the part of DND or the CF, the responsible budget manager must review the MoU and confirm the availability of funds. Other personnel may have to review the MoU if it relates to their area(s) of responsibility.\textsuperscript{10} A more detailed list of personnel to be contacted during the preparation stage can be found in DAOD 7014-1 (Memoranda of Understanding (MoU)).

11. After the completion of the various reviews, the MoU is ready to be signed by the parties to the arrangement. The subject matter and nature of a proposed MoU will determine who has authority to sign the MoU on behalf of the Government of Canada. For a domestic MoU, the following are signing authorities for DND and the CF within their respective areas of responsibility:

   a. Assistant Deputy Ministers (ADM);
   b. Environmental Chiefs of Staff (ECSs);
   c. Vice Chief of the Defence Staff (VCDS);

\textsuperscript{6} DAOD 7014-1 (Memoranda of Understanding (MoU) Development), marginal note: Initiation Phase/Process.
\textsuperscript{7} Ibid., marginal note: MoU Preparation/Document Structure.
\textsuperscript{8} Ibid.
\textsuperscript{9} Ibid., marginal notes: Completion Phase/Overview and Completion Phase/Review Process.
\textsuperscript{10} Ibid., marginal note: Completion Phase/Review Process.
d. Commander of Canada Command (Canada COM);
e. Commander of Canadian Expeditionary Force Command (CEFCOM);
f. Commander of Canadian Operational Support Command (CANOSCOM);
g. Commander of Canadian Special Operations Forces Command (CANSOFCOM);
h. Chief of Defence Intelligence (CDI); and
i. the responsible budget managers at the rank of LCol or above or civilian equivalent (when the MoU is in their own area of responsibility and there is no funding required or all the funding will come out of their own budget).^{11}

12. With respect to international MoU, the ADMs, ECSs, VCDS and the DCDS have the authority to sign when the MoU specifically pertains to their area of responsibility. They may delegate, in writing, their authority to sign an MoU.\^{12}

13. Once the MoU is created, reviewed and signed, the final step is distribution. The original and an electronic copy will be forwarded to the NDMoUC, while a paper copy, signed by all participants, will be provided to all those with an interest in the MoU.\^{13}

SECTION 3
ADDITIONAL GUIDANCE

14. Given that MoU are intended to be non-binding arrangements, care must be taken not to use legal, contractual or treaty-related terminology in the text of the document. Such diligence will avoid creating the impression that the participants have entered into a legally binding agreement.

15. Once a CO decides to use an MoU, the process outlined in the relevant DAODs and the Memoranda of Understanding (MoU) Writing Guidelines must be followed. The NDMoUC must be contacted prior to drafting the MoU. If the correct procedure is not followed, the draft MoU will have to be re-written.

SECTION 4
REFERENCES

Orders, Directives and Instructions
DAOD 7014-0 (Memoranda of Understanding (MoU)).
DAOD 7014-1 (Memoranda of Understanding (MoU) Development).

Secondary Material
DND, ADM (Fin CS), Memoranda of Understanding (MoU) Writing Guidelines, online: DIN <http://admfincs.mil.ca/admfincs/subjects/daod/7014/MoU/guide_e.asp>.

^{11} Ibid., marginal note: Completion Phase/Signature.
^{12} Ibid.
^{13} Ibid., marginal note: Completion Phase/Distribution.
CHAPTER 6
NON-PUBLIC PROPERTY

SECTION 1
INTRODUCTION TO NON-PUBLIC PROPERTY

General

1. COs are entrusted with the administration of NPP. While full coverage of such a complex subject is beyond the scope of this manual, this chapter is intended to assist COs in exercising these responsibilities. In particular, this chapter will explain how to avoid some of the obstacles that COs occasionally face when confronting these kinds of matters.

2. Non-public property (NPP) is a legally defined term, found in section 2 of the National Defence Act (NDA). Although it is often referred to as non-public ‘funds,’ Non-public funds (NPF) is not a legally defined term. While it is true that there are money accounts, or ‘funds,’ created for non-public purposes, the general use of the term ‘funds’ does not reflect the fact that NPP is a much broader term. The legal meaning of ‘property,’ although it does include money or ‘funds,’ also includes every other type of property of every nature and kind, such as physical assets, real estate and rights. It is therefore more correct and appropriate to describe NPP organizations, activities and property as NPP, as opposed to NPF.

3. The NDA also establishes, in sections 38 to 41, the specific legal provisions governing NPP. Those sections provide that NPP is vested in the Commanding Officers for the benefit of serving and former CF members and their dependants or any other purpose approved by the Chief of the Defence Staff. These provisions came into force in 1950.

4. These provisions, together with the fact that the property is called ‘non-public,’ sometimes lead people to conclude that NPP is not Crown property. Such a conclusion is incorrect. The words ‘non-public’ are not legally the equivalent of ‘not Crown.’ NPP is public property in the sense that it is Crown property. NPP is merely a special class of Crown property created by the NDA. In short, “public” refers to “appropriated” funds and the property derived therefrom, whereas “non-public” refers “non-appropriated” funds and the property derived therefrom. They are both Crown property.

5. The major difference between ‘public’ and ‘non-public’ property, is that NPP is not subject to the rules and regulations governing the administration of public property that are found in the Financial Administration Act (FAA) and the regulations made pursuant to the FAA. The reason those rules do not apply, is that the NDA specifically states that the FAA does not apply to NPP. The CDS is responsible for establishing the rules governing how NPP is to be administered. Even so, because the CDS and Base, Wing and Unit Commanders are always acting in their official capacities when carrying out their NPP responsibilities, and because the NDA makes the MND ultimately responsible for NPP, there is always accountability to the Crown “public” for how NPP is administered.

6. While NPP is unique in Canadian Law, many countries have established similar special classes of property or funds administered by military organizations in support of their troops, all of which operate outside the rules governing how “public” (or “appropriated”) property is administered. In the United States, for example, this class of property is called “Non-Appropriated Funds.”, and the organizations that administer those funds are called NAFIs, or non-appropriated funds instrumentalities. In Great Britain, the funds are called NAAFIs, standing for Navy, Army, Air Force.

---

1 R.S.C. 1985, c. N-5 [NDA].
7. NPP activities have existed since the Second World War when messes and canteens were set up for front-line soldiers. From that time until the unification of the Canadian Armed Forces into the CF, individual bases and units ran their own NPP activities.²

8. Unification precipitated a study into the administration of NPP. Many of the study team’s recommendations were implemented in 1967 when the Defence Council approved the following:
   a. The establishment of an NDHQ entity, directly responsible for certain aspects of the administration of messes, canteens, and institutes;
   b. The establishment of the CF Exchange (CANEX) system;
   c. The formation of the CF Central Fund (CFCF); and
   d. The formation of the CF Personnel Assistance Fund (CFPAF).³

9. Since 1969, the Government of Canada recognized that personnel support is a public responsibility, and public support for the system of NPP organizations was formally authorized. Indeed, the relationship between Her Majesty in Her public capacity and Her Majesty in Her non-public capacity, is one that is truly symbiotic. The Canadian Forces Personnel Support Agency (CFPSA) took over the administration of NPP activities in 1996.⁴

10. Pursuant to their legal obligations under the NDA, the CDS and COs have established a number of NPP organizations to administer and deliver NPP programs, services and activities, and to assist DND in delivering departmental programs and services in support of operational readiness and effectiveness. At the national level, these include CFPSA, CANEX, SISIP and PSP. At the Base, Wing and Unit level, these organizations are numerous, and include messes, museums, cable television operations, and sports and recreational clubs and facilities.

Morale and Welfare

11. It is the duty of all officers and non-commissioned members to promote the welfare of their subordinates,⁵ and to ensure the proper care and maintenance (as well as prevent the waste of), all ‘non-public property’ within the member’s control.⁶ This is amplified by CDS guidance, which states:

   COs of static and deployed units, under the guidance of the chain of command, are responsible for the morale and welfare of CF members within their units and, where applicable, their families. CFPSA exists to support the chain of command in that role by delivering an approved range of programs, services, guidance and technical support.⁷

---

² CFPSA Finance Division, A Brief History of Non-Public Funds, online: DIN <http://www.cfpsa.com/en/corporate/services/finance/index.asp> [A Brief History of Non-Public Funds].
³ A-PS-110-001/AG-002, c. 2 at para. 11.
⁴ A Brief History of Non-Public Funds.
⁵ QR&O 4.02(c) and 5.01(c).
⁶ QR&O 4.02(d) and 5.01(d).
SECTION 2
NATIONAL DEFENCE ACT AND LEGAL ISSUES

National Defence Act

12. The provisions regarding NPP are found at sections 38 to 41 of the *NDA*. The Act also makes the wilful destruction, loss, or improper disposal of NPP by a person subject to the *Code of Service Discipline (CSD)* an offence. Section 116 of the *NDA* states:

Every person who:

wilfully destroys or damages, loses by neglect, improperly sells or wastefully expends any public property, non-public property or property of any of Her Majesty's Forces cooperating therewith, is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

13. Unlawfully disposing of, removing, or possessing NPP by any person (whether subject to the *CSD* or not), constitutes an offence triable by civil court. Section 298 of the *NDA* states:

Every person who:

a. unlawfully disposes of or removes any property,

b. when lawfully required, refuses to deliver up any property that is in the possession of that person, or

c. without lawful cause, the proof of which lies on that person, has possession of any property,

d. is guilty of an offence and liable, on summary conviction, to a fine not exceeding one hundred dollars for each offence.

14. For the purposes of this section, 'property' means any public property under the control of the Minister, non-public property and property of any of Her Majesty's Forces or of any forces cooperating therewith [emphasis added].

Legal Issues – General

15. NPP organizations are not legal "persons" capable of suing or being sued in their own names, or capable of entering into legally binding contracts in their own names. Legally, they are "administrative constructs" of the CDS and COs. As such, whenever they have to be described for any legal purposes, such as in a legal document or lawsuit, they are described as "Her Majesty the Queen in right of Canada, as represented by [insert rank, name and position] (e.g., CDS, Base/Wing Commander, etc.) in [his/her] Non-Public Property capacity through the Non-Public Property organization of (e.g., CANEX, SISIP, Shilo Cablevision, etc.)." In any lawsuit commenced by or against a NPP organization, the Attorney General for Canada must represent the organization.

16. Contract law requires that the parties to a contract be separate, distinct legal "persons." Based on this, NPP organizations cannot enter into contracts with any other organization that also constitutes Her Majesty in right of Canada; for example, DND. Therefore, in order to record arrangements and agreements between DND and NPP organizations, Memoranda of Understanding (MoU) or Service Level Agreements (SLA) are used.
17. Finally, COs may establish trust accounts for funds donated or raised for a specific purpose in conformity with the NPP Sponsorships and Donations Policy. Funds received for a specific purpose can only be used for that purpose.8

Liability of Commanding Officers

18. The publication Public Support for Personnel Support Programs states the following:

The legal liability of the CDS or the CO when he is acting within the scope of his duties, and in his capacity under NDA, Section 38, is not a personal liability, but is a liability only in his capacity as CDS or CO. In effect, the liability of the CDS or the CO is similar to that of a corporation president or a trustee when he is acting within the scope of his duties.9

19. In other words, were a CO to incur liability in the performance of their NPP duties, the situation would be no different than if the liability was incurred in the course of the CO’s military duties. The Crown will indemnify CF members against personal civil liability incurred in the course of performing their NPP duties. To be eligible to be indemnified, however, the CF member must have acted honestly and without malice, been within the scope of their duties, and have been deemed to have met reasonable departmental expectations.10

Taxation

20. Real property purchased by any NPP organization must be acquired in the name of “Her Majesty the Queen in right of Canada,” notwithstanding that the property vests as a matter of law in the CDS or local base commander, as all such acquisitions are made in their official capacities, acting for or on behalf of Her Majesty. That being the case, the property is exempt from municipal taxation.11 If real estate used for NPP purposes is assessed for municipal taxes, the CO should contact the unit legal adviser for advice.

Legal Advice

21. Unit legal advisers are available to provide legal advice to COs on matters concerning NPP, “providing that the time taken does not materially reduce the availability and ability of [legal officers] to perform their primary tasks.”12

22. Military Family Resource Centres (MFRCs) are provincially incorporated, independent bodies. As such, MFRCs retain civilian legal counsel and are not provided with legal advice by CF legal officers.

SECTION 3

UNIT NON-PUBLIC PROPERTY

23. Although the NPP of a unit vests in the CO of the unit,13 NPP must be used for the benefit of serving and former members and their dependants. Any other use of NPP must be approved by the CDS.14 Only the CDS may authorize the sale or other disposal of NPP.15

---

8 NPP Reading Package at paras. 52, 54.
10 See Chapter 32 (Administrative Review), s. 3 found in Part 5 of this manual for more information concerning this topic.
12 A-PS-110-001/AG-002, c. 3 at para. 106.
13 NDA, s. 38(1).
14 Ibid.
15 Ibid., s. 39(3).
CFAO 27-9 constitutes authorization for the disposal of NPP in the circumstances it specifies, and contains the appropriate policy and procedures.\textsuperscript{16}

24. If a unit is disbanded, the NPP of that unit passes to and vests in the CDS, who may dispose of the NPP at his discretion for the benefit of CF members, former members, and their dependants.\textsuperscript{17} If a unit is substantially reduced in strength or otherwise, significantly altered, the CDS has the discretion to have the NPP vested in the CDS and may dispose of the NPP at their discretion for the benefit of members, former members, and their dependants.\textsuperscript{18} If NPP is donated to the CF, but not to any specific unit, the NPP vests in the CDS.\textsuperscript{19}

\textbf{SECTION 4}

\textbf{MESSES AND INSTITUTES}

\textbf{General}

25. The term ‘mess,’ in the NPP context, can have two meanings. First, ‘mess’ can refer to an organization established for the purpose of building \textit{esprit de corps} and comradeship amongst its members. Second, ‘mess’ can refer to a building or facility in which members carry out the functions of that organization.\textsuperscript{20} A list of regulations, orders, and directives, applying specifically to the operation of messes is provided at section 6 of this chapter.

26. Mess facilities provide the following:
   a. quarters for living-in members;
   b. food services;
   c. venues for entertainment events;
   d. meeting places to foster the development of \textit{esprit de corps}, communication, and co-operation; and
   e. venues for both official and unofficial social functions.\textsuperscript{21}

\textbf{Mess Membership}

27. All CF members must belong to a mess appropriate to that member’s rank. Normally, a mess will be designated to serve certain units, and members of those units will belong to the mess so designated. However, with the permission of all concerned COs, a member may join another mess as long as the other mess is appropriate to that member’s rank.\textsuperscript{22}

28. The member must have a valid reason for joining another mess.\textsuperscript{23} For example, suppose that a regular force officer’s place of work is in a reserve force armoury. Although there might be an officers’ mess located in the armoury, the regular force officer’s designated mess might be across town and situated on a CF base. In that case, the geographic distance between the officer’s place of work and their designated mess might be a valid reason for belonging to the officers’ mess located at the armoury rather than the officers’ mess on the base.

\textsuperscript{16} Ibid., s. 39(3).
\textsuperscript{17} Ibid., s. 38(2).
\textsuperscript{18} Ibid., s. 38(3).
\textsuperscript{19} Ibid., s. 39(1).
\textsuperscript{20} CFAO 27-1 (Mes ses), para. 3.
\textsuperscript{21} A-PS-110-001/AG-002, c. 2 at para. 34.
\textsuperscript{22} CFAO 27-1 (Mes ses), para. 10.
\textsuperscript{23} Ibid.
Alcohol Policy

29. *QR&O* 19.04 (Intoxicants) states:

No officer or non-commissioned member shall introduce, possess or consume an intoxicant on a base, unit or element or in a building or area occupied by the CF, except:

a. in a non-public property organization with respect to which a general authority has been granted to possess or consume an intoxicant during specified hours; or

b. in such other place and at such times as the officer in command may approve.

30. *CFAO* 27-12 (Provision, Serving and Consumption of Alcoholic Beverages) amplifies *QR&O* 19.04 (Intoxicants). This CFAO applies to the serving of alcohol at all CF facilities and functions whether held on DND property or elsewhere. COs (including COs responsible for messes), are to establish and promulgate orders governing the service and consumption of alcohol at their units. The objectives of these orders are to promote the responsible use of alcohol and to take reasonable steps to avoid contributing to alcohol-related injury or death.

31. Paragraph 4 of *CFAO* 27-12 (Provision, Serving and Consumption of Alcoholic Beverages) contains a number of provisions that must be included in the CO’s alcohol policy. Of special note is the legal drinking age. As a federal government institution, the CF is not legally bound to observe provincial legislation (e.g., CF messes do not require provincial liquor licenses). However, it is CF policy to observe the age of majority of the province in which a mess or unit is located and to comply with provincial licensing requirements. To this end, part of a mess’ alcohol policy should contain a clause prohibiting the sale of alcohol to minors according to the age of majority law in that province.

32. Another clause that should be included in the mess’ alcohol policy is a provision that intoxicated or apparently intoxicated persons shall not be served alcohol. This policy, when applied, provides a measure of protection from liability for the CF and CF members. As one court recently stated:

Commercial hosts serve alcohol for profit and, as a result, the relationship between the commercial host and the drinker is a contractual one giving each party certain legitimate expectations… Commercial hosts are closely regulated by statute and have a statutory duty not to serve alcohol to a visibly intoxicated person. To comply with their statutory duty, commercial hosts must monitor the alcohol consumption of their patrons and control the structure of the environment in which alcohol is served.

33. It is current CF policy for commanders of deployed CF task forces to implement and enforce an alcohol policy. For non-combat missions, a limit of two drinks per day has been considered reasonable. Under this policy, task force commanders (TFCs) may permit up to three drinks on St. Jean Baptiste Day, Canada Day, and Christmas. However, notwithstanding these general allowances, TFCs are encouraged to impose more restricted policies in areas of

---

24 *CFAO* 27-12 (Provision, Serving and Consumption of Alcoholic Beverages), para. 2.
27 *Ibid.*, subpara. 4h.
increased risk. Comd CEFCOM has the discretionary authority to adjust or suspend this policy when appropriate.

**Smoking Policy**

34. The policy regarding smoking in messes has changed greatly in recent years and has been the subject of heated debate amongst mess members. Historically, smoking was permitted in all areas of a mess. For example, the manual entitled, *Mess Administration* contemplates that, after the toasts, the PMC gives mess dinner guests permission to smoke by personally lighting a cigarette or by passing a cigar to a neighbour. Recently, however, many messes have banned smoking in most areas and instituted designated areas where smoking is permitted. The debate concerning whether these ‘smoking rooms’ were considered ‘legitimate’ became moot with the promulgation of DAOD 5020-1 (Smoking in the Workplace). Pursuant to this DAOD, smoking is prohibited in all CF workplaces and ‘smoking rooms’ shall not be designated. Messes are included in the definition of CF ‘workplaces.’ Therefore, smoking is now prohibited in messes.

**Mess Accounts**

35. Members may pay their mess charges through their pay accounts by pay allotment or acquittance roll. Although the CO may introduce such a payment scheme, participation is optional for each member and requires that a member provide authorization before it can be implemented with respect to that individual.

36. *QR&O* 27.38 (Administrative Deductions – Overdue Non-Public Accounts) contains a special provision that allows a CO to order administrative deductions in order to recover overdue mess accounts. Unlike other administrative deductions, there is no limit to the amount that may be recovered (i.e., up to the amount owed) and there is no built-in provision for the member to object to the administrative deduction. However, the member may submit an application for redress of grievance. A debt to a NPP account such as an overdue mess account constitutes a debt to Her Majesty the Queen in Right of Canada, and may be enforced as such.

**SECTION 5**

**MISCELLANEOUS MATTERS RELATED TO NON-PUBLIC PROPERTY**

**Consolidated Insurance Program**

37. A detailed examination of the NPP Consolidated Insurance Program (CIP) is beyond the scope of this chapter and it is recommended that individuals consult the NPP accounting policies manual for further information. However, by way of introduction, the CFPSA Chief Financial Officer and Vice President Informatics (CFO & VPI) manages and operates the CIP, which provides insurance coverage to all NPP activities and all NPP activities of the regular force. Reserve force units and museums may also be covered by the CIP, but only with the prior approval of the CFO & VPI.

38. Individual units are prohibited from purchasing additional insurance coverage except where CIP insurance coverage is excluded (i.e., off-base clubhouses, etc.). Where doubt exists

---

31 DAOD 5020-1 (Smoking in the Workplace), marginal note: Standard Practice/Prohibition.
32 CFAO 203-4 (Payment of Mess Charges through Pay Accounts).
33 This differs from the administrative deduction scheme contemplated by *QR&O* Chapter 38 (Liability for Public and Non-Public Property), as amplified by CFAO 38-1 (Liability for Public and Non-Public Property). See Chapter 8 (Liability For Public and Non-Public Property) found in Part 2 of this manual for more information.
34 A-FN-105-001/AG-001, *Policy and Procedures for Non-Public Funds Accounting*, c. 11.
as to the coverage of the CIP, the CFO & VPI should be consulted. At the unit level, two main points of concern arise. First, any changes to the value of NPP holdings should be reported to the CFO & VPI. Second, and most importantly, all occurrences involving NPP where there may be legal liability or property losses in excess of $5,000 must be reported to the CFO & VPI immediately (i.e., by telephone during working hours and by message or fax during silent hours).

**Base and Station Funds – Regular Force**

39. The policy governing base and station funds is found at CFAO 27-6 (Base and Station Funds – Regular Force). Of particular note to COs are the provisions concerning unit funds. A base commander may authorize the CO of a lodger, satellite, or integral unit to establish a unit fund where the unit is remote or where the base commander considers it practical and advantageous to do so. The base commander may authorize grants from the base fund to the unit fund and the CO shall administer the unit fund as if it were a base fund, to the extent practicable. If a base commander does not authorize a unit to operate its own fund, they may still allocate a specific amount from the base fund to be used for the benefit of the members of that unit.

**Unit Funds – Reserve Force**

40. CFAO 27-7 (Unit Funds – Reserve Force) establishes the policy and procedures for reserve force unit funds. COs may establish unit funds with the approval of their brigade, district, or equivalent commander. Once established, the CO is responsible for the administration of the fund and for the establishment of a unit fund committee and subcommittees, if required. The CO must also issue committee members with terms of reference (TOR).

41. Without the approval of the area commander (on the recommendation of the brigade or equivalent commander), unit COs may not make an expenditure of non-public funds in excess of $1,000 and may not write-off losses of, or damage to, NPP in excess of $150 in any one month.

42. COs must ensure that federal and provincial regulations are complied with including, but not limited to, income tax, Canada or Quebec pension plans, workers compensation, employment insurance and sales taxes. Moreover, as the CIP does not usually cover reserve units, reserve COs must obtain private insurance covering any loss of, or damage to, NPP such as unit silver and historical artefacts. If the unit operates a mess or canteen, particularly where alcohol is served, the CO must also obtain third person liability insurance.

**Branch, Regimental and Group Funds**

43. CFAO 27-8 (Branch, Regimental and Group Funds) prescribes the policy and procedures for the establishment and operation of branch, regimental and group funds. The term ‘regiment’ is used in the historical sense (i.e., The Royal Regiment of Canadian Artillery, Royal Canadian Artillery).
Regiment, etc.) and not in the sense of a formed unit (i.e., 2nd Regiment, Royal Canadian Horse Artillery). Membership in branch, regimental and group funds is voluntary and is restricted to active or retired members of the branch, regiment or group concerned. The payment of membership fees is voluntary and is subject to maximum amounts according to rank.

Write-off of Non-Public Property

44. Unless otherwise stated, the write-off of NPP may be approved as follows:
   a. the CO of a station or unit may approve a write-off of NPP if the loss in any single occurrence does not exceed $500;
   b. a base commander may approve a write-off of NPP if the loss in any single occurrence does not exceed $1,000; or
   c. the officer commanding a command may approve the write-off of NPP in any other case.

45. COs of reserve units may write-off the loss of, or damage to, NPP of up to $150 in any one month.

Recreation

46. Base commanders and other COs are responsible for ensuring that recreational programs are organized for CF members and their dependants. A list of regulations, orders and directives applying specifically to recreational activities is provided at section 6 below.

SECTION 6

REFERENCES

Legislation


Regulations

QR&O 4.02 (General Responsibilities of Officers).
QR&O 4.61 (Recreation Programs).
QR&O 5.01 (General Responsibilities of Non-Commissioned Members).
QR&O 19.04 (Intoxicants).
QR&O Chapter 27 (Messes, Canteens, and Institutes).
QR&O Chapter 38 (Liability for Public and Non-Public Property).
QR&O 210.38 (Recoverable Advances to Messes and Canteens).

50 CFAO 27-8 (Branch, Regimental and Group Funds), para. 2.
51 Ibid., para. 7.
52 Ibid., para. 8.
53 CFAO 27-6 (Base and Station Funds – Regular Force), para. 26.
54 CFAO 27-7 (Unit Funds – Reserve Force), para. 19.
55 QR&O 4.61(1).
Orders, Directives and Instructions
CFAO 9-20 (Range Safety Officers).
CFAO 27-1 (Messes).
CFAO 27-5 (Canadian Forces Museums).
CFAO 27-6 (Base and Station Funds – Regular Force).
CFAO 27-7 (Unit Funds – Reserve Force).
CFAO 27-8 (Branch, Regimental and Group Funds).
CFAO 27-9 (Disposal of Non-Public Property).
CFAO 27-10 (Artefacts and Memorabilia – Non-Public Property).
CFAO 27-12 (Provision, Serving and Consumption of Alcoholic Beverages).
CFAO 34-38 (Sanitary Control of Indoor and Outdoor Pools and Swimming Areas).
CFAO 38-1 (Liability for Public and Non-Public Property).
CFAO 50-1 (Physical Fitness Training).
CFAO 50-2 (Recreation).
CFAO 50-3 (Sports).
CFAO 50-7 (Sport Parachuting).
CFAO 50-11 (Rifle Associations).
CFAO 50-13 (Entertainment Radio Stations in Canada).
CFAO 50-14 (Gliding and Soaring).
CFAO 50-16 (Recreational Shooting Competition).
CFAO 50-20 (Recreation Clubs).
CFAO 57-5 (Unofficial Service Newspapers).
CFAO 203-4 (Payment of Mess Charges Through Pay Accounts).
CFAO 210-17 (Advances to Messes and Canteens).
CFAO 210-20 (Grants for Provision and Maintenance of Physical Fitness Equipment).
CFAO 210-24 (Recreational Libraries).
DAOD 5020-1 (Smoking in the Workplace).
DAOD 9003-1 (Governance Framework – Non-Public Property Board of Directors and the Canadian Forces Personnel Support Agency).

**Jurisprudence**


**Secondary Material**

A-AD-262-000/AG-000, *Mess Administration*.

A-FN-105-001/AG-001, *Policy and Procedures for Non-Public Funds Accounting*.


CHAPTER 7
PROVISION OF DEFENCE RESOURCES

SECTION 1
INTRODUCTION

Purpose

1. The purpose of this chapter is to provide guidance to COs with respect to the provision of DND and CF resources to non-defence agencies. The provisions of this chapter do not apply to the disposal of surplus assets or the direct sale of goods. This chapter must be read in conjunction with the Provision of Services manual and the other regulations, orders and directives highlighted in section 2 of this chapter.

2. The decision to provide services for activities such as disaster assistance, support to law enforcement agencies and major national undertakings is likely to be taken at a very high level. In such cases, unit COs will be tasked to provide resources by higher headquarters and will probably not be approached directly by the non-defence agency requesting support. Unit COs are more likely to be approached directly by non-defence agencies with requests for support to community activities such as local fairs, jamborees, or community days.

General

3. Non-defence agencies, on occasion, will request use of DND or CF resources for non-defence purposes. DND and CF resources may be made available to non-defence agencies in the following ways:

   a. provision of services (e.g., providing CF fire fighters and equipment to a local community during an emergency);

   b. licence or lease for the use of DND property (e.g., providing armoury space for commercial or non-commercial activities); and

   c. loan of DND materiel (e.g., providing tentage to the Boy Scouts or Girl Guides Association, loans to contractors, etc.).

The nature of the resources requested dictate the provisions that will be included in the resulting written agreement. Care should be taken to confirm the correct legal instrument and approving authority under which each type of assistance may be made available.

4. Services may be provided so long as they are consistent with overall government policy, reflect well on DND and the CF, and do not adversely affect defence capabilities. The service could include a range of activities, from providing CF transportation (with operators) to medical personnel conducting a medical evacuation during a natural disaster. The policy, procedures, and administrative details for the provision of services are found in the manual entitled Provision of Services.

---

1 For information on the disposal of surplus assets, see DAOD 1005-1 (Return of Proceeds from the Sale of Surplus Assets) and CFAO 36-53 (Materiel Disposal). In the case of disposal of surplus assets or sales to other government departments, Director Disposal, Sales, Artefacts and Loans (DDSAL) should be contacted.

2 B-GS-055-000/AG-001, Provision of Services, online: DIN <http://admfincs.mil.ca/dfpp/prov_e.asp> [ Provision of Services].
5. The authority for the lease or licence of federal real property is found under the *Federal Real Property and Federal Immovables Act* (FRPFIA). Administrative requirements that reflect departmental policy and procedures with regard to licensing of DND and CF real property under this authority are described in the *Provision of Services* manual and discussed below.

6. Loans of public property are governed by subsection 61(2) of the *Financial Administration Act* (FAA) and the regulations made under that Act. These loans may be made where the MND considers the loans to be in the national interest.

7. In certain circumstances, a non-defence agency may request DND or CF resources that would require a combination of the different, above-mentioned types of resources. In that regard, the *Provision of Services* manual and CFAO 36-30 (Loans if Materiel by and to DND) address how such agreements and their accompanying administrative requirements are to be handled. In cases where the approving authority is the same for the different types of resources requested, the request may be addressed under one agreement. However, any agreement that purports to address loans or licence of real property will be required to address the requirements of the applicable statutory or regulatory authorities. Notably, given that provision of services, licences and loans of materiel have differing approval authorities, a combination request will likely involve different approval authorities. Where the requests involve different approving authorities, advice should be sought from the unit legal adviser as to the most appropriate way to structure the agreement(s).

**SECTION 2
PROVISION OF SERVICES

General**

8. CFAO 23-1 (Provision of Services to Non-Defence Agencies) states, “…the Canadian Forces may, when it is in the public interest, provide a service to a civil authority, civilian organization or private individual.” The *Provision of Services* manual applies to any request from a non-defence agency for services involving DND and CF resources. The term ‘non-defence agency’ is defined as “an organization or individual outside Defence, including an [other government department (OGD)], another level of government, the government and armed forces of other countries, institutions, commercial businesses, or non-profit organisations.” The *Provision of Services* manual is made under the authority of the *NDA* and, as such, articulates the departmental policy on provision of services. Other documents or instruments may contain provisions that conflict with the *Provision of Services* manual. Unless the conflicting provision is based on federal legislation, an Order in Council, or QR&O, the provisions of the *Provision of Services* manual shall take precedence where provision of services is concerned.

9. A summary of the procedures for providing a service may be found in the *Provision of Services* manual at Annex F (Procedures For Providing a Service). A CO is the approving authority for the provision of services with respect to the personnel and materiel within their own organization. When a CO receives a request for the provision of a service, they must evaluate the request against the conditions for providing services. The CO must deny the request if

---

5 S.C. 1991, c. 50 [FRPFIA].
6 The reader may note that CFAO 23-1 (Provision of Services to Non-Defence Agencies) purports to supplement QR&O 36.40 (Repealed). The QR&O article was repealed by the Ministerial Order for Provision of Services dated 29 August 1997. However, the Ministerial Order went on to approve the policy contained in the *Provision of Services* manual. Therefore, the *Provision of Services* manual remains a valid policy document. See *Provision of Services* manual, Annex A (Text of Ministerial Order).
7 *Provision of Services* at para. 1.
8 Ibid., at para. 5j.
10 *Provision of Services* at para. 4.
11 Ibid., Annex C (Provision of Services Authorities). Note: a CO’s authority to loan materiel is much more limited.
providing the service will unacceptably degrade the unit’s readiness or military capabilities, or erode public confidence in DND or the CF.\(^{11}\)

10. The CO should consider denying the request if it will compete with private industry or be provided on a continuing basis where OGDs or the private sector should be providing the service.\(^{12}\) Occasions where it would be appropriate to provide a service in competition with private industry or on a continuing basis will be very rare and approving authorities will be held accountable for their decisions.\(^{13}\) COs should therefore, consider the following:

   a. the service should be consistent with government policy;
   
   b. public reaction should be favourable;
   
   c. the service should not be provided if a local supplier can provide the service or where a supplier outside the local area can provide the service at a reasonable cost;
   
   d. the service should not be provided where an OGD can provide the service;
   
   e. the service should not be provided if the non-defence agency will become dependent on the DND or CF; and
   
   f. approving authorities should generally not be seeking revenue opportunities.\(^{14}\)

11. If a CO suspects that a request may be politically sensitive, the request must be referred to a superior authority.\(^{15}\) The CO must also ensure that the non-defence agency is aware of the policies governing the provision of services.\(^{16}\)

12. The CO must then identify the type of service, as this will determine the manner in which the recoverable cost is calculated (i.e., the amount chargeable for supplying a service, as calculated in accordance with the Provision of Services manual). There are four types of service, as follows:

   a. Type 1 – service provided to an OGD;
   
   b. Type 2 – service provided in compliance with an Act, regulation or agreement;
   
   c. Type 3 – service provided to use surplus defence capacity; and
   
   d. Type 4 – other requests. Although the CO must consult the descriptions of each type of service at pages 7 to 9 of the Provision of Services manual, this is the type of service most likely to be seen at the unit level (e.g., service in support of community activities).\(^{17}\)

13. The cost must be estimated in advance of providing the service. In the case of a Type 4 service, the recoverable cost is the full cost plus an administrative charge.\(^{18}\) The full cost is the sum of all costs incurred by the unit.\(^{19}\) The administrative charge is calculated in accordance with

---


\(^{13}\) *Ibid.*, at para. 25.


\(^{16}\) A sample letter to the non-defence agency may be found in the Provision of Services manual, Annex D (Sample Letter Advising Users of Policy on the Provision of Services to Non-Defence Agencies).

\(^{17}\) Provision of Services at paras. 27-37.


\(^{19}\) For calculation of full cost, see Provision of Services at paras. 60-65.
14. The CO should decide if they wish to reduce the fees charged to the non-defence agency. COs are authorized to do so by up to $15,000 for each provision of service unless further limited by the superior approving authority. For example, there may be latitude for charging less than recoverable cost where the non-defence agency is a charitable or non-profit organization, where a broad sector of the public will benefit from the service, or where the service is humanitarian in nature. The CO has discretion in reducing fees and must apply their knowledge of the local situation and experience.

15. The ‘Provision of Services Register’ is a document in which approving authorities record the details of their decisions vis-à-vis provision of services. The ‘Provision of Services Record’ is a document used to record situations requiring a superior’s approval to charge less than recoverable cost.

16. If the CO wishes to reduce the fees charged, up to the $15,000 limit, the service and the reduction must be recorded on the ‘Provision of Services Register.’ If the CO wishes to reduce the fees charged by more than $15,000, they must complete a ‘Provision of Services Record,’ which must be submitted to a superior approving authority before the service is provided (e.g., base and brigade commanders can reduce the amount of fees charged by up to $25,000, environmental chiefs of staff can reduce the amount by up to $100,000, etc.). If the CO has any reason to believe that the service may become politically sensitive, or that cost recovery will not be possible, the superior approving authority must be so informed.

17. In non-emergency situations, a written agreement will be prepared with the non-defence agency. The CO must ensure that the non-defence agency is aware of the approximate amount that they are to be charged and of the costing methodology. An authorized representative of the non-defence agency must agree to pay and accept the terms of the agreement by their signature. If, while providing the service, it appears that the actual cost will be greater than the estimated cost, the non-defence agency must immediately be informed in writing. If the non-defence agency does not agree to pay the additional costs, the service will be terminated.

18. In truly urgent situations, services may be provided without completing all of the procedures required by the Provision of Services manual. However, the spirit and intent of the omitted steps must be followed and the non-defence agency must be made aware of the conditions under which the service is provided as soon as possible. Thereafter, a written agreement must also be completed with the non-defence agency as soon as possible.

20 Provision of Services at subpara. 5a.
21 Ibid., Annex F (Procedures For Providing a Service) at para. c.
22 Ibid., at paras. 42-48.
24 Ibid., at paras. 43-44.
25 Ibid., at Annex K (Provision of Services Register/Provision of Services Register Completion Instructions).
26 Ibid., at Annex J (Provision of Services Record/Provision of Services Record Completion Instructions).
27 Ibid., at Annex C (Provision of Services Authorities).
29 The written agreement must conform to the requirements found at paras. 40-41 of the Provision of Services manual. Of particular importance, the agreement must indemnify and save harmless Her Majesty, Her officers, etc. from and against all claims, demands, etc. Sample agreements are found at Annex G (Sample Agreement For Provision of a Service to Non-OGD) for Non-OGD and Annex H (Sample Letter of Agreement For Provision of a Service to OGD) for OGD. Specific insurance provisions are at Annex G (Sample Agreement For Provision of a Service to Non-OGD).
30 Provision of Services, Annex F (Procedures For Providing a Service) at paras. g-i.
31 Ibid., at para. 38.
19. Once the service is provided, the CO shall cause the costs to be calculated and then finalize either the 'Provision of Services Record,' or the 'Provisions of Services Register,' as applicable. The 'Detailed Work Sheet for Calculation of Recoverable Costs,'\textsuperscript{32} is to be completed and submitted to the appropriate comptroller, who will then invoice the non-defence agency. Provision of Services Registers and Records are to be forwarded quarterly in accordance with the instructions of the superior approving authority.\textsuperscript{33}

\section*{SECTION 3}

\textbf{REAL PROPERTY}

\textbf{General}

20. Authorization for the use of real property is considered a 'lease' or 'licence'; the authority for which lies under the \textit{FRPFIA}\textsuperscript{34} and the \textit{FAA}\textsuperscript{35}. Unlike the case of a provision of a service, a unit CO is not an approving authority if the service includes the use of real property (e.g., land, armoury, etc.). Authorization for the lease or licence of real property must be obtained from a departmental official with delegated authority to deal with real property.\textsuperscript{36} Base and wing commanders, the Commandant CF Support Unit (Ottawa) (CFSU(O)), COs of area support units (ASUs), COs of land force area training centres, and COs of area support groups (ASGs) may lease or licence real property for an amount of up to $500,000 for the term, with a maximum amount of $100,000 per year.\textsuperscript{37} The term of the lease or licence cannot exceed five years.\textsuperscript{38} Approving authorities should refer to DAOD 4001-0 (Realty Asset Management) and DAOD 4001-1 (Realty Asset Life Cycle Management) prior to entering into a lease or licence agreement for real property.\textsuperscript{39}

21. Treasury Board (TB) has promulgated policies under the authority of the \textit{FRPFIA}\textsuperscript{40} requiring that all dispositions of federal real property be at market value. Accordingly, where leasing or licensing real property is concerned, there is no discretion to charge less than market value.\textsuperscript{41} However, there is some flexibility in determining what the market value actually is.\textsuperscript{42} The determination requires the exercise of sound judgment, supported by an understanding of what is the 'going rate' for comparable uses of similar facilities in the open market. Competition with the private sector can be avoided by charging no less than a private business would charge for the use of similar facilities for the same type of purpose. In some circumstances, the nature of the facility and proposed use may be such as to minimize the market value of the licence. For example, the CO of an ASU might be asked to make an armoury available to Canadian Blood Services for a blood donor clinic, or to a municipality for a homeless shelter during periods of extreme cold. In either of these examples, there is unlikely to be competition to host the activity amongst members of the private sector. Accordingly, the market value for the service may effectively be rendered nil.\textsuperscript{43}

\begin{flushright}
\textsuperscript{32} \textit{Ibid.}, Annex L (Detailed Work Sheet For Calculation of Recoverable Costs).
\textsuperscript{33} \textit{Ibid.}, para. 53.
\textsuperscript{34} \textit{FRPFIA}, c. 50.
\textsuperscript{35} \textit{FAA}, s. 61(1).
\textsuperscript{36} \textit{Provision of Services} at para. 20 and Annex E (Real Property).
\textsuperscript{37} \textit{A-FN-100-002/AG-006} at 46/49. Note that Task Force Commanders on deployed operations outside Canada have an authority to lease up to a value of $4.5 million with a restriction of no more than $1.5 million in one year. The authority to finalize leases is to be specified in each deployment by the DCDS.
\textsuperscript{38} \textit{Ibid.}
\textsuperscript{39} \textit{Provision of Services}, Annex E (Real Property) at para. 1.
\textsuperscript{40} \textit{FRPFIA}, c. 50.
\textsuperscript{41} \textit{Provision of Services} at Annex C (Provision of Services Authorities).
\textsuperscript{42} \textit{Ibid.}, Annex E (Real Property) at para. 4.
\textsuperscript{43} \textit{Ibid.}, Annex E (Real Property) at paras. 4-7.
\end{flushright}
SECTION 4
LOANS OF MATERIEL

General

22. Regulations made pursuant to the FAA\(^{44}\) authorize the loans of DND and CF materiel. While there are various regulations under this Act that provide authority to make loans in respect of DND and CF materiel, the Defence Materiel Loan Regulations\(^{45}\) (DML Regulations) are the regulations most relevant to CF units and are amplified by CFAO 36-30 (Loans of Materiel by and to DND), Annex D (Loans of Materiel (Other Than Loans to Contractors and Foreign Governments For Test and Evaluation).

23. The DML Regulations authorize the MND, or such other authority as may be designated by the MND, where it is considered that the national interest would be served to authorize loans of materiel:

   a. for relief purposes in the event of civil disaster;
   b. to authorized law enforcement agencies in the event of civil disturbances;
   c. to armed forces of friendly countries;
   d. to civil organizations for the benefit of, or in support of, the CF or DND, Dominion and Provincial Rifle Associations, and the Boy Scout and Girl Guide Associations;
   e. to civil organizations for community purposes, provided that such loans neither interfere with military training or operations nor cause undue depreciation of materiel, and further provided, unless the MND, or such other authority as may be designated by the MND, waives this condition, that the facilities made available through such loans of materiel are not otherwise readily obtainable through normal commercial channels;
   f. to departments of the Government of Canada and Crown corporations;
   g. for purposes directly connected with, or in support of, national defence, to provincial governments, and colleges and universities; and
   h. to contractors or other organizations or individuals engaged in work or duties for DND.\(^{46}\)

24. The DML Regulations provide for a reasonable charge to be levied in respect of every loan of materiel except for those made to Boy Scout and Girl Guide Associations, Dominion and Provincial Rifle Associations, or for community activities of a non-commercial, charitable nature or directly for the benefit of, or in support of, the CF or DND. The DML Regulations also permit waiver of the charges in other cases when the MND considers that it is in the public interest to reduce or waive the charges. In such cases, the MND shall determine what rate, if any, shall be charged. If the MND reduces or waives the charges and the amount is $1,000 or more, the MND

\(^{44}\) FAA, s. 61(2).
\(^{45}\) C.R.C., c. 690 [Defence Materiel Loan Regulations]. See also Provision of Materiel and Services to Foreign Ships Order, C.R.C., c. 721; Defence Floating Equipment Rental Order, C.R.C., c. 687; Defence Clothing and Equipment Loan Order, C.R.C., c. 686; Defence Materiel and Equipment Loaned to Contractors Order, C.R.C., c. 689; Loan of Defence Materiel to Canadian Contractors Order, C.R.C., c. 709; Defence Materiel Loan or Transfer for Test and Evaluation Regulations, C.R.C., c. 691.
\(^{46}\) Defence Materiel Loan Regulations, s. 4. In the case of loans to contractors for use by non-defence organizations, the Director Disposal Sales Artefacts and Loans (DDSAL) should be contacted to assist.
must make a report to TB. The DML Regulations provide that all loans are to be at no cost to the Crown unless the MND considers it in the public interest for the Crown to bear all or part of the cost.\textsuperscript{47}

25. Another regulation, the Public Property Loan Regulations\textsuperscript{48} (PPL Regulations), dictates the conditions required in loan agreements. Subsection 4(1) states that, “subject to subsection 4(2), every loan of public property shall be by way of a contract in writing,” which shall include:

a. a description of the consideration for the loan;

b. an undertaking that the borrower will indemnify Her Majesty for, and save Her Majesty harmless from, all losses and claims of any kind in respect of the borrower’s use or possession of the public property;

c. a statement that the lending authority may, at any reasonable time, inspect the public property and view its state of repair;

d. the term of the loan; and

e. identification of any security that the lending authority requires contained in any loan agreement.

Subsection 4(2) provides that, where an emergency exists, a loan may be made on obtaining a written acknowledgement of receipt thereof from the borrower. If a loan is made on that basis, the lending authority is required to enter into a written contract for the loan in the form described in subsection 4(1), as soon as practicable thereafter.

26. The authorities that may loan materiel are prescribed in CFAO 36-30 (Loans of Materiel by and to DND), Annex D (Loans of Materiel (Other Than to Contractors and Foreign Governments for Test and Evaluation)), at paragraphs 6 to 9. It should be noted that they differ substantially from those who are authorized to provide services to non-defence agencies under the Provision of Services manual. That Annex prescribes the CDS, Director General Supply (now DGIIIP), officers commanding a command and the senior staff officer of a command, as authorities for loans. Base commanders are authorized to loan materiel to Boy Scout and Girl Guide Associations, Dominion of Canada Rifle Associations and provincial rifle associations. The order requires the prior approval of the MND in respect of loans of vessels, aircraft, cannon, firearms, weapons and ammunition (with some exceptions). The authority to approve loans to provincial governments for relief purposes in the event of civil disaster is restricted to the CDS. In this regard, CFAO 36-30 (Loans of Materiel by and to DND) permits base and regional commanders to authorize the immediate issue of materiel that is available under their control in extreme emergencies.\textsuperscript{49}

27. This CFAO provides that the rental charge\textsuperscript{50} is to be calculated as follows:

a. the rental charge should normally be an amount equivalent to an amount charged by a commercial company for the rent of similar articles under similar circumstances, but no charge shall be less than an amount as computed as in subparagraph b;

b. where, having regard to the circumstances or the nature of the materiel to be loaned, the usual commercial rate referred to in subparagraph a. cannot be

\textsuperscript{47} Ibid., s. 5.
\textsuperscript{48} Public Property Loan Regulations, SOR/92-745.
\textsuperscript{49} CFAO 36-30 (Loans of Materiel by and to DND), Annex D (Loans of Materiel (Other Than to Contractors and Foreign Governments for Test and Evaluation)) at para. 8.
\textsuperscript{50} Ibid., para. 21.
readily ascertained, the rental shall be no less than five per cent of the Service
catalogue price of the materiel loaned for each month or portion thereof;

(c) rental charges shall commence upon the date of shipment and end upon the date
of receipt by DND; and

(d) recoverable invoices for rental charges shall be issued monthly on a net basis.

28. The rental charges shall include the cost of normal depreciation, fair and normal wear
and tear, handling charges and any preparatory work required to adapt the materiel to the
borrower’s special requirement. The rental charge excludes the cost of transportation,
packaging, loss, and damage beyond fair and normal wear and tear.\footnote{Ibid.}

29. The circumstances under which the MND would consider that it would be in the public
interest for charges to be waived are further amplified in the order. It provides that no charges
will be made for loans:

(a) for community activities of a non-commercial charitable nature;

(b) directly for the benefit of, or in support of, the CF or DND;

(c) for relief purposes in the event of civil disaster;

(d) to authorized law enforcement agencies in the event of civil disturbance;

(e) to armed forces of Commonwealth and NATO countries;

(f) to other government departments, Crown corporations and the RCMP; or

(g) to contractors when the charge of a rental fee would increase the cost of the
work to the Crown.

30. CFAO 36-30 (Loans of Materiel by and to DND) further provides that when, in the opinion
of the approving authority, circumstances warrant the waiving of charges in cases other than
those outlined above, “a recommendation shall be submitted to the [MND] for approval through
normal Services channels.”\footnote{Ibid., Annex D (Loans of Materiel (Other Than to Contractors and Foreign Governments for Test and Evaluation)) at para. 23.}

31. A report shall be made to the DM where an approving authority waives the rental charges
in an amount estimated to be $1,000 or more:

(a) for relief purposes in the event of civil disaster;

(b) to authorized law enforcement agencies in the event of civil disturbance;

(c) to armed forces of other Commonwealth and NATO countries,

(d) to other departments of the Government of Canada, Crown corporations; or

(e) in any other case approved by the MND.\footnote{Ibid., Annex D (Loans of Materiel (Other Than to Contractors and Foreign Governments for Test and Evaluation)) at para. 24.}

32. Where an approving authority receives a request for the loan of DND or CF materiel, the
Director Disposal Sales Artefacts and Loans (DDSAL), the NDHQ policy OPI, should be

\footnote{Ibid.}

\footnote{Ibid., Annex D (Loans of Materiel (Other Than to Contractors and Foreign Governments for Test and Evaluation)) at para. 23.}

\footnote{Ibid., Annex D (Loans of Materiel (Other Than to Contractors and Foreign Governments for Test and Evaluation)) at para. 24.}
contacted. That directorate can assist through the provision of current precedents for loan agreements and other policy information specific to the circumstances of the loan concerned.

SECTION 5

REFERENCES

Legislation


Regulations

*Defence Clothing and Equipment Loan Order*, C.R.C., c. 686.

*Defence Floating Equipment Rental Order*, C.R.C., c. 687.

*Defence Materiel and Equipment Loaned to Contractors Order*, C.R.C., c. 689.

*Defence Materiel Loan Regulations*, C.R.C., c. 690.

*Defence Materiel Loan or Transfer for Test and Evaluation Regulations*, C.R.C., c. 691.

*Loan of Defence Materiel to Canadian Contractors Order*, C.R.C., c. 709.

*Provision of Materiel and Services to Foreign Ships Order*, C.R.C., c. 721.

*Public Property Loan Regulations*, SOR/92-745.

Orders, Directives and Instructions

CFAO 23-1 (Provision of Services to Non-Defence Agencies).

CFAO 36-30 (Loans of Materiel by and to DND).

CFAO 36-53 (Materiel Disposal).

DAOD 1005-1 (Return of Proceeds from the Sale of Surplus Assets).

DAOD 4001-0 (Management of Realty Asset).

DAOD 4001-1 (Realty Asset Life Cycle Management).

Secondary Material


CHAPTER 8

LIABILITY FOR PUBLIC AND NON-PUBLIC PROPERTY

SECTION 1

INTRODUCTION

General

1. All CF members are responsible for the public and non-public property (NPP) entrusted to them and the CF must have mechanisms for dealing with the damage or loss of that property. The term ‘write-off’ refers to “the approval of a deletion from inventory of materiel that has been lost.”¹ The term ‘administrative deduction’ means:

   An amount chargeable against the pay account of a member to reimburse the Crown or a non-public property organisation, in whole or in part, for financial loss for which the member has been found responsible.²

Purpose

2. This chapter is meant to aid COs when making decisions concerning administrative deductions, issues of liability involving public and NPP, when making write-offs, and when considering the National Defence Claims Regulations, 1970.³ This chapter must be read in conjunction with the statute, regulations, orders, and directives referred to in section 2 of this chapter.

Theft, Loss or Damage

3. A CO must immediately report to the officer commanding a command or formation the loss, theft, damage, or destruction of public property, unless it is within the power of the CO to write-off the loss, or the amount of the damage does not exceed $100.⁴ The foregoing does not apply to aircraft accidents, fire, explosion, or any similar occurrence, a claim by or against the Crown, or public funds.⁵

4. The issue of liability for public and NPP is complex, and navigating through the disparate and convoluted regulations can be difficult. A prudent CO would, therefore, consult their unit legal adviser prior to ordering any administrative deduction,⁶ or where there exists the possibility of a third party claim by or against the Crown.⁷

---

² QR&O 1.02 (Definitions).
⁴ QR&O 21.71(2). See section 5, below, for additional information concerning ‘write-off.’
⁵ QR&O 21.71(1).
⁶ DAOD 7004-1 (Claims and Ex gratia Procedures).
⁷ CFAO 38-1 (Liability for Public and Non-Public Property), para. 11. The unit legal adviser will contact NDHQ.
SECTION 2

STATUTE AND REGULATIONS

National Defence Act

5. Section 37 of the NDA\(^8\) enables regulations to be made concerning the liability of CF members with respect to the loss of, or damage to, public property. Section 40 of the NDA enables similar regulations to be made with respect to NPP.

Queen’s Regulations and Orders

6. All officers and non-commissioned members must “ensure the proper care and maintenance [of], and prevent the waste of, all public and non-public property within the [member’s] control.”\(^9\) Specific liability is derived from QR&O 38.01 (Liability for Public and Non-Public Property). QR&O 38.01(1) makes CF members liable to reimburse the Crown for financial losses due to improper purchases, deficiencies in personal kit, and damage to, or loss of, DND and CF property, married quarters, single quarters, dining facilities, and recreational facilities. QR&O 38.01(2) makes CF members similarly liable to reimburse NPP organizations for damage to, or loss of, NPP. QR&O 38.03 (Administrative Deductions) provides the authority by which administrative deductions may be ordered against members in order to reimburse the Crown or an NPP organization.

SECTION 3

ADMINISTRATIVE DEDUCTIONS

General

7. Administrative deductions are a means by which a member may be ordered to reimburse the Crown for the loss of, or damage to, public property that occurs when the member is acting within the scope of their duties or employment or when a member is liable to reimburse an NPP organization for the loss of, or damage to, NPP.\(^10\)

8. Administrative deductions are not bars to disciplinary action nor are they to be used in lieu of disciplinary action. However, where a member is found guilty of an offence arising from the loss of, or damage to, public or NPP, the presiding officer may consider the amount of any administrative deduction as a mitigating factor during the sentencing phase.\(^11\)

Procedural Fairness

9. Procedural fairness is an essential element of administrative decision-making. This is no less the case when a CO decides whether to order an administrative deduction against a member. For this reason, the process to be followed in ordering an administrative deduction is designed to be inherently fair.

10. A CO who is considering ordering an administrative deduction against a member must ensure that the incident resulting in the loss or damage has been fully investigated.\(^12\) If, after examining the investigation, the CO decides that an administrative deduction is warranted, the CO must propose the administrative deduction to the member using the appropriate annex to

---


\(^9\) *QR&O* 4.02(d) and *QR&O* 5.01(d).

\(^10\) CFAO 38-1 (Liability for Public and Non-Public Property), paras. 2a, 3.


\(^12\) *QR&O* 38.03(1).
CFAO 38-1 (Liability for Public and Non-Public Property), except in the case of illegal absentees. This step satisfies the requirement of procedural fairness that notice be given to the member. Written reasons must be appended to the annex to support both the imposition of the proposed administrative deduction and the amount of the proposed administrative deduction (i.e., the proceedings of a BOI, the report of an SI, a memorandum from an investigating officer, a form CF 164, etc.). This step satisfies the requirement of procedural fairness to ensure that the case ‘to be met’ is disclosed to the member.

11. The member may accept the proposed deduction or object to it on the grounds that it is unwarranted or excessive. If the member objects to the deduction, the member may append written reasons to the annex and return it to the CO. This step satisfies the requirement of procedural fairness in that the member is given the opportunity to make submissions.

12. If, upon receiving the member’s objection, the CO is in any doubt as to the propriety of ordering an administrative deduction, the CO must give the member the benefit of the doubt. If the CO maintains that an administrative deduction is warranted, the matter may be passed up the chain of command to the formation commander, the officer commanding a command, and finally, the CDS. Each of these officers must be presented with all available evidence relating to the occurrence and with the written submissions of the member concerned.

Investigations

13. QR&O 38.03(1) states:

Any circumstances which may give rise to liability of an officer or non-commissioned member to reimburse the Crown or a non-public property organization under article 38.01 (Liability for Public or Non-public Property), shall be investigated (see Chapter 21 – Summary Investigations and Boards of Inquiry). A statement from the member concerned should be obtained if practical.

14. In conducting an investigation regarding the loss of, or damage to, public property or to NPP, particular attention should be paid to QR&O Chapter 21 (Public or Non-Public Property), section 10. The CO may choose to convene a BOI, order an SI, or order an informal administrative investigation. Where an administrative deduction is contemplated in response to a BOI, the minutes of proceedings shall be so endorsed by the review authority.

‘Wilfulness’ and ‘Negligence’

15. In deciding whether an administrative deduction against a member is warranted, a CO must determine whether the member acted either wilfully or negligently. If there is neither wilfulness nor negligence, no blame is attributable to the member. An administrative deduction cannot, therefore, be imposed.

16. QR&O Chapter 38 (Liability for Public and Non-Public Property) provides that administrative deductions will not be imposed with respect to improper purchases, loss of, or

---

13 CFAO 38-1 (Liability for Public and Non-Public Property), para. 28.
14 Ibid., para. 36.
15 QR&O 38.03(3).
16 CFAO 38-1 (Liability for Public and Non-Public Property), Annex B (Administrative Deduction – General Form), Part B and Annex C (Administrative Deduction – Damage to Married Quarters), Part B.
17 Ibid., para. 5.
18 QR&O 38.03(6).
19 CFAO 38-1 (Liability for Public and Non-Public Property), para. 6.
20 DAOD 7002-1 (Boards of Inquiry), marginal note: Forwarding and Staffing Procedures/Endorsement of the Minutes of Proceedings by Review Authorities.
21 QR&O 38.01(1)(a).
damage to, public property\textsuperscript{22} and NPP,\textsuperscript{23} if there is only negligence of a minor character. CFAO 38-1 (Liability for Public and Non-Public Property) widens the scope of this limit with the blanket statement: ‘An administrative deduction shall not be imposed in respect of negligence of a minor character.’\textsuperscript{24} In other words, administrative deductions may be imposed only where there is negligence of other than a minor character or an element of wilfulness exists in the circumstances of the case.

17. The word ‘negligently’ signifies that the member did something, or omitted to do something, in a manner that would not have been adopted by a reasonably capable and prudent person in the member’s position in the CF under similar circumstances.\textsuperscript{25} Where administrative deductions are concerned, there are two types of negligence:

   a. negligence of a minor character – blame is attributable to the member but there is no recklessness, undue carelessness, intentional commission of a wrongful act, or intentional omission to perform a legal duty; and

   b. negligence of other than a minor character – blame is attributable to the member involving recklessness, undue carelessness, intentional commission of a wrongful act, or intentional omission to perform a legal duty.\textsuperscript{26}

18. The meanings of the words ‘reckless’ and ‘careless’ are intertwined. To be reckless is to be heedless of consequences, headlong, irresponsible, or to show carelessness for the consequence of one’s actions.\textsuperscript{27} To be careless is to be consciously indifferent or oblivious to the potential consequences of one’s actions.\textsuperscript{28} The word ‘intent’ signifies aim, actual desire, design, end, objective or purpose.\textsuperscript{29} In the context of negligence of other than a minor character, the term ‘intent’ refers to the commission or omission of an act, not necessarily to the results of that act. The word ‘wilful’ signifies that one knew what one was doing, that one intended to do what one did, and that one was not acting under compulsion.\textsuperscript{30} In the context of administrative deductions, the term wilful is applied to an act where the member intended to cause the damage or loss to the public or NPP in question.

19. Some illustrations may be of assistance to the reader. For example, take a situation where damage occurs to a stack of china plates during a formal dinner:

   a. where a member is not paying attention to his surroundings and clumsily trips over a chair and falls into a table, thereby knocking over a stack of plates, negligence of a minor character can be said to have caused the loss;

   b. where a member insists on carrying the entire stack of plates at once, after having been warned not to do so, and subsequently drops the stack of plates, recklessness or undue carelessness (i.e., negligence not of a minor character) can be said to have caused the loss;

   c. where a member strikes a second member, causing the second member to fall into the stack of plates, thereby breaking them, the intentional commission of a wrongful act (i.e., negligence not of a minor character) can be said to have caused the loss; and

\textsuperscript{22} QR&O 38.01(1)(b).
\textsuperscript{23} QR&O 38.01(2).
\textsuperscript{24} CFAO 38-1 (Liability for Public and Non-Public Property), para. 12.
\textsuperscript{25} For example, see QR&O 103.33 (Setting Free Without Authority or Allowing or Assisting Escape), Note (B). Note that this is a modified, objective standard (i.e., what might constitute negligence on the part of an experienced NCO would not necessarily constitute negligence on the part of an inexperienced Pte).
\textsuperscript{26} CFAO 38-1 (Liability for Public and Non-Public Property), para. 9.
\textsuperscript{27} D.A. Dukelow, The Dictionary of Canadian Law, 3\textsuperscript{rd} ed. (Toronto: Carswell, 2004), s.v. ‘reckless.’
\textsuperscript{28} Ibid., s.v. ‘careless.’
\textsuperscript{29} Ibid., s.v. ‘intent.’
\textsuperscript{30} For example, see QR&O 103.33 (Setting Free Without Authority or Allowing or Assisting Escape) at Note (C).
d. where a member exclaims, “Let’s smash the Regimental china!” and proceeds to kick over the stack of plates, a wilful act can be said to have caused the loss.

Limitations Concerning Amount of Administrative Deductions

20. *QR&O 38.03(4)(b)* places limits on the amount that may be ordered as an administrative deduction with respect to improper purchase, loss of public property, and loss of NPP, where there is negligence not of a minor character. *CFAO 38-1 (Liability for Public and Non-Public Property)* widens the scope of this limit by providing, “Except as otherwise provided in this order, an administrative deduction in respect of negligence not of a minor character shall not exceed the scale prescribed in *QR&O 38.03(4)(b).*” In other words, unless there is a provision to the contrary in *CFAO 38-1* (Liability for Public and Non-Public Property), such as personal kit or married quarters, the following limits apply to all administrative deductions where there is negligence not of a minor character:

Table 1: Maximum Amount of Administrative Deduction – Negligence Not of a Minor Character

<table>
<thead>
<tr>
<th>Where the amount involved is:</th>
<th>The administrative deduction cannot exceed:</th>
</tr>
</thead>
<tbody>
<tr>
<td>$25 or less</td>
<td>The full amount</td>
</tr>
<tr>
<td>More than $25 but not more than $100</td>
<td>The greater of one-half the amount or $25</td>
</tr>
<tr>
<td>More than $100 but not more than $300</td>
<td>The greater of one-third the amount or $50</td>
</tr>
<tr>
<td>More than $300 but not more than $500</td>
<td>The greater of one-quarter of the amount or $100</td>
</tr>
<tr>
<td>More than $500</td>
<td>The greater of one-fifth of the amount or $125 (cannot exceed $250 where liability arises out of negligence in operating a motor vehicle)</td>
</tr>
</tbody>
</table>

21. Conversely, where the loss or damage is occasioned by a member’s wilful act or omission (see example at subparagraph 19d), the CO should consider imposing an administrative deduction for the full amount of the loss or damage. This is particularly true where the loss or damage occurred while the member had possession of the property without authority, or as the result of an offence for which the member has been convicted. Such a measure need not be considered where the Crown asserts a claim against a third party (or the third party’s insurer) for the loss of public property, or if the loss of NPP is covered by insurance.

Improper Purchases at Public Expense

22. If a member makes an improper purchase at public expense, administrative deductions will normally be warranted only where the CO decides that the member made the purchase wilfully, knowing that the purchase was improper. Thus, the CO must decide, on a balance of probabilities, that the member knew that the purchase was made improperly, that the member intended to make the purchase, and that the member was not acting under compulsion to make the purchase.

Kit Deficiencies

23. If a member loses a piece of personal kit, the onus is placed on the member to prove that the loss was not due to their own wilfulness or negligence. If the member succeeds in proving,
on a balance of probabilities, that the loss was neither due to wilfulness nor to negligence, an administrative deduction cannot be ordered against the member.

24. If the member fails to prove that the loss was neither due to wilfulness nor to negligence, an administrative deduction may be ordered against the member at the CO’s discretion. As a general guideline, if the lost piece of kit was old or issued to the member in poor condition, the CO should consider imposing an administrative deduction of less than the catalogue value to reflect the depreciated value of the item. Conversely, if the item was highly attractive (e.g., a laser range finder, GPS unit, etc.), the CO may wish to consider imposing an administrative deduction for the full value of the item. That is to say, the maximum amounts contained in Table 1 at paragraph 20, above, do not apply to deficiencies of personal kit.

Married Quarters

25. An administrative deduction may be imposed with respect to damage occurring to married quarters, except for damage beyond the control of the member (i.e., reasonable wear and tear, fire, lightning, etc.). The maximum amounts contained in Table 1 at paragraph 20, above, do not apply to married quarters and the CO has the discretion to order an administrative deduction to cover all or part of the loss. In exercising this discretion, the CO should consult paragraphs 17 to 20 of CFAO 38-1 (Liability for Public and Non-Public Property).

Loss Incurred Where Member is an Occupant

26. QR&O 38.01(1)(e) provides a mechanism by which each and every member occupying a facility can be held liable for any loss or damage. The onus is placed on each individual member to prove, on a balance of probabilities, that the loss was not due to their wilfulness or negligence. If a member succeeds in proving that the loss was neither due to wilfulness or negligence on their part, an administrative deduction cannot be ordered against that member. Any occupant who does not prove, on a balance of probabilities, that the loss was neither due to wilfulness or negligence on that member’s part is subject to an administrative deduction. The total amount is divided equally among the members subject to an administrative deduction, but the total amount cannot exceed the maximum amount as set out in Table 1 at paragraph 20 above. However, a subsequent increase, reduction, or cancellation of one individual’s deduction does not, in and of itself, affect the amount of any other individual’s deduction. The authority provided under QR&O 38.01(1)(e) is not to be used where the liability of a particular member, or members, can be established.

Public Funds – Loss, Deficiency or Overage

27. Circumstances involving losses, deficiencies or overages of public funds are a specialized situation and the CO should refer to CFAO 202-4 (Public Funds – Reporting Losses, Deficiencies or Overage) for guidance. A CO, an officer commanding a formation, or an officer commanding a command may propose an administrative deduction with respect to a loss of public funds. However, such an administrative deduction may be ordered only by the CDS.

38 Depreciated values can be obtained from the CF supply system or AJAG offices.
39 CFAO 38-1 (Liability for Public and Non-Public Property), para. 15.
40 QR&O 38.01(1)(d).
41 QR&O 38.01(1) states that a CF member is liable to reimburse the Crown for any financial loss relating to: (a) an improper purchase; (b) wilful or negligent damage or loss; (c) deficiency in personal equipment; (d) damage or loss of public property - married quarters; or (e) damage or loss of public property in other quarters or recreational facility. See also QR&O 38.03(5) concerning the limits on the amount of deductions that may be ordered pursuant to QR&O 38.01 (Liability for Public and Non-Public Property).
42 CFAO 202-4 (Public Funds – Reporting Losses, Deficiencies or Overage), para. 15, Note 1.
Non-Public Property

28. *QR&O* 38.01(2) provides the authority by which an administrative deduction can be imposed for the loss, deficiency, theft, destruction, deterioration, or improper expenditure of NPP. CFAO 38-1 (Liability For Public and Non-Public Property) applies to any administrative deduction made pursuant to *QR&O* 38.01(2).

29. Only the CDS may authorise the sale or other alienation of NPP. Therefore, a CO cannot impose a policy whereby members who lose or damage NPP are made to buy the item (i.e., “You break it, you bought it!”).

30. *QR&O* Chapter 38 (Liability for Public and Non-Public Property), as amplified by CFAO 38-1 (Liability For Public and Non-Public Property), is the authority by which all administrative deductions are made with one exception: that of overdue accounts to messes, canteens, and institutes. Note that a debt to a NPP organization is a debt to Her Majesty the Queen in Right of Canada. Where a member is delinquent in paying their mess bill, *QR&O* 27.38 (Administrative Deductions – Overdue Non-Public Accounts) provides the member’s CO with the authority to subject the member “to an administrative deduction in an amount sufficient to pay the account in full.” This differs from the procedure for other administrative deductions in that there is no limit to the amount that may be deducted (up to the amount owed) and there is no opportunity for the member to object to the deduction.

Limitations on the Power to Impose Administrative Deductions

31. Despite any of the foregoing, the power to order administrative deductions (under *QR&O* Chapter 38 (Liability for Public or Non-Public Property)), over the objection of the member, is extremely limited. If liability exists under *QR&O* 38.01 (Liability for Public or Non-Public Property), and it is determined that reimbursement is warranted, administrative deductions may be ordered as follows:

   a. by a CO, unless:

      i. the amount exceeds $200;

      ii. the member concerned objects on the grounds that the proposed deduction is unwarranted or excessive; or

      iii. a loss of, or deficiency in, public funds is involved.

   b. by an officer commanding a formation, or an officer commanding a command, unless:

      i. the member concerned objects on the grounds that the proposed deduction is unwarranted or excessive and the amount exceeds:

          (1) $50 in the case of an officer commanding a formation; or

          (2) $100 in the case of an officer commanding a command; or

      ii. a loss of, or deficiency in, public funds is involved.

   c. by the CDS, unless;

---

43 *NDA*, s. 39(3).
44 *QR&O* 38.03(2)(a).
45 *QR&O* 38.03(2)(b).
A-LG-007-000/AF-010  MILITARY ADMINISTRATIVE LAW MANUAL

i. the member concerned objects on the grounds that the proposed deduction is unwarranted or excessive, and the amount exceeds $250.\(^{46}\)

The CDS also has the authority to increase, reduce, or cancel any administrative deduction ordered by a subordinate commander, subject to the proviso that the deduction cannot be raised above $250 over the objection of the member.\(^{47}\)

32. The power to order an administrative deduction may be summarized as follows:

Table 2: CFAO 38-1 (Liability For Public and Non-Public Property), Annex D (Power to Order an Administrative Deduction)

<table>
<thead>
<tr>
<th>Authority</th>
<th>Maximum with Consent</th>
<th>Maximum without Consent</th>
<th>Illegal Absentee</th>
<th>Loss or Deficiency of Public Funds</th>
</tr>
</thead>
<tbody>
<tr>
<td>CO</td>
<td>$200</td>
<td>Nil</td>
<td>Nil</td>
<td>Nil</td>
</tr>
<tr>
<td>Formation Commander</td>
<td>No limit</td>
<td>$50</td>
<td>$50</td>
<td>Nil</td>
</tr>
<tr>
<td>Commander of Command</td>
<td>No limit</td>
<td>$100</td>
<td>$100</td>
<td>Nil</td>
</tr>
<tr>
<td>CDS</td>
<td>No limit</td>
<td>$250</td>
<td>$250</td>
<td>No limit with consent; $250 without consent.</td>
</tr>
</tbody>
</table>

33. When an administrative deduction is originally ordered, or when it is increased by the CDS, the member must be given the opportunity to object on the grounds that the proposed deduction is unwarranted or excessive.\(^{48}\) The regulations provide no means of taking issue with a member who objects to an administrative deduction on these grounds. In other words, the objection need not be reasonable; it is sufficient that the objection is made. Thus, if a member objects, the maximum administrative deduction that may be ordered against the member to reimburse the Crown or an NPP organization is $250, and then only by the CDS.

34. Where a CO, a formation commander, or an officer commanding a command is precluded from ordering an administrative deduction, that officer is to report the matter to the next higher authority and shall forward all available evidence (i.e., proceedings of BOI, minutes of SI, etc.), and any statement made by the member in support of their objection, to the next higher authority.\(^{49}\)

35. If the CDS is precluded from ordering an administrative deduction because of the member’s objection, the matter is to be referred to the Judge Advocate General (JAG).\(^{50}\) The JAG will then refer the matter to the Director of Claims and Civil Litigation (DCCL) at the Office of the DND/CF Legal Adviser (DND/CF LA). Should it be decided that civil action is to be taken to recover the loss, the amount proposed for the administrative deduction does not prejudice the right of the Crown or the NPP organization to recover the full amount of the loss.\(^{51}\)

36. This raises doubts as to the purpose and viability of administrative deductions. If the CDS can order an administrative deduction of only $250 over the objection of the member (see Table 2 above), why would a member ever consent to an administrative deduction of more than

\(^{46}\) QR&O 38.03(2)(c).

\(^{47}\) QR&O 38.03(9).

\(^{48}\) QR&O 38.03(3). The opportunity to object does not apply to illegal absentees of the regular force, members of the reserve force who are absent from their unit without authority in excess of three months, and members who have released but have not died.

\(^{49}\) QR&O 38.03(6).

\(^{50}\) QR&O 38.03(7).

\(^{51}\) Ibid.
37. For example, a member recklessly destroys NPP valued at $5,000. As the loss of NPP was over $500 and was due to recklessness (i.e., negligence not of a minor character), QR&O 38.03(4)(b)(v) applies and the administrative deduction cannot exceed $1,000 (i.e., one-fifth of the amount – see Table 1). The CO decides to recover the maximum amount possible but QR&O 38.03(2)(a)(i) prevents a CO from ordering an administrative deduction of over $200 (even with consent – see Table 2). The CO, therefore, reports the matter to their brigade commander. The brigade commander proposes to order an administrative deduction of $1,000, but the member objects. The same thing happens at the command and CDS levels. The matter is eventually referred to DCCL and the decision is made to sue the member for the full amount of the loss. If the CF is successful in its action, the member is liable for $5,000. Whereas, had the member accepted the administrative deduction, the member would have been liable for only $1,000.

38. In respect of public property destroyed or damaged, or the loss of public funds, by a CF member, the loss is recovered by way of deduction from, or set off against, any sum of money that may be due or payable to the CF member.  

**Joint Negligence**

39. It is possible that two or more members may be jointly negligent for the same loss. Except where the liability is based on QR&O 38.01(1)(e), the CO must apportion blame to each member on a percentage basis (i.e., Cpl A is 50% responsible, Cpl B is 40% responsible, and Cpl C is 10% responsible). The total amount of all deductions cannot exceed the maximum amount as prescribed in Table 1 at paragraph 20, above.

**Member From Another Unit**

40. Where the public or NPP of Unit A is lost or damaged by a member of Unit B, or by a member of Unit A who is subsequently posted to Unit B, the CO of Unit A will cause the matter to be investigated. If the results of the investigation are such that the CO of Unit A feels that an administrative deduction is warranted, they will submit particulars and recommendations to the CO of Unit B.

41. If the CO of Unit B agrees that an administrative deduction is warranted, they will complete Part A of the appropriate annex to CFAO 38-1 (Liability For Public and Non-Public Property) and forward a copy to the member and the CO of Unit A, respectively.

42. If the CO of Unit B does not agree that an administrative deduction is warranted, they will so notify the CO of Unit A and seek their concurrence in not imposing the administrative deduction. If the two COs cannot agree, the CO of Unit A shall forward a full report (including the views of the CO of Unit B), to command headquarters (if both units are in the same command), or to NDHQ (if both units are not in the same command), for a decision pursuant to QR&O 38.03(2).

---

52 QR&O 38.03(11).
53 See Note to QR&O 38.01 (Liability For Public or Non-Public Property).
54 See paras. 27-28, above.
55 CFAO 38-1 (Liability For Public and Non-Public Property), para. 10.
56 Ibid., at para. 7.
57 Ibid., at para. 31.
58 Ibid., at para. 32.
59 Ibid., at para. 33.
Voluntary Reimbursement

43. If a member voluntarily reimburses the amount that they would have otherwise been liable to repay, pursuant to QR&O Chapter 38, an administrative deduction shall not be imposed against the member.  

Miscellaneous Provisions

44. If a member wilfully or negligently loses their CF identification card, the CO may order an administrative deduction of $25 against the member. If a member loses or damages a Geneva Convention Identification Card (Form CF 281), a CO may consider imposing an administrative deduction of $3.

45. Subject to the other provisions of QR&O Chapter 38 (Liability for Public and Non-Public Property), an administrative deduction may be ordered against the pay and allowances of illegal absentees. The administrative deduction may be ordered after the expiration of 21 days after the member is reported absent without authority.

SECTION 4

NATIONAL DEFENCE CLAIMS REGULATIONS, 1970

46. The National Defence Claims Regulations, 1970, prescribe the liability of a member to reimburse the Crown for loss of, or damage to, public property that occurs when the member is acting outside the scope of their duties or employment. All such cases shall be reported to the unit legal adviser who shall refer the matter to the appropriate Assistant Judge Advocate General (AJAG) for an opinion.

SECTION 5

WRITE-OFF

47. Pursuant to DAOD 1006-1 (Write-Off of Materiel), a CO’s responsibilities with respect to write-offs include the following:

a. losses of materiel approved for write-off are to be reported quarterly through the chain of command;

b. materiel is to be written-off in accordance with the document titled Delegation of Authorities for Financial Administration for DND and the CF; and

c. the effective operational management of the write-off of materiel is to be conducted in accordance with Chapter 13 (Clothing and personal equipment) at Volume 3 (Corporate CFSS procedures) of the Canadian Forces Supply Manual.

---

60 Ibid., at para. 24.
61 CFAO 26-13 (Geneva Convention Identification Cards and Certificates – Members of the Canadian Forces), subpara. 12d.
62 CFAO 19-19 (Disposal of Absentees), subpara. 3g(1) and Annex C (Action Required When a Member of the Reserve Force on Class “C” is Reported Absent), subpara. 1f(1).
63 QR&O Vol. 4, Appendix 1.6 (National Defence Claims Regulations, 1970).
64 Ibid., para. 3.
65 Ibid., paras. 4-5. The matter may be referred to a higher authority such as the Director of Claims and Civil Litigation (DCCL).
48. Within the *Delegation of Authorities* document is a matrix referred to as the ‘Delegation Instrument’ (DI Matrix). Write-off authority is found at Column 42 of the DI Matrix, to which the following notes apply:

    This is the authority to approve or recommend for write-off, the recording of losses due to inventory shortage, destruction, fire, theft, loss and other reasons (i.e., negligence) of materiel for which the approving authority is responsible. However, [COs] shall not have write-off authority for materiel for which they are the account holder. This authority does not apply to disposals, sales, trade-ins, or donations of surplus or unserviceable materiel.

[emphasis added]

49. It should be noted that write-off only authorizes amendment of records to adjust for a previous event. The write-off of materiel does not prejudice any subsequent disciplinary, recovery, or other administrative action against a DND employee or CF member: “The dollar value of authority limits for the write-off of materiel is based on the historical (purchase) cost of the materiel, as opposed to the depreciated value under accrual accounting.”

50. For the purpose of the DI Matrix, the position of CO is considered to be equivalent to that of base commander. Therefore, COs may write-off materiel of an amount up to $40,000. This amount is in Canadian funds, includes applicable taxes and is ‘per incident.’

51. Write-off authority cannot be re-delegated (i.e., COs cannot delegate their signing authority to a subordinate, nor may a subordinate sign a write-off on behalf of the CO). However, an acting CO may exercise the CO’s write-off authority but only if the CO’s superior (i.e., brigade commander) provides authority for doing so, in writing.

52. The write-off of NPP may be approved as follows:

   a. the CO of a station or unit may approve a write-off of NPP if the loss in any single occurrence does not exceed $500;

   b. a base commander may approve a write-off of NPP if the loss in any single occurrence does not exceed $1,000; or

   c. the officer commanding a command may approve the write-off of NPP in any other case.

SECTION 6

REFERENCES

Legislation


Regulations

QR&O 1.02 (Definitions).

QR&O 4.02 (General Responsibilities of Officers).

QR&O 5.01 (General Responsibilities of Non-Commissioned Members).

QR&O 21.71 (Loss of or Damage to Public Property Other Than Public Funds).

QR&O Chapter 38 (Liability for Public and Non-Public Property).

QR&O 38.01 (Liability for Public or Non-Public Property).

QR&O 103.33 (Setting Free Without Authority or Allowing or Assisting Escape).

QR&O 108.20 (Procedure).

QR&O Volume 4, Appendix 1.6 (National Defence Claims Regulations, 1970).

Orders, Directives and Instructions

CFAO 19-16 (Civil Prosecution).

CFAO 19-19 (Disposal of Absentees).

CFAO 22-10 (Investigation and Report of Loss or Damage Due to Criminal Offences).

CFAO 26-3 (Identification Cards).

CFAO 26-13 (Geneva Convention Identification Cards and Certificates – Members of the Canadian Forces).

CFAO 27-6 (Base and Station Funds – Regular Force).

CFAO 38-1 (Liability for Public and Non-Public Property).

CFAO 202-4 (Public Funds – Reporting Losses, Deficiencies or Overage).

DAOD 1006-1 (Write-Off of Materiel).

DAOD 7002-1 (Boards of Inquiry).

DAOD 7004-1 (Claims and Ex gratia Procedures).

Secondary Material


CHAPTER 9
ACCESS TO INFORMATION AND PRIVACY

SECTION 1
INTRODUCTION

1. The Government of Canada holds documents containing information on government business and activities, as well as personal information on Canadian citizens. The Access to Information Act (AIA) provides the public with the means of obtaining records held by government institutions. The Privacy Act (PA) protects a person’s personal information from disclosure to third parties and it provides, under certain circumstances, a person access to their own personal information.

SECTION 2
ACCESS TO INFORMATION ACT

2. The AIA sets out who has the right to access records under the control of a government institution. The Act also provides a definition of what qualifies as a record for its purposes. A list of exemptions specified in the AIA limiting a person’s right to disclosure of information held by the government is covered in sections 13 to 26 of the AIA. These exemptions will be discussed in greater detail in this chapter.

3. The general principle with respect to disclosure of government information is to provide the information to the public on request. However, there are a few exemptions provided for by the legislation. These exemptions are limited and specific so as to ensure that information is not withheld in the absence of a valid reason. The AIA provides a list of these exemptions in order to ensure that information is not withheld arbitrarily. The Act also provides for an independent review by the Information Commissioner (IC) or the Federal Court of Canada (FCC) with respect to any refusal to disclose information.

4. The Act is used to complement existing methods of public access to departmental records. It is not meant to replace these methods. Informal requests for access to records in the control of departments should still be used to provide access to these records. Informal access is processed outside of the AIA. DAOD 1001-2 (Informal Requests for Access to Departmental Information) addresses the procedures associated with informal requests.

5. In order to be an applicant and entitled to make a request for the release of records under the AIA, the applicant must be a Canadian citizen or a permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act (IRPA). The applicant must:

   a. be present in Canada at the time of the request (and at the time of receipt of the material);

   b. pay a fee to the Receiver General for Canada (which is often waived); and

---

1 Access to Information Act, R.S.C. 1985, c. A-1, s. 2(1) [AIA].
2 Privacy Act, R.S.C. 1985, c. P-21, s. 2. [PA].
4 AIA, ss. 30(1), 41.
5 Ibid., s. 2(2).
6 DAOD 1001-0 (Access to Information), marginal note: Policy Direction/Context.
7 AIA, s. 4(1).
6. In order to determine what information can be disclosed and what must be withheld, the CO must know what qualifies as a ‘record.’ Section 3 of the AIA defines a ‘record’ to include:

   any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record, and any other documentary material, regardless of physical form or characteristics, and any copy thereof. 9

Based on the above definition, a ‘record’ includes almost anything and it is very wide reaching. It would include drafts that clearly indicate how the final document evolved.

7. There are two methods of access to information in records held by DND and the CF. The first method is a formal request for access. This is accomplished by submitting a request in writing to the Director Access to Information and Privacy (DAIP) at NDHQ. The second method is an informal request for access to the information. This can be done either in writing or verbally to the department that has the requested information in its possession. 10

8. Applicants may ask to have the documents provided to them in their official language. If the record does not exist in their official language and DAIP believes that it is in the public interest to provide translation, it should be translated in a reasonable period of time. The decision to prepare or deny a translation will be made on a case-by-case basis. 11

9. Operational, administrative and transitory records are subject to the AIA. Also, only departmental records are subject to the AIA. Records pertaining to a Minister’s constituency or political business are not considered departmental files. 12 Notes made by employees or servants in the course of their employment/duties are in fact departmental records.

10. Transitory records are defined as records that are "…required only for a short time to ensure the completion of a routine action or the preparation of a subsequent record. These short-lived records are not essential in documenting the initiation or conduct of a government institution’s business." 13 An example of a transitory document includes a message slip indicating that a meeting is to be held at a particular time. Transitory records may be disposed of unless an access request has been made. Any transitory records still in existence at the time of the request must be dealt with in accordance with the AIA.

11. The Office of Primary Interest (OPI) must process and send the completed request for access to information back to DAIP within 30 days of receiving the original request from DAIP. On receiving the completed request, DAIP must ensure that the AIA was complied with and it must also provide the applicant with written notice as to whether access will be given or refused. If access is to be given, the applicant is to be provided with the information. 14 The OPI will be any department or unit that has the requested record in its possession.

12. The OPI has a number of responsibilities with respect to access to information requests. These responsibilities include:

---

8 DAOD 1001-1 (Formal Requests for Access to Departmental Information), marginal note: Guidelines/Conditions applying to the applicant.
9 AIA, s. 3.
10 DAOD 1001-0 (Access to Information), marginal note: Methods of Access/Types of Requests.
11 Ibid., marginal note: Methods of Access/Language of Requests.
12 DAOD 1001-1 (Formal Requests for Access to Departmental Information), marginal note: Guidelines/Types of Records.
14 AIA, s. 7.
a. locating all records pertaining to the access request, regardless of form;
b. ensuring records are complete;
c. determining the sensitivity of information;
d. recommending severances;
e. assessing the time to respond to the access request (i.e., the OPI must advise DAIP of any need for an extension of the statutory, 30 calendar day time limit);
f. signing off at the appropriate level; and
g. sending the completed request to DAIP.\(^{15}\)

13. The 30-day time limit may be extended for a reasonable period of time if the request was for a large number of records or it is necessary to search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution. It may also be extended if consultations are necessary to comply with the request or if a notice of the request is given to a third party as provided for under the AIA and, for one of these reasons, the 30-day time limit cannot be met. DAIP must give notice of the extension and the length of the extension to the applicant within 30 days after the request was received. The notice must contain a statement that the person has a right to make a complaint to the IC about the extension. Notice of the extension must also be given to the IC.\(^{16}\)

Exclusions and Exemptions

14. Even though a person may file a request for information, not all information within the control of the Government will be provided to the applicant. If the information is readily available to the public, citizens are expected to obtain the materials themselves. The following categories of information are specifically excluded from the scope of the AIA:

a. published material;
b. material available for purchase by the public;
c. library or museum material made or acquired and preserved solely for public reference or exhibition purposes;
d. material placed in the National Archives, the National Library or the National Museums of Canada by, or on behalf of, persons or organizations other than government institutions; and
e. confidences of the Queen’s Privy Council for Canada.\(^{17}\)

15. There are also exemptions that limit the amount of disclosure that may be provided to an applicant. The public is not entitled to access every record in the government’s possession. Certain records either must not, or should not, be released to the public. However, information that can be released must be released. Section 25 of the AIA provides for the severance of information that cannot be disclosed from the information that can. It states, “…the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such [exempted] information or material.”\(^{18}\) DAIP is responsible for reviewing severances recommended by the OPI.

16. The allowable exemptions are set out in sections 13 to 26 of the AIA. There are two types of exemptions: mandatory and discretionary. The majority of exemptions provided under

\(^{15}\) DAOD 1001-1 (Formal Requests for Access to Departmental Information), marginal note: Responsibilities/Responsibility Table.

\(^{16}\) AIA, ss. 9(1)-(2).

\(^{17}\) DAOD 1001-0 (Access to Information), marginal note: Definitions/Excluded Material.

\(^{18}\) AIA, s. 25.
the AIA are discretionary in nature. A mandatory exemption requires the head of the government institution to withhold disclosure of the relevant information that has been requested. A discretionary exemption is one in which the head of the government institution has some discretion as to whether the requested records should be disclosed. Case law indicates that this discretion must be exercised fairly and not be arbitrary. When exercising discretion, the decision-maker usually must consider whether the disclosure would cause injury to the concerned party.

17. DAIP has an option to disclose any record that is subject to discretionary exemptions where it is felt that no injury will result from its disclosure, or if the interest in disclosing the information outweighs any injury that could result from its disclosure. This is referred to as the ‘injury’ test. When deciding on whether an injury will occur, DAIP must decide whether the injury to the actual party or interest will be specific, current or probable.

**Mandatory Exemptions**

18. The following AIA exemptions are mandatory:
   a. subsection 13(1) - information obtained in confidence from the government of a foreign state, international organization of states, provincial governments and municipal/regional governments;
   b. subsection 16(3) - information that was obtained or collected by the RCMP while performing policing services for a province or municipality where the Government of Canada has agreed on request to protect such information;
   c. subsection 19(1) - personal information;
   d. section 20 - third party information; and
   e. section 24 - statutory prohibition.

19. DAIP must refuse to disclose any records to the public that are subject to mandatory exemptions. However, for certain mandatory exemptions, the record may be disclosed if the person affected by the information consents. For instance, subsection 19(1) of the AIA provides that a record must not be disclosed if the record contains personal information as defined by section 3 of the PA. However, it may be disclosed if:
   a. the person whose personal information is in the record consents to its disclosure;
   b. the information is publicly available; or
   c. the information is in accordance with section 8 of the PA. Section 8 of the PA lists a number of circumstances whereby personal information may be disclosed without the consent of the person to whom it belongs.

This will be discussed in greater detail in section 3 of this chapter.

20. Another important mandatory exemption is provided for in subsection 20(1) of the AIA. Records containing third party information must not be disclosed if the record requested contains trade secrets of a third party, financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party, information whose disclosure could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice, the competitive position of a third party, or information the disclosure of

---

19 TB Manual, Access to Information, c. 2-7, s. 8.2 at p. 12.
20 Ibid., c. 2-7, s. 8.2 at p. 13.
21 DAOD 1001-1 (Formal Requests for Access to Departmental Information)
22 AIA, s. 19(1).
which could reasonably be expected to interfere with contractual or other negotiations of a third party. It may be disclosed, however, if the third party consents to its disclosure.23 This exemption is applied in DND to material pertinent to private sector organizations that have entered into contracts with DND to provide goods and services.

21. Another mandatory exemption is found in section 24 of the AIA. This section of the Act also prohibits the disclosure of any record requested under the AIA that contains information, the disclosure of which is restricted by another statute. There is a list of the statutes in schedule 2 of the Act.24

**Discretionary Exemptions**

22. There are times in which the DAIP can exercise discretion when deciding whether to release a record. These records are said to be subject to a discretionary exemption. There is a list of discretionary exemptions in the AIA. COs should note the following in particular:

   a. section 15 - international affairs and defence;
   b. subsection 16(1) - law enforcement and investigations;
   c. subsection 21(1) - advice, recommendations, deliberations and plans; and
   d. section 23 - solicitor-client privilege. A detailed list of the discretionary exemptions can be found in DAOD 1001-1 (Formal Requests for Access to Departmental Information).

23. Section 15 of the AIA pertains to international affairs and defence. Disclosure of records may be refused if the record requested contains information which, if disclosed, could reasonably be expected to be injurious to the conduct of international affairs, the defence of Canada or any state allied or associated with Canada or the detection, prevention or suppression of subversive or hostile activities.25

24. Section 16 of the AIA provides an exemption from disclosure for records relating to law enforcement and investigations, investigative techniques and plans for lawful investigations, criminal methods and techniques, etc.26 This exemption includes law enforcement investigations conducted by the MP and NIS.

25. Subsection 21(1) of the AIA also provides that advice or recommendations developed by or for a government institution or a Minister of the Crown, and positions or plans prepared for negotiations, constitute a discretionary exemption. This section does not apply to discretionary decisions or adjudicative matters affecting the rights of a person and reports prepared by a consultant or an advisor who was not, at the time the report was prepared, an officer or employee of a government institution.27

26. Section 23 of the AIA pertains to solicitor-client privilege, which covers communications between the government and its legal counsel. The privilege also covers materials prepared by or for the solicitor for the purpose of providing legal advice.28 It should be noted, in the context of legal advice provided to the CF chain of command or DND, that the privilege belongs to the client (i.e., the Government of Canada), not the individual officer, NCM or DND employee who received the advice on behalf of DND or the CF or even the lawyer that gave the advice. It should also be noted that, regardless of who provided the legal advice, whether a legal officer in the Office of the

---

23 AIA, s. 20(1); Order PO-2343 Ontario (Ministry of Health and Long-Term Care, [2004] O.I.P.C. No.259 (QL), online: IPCO <www.ipc.on.ca>.
24 AIA, s. 24.
25 Ibid., s. 15.
26 Ibid., s. 16.
27 Ibid., s. 21.
28 Ibid., s. 23.
JAG, or a civilian lawyer in the Office of the DND and CF Legal Advisor (DND/CF LA), no person in those offices is empowered to waive the privilege. Only the MND has the authority to waive solicitor-client privilege within DND and the CF.  

Complaints and Offences

27. COs should be aware that a person requesting information under the AIA has a right to complain to the Office of the Information Commissioner (OIC) and request a review of the severances, delays, fees, etc., with respect to an access request. However, if an access request was made informally and access was denied, the applicant must make a formal request through DAIP instead of making a complaint to the OIC.

28. The AIA makes it an indictable offence or an offence punishable on summary conviction to:
   a. destroy, mutilate or alter a record;
   b. falsify a record or make a false record;
   c. conceal a record; or
   d. direct, propose or counsel any person in any manner to take such actions with the intent to deny the right of access provided by the AIA.

If a person is found guilty of an indictable offence, that person is liable to imprisonment for a term not exceeding two years or a maximum fine of $10,000 or to both penalties. If the person is found guilty of an offence punishable by summary conviction, the person may be liable to imprisonment for a term not exceeding six months or to a fine not exceeding $5,000 or to both penalties.

SECTION 3

PRIVACY ACT

29. The PA serves two purposes. The first purpose is to protect the privacy of individuals with respect to personal information about themselves held by a government institution. The second purpose is to provide individuals with a right of access to that information.

30. To understand the PA, one must understand what qualifies as ‘personal information.’ According to section 3 of the Act, personal information means information about an identifiable individual that is recorded in any form including, but not limited to:
   a. information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual;
   b. information relating to the education, medical, criminal or employment history of the individual or financial transactions in which the individual has been involved;
   c. any identifying number, symbol or other particular assigned to the individual. This can include a person’s service number or Social Insurance Number;
   d. information relating to the residential address, fingerprints or blood type of the individual;

There is one exception to the above rule: military personnel advised or represented by legal officers from the Directorate of Defence Counsel Services (DDCS) in a disciplinary matter are the ‘client,’ and as such, are entitled to waive the privilege attached to any information that passed between them and their lawyer.

AIA, s. 30(1).
Ibid., s. 67.1.
Ibid., s. 67.1.
PA, s. 2; Terry.

9-6
e. personal opinions or views of the individual, except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution, or a part of a government institution specified in the regulations;

f. correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence;

g. views or opinions of another individual about the individual;

h. views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution, or a part of an institution referred to above in subparagraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual; and

i. the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual.\(^{34}\)

31. The following is not considered personal information for the purposes of sections 7, 8 and 26 of the \textit{PA} and section 19 of the \textit{AIA}:

a. information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual\(^{35}\) including:

i. a determination as to whether the individual is or was an officer or employee of the government institution;

ii. the title, business address and telephone number of the individual;

iii. the classification, salary range and responsibilities of the position\(^{36}\) held by the individual;

iv. the name of the individual on a document prepared by the individual in the course of employment; and

v. the personal opinions or views of the individual given in the course of employment;

b. information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services;

c. information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit conferred on an individual, including the name of the individual and the exact nature of the benefit; and

d. information about an individual who has been dead for more than 20 years.\(^{37}\)

32. The \textit{PA} prohibits the government from collecting information on a person unless it relates directly to a program or activity undertaken by the institution that is doing the collecting.\(^{38}\)

\(^{34}\) \textit{PA}, s. 3.

\(^{35}\) \textit{Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)}, [2003] 1 S.C.R. 66, 224 D.L.R. (4th) 1, 2003 SCC 8. The Supreme Court of Canada (SCC) held that information “…directly related to the general characteristics associated with the position or functions of a federal employee…applied retroactively and was not limited to an employee’s most recent position.”


\(^{37}\) \textit{PA}, s. 3.

\(^{38}\) \textit{Ibid.}, s. 4.
33. As with the AIA, in order to be an applicant and, therefore, entitled to make a request for the release of records pursuant to the PA, the applicant must be either a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the IRPA.  

34. Any person on whom personal information is held by the government is entitled to be given access to their information held in personal information banks and to other personal information about themselves under the control of a government institution, provided the applicant can provide enough information to locate the record.  

35. A request for documents under the PA must be made in writing. It must be sent to the government institution that has control of the personal information and it must identify the personal information bank. For the CF, “head of government” functions in respect of AIA or PA matters have been delegated to DAIP.  

36. When a request for access to personal information held in a personal information bank is made, DAIP must respond to the request within 30 days as to whether access to the information will be given. If access is to be provided, then it must be given to the applicant within this same, 30-day period. As with the AIA provisions, the 30-day time limit can be extended. However, the PA allows for an additional 30 days whereas the AIA allows for a ‘reasonable period of time.’ If DAIP fails to give the applicant access to their personal information within 30 days, this failure is deemed to be a refusal to disclose.  

37. Access to personal information may be requested formally or informally. A formal request is made as noted above. Informal requests may be made directly to the OPI. The request may be made in writing or orally. Access should be given within 30 days of the request. If access is refused, the applicant is not entitled to forward a complaint to the Privacy Commissioner (PC). A complaint can only be forwarded if the request was a formal one.  

Exclusions and Exemptions  

38. As with the AIA, certain records are excluded from privacy requests. These exclusions can be found at sections 69 and 70 of the PA. Exclusions refer to documents that are already in the public domain. The exclusions in the PA are the same as those found in the AIA. The PA also provides for various exemptions from disclosure. These exemptions may be either mandatory or discretionary. The exemptions are set out in sections 18 to 28 of the PA. Most of the exemptions are discretionary.  

Mandatory Exemptions  

39. Subsection 19(1) of the PA provides that personal information obtained in confidence from a foreign government or institution, an international organization of states or institution, a provincial government or institution, or a municipal or regional government established by the province, must not be disclosed to the applicant. This is a mandatory exemption.
Discretionary Exemptions

40. The remainder of exemptions found in sections 20 to 28 of the PA, with the exception of subsection 22(2) of the Act (i.e., those concerning the RCMP acting as provincial police), are discretionary. A complete list of exemptions can be found in the exemption table to DAOD 1002-2 (Informal Requests for Personal Information).

41. Like the AIA, the PA provides an exemption for records relating to law enforcement and investigations, investigative techniques and plans for lawful investigations, criminal methods and techniques, etc., including law enforcement investigations conducted by the MP and the NIS. Section 21 of the PA is a discretionary exemption and it is the same as found in section 15 of the AIA. See paragraph 23 above of this chapter.

42. Subsection 22(1) of the PA is a discretionary exemption that applies to law enforcement and investigations. DAIP may refuse to disclose any personal information that was obtained or prepared by the government institution during an investigation whose purpose was to detect, prevent or suppress crime, enforce Canadian laws, or investigate activities that are suspected of constituting a threat to the security of Canada within the meaning of the Canadian Security Intelligence Service Act. In order to deny disclosure, it must be determined that the disclosure will reasonably be expected to be injurious to the enforcement of Canadian laws, the conduct of investigations, or the security of penal institutions.

43. Remaining exemptions include:
   a. security clearances (i.e., DAIP may refuse to disclose personal information obtained for the purpose of granting security clearances if the information could reveal the identity of the person who provided the information to the investigative body);
   b. personal information about another person;
   c. any document that is subject to solicitor-client privilege; or
   d. medical information if the disclosure would be contrary to the best interests of the applicant.

Disclosure

44. When the Government of Canada collects personal information, that information must not be disclosed within, or external to, the CF or DND without the consent of the person in question, unless it is being disclosed in accordance with section 8 of the PA. In this regard, a complete list of acceptable disclosure of personal information can be found at subsection 8(2) of the PA.

45. Subsection 8(2) of the Act provides that personal information may be disclosed for the purpose for which it was obtained or collected. It may be disclosed in accordance with any Act of Parliament or regulation that permits its disclosure. It may be disclosed to comply with a

---

47 Ibid., s. 16.
49 PA, s. 22(1).
50 Ibid., s. 23.
51 Ibid., s. 26.
52 Ibid., s. 27.
53 Ibid., s. 28.
54 Ibid., s. 8(2)(a).
55 Ibid., s. 8(2)(b).
court order.\textsuperscript{56} It may also be disclosed to the Attorney General of Canada for use in legal proceedings involving the Crown.\textsuperscript{57}

46. Section 8 of the \textit{PA} further provides that personal information can be disclosed to an investigative body specified in the \textit{Privacy Regulations}, upon that body’s written request, for the purpose of enforcing any Canadian law or for carrying out an investigation. The request must specify the purpose and describe the information to be disclosed.\textsuperscript{58} Any CO receiving such a request would be well advised to consult with the unit legal adviser before taking any action.

47. Personal information may also be disclosed to a foreign government, international organization of states, province, etc., under an agreement or arrangement with the Government of Canada for the purpose of administering or enforcing a law or carrying out an investigation.\textsuperscript{59} Before releasing information of this nature, DAIP should be consulted.

48. Information relating to an individual who has sought assistance from a Member of Parliament (MP) can be disclosed to the MP concerned, in order for that MP to help resolve the problem.\textsuperscript{60} Essentially, this is an example of implied consent as provided by an individual.

49. The \textit{PA} also provides that the head of the government institution may disclose the information if it is in the public interest and this interest clearly outweighs the invasion of privacy, or it clearly benefits the individual to whom the information relates.\textsuperscript{61}

Complaints

50. As with the \textit{AIA}, an applicant requesting personal information under the \textit{PA} has the right to complain to the PC if disclosure is denied. They may also submit a complaint with respect to the extension of the time limit required by the government institution to consider and disclose the information or in relation to the collection, use, retention or disposal of their personal information.\textsuperscript{62}

SECTION 4

ADDITIONAL GUIDANCE

51. Care must be taken when disclosing records pursuant to informal requests. As discussed above, certain information must not be disclosed based on mandatory exemptions. Some information may be disclosed at the discretion of the OPI or DAIP on the basis of discretionary exemptions or as long as the information does not touch on any of the exemptions. If the CO is unsure whether to release information in response to an informal request, they should contact DAIP for assistance.

52. If the record to be released, pursuant to an informal request for information, needs to be severed, in part, due to exemptions under the Act, the CO must contact DAIP concerning these severance provisions. If no severances are required, the CO can release the records directly to the applicant.

\textsuperscript{56} Ibid, s. 8(2)(c).
\textsuperscript{57} Ibid, s. 8(2)(d).
\textsuperscript{58} Ibid, s. 8(2)(e).
\textsuperscript{59} Ibid, s. 8(2)(f).
\textsuperscript{60} Ibid., s. 8(2)(g).
\textsuperscript{61} Ibid., s. 8(2)(m).
\textsuperscript{62} \textit{PA}, s. 29.
SECTION 5
REFERENCES

Legislation


Regulations


Privacy Regulations, SOR/83-508.

Orders, Directives and Instructions

DAOD 1001-0 (Access to Information).

DAOD 1001-1 (Formal Requests for Access to Departmental Information).

DAOD 1001-2 (Informal Requests for Access to Departmental Information).

DAOD 1002-0 (Personal Information).

DAOD 1002-1 (Requests under the Privacy Act for Personal Information).

DAOD 1002-2 (Informal Requests for Personal Information).

DAOD 1002-3 (Management of Personal Information).

Jurisprudence


Order PO-2343 – Ontario (Ministry of Health and Long-Term Care), [2004] O.I.P.C. No.259 (QL), online: IPCO <www.ipc.on.ca>.


9-11

Secondary Material

ADM (Fin CS), Access to Information and Privacy, online: DIN
<http://admfincs.mil.ca/subjects/ati/intro_e.asp>.

Canadian Forces Provost Marshal, Privacy and Access to Information, online: DIN

Directorate Access to Information and Privacy, Welcome to Access to Information and Privacy Course, 09/04 (PPT).


CHAPTER 10
ELECTIONS

SECTION 1
INTRODUCTION

1. CF members are entitled to vote in federal, provincial and municipal elections provided they meet the voting requirements contained in the Canada Elections Act (CEA)\(^1\) and in applicable, provincial and municipal elections legislation.\(^2\)

2. CF members are frequently posted or deployed during their military careers. During an election they may find themselves away from their electoral districts and unable to return to their districts for the purposes of casting a ballot. They may also find themselves unable to attend a civilian polling station if they are serving in a remote area. In order to facilitate the right of CF members to exercise their right to vote during federal general elections, the Special Voting Rules (SVRs) have been enacted, pursuant to the CEA.\(^3\) The SVRs are administered by the ‘Coordinating Officer,’ an officer appointed by the MND and serving in the Office of the JAG. The Coordinating Officer works during and between elections with the Chief Electoral Officer (CEO) for the Government of Canada.\(^4\) The SVRs govern all aspects of the federal voting process for CF electors.

3. A citizen’s right to vote is enshrined in our Canadian Constitution\(^5\) and this right is fundamental to our democratic system. With respect to federal general elections, the SVRs set out a framework designed to facilitate the right to vote which require, in particular, COs to perform duties, provide facilities and make other arrangements so that service polling stations are established and are made accessible to CF members. Eligible CF members vote under the SVRs of the CEA. This is a flexible voting system that allows CF members to vote for a candidate in their selected electoral district while serving anywhere in the world.

SECTION 2
ELIGIBILITY TO VOTE AND SERVICE VOTING PROCEDURES

4. There are a number of documents pertaining to elections and the voting procedure for CF electors. The CEA is the main source of statutory authority. Part 11, Division 2 of the Act sets out the SVRs as they apply to CF electors. These rules allow CF members to vote at service polls during a 6-day service voting period that precedes the civilian polling day.\(^6\) COs are required, as a minimum, to have service polling stations open for at least three hours during three days of the service voting period. The SVRs address voting entitlement, the completion and amendment of a Statement of Ordinary Residence (SOR), the duties of COs and the service voting procedures.\(^7\)

---

\(^1\) Canada Elections Act, S.C. 2000, c. 9 [CEA].
\(^2\) Federal elections are governed by the CEA, while provincial elections are governed by a set of voting rules and procedures that vary from province to province. At the municipal level, given that town and cities are a creation of provincial legislation, the province establishes these particular voting rules.
\(^3\) CEA, Part 11.
\(^4\) Ibid., s. 199.
\(^6\) The service voting period commences on Monday, the 14\(^{th}\) day before civilian polling day and terminates on Saturday, the 9\(^{th}\) day before civilian polling day.
\(^7\) CEA, Part 11.
5. The publication titled *Federal, Provincial and Territorial Electoral Events*\(^5\) (elections manual), issued on the authority of the CDS, is another useful document that can assist COs in their election duties. This manual provides detailed information on the eligibility of CF electors to vote and the corresponding voting procedures.

6. The instructions set out in this chapter apply to federal elections only. They do not apply to provincial, territorial or municipal elections. In the case of federal by-elections, the SVRs are normally adapted to enable eligible CF electors to vote by mail with a ballot kit issued by Elections Canada. As for provincial, territorial or municipal elections, the eligible CF member will vote in accordance with the applicable provincial, territorial or municipal rules where they are residing.\(^9\)

7. With respect to provincial, territorial or municipal elections, CF members vote in accordance with the rules prescribed by the province, territory or municipality where they are residing, as the case may be. Whenever a provincial, territorial or municipal general election is called, the Coordinating Officer issues a message informing CF members of the voting eligibility requirements and the procedure by which they may exercise their right to vote. The message will also normally indicate the dates set for advanced polls and whether the legislation of the province or territory permits the vote of electors by a mail-in ballot procedure, proxy or by other means.

8. The SVRs facilitate a CF member’s right to vote at service polls. Therefore, CF members can take advantage of voting at a service voting poll as one of the ways in which to exercise their right to vote. The SVRs are the primary method available to CF members to vote while they are on temporary duty, posted or deployed away from their ordinary place of residence. CF members may also vote at civilian polling stations established for the polling division of the elector’s place of ordinary residence, but only if they ordinarily reside in that electoral district as of polling day and have named the same electoral district in their SOR.\(^10\)

9. CF electors must meet the same basic eligibility requirements to vote as every other Canadian citizen. A CF elector must be a Canadian citizen who is at least 18 years of age before the civilian polling day.\(^11\) In order to vote in accordance with the rules contained in the *CEA*, a CF elector must also meet one of the following additional requirements:
   a. be a member of the regular force of the CF;
   b. be a member of the reserve force of the CF on full-time training or service or on active service;
   c. be a member of the special force of the CF; or
   d. be a person who is employed outside Canada by the CF as a teacher in, or as a member of the administrative support staff for, a CF school.\(^12\)

10. Reserve force members are considered to be on full-time training or service when they are serving on Class “B” or “C” Reserve Service during the prescribed service voting period. In accordance with the 1989 Order in Council (P.C. 1989-583), reserve force members are on active service when they are serving anywhere beyond Canada.\(^13\)

11. The *CEA* provides that a CF member, who is incarcerated in a civil correctional institution, detention barrack or service prison, and is serving a sentence of less than two years, is entitled to vote in a federal election. It further states that, if the CF member is serving a

---

\(^{5}\) A-LG-007-000/AF-001, *Federal, Provincial and Territorial Electoral Events*. This elections manual has largely superseded CFAO 99-9 (Federal, Provincial and Territorial Elections).

\(^{9}\) A-LG-007-000/AF-001 at 1-2.

\(^{10}\) *CEA*, ss. 192-193.

\(^{11}\) *CEA*, s. 5.

\(^{12}\) Ibid., s. 191.

\(^{13}\) A-LG-007-000/AF-001 at 4-1.
sentence greater than two years, the CF member is ineligible to vote in the federal election. However, this is no longer the law. In 2002, the Supreme Court of Canada (SCC) ruled that paragraph 51(e) of the CEA (now paragraph 4(c)), is unconstitutional:

The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside...The framers of the Charter signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause...Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the Charter...15

Statement of Ordinary Residence

12. A SOR is a document prepared by a CF elector before a commissioned officer or a deputy returning officer stating the CF elector's electoral district as being the district for which the elector's vote would be counted for voting purposes at federal elections. Statutory requirements mandate that the choice of electoral district be one for which the elector has some connection. One connection is the place of ordinary residence in Canada immediately before enrolment or hiring16 It should be noted that, before SORs take effect in respect of members of the regular force, the SORs must be validated by Elections Canada.17

13. In that context, before an eligible CF member can cast a vote during the service voting period, the CEA requires members of the regular force to complete an SOR.18 Every member of the regular force is required to complete an SOR at the time of enrolment. Members of the reserve force who intend to vote at a service polling station during an election period must also complete a SOR19 when on full-time training or service or when on active service. Finally, a teacher employed by the CF outside Canada as a teacher in, or as a member of, the administrative support staff for a CF school, must also complete a SOR when they are hired.20

14. If the member has not completed an SOR at the time of enrolment (i.e., due to an administrative error), or subsequently wishes to change their electoral district, the member may complete a new SOR at any time.21 Once a member of the regular force has completed an SOR, the member’s CO must ensure that a copy is retained on the member’s file and the original SOR is forwarded to the CEO at Elections Canada. The CEO will validate the member’s electoral district. The SOR will then be returned to NDHQ/DHRIM 3 (NDHQ/DHRIM 3) who will update the member’s information regarding the member’s ordinary residence for voting purposes, the date the SOR was completed before a commissioned officer or a Deputy Returning Officer (DRO), and the name of the electoral district.22

15. NDHQ/DHRIM 3 will then ensure that the validated, original SOR is returned to the member’s CO. The CO must ensure that the validated SOR is placed in the member’s unit

---

14 Ibid. at s. 4, para. 2.
15 Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 at paras 9, 11, 44, 168 C.C.C. (3d) 449, 2002 SCC 68 [Sauvé]; Section 51 of the CEA (now para. 4(c)) denies a person who is incarcerated in a correctional institution and serving a sentence of two years or more the right to vote.
16 CEA, s. 194(4).
17 Ibid., s. 196.
18 Form DND 406/EC78000, Statement of Ordinary Residence, Regular Force.
20 A-LG-007-000/AF-001, s. 4 at para. 4.
21 Ibid., s. 4 at para. 5.
22 Ibid., s.4 at p. 4-3 to 4-5.
service record and the invalidated copy is removed. The CO may destroy any previous SORs, regardless of whether they are originals or copies.\(^{23}\)

16. For members of the reserve force who are on full-time service or who are on active service during the election period, the CO of the unit in which the member is serving must ensure the original SOR is filed with the unit where the member is on full-time training or service or active service. The member should also retain a copy of the SOR.\(^{24}\) It should be noted that SORs completed by reserve force members are not forwarded to the CEO for validation. An SOR must be retained for a period of at least one year after a person ceases to be entitled to vote under the SVRs (i.e., one year after the member completes full-time or active service). It may then be destroyed at the end of that period.\(^{25}\)

17. A CF elector may also amend an SOR at any time by indicating one of the electoral districts to which the elector has connections for specified reasons. Subsection 194(4) of the CEA provides that a CF elector may indicate as the place of [their] ordinary residence, the civic address of:

\begin{itemize}
  \item[a.] the place of ordinary residence of the spouse, common-law partner, a relative or a dependant of the eligible elector, a relative of his or her spouse or common-law partner or a person with whom the elector would live but for his or her being enrolled in or hired by the CF;
  \item[b.] the place where the member is residing by reason of his or her performance of services as a member of the CF; or
  \item[c.] the elector’s place of ordinary residence, immediately before being enrolled in, or hired by, the CF.\(^{26}\)
\end{itemize}

However, it should be remembered that the amendment will only come into effect 60 days after the date on which the CO of the unit receives the SOR. If the amendment is made during an election period, the amendment will take effect 14 days after the civilian polling day.\(^{27}\) Therefore, CF electors should ensure that their SOR is current in sufficient enough time to exercise their right to vote in a federal electoral district to which they have a connection.

### Special Voting Procedures

18. If a CF member is away from their unit on duty or leave, the member is entitled to vote at a military polling station of any base, unit or element in or outside of Canada. The CF member must produce satisfactory evidence to a commissioned officer or a DRO at the polling station that the member is a CF elector. Presenting their military identification card typically accomplishes this.\(^{28}\)

19. For members on leave during a federal general election, the CO must ensure that the member’s leave form or other required documents authorizing the absence indicate the member’s electoral district. The district indicated on the leave documents must correspond to the district on the member’s SOR. If the CEO has not validated the SOR, the notation on the document must indicate the place of ordinary residence of the elector, as shown on the elector’s SOR.\(^{29}\)

\(^{23}\) *CEA*, ss. 196(3)-(4).
\(^{24}\) A-LG-007-000/AF-001, s. 4 at para. 11.
\(^{25}\) *CEA*, s. 198; A-LG-007-000/AF-001, s. 4 at para. 12.
\(^{26}\) *CEA*, s. 194(4).
\(^{27}\) *Ibid.*, s. 194(6).
\(^{28}\) A-LG-007-000/AF-001, s. 4 at para. 13. Other documents confirming CF member status and electoral district can include annotated leave or TD forms.
\(^{29}\) A-LG-007-000/AF-001, s. 4 at para. 14.
20. CF members who are hospitalized or who are in a convalescent institution during the voting period and are unable to return to their unit during the service voting period are, for the purposes of voting, considered members of the unit under the command of the officer in charge of the hospital or institution. If no DRO has been appointed to the hospital or convalescent institution, the DRO for the parent unit to which the hospital or convalescent institution belongs will be the DRO for the institution.

21. The DRO for the hospital or convalescent institution may, if the DRO considers it advisable and the CO of the unit approves, go from room to room to collect the votes of those members who are bedridden. The DRO and a witness chosen by the elector can assist CF members who are physically unable to cast their own ballot. The DRO must assist the elector by completing the declaration portion of the outer envelope and by writing the elector’s name where the elector’s signature is to be written. The DRO marks the ballot as directed by the CF member. The DRO must do so in the presence of the elector and a witness. The DRO and the witness must sign the bottom portion of the outer envelope to indicate that the elector was assisted and that the DRO and the witness will keep secret the name of the candidate for whom the elector voted.

Role of Liaison Officer

22. The Coordinating Officer is also assisted by Liaison Officers (LOs) who are responsible for specific voting areas in Canada and abroad. The LOs are selected by the CDS and appointed by the MND. The general duties of LOs include ensuring that CF electors receive all necessary information concerning the voting procedures, are given the opportunity to vote, and that marked ballots are transported on time to the SVR Administrator (SVRA) in Ottawa (i.e., an official from Elections Canada), to be counted. In addition, LOs play an important role in liaising with COs and the SVRA, as well as being a proactive point of contact with COs and DROs (i.e., the CF personnel designated to take the vote of CF electors).

Duties of Commanding Officer

23. COs are responsible for ensuring that the appropriate facilities and resources are provided to enable eligible CF electors to cast a ballot in general federal elections. The CO must follow the SVRs set out in Part 11 of the CEA.

24. A ‘writ’ is a formal notification that an election has been called. Immediately after being informed that a writ has been issued, each unit CO must prepare a list based on the SORs held in the unit records of the names of any eligible electors serving in or attached to the unit. This list must be prepared according to a set format: in alphabetical order – surname, given names, gender, rank, and SOR. It is essential that COs take immediate steps to ensure that the list of CF electors for their unit is compiled within seven days of the writ being issued. The list can only be used for the purposes of taking the CF member’s vote. For example, the list cannot be given or made available to any candidates. Any improper use of the list for a purpose other than voting is a breach of the law. If COs have any questions pertaining to the preparation of the list, they should contact the office of the SVRA.

25. The CO must also publish a notice in the unit routine orders. This notice is to inform CF members that an election has been called. The notice must provide the date of the election and
inform members that the SVRs provide that eligible CF electors may cast a ballot anytime during the 6-day voting period commencing on the Monday, 14 days before civilian polling day, and terminating on the Saturday, nine days before civilian polling day. The notice must be re-published at least twice in the unit routine orders prior to service polling day. This notice must also be posted in a conspicuous location where CF members frequent and it must clearly indicate the location of each service voting place and the location of any mobile polls.37

26. A CO must also establish as many polling stations as are necessary to enable CF electors to vote, ensuring that the voting facilities are of sufficient size to allow voting to take place in an orderly fashion. Voting facilities must be located as near as practicable to a post office, mail box, or other receptacle provided for mail. The CO may establish a joint polling station with one or more units in the area, if it would be more expedient for electors to cast their ballots at one polling station.38 For example, this occurs most frequently at the base level whereby the base commander assumes the responsibility to establish polling stations on behalf of the other base units.

27. The service polling stations must be open for a minimum of three hours a day for at least three of the six service voting days.39 COs may increase the number of hours that a military poll is opened, but they cannot decrease them. All voting must be completed within the 6-day service voting period.

28. The CO may also establish mobile polls if the CO feels there are CF electors who cannot conveniently reach the polling stations established at the CF elector’s unit. The mobile polling station must be open for votes for the days and hours that the CO feels are necessary to collect the votes of CF electors. As long as mobile polling stations are only open during the 6-day voting period, there is no minimum number of hours or days for which they must remain open. This provision is at the discretion of the CO.40

29. The CO must also notify the LO41 of the number of polls, including mobile polls, and location service polling stations, as soon as possible after their establishment.

30. It is important that COs are aware of the requirements of subsection 205(1) of the CEA. This provision requires the following action to be taken by COs:

Within seven days after being informed of the issue of the writs, each commanding officer shall:

a. establish polling stations;

b. designate an elector as the deputy returning officer for each polling station;

c. through a liaison officer, provide the Chief Electoral Officer with a list of the designated deputy returning officers and their ranks, and sufficient copies of the list of electors for the unit; and

d. provide the designated deputy returning officer[s] with a copy of the list of electors for the unit.

31. The CO must designate a sufficient number of electors to act as DROs. DROs are responsible for receiving the votes of CF electors who are either serving in, or attached to, the CO’s unit and for fixing the voting times during the voting period. The DRO is the only person

37 Ibid., s. 5 at para. 7.
38 CEA, s. 207.
39 Ibid., s. 205(3).
40 CEA, ss. 206(1)-(2).
41 According to s. 177 of the CEA a ‘liaison officer’ means “a Canadian Forces elector designated under section 201 or a person appointed under subsection 248(1)’ of the Act. The MND designates LOs.
authorized under the rules to take the vote of CF electors. A detailed list of DRO duties can be found in the elections manual at pages 5-5 and 5-6. In that regard, the Coordinating Officer and that person's assistant are responsible for giving the appropriate briefings to the DROs so that each understands, and is able to fulfill, their respective responsibilities. The failure of a DRO to properly perform their responsibilities could result in CF electors' votes not being counted. For example, if a DRO fails to have the elector sign the declaration found on the outer envelope, the elector's vote will not be counted.

32. When choosing personnel to act as DROs, the CO should keep in mind that, with the exception of small units, all DROs must be both a CF elector and an officer holding the rank of Lt/SLt or Capt/Lt(N). Senior DROs must hold the rank of Maj/LCdr. The DROs are responsible for the application and enforcement of important rules and instructions, regardless of rank.

33. The CO must also, through the LO:
   a. provide the SVRA with a copy of the list of designated DROs;
   b. confirm to the SVRA, in writing, that the list of CF electors in the unit was prepared and completed in accordance with the legal requirements; and
   c. confirm the number of CF electors.

34. Upon receiving election materials and the lists of the names of candidates, the CO must acknowledge receipt of the materials, distribute the materials in sufficient quantity to every DRO, and ensure copies of those lists are posted in prominent places, such as a unit board or another area where CF electors frequent.

35. The CO must also ensure that any necessary special arrangements are made so that the completed outer envelopes are forwarded to the SVRA in a timely fashion. The CO is also responsible to ensure that all necessary measures are taken to protect the secrecy of the ballots cast at the polling station.

36. At the end of the service voting period, the DRO must send to the CO, for onward delivery to the SVRA, the outer envelopes that contain the marked special ballots. Other materials, such as any unused or spoiled outer envelopes, any unused or spoiled special ballots and unused inner envelopes, must be sent in a separate and clearly identifiable parcel to the SVRA, along with every SOR completed at the time of voting.

37. The CO must ensure that all election materials and documents that the CO receives from the DRO, such as the outer envelopes that contain the marked special ballots, are forwarded to the SVRA. The original and one copy of the SOR are also sent to the CO of the CF elector.

38. Since Elections Canada is responsible for all expenditures associated with the taking of votes during a general election, the CO must ensure that the unit keeps an accurate record of expenditures, retains all receipts where applicable and, on the date of the civilian polling day or such date as NDHQ/JAG/Coord Offr SVR may determine, submit a detailed report to NDHQ/JAG/Coord Offr SVR. Financial and administrative instructions will be issued by

---

42 A-LG-007-000/AF-001, s. 5 at subpara. 12(f).
43 Electors are required to place their ballot in an unmarked envelope. The unmarked envelope is sealed and placed in an outer envelope, which is also sealed. See ibid.
44 A-LG-007-000/AF-001, s. 5 at para. 11.
45 The specific requirements of the CEA, s. 205(1), are set out in A-LG-007-000/AF-001, s. 5 subpara. 8(b).
46 A-LG-007-000/AF-001, ibid.
47 CEA, s. 209.
48 A-LG-007-000/AF-001, s. 5 at subpara. 10(c).
49 ibid., s. 5 at subpara. 10(d).
50 CEA, s. 219(1).
51 ibid., s. 219(2).
52 A-LG-007-000/AF-001, s. 5 at para. 30.
NDHQ/Director Financial Operations to ensure that elections-related expenses are properly accounted for and authorized.

SECTION 3

ADDITIONAL GUIDANCE

39. It is important that COs familiarize themselves with the elections manual. COs must have a clear understanding of their duties as they pertain to elections. A CF member’s right to vote is a fundamental democratic right that should not be taken lightly.

40. COs are responsible for ensuring that the service voting procedures required by the SVRs are followed. Failure to properly obtain and deal with a CF elector’s vote may result in the vote not being counted and included in the election results. This effectively denies the CF member of any meaningful participation in the democratic process.

41. COs should choose their DROs carefully. They have important responsibilities and any mistake or omission on the part of the DRO can lead to the invalidation of the CF member’s vote.

SECTION 4

REFERENCES

Legislation


Regulations

QR&O 19.14 (Improper Comments).

QR&O 19.36 (Disclosure of Information or Opinion).

QR&O 19.37 (Permission to Communicate Information).

QR&O 19.375 (Communications to News Agencies).

QR&O 19.42 (Civil Employment).

QR&O 19.44 (Political Activities and Candidature for Office).

QR&O 29.09 (Use of Works and Buildings For Other Than Military Purposes).

Orders, Directives and Instructions

CANFORGEN 146/04 ADM (HR-MIL) 301230Z Nov 04, Amendment to a Canadian Forces Member’s Statement of Ordinary Residence.

CFAO 99-9 (Federal, Provincial and Territorial Elections).
Jurisprudence


Secondary Material

A-LG-007-000/AF-001, Federal, Provincial and Territorial Electoral Events.

DND, DCDS, Elections, online: DIN <http://dcds.mil.ca/iml/hdi/pages/elect_e.asp>.

DND, JAG, Service Estates & Elections, online: DIN <http://jag.dwan.dnd.ca/estates_and_elections/default_e.asp>.

Elections Canada’ main page, online: Elections Canada <http://www.elections.ca>.

CHAPTER 11

SERVICE ESTATES

SECTION 1

INTRODUCTION

1. When a member of the CF dies, the CF must collect, administer and distribute the deceased member’s service estate. The NDA provides the CF with a description as to what constitutes a service estate. QR&O provide information with respect to collecting, administering and distributing the deceased’s estate. There is also a requirement to collect and safeguard the personal belongings of a member who has been reported missing or who has been released from the CF with unsound mind.

SECTION 2

GENERAL

2. Section 42 of the NDA defines ‘service estate.’ This is important when determining which property belonging to the deceased member will form part of their service estate. QR&O Chapter 25 (Service Estates and Personal Belongings) provides the procedures for collecting, administering and distributing the service estate. It sets out in detail who has the authority to appoint a Director of Estates (DE), how the service estate is administered and the duties of the Committee of Adjustment (COA). It applies to members of the regular force, special force and members on Class “B” or Class “C” reserve service.

3. DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings) covers the responsibilities of COs with respect to the personal and movable property of a deceased member, a member who has been reported missing and a member who has been released with unsound mind. It also sets out the composition, duties and responsibilities of the COA.

4. The MND is responsible for appointing a DE. This individual is directly responsible to the MND with respect to the exercise of their functions, power and duties. The DE has the same rights and powers with respect to a deceased member’s service estate as if the DE has been appointed as an executor or administrator of the estate by a court of competent jurisdiction. The MND has appointed the Judge Advocate General (JAG) as the DE.

Service Estate

5. Subsection 42(2) of the NDA defines a member’s service estate to include:

   a. service pay and allowances;

   b. all other emoluments emanating from Her Majesty that, at the date of death, are due or otherwise payable;

   c. personal equipment that the deceased person is, under regulations, permitted to retain;

   d. personal or movable property, including cash, found on the deceased person, or on a defence establishment, or otherwise in the care or custody of the CF; and

---

2 QR&O 25.015 (Application and Definitions).
3 QR&O 25.02 (Director of Estates).
4 QR&O 25.02(3).
6. Any equipment or personal property found in a family home, or found to be under the care, control or custody of the next of kin of the deceased member, does not form part of the deceased member’s service estate.\(^6\)

Personal Belongings

7. QR&O 25.16(1) defines ‘personal belongings’ as:
   a. personal equipment that an officer or non-commissioned member is, under regulations, permitted to retain on release; and
   b. personal or movable property, including cash found in quarters or in the care or custody of the CF.

8. The CF is responsible for collecting and safeguarding a deceased member’s service estate and the personal belongings of a member who has been reported missing or who has been released with unsound mind.\(^7\)

Committee of Adjustment

9. The COA is responsible for collecting, preparing an inventory of, and safeguarding a member’s service estate. When the COA is dealing with the service estate of a deceased member or the personal belongings of a missing member, the COA is responsible for ensuring that a copy of the minutes is forwarded to the DE. The estate and personal belongings of the member are to be disposed of in a manner as directed by the DE.\(^8\) When a member is released with unsound mind, the COA is responsible for ensuring that a copy of the minutes is forwarded to NDHQ and the member’s personal belongings are forwarded to the Department of Veterans Affairs (DVA).\(^9\)

10. The CO of a deceased officer or non-commissioned member is responsible for appointing the COA. The COA is to be comprised of three officers, with one of the officers being the president. The president of the COA should be an officer at the rank of Maj/LCdr or above. While the preference is to have an officer at the rank of Maj/LCdr or above act as president of a COA, officers of the rank of Capt/Lt(N) may also act as such. However, the president of a COA cannot hold a rank below that of a Capt/Lt(N). An accounting/finance officer should be one of the three officers on the COA.\(^10\)

11. The COA may be less than three officers, but only with the concurrence of the DE. If there is an insufficient number of officers available, then a CWO/CPO1, MWO/CPO2 or WO/PO1 can be appointed to the COA.\(^11\)

12. Notwithstanding the above, there are times when the COA will consist only of the CO. This will occur only where the following conditions are met:
   a. the member dies on terminal leave;
   b. a clearance certificate\(^12\) was issued;

---

\(^6\) QR&O 25.01(2).
\(^7\) Ibid.
\(^8\) QR&O 25.08(2) and QR&O 25.17(2).
\(^9\) QR&O 25.18 (Personal Belongings of an Officer or Non-Commissioned Member Released with an Unsound Mind).
\(^10\) DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings).
\(^11\) Ibid.
\(^12\) A ‘clearance certificate’ is the document used by CF members to clear into a unit on arrival and to clear out of a unit on departure.
c. the member does not have any preferential charges in their pay account; and

d. the member left no personal or movable property at the unit.

13. The CO is responsible for signing a statement indicating that the four above conditions were met. The statement is to be forwarded to the DE. Preferential charges include: sums due for quarters, unpaid non-public property accounts (e.g., mess dues), sums due for materiel and a balance owing in the member’s pay account. It is the responsibility of the DE to satisfy preferential charges from the service estate. Any questions pertaining to the payment of preferential charges should be directed to the DE Office within the Office of the JAG.

14. The action to be undertaken by the COA with respect to the personal or movable property of the member is set out in DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings). The Table to this DAOD provides the COA with information concerning how to deal with various types of property. This Table should be consulted both before and while the COA begins to collect and safeguard the member’s property. QR&O Chapter 25 (Service Estates and Personal Belongings) should also be consulted.

15. The COA is not responsible for satisfying claims against a service estate or a member. The service estate is not to be liquidated to satisfy any civilian creditor’s claim. If there are any claims against the service estate, the civilian creditor should be advised to contact the DE. There should be no mention of the claim in the minutes of the COA.

16. Once the COA has completed its work, a clearance certificate must be issued. The COA is responsible for ensuring that the appropriate clearance certificate is completed, forwarded to the appropriate accounting officer and a copy of the certificate is attached as an exhibit to the minutes.

17. Preparing the minutes of proceedings is the next step in the process after completing the clearance certificate. The minutes are to be prepared in duplicate and signed by all members of the COA. The appropriate form to be used is set out in DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings). The original is to be forwarded, along with all exhibits, to the DE. The duplicates with exhibits are to be kept on the unit file. In cases where a member was released with unsound mind, two copies of the minutes are to be forwarded to the Director Military Careers Administration and Resource Management 4 (DMCARM 4).

18. The minutes must be completed and forwarded to the DE within 14 days after the death, the reporting of a member as being missing or the release of a member with unsound mind. If the minutes cannot be completed and forwarded to the DE within 14 days, the COA is responsible for contacting the DE and explaining the reason for the delay. The COA is also responsible for providing the DE with the expected date by which the minutes will be forwarded.

19. After forwarding the minutes of proceedings to the DE, the COA is responsible for ensuring that the member’s property is properly disposed of. When dealing with the property of a deceased member or a member who has been reported missing, the DE will issue disposal instructions.

20. DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings) sets out the actions to be taken by the COA with respect to the disposal of certain items found in a member’s quarters, on the member or under the care and control of the CF. Items include cash,
public clothing, equipment or material, identification cards, identification discs and passports. It also provides instructions on how to deal with claims and advances and preferential charges. The process set out in the above DAOD should be consulted and followed.

SECTION 3

COMMANDING OFFICER’S RESPONSIBILITIES

Death of a Member

21. When a member of the CF dies, the CO has a number of responsibilities to fulfill with respect to the estate of the deceased member. The CO is responsible for ensuring that all personal and movable property belonging to the deceased member is secured and safeguarded. This includes property found in quarters or under the care and control of the CF. The CO does not have to take any action with respect to any property found in married or civilian quarters or that is under the care and control of the next of kin, unless the DE decides that steps must be taken to safeguard this property.\(^\text{20}\)

22. The CO is responsible for ensuring that a COA is appointed within 48 hours of the death. The CO should appoint an assisting officer (AO) to assist the next of kin and the name and telephone number of the AO should be provided to the DE.\(^\text{21}\)

23. The CO is also responsible for ensuring that the Records Support Unit (RSU) forwards to the DE a copy of any will or will certificate form held in custody for the deceased member or, if there is no will or will certificate form, a statement to that effect. The CO does not have to search for a will in a location under the control of the next of kin. If the CO deviates from applying DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings), the CO is required to contact the DE and report this fact.\(^\text{22}\)

Missing Member

24. When a member is missing, the CO has to take steps to ensure the safeguarding of the member’s personal belongings. The CO is responsible for ensuring that all of the personal property or movable property of the missing member found in quarters or under the control and care of the CF is safeguarded. As with the property of a deceased member, the personal property or movable property of a missing member that is located in married or civilian quarters, or is found in the care and control of the next of kin, does not have to be collected or safeguarded by the CF unless the DE decides otherwise.\(^\text{23}\)

25. The CO is also responsible for ensuring that a COA is appointed within 15 days after the date the member is believed to have gone missing. This differs from the appointment of a COA for a deceased member, which must be appointed within 48 hours.\(^\text{24}\)

26. The CO is also responsible for ensuring that the RSU forwards to the DE a copy of any will or will certificate form held in custody for the missing member or, if there is no will or will certificate form, a statement to that effect. If the CO deviates from applying DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings), the CO must contact the DE and report this fact.\(^\text{25}\)

\(^{20}\) Ibid.
\(^{21}\) Ibid.
\(^{22}\) Ibid.
\(^{23}\) Ibid.
\(^{24}\) Ibid.
\(^{25}\) Ibid.
27. When a member disappears and the MND, or an authority designated by the MND, believes in their opinion that the circumstances surrounding the disappearance raises beyond a reasonable doubt the presumption that the member is dead, a presumption of death certificate may be issued. The certificate must provide the date on which the member is deemed to have died.  

28. If, by the end of six months from the date of a member’s disappearance, the circumstances surrounding the disappearance do not provide conclusive proof that the missing member is dead, the CDS, or an authority designated by the CDS, is responsible for making further inquiries from the missing member’s next of kin, as well as the applicable CO or any other likely source of information. If there is no evidence that the member is still alive and the CDS believes that the circumstances surrounding the disappearance of the member raises a belief beyond a reasonable doubt that the member is dead, the CDS may issue a presumption of death certificate. The certificate will indicate the date on which the member is deemed to have died.

29. The NDA and the QR&O do not specifically address the issue as to who will deal with the property of a missing member who is deemed to have died. However, it follows that once a member is deemed to have died and a death certificate is issued, the CO will then deal with the member’s personal property in accordance with the section on service estates of deceased members and not in accordance with the section pertaining to the personal belongings of members reported missing.

Member Released with Unsound Mind

30. The CO of a member who is being released with unsound mind must ensure that all of the personal property or movable property of the member that is found in quarters or under the care and control of the CF is collected and safeguarded. As with the personal property of a deceased or missing member, the CO is not responsible for collecting or safeguarding any personal or movable property of the member that is located in married or civilian quarters or is under the care and control of the next of kin, unless the DE believes that the circumstances require the property to be safeguarded. A COA must be appointed within 48 hours of the release of the member.

31. In the case of a member released with unsound mind, the CO is responsible for ensuring that a search is conducted for a will or will certificate held in the care and control of the CF. As with the case of a deceased member or a member reported missing, if there is no will or will certificate found, a statement to that effect must be made. The will or will certificate is not sent to the DE but rather, DMCARM 4.

---

26 NDA, s. 43; QR&O 26.20 (Certificates of Death or Presumption of Death) and QR&O 26.21 (Signing of Certificates of Death and Presumption of Death).
27 QR&O 26.20(3)-(5).
28 DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings) does not define the term ‘unsound mind.’ It is presumed that a member with unsound mind is released under QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 3(a) (On medical grounds, being disabled and unfit to perform duties as a member of the Service). The Dictionary of Canadian Law, 3rd ed., as cited at Bisoukis v. Brampton (City) (1999), 46 O.R. (3d) 417, 180 D.L.R. (4th) 577 (CA), provides the following definition of a ‘person of unsound mind’: ‘In the context of the Limitations Act [R.S.O. 1990 c. L.15, s. 47], a person is of unsound mind when he or she, by reason of mental illness, is incapable of managing his or her affairs as a reasonable person would do in relation to the incident or event, which entitles the person to bring an action.’ The Black’s Law Dictionary defines ‘unsound’ as “not healthy...not mentally well.”
29 DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings).
30 Ibid.
SECTION 4
ADDITIONAL GUIDANCE

32. The main priority of COs is to collect and safeguard personal property belonging to a deceased service member, a member who has been reported missing or a member who has been released with unsound mind. This includes personal property on the deceased person, located in quarters or under the care and control of the CF. It does not include personal belongings in the possession, care or control of the next of kin or located in married or civilian quarters.

33. Once the belongings are collected, an inventory should be taken to record what has been located. If any belongings are to be returned to supply, a receipt should be obtained acknowledging what property was returned. If cash is located on the member or in quarters, the cash should be handed over to an accounting officer and a receipt should be obtained. No disposal of property should take place without contacting the DE.

SECTION 5
REFERENCES

Legislation

Limitations Act, R.S.O. 1990 c. L.15


Regulations

QR&O 15.01 (Release of Officers and Non-Commissioned Members).
QR&O Chapter 21 (Summary Investigations and Boards of Inquiry).
QR&O Chapter 25 (Service Estates and Personal Belongings).
QR&O 25.015 (Application and Definitions).
QR&O 25.02 (Director of Estates).
QR&O 25.03 (Preferential Charges Against a Service Estate).
QR&O 25.08 (Committee of Adjustment to Deal with a Service Estate).
QR&O 25.17 (Personal Belongings of a Missing Officer of Non-Commissioned Member).
QR&O 25.18 (Personal Belongings of an Officer or Non-Commissioned Member Released with an Unsound Mind).
QR&O 26.20 (Certificates of Death or Presumption of Death).
QR&O 26.21 (Signing of Certificates of Death and Presumption of Death).

Orders, Directives and Instructions

DAOD 7011-0 (Service Estates and Personal Belongings).
DAOD 7011-1 (Responsibilities for Service Estates and Personal Belongings).


**Jurisprudence**


**Secondary Material**


CHAPTER 12
ENROLMENT

SECTION 1
INTRODUCTION

1. The National Defence Act (NDA), regulations and orders govern the enrolment of members into the CF.

SECTION 2
REGULAR FORCE

General

2. Section 20 of the NDA provides that:
   a. commissions of officers in the CF shall be granted by her Majesty during pleasure; and
   b. persons shall be enrolled as officer cadets or as non-commissioned members for indefinite or fixed periods of service, as may be prescribed in regulations made by the Governor in Council.

Enrolment Criteria

3. An applicant who is interested in becoming an officer or an NCM in the CF has to meet a number of enrolment criteria. These criteria include:
   a. the applicant must be a Canadian citizen. The CDS, or an officer designated by the CDS, may authorize the enrolment of non-Canadian citizens if the CDS is satisfied that a special need exists and that national security will not be prejudiced;
   b. the applicant must be of good character;
   c. the applicant must be at least 17 years of age. There are, however, exceptions to the age requirement. The exceptions are as follows:
      i. an applicant may be accepted for enrolment as an officer cadet prior to reaching age 17;
      ii. the applicant may also be accepted for enrolment in the reserve force on reaching the age of 16; and
      iii. the applicant may be accepted as an apprentice in the regular force on reaching the age of 16. However, the applicant may not be enrolled during an emergency or subject to overseas service. This does not preclude service in training ships in non-operational waters.

If an applicant is under the age of 18 years, the applicant must have the consent of a parent or guardian to enrol and, regardless, cannot be deployed to a theatre of hostilities. The applicant will, as a minimum, also have to meet any other conditions prescribed by the CDS.

---

1 National Defence Act, R.S.C. 1985, c. N-5, s. 20. [NDA].
2 NDA, s. 34. Persons under the age of 18 shall not be deployed to theatres of hostilities. See also DAOD 5003-1 (Restrictions on Duty).
3 QR&O 6.01 (Qualifications for Enrolment).
4. There are persons who are precluded from enrolling in the CF. These individuals include:
   a. members of the Royal Canadian Mounted Police (RCMP) for service in the regular force. The reason for this exemption is that RCMP are members of another federal force and, during times of emergency, could be required by law to serve both as CF members and as RCMP members simultaneously;  
   b. current members of any other of Her Majesty’s Forces (i.e., members of other Commonwealth Forces);
   c. unless special authority is obtained from the CDS, persons who have been previously released from the CF, or from any other of Her Majesty’s Forces, where a determination has been made that they:
      i. are medically unfit;
      ii. were inefficient; or
      iii. were released with a conduct assessment below “good” or the equivalent. This does not apply to a person who was released with a conduct assessment below good or the equivalent that was based upon a conviction for which a pardon has been granted under the Criminal Records Act.

5. Persons who have been dismissed with disgrace from the CF, for which the punishment has not been set aside, will not be re-enrolled in the CF unless there is an emergency. Special authority must be obtained from the CDS to enrol any member who has been released from the CF, any other of Her Majesty’s Forces, the RCMP, or a foreign Commonwealth Force for misconduct.

**Rank on Enrolment**

6. Applicants enrolling in the CF as an officer will be enrolled in the rank of officer cadet. It is possible for an officer cadet to be promoted to a higher rank on the day of enrolment. For instance, some specialist officers, such as medical officers and legal officers, are promoted on the day of enrolment to a higher rank due to their special qualifications.

7. Applicants, who enrol as non-commissioned members, will be enrolled as privates unless CFRG(HQ) approves the enrolment at a higher rank. An applicant may be granted a higher rank on enrolment if the applicant has a special civilian skill in which there is a specific military requirement or in recognition of membership in a Canadian cadet organization. A higher rank may also be granted to a former member of the reserve force or a member of another military force if that member has military qualifications that are considered equivalent to those acquired in the regular force.

---

4 QR&O 6.01(5). RCMP members may, however, serve in the reserve force, notwithstanding the fact they are liable to be placed on ‘active service’ during times of emergency. In this regard, it is acknowledged that the same conflict ‘to serve’ potentially arises in that RCMP members would likely to be required by law to serve in their capacity as both an RCMP officer and a reserve member of the CF under such circumstances. That said, given the paucity of such situations, the CF has undertaken to manage this risk accordingly. See QR&O 9.04 (Training and Duty).
5 QR&O 6.01(2)-6.01(5).
6 National Defence Act, s. 20(2).
7 DAOD 5002-1 (Enrolment – Regular Force).
SECTION 3
PRIMARY RESERVE – OFFICERS

Authorities

8. A commander of a command may authorize an area commander to approve the enrolment of an applicant who meets the enrolment standards for reserve force members. A commander of a command may also waive the age, and academic and professional standards found in CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), Appendix 1 (Basic Enrolment Standards), as long as the applicant meets the other qualifications. Commander CFRG is the approving authority for all other applicants.  

Enrolment Criteria

9. Applicants may enrol as an officer cadet in the primary reserves if a vacancy exists in the establishment and the applicant meets the enrolment criteria in QR&O 6.01 (Qualifications for Enrolment). Additional enrolment criteria are set out in CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), Appendix 1 (Basic Enrolment Standards).

10. Enrolment criteria in CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), Appendix 1 (Basic Enrolment Standards) include:

a. Citizenship – an applicant must be a Canadian citizen except that applicants who are landed immigrants in Canada and meet the other qualification standards may be considered for enrolment with the approval of the Commander CFRG. Their enrolment must not, in the opinion of the Commander CFRG, be prejudicial to national security. Applicants will be required to apply for Canadian citizenship when they become eligible;  

b. Character – an applicant must possess good character, a record of good conduct and be recommended by the CO of the unit;  

c. Age – an applicant must be at least 17 years of age by the enrolment date. If an applicant is under the age of 18 years, the applicant will need the consent of a parent or guardian. After completing occupational training, an applicant must be able to complete a minimum of two years of service for every year or part year of training, prior to compulsory retirement. The commander of a command may extend the maximum ages when it is in the interests of the CF;  

d. Academic and Professional – an applicant must meet the minimum academic requirements of their MOC;  

e. Medical - the applicant must undergo a medical examination and meet the medical standards as set out in ADM (HR-Mil) Instruction 11/04, CF Medical Standards, 23 Apr 04;  

f. Selection Tests - as prescribed by DMHRR 6 (i.e., various aptitude tests); and  

g. Reliability and Security Screening – each applicant must be able to obtain the security clearance required for their respective MOC. CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), Appendix

---

5 CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), para. 10.  
9 Foreign citizens shall not be enrolled as aircrew. CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), Appendix 1 (Basic Enrolment Standards), Serial 2 (Citizenship).  
10 NDA, s. 20(3), 34. Persons under the age of 18 shall not be deployed to theatres of hostilities. See also DAOD 5003-1 (Restrictions on Duty).  
11 Online: DIN <http://hr.ottawa-hull.mil.ca/docs/instruction/instructions/engraph/1104_admhrmil_e.asp>.
5 (Reliability, Security Clearance, Pre-Assessment and Security Clearance Procedures) should be consulted for additional information.\textsuperscript{12}

11. CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), Appendix 2 (Special Qualifications) sets out the special qualifications for applicants enrolling in specialized military occupations such as legal, dental and medical.\textsuperscript{13}

**Rank**

12. An officer applicant will be enrolled in the primary reserve in the rank of officer cadet. It is possible for an officer cadet to be promoted to a higher rank on the day of enrolment if they have a special expertise or advanced qualification.\textsuperscript{14} CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), Appendix 3 (Rank Following Enrolment) should be consulted for more details.

**SECTION 4**

**PRIMARY RESERVE – NON-COMMISSIONED MEMBERS**

**Authorities**

13. A commander of a command or another authority designated by the CDS has the authority to enrol an applicant who meets the enrolment criteria for members of the primary reserve.\textsuperscript{15} Two exceptions to this provision relate to the enrolment of applicants in the intelligence and military police (MP) trades for which approval must be sought from DGMC and the Provost Marshal, respectively.

**Enrolment Criteria**

14. Applicants may enrol as an NCM in the primary reserve of the CF. In order to do so there must be a vacancy in the establishment. Further, the applicant must be able to contribute to the operational effectiveness of the CF. "Any limitation on eligibility for enrolment resulting from the latter requirement will be confined to the minimum that must be imposed in order to achieve the required standard of operational effectiveness."\textsuperscript{16}

15. NCM applicants must meet the enrolment criteria found in QR&O 6.01 (Qualifications for Enrolment) and that discussed above in section 2 of this chapter. CFAO 49-11 (Terms of Service – Non-Commissioned Members – Primary Reserve), Annex A (Enrolment), Appendix 1 (Basic Enrolment Standards) also contains additional standards for enrolment. These standards include the following:

- a. **Citizenship**: an applicant must be a Canadian citizen. Applicants with landed immigrant status may be considered if they meet the other qualification standards and their enrolment is approved by the Commander, CFRG;

- b. **Character**: an applicant must possess good character, a record of good conduct and be recommended by the CO of the unit;

- c. **Age**: at a minimum, the applicant must be 17 years old by July of the enrolment year and, at a maximum, the applicant must have at least two years of service remaining after completing military and occupational training before reaching

\textsuperscript{12} CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), Appendix 1 (Basic Enrolment Standards).
\textsuperscript{13} Ibid., Annex A (Enrolment Purpose), Appendix 2 (Special Qualifications).
\textsuperscript{14} Ibid., Annex A (Enrolment Purpose), para. 9.
\textsuperscript{15} CFAO 49-11 (Terms of Service – Non-Commissioned Members – Primary Reserve), Annex A (Enrolment), paras. 10-11.
\textsuperscript{16} Ibid., para. 3.
compulsory retirement age. If an applicant is under the age of 18 years, the applicant must have the consent of a parent or guardian;  

d. Academic – the applicant should have completed at least grade ten in education. In certain circumstances, the applicant may have less than grade ten if the selection tests indicate some compensating factor. This does not apply to former members of the CF who apply for component transfer or re-enrolment;

e. Medical – the applicant shall undergo a medical examination and must meet the medical standards as set out in ADM (HR-Mil) Instruction 11/04, Canadian Forces Medical Standards, 23 Apr 04.

f. Selection Tests – as prescribed by DMHRR 6 (i.e., various aptitude tests); and

g. Reliability and Security Screening – each applicant must be able to obtain the security clearance required for their respective MOC.  

Rank

16. The rank granted to an applicant on enrolment is that of private.  

SECTION 5

COMPONENT TRANSFERS

General

17. The CF consists of three components: the Reserve Force, the Regular Force, and the Special Force. The Special Force will not be discussed in this section. Section 24 of the NDA states:

No officer on non-commissioned member shall be transferred from the regular force to the reserve force or from the reserve force to the regular force unless the officer or non-commissioned member consents to the transfer.

Transfer from Reserve Force to Regular Force

18. Members of the reserve force may apply for transfer to the regular force. They must meet the enrolment criteria as set out for regular force applicants and there must be a vacancy in the military occupation in question. Applicants will normally be transferred to the same military occupation in which they served in the reserve force. It is possible that an officer who has transferred from the reserve force to the regular force may be enrolled as an officer cadet, commissioned as a second lieutenant and promoted to a rank authorized by NDHQ. Unless the CDS grants additional seniority, seniority will be from the date of transfer (less any period of leave without pay on enrolment).

19. Reserve force non-commissioned members who apply for transfer to the regular force are to be attested in the same manner as if they were regular force members being re-engaged.
for a further term of service. QR&O 6.23 (Conditions of Re-engagement) provides the manner in which a member is to be re-engaged for a further term of service. The member must be medically fit and complete the required re-engagement documents. They do not have to take the oath or solemn affirmation again but will continue to serve on the oath or affirmation given at the time of their original enrolment.

Transfer from Regular Force to Reserve Force

20. A member of the regular force or the special force can apply for transfer to the reserve force provided they are eligible for release under QR&O 15.01 (Release of Officers and Non-Commissioned Members). The person with authority to approve the member’s release, as well as the receiving unit, must approve the transfer between components.

21. Regular force non-commissioned members who transfer to the reserve force are to be attested in the same manner as if they were reserve force members being re-engaged for a further term of service. QR&O 6.23 (Conditions of Re-engagement) provides the manner in which a member is to be re-engaged for a further term of service. The member must be medically fit and complete the required re-engagement documents. They do not have to take the oath or solemn affirmation again but will continue to serve on the oath or affirmation given at the time of their original enrolment.

22. An officer transferring to the reserve force must meet the enrolment criteria set out in CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), Appendix 1 (Basic Enrolment Standards). That appendix sets out the basic enrolment qualifications already discussed at section 3 of this chapter.

23. A non-commissioned member transferring to the reserve force must meet the enrolment criteria set out in CFAO 49-11 (Terms of Service – Non-Commissioned Members – Primary Reserve), Annex A (Enrolment), Appendix 1 (Terms of Service – Non-Commissioned Members – Primary Reserve). That appendix sets out the basic enrolment qualifications discussed at section 4 of this chapter.

SECTION 6

RE-ENROLMENT

Regular Force

24. Some former CF members wish to serve in the CF again. An applicant, who is interested in re-enrolling as an officer or an NCM in the CF, has to meet the same enrolment criteria as discussed in paragraph 3 above. A former officer will be re-enrolled in the rank of officer cadet and may be promoted to a higher rank upon enrolment. This will be determined by NDHQ on a case-by-case basis.

25. When an applicant applies for re-enrolment in the CF as an NCM within six months of release from the CF, the applicant may, with prior approval of NDHQ, be granted the substantive

24 QR&O 10.05 (Voluntary Transfer from Reserve Force to the Regular Force).
25 A member of the Reserve Force serves on an Indefinite Period of Service. Normally, upon transfer to the Regular Force, the member will initially serve on a Fixed Period of Service offered prior to the transfer. See ADM (HR-Mil) Instruction 05/05 The New CF Regular Force Terms of Service.
26 QR&O 6.23 (Conditions of Re-engagement).
27 QR&O 10.04 (Voluntary Transfer to Reserve Force). See generally CANFORGEN 134/05 ADM (HR-MIL) 063 050822Z Aug 05, and ADM (HR-MIL) Instruction 07/05 - Canadian Forces Component Transfer.
28 Ibid.
29 Eligibility may be subject to specialist branch restrictions and requirements.
30 QR&O 6.23 (Conditions of Re-engagement).
31 DAOD 5002-1 (Enrolment – Regular Force) applies to every re-enrolment in the Regular Force.
32 CFAO 6-1 (Enrolment – Regular Force), para. 10.
rank and the MOC qualifications that the member held prior to release. If the member decides to re-enrol and it has been longer than six months since release, the member may, with prior approval of NDHQ, be re-enrolled and granted an acting rank and a provisional MOC qualification. The member will hold the acting rank and provisional MOC qualification as long as NDHQ determines it to be appropriate.  

Reserve Force Officers  

26. An applicant may re-enrol in the primary reserve if the applicant meets the basic enrolment standards found in CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), Appendix 1 (Basic Enrolment Standards). The basic enrolment standards are described in section 3 of this chapter. The applicant must be considered suitable and qualified to perform the duties of the position applied for. The applicant must also provide proof of former service in accordance with QR&O 6.02 (Action Prior to Enrolment of Persons with Former Service). This requires the applicant to state the particulars of the applicant’s former service, indicate the cause of release and provide copies of the release papers. In such cases, the approval of the enrolment authority must be obtained. Additionally, a former CF member seeking re-enrolment must have been previously released under QR&O 15.01 Item 4(a) (Voluntary – On Request – When Entitled to an Immediate Annuity), Item 4(b) (Voluntary – On Completion of a Fixed Period of Service), Item 4(c) (Voluntary – On Request – Other Causes), Item 5(a) (Service Completed – Retirement Age), Item 5(b) (Service Completed – Reduction in Strength) or Item 5(c) (Service Completed – Completed Service for Which Required).

27. An applicant, who has been formerly released pursuant to QR&O 15.01 Item 3(b) (Medical), Item 5(d) (Service Completed – Not Advantageously Employable), Item 5(e) (Service Completed – Irregular Enrolment) or Item 5(f) (Service Completed – Unsuitable for Further Service), may be considered for re-enrolment depending on what led to the release. The applicant is to be re-enrolled in the rank of officer cadet and may be promoted immediately to a higher rank by the appropriate approval authority.

Reserve Force Non-Commissioned Members  

28. An applicant may re-enrol in the primary reserve if the applicant meets the basic enrolment standards found in CFAO 49-11 (Terms of Service – Non-Commissioned Members – Primary Reserve), Annex A (Enrolment), Appendix 1 (Basic Enrolment Standards). The basic enrolment standards are also mentioned in section 4 in this chapter. The applicant must provide proof of former service in accordance with QR&O 6.02 (Action Prior to Enrolment of Persons with Former Service). This requires the applicant to state the particulars of the applicant’s former service, state the cause of release and provide the release papers. In such cases, the approval of the enrolment authority must be obtained. Additionally, a former CF member must have been released under one of the following release items: QR&O 15.01 Item 3(b) (Medical), Item 4(a) (Voluntary – On Request), Item 4(b) (Voluntary – On Completion of a Fixed Period of Service), Item 4(c) (Voluntary – On Request – Other Causes), Item 5(a) (Service Completed – Retirement Age), Item 5(b) (Service Completed – Reduction in Strength), Item 5(c) (Service Completed – Completed Service for Which Required), Item 5(d) (Service Completed – Not Advantageously Employable), Item 5(e) (Service Completed – Irregular Enrolment) or Item 5(f) (Service Completed – Unsuitable for Further Service).
Advantageously Employable), Item 5(e) (Service Completed – Irregular Enrolment) or Item 5(f) (Service Completed – Unsuitable for Further Service).  

29. Unlike the requirement for enrolment in which the applicant must have two years available to serve prior to compulsory retirement, applicants who are re-enrolling only need to be able to serve one year prior to reaching compulsory retirement age.  

30. The area commander will determine the rank given to an applicant who re-enrols in the CF. A former NCM, who re-enrols in the CF, may be granted a time credit toward the member’s promotion to corporal or above. If the member re-enrols in their previous MOC within one year of their release date, the member must be granted a time credit or seniority in the rank held at release. If the applicant enrols in their previous MOC later than one year after release but less than three years after release, the member may be granted a time credit or seniority, in the rank the member held at the time of release.  

31. If the member re-enrols in their previous MOC more than three years from the date of release or re-enrols in a different MOC, a former private will be re-enrolled as a private with minimum time credit for QL authorized. Members released as a corporal or above will be re-enrolled as a corporal or master corporal with minimum time credit or seniority for the qualification level authorized.  

SECTION 7  
RE-INSTATEMENT  

32. Re-instatement is not the same as re-enrolment. These terms should not be used interchangeably. Re-instatement applies to a member who has been released from the CF as a result of a finding at a service tribunal where the finding is later set aside. In such a case, the member’s release is to be cancelled and the member is deemed not to have been released. Subsection 30(4) of the NDA provides:

Subject to regulations made by the Governor in Council, where:

a. an officer or non-commissioned member has been released from the CF or transferred from one component to another by reason of a sentence of dismissal or a finding of guilty by a service tribunal or any court, and

b. the sentence or finding ceases to have force and effect as a result of a decision of a competent authority,

the release or transfer may be cancelled, with the consent of the officer or non-commissioned member concerned, who shall thereupon, except as provided in those regulations, be deemed for the purpose of this Act or any other Act not to have been so released or transferred.

33. A member who is re-instated is deemed not to have been released from the CF. Accordingly, the member is entitled to receive back pay. Further, the period during which no service was rendered must be counted and credited as full time service for annuity purposes. Conversely, re-enrolment would not place the members in the same position that they would have been in had they not been released. Re-enrolled members will have ‘broken service,’ with all of

---

40 CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex A (Enrolment Purpose), Appendix 4 (Enrolment of Applicants with Former Commissioned Service), para 1.
41 CFAO 49-11 (Terms of Service – Non-Commissioned Members – Primary Reserve), Annex A (Enrolment), Appendix 2 (Enrolment of Applicants with Former Service), para. 1.
42 CFAO 49-5 (Career Policy – Non-Commissioned Member – Primary Reserve), Annex C (Rank and MOC on Transfer, Enrolment, and Re-enrolment), para. 5.
43 Ibid., para. 3.
44 Ibid., Annex C (Rank and MOC on Transfer, Enrolment, and Re-enrolment), para. 3(b).
the attendant consequences, including loss of pay and annuity benefits under the *Canadian Forces Superannuation Act*.\textsuperscript{45} The rank of a re-enrolee will depend on the amount of time that has elapsed since the member was released from the CF.\textsuperscript{46}

**SECTION 8**

**REFERENCES**

**Legislation**


**Regulations**

QR&O 3.09 (Order of Seniority).

QR&O 6.01 (Qualifications for Enrolment).

QR&O 6.02 (Action Prior to Enrolment of Persons With Former Service).

QR&O 6.23 (Conditions of Re-engagement).

QR&O 9.04 (Training and Duty).

QR&O 10.04 (Voluntary Transfer to Reserve Force).

QR&O 10.05 (Voluntary Transfer from Reserve Force to the Regular Force).

**Orders, Directives and Instructions**

ADM (HR-MIL) Instruction 11/04, CF Medical Standards, 23 Apr 04.

ADM (HR-MIL) Instruction 07/05, Canadian Forces Component Transfer.

ADM (HR-Mil) Instruction 05/05 The New CF Regular Force Terms of Service

CANFORGEN 082/04 ADM (HR-MIL) 035 031825Z Jun 04, Component Transfer Procedures for Deployed CF Members.

CANFORGEN 134/05 ADM (HR-MIL) 063 050822Z Aug 05

CANFORGEN 061/07 VCDS 010/07 271400Z MAR 07, Component Transfer (Ct) Programme For Reservists Within Combat Arms MOS ID

CFAO 6-1 (Enrolment – Regular Force).

CFAO 11-6 (Commissioning and Promotion Policy – Officers – Regular Force).

CFAO 49-5 (Career Policy – Non-Commissioned Member – Primary Reserve).

CFAO 49-10 (Terms of Service – Officers – Primary Reserve).

\textsuperscript{45} R.S., 1985, c. C-17.

\textsuperscript{46} Ibid., para. 1.
CFAO 49-11 (Terms of Service – Non-Commissioned Members – Primary Reserve).

DAOD 5002-1 (Enrolment – Regular Force)

DAOD 5002-2 (Direct Entry Officer Plan – Regular Force).

DAOD 5002-3 (Component and Sub-Component Transfer).

DAOD 5003-1 (Restrictions on Duty).

**Secondary Material**

DND, CF Recruiting, online: DND <http://www.recruiting.dnd.ca>. 
CHAPTER 13

UNIVERSALITY OF SERVICE

SECTION 1

INTRODUCTION

1. Regardless of their trade or occupation, members of the CF are soldiers (or sailors or aircrew) first and foremost. As stated in the Generic Task Statement, “[t]he roles and objectives of the CF require members to serve in a variety of geographic locations and environmental conditions. All members must, therefore, be conditioned to cope with the stresses imposed by sustained operations and be physically ready to respond on short notice.”¹ This notwithstanding, the CF has adopted a more flexible approach that requires all members to meet minimal operational standards unless they are specifically exempt or retained subject to employment restrictions.² The purpose of this chapter is to provide background information and explain CF policy vis-à-vis medical standards, universality of service, and retention subject to employment restrictions.

SECTION 2

MEDICAL STANDARDS

Medical Categories

2. A medical category is a series of numerical values assigned to an individual based on the results of a medical examination. Minimum medical categories have been assigned to each Military Occupation Classification (MOC) and may be found in the manual entitled Medical Standards for the Canadian Forces.³ The medical category is comprised of the member’s year of birth and the following six factors:

   a. visual acuity (V);
   b. colour vision (CV);
   c. hearing (H);
   d. geographical factor (G);
   e. occupational factor (O); and
   f. air factor (A).⁴

3. The year of birth is included in the medical category as many diseases show a prevalence that varies with age. Visual acuity is rated from V1 to V5, colour vision is rated from CV1 to CV3, and hearing is rated from H1 to H4. The best vision, colour vision, and hearing are assigned a rating of 1. In each category, a higher numerical value indicates progressively poorer vision, colour vision, or hearing.⁵

---

¹ A-MD-154-000/FP-000, Medical Standards for the Canadian Forces (CFP 154), Annex D, Appendix 1 (Generic Task Statement – All CF Members), Generic Task Statement available online: DIN <http://hr.dwau.dnd.ca/health/policies/med_standards/pdf/Engraph/GTS7_e.pdf>.
² CDS, CDS Guidance to Commanding Officers, c. 16, Part B (Universality of Service and Accommodation), online: <http://www.cda.forces.gc.ca/cdsguidance/engraph/2006/chapter16_e.asp>.
³ A-MD-154-000/FP-000, Annex E (Medical Standards for Military Occupations).
⁴ A-MD-154-000/FP-000, c. 3, para. 1.
⁵ ibid., paras. 2 to 5.
4. The geographical factor is indicative of where a member can perform their duties without limitations or health risks to the member or others. Three sub-factors are considered in assessing the geographical factor: climate, accommodation and living conditions, and available medical care. At the extremes, a factor of G1 is assigned only to members who have passed very stringent medical tests (i.e., astronauts) whereas a G6 is assigned to members who are considered unfit for any work environment. A G2 is assigned to members who have no geographical limitations due to a medical condition, who are considered healthy, and who require only routine and periodic medical services.\(^6\)

5. The occupational factor involves physical and mental activity and the stress associated with employment within a specific MOC. An O1 category is assigned to such people as astronauts while an O2 is assigned to members who have either no medical employment limitations, or very minor limitations that do not prevent the member from meeting the generic and MOC-specific task statements. At the other extreme, an O5 is assigned to a member who, for example, is considered unfit for any military work, while an O6 is assigned to a member who is considered unfit for work in any capacity.\(^7\)

6. The air factor is designed to measure one’s ability to perform flight duties or to be a passenger in an aircraft. For non-aircrew members, A5 indicates that one is medically fit to fly as a passenger in a CF aircraft. For all members, A6 indicates that one is considered medically unfit to fly in any capacity. Categories A1 to A4 and A7 apply only to aircrew.\(^8\)

7. It may become necessary to temporarily lower a medical category (i.e., after surgery). A temporary category may apply for 6 months and may be renewed once (i.e., for a total of 12 months). The Director Health Treatment Services (DHTS) must review any extension of a temporary category beyond 12 months. As soon as the member’s medical condition becomes stable or is unexpected to improve, a permanent medical category should be assigned.\(^9\)

Medical Employment Limitations

8. Medical employment limitations (MELs) are restrictions placed upon the employment and deployment of a member by a doctor. In determining MELs, doctors will refer to the generic task statement, the MOC task statement and consultants’ reports.\(^10\) MELs are “based on considerations relating to the member’s medical condition, prognosis and recovery, the member’s safety, the safety of other CF members and the public, the operational effectiveness and the member’s rights and freedoms.”\(^11\)

9. While the assignment of an MEL is within the purview of a doctor, any career action resulting from an MEL is the responsibility of the Director Military Careers Administration and Resource Management (DMCARM). If an MEL results in a permanent change to a member’s medical category, the file is sent to DMCARM for an administrative review (AR).\(^12\) This process assesses the member’s suitability for further service in the CF based on the member’s MELs.\(^13\)

---

\(^{6}\) Ibid., para. 6.
\(^{7}\) Ibid., para. 7.
\(^{8}\) Ibid., para. 8.
\(^{9}\) Ibid., para. 9.
\(^{10}\) ADM (HR-Mil) Instruction 11/04, Canadian Forces Medical Standards, 23 Apr 04, online: DIN <http://hr3.ottawa-hull.mil.ca/docs/instruction/instructions/engraph/1104_admhrmil_e.asp> [CF Medical Standards].
\(^{11}\) CF Medical Standards.
\(^{12}\) See Chapter 33 (Administrative Review) found under Part 5 of this manual for more information on administrative reviews.
\(^{13}\) CF Medical Standards.
SECTION 3

UNIVERSALITY OF SERVICE

10. Subsection 33(1) of the National Defence Act (NDA) provides that members of the regular force “are at all times liable to perform any lawful duty.” Pursuant to regulations made by the Governor in Council, members of the primary reserve may be ordered to conduct training and may be called out to perform any lawful duty. The word ‘duty’ means, “any duty that is military in nature and includes any duty involving public service authorized under [NDA] section 273.6.” Members of the supplementary reserve are not required to perform any duty or training except when on active service, but may be placed on active service by the Governor in Council. In other words, all members of the regular force must perform any lawful duty at any time. Members of the primary reserve may be called out to do likewise and members of the supplementary reserve are obliged to perform military duties when placed on active service. The underlying presumption for establishing universality of service is that CF members must be employable and deployable.

11. Under the Canadian Human Rights Act (CHRA), it is a discriminatory practice to refuse to employ someone, or to terminate someone’s employment, based on a prohibited ground of discrimination, including disability. It is also a discriminatory practice for an employer to have a policy that deprives people of employment opportunities on the basis of a prohibited ground of discrimination, including disability. The word ‘disability’ means, “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.”

12. A practice is discriminatory regardless of whether it results in ‘direct discrimination’ or ‘adverse effect discrimination.’ Direct discrimination refers to a policy that is discriminatory on its face, whereas adverse effect discrimination refers to a standard that is neutral on its face but discriminates in effect. For example, a policy whereby an employer refused to hire women would be considered direct discrimination. A policy whereby an employer refused to hire anyone under six feet tall would be considered adverse effect discrimination, as such a requirement might tend to exclude women and members of certain races and ethnic origins.

13. An obvious violation of a prohibited ground of discrimination is discrimination unless it can be legally justified. A practice is not discriminatory, however, if the employer can establish that the policy is based on a bona fide occupational requirement (BFOR). For the practice to be considered based on a BFOR, it must be established on a balance of probabilities that:

a. the employer adopted the particular standard for a purpose rationally connected to the performance of the job;

b. the employer adopted the particular standard in an honest and good faith belief that it was necessary for the fulfilment of that legitimate work-related purpose; and

---

14 R.S.C. 1985, c. N-5, s. 33(1) [NDA].
15 Ibid., s. 33(2).
16 Ibid., s. 33(4).
17 Ibid., s. 33(3), OR&O 2.034(b) and DAOD 5002-4 (Supplementary Reserve), marginal note: Overview/Liability to Perform Duty and Training.
18 Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 3(1), 7 [CHRA].
19 Ibid., s. 10.
20 Ibid., s. 25.
21 Ibid., s. 15(8).
23 CHRA, s. 15(1)(a).
14. Although CF personnel are ‘members,’ not ‘employees,’ for the purposes of the CHRA, CF members are deemed to be Crown employees.\textsuperscript{25} Thus, CF members are protected by the CHRA. However, in the CF, the principle of ‘accommodation of needs’ is subject to the principle of ‘universality of service’ which means that all CF members “must at all times and under any circumstances [be able to] perform any functions that they may be required to perform.”\textsuperscript{26} There are three essential tenets to the principle of universality of service:

\begin{itemize}
  \item[a.] members of the CF are soldiers, sailors or aircrew first and foremost, whatever their trade or occupation;
  \item[b.] it is the duty of every member of the CF to be ready to serve at all times, in any place and under any conditions; and
  \item[c.] universality of service applies to all CF members.\textsuperscript{27}
\end{itemize}

15. The \textit{Generic Task Statement} expands on the minimum employment and deployment requirements of universality of service applicable to all CF members. Included are physical factors indicative of extremes of exertion and range of motion, and stress factors indicative of circumstances and conditions under which duties must be performed. These factors are used by medical personnel to determine if members are medically fit to perform (or to be trained to perform) physical tasks and medically able to adapt to the conditions of the CF environment.

\section*{SECTION 4}

APPLICATION OF THE CHRA TO THE CF

16. In a trilogy of cases in the early 1990s, the Federal Court of Appeal (FCA) confirmed that the universality of service is a BFOR. In \textit{Canada (Attorney-General) v. St. Thomas},\textsuperscript{28} a CF member had been released because of asthma. The member took issue with his release and the case went to the FCA. The court ruled against the member saying:

\begin{quote}
  …we are here considering the case of a soldier. As a member of the Canadian Forces, the respondent, St. Thomas, was first and foremost a soldier. As such he was expected to live and work under conditions unknown in civilian life and to be able to function, on short notice, in conditions of extreme physical and emotional stress and in locations where medical facilities for the treatment of his condition might not be available or, if available, might not be adequate. This, it seems to me, is the context in which the conduct of the Canadian Forces in this case should be evaluated.\textsuperscript{29}
\end{quote}

17. In \textit{Canada (Attorney General) v. Robinson}, the FCA confirmed that the CF’s “soldier first” policy applied to members in support positions and any assertion that members in support trades might be less likely to engage in combat duties was irrelevant.\textsuperscript{30} It was also confirmed that this requirement was imposed by statute\textsuperscript{31} and that administrative practices employed in the CF could not work as a modification of the stated legal requirement. That is to say, an inconsistent application of the legal requirement in practice does not change the overriding legal requirement.

\begin{footnotes}
\item[24] B.C.G.S.E.U., at para. 54.
\item[25] CHRA, s. 64.
\item[26] CHRA, s. 15(9).
\item[29] \textit{Ibid.}, at 677.
\item[31] NDA, s. 33(1).
\end{footnotes}
In Canada (Human Rights Commission) v. Canada (Armed Forces), a clarinet player named Husband attempted to join the CF as a musician. She was denied entry to the CF as she was legally blind. She made a complaint under the CHRA, which was dismissed by the Canadian Human Rights Tribunal (CHRT). The FCA agreed with the Tribunal’s finding:

…that the primary role of all regular members of the CAF is to protect the interests of Canada, Canadians and Canadian allies with physical force, if necessary. While other roles may be assumed by various members of the CAF when our country is not at war, the primary obligation and purpose of the CAF is to maintain that wartime preparedness. It is therefore my opinion that the defence of BFOR, as it relates to the occupation which is the subject matter of this complaint, must be related to the military aspects of being a regular member of the Armed Forces as well as the occupation of being a musician in the CAF.

18. DAOD 5023-0, Universality of Service and DAOD 5023-1, Minimum Operational Standards Related to Universality of Service describe CF policy with respect to universality of service. All CF members who serve in the Regular or Reserve Forces are expected to be able to contribute to, and be ready for operational duty in the service of the nation when required. CF members must be able to perform the skill requirements of common operational core tasks, as indicated by satisfactory routine unit and pre-deployment training evaluation and be free of medical employment limitation that would preclude performance of core tasks (as described in the DAOD). CF members must be deployable and not have a medical or other employment limitation that would preclude deployment.

19. If it is determined after an administrative review (AR) that a member of the Regular or Reserve Forces is permanently unable to meet one or more of the minimum operational standards, the CF member shall be:
   a. released from the Regular or Reserve Force; or
   b. retained subject to employment limitations on a temporary, transitional basis.

SECTION 5
REFERENCES

Legislation


Regulations

QR&O 2.03 (The Reserve Force).

QR&O 15.17 (Release of Officers – Age and Length of Service).

QR&O 15.31 (Release of Non-Commissioned Members – Age and Length of Service).

33 Ibid., at 724.
34 DAOD 5023-0, Universality of Service
35 DAOD 5023-1, Minimum Operational Standards Related to Universality of Service
Orders, Directives and Instructions

ADM (HR-MIL) Instruction 11/04, Canadian Forces Medical Standards, 23 Apr 04, online: DIN <http://hr3.ottawa-hull.mil.ca/docs/instruction/instructions/engraph/1104_admhrmil_e.asp>.


DAOD 5002-4 (Supplementary Reserve).

DAOD 5023-0 (Universality of Service)

DAOD 5023-1 (Minimum Operational Standards Related to Universality of Service

Jurisprudence


Secondary Material

A-MD-154-000/FP-000, Medical Standards for the Canadian Forces (CFP 154), Annex D, Appendix 1 (Generic Task Statement – All CF Members), Generic Task Statement available online: DIN <http://hr.dwan.dnd.ca/health/policies/med_standards/pdf/Engraph/GTS7_e.pdf>.


DMCARM, Guidelines for Retention of Members with Medical Employment Limitations, para. 1, online: DIN <http://hr.ottawa-hull.mil.ca/dgmc/docs/programs/admreview/Guidelines_b.pdf>. 

13-6
CHAPTER 14

ADMINISTRATIVE ACTION

SECTION 1

INTRODUCTION

1. Supervisors at all levels are generally responsible for promotion of the “welfare, efficiency and good discipline of all subordinates.” Accordingly, supervisors possess a broad range of administrative authority and a variety of administrative procedures that they can use to correct the inadequate performance or misconduct of CF members. Except for compulsory release, administrative actions are intended to provide an opportunity for a CF member to correct or overcome a personal performance or conduct deficiency and then continue with their military career in a positive and productive manner. Administrative actions are normally progressive; starting with the least severe administrative sanction and progressing onward to more severe sanctions only if the performance or conduct does not improve. The chain of command always has the option of initiating administrative action starting with more severe sanctions when appropriate, taking into consideration the nature and seriousness of the member’s deficiency or misconduct as well as the concept of procedural fairness that underlies all administrative action.

2. The application of the principles of procedural fairness will vary depending on the type of administrative sanction utilized. In general, as the potential consequences of an administrative action become more severe, the member’s entitlement to procedural fairness increases. Within the CF, the highest level of procedural fairness that is most often applied requires the member to receive:

   a. notice that the decision is being considered;
   b. disclosure of all documents and information that will be considered by the decision-maker when making the decision;
   c. the opportunity to make representations; and
   d. a fair and unbiased decision by the decision-maker, accompanied with reasons.

Career Management versus Administrative Sanction

3. It is important to distinguish career management decisions from administrative sanction decisions. The former are the routine decisions made in the course of managing the professional development and career progression of every member of the CF. The latter represents the administrative action that is imposed on a CF member to rectify and remedy individual deficiencies in performance or conduct. Understanding the distinction is important to appropriately discern the different levels of procedural fairness that must be applied in each case.

4. Career Management. Procedural fairness has a limited application in respect of career management decisions because the outcomes of such decisions are not considered to be sanctions or penalties and such decisions are not being made as a result of any misconduct or inadequate performance on the part of the member. The vast majority of these types of decisions are made routinely and are accepted by the affected members, notwithstanding that the individual members may not have been consulted or informed prior to the decision being made. Those few members who disagree with a career management decision are entitled to apply for redress through the CF grievance process.

---

1 QR&O 4.02(c); QR&O 5.01(c).
5. Common examples of career management decisions that do not require procedural fairness measures (i.e., notice, disclosure, representations, fair unbiased decisions with reasons) include:
   a. postings;
   b. selection to attend courses;
   c. appointments;
   d. work assignments;
   e. promotions;
   f. relinquishment of rank followed by reversion;
   g. reversion as a consequence of routine postings and transfers or a lack of a service requirement for the member to continue to hold a particular type of rank;
   h. performance evaluation reports (PERs);
   i. selection for honours and awards; and
   j. pay.

Notwithstanding the common practice that a CF member may be consulted by the chain of command prior to certain types of career management decisions being made (i.e., being asked to indicate three posting preferences), such decisions can be made without any notice to, or input from, the member.

6. Administrative Sanction  In contrast to career management, procedural fairness plays a significant role when serious administrative sanctions are being taken against a CF member. Such sanctions can impair a member’s career progression or, ultimately, lead to the termination of the member’s military service career by way of compulsory release. Accordingly, as the administrative sanctions become progressively more severe, procedural fairness requirements are enhanced for the benefit and protection of the member.

7. Common examples of administrative sanctions that do require procedural fairness measures (i.e., notice, disclosure, representations, fair unbiased decisions with reasons) include:
   a. remedial measures;
   b. relief from the performance of military duty; and
   c. removal from command;

Administrative and Disciplinary Action

8. Administrative and disciplinary action must always be clearly distinguished. It is inappropriate for administrative action to be used as a substitute for disciplinary action, although disciplinary action is never precluded by any administrative action that has already been carried out. The imposition of administrative action and disciplinary action arising from the same incident
is not “double jeopardy.” This is a legal term that describes a situation wherein an individual has been “placed in jeopardy under the criminal law twice for the same matter.”

9. Notwithstanding that double jeopardy does not apply to administrative and disciplinary action for the same event, caution should be exercised when military authorities contemplate proceeding with both measures following an incident. For example, if a CO places a member on Recorded Warning (RW) and later presides at the member’s summary trial (arising out of the same or a related incident), there could be a reasonable perception of bias on the part of the CO in that, by applying administration action, the CO has already reached a conclusion concerning the member’s involvement in the incident and their guilt on the disciplinary charge(s). To be clear, it is lawful for a CO to first take disciplinary action and, regardless of whether the charges result in a conviction or acquittal, to follow-up the disciplinary proceedings with appropriate administration action.

SECTION 2

REMEDIAL MEASURES

10. There are three types of remedial measures: Initial Counselling (IC), Recorded Warning (RW) and Counselling and Probation (C&P). Remedial measures are intended to make the CF member aware of any conduct or performance deficiency, assist the CF member in overcoming the deficiency, and allow the CF member to correct their conduct or improve their performance. Although the members on whom they are imposed may perceive them as punitive, IC, RW and C&P are not punishments as defined in QR&O 104.02 (Scale of Punishments).

11. A single remedial measure will address a single conduct or performance deficiency but not both and not more than one. Where a CF member has displayed multiple deficiencies in conduct or performance, a separate and appropriate measure will be necessary. It is possible for a CF member to receive one or more remedial measures at the same time for deficiencies arising out of one event (e.g. an RW for misuse of alcohol and a C&P for sexual misconduct). The narrative describing each deficiency must be adequate so that the necessary monitoring may occur and the remedial measures can be reviewed meaningfully by staff and third parties who are unfamiliar with the facts that gave rise to the measure.

12. Remedial measures are selected by determining which measure is most appropriate for any given case. Various factors must be considered before a measure is selected. These factors include:

a. the facts of the case, including the significance and impact of the deficiency;

b. the CF member’s entire period of service, including rank, military occupation, experience and position;

c. any informal conduct or performance assessment, evaluation or constructive criticism previously received by the CF member in respect of the deficiency;

d. any previous deficiency substantially related to the CF member’s current deficiency and the amount of time that has elapsed between the two; and

e. any relevant policy factors related to the specific deficiency.

---

2 B-GG-005-027/AF-011, Military Justice at the Summary Trial Level, Ver. 2.0, c. 14 s. 3 at para. 14 [emphasis added].
3 DAOD 5019-4 (Remedial Measures); CANFORGEN 126/07, DAOD on Remedial Measures and Transitional Provisions.
13. An Initiating Authority selects the most appropriate remedial measure, initiates the remedial measure to be implemented; and delivers or causes to be delivered to the CF member the remedial measure. Only specific officers can initiate a remedial measure: a CO, a commander of a command or formation, the CDS, the CMP, DGRMC, D Mil C, and DMCARM. A CO may designate in writing officers who may issue an IC or RW. Sexual misconduct and drug cases An Initiating Authority must deliver a remedial measure personally to the member concerned. Only when that is not practical can the Initiating Authority order an appropriate officer to deliver the remedial measure to the member.

14. An Initiating Authority may determine that it is appropriate to initiate a more significant remedial measure without progressing from IC to RW to C&P. An Initiating Authority may initiate, in exceptional circumstances, an administrative action, other than a remedial measure, in the absence of any previous remedial measures initiated in respect of the CF member. There is no limit to the number of remedial measures that a CF member may receive or be subject to at any one time. It is possible, for example, for a CF member to be on IC for conduct regarding harassment, RW for performance regarding poor workmanship and C&P for conduct regarding prohibited drug use, all at the same time. If a CF member has demonstrated a conduct or performance deficiency, an initiating authority may review a CF member’s unit personal file (UPF) and determine that the CF member’s personnel record warrants other administrative action. The determining factor is not the number of measures, but rather the overall character of the CF member’s service.

15. Neither an IC nor RW impacts on any eligibility for promotion, training, posting, re-engagement or pay. As long as the member improves the performance or conduct, there should be no further career implications. When a CF member is placed on C&P, the eligibility for career opportunities is restricted. The CF member is not eligible for promotion, attendance on career courses, receiving incentive pay, or being posted or attached posted. Exceptions may be made to the general prohibition against postings and attached postings for operational reasons and in exceptional circumstances by DGRMC.

16. An IC and RW are administered by the Initiating Authority’s completing DAOD Form 5019-CPDA A, Remedial Measure to identify the deficiency (conduct or performance), describe the deficiency, identify the selected remedial measure, and establish the monitoring period. The Initiating Authority, or the officer it orders to deliver the remedial measure, shall then brief the member on the monitoring period, the conduct or performance expected, the schedule for progress briefing sessions, and the consequences of failure to correct the deficiency. The Initiating Authority will subsequently place a written account of each briefing session in the CF member’s UPF.

17. Because of its career implications, there is a requirement for more procedural fairness before initiating C&P. The Initiating Authority shall complete DAOD Form 5019-CPDA B, Notice of Intent to Place on Counselling and Probation and deliver it to the CF member, informing the CF member of the Initiating Authority’s intention to place the member on C&P, of the deficiency for which the measure is being taken, and the reasons that support the measure. The Initiating Authority shall disclose to the CF member copies of all documents that substantiate the proposed C&P and are to be considered before making a final decision. The Initiating Authority shall not release information that is exempt under DAOD 1001-0, Access to Information and DAOD 1002-0, Personal Information. The Initiating Authority shall provide the CF member with a reasonable opportunity, not less than 24 hours, to make written representations to the Initiating Authority. A CF member may request assistance or additional time to make representations. The Initiating Authority may grant such a request, if appropriate in the circumstances. If the CF member provides representations and the decision is to proceed with C&P, the Initiating Authority shall complete the appropriate form. The CF member’s representations may also cause an Initiating Authority to initiate IC or RW instead of C&P, to initiate other administrative action, or to take no further action.
18. Every remedial measure is followed by a monitoring period. The monitoring period is intended to allow a CF member time to demonstrate improvement and to overcome the deficiency, and allow time to assess the CF member’s progress. The monitoring period in which the CF member is to be regularly briefed and provided with the necessary leadership and support varies depending upon the type of measure, the Initiating Authority’s judgment as to how long an appropriate monitoring period should be, and the reason for initiating it. An IC and RW monitoring period may last three to six months. A C&P monitoring period normally lasts six months but can be extended an additional three months. A C&P initiated for illicit drug use will last twelve months and cannot be extended. A monitoring period normally commences when the CF member is informed of the remedial measure. When the commencement of the monitoring period cannot be started immediately, or the monitoring period needs to be suspended (e.g. no regularly scheduled duty period, LWOP, etc.), an Initiating Authority may adjust the dates of the monitoring period in the interest of fairness to the CF member or for service reasons.

19. A reporting officer may comment on a CF member’s deficiency on the member’s Personnel Evaluation Report. A remedial measure must be explained to the member by the appropriate supervisor in the member’s preferred official language. Any CF member who believes they have been aggrieved by a remedial measure may submit a grievance. All IC, RW, Notices of Intent (NOI) and C&P shall be kept permanently on the CF member’s personnel file.

SECTION 3
RELIEF FROM PERFORMANCE OF MILITARY DUTY

20. There are occasions where it may be appropriate for an officer or NCM to be relieved from the performance of their military duties. There is authority to relieve a CF member from the performance of their military duties under two circumstances:
   a. pursuant to QR&O 19.75 (Relief from Performance of Military Duty); and
   b. pursuant to QR&O 101.08 (Relief from the Performance of Military Duty – Pre and Post Trial).

21. Despite certain similarities, there is no overlap between QR&O 19.75 (Relief from Performance of Military Duty) and QR&O 101.08 (Relief from the Performance of Military Duty – Pre and Post Trial) and the two provisions must be kept conceptually and procedurally distinct. Relief From Performance of Military Duty - General

22. In exceptional circumstances, when other administrative action is insufficient, military authorities may determine it is necessary to relieve a member from performing all military duties for reasons of public interest or because the member’s presence will undermine unit morale or operational effectiveness. The following authorities may relieve a member from the performance of military duty:
   a. the CDS; and
   b. an officer commanding a command.

23. Before deciding that an officer or NCM is to be relieved of duty, the authority shall provide the member with the reasons why relief from duty is being considered. These reasons should set out, in sufficient detail, the basis for contemplating the relief from military duty so that the member’s representations in response can be relevant and meaningful.

---

4 See DAOD 5059-0, Performance Assessment of Canadian Forces Members
5 QR&O 19.75(1).
6 QR&O 19.75(6)(a).
24. The member is entitled to “a reasonable opportunity to make representations.” However, the regulations are silent as to what period of time constitutes a ‘reasonable opportunity.’ That determination must be based on all of the circumstances prevailing at the time. In the absence of an emergency, what will be considered a reasonable opportunity to make representations may require a longer period than would be otherwise reasonable when time is of the essence. Representations should be in writing and they must be considered before a final decision is reached.

25. The authority that orders the relief of an officer or NCM from military duty is required to provide to the member written reasons for their decision within 24 hours of relieving the member. The CDS must be informed of the reasons in writing if an officer commanding a command makes such a decision.

Considerations When Deciding Whether to Relieve From Military Duty

26. As with all administrative actions, a decision to relieve an officer or NCM from military duty must be made with due consideration. When determining whether to relieve a member from military duty, authorities must consider:

   a. the public interest (including maintaining discipline, good morale and the operational effectiveness of the CF); and
   
   b. the interests of the member.

27. The public interest in relieving a CF member from military duty may arise for reasons that are external to the CF, internal to the CF, or a combination of both. This public interest includes the effect a member has on operational effectiveness and morale, and the confidence that a CO or commander has in the CF member.

28. The ramifications of being relieved of military duty may be substantial or negligible, depending in part on the individual circumstances of the member concerned. For a junior CF member, early in their military career and not yet having established a reputation within the military community, the repercussions of being relieved from military duty can be overcome by service rendered in later years. For a senior officer, approaching the end of a career, or who is being considered for higher command, the stigma that could be associated with that officer’s abilities or character may be irreparable. In both cases, the authority that considers relieving a member from military duty must give careful consideration to any representations made by the member.

29. It may be readily apparent that relieving a CF member of their military responsibilities and removing them from the unit would benefit the CF or the community in some way and, thereby, constitute a course of action that is considered to be ‘in the public interest.’ However, it must also be remembered that the public interest includes the maintenance of Canadian societal values and respect for the Rule of Law. Societal values include the importance of protecting individual rights. In Canada, ‘respect for the rule of law’ means that state action against individuals must be carried out in accordance with the law. In the case of relieving a CF member from military duty, the law requires a balancing of both the public interest and the member’s interests. Before an authority can decide to order the relief of a member, that authority must decide:

---

7 QR&O 19.75(6)(b).
8 QR&O 19.75(7).
9 QR&O 19.75(8).
10 QR&O 19.75 (Relief From Performance of Military Duty), Note A.
11 While the circumstances would be exceptional, there may be situations where removal from military duties might be advantageous to, or for the benefit of, the member (i.e., for their protection or to avoid public humiliation). Regardless of whether the member might be in agreement with the action, the process of notification, solicitation of the member’s representations and provision of a written decision must be followed in all cases.
a. that no other administrative means of employing the subject (i.e., attach posting, leave, re-assignment of duties) are adequate in the circumstances; and

b. any prejudice to the member is clearly outweighed by the benefits to the public and the CF.

30. The officer who is responsible for ordering a CF member relieved of military duty shall return the member to duty as soon as the circumstances that originally required the administrative action no longer exist. The CDS must be informed, in writing, of this change of circumstances and the decision to return the member to duty.\(^\text{12}\)

### Relief From Performance of Military Duty – Pre and Post Trial

31. In disciplinary cases, a member may be relieved from the performance of military duties if it is necessary to separate the member from the unit. One of the following circumstances must exist for QR&O 101.08 (Relief From Performance of Military Duty – Pre and Post Trial) to apply:

a. the authority has reasonable grounds to believe that the member has committed an offence under an Act of Parliament or of a provincial legislature and an investigation has been commenced;

b. the member has been charged with an offence as described above; or

c. the member has been convicted of an offence but is not sentenced to detention or imprisonment.\(^\text{13}\)

32. The CDS, an officer commanding a command, a formation commander and a CO, all have the authority to relieve personnel from the performance of military duty under QR&O 101.08 (Relief From Performance of Military Duty – Pre and Post Trial) in normal circumstances. However, only the CDS can relieve a CF member from duty, when the member is on active service, by reason of an emergency. Otherwise, the authority of a commander of a command or a formation commander under this authority is limited to NCMs and officers below the rank of LCol, while the authority of a CO to relieve a member from duty is limited to officer cadets and NCMs below the rank of WO.\(^\text{14}\)

33. The decision-maker must ensure that the procedural safeguards specified in regulations are addressed. Prior to making the final decision, the authority must advise the member why the relief from duty is being considered and provide the member with a reasonable opportunity to make representations. If the member is ultimately relieved, the authority must, within 24 hours, provide the member with written reasons for the action.\(^\text{15}\)

34. Relief from military duty cannot be used as a form of discipline, punishment or penalty.\(^\text{16}\) Relief from military duty is merely an administrative separation from employment. Nevertheless, the extreme nature of the action can still have significant, prejudicial effects on the member’s reputation and morale. A member who is relieved from performing military duties continues to receive pay and allowances,\(^\text{17}\) remains subject to the Code of Service Discipline and is liable to obey all lawful commands.\(^\text{18}\)

---

\(^\text{12}\) QR&O 19.75(5).
\(^\text{13}\) QR&O 101.08 (3).
\(^\text{14}\) QR&O 101.08(1)-(2).
\(^\text{15}\) QR&O 101.08(5)-(6).
\(^\text{16}\) QR&O 101.08 (Relief From Performance of Military Duty – Pre and Post Trial) Note (A).
\(^\text{17}\) QR&O 208.30 (Forfeitures – Officers and Non-Commissioned Members) to QR&O 208.36 (Restoration of Pay and Allowances) describe circumstances when an officer or NCM is subject to forfeiture of pay.
\(^\text{18}\) QR&O 101.08 (Relief From Performance of Military Duty – Pre and Post Trial) Note (B).
SECTION 4

REMOVAL FROM COMMAND

35. In the same way that selection for command is not governed by the NDA or QR&Os, neither is the temporary or permanent removal from command determined by reference to any specific statute or regulation. As with the command appointment process whereby the CDS appoints environmental commanders who, in turn, appoint formation commanders and COs, the removal of an officer from command is governed by the customs and practice of the service. Accordingly, the commander with authority to appoint an officer as a CO or a subordinate commander is normally the same authority who will, if need be, exercise the power to remove an officer from command. 19

36. The temporary or permanent removal from command reflects a general “loss of confidence in the person’s ability to effectively exercise command” as the result of:
   a. professional or off-duty misconduct; or
   b. unsatisfactory performance that may include:
      i. serious errors in judgement; or
      ii. a trend of errors having a significant impact. 20

37. Considering the potential impact on an individual’s career, any officer who is being considered for removal from command must be afforded the fullest measure of procedural fairness. At a minimum, procedural fairness in this context must include providing the individual whose career may be affected with:
   a. a notice of intention to render a decision regarding their continuing command;
   b. information regarding the superior’s concerns and the allegations against the member’s interest so that the member may properly address the concerns (this will include the disclosure of all information and documentation that is to be considered by the decision-maker); and
   c. a reasonable period of time to prepare a response and to make representations to the member’s superior. Whether the representations will be made orally or in writing will be determined by the situation. 21

38. The superior officer who is considering the removal of an officer from command should consider the following prior to making a decision:
   a. the seriousness of the allegations or circumstances causing concern;
   b. the reliability and completeness of the information causing concern, including police reports or service investigations, if any;
   c. the representations of the officer whose career may be affected;
   d. the effect that the officer’s continued presence or removal will have on that officer’s subordinates;

19 NDHQ, Chief of the Defence Staff, Guidelines – Removal from Command, 12 December 2001 at para. 3.
20 Ibid., at para. 4.
21 Ibid., at para. 7.
e. the notoriety of the issue, as well as both the CF’s and the public’s perception of it;

f. the principles of Canadian Defence Ethics;

g. the officer’s ability to effectively carry out the functions of command, including leadership and disciplinary functions, while maintaining public trust and confidence;

h. the consequences of any investigation or legal proceedings, if applicable, including rights of appeal;

i. the superior’s assessment as to the individual’s ability to exercise command given current and projected circumstances;

j. past precedents;

k. previous corrective measures that have been taken, if applicable; and

l. the best interests of the CF.  

39. Normally, the appointing authority that removes a CO or subordinate commander from command will also act as the review authority. The decision to remove a flag or general officer from command will usually be made by the appointing authority. However, the review of the removal action will be conducted by Armed Forces Council, which will advise the CDS after completing the review.  

SECTION 5

REFERENCES

Legislation


Regulations

QR&O 4.02 (General Responsibilities of Officers).

QR&O 5.01 (General Responsibilities of Non-Commissioned Members).

QR&O 19.75 (Relief From Performance of Military Duty).

QR&O 101.08 (Relief From Performance of Military Duty – Pre and Post Trial).

QR&O Volume III, Section 3 (Forfeitures).

QR&O 208.30 (Forfeitures – Officers and Non-Commissioned Members).

QR&O 208.36 (Restoration of Pay and Allowances).

Orders, Directives and Instructions

22 Ibid., at para. 8.

23 Ibid., at para. 11.
DAOD 5019-4 (Remedial Measures).

CANFORGEN 126/07, DAOD on Remedial Measures and Transitional Provisions.

Jurisprudence


Secondary Material

B-GG-005-027/AF-011, Military Justice at the Summary Trial Level, Ver. 2.0.

CHAPTER 15
PERSONNEL EVALUATION REPORTS

SECTION 1
INTRODUCTION

General

1. In accordance with QR&O 26.08 (Personal Reports and Assessments), routine and special personal reports and assessments are to be prepared on CF members.¹ To that end, DAOD 5059-0 (Performance Assessment of Canadian Forces Members) states that regular force members will be assessed under the Canadian Forces Personnel Appraisal System (CFPAS) and reserve force members will be assessed under the CFPAS, taking into account any additional instructions issued by the environmental commanders (or equivalent).²

Purpose

2. The CFPAS in general, and the guidelines for writing PERs in particular, are explained in detail in the CFPAS Policy Directive and the CFPAS Handbook. The purpose of this chapter is not to reiterate these publications. Rather, this chapter is meant to assist in avoiding common pitfalls associated with the writing of PERs. This chapter must be read in conjunction with the regulations and policies enumerated in section 4 below.

SECTION 2
LEGISLATION, REGULATIONS AND POLICY

Canadian Human Rights Act

3. Pursuant to the Canadian Human Rights Act (CHRA), employers cannot “in the course of employment, …differentiate adversely in relation to an employee on a prohibited ground of discrimination.”³ Prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex (including pregnancy or childbirth), sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.⁴

4. PERs must not contain information related to the prohibited grounds of discrimination listed in the CHRA.⁵ For example, it would be improper to write, "Capt Smith is in good physical condition, despite being advanced in years."

Regulations and Policy

5. The CFPAS Policy Directive prescribes the policy governing the CFPAS and provides amplification to some of the topics touched upon in the CFPAS Handbook. It is to be read in conjunction with the CFPAS Handbook.⁶ The CFPAS Policy Directive, CFPAS Handbook, and CFPAS Word Picture Book (CFPAS WPB) are available in the CFPAS software Help File on the DIN (CF Intranet) through Baseline software.

¹ QR&O 26.08 (Personal Reports and Assessments).
² DAOD 5059-0 (Performance Assessment of Canadian Forces Members), marginal note: Policy Direction/Requirements.
³ R.S.C. 1985, c. H-6, s. 7(b).
⁴ Ibid., s. 3.
⁵ See CFPAS Handbook, s. 301 at para. 3 and CFPAS Policy Directive at para. 30e.
6. The *CFPAS Handbook* provides detailed instructions on the CFPAS. The handbook is published under the authority of the CDS and is maintained by the Director Military Careers Administration and Resource Management (DMCARM).

7. The *CFPAS WPB* is issued under the authority of the CDS and is maintained by DMCARM and provides benchmarks so that supervisors can identify the level of performance in each of the 16 Performance Assessment Factors (AFs) that most closely corresponds to the member’s actual performance during the reporting period. The *CFPAS WPB* is broken down by rank from Cpl/LS to MWO/CPO2 and from Lt/SLt to LCol/Cdr. Once the supervisor finds the word picture that most closely equates to the member’s observed performance in each AF, the *CFPAS WPB* directs the supervisor to the appropriate “dot” for that AF. A similar decision-making tool for assessing the six Potential Factors (PFs) is found in the “Potential Rating Scale” in section 305 of the *CFPAS Handbook*.

8. The CFPAS home page is available from within the DGMC website on the CF Intranet and contains a “What’s New” section, downloads and frequently asked questions (FAQs), as well as a means to contact DMCARM 2 personnel who administer CFPAS and the Selections Boards on behalf of DMCARM.7

**SECTION 3**

**ADDITIONAL GUIDANCE**

9. Performance and potential are rated separately: AFs are not to influence PFs nor are PFs to influence AFs. For example, during a given reporting period, Cpl A may have performed very well but demonstrated only normal potential for promotion. Cpl A could receive mostly “exceeded standard” AFs and mostly “normal” PFs. Conversely, newly promoted Cpl B, whose performance was still developing, could have demonstrated very great potential for promotion. Cpl B could receive mostly “developing” AFs and mostly “outstanding” PFs. As it is the PFs that influence the potential ranking,5 Cpl B must rank ahead of Cpl A, even though Cpl A’s performance was better.

10. If a member receives any “unacceptable” AFs, that rating must be substantiated in the section 4 narrative.9 Similarly, “low” PFs must be substantiated in the section 5 narrative.10 If a member receives an “unacceptable” AF or a “low” PF, the CO must sign section 5 of the PER.11 If a member receives one or more “low” PFs, the member must receive a “no” under promotion recommendation.12 “No” recommendations must be substantiated in the section 5 narrative,13 and section 6 must be completed.14

11. All “outstanding” PFs must be substantiated in the section 5 narrative.15 If a member receives 4 or more “outstanding” PFs and no “low” PFs, the member automatically receives an “immediate” promotion recommendation and section 6 (additional review) must be completed.16

12. Because of the great importance that PERs play in the administration of a member’s career, it is hardly surprising that PERs are often the subject of applications for redress of grievances pursuant to QR&O Chapter 7 (Grievances). However, most PER-related

---

8 *CFPAS Handbook*, s. 312 at para. 8.
9 *ibid.*, s. 301 at para. 4.
10 *ibid.*, s. 301 at para. 5.
11 *ibid.*, s. 312 at para. 3.
12 *ibid.*, s. 312 at para. 5b.
13 *ibid.*, s. 312 at para. 5a.
14 *ibid.*, s. 313 at para. 1.
15 *ibid.*, s. 301 at para. 5.
16 *ibid.*, s. 312 at para. 5d.
disagreements can and should be resolved at the unit level as there is ample opportunity for doing so. That is, a member may voice disapproval with their PER during the PER interview. If the member’s supervisor agrees with the member’s point of view, the PER may be amended accordingly. If the member’s supervisor disagrees with the member’s assessment of the situation, the supervisor should be able to clearly articulate to the member the reasons why the PER appears as it does. If the supervisor is able to provide the member with valid reasons for the assessment, even a member who is unhappy with the assessment will probably leave the interview satisfied that it was fairly written.

13. If the member is unhappy with the supervisor’s explanation, the member should make every effort to resolve the dispute informally with the member’s CO. This provides the CO with the opportunity to consider the member’s submissions and to make the desired amendments, if warranted. If not, the CO has yet another opportunity to explain to the member why the PER should go unchanged. Again, the CO should be able to clearly articulate to the member why a change to the PER is inappropriate.

14. If every effort at informal resolution in consultation with the CO proves unsuccessful, the member may submit an application for redress of grievance to the CO who will then forward the grievance to the Director General Military Careers (DGMC). DGMC will act as the initial authority (IA). If the IA does not grant redress, the member may submit the grievance to the CDS who may delegate final authority for such matters to the Director General CF Grievance Authority (DGCFGA). A recent review of grievances submitted to DGCFGA revealed systemic problems that are explained in the paragraphs that follow.

15. One of the most common PER errors that results in redress being granted is a lack of consistency between the section 4 narrative and the AFs or the section 5 narrative and the PFs. In other words, the “dots” should correspond to the narrative. After the section 4 narrative is written, the supervisor must turn to the CFPAS WPB and find the word picture that most closely resembles the phraseology used in the narrative. This will direct the supervisor to the correct “dot” within the AF. Similarly, after the reviewing officer completes the section 5 narrative, the supervisor should turn to the “Potential Rating Scale” in section 305 of the CFPAS Handbook in order to determine the correct “dot” in each of the PFs. For example, if the section 4 narrative of a PER stated that, “PO2 Smith carefully selected the best course of action when she…,” but PO2 Smith was rated as “skilled” under AF 7, PO2 Smith could justifiably grieve that she should have been awarded a rating of “exceeded standard.”

16. The PER narrative should bear some resemblance to the narrative in section 5 of the member’s PDRs and to the narrative in any letters of assessment, course reports, etc. PDRs are not meant to be a tool that the member can use in order to predict the scoring that will appear on the PER. However, the contents of a PER should not come as a surprise to the member. For example, if A/SLt Jones’ midpoint PDR states that he “respects the dignity of others” and he receives a course report stating that he “functions well in a team setting”, the CFPAS WPB would indicate that he should be rated as “skilled” under AF 5. Conversely, in the absence of any other information, if A/SLt Jones is rated as “needs improvement” under AF 5 of his PER, he might well be successful in any application for redress of grievance based on this argument.

17. PERs are to reflect the entire 12-month reporting period (i.e., 1 April to 31 March). A member’s parent unit should collect PDRs and other assessments from all other units where the member has been employed during the reporting period and this information should be

18 CFPAS Handbook, s. 301 at para. 4.
19 Ibid., at para. 5.
20 This is because the phrase, “carefully selects best course of action” corresponds directly with the phrase, “exceeded standard” under AF 7 for Sgt/PO2 in the CFPAS WPB.
21 DGMC 001 170901Z JAN 05, CFPAS Lessons Learned and the Way Ahead, para. 4, online: DIN http://hr3.ottawa-hull.mil.ca/dgmc/docs/msg/2005/dgmc001_b.pdf [DGMC 001 170901Z JAN 05].
incorporated into the PER.\textsuperscript{22} This includes previous units to which the member was posted (i.e., if a member is posted from one unit to another on 1 July, the period from 1 April to 30 June must be included in the PER). In such a case, the losing unit should complete section 5 of a PDR and forward it to the gaining unit.\textsuperscript{23} Where the PER does not cover the entire reporting period (i.e., where the member received an in-theatre PER, is on leave without pay, advanced training list, etc.), the reason is to be noted (including all pertinent dates), in section 3 of the PER.\textsuperscript{24}

18. Relatively minor administrative errors and deviations from CFPAS procedure will not necessarily render a PER invalid. Examples of such minor errors and deviations could include typographical errors, errors as to the order in which PERs are signed,\textsuperscript{25} or failing to provide the member with a copy of the completed signed PER at the time of the PER interview.\textsuperscript{26} While such oversights may not result in redress being granted, they reflect poorly on the unit and every effort should be made to ensure that PERs are error free.\textsuperscript{27}

19. Fluctuations in PERs from one year to the next are to be expected, as PERs are based solely on the current reporting period. Therefore, a member may find that their overall evaluation has declined from the previous year. Such a decline in any part of a PER is not indicative of an irregularity in the PER. As stated in the \textit{CFPAS Handbook}:

\begin{quote}
In assessing performance the supervisor reviews observed work behaviours and information pertaining to the member that is applicable for the current reporting period and contained in the PDR forms and other personnel documents such as letters of appreciation and course reports which are typically stored in the personnel file.\textsuperscript{28}
\end{quote}

20. Once a PER is completed and signed, only one copy of the document should be made. The copy is to be provided to the member during the PER interview for the member’s retention and all drafts should be destroyed.\textsuperscript{29} See chapter 4 of the \textit{CFPAS Handbook} for instructions regarding the supplementary reporting channels for medical officers, dental officers, legal officers, chaplains, military police, Canadian defence attachés and CF exchange officers.

21. The role of unit merit boards has been contentious. Under the former PER system, high score controls were imposed upon units. Typically, high score controls meant that an increase in score for one member would result in a decrease in score for another. As units tended to ‘right justify’ scores for their top performers, those not considered to be a top performer suffered under that system. Moreover, supervisors did not have the latitude to score subordinates as they saw fit. CFPAS has removed high score controls from all aspects of the PER.\textsuperscript{30} The \textit{CFPAS Handbook} states:

\begin{quote}
given that high score controls no longer exist, PERs can now be written by supervisors without unit merit boards dictating what supervisors can allocate in terms of scores. Units will still have to rank the top 10 people or 50% (whichever is less), for each rank and MOS within the unit, but the high scores typically awarded to the top people in each MOS will no longer adversely impact PER scores for the remaining unit personnel.\textsuperscript{31}
\end{quote}

\textsuperscript{22} \textit{CFPAS Policy Directive} at para. 9.
\textsuperscript{23} \textit{Ibid.}, para. 5.
\textsuperscript{24} \textit{CFPAS Handbook}, s. 309 at para. 2.
\textsuperscript{25} \textit{Ibid.}, s. 314 at para. 1.
\textsuperscript{26} \textit{Ibid.}, s. 315 at para. 8.
\textsuperscript{27} \textit{Ibid.}, s. 315 at para. 5.
\textsuperscript{28} \textit{Ibid.}, s. 301 at para. 3.
\textsuperscript{29} \textit{Ibid.}, s. 315 at para. 8.
\textsuperscript{30} \textit{Ibid.}, s. 103 at para. 1.
\textsuperscript{31} \textit{Ibid.}, s. 108 at para. 1b.
22. Thus, CFPAS allows COs to provide supervisors with greater latitude in scoring their subordinates and decreases the need for co-ordination at the unit level. However, the fact that high score controls have been removed from the CF system, and that PERs ‘can’ be written without reference to unit merit boards, does not mean that PERs ‘must’ be written without reference to unit merit boards. CFPAS neither requires, nor prohibits unit co-ordination of PERs. For example, should a CO choose to not take advantage of the greater latitude offered by CFPAS and instead, opts for unit co-ordination of promotion recommendations, this would not render a PER invalid, in and of itself.\textsuperscript{32} Moreover, as CFPAS removed high score controls, it is for the units to monitor PER scores in order to guard against artificial inflation.\textsuperscript{33}

23. Compassionate, administrative, medical, and disciplinary problems are to be commented on in PERs where they result in restricted employment or they negatively affect the member’s performance, deportment or behaviour.\textsuperscript{34} Counselling with respect to shortcomings given to a member prior to the current reporting period may be mentioned where the shortcomings continue to result in restricted employment or negatively affect the member’s performance or behaviour in the current reporting period.\textsuperscript{35} Where a member is retained with employment restrictions under the universality of service policy, this fact may be commented upon, but the member is to receive a PER that is completed in the standard fashion in every other respect.\textsuperscript{36}

24. If a conviction under the Criminal Code or the NDA occurs during the reporting period and results in restricted employment, has an adverse effect on performance, or results in a reduction of rank as a result of a sentence awarded by a service tribunal, the details of the conviction (including the date of conviction), must be recorded in the PER.\textsuperscript{37} Conversely, unresolved charges are not to be mentioned in PERs without the written authorization of DMCARM 2 (in the case of regular force members), or other appropriate authority (in the case of reserve force members).\textsuperscript{38} DMCARM 2, or the other appropriate authority, must consult the appropriate representative of the Judge Advocate General before providing written authorization to mention unresolved charges.\textsuperscript{39}

SECTION 4

REFERENCES

Legislation


Regulations

QR&O Chapter 7 (Grievances).

QR&O 26.08 (Personal Reports and Assessments).

QR&O 26.09 (Recommendation for Promotion).

QR&O 26.10 (Personal Reports and Assessments – Military Judges).

QR&O 26.11 (Assessment of Performance – Member of Court Martial Panel).

\begin{itemize}
\item \textsuperscript{32} This position has been supported by DGCFGA.
\item \textsuperscript{33} DGMC 001 170901Z JAN 05 at para. 6.
\item \textsuperscript{34} CFPAS Policy Directive at para. 30a.
\item \textsuperscript{35} \textit{Ibid.}, para. 30b.
\item \textsuperscript{36} \textit{Ibid.}, para. 30a.
\item \textsuperscript{37} \textit{Ibid.}, para. 30c.
\item \textsuperscript{38} In the case of reserve members, COs should contact DMCARM 2 in order to determine the other appropriate authority.
\item \textsuperscript{39} CFPAS Policy Directive at para. 30d.
\end{itemize}

Orders, Directives and Instructions

DAOD 5059-0 (Performance Assessment of Canadian Forces Members).

Secondary Material


CHAPTER 16
PROMOTION
SECTION 1
INTRODUCTION

1. Officers and non-commissioned members of both the regular and reserve force may be promoted provided they meet the promotion requirements set out in the QR&Os and in orders issued under the authority of the CDS. The regulations and orders that apply in each case will depend on whether the member is an officer or NCM of the regular force, or an officer or NCM of the reserve force. Although this chapter describes in more detail the regulations and orders controlling promotions in the regular and reserve forces, the CF’s various promotion policies can be reduced to three basic questions:

a. **Vacancy**: does the CF believe this particular vacancy requires the promotion of a member?

b. **Recommendation**: does the CF believe this particular member is ready for promotion? and

c. **Approval**: does the CF want to promote this particular member into this particular vacancy?

SECTION 2
REGULAR FORCE OFFICERS

2. *QR&O* Chapter 11 (Promotion, Reversion and Compulsory Remustering) and *QR&O* Chapter 12 (Promotion of Officers), as well as CFAO 11-6 (Commissioning and Promotion Policy – Officers - Regular Force), govern the commissioning and promotion policy for officers of the regular force. *QR&O* Chapter 11 (Promotion, Reversion and Compulsory Remustering) provides the authority for promotion and the conditions that apply. CFAO 11-6 (Commissioning and Promotion Policy – Officers - Regular Force) amplifies *QR&O* 11.02 (Conditions Governing Promotion). It sets out the authority to promote, the military requirements associated with a promotion, promotion zones and recommendations. This CFAO was significantly amended by CANFORGEN 087/06. These orders are the main sources of information for the promotion of regular force officers in the CF and should be read in detail. *QR&O* 12.01 (General) provides that "officers shall be promoted in rank in accordance with orders and instructions issued by the Chief of the Defence Staff."

 Authorities

3. The person with the authority to promote an officer in the CF is either the MND or the CDS, depending on the rank of the officer. For BGen/Cmdre or higher, it is the MND who will promote the officer on the recommendation of the CDS. For officers of the rank of Col/Capt(N) or below, the CDS has the authority to promote. If the officer is a LCol/Cdr or below, the CDS can designate an officer to fulfill the responsibilities of promoting the member. CFAO 11-6

---

1. *QR&O* 11.02 (Conditions Governing Promotion).
2. CANFORGEN 087/06 CMP 040 081835Z MAY 06 (New DAODs On Universality Of Service, Minimum Operational Standards Related To Universality Of Service, And CF Physical Fitness Program)
3. *QR&O* 12.01 (General).
4. *QR&O* 11.01 (Authority for Promotion), CFAO 11-6 (Commissioning and Promotion Policy – Officers – Regular Force), para. 9.
(Commissioning and Promotion Policy – Officers - Regular Force) has a table of designated officers with the authority to promote officers to the next rank. The list should be used with caution as the names of many of the directorates have now changed and new designations have been signed by the CDS.

Conditions for Promotion

4. An officer may be promoted if the member satisfies various conditions for promotion. First, before any member can be promoted, there must be a vacancy in the total establishment for the member's component. Second, the appropriate authority must recommend the officer for promotion. Third, the officer must meet the promotion standards, as prescribed by the CDS. The CDS, however, may direct that the requirement to meet any promotion standard be waived. Members of the special force, whether officers or NCMs, may be promoted to a temporary or acting rank.

5. In accordance with the third condition concerning promotion, an officer must meet the following promotion standards, as prescribed by the CDS:
   a. meet minimum operational standards related to universality of service as set out in DAOD 5023-1 which includes successful completion of the applicable fitness standard;
   b. complete 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;
   c. attain the qualification requirements for the officer’s military occupation, except that an officer commissioned under the special requirements commissioning plan (SCRP) may be promoted to captain without an occupational qualification;
   d. be medically fit and meet the minimum medical standards for the field of employment prescribed in A-MD-154-000/FP-000 Medical Standards for the Canadian Forces, or be recommended by the administrative review (medical employment limitations) for retention without restrictions;
   e. be in possession of the minimum security clearance required by the officer’s MOC; and
   f. where promotion is on a competitive basis meet other conditions prescribed in this order dependent on: 1) individual merit, including potential for more senior rank, and 2) the military requirement.

6. Promotion to Capt/Lt(N), Maj/LCdr, LCol/Cdr, and Col/Capt(N) in most military occupations is a competitive process. Each officer will compete with other officers in the same MOC. Promotion to the rank of BGen/Cmdre is competitive among General Service Officers and within Specialist Officer MOCs. Promotion to MGen/RAdm and above is through a selection process.

7. COs making recommendations for promotion of their subordinates must do so on a Personnel Evaluation Report (PER). A CO must immediately report any changes in circumstances between the time the PER report was submitted and the next PER submission which could affect the officers eligibility or suitability for promotion.

---

5 QR&O 11.02(3).
6 CANFORGEN 087/06.
7 CFAO 11-6, paras. 6-8.
8 Ibid., para. 16.
8. The following are general provisions which apply to officer promotion:
   a. promotions are to substantive rank;
   b. an officer is not to be promoted prior to entering the promotion zone for the next rank. The exception is where there has been an accelerated promotion or an officer is given an acting rank;
   c. if an officer declines the promotion offer, the officer will not be considered for another promotion during the same promotion year that the offer was made. The officer may be offered another promotion in subsequent years provided he or she remains eligible;
   d. if an officer has any medical, compassionate or other reasons which potentially limit the officer’s employability in the next rank, the officer may be denied a promotion or the promotion may be deferred; and
   e. the officer must be MOC qualified to be promoted above the rank of Lt/SLt unless there are special provisions providing otherwise.

9. COs may recommend officers for accelerated promotion. The officer must hold at least the rank of Lt/SLt. The CO must prepare a PER, which must set out the reason why the subordinate deserves a rapid and extraordinary promotion and why the promotion is in the best interests of the CF. The report must be reviewed and endorsed by the most senior officer at each level of the chain of command. DAOD 5059-0 (Performance Assessment of Canadian Forces Members) should be followed when completing PERs for the purpose of recommending an accelerated promotion.

10. Annex A (Special Provisions – General Service Officer Occupations) to CFAO 11-6 (Commissioning and Promotion Policy – Officers – Regular Force), provides further information with respect to the special provisions concerning the promotion of general service officers in various entrance plans. Annex B (Special Provisions – Specialist Officer Occupations) to CFAO 11-6 pertains to specialist officers and the special provisions concerning their promotions. Annex C (Officer Merit Boards – Regular Force) to CFAO 11-6 provides direction on the conduct of officer merit boards for the regular force. These annexes should be consulted for further details on promotions.

Acting Rank

11. The CDS may authorize a designated officer to grant a CF officer an acting rank. Acting ranks may be granted to meet special requirements. An officer who has been granted an acting rank does not have seniority in that rank, but will continue to have seniority in the officer’s substantive rank. The holding of the higher rank must be essential for the member to perform his or her job. Acting ranks will not be granted for temporary or fill-in positions.

---

9 Ibid., para. 17.
10 Ibid., para. 19. It should be noted that DAOD 5059-0 (Performance Assessment of Canadian Forces Members) has replaced CFAO 26-6 (Personal Evaluation Reports), which has been cancelled.
11 CFAO 11-6, para. 9.
12 Ibid., paras. 17(a), 17(c); CANFORGEN 060/00 – ADM (HR-MIL) 021300Z Jun 00 (Acting Pay/Rank).
13 CANFORGEN 060, para. 7(b).
SECTION 3
REGULAR FORCE NON-COMMISSIONED MEMBERS

12. The main source of information pertaining to the promotion of an NCM is CFAO 49-4 (Career Policy Non-Commissioned Members Regular Force). This CFAO was significantly amended by CANFORGEN 087/06. These orders set out who has the authority to promote an NCM to the next higher rank and the conditions that must be satisfied before an NCM is considered for promotion. They amplify QR&O Chapter 11 (Promotion, Reversion and Compulsory Remustering) and QR&O Chapter 14 (Promotion and Reclassification of Non-Commissioned Members).

13. QR&O 14.01 (General) provides that "non-commissioned members shall be promoted in rank and reclassified in accordance with orders and instructions issued by the [CDS]."

Authorities

14. The authority to promote an NCM in the CF is either the member’s CO or NDHQ/D Mil C, depending on the rank of the NCM. A CO has the authority to promote a member to:
   a. Private (Basic)/Ordinary Seaman (Pte(B)/OS);
   b. Private (Trained)/Able Seaman (Pte(T)/AS);
   c. acting lacking Corporal/Leading Seaman (AL/Cpl/LS);
   d. acting Corporal/Leading Seaman (Provisional) (A/Cpl/LS(P)); and
   e. Corporal/Leading Seaman (Cpl/LS).

NDHQ/D Mil C has the authority to appoint a member to MCpl/MS or promote a member to the rank or Sgt/PO2 or higher.

Conditions for Promotion

15. As with the promotion of officers, no NCM may be promoted unless the member satisfies various conditions for promotion. First, before any member can be promoted, there must be a vacancy in the total establishment of the member’s component. Second, the NCM must be recommended by the appropriate authority. Third, the member must meet the promotion standards, as prescribed by the CDS. However, the CDS may direct that the requirement to meet any promotion standard be waived. Members of the special force, whether an officer or NCM, may be promoted to a temporary or acting rank only.

16. In accordance with the third condition concerning promotion, an NCM must meet the following promotion standards prescribed by the CDS:
   a. meet the minimum operational standards related to universality of service as set out in DAOD 5023-1 which includes successful completion of the applicable fitness standard;

14 CANFORGEN 087/06 CMP 040 081835Z MAY 06 (New DAODs On Universality Of Service, Minimum Operational Standards Related To Universality Of Service, And CF Physical Fitness Program)
15 QR&O 14.01 (General).
16 CFAO 49-4 (Career Policy Non-Commissioned Members – Regular Force), para. 4. It should be noted that any reference to NDHQ/DGPCOR in this CFAO, and any subsequent ones as cited in this manual, shall be construed as a reference to NDHQ/D Mil C.
17 QR&O 11.02(3).
b. meet the prerequisites prescribed in CFAO 49-4 (Career Policy Non-Commissioned Members Regular Force), Annex A (Promotion-Eligibility Criteria); and

c. when the appointment is to MCpl or promotion to a rank higher than Cpl, meet other conditions prescribed in this order, dependent on: 1) individual merit, as determined by a merit board, and 2) the military requirement; and

d. meet such other conditions as the CDS may prescribe from time to time.  

17. COs are responsible for recommending appointments to the rank of MCpl/MS and all promotions of Sgt/PO2 and above. If a CO recommends that a member be promoted, this recommendation is construed to mean that the member has demonstrated the potential to move up to the next higher rank and that the CO is prepared to retain and develop the member in the next higher rank. A CO is also responsible for ensuring, prior to the promotion, that the member meets the minimum medical standards required for the member’s MOC, as prescribed in ADM (HR-Mil) Instruction 11/04.

18. COs who make recommendations for promotion of their subordinates must do so in a Personnel Evaluation Report (PER). A CO must report immediately any changes in circumstances between the time the PER report was submitted and the next PER submission which could affect the NCM’s eligibility or suitability for promotion. If the CO decides not to promote a member to Pte(T)/AB or Cpl/LS, the CO is responsible for contacting NDHQ/D Mil C and providing the department with information pertaining to the circumstances surrounding the denial and the anticipated delay in promotion. The member must also be informed of the action taken and that they have a right to submit an application for redress of grievance.

19. In situations where a rank change instruction has been issued and the CO does not agree with the instruction, the CO can recommend that the promotion be denied. This recommendation must be forwarded to NDHQ/D Mil C and the member must be advised of the C0s action and NDHQ’s decision.

Acting Appointments and Rank

20. A member may be granted an acting appointment or rank if the member has met all promotion requirements with the exception of a qualification level (QL) or formal course. The CO may grant a member A/Cpl/LS(P) or AL/Cpl/LS. NDHQ/D Mil C may grant AL/MCpl/LS and above. As with any appointment or promotion, a member will only be granted an acting appointment or rank if a vacancy exists.

21. When a member has been promoted to Cpl/LS and the member held an acting rank prior to the promotion, the member will have seniority in the substantive rank from the date the member was granted acting rank. When a member is appointed to MCpl/MS or promoted to Sgt/PO2 or above and the member held an acting rank prior to the promotion, the member’s seniority in the substantive rank will be calculated from the 1st of January of the year the member was granted an acting rank. This does not apply to members who have been granted acting-while-so-employed rank.

18 CANFORGEN 087/06 CMP 040 081835Z MAY 06 (New DAODs On Universality Of Service, Minimum Operational Standards Related To Universality Of Service, And CF Physical Fitness Program)
19 CFAO 49-4 (Career Policy Non-Commissioned Members Regular Force), para. 12.
20 Ibid., para. 15. It should be noted that CFAO 34-30 (Medical Standards for the Canadian Forces) was replaced by ADM (HR-MIL) Instruction 11/04, Canadian Forces Medical Standards, online: DIN < http://hr3.ottawa-hull.mil.ca/docs/instruction/instructions/enigraph/1104_admhrmil_e.asp >.
21 Ibid., paras. 13-14.
22 Ibid., para. 16.
23 Ibid., Annex C (Acting Rank – Acting Lacking (AL) or Provisional (P)), paras. 1-2.
24 Ibid., para. 23.
22. There are cases in which a member will not be granted an acting appointment or rank. They include when the member has:
   a. not been able to meet the MOC qualifications of the appointment or rank due to medical reasons;
   b. declined or failed to attend a QL course or examination due to personal reasons; or
   c. previously reverted from the same acting rank.\textsuperscript{25}

SECTION 4

PRIMARY RESERVE OFFICERS

23. CFAO 49-12 (Promotion Policy – Officers – Primary Reserve) is the main source of information pertaining to the promotion of officers in the primary reserve. Much of the policy is similar in design to the promotion policy for regular force officers. CFAO 49-12 (Promotion Policy – Officers – Primary Reserve) sets out promotion prerequisites, promotion authorities and provides the procedure for making submissions for promotions. This CFAO was significantly amended by CANFORGEN 087/06.\textsuperscript{26}

Authorities

24. The authorities to promote primary reserve officers are as follows:
   a. for general officers, the MND on the recommendation of the CDS;
   b. for Col/Capt(N), the CDS on the recommendations of a commander of a command;
   c. for LCol/Cdr and below, the commander of a command; and
   d. for Maj/LCdr and below, an area commander, subject to any limitations imposed by the commander of a command.\textsuperscript{27}

Conditions for Promotion

25. In accordance with CF policy, unless otherwise authorized by NDHQ, an officer of the primary reserve may only be promoted above the rank of Lt/SLt if there is an establishment vacancy.\textsuperscript{28} As with regular force officers in the CF, promotion of primary reserve officers will be dependent on merit and potential.\textsuperscript{29}

26. To be eligible for promotion an officer must:
   a. meet the minimum operational standards related to universality of service as set out in DAOD 5023-1 which includes successful completion of the applicable fitness standard;
   b. be in the promotion zone;

\textsuperscript{25} Ibid., Annex C (Acting Rank – Acting Lacking (AL) or Provisional (P)), para. 6.
\textsuperscript{26} CANFORGEN 087/06 CMP 040 081835Z MAY 06 (New DAODs On Universality Of Service, Minimum Operational Standards Related To Universality Of Service, And CF Physical Fitness Program)
\textsuperscript{27} CFAO 49-12 (Promotion Policy – Officers – Primary Reserve), para. 13.
\textsuperscript{28} Ibid., para. 6.
\textsuperscript{29} Ibid., para. 7.
c. have qualified, and demonstrated that they possess the skills and knowledge required, to perform the duties and tasks of their officer classification;

d. be judged to possess the necessary experience and ability for the next higher rank;

e. be recommended by their commanding officer;

f. be available for the duties to be performed by an officer of the next higher rank in the vacancy being considered; and

g. meet the minimum medical standards for their officer classification in accordance A-MD-154-000/FP-000 Medical Standards for the Canadian Forces or be recommended by the administrative review (medical employment limitations) as being retained without restrictions.  

27. Officers, who are on Class “B” or Class “C” reserve service, will not be promoted unless they can be paid at the rates prescribed for the next rank. If the promotion is deferred, the approving authority must authorize the promotion the day following completion of the Class “B” or Class “C” reserve service. The date of seniority for the promotion will be the day the officer would have been promoted if the officer were not employed on either Class “B” or Class “C” reserve service.  

**Acting Rank**

28. The promotion authority may grant an acting rank to an officer, provided that the officer meets all of the required prerequisites for promotion. An officer will not be promoted to the substantive rank until the officer has obtained the required qualifications for the rank. The officer may retain the acting rank as long as the officer is able to perform satisfactorily in the assigned rank. Seniority will be calculated from the date the officer was promoted to the substantive rank. 

**SECTION 5**  
**PRIMARY RESERVE NON-COMMISSIONED MEMBERS**

29. CFAO 49-5 (Career Policy – Non-Commissioned Member – Primary Reserve) is the main source of information on the promotion of primary reserve NCMs in the CF. It provides details pertaining to the level of authorization required to promote a primary reserve NCM and the eligibility criteria for promotion.

**Authorities**

30. The authorities to promote an NCM in the primary reserve are a commander of a command or a commander of an area, district or unit, subject to any limitations imposed by the commander of a command. 

---

30 CANFORGEN 087/06 CMP 040 081835Z MAY 06 (New DAODs On Universality Of Service, Minimum Operational Standards Related To Universality Of Service, And CF Physical Fitness Program)

31 Ibid., para. 25.

32 Ibid., paras. 16-18.

33 CFAO 49-5 (Career Policy – Non-Commissioned Member – Primary Reserve), para. 5.
Conditions for Promotion

31. Members must meet the requirements for promotion as set out in CFAO 49-5 (Career Policy – Non-Commissioned Members – Primary Reserve), Annex A (Rank and Trade Eligibility Criteria For Promotion). This CFAO was significantly amended by CANFORGEN 087/06. To be eligible for promotion, a member must meet the minimum operational standards related to universality of service as set out in DAOD 5023-1 which includes successful completion of the applicable fitness standard and meet the additional prerequisites prescribed at Appendix 1 or 2 to Annex A to CFAO 49-5, as applicable. Appointment to Master Corporal and promotion to the rank of Corporal and above shall be based on merit, and there must be a vacancy or quota in the rank or appointment to which promotion is being considered. Each rank level also has prescribed courses that must be completed before the member can be promoted to the next higher rank.

32. When a CO recommends a member for promotion, this does not mean that the promotion is automatic. The CO, by recommending the member for a promotion, is agreeing that if the member is promoted, the CO will retain and develop the member in their unit. If a promotion is granted, the CO is responsible for ensuring that the promotion is announced and recorded.

33. COs are also responsible to ensure that if they have recommended a member for promotion (and if there has been a change in circumstances that adversely affects a member’s suitability for promotion), that this fact is reported to the approval authority.

34. There may be times when a CO believes that one of his subordinates should be granted an accelerated promotion. The decision to grant an accelerated promotion rests with a commander of a command. However, the CO may nominate a subordinate who the CO feels has demonstrated outstanding ability or leadership or supervisory potential.

35. The eligibility criterion for an accelerated promotion varies depending on the rank of the member. A Cpl/LS must demonstrate outstanding performance as a tradesperson while a MCpl/MS must demonstrate leadership potential. The member must have spent at least one year in their current rank or appointment and have satisfied the promotion prerequisites, with the exception of the time requirements as found in CFAO 49-5 (Career Policy – Non-Commissioned Member – Primary Reserve), Annex A, Appendix 1 (Prerequisites For Promotion - Members Other Than Musicians) and Appendix 2 (Prerequisites For Promotion – Musicians), respectively. There is no accelerated promotion to CWO/CPO1.

36. The CO is responsible for ensuring that, prior to approving a promotion, the member meets the minimum medical standards for their MOC. Assessments must have been made within the preceding 12 months for members who may be promoted to Sgt/PO2 or above.

Acting Rank

37. The promotion authority may grant an acting rank to a non-commissioned member provided that the member meets all of the required prerequisites for promotion with the exception of qualifications required for the member’s MOC or minimum time in rank. A member will not be promoted to the substantive rank until the member has obtained the required qualifications for the rank. The member may retain the acting rank as long as the member is able to perform satisfactorily in the assigned rank.

---

34 CANFORGEN 087/06 CMP 040 081835Z MAY 06 (New DAODs On Universality Of Service, Minimum Operational Standards Related To Universality Of Service, And CF Physical Fitness Program)
35 Ibid., para. 15.
36 Ibid., paras. 19-20.
37 Ibid., para. 20.
38 Ibid., para. 23
39 Ibid., para. 18.
SECTION 6
ADDITIONAL GUIDANCE

38. Promotion of subordinate members will depend not only on merit and potential, but also military requirements. There must be a vacancy in the next higher rank before a member can be promoted. Additionally, the member must meet the promotion standards as set out by the CDS.

39. Promotions are not automatic. In one grievance decision, the CF Grievance Authority stated, “Promotions are not an entitlement and they are not granted as rewards. There are many deserving members who are qualified and deserving of promotion but who are not promoted. The reason they are not promoted is because there is no vacancy in their unit or there is no military requirement for their promotion. Promotions are based firstly on the military requirement. If you are not an effective member of a military unit then there is no military requirement to promote you.” Ultimately, promotion is a privilege, not a right.

SECTION 7
REFERENCES

Legislation


Regulations

*QR&O* Chapter 3 (Rank, Seniority, Command And Precedence), Section 1 (Rank & Seniority).

*QR&O* 11.01 (Authority for Promotion).

*QR&O* 11.02 (Conditions Governing Promotion).

*QR&O* 12.01 (General).

*QR&O* Chapter 12 (Promotion of Officers).

*QR&O* Chapter 14 (Promotion and Reclassification of Non-Commissioned Members).

*QR&O* 14.01 (General).

Orders, Directives and Instructions

ADM (HR-MIL) Instruction 11/04, Canadian Forces Medical Standards, online: DIN <http://hr3.ottawa-hull.mil.ca/docs/instruction/instructions/engraph/ 1104_admhrmil_e.asp >.

CANFORGEN 060/00 ADM (HR-MIL) 021300Z Jun 00, Acting Pay/Rank, online: DIN < http://vcds.dwan.dnd.ca/vcds-exec/pubs/canforgen/2000/060-00_e.asp >.

CANFORGEN 091/03 ADM (HR-MIL) 041 072043Z Jul 03, Effective Promotion Date Policy – Members on Advanced Training Interim Policy Amendment, online: DIN < http://vcds.dwan.dnd.ca/vcds-exec/pubs/canforgen/2003/091-03_e.asp >.

CANFORGEN 198/05 CDS 104/05 211441Z DEC 05 (CDS Direction for Physical Fitness)

CANFORGEN 087/06 CMP 040 081835Z May 06 (New DAODs On Universality Of Service, Minimum Operational Standards Related To Universality Of Service, And CF Physical Fitness Program)

CFAO 11-6 (Commissioning and Promotion Policy – Officers – Regular Force).

CFAO 49-4 (Career Policy Non-Commissioned Members – Regular Force).

CFAO 49-5 (Career Policy – Non-Commissioned Members – Primary Reserve).

CFAO 49-10 (Terms of Service – Officers – Primary Reserve).

CFAO 49-12 (Promotion Policy – Officers – Primary Reserve).

CFAO 50-1 (Physical Fitness Training)

DAOD 5023-0 (Universality of Service)

DAOD 5023-1 (Minimum Operational Standards Related to Universality of Service)

DAOD 5023-2, (Physical Fitness Program)

DAOD 5059-0 (Performance Assessment of Canadian Forces Members).
CHAPTER 17

OCCUPATIONAL TRANSFERS

SECTION 1

REGULAR FORCE

Introduction

1. CF members may change their military occupation during the course of their career. This may be done voluntarily or as the result of a compulsory action taken by the CF. Generally, this process is referred to as an ‘occupational transfer’ (OT) or ‘remustering.’ The procedures and associated standards will depend upon whether the subject member is an officer or an NCM.

Officer Occupational Transfers

2. An OT for an officer in the regular force may be voluntary or compulsory. A voluntary transfer is the term used to describe the transfer of an officer from one Military Occupational Structure Identification (MOS ID) to another, after initial qualification. This request must be done in writing through the officer’s CO. All applications will be examined on the basis of the CF’s requirements, as well as the officer’s qualifications, the reasons cited by the officer in support of the transfer, and the officer’s abilities. A voluntary transfer request from an officer who is serving on obligatory service will normally not be granted during that period of service.

3. Compulsory transfers are within the authority of NDHQ. There are several potential circumstances where a compulsory transfer may be initiated, such as when:
   a. an officer fails to meet the minimum medical standard for the officer’s current occupation;
   b. there is a change in the overall military establishment;
   c. a surplus or deficiency occurs in a particular occupation;
   d. an officer is no longer fully employable within the officer’s present occupation; or
   e. an officer cadet of the Regular Officer Training Plan (ROTP) or University Training Plan for Members (UTPM) does not meet the academic or military standards for the officer’s chosen occupation.

4. In accordance with CFAO 10-1 (Officer Transfer – Military Occupation Regular Force), NDHQ/D Mil C is the approving authority for all occupation transfers of regular force officers and officer cadets. In 2001, the responsibility for approving voluntary transfers between occupations was given to CF Recruiting Group.

5. Regardless of the type of transfer, a transfer could affect promotion, terms of service, obligatory service, or pay. If an officer who is being occupation transferred is not qualified in his or her current occupation, the officer will be transferred as untrained to the new occupation. The

---

1. CFAO 10-1 (Officer Transfer – Military Occupation Regular Force), para. 3.
2. Under the Military Occupational Structure Analysis Redesign and Tailoring program, the CF is replacing the former Military Occupation Classification (MOC) system with MOS ID.
3. Ibid., para. 4.
4. Ibid., para. 6.
5. Ibid., para. 8.
effective date will normally be the date that the transfer was approved. An administrative review for a compulsory OT will determine the effective date of a compulsory transfer of a qualified officer. Officers who undergo a specialty training plan, such as the Dental Officer Training Plan, will be transferred to their new occupation effective the date that they are licensed in their new specialty.\(^7\)

6. Officers who are transferred from one occupation to another will retain their seniority in rank and entitlement to annual leave, except for the purpose of determining when an officer enters the promotion zone.\(^8\) If an officer is to be promoted in one occupation during the same calendar year that he or she would be transferred to a new occupation, the effective date of the transfer should normally occur after the promotion. If the promotion is to occur after the transfer, the member will be given a choice of remaining in the current occupation, or accepting the transfer and refusing the promotion.\(^9\) However, for those who transfer prior to promotion, the dates when these officers enter their promotion zones will be changed because in order to enter the promotion zones they must not only accumulate seniority in their rank, but also in their new occupation.\(^10\)

7. Terms of service may be affected by a change in classification, particularly when officers intend to transfer from a general service officer occupation to a specialist occupation. In most cases, they are not allowed to do so unless they consent in writing to the conversion of their terms of service. In order that CF members do not suffer adverse career consequences, the relevant orders provide for protections, which include seniority and vested pay rights.\(^11\)

8. Obligatory service may be incurred when an officer undergoes education or training at the expense of the CF that the CDS or Chief Military Personnel has specifically designated as requiring mandatory service.\(^12\) Such periods of obligatory service are intended to compensate the CF for the period of time during which the officer received subsidized education.\(^13\)

**Occupational Transfer of Non-Commissioned Members**

9. There are four categories of reclassification for NCMs: compulsory, voluntary, occupation reassignments and career progression OTs.\(^14\) There are also two types of compulsory transfers for NCMs: a transfer for reasons related to inefficiency and a simple compulsory occupational transfer.

10. A ‘competent authority’\(^15\) for the occupational transfer of NCMs is the CDS, an authority designated by the CDS or an officer commanding a command. A competent authority may transfer an NCM for “inefficiency.”\(^16\) The NCM’s CO, who is required to provide a report to the competent authority, must initiate the transfer. If the NCM holds the rank of Sgt/PO2 or above, the CO may compel the NCM to be examined by a committee of officers. An order compulsorily transferring an NCM must identify that the transfer is for inefficiency.\(^17\)

\(^7\) CFAO 10-1 (Officer Transfer – Military Occupation Regular Force), paras. 10-12.
\(^8\) *Ibid.*, para. 13: “An officer will retain seniority in rank when transferred from one occupation to another, except for the purpose of determining when an officer enters the promotion zone.”
\(^11\) CFAO 10-1 (Officer Transfer – Military Occupation Regular Force), para. 22; CBI 204.02 (Pay When on Leave) and CBI 204.30 (Pay – Non-Commissioned Members).
\(^12\) DAOD 5049-1 (Obligatory Service); and CDS 10 Aug 06 Order - Delegation to prescribe courses and determine obligatory service requirements pursuant to QR&O 15.07, 15.071, 15.075.
\(^13\) DAOD 5049-1 (Obligatory Service), marginal note: Overview/Purpose.
\(^14\) CFAO 11-12 (Occupation Transfer of Non-Commissioned Members – Regular Force), para. 3.
\(^15\) QR&O 11.10(1).
\(^16\) QR&O 11.10(2)(b).
\(^17\) QR&O 11.10(5)-(8).
11. The CDS may also prescribe the grounds for any other type of compulsory OT of an NCM. The decision may be taken by the CDS or an authority designated by the CDS:
   a. when the NCM is on active service;
   b. while the NCM is undergoing a course of training or instruction in a trade; or
   c. at any other time when the exigencies of the service so require. ¹⁸

12. A compulsory occupational transfer generally occurs due to:
   a. deletion of an occupation;
   b. changes in the establishment requirements of the CF;
   c. an administrative review (AR)¹⁹ decision;
   d. Career Review (CR) decisions; or
   e. other reasons as determined by NDHQ/D Mil C. ²⁰

13. An occupation reassignment may apply to the OT of a Pte/OS (Basic) who has yet to achieve their qualification level (QL) 3. A career progression OT refers to a change of occupation that forms part of a natural career progression for the NCM’s trade. ²¹

14. A voluntary occupational transfer is a transfer requested by an NCM who is QL 3 qualified. The CO of the member in question is required to submit a recommendation in favour of, or opposed to, the application that has been submitted. A copy of the CO’s recommendation, with reasons for recommending or opposing the transfer, should be disclosed to the subject and the member should be afforded an opportunity for further representations before a decision is made. After the decision, the member should be informed of the final decision and the reasons for the decision.

15. Regardless of the type of transfer, when a member fails occupation training or second language training (SLT) after an OT, an administrative review will examine the member’s file and consider various options including: re-coursing, transferring to a new occupation, returning to the former occupation, or releasing. ²²

16. The main consequence of a compulsory transfer is that a member’s pay will be reduced in the case of a transfer for inefficiency. If the compulsory transfer is for a reason other than inefficiency, NCMs will receive the higher of either the rate of pay they were entitled to immediately before the transfer or the rate of pay in the new military occupation.

**Vested Right of Pay**

17. The pay of any officer or NCM who is compulsorily transferred to a different military occupation for any reason, other than remuster for inefficiency, is vested or protected. The reason for the OT must be due to:
   a. the elimination of the member’s military occupation;

---

¹⁸ QR&O 11.13 (Compulsory Remustering of Non-commissioned Members).
¹⁹ Formally referred to as the Career Medical Review Board (CMRB).
²⁰ CFAO 11-12 (Occupation Transfer of Non-Commissioned Members – Regular Force), para. 4. It should be noted that any reference to NDHQ/DGPCOR, in this CFAO and any subsequent ones cited in this manual, shall be construed as a reference to NDHQ/D Mil C.
²¹ Ibid., paras. 6-7.
²² Ibid., paras. 11-12.
b. the downgrading of a military occupation to a lower pay group; or

c. the amalgamation of two or more military occupations.23

18. This provision is not applicable to pilots paid under CBI 204.215 (Pay – Officers – Pilots – Lieutenant-Colonel, Major and Captain) or NCMs who are appointed to the rank of officer cadet or if they are subject to an officer entry plan referred to in CBI 204.211 (Pay – General Service Officers – Officer Entry Plans – Lieutenant, Second Lieutenant and Officer Cadet). 24

19. Even though there has been a long-standing provision that “the member will continue to receive the rate of pay applicable immediately prior to the date on which compulsory OT occurred,”25 a more recent inclusion to CBI 204.03 (Pay Protection on Compulsory Occupational Transfer) clarifies the meaning of the rate of pay before the OT occurred. In effect, a member will be paid at the same rate until “the rate of pay in the new or downgraded military occupation for the rank, incentive pay category and, if applicable, pay level and trade group is greater than, or equal to, the rate of pay before the change of military occupation.”26

20. The rate of pay is calculated as the larger sum of any adjustments in the rank, incentive pay category, pay level and trade group applicable to the member on the day just before the change of occupation or the rank, pay level and trade group of the member if the member had remained in the previous occupation.27

SECTION 2

RESERVE FORCE

Primary Reserve

21. Officers who serve in the primary reserve may also undergo a compulsory or voluntary OT. 28 Normally, an officer of the primary reserve may be occupation transferred if:

a. the officer’s medical standard is below that required for the occupation;

b. there is an establishment change that precipitates a surplus or deficiency in a particular occupation; or

c. the officer fails to meet the occupation standards.29

22. If a compulsory OT is to occur, the area HQ must inform the member, through the unit CO, requesting an occupation preference from the member within 60 days. The area HQ may authorize the OT after the 60-day period has elapsed. 30

23. NCMs of the primary reserve may be voluntarily or compulsorily reassigned to a different occupation. Compulsory military occupational transfers may occur due to:

a. service requirements;

b. establishment changes in the CF;

c. an occupation deletion or restructuring;

---

23 CBI 204.03(1).
24 CBI 204.03(2).
26 CBI 204.03(3).
27 CBI 204.03(4).
28 CFAO 49-10 (Terms of Service – Officers – Primary Reserve), Annex B (Transfers).
29 Ibid., paras. 6(a)-(c).
30 Ibid., paras. 7(a)-(b).
d. medical reasons;

e. inefficiency, pursuant to QR&O 11.10 (Reversion and Remustering For Inefficiency);

f. reasons of career progression; and

g. a failure on the part of the member to achieve the requisite qualifications.\(^\text{31}\)

24. The commander of the command is the authority for compulsory and voluntary occupational transfers. The CO’s recommendations must be forwarded to the area headquarters.\(^\text{32}\)

25. An NCM compulsory occupational transfer requires that the member be advised through the unit CO and then given 60 days to indicate their new occupation preference. Regardless as to whether the member has identified a preference, area headquarters may authorize the OT after the 60 day period has elapsed.\(^\text{33}\)

26. Voluntary occupational transfers are subject to the following conditions:

a. the member may only apply to transfer to one occupation;

b. the member must have a minimum of one year service in a occupation from the date of enrolment or re-enrolment;

c. the member must be at least QL 1 qualified;

d. all medical standards for the new occupation must be met;

e. the member must be able to qualify for the requisite security clearance for the new occupation;

f. the member must fill an established vacancy on transfer; and

g. the member must meet the enrolment standards for the MOS ID to which the member is transferring.\(^\text{34}\)

\[\text{SECTION 3}\
\text{REFERENCES}\]

\[\text{Legislation}\]


\[\text{Regulations}\]

QR&O 11.10 (Reversion and Remustering for Inefficiency).

QR&O 11.13 (Compulsory Remustering of Non-Commissioned Members).

\(^{31}\) CFAO 49-11 (Terms of Service – Non-Commissioned Members – Primary Reserve), Annex C (Remuster), paras. 2(a)-(g).

\(^{32}\) Ibid., paras. 3 and 6.

\(^{33}\) Ibid., para. 4.

\(^{34}\) Ibid., para. 5.
Orders, Directives and Instructions

CBI Chapter 204.03 (Pay Protection on Compulsory Occupational Transfer).

CFAO 10-1 (Officer Transfer – Military Occupation Regular Force).

CFAO 11-6 (Commissioning and Promotion Policy – Officers – Regular Force).

CFAO 11-12 (Occupation Transfer of Non-Commissioned Members – Regular Force).

CFAO 49-10 (Terms of Service – Officer – Primary Reserve).

CFAO 49-11 (Terms of Service – Non-Commissioned Members – Primary Reserve).

DAOD 5049-1 (Obligatory Service).

DGMC 004 271519Z Mar 01, Change of Responsibility for Occupation Transfer and Reassignment, online: DIN <http://hr.ottawa-hull.mil.ca/dgmc/docs/msg/2001/dgmc004_e.pdf>.
CHAPTER 18
LEAVE

SECTION 1
INTRODUCTION

1. Members of the CF are entitled to varying amounts of leave depending on whether they are a member of the regular force or reserve force. There are several types of leave available to members of the CF including, but not limited to: annual leave, compassionate leave and short leave. Members on leave are subject to recall to duty.

2. The rules that apply will depend on the type of leave requested and the status of the member. This chapter focuses on annual leave, compassionate leave, short leave, maternity and parental leave and the ability of COs to recall members to duty while they are on leave.

SECTION 2
TYPES OF LEAVE

3. QR&O Chapter 16 (Leave) and CFAO 16-1 (Leave) govern the granting of leave to members of the CF. QR&O Chapter 16 provides the authority for granting leave and the conditions that apply. CFAO 16-1 amplifies QR&O Chapter 16. It sets out, in detail, the various types of leave that a member may be granted, the length of leave that may be granted and the conditions that apply. These regulations and orders are the main sources of information for the granting of leave to members of the CF.

Long Leave

4. ‘Long leave’ is a category of leave granted to a member of the regular force or the reserve force on active service or a member of the reserve force who serves on Class “B” or Class “C” reserve service for a period of at least 30 consecutive days. Long leave includes all of the following types of leave as set out in QR&Os 16.14 (Annual Leave) to 16.27 (Parental Leave), namely:
   a. annual leave;
   b. accumulated leave;
   c. sick leave;
   d. compassionate leave;
   e. retirement leave;
   f. rehabilitation leave;
   g. special leave;
   h. leave without pay and allowances;
   i. maternity leave; and
   j. parental leave.

1 QR&O 16.11 (Application of Section).
Annual Leave

5. Annual Leave in the regular force is calculated in working days and may be granted in single days. Members of the regular force with less than five years of service in the Canadian Forces are entitled to 20 days annual leave; those who have accumulated a minimum of five years of Canadian Forces service but less than 28 years of service in the regular force are entitled to 25 days; those who have completed 28 years of regular force service are entitled to 30 days of annual leave. Annual leave shall commence in the leave year of entitlement. However, it may be granted to extend into the next leave year. The portion that extends into the new leave year shall be charged against the old year entitlement although annual leave from the new leave year entitlement may be granted in the same leave period to form a continuous leave period.

6. The annual leave of an officer or NCM that is not granted in a leave year shall not be carried over as accumulated leave unless the leave has been withheld because of imperative military requirements. Any carry-over of annual leave under these circumstances shall not exceed 25 days and must be approved:
   a. by the CO, where the amount to be carried over is five days or less; and
   b. by the officer commanding the formation or, if there is no officer commanding the formation within the member’s chain of command, the officer commanding the command, where the amount to be carried over is in excess of five days.

7. A member of the reserve force employed on Class “B” or Class “C” reserve service, or a combination of both, for a period of not less than 30 days without interruption, is entitled to an annual leave equivalent of one day of annual leave for each period of 15 consecutive full days of service to a maximum of 24 working days in a leave year. Annual leave thus earned shall normally be taken during the period of such service.

8. QR&O 16.14 (Annual Leave) and CFAO 16-1 (Leave), section 2 (Annual Leave) also contain provisions for the calculation of annual leave entitlements in special circumstances, such as during the year of enrollment or release of a member.

Short Leave

9. QR&O 16.30 (Granting of Short Leave) provides that “short leave may be granted to an officer or non-commissioned member by a CO in the circumstances prescribed in orders issued by the Chief of the Defence Staff.” CFAO 16-1 (Leave), section 7 (Short Leave) amplifies QR&O 16.30 (Granting of Short Leave). The purpose of short leave is to provide members with some time away from duty after they have worked long hours during operations or training or have worked on statutory holidays or other normal days of rest.

10. A member’s CO can grant short leave for periods of up to 48 hours away from duties. COs are left to determine when short leave should be granted, subject to the following limitations. COs cannot grant short leave more than once a month, provide short leave for longer than 48 hours away from duties, or provide short leave on statutory holidays or other normal days of rest.

---

2 CFAO 16-1 (Leave) and QR&O 16.14 (Annual Leave).
3 CFAO 16-1 (Leave), s. 2, para. 44.
4 QR&O 16.14(3).
5 CFAO 16-1 (Leave), para. 45.
6 QR&O 16.15(2).
7 QR&O 16.15(4).
9 CFAO 16-1 (Leave), para. 58.
10 QR&O 16.30 (Granting of Short Leave).
11 CFAO 16-1 (Leave), para. 103.
hours, grant short leave consecutively with another short leave or grant short leave in conjunction with retirement leave.\textsuperscript{12}

11. COs may grant short leave for any reason they consider valid. CFAO 16-1 (Leave) provides a number of examples to illustrate what may constitute a valid reason for granting short leave.\textsuperscript{13} COs are encouraged to review these examples when deciding whether or not valid reasons exist for granting short leave to CF members. Some examples found at CFAO 16-1 (Leave) include compensating members who were not granted normal periods of leave as a result of being away from home while aboard HMC ships or submarines or while they were deployed on operations or training exercises.

12. It is important to note that the examples listed in CFAO 16-1 (Leave), section 7 (Annual Leave) are meant to serve as a guide to COs and as such, are not exhaustive in scope. Other potentially valid reasons remain at a CO’s disposal for granting short leave (i.e., short leave can also be used to compensate shift workers who did not benefit from statutory holidays).

\textbf{Compassionate Leave}

13. A CO or an officer commanding a command can grant compassionate leave when a CF member submits a leave request due to an urgent and exceptional personal reason. The CO should verify the need or grounds for compassionate leave prior to granting it. If this is not possible, the CO should grant the leave and verify the grounds after the member returns from leave.\textsuperscript{14} Any compassionate leave that is not verified must be recovered.\textsuperscript{15}

14. A CO has the authority to grant compassionate leave to a CF member as long as it does not exceed 14 calendar days. An officer commanding a command may authorize compassionate leave up to 30 calendar days in appropriate cases. This includes the 14 days leave authorized by the CO.\textsuperscript{16} Compassionate leave is separate from annual or accumulated leave. However, annual and accumulated leave may be used in conjunction with compassionate leave. Compassionate leave is not to be used in conjunction with retirement leave.\textsuperscript{17}

15. Neither the CFAOs nor the QR&Os define what is considered an ‘urgent and exceptional personal reason’ for granting compassionate leave. Caring for a sick child or aging parent until health care assistance can be obtained or until they can be institutionalized, may qualify. Examples as to what circumstances might constitute urgent and personal reasons include:

\begin{itemize}
  \item a. compassionate situations due to the death or critical illness of a family member. Critical illness is defined as an illness or injury that is of such severity that the patient’s life is in immediate danger; or
  \item b. traumatic family situations relating to the member or the family of a member that are due to severe injury, disease or trauma that has a detrimental and significant effect on the member’s ability to perform assigned duties.\textsuperscript{18}
\end{itemize}

16. Collective agreements for the federal public service also specifically provide for bereavement leave with pay when a member of an employee’s immediate family dies.\textsuperscript{19} Accordingly, it would not be unreasonable for COs to grant CF members compassionate leave for

\textsuperscript{12} Ibid., paras. 104-105.
\textsuperscript{13} Ibid., para. 106.
\textsuperscript{14} CFAO 56-28 (Investigation of Compassionate Problems) outlines the procedure to be followed in compassionate cases where there is a need for investigation.
\textsuperscript{15} QR&O 16.17 (Compassionate Leave).
\textsuperscript{16} QR&O 16.17(1).
\textsuperscript{17} CFAO 16-1 (Leave), paras. 76, 78.
\textsuperscript{18} ‘Immediate family’ is defined in the collective agreement as “a father, mother (including a stepfather and stepmother), brother, sister (including a stepbrother and stepsister), spouse (including a common law partner living with the employee), child (including a stepchild of the common law partner and a stepchild or ward of the employee), grandparent, father-in-law, mother-in-law or other relative permanently residing with the employee.”
\textsuperscript{19} CANFORGEN 037/01 ADM (HR-MIL) 017 021500Z APR 01, Modifications to the CF Leave Policy online: DIN <http://vcds.dwan.dnd.ca/go/canforgen/2001/037-01_e.asp>.
comparable instances of bereavement. The CO will have to exercise sound judgment in order to determine what other circumstances might constitute an 'urgent and exceptional personal reason' prior to granting compassionate leave.

**Maternity Leave**

17. Maternity leave entitlements apply to members of the regular force and members of the reserve force on Class “B” or Class “C” reserve service. Maternity leave is defined in *QR&O 16.26* (Maternity Leave) as “a period of leave without pay and allowances granted to an officer or non-commissioned member for maternity purposes.” Maternity leave is normally combined with parental leave, which will be discussed below.

18. A member is eligible for maternity leave if the member has been pregnant for at least 19 weeks. The member is entitled on request to a maximum of 17 weeks of maternity leave. Maternity leave is not to start more than 8 weeks before the expected date of birth and it must not exceed more than 17 weeks past the date of birth. However, this time period may be extended for two reasons:
   a. the newborn has been hospitalized prior to the member commencing maternity leave; and
   b. for the period where the member, after commencing maternity leave but before the end of maternity leave, returns to duty while the newborn is hospitalized.

19. If a member is required to return to duty for a short period, the member’s maternity leave should be extended for a similar short period. However, maternity leave must end not later than 52 weeks after the date of the end of the pregnancy.

**Parental Leave**

20. CF policy provides eligible members with time away from duty to take care of newborn and adopted children. Parental leave entitlements apply to members of the regular force and members of the reserve force on Class “B” or Class “C” reserve service. Parental leave is defined in *QR&O 16.27* (Parental Leave) as “a period of leave without pay and allowances granted to an officer or non-commissioned member for parental purposes relating to a newborn or adopted child or child to be adopted.”

21. A member of the CF, if eligible for parental leave benefits, may, on request, take parental leave for a period of up to 37 consecutive weeks. If the member is taking maternity leave in accordance with *QR&O 16.26* (Maternity Leave), the member is entitled, on request, to take up to 35 consecutive weeks of parental leave. In order to be entitled to parental leave pursuant to *QR&O 16.27* (Parental Leave), the member must have:
   a. the care and custody of the member’s newborn child;
   b. commenced legal proceedings under the laws of a province to adopt a child and this child is placed with the member for the purpose of adoption; or

---

20 QR&O 16.26(2).
21 QR&O 16.26(3).
22 QR&O 16.26(4).
23 QR&O 16.26(5).
24 QR&O 16.26(7)-(8).
26 QR&O 16.27(1)-(2).
22. The end date of the parental leave can be extended under the following circumstances:
   a. the member has not commenced parental leave and the child, whether it is a newborn or a child that has been adopted or will be adopted, is hospitalized;
   b. the member has returned to duty prior to the end of the parental leave entitlement and the newborn or a child that has been adopted or will be adopted, is hospitalized; or
   c. for the period where the member has been recalled to duty prior to the end of the member's parental leave.28

Even though the end date of a member’s parental leave may be extended, it must be completed no later than 52 weeks from the date on which the child of the member is born or, in the case of adoption, the day on which the member initially became entitled to commence the leave.

23. When both parents are members of the CF, the combined sum of their respective entitlements to parental leave must not exceed 37 weeks.29 When both parents are members of the CF and one parent is entitled to an exemption from duty and training for maternity purposes, the combined sum of their entitlements to parental leave is not to exceed 35 weeks.30

24. In situations where a member has shared custody of the child, parental leave entitlements exist only when the member has care and custody of the child. In situations where the member no longer has care and custody of a child (i.e., either due to a family separation or the death of a child), the member’s parental leave entitlement ceases.31

25. Maternity and parental leave will not be extended even though the member may have taken sick leave during their maternity or parental leave. The CO must not order a member to take annual leave during a period of maternity or parental leave. However, the member may request to be permitted to take annual leave. Maternity and parental leave will not be extended if the member takes leave with pay for other reasons, (with the exception of special leave – relocation). The Table to DAOD 5001-2 (Maternity and Parental Benefits) outlines the process for CF members proceeding on maternity or parental leave.32

SECTION 3
CALCULATION OF LEAVE ON TRANSFER FROM RESERVE FORCE TO REGULAR FORCE

26. The CF has recently modified the annual leave policy such that prior reserve service is credited toward calculation of five years service in the CF for the purpose of determining entitlement to 25 days of annual leave.33

27. As of April 1, 2004, five years of service in the CF is considered completed on the day following the day on which the member’s present period of continuous service, any prior period of regular force service, one quarter of any previous Class "A" reserve service and any previous

---

27 QR&O 16.27(3).
28 QR&O 16.27(5).
29 QR&O 16.27(8).
30 QR&O 16.27(9). Note also that CANFORGEN 167/05 ADM (HR-MIL) 085 011253Z Nov 05, Publication of ADM (HR-MIL) Instruction 20/04 – Administrative Policy of Class “A”, Class “B” and Class “C” Reserve Service, online: DIN <http://vcds.dwan.dnd.ca/vcds-exe/nibs/canforgen/2005/167-05_e.asp> changed exemption from “drill and training” to "exempt duty and training."
32 Ibid., marginal note: Process/Process.
33 CANFORGEN 046/04.
period of service on Class “B” or Class “C” reserve service totals five years. This policy is not retroactive.35

28. CANFORGEN 046/04 also allows reserve force members on Class “B” or Class “C” reserve service for more than 30 days to earn leave for partial months of service. As of April 1, 2004, Class “B” and Class “C” reserve members are entitled to earn one day of annual leave for every 15 consecutive full days of service to a maximum of 24 annual leave days in a leave year. This policy does not apply to reserve members on Class “B” or Class “C” reserve service who are serving less than 30 days.36

29. As clarification of the reservists’ leave year, CANFORGEN 004/03 ADM (HR-MIL) 081 090950Z Jan 03, Annual Leave Administration – Class “B” and Class “C” Reserve Service provides that annual leave for reserve force members on Class “B” or Class “C” reserve service is based on the period of employment (POE) and not on the fiscal year. Therefore, reserve force members on Class “B” and Class “C” service who are hired half-way through a fiscal year are not expected to take all of their leave in the fiscal year. They must take their leave during their POE so as not to extend their paid service past the period of their TOS.

SECTION 4
RECALL FROM LEAVE

30. Recalling a member from leave is an exception. QR&O 16.01(2) provides that a member of the CF may only be recalled from leave if there is an imperative military requirement and if the member’s CO has personally directed the recall.

31. QR&O 16.26(6) and 16.27(8) also allow a CO to recall a member from maternity leave, or defer the commencement of a period of parental leave, if there are imperative military requirements. DAOD 5001-2 (Maternity and Parental Benefits) provides some examples of what could be considered as a return to duty for imperative military requirements. Examples include a house hunting trip, special leave (relocation), travelling time provided under Compensation and Benefits Instructions (CBI) Chapter 209 (Transportation and Travelling Expenses) for a posting and a period of time prior to a posting in order to complete out-clearance. Attendance at other administrative appointments or medical or dental appointments are not considered to be an imperative military requirement.

32. Once a member is recalled from leave, the member is considered to be on duty while travelling from the location from which recalled. The member is also considered to be on duty while travelling back to that location, provided that the member resumes leave immediately after completing the duty for which the member was recalled.38

33. A CO who recalls a member from leave is responsible for ensuring that the member’s records support unit (URS) is notified of the details of the altered leave period. The CO should also keep in mind that a member is entitled to claim reimbursement for travel expenses when recalled from leave and additional expenses resulting either from the cost of breaking contractual arrangements or cancellation fees that were made specifically for the purpose of an approved leave period. The member, and the CO prior to directing the recall, should consult Compensation

---

34 QR&O 16.14 (4).
35 CANFORGEN 046/04, para. 2.
36 Ibid., para. 3.
38 QR&O 16.01(2)-(3).
and Benefits Instructions (CBI) 209-54 (Reimbursement of Expenses When Recalled From, or on Cancellation of, Leave).\textsuperscript{39}

SECTION 5

ADDITIONAL GUIDANCE

34. The annual leave entitlement is considered to be an adequate amount of leave for a service member. That said, a CO should recognize the need of CF members to take leave for various reasons and should exercise discretion to grant compassionate leave in cases where the CO feels there are urgent and exceptional personal reasons to grant it. There will also be times when a member should be granted short leave for working extended hours or being away from home port on HMC ships or submarines or aircraft deployments for an extended period of time.

35. When deciding to recall members, COs are responsible for ensuring that the member is being recalled for imperative military reasons. Although this term has not been defined, COs must exercise sound judgement when determining whether the reason for the recall is imperative. The decision to recall someone from leave has to be made personally by a CO; it cannot be delegated.

SECTION 6

REFERENCES

Regulations

QR\&O Chapter 16 (Leave).
QR\&O 16.01 (Withholding of and Recall From Leave).
QR\&O 16.11 (Application of Section).
QR\&O 16.15 (Accumulated Leave).
QR\&O 16.17 (Compassionate Leave).
QR\&O 16.26 (Maternity Leave).
QR\&O 16.27 (Parental Leave).
QR\&O 16.30 (Granting of Short Leave).

Orders, Directives and Instructions


\textsuperscript{39} CFAO 16-1 (Leave), para. 9. It should be noted that the reference to QR\&O 209.54 (Repealed September 1, 2001) in CFAO 16-1 (Leave), shall be construed as a reference to CBI 209.54 (Reimbursement of Expenses When Recalled From, or on Cancellation of, Leave).

CANFORGEN 037/01 ADM (HR-MIL) 017 021500Z Apr 01, Modifications to the CF Leave Policy online: DIN <http://vcds.dwan.dnd.ca/go/canforgen/2001/037-01_e.asp>.


CBI 209 (Transportation and Travelling Expenses).

CBI 209.54 (Reimbursement of Expenses When Recalled From or on Cancellation of Leave).

CFAO 16-1 (Leave).

CFAO 20-25 (Commercial Transportation for Compassionate Leave).

CFAO 56-28 (Investigation of Compassionate Problems).

CFAO 205-32 (Leave Entitlement – Payment to Service Estate).

CFAO 209-15 (Transportation on Leave, Special Leave or Recalled From Leave).

DAOD 5001-2 (Maternity and Parental Benefits).

DAOD 5003-5 (Pregnancy Administration).

**Jurisprudence**


**Secondary Material**

CHAPTER 19
RELEASE
SECTION 1
INTRODUCTION

Obligation to Serve

1. When a person becomes a member of the CF, that person is bound to serve in the CF until that person is lawfully released.\(^1\) This imposes a legal obligation upon CF members unlike any member of civilian society. Civilians who decide to abandon their job may face the prospect of loss of employment or the potential of being sued for breach of contract. If CF members abandon their place of duty or fail to report for duty, they may face far more serious repercussions. For example, a member on active service (or under orders for active service), who is convicted of desertion before a service tribunal is potentially liable to a punishment of life imprisonment and a member not on active service who deserts is liable to imprisonment for five years.\(^2\) Similarly, a member who is absent without leave is liable to imprisonment for two years less a day.\(^3\)

2. Notwithstanding the fact that reserve force members on Class “A” service are not subject to the Code of Service Discipline (CSD) at all times,\(^4\) reservists are also potentially subject to far more serious repercussions for failing to attend their place of duty when required to do so than civilians might be under similar circumstances. For example, when, without lawful excuse, a reserve member neglects or refuses to attend any parade or training, the member may be found guilty of an offence that is punishable, on summary conviction, by a civilian court.\(^5\) In other words, while civilians may be terminated from their employment for reasons related to tardiness and absenteeism, they do not face the possibility of being charged with an offence for such conduct as would members of the CF.

3. Release from the CF is a matter of great significance as it is only upon release that the legal obligation to serve ceases and the member is relieved of such responsibility. The term ‘release’ is defined as “the termination of the service of an officer or non-commissioned member in any manner.”\(^6\) A member may be released from the CF only in accordance with QR&O 15.01 (Release of Officers and Non-Commissioned Members) and the Table to that Article.\(^7\)

Purpose

4. Release is a very complex subject and this chapter is not meant to cover all aspects of release. Rather, it is meant to provide a survey of several common release issues and to be an aid in releasing a member who does not want to be released from the CF (i.e., a recommendation for compulsory release). For greater detail on the procedures, guidance is provided by the CMP publication, Military Human Resources Records Procedures (MHRP).\(^8\)

---

\(^1\) National Defence Act, R.S.C. 1985, c. N-5, s. 23(1) [NDA].
\(^2\) NDA, s. 88(1).
\(^3\) NDA, s. 90(1).
\(^4\) NDA, s. 60 sets out the conditions when a reserve force member would be subject to the Code of Service Discipline (CSD).
\(^5\) An officer is liable to a fine of up to $50 per offence; a NCM is liable to a fine of up to $25 per offence, and each day on which an absence occurs is a separate offence (NDA, s. 294). Prosecution must be commenced within six months after the date of commission of the offence (NDA, s. 287). An offence under NDA, s. 294 would be prosecuted by the Department of Justice in a civilian, criminal court. A CO contemplating taking action pursuant to NDA, s. 294 should consult their unit legal advisor.
\(^6\) NDA, s. 2(1).
\(^7\) QR&O 15.01(1).
\(^8\) A-PM-245-001/FP-001. online DIN < http://hr.dwain.dnd.ca/DHRIM/mhrrp/engraph/home_e.asp >.
Entitlement to Release and the Exception

5. A member is obliged to serve until lawfully released from the CF in accordance with regulations.\(^9\) Except during an emergency, where a member is on active service, CF personnel are entitled to be released at the expiration of the term of service on which they are serving.\(^10\) An emergency is defined as an “insurrection, riot, invasion, armed conflict or war, whether real or apprehended.”\(^11\)

6. The Governor in Council (GIC) may place the CF (or any component, unit, element or member thereof), on active service in the defence of Canada or in the collective defence of Canada’s treaty partners.\(^12\) A member is deemed to be on active service if that member is:
   a. serving with (or attached or seconded to), a component, unit or other element of the CF that has been placed on active service;
   b. has personally been placed on active service; or
   c. has been lawfully attached or seconded to a portion of a force that has been placed on active service.\(^13\)

7. On 6 April 1989, the GIC placed all members of the regular force, as well as all members of the reserve force serving outside Canada, on active service.\(^14\) This Order in Council remains in effect as of the time of writing this manual.

8. The situation may arise where a member’s term of service expires during or shortly after an emergency or a period of active service. If a member is on active service or an emergency exists and the member’s term of service expires during, or within one year of the cessation of, the period of active service or the emergency, the member is liable to serve for one year from the cessation of the period of active service or the emergency.\(^15\)

SECTION 2

COMPULSORY RELEASE

Procedural Fairness

9. This section deals with instances where a CO proposes to recommend that a member be released under QR&O 15.01 (Release of Officers and Non-Commissioned Members) pursuant to one of the following release items:
   a. Item 1(b) (Service Misconduct);
   b. Item 1(d) (Fraudulent Statement on Enrolment);
   c. Item 2 (Unsatisfactory Service);
   d. Item 5(d) (Not Advantageously Employable);
   e. Item 5(e) (Irregular Enrolment); or

\(^9\) NDA, s. 23.
\(^10\) NDA, s. 30(1).
\(^11\) NDA, s. 2(1).
\(^12\) NDA, s. 31(1). The GIC refers to the Governor General in Council acting on the advice of the Privy Council.
\(^13\) NDA, s. 31(2).
\(^15\) NDA, s. 30(3).
f. Item 5(f) (Unsuitable for Further Service).  

10. Compulsory release from the CF is the most serious form of administrative action that may be taken against a member. As such, a member is not normally recommended for release for unsatisfactory service, as not advantageously employable or as unsuitable for further service until the member has received counselling in accordance with CFAO 26-17 (Recorded Warning and Counselling and Probation) and the counselling has been determined ineffective. A recommendation to release a member must not be arbitrarily made and procedural fairness must be provided in the following manner:

   a. notice should be given to the concerned member;
   b. the alleged facts upon which the recommendation for release is based should be disclosed;
   c. the opportunity to make representations should be provided to the concerned member; and
   d. the approving authority should consider all available evidence and be prepared to provide reasons for the decision.

11. Serving the concerned member with a ‘Notice of Intent to Recommend Release’ (NOI) helps to ensure that the requirements of procedural fairness are met. An NOI is required by regulation where the concerned member is:

   a. a commissioned officer of the regular or reserve force;  
   b. a sergeant or warrant officer of the regular or reserve force;  
   c. any other member who has served 10 or more years in the regular force.

12. Notwithstanding those regulations, if a CO is going to recommend that a member be compulsorily released, it is recommended that the CO always serve an NOI on the member regardless of the rank, component or years of service of the member. Once the member has been given the opportunity to make representations, the CO is in a better position to decide whether to proceed with the recommendation for release. Providing procedural fairness will also help to insulate the decision from an adverse result on a possible application for judicial review that can be made by a member before a civil court.

13. A CO should cause an NOI to be prepared and personally deliver it to the member. The CO should inform the member that the member has 14 days in which to object to the recommendation and that if the member does not reply in writing within 14 days, the member shall be deemed to have no objection to the proposed release.

14. The officer who prepared an NOI (or any officer superior to the officer who prepared it and to whom it has been forwarded), may withdraw the NOI. Unless the NOI is withdrawn, after 14 days have lapsed from the date of delivery of the NOI, the CO should forward the NOI to the appropriate release authority. Accompanying the NOI should be the member’s reply or a reply of another officer.

---

16 See Table 2 to this chapter for a description of the release items.
18 QR&O 15.21(1).
19 QR&O 15.36(1).
20 QR&O 15.36(1), 15.22(1).
21 QR&O 15.21(2)(a), 15.22(2)(a), 15.36(2)(a).
22 QR&O 15.21(2)(b), 15.22(2)(b), 15.36(2)(b).
23 QR&O 15.21(2)(c), 15.22(2)(c), 15.36(2)(c).
24 QR&O 15.21(9), 15.22(7), 15.36(7).
25 QR&O 15.21(5), 15.22(5), 15.36(5).
statement by the CO that the member has failed to make a reply. The CO (or the CO’s superior), may also include comments. The interests of procedural fairness, these comments should be disclosed to the member.

15. When the NOI and accompanying documents reach the release authority, that authority may decide to withdraw the NOI and retain the member in the CF. If the release authority decides to proceed with the member’s release, the member will be advised of the reasons for doing so and of the right to submit an application for redress of grievance, in accordance with QR&O Chapter 7 (Grievances).

SECTION 3
COMMON RELEASE ISSUES

Authorities

16. The Governor General is the release authority for all commissioned officers. The CDS and any officer designated by him may approve the release of NCMs and officer cadets. The CDS has designated which officers may approve the release of NCMs and officer cadets and which officers may recommend to the Governor General the release of commissioned officers. Those designations are found in Tables 1 and 2 to this chapter.

17. A recommendation for the release of a commissioned officer is made to the Governor General in the following manner: after the CDS (or an officer designated by him) determines it is necessary to recommend the release of a commissioned officer to the Governor General, the commissioned officer’s name is forwarded to the Director Military Careers Administration Resource Management (DMCARM). A list of names is compiled monthly and forwarded to the Rideau Hall. The Governor General signs the list and it is then returned to DMCARM. The administration of the release may then proceed.

Date of Release

18. The importance of the date of release should not be underestimated. As discussed earlier in section 1 of this chapter, release terminates the member’s service in the CF. The key implications of the date of release are that the CF can longer rely upon the member’s service after that date and the member no longer has any liability to serve after that date. Furthermore, the date of release is vital to establishing the member’s pension and other release benefits.

19. In the case of a punishment of dismissal with disgrace from Her Majesty’s service or dismissal from Her Majesty’s service awarded by a court martial, the date of release shall be as soon as practicable after the awarding of the punishment. In any other case, the date of release shall be set by the approving authority or, if no date is set by the approving authority, as soon as practicable after the release is approved.

20. When a specific date of release is set by an approving authority, the date cannot be any date before the approving authority actually approved the release. Setting a release date before the date on which the release was actually approved (e.g. a retroactive release) adversely impacts the member’s pension rights and other release benefits. Courts generally reject such retroactive action.

---

26 QR&O 15.21(6), 15.22(6), 15.36(6).
27 QR&O 15.21(10), 15.22(8), 15.36(8).
28 QR&O 15.01(3)(a).
29 QR&O 15.01(3)(b)
30 QR&O 15.03.
21. If the date of release is set as the date the approving authority actually approves the member’s release, then the CF must act expeditiously to administer the release. The next day, the member will be under no obligation to sign any release papers, to undergo medical examinations, or to conduct other release procedures which the CF requires.

22. Where no release date has been set, the CF must act expeditiously to effect the release. The release date would then be set by factual circumstances such as when the member’s retirement leave terminates.

23. Generally, both the CO and the member should anticipate that the CF can process a release in 30 days for members entitled to an immediate, unreduced pension and in six months for other members. However, no member should ever presume that they will be released on the date they wish to be released. This is particularly true for commissioned officers whose release must be approved by the Governor General.

**Release Items**

24. Care must be taken in selecting the most appropriate release item under the Table to **QR&O 15.01 (Release of Officers and Non-Commissioned Members)**. Where more than one item could apply to the release, the releasing authority will determine the prime reason for release and assign the appropriate release item. The chosen release item should reflect the circumstances of the release and not be selected to achieve a desired result, such as a form of punishment, a means of depriving a member of rehabilitation benefits, a means of attaching a stigma to a member’s release or a means of attempting to increase a member’s terminal benefits. When recommending a release item, care should be taken not to change a proposed release item for personnel pending release on medical grounds to a release item for reasons relating to misconduct in situations where the incident may be the result of the member’s medical condition.

25. The importance of choosing the correct release item cannot be overstated. Whereas a release under **QR&O 15.01 Item 5 (Service Completed)** is noted “honourably released,” a release under **QR&O 15.01 Item 1 (Misconduct)** or **QR&O 15.01 Item 2 (Unsatisfactory Service)** carries a stigma that will be associated with the member in perpetuity and has a significant effect on any future employment with the Government of Canada or re-enrolment in the CF. Moreover, the item under which a member is released affects the member’s entitlement to severance pay, rehabilitation leave and relocation benefits.

26. The following release items under **QR&O 15.01 (Release of Officers and Non-Commissioned Members)** will be discussed in order of increasing severity in the paragraphs that follow:

a. Item 5(d) (Not Advantageously Employable);

b. Item 5(f) (Unsuitable for Further Service);

c. Item 2(b) (Unsatisfactory Performance);

d. Item 2(a) (Unsatisfactory Conduct); and

---

33 Ibid., para. 4.
34 For example, misuse of alcohol could be a symptom of Post Traumatic Stress Disorder.
35 QR&O 6.01(2)(b)(ii) and (4).
36 CFAO 204-10 (Severance Pay/Rehabilitation Leave), Annex A (Entitlement to Severance Pay or Rehabilitation Leave on Release or Transfer).
27. QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 5(d) (Not Advantageously Employable) carries no stigma and applies to those members whose problems are largely beyond their control and who are to be released for their benefit, the benefit of the CF or both. This release item applies to the release of a member if:

a. the member is unable to adapt to military life;

b. the member is unable to meet military occupational standards and occupational transfer or remuster is not warranted;

c. despite acceptable military performance, the member has become an administrative burden (i.e., chronic debt);

d. despite acceptable military performance, the member’s compassionate circumstances result in an unacceptable administrative burden; or

e. despite acceptable military performance, the member’s social conduct, on or off duty, fails to meet the high standards expected of a member of the CF.  

28. In cases where members are unable to improve their performance, despite their best efforts, they should be released under the above item. For example, Cpl A studies diligently for a performance objective (PO) check but fails the PO check. Cpl A is counselled and continues studying diligently but fails several re-writes as Cpl A does not have the aptitude to pass the PO check. Assuming that Cpl A is not suitable for another military occupation, Cpl A should be released as not advantageously employable.

29. QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 5(f) (Unsuitable for Further Service) carries no stigma but applies to members whose problems are largely within their control. This item applies to the release of a member if, through the member’s own volition, the member:

a. is guilty of unsatisfactory conduct that brings discredit to the CF (either socially or on duty);

b. has become an excessive administrative burden through a pattern of behaviour involving frequent disciplinary problems;

c. refuses to adhere to regulations but whose offences are not serious enough to warrant a release under QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 2 (Unsatisfactory Service); or

d. has the ability to improve performance to an acceptable standard but is unwilling to do so.  

30. In cases where a member is able to improve their performance but fails to actively take steps to improve their performance, the member should be released under the above item. For example, Cpl B puts a minimal effort into studying for a PO check and fails. Time and again, Cpl B is counselled but makes no greater effort and fails repeatedly. Cpl B has the aptitude to meet military standards but is unwilling to put in the required effort to succeed. Cpl B should be released as unsuitable for further service.

31. QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 2(b) (Unsatisfactory Performance) applies to members who have the ability to improve their

---


38 Ibid., para. 28.
performance but continue to display a lack of application or effort in the performance of their duties.\textsuperscript{39} A release under this item carries a permanent stigma for a member and should be used only where warranted. Where there is doubt as to the degree of seriousness of the circumstances, the member should be given the benefit of the doubt and released under QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 5(f) (Unsuitable for Further Service).\textsuperscript{40}

32. Where a member is able to perform to a higher standard but intentionally performs below the member’s capabilities, and if release is being considered as an option, the member should be released under the above item. For example, Cpl C, who is subject to obligatory service, requests a voluntary release but it is denied. Cpl C is very capable of performing his duties but chooses to neglect to perform them as a form of protest (and says so). Cpl C is counselled and placed on Recorded Warning (RW). Cpl C’s recalcitrant behaviour continues and the member is placed on Counselling and Probation (C&P) but ultimately fails to meet the expected standard. Cpl C may deserve the stigma associated with a release for unsatisfactory performance.

Releases under QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 2(a) (Unsatisfactory Conduct) and Item 1(b) (Service Misconduct) both arise as a result of a conviction by a service tribunal or other court. As a great deal of stigma is associated with release under these items (not to mention repercussions on severance pay, pension, benefits, etc.), a decision to release a member under either of these items must be made at NDHQ. The exception to the general rule is the case of reserve NCMs where the commander of the command makes the decision (where so designated by the CDS). The GiC remains the release authority for all officers other than officer cadets.

Non-Effective Members

33. Except for a member of a Primary Reserve List, a Reserve Force member shall be declared non-effective (NES) when their unauthorized absence from duty has exceeded 30 days, during which time no fewer than three duty periods were conducted by the member’s unit.\textsuperscript{41} If a person becomes a non-effective member, and the CO either determines that the member will not again become effective or does not grant the member an exemption from training, the CO should take the following action:

   a. initiate recovery action of any public clothing, materiel or stores in the possession of the member;

   b. within 60 days after the member is designated as non-effective, inform the member by means of an NOI that release action is intended under QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 5(f) (Unsuitable for Further Service). The CO should inform the member that they have 14 days in which to object to the recommendation and that if they do not reply in writing within 14 days, the member shall be deemed to have no objection to the proposed release; and

   c. if the member does not object to being released or does not reply within 14 days of delivery of the NOI, initiate release proceedings under QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 5(f) (Unsuitable for Further Service). If the member objects to being released where the CO is not the release authority, the CO must forward the file through the chain of command or, where the CO is the release authority, consider the member’s representations in deciding whether or not the member should be released.

\textsuperscript{39} QR&O 15.01 (Release of Officers and Non-Commissioned Members), Table.
\textsuperscript{40} CFAO 15-2 (Release – Regular Force), Annex A (Specific Release Policies), para. 21.
\textsuperscript{41} CMP Instr 20/04 Administrative Policy of Class A, Class B, and Class C Reserve Service, s. 3.9.
Voluntary Release During Restricted Release

34. As mentioned in section 1 of this chapter, CF members are obliged to serve until lawfully released. Generally, a member has a right to release when entitled to an immediate annuity or upon completion of a fixed period of service. The CF has no obligation to release a member prior to either of those events. However, the CF has adopted a policy of allowing some members to voluntarily release after providing a certain period of notice even though the member has no right to release. There are exceptions which restrict that policy and serve to extend the period the member is obliged to serve. The exceptions collectively are categorized as “restricted release”. There are two broad sub-categories of restricted release:

a. obligatory service following receipt of funds specified in regulations; and

b. restricted release following receipt of specialized training in the CF.

35. Some training in the CF is very intensive and specialized to a degree that members who successfully complete the training are at a premium. Often, the skills they acquire during training are in high demand in the civilian sector. To avoid the scenario of a member receiving such training and immediately thereafter taking release, a scenario which provides no benefit to the CF, a member may be required to waive any right to release the member may have or will have and to undertake to serve a fixed number of years. The voluntary release of a member under this sub-category of restricted release may be approved for compassionate reasons.

36. The more common sub-category of restricted release follows regulations and is called obligatory service. There are programs to encourage skilled persons to join the CF (e.g., recruitment allowances for medical officers and NCMs with post-secondary diplomas or certificates), programs to educate and train already-serving members (e.g., University Training Plan – NCM), and programs to encourage serving members of stressed MOCs to remain in the CF (e.g., Pilot Terminable Allowance). In return for a sum of money or a subsidized education paid for by the CF, the member is expected to serve in the CF for a predetermined period of time after the member has completed all or part of the program.

37. The purpose of the three obligatory service regulations is to restrict the right to voluntary release of CF members who have benefited from these programs. Obligatory service is intended to maintain the effectiveness of the CF and to ensure that CF members provide an equitable return in the form of service to the CF for the extraordinary benefit that they have received.

38. It is CF policy that a member serving a period of obligatory service will not normally be voluntarily released. As an exception to this general policy, the CDS or the designate of the CDS may approve a voluntary release of a CF member prior to the expiration of a period of obligatory service if both of the following conditions apply:

a. there are special and unforeseen circumstances (i.e., circumstances that are compelling in nature and are unique or extraordinary to the member); and

b. the exigencies of the service permit the release.

---

42 QR&O 15.071 (Voluntary Release After Receiving A Recruitment Allowance).
43 QR&O 15.07 (Voluntary Release After Subsidized Education or Training).
44 QR&O 15.075 (Voluntary Release After Receipt Of Pilot Terminable Allowance).
45 DAOD 5049-1 (Obligatory Service), marginal note: Overview/Purpose.
46 Director General Military Careers (DGMC) is the designate of the CDS for NCM releases and issues release messages for officer and NCM releases.
47 QR&O 15.07 (Voluntary Release After Subsidized Education or Training) and DAOD 5049-1 (Obligatory Service), marginal note: Operating Principles/Voluntary Release.
39. Even if there are special and unforeseen circumstances, the member will not be released if the exigencies of the service require the member’s continued retention in the CF. If the release authority approves the voluntary release of a member on obligatory service, the member is subject to repay the costs associated with the program\(^{48}\) that led to the period of obligatory service unless the release is granted for compassionate reasons. Compassionate reasons are reasons that, in the release authority’s opinion:

a. would seriously prejudice the health or welfare of a member or the member’s immediate family if military service continued; and

b. cannot be improved by other options such as leave, leave without pay or posting (i.e., can only be improved as a result of release).\(^ {49}\)

40. There have been periods in the history of the CF where the CF has not strictly enforced the obligatory service policy. This was especially evident during the downsizing of the CF that occurred during the 1990s. However, the CF is now in a period of force regeneration and the obligatory service provisions will be strictly adhered to once again. Therefore, CF members owing obligatory service will not normally be released and it would not be prudent for them to accept external job offers prior to the approval of their release.\(^ {50}\)

41. Embarking on a course of action that will restrict release is a serious commitment. Because of this, members must be notified in advance of the terms to which they will be subject. At a minimum, members should be informed of the anticipated period of restricted release, that they will not normally be released during a period of restricted release, and that they will be subject to reimburse the Crown if they are released during a period of restricted release on other than compassionate grounds. Members should acknowledge notification by signing a ‘Statement of Understanding’ that may be found in one of the forms attached to DAOD 5049-1 (Obligatory Service) or in the orders pertaining to a specific subsidized education or training program.

42. Specific information concerning obligatory service (and voluntary release during obligatory service), may be found in DAOD 5049-1 (Obligatory Service), as well as in the following references:

a. subsidized education or training: QR&O 15.07 (Voluntary Release After Subsidized Education or Training);

b. recruitment allowances: QR&O 15.071 (Voluntary Release After Receiving a Recruitment Allowance), CBI 205.525 (Recruitment Allowances); and

c. pilot terminable allowance: QR&O 15.075 (Voluntary Release After Receipt of Pilot Terminable Allowance), CBI 205.51 (Pilot Terminable Allowance).

Reinstatement

43. Where a member has been sentenced to dismissal by a court martial, the member will be released under QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 1(a) (Sentenced to Dismissal). A member may also be released by reason of a guilty finding by a service tribunal or any court under QR&O 15.01 Item 1(b) (Service Misconduct), QR&O 15.01 Item 2(a) (Unsatisfactory Conduct) or QR&O 15.01 Item 5(f) (Unsuitable for Further Service). A member could also be released or transferred to the reserve force (at their request), if a finding of guilt by a service tribunal or any court contributed to that member being released under QR&O 15.01 Item 5(d) (Not Advantageously Employable).\(^ {51}\) If the sentence or finding of guilt ceases to

\(^{48}\) QR&O 15.07(4).

\(^{49}\) QR&O 15.07 (Voluntary Release After Subsidized Education or Training) and DAOD 5049-1 (Obligatory Service), marginal note: Operating Principles/Voluntary Release.


\(^{51}\) With the approval of DGMC. See also CFAO 15-2 (Release – Regular Force), para. 7.
have force and effect as a result of a decision of a competent authority (i.e., overturned by an appellate court or review authority), the release or transfer may be cancelled with the consent of the member. The MND may initiate such a cancellation within 18 months of the release or transfer and the GiC may do so at any time.\textsuperscript{52}

44. If a member's release or transfer is cancelled, the authority cancelling the release or transfer may direct a deduction of all or part of the member's pay and allowances in respect of the period during which no military service has been rendered.\textsuperscript{53} However, such a practice may be viewed unfavourably by a court when the CF was responsible for the circumstances under which the member rendered no service. In any case, the member who was so released would be entitled to the difference between the lower benefits that are paid to members released for misconduct and the benefits normally paid to members upon release.\textsuperscript{54}

45. It is important not to confuse the term 'reinstatement' with 're-enrolment.’ Reinstatement is currently available only to former CF members who have been released as a result of a decision of a service tribunal or other court where that decision is subsequently overturned by a competent authority.\textsuperscript{55} Otherwise, re-enrolment is the only means by which a former member can resume service in the CF. When a member is reinstated, it is as though the member was never released (other than the above-noted deductions for the period during which no military service was rendered). This is not the case with re-enrolments where a break in service is inevitable.

\textsuperscript{52} QR&O 15.50(2).
\textsuperscript{53} QR&O 15.50(3); CBI 208.31(3).
\textsuperscript{54} QR&O 15.50(4); CBI 209.99 (Entitlement to Transportation Benefits on Reinstatement – Regular Force) and CBI 209.9942 (Movement of Dependents, Furniture and Effects – Personnel Reinstated – Regular Force).
\textsuperscript{55} NDA, s. 30(4).
## TABLE 1 – AUTHORITIES TO RELEASE & INITIATE RELEASE OFFICERS – RESERVE FORCE

<table>
<thead>
<tr>
<th>RELEASE ITEM</th>
<th>AUTHORITY TO APPROVE RELEASE</th>
<th>AUTHORITY TO INITIATE RELEASE</th>
<th>QR&amp;O Chapter</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Item 1 - Misconduct</td>
<td>Pte to CWO</td>
<td>O Cd</td>
<td>2Lt to Maj</td>
</tr>
<tr>
<td>(1) 1(a)</td>
<td>CDS</td>
<td>CDS</td>
<td>MND</td>
</tr>
<tr>
<td>(2) 1(b)</td>
<td>DMCARM</td>
<td>DMCARM</td>
<td>DMCARM</td>
</tr>
<tr>
<td>(3) 1(c)</td>
<td>CC</td>
<td>CC</td>
<td>CC</td>
</tr>
<tr>
<td>(4) 1(d)</td>
<td>DMCARM</td>
<td>DMCARM</td>
<td>DMCARM</td>
</tr>
<tr>
<td>(5) 1(e)</td>
<td>CC</td>
<td>CC</td>
<td>CC</td>
</tr>
<tr>
<td>(6) 1(f)</td>
<td>DMCARM</td>
<td>DMCARM</td>
<td>DMCARM</td>
</tr>
</tbody>
</table>

**NOTE 1:** The Governor General approves the release of commissioned officers. Authorities listed here for commissioned officers are only for initiating release process. 

**NOTE 2:** All release cases involving illicit drug involvement, alcohol misuse, sexual misconduct, conduct, harassment, racist conduct, and family violence shall be referred to DMCARM, DGMC, or CMP depending on rank. 

**NOTE 3:** Cmdt RMC approves the release of RETP officer cadets attending RMC and CO CFMDS det RMC approves the release of RETP officer cadets attending Fort St-Jean. These release authorities are applicable only to members released under QR&O 15.01 Items 4(c), 5(d), and 5(f), and shall not include cases under Items 5(d) or 5(f) that involve drug or alcohol abuse, sexual misconduct, conduct, family violence, harassment or racism. The latter shall be referred to DMCARM, DGMC, or CMP depending on rank. 

**NOTE 4:** The unit CO approves the release of untrained Reserve OCdts, other than RETP officer cadets. 

**NOTE 5:** NDHQ/DGPGP approves the release of Cdn Rangers’ NCMs and has the authority to initiate releases for Cdn Rangers’ officers. 

**NOTE 6:** The unit CO approves the release of Cdn Rangers’ NCMs and has the authority to initiate releases for Cdn Rangers’ officers. This release authority is applicable only to Cdn Rangers released under QR&O 15.01 Items 3, 4, and 5 and shall not include cases under Items 5(d) or 5(f) that involve drug or alcohol abuse, sexual misconduct, conduct, family violence, harassment or racism. The latter shall be referred to DMCARM. Release under Items 1 and 2 are IAW the authorities designated in the Chart. 

---

<table>
<thead>
<tr>
<th>Item</th>
<th>Category</th>
<th>Reason for Release</th>
<th>Notation on Record of Service (see QR&amp;O 15.01(4))</th>
<th>CDS Delegated Release Authority</th>
<th>Authority to Initiate Release Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Misconduct</td>
<td>(a) Sentenced to Dismissal</td>
<td>“Released for Misconduct”</td>
<td>CDS</td>
<td>MND</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b) Service Misconduct</td>
<td></td>
<td>DMCARM</td>
<td>DGMC</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(c) Illegally Absent</td>
<td></td>
<td>DMCARM</td>
<td>DGMC</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(d) Fraudulent Statement on Enrolment</td>
<td></td>
<td>DMCARM</td>
<td>DGMC</td>
</tr>
<tr>
<td>2</td>
<td>Unsatisfactory Service</td>
<td>(a) Unsatisfactory Conduct – General</td>
<td>“Service Terminated”</td>
<td>DMCARM</td>
<td>DGMC</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(a) Unsatisfactory Conduct (drugs, alcohol, sexual misconduct, harassment, racist conduct, family violence and abuse)</td>
<td></td>
<td>DMCARM</td>
<td>DGMC</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b) Unsatisfactory Performance</td>
<td></td>
<td>D Mil C</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>Medical</td>
<td>(a) On medical grounds, being disabled and unfit to perform duties as a member of the Service</td>
<td>“Honourably Released”</td>
<td>DMCARM</td>
<td>DGMC</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b) On medical grounds, being disabled and unfit to perform his duties in his present trade or employment, and not otherwise advantageously employable under existing service policy</td>
<td></td>
<td>DMCARM</td>
<td>DGMC</td>
</tr>
<tr>
<td>4</td>
<td>Voluntary</td>
<td>(a) On Request – When Entitled to an Immediate Annuity</td>
<td>“Honourably Released”</td>
<td>BCmd/C O</td>
<td>D Mil C Sect Head</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b) On Completion of a Fixed Period of Service</td>
<td></td>
<td>BCmd/C O</td>
<td>D Mil C Sect Head</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(c) On Request – Other Causes</td>
<td></td>
<td>BCmd/C O</td>
<td>D Mil C Sect Head</td>
</tr>
<tr>
<td>5</td>
<td>Service Completed</td>
<td>(a) On Reaching CRA &amp; Retirement by Years of Service</td>
<td>“Honourably Released”</td>
<td>CM</td>
<td>DSA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(b) Reduction in Strength</td>
<td></td>
<td>CM</td>
<td>DSA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(c) Completed Service for Which Required (not related to CF realignment)</td>
<td></td>
<td>CM</td>
<td>DSA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(d) Not Advantageously Employable – alcohol</td>
<td></td>
<td>CM</td>
<td>DSA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(d) Not Advantageously Employable – untrained personnel</td>
<td></td>
<td>CM</td>
<td>DSA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(e) Irregular Enrolment</td>
<td></td>
<td>CM</td>
<td>DSA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(f) Unsuitable for Further Service – General</td>
<td></td>
<td>CM</td>
<td>DSA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(f) Unsuitable for Further Service (drugs, alcohol, sexual misconduct, harassment, racist conduct, conduct, family violence and abuse)</td>
<td></td>
<td>CM</td>
<td>DSA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(f) Unsuitable for Further Service – untrained personnel</td>
<td></td>
<td>CM</td>
<td>DSA</td>
</tr>
</tbody>
</table>

Note 1 – The Governor General is the release authority for commissioned officers. The CDS, and other release authorities delegated by the CDS, are release authorities for officer cadets or NCMs. The CDS and other release authorities may initiate the release process for commissioned officers.

Note 2 – All release recommendations involving illicit drug involvement, alcohol misuse, sexual misconduct, harassment, racist conduct, family violence, conduct, and untrained regular force personnel shall be referred to DMCARM (DGMC for LCol and above) for processing.

Note 3 – The Commandant RMC is the CDS designated release authority for ROTP, RETP, and UTPNCM officer cadets attending RMC and the CO CFMDS detachment RMC is the CDS designated release authority for ROTP, RETP, and UTPNCM officer cadets attending Fort St-Jean. These release authorities are applicable only to members released under Item 4(c) (On Request – Other Causes), Item 5(d) (Not Advantageously Employable), and Item 5(f) (Unsuitable for Further Service). However, cases under Item 5(d) (Not Advantageously Employable) and 5(f) (Unsuitable for Further Service) that involve drug or alcohol abuse, sexual misconduct, family violence, harassment, conduct, or racism shall be referred to DMCARM.

Note 4 – The Commander CFRG is the CDS designated release authority for ROTP, UTPNCM, and CFCECPEP officer cadets attending civilian institutions and may initiate the release process for commissioned officers undergoing IAP/BOTP. Commander CFRG is the CDS designated authority to initiate release administration for junior officers enrolled in MOTP and DOTP. These authorities are applicable only to members released under Item 4(c) (On Request – Other Causes), Item 5(d) (Not Advantageously Employable), and Item 5(f) (Unsuitable for Further Service). However, cases under Item 5(d) (Not Advantageously Employable) and 5(f) (Unsuitable for Further Service) that involve drug or alcohol abuse, sexual misconduct, family violence, harassment, conduct, or racism shall be referred to DMCARM.

Note 5 – The Commandant CFLRS is the CDS designated release authority for RETP officer cadets and for all other officer cadets who have not incurred obligatory service undergoing IAP/BOTP released under Item 4(c) (On Request – Other Causes), Item 5(d) (Not Advantageously Employable), and Item 5(f) (Unsuitable for Further Service), except UTPNCM, SCP, and CFRP officer cadets. However, cases under Item 5(d) (Not Advantageously Employable) and 5(f) (Unsuitable for Further Service) that involve drug or alcohol abuse, sexual misconduct, family violence, harassment, conduct, or racism shall be referred to DMCARM.

Note 6 – The Commander CFRG is the CDS delegated release authority for release of NCMs who have completed basic recruit training but have not completed basic occupation training and is applicable only to members released under Item 4(c) (On Request – Other Causes). The CO of a recruit school is the CDS delegated release authority for NCMs who have not yet completed basic recruit training and is applicable only to members released under Item 4(c) (On Request – Other Causes) and Item 5(d) (Not Advantageously Employable).

Note 7 – For cases not covered in notes 3, 4, 5, and 6, DMCARM is the CDS delegated release authority for non-commissioned members and officer cadets not yet MOC qualified.

Note 8 – The CO of a CFRC is the CDS delegated release authority for officer cadets with no paid service.

Note 9 – When an Item 1(a) (Sentenced to Dismissal) release occurs, the service record entry shall be “Dismissed with Disgrace for Misconduct” or “Dismissed for Misconduct”, as applicable.
QR&O 15.01 (Release of Officers and Non-Commissioned Members).

QR&O 15.07 (Voluntary Release After Subsidized Education or Training).

QR&O 15.071 (Voluntary Release After Receiving A Recruitment Allowance).

QR&O 15.075 (Voluntary Release After Receipt Of Pilot Terminable Allowance).

QR&O 15.21 (Notice of Intent to Recommend Release – Commissioned Officers).

QR&O 15.22 (Notice of Intent to Recommend Release – Officer Cadets).

QR&O 15.36 (Notice of Intent to Recommend Release – Non-Commissioned Members).

QR&O 15.50 (Reinstatement).

Orders, Directives and Instructions


CANFORGEN 092/02 ADM (HR-MIL) 051/02 291209Z Aug 02, (Clarification to Misuse of Alcohol Policy), online: DIN <http://vcds.dwan.dnd.ca/vcds-exec/pubs/canforgen/2002/092-02_e.asp>.

CBI 205.51 (Pilot Terminable Allowance).

CBI 205.525 (Recruitment Allowances).

CBI 208.31 (Forfeitures, Deductions and Cancellations – When No Service Rendered).

CBI 209.99 (Entitlement to Transportation Benefits on Reinstatement – Regular Force).


CFAO 19-36 (Sexual Misconduct).

CFAO 26-17 (Recorded Warning and Counselling and Probation).

CFAO 49-4 (Career Policy Non-Commissioned Members – Regular Force).

CFAO 49-9 (Terms of Service – General Service Officers – Regular Force).

CFAO 49-10 (Terms of Service – Officers – Primary Reserve).

CFAO 49-11 (Terms of Service Non-Commissioned Members Primary Reserve).

CFAO 204-10 (Severance Pay/Rehabilitation Leave).
DAOD 5019-3 (CF Drug Control Program)

DAOD 5049-1 (Obligatory Service).


Jurisprudence


CHAPTER 20
CF PENSION AND OTHER BENEFITS

SECTION 1
INTRODUCTION

1. The pension benefits that are provided to CF members are constantly reviewed to ensure that they meet the objectives of the CF human resource policies and the needs of the CF membership. The breadth of this subject area is vast and a complete understanding of pension complexities is beyond the purview of this manual. Nevertheless, COs should be aware of certain critical elements that will allow them to effectively manage their subordinates. In addition, there are other benefits that may be payable and will be briefly discussed.

SECTION 2
BENEFITS UNDER THE CANADIAN FORCES SUPERANNUATION ACT

2. There has been a retirement income scheme for CF members in place since the Militia Pension Act of 1901. Prior to 2003, the last major initiative to revamp the CF retirement income scheme occurred in the 1970’s with the introduction of the Canadian Forces Superannuation Act\(^1\) to replace the Defence Services Pension Act. Various reforms occurred in the intervening years, which reflected the need to adapt the retirement income scheme to take into account changing demographics of the work force and recruitment and retention impacts. The current pension modernization initiative began with the 1999 amendments to the CFSA\(^2\) which were included in the reform of the financial arrangements and which led to the full-scale restructuring scheme that was approved by Parliament in 2003\(^3\).

3. The 2003 amendments to the Act\(^4\) received Royal Assent on 7 November 2003, and came into force on 1 March 2007.\(^5\) The overall intent of this legislation is to align the retirement income arrangements available to CF members with the CF Human Resources strategy and to have the pension arrangements line up with those offered by other large Canadian employers. The benefits scheme has been restructured to:

   a. tie benefit eligibility to years of pensionable service rather than completion of a period of engagement in the CF (entitlements are no longer based on a decision of the Service Pension Board);

   b. provide an unreduced pension after 25 years of paid service in the CF (including service in both the Regular Force and the Reserve Force);

   c. reduce the minimum period for qualifying for a pension to two years (“vesting”); and

   d. provide for a transfer value payment if member is vested, under age 50 and not entitled to an immediate annuity; or immediate access to a reduced pension if member is between age 50 and sixty.

4. The legislation allows for certain reserve force members to be afforded the same arrangements as their regular force counterparts. This aspect complements the 1999 legislative

---
\(^1\) R.S.C. 1985, c. C-17. [CFSA].
\(^2\) S.C. 1999, c. 34.
\(^3\) Director General Compensation and Benefits (DGCB), Canadian Forces Modernization Project. Online: DIN <http://hr.ottawa-hull.mil.ca/dgcb/dpsepengraph/cfmp_whatsnew_e.asp> [CF Modernization Project].
authority to create a pension plan for reservists. The 2003 amendment also makes provisions to increase ‘administrative flexibility’ and the establishment of the necessary ‘grandfather provisions’ for those already entitled to benefits under the existing pension scheme.\(^6\)

5. The key to understanding the amendments to the CFSA is discerning the types of benefits to which a member may become entitled at certain points in their service. A contributor who ceases to be in the regular force is entitled to a deferred annuity if they have two or more years of pensionable service and are not entitled to an immediate annuity.\(^7\)

6. A member entitled to a deferred annuity on release who meets the required conditions can elect for a transfer value payment, i.e., to have the capitalized value of that annuity transferred to an external retirement savings vehicle. A member can also choose to have the payment date of the deferred annuity advanced from age sixty to an earlier date (after age fifty) but there will be a reduction in the annuity to take into account the longer payment period. Finally, a member entitled to a deferred annuity who subsequently becomes entitled to a disability pension under the Canada Pension Plan (CPP) or Quebec Pension Plan (QPP) ceases to be entitled to the deferred annuity and instead becomes entitled to an immediate unreduced annuity.

7. The amendments also removed the definitions of ‘intermediate engagement,’ ‘retirement age’ and ‘short engagement’ from the CFSA since these terms are not relevant under the new benefit entitlement scheme.\(^8\) The legislation now sets out exactly when a member would be entitled to an immediate annuity. Members are eligible for an immediate unreduced annuity (IUA) upon release, if they have two or more years of pensionable service to their credit and can meet one of the following criteria:

- a. they have completed not less than 25 years of paid CF service;
- b. they have reached 60 years of age;
- c. they have reached 55 years of age and have to their credit not less than 30 years of pensionable service;
- d. they are disabled and have to their credit not less than 10 years of pensionable service; or
- e. they cease to be a member of the regular force due to a reduction in the CF and meet the age and service requirements.

8. The 2003 legislation also allows for benefit grandfathering regulations. A member who meets the specified conditions can choose to have his retirement annuity determined in accordance with the former legislation.

**Vesting**

9. The 2003 amendments lower the vesting point in the CFSA. Vesting refers to the right of a plan member to receive a benefit from the pension plan on termination of employment other than a return of contributions. A vested benefit may be in the form of an immediate or deferred annuity, and the latter may be converted into a cash out of the accrued benefit (transfer value payment) or an early reduced annuity. Previously, a CF member needed 10 years to reach the vesting point, but now entitlement to a pension-type benefit will vest in the member after two years of pensionable service.

---


\(^7\) An Act to amend the Canadian Forces Superannuation Act and to make consequential amendments to other Acts, S.C. 2003, c. 26.

\(^8\) Ibid., s. 1.(1).
10. It is also possible for the contributor who is entitled to a deferred annuity and who meets the required conditions to choose a transfer value payment in lieu of that annuity. The transfer value amount is the present value of the contributor’s pension benefits. This amount must be transferred to:

a. a pension plan that is registered under the Income Tax Act, if it will accept the amount;

b. a retirement savings plan or fund prescribed by the regulations; or

c. a financial institution authorized to sell immediate or deferred life annuities, for the purchase of such an annuity.

Note that the payment of a transfer value extinguishes all other pension entitlements and there would be no survivor benefits under the CFSA on the death of the former member.

Improved Survivor Benefits

11. The amendments have also improved survivor benefits. Under the old scheme, the survivor of a member with less than five years of service in the regular force would have only received the greater of a cash termination allowance or a return of contributions. The survivor of a contributor with five or more years of service would have received an annual allowance for life. The children of the survivor would receive benefits until the age of 18 or, if they were in continuous full-time attendance at school or university, until the age of 25. The 2003 amendment alters this arrangement. The two-year vesting period will apply. In addition, the prescribed definition of dependent children becomes more flexible. For example, the 2003 amendments remove the requirement for a dependent child to be in school or university on a continuous basis.

Pension Coverage for Reserve Force

12. The amendments to the CFSA in 1999 granted the authority to the government (Treasury Board) to make regulations establishing a reserve force pension plan. The 2003 amendments provided additional regulation-making authority to bring long-term full time reservist under the same pension arrangements that apply to Regular Force members.10

SECTION 3

ADDITIONAL BENEFITS

13. Additional benefits available may be available to CF members, former CF members, next-of-kin and estates, depending on the circumstances. These benefits/programs will be very briefly referred to and COs are encouraged to refer to the reference documentation for additional amplification.

Summary of Death Benefits

14. The surviving spouse/partner of a CF member or former member who dies of a condition for which pension entitlement was awarded under the Pension Act11 will be entitled to a survivor’s pension. The Pension Act has been superseded by the Canadian Forces Members and Veterans Reestablishment and Compensation Act.12

---

9 S.C. 2003, c. 26, s. 22(1) and (2).
10 Ibid., s. 3.1.
15. Pursuant to the CFMVRCA, a Death Benefit will be payable to a surviving spouse/common-law partner and/or surviving dependent child(ren) of a member for the non-economic impacts of a sudden service-related death, which includes the member’s loss of life, the resulting loss of guidance, care, companionship and the impact of the member’s death on the functioning of the household. Education Assistance is also available to help children carry on their education past high school if they have a CF parent who dies as a result of military service.

16. The CPP and QPP provide death benefits consisting of a lump sum payment, monthly spouse’s pension and monthly orphan’s allowance under certain conditions. Additional contacts/information is available in the Reference section to this Chapter.

17. The Supplementary Death Benefit (SDB) are benefits that are similar to life insurance for all members of the Regular Force and to qualifying members of the Reserve Force on Class “C” service. Mandatory contributions are required. Reservists on Class “A” or “B” service do not contribute to the SDB. A non-contributory Death Gratuity is provided in lieu. In addition, severance pay will be paid to the executor/administrator of the service estate. SISIP Financial Services provides additional benefits. A thorough description of all of these benefits is available in the guide prepared by National Defence/VAC titled Death & Disability Programs and Services.

18. Members of the Reserve Force are not eligible for Severance Pay, but the Reserve Force Retirement Gratuity (RFRG) is a benefit comparable to Severance Pay. If the CF member dies, is still enrolled in the Primary Reserve, and is entitled to RFRG, this gratuity is paid to the member’s estate.

Summary of Benefits Available for Injuries

19. Pursuant to the CFMVRCA, injured CF members are eligible for benefits if a member or veteran suffers an illness or injury as a result of service and may be eligible for:

   a. Rehabilitation Program including medical, psychological and vocational assistance (on release from CF);

   b. Financial Benefits Program (on release);

   c. Job Placement Program (offered while member is still serving);

   d. Health Benefits Program (on release);

   e. Disability Awards (offered while member is still serving); and

   f. VAC Assistance Line.

20. CPP and QPP Disability Benefits may also be available to CF members and to former CF members. SISIP Long Term Disability Group Insurance Plan provides for replacement income protection if the member is released from the CF for medical reasons, or if the individual becomes totally disabled.

21. A description of other benefits, including UN disability compensation is available in the DND/VAC publication Death & Disability Programs and Services.

---

13 CFMVRCA, Part III.
SECTION 4
REFERENCES

Legislation


Public Service Pension Investment Board Act, S.C. 1999 c. 34.


Regulations Amending the Canadian Forces Superannuation Regulations, SOR/2007-33.

Orders, Directives and Instructions


Secondary Material


Director General Compensation and Benefits (DGCB), Canadian Forces Modernization Project. Online: DN <http://hr.ottawa-hull.mil.ca/dgcb/dpsp/engraph/cfpmp_whatsnew_e.asp>.
CHAPTER 21
CF DRUG CONTROL PROGRAM
SECTION 1
INTRODUCTION

1. The possession, consumption and trafficking of certain drugs are criminal offences in Canada under the Controlled Drugs and Substances Act (CDSA)\(^1\) and the Food and Drugs Act (FDA).\(^2\) While civilian anti-drug laws are designed to deter and punish criminal misconduct, the unique demands of a military force have required the CF to design an anti-drug program to achieve the following additional purposes of promoting:

   a. the maintenance of operational readiness;
   b. the safety and health of both members and the public;
   c. the security of defence establishments and materiel (and other public or private property);
   d. the security of classified and protected information;
   e. discipline within the CF;
   f. the reliability of CF members;
   g. cohesion; and
   h. morale.\(^3\)

2. These objectives have precipitated a more stringent administrative and disciplinary approach to drug enforcement in the CF than that which exists in the civilian criminal justice system and civilian employment environments. The essential elements of the CF Drug Control Program are contained in QR&O Chapter 20 (Canadian Forces Drug Control Program), which is amplified by DAOD 5019-3 (Canadian Forces Drug Control Program). Any supervisor who is contemplating drug-related administrative or disciplinary action must read and adhere to these provisions. In addition, these regulations and orders set out the drug and alcohol education regime established by the CDS.

3. The CF Drug Control Program’s focal point is described within the qualified drug prohibition at QR&O 20.04 (Prohibition), as follows:

   No officer or NCM shall use any drug unless the:

   a. member is authorized to use the drug by a qualified medical or dental practitioner for the purpose of medical treatment or dental care;
   b. drug is contained in a non-prescription medication used by the member in accordance with the instructions accompanying the medication; or
   c. member is required to use the drug in the course of military duties.\(^4\)

---

\(^1\) S.C. 1996, c. 19.
\(^3\) QR&O 20.03 (Purpose).
\(^4\) QR&O 20.04 (Prohibition).
SECTION 2

CATEGORIES OF TESTING

4. The enforcement of the CF drug prohibition may require a CF member to provide a mandatory urine sample when lawfully ordered to do so. There are six principal categories of testing:
   
a. QR&O 20.08 (Deterrent Testing);

b. QR&O 20.09 (Testing of Members in High Risk Safety Positions);

c. QR&O 20.10 (Accident and Incident Related Testing);

d. QR&O 20.11 (Testing for Cause);

e. QR&O 20.12 (Control Testing); and

f. QR&O 20.13 (Blind Testing).

5. Each of the above testing categories has its own prescribed standards and limitations regarding the authority to initiate a test and the ultimate use of the results, and each category of test is designed to achieve very specific objectives.

Deterrent Testing

6. ‘Deterrent Testing’ is ordered by a designated officer in order to test the members of a randomly selected unit or element consisting of five or more personnel. The purpose of the deterrent testing regime is to allow the CF to test the members of any unit at any time. That any member is subject to a testing order at any time acts as a deterrent from drug use, thus promoting the purposes of the CF Drug Program. Deterrent testing is a form of random drug testing. The CF currently does not conduct deterrent testing.

High Risk Safety Positions Testing

7. The CDS or his designate may order the testing of members in high risk safety positions where “a high risk to the safety of individuals would be created if a member in the occupation or position were under the influence of a drug while on duty.” The CDS has designated every CF position deployed in and preparing to deploy to Afghanistan to be a safety sensitive position.\(^5\) The CDS has authorized several commanders to order this type of testing. No one but a CDS designate may order such a test.

8. The designation of any position or occupation as safety sensitive depends upon consideration of several factors. These factors generally concern the nature of the work performed and the location in which it is performed as well as the risk to the safety of individuals if a member in the occupation or position were under the influence of a drug while on duty. Once the factors are considered, the CDS may determine it is reasonable to issue an appropriate designation. The chain of command may always recommend to the CDS that a particular position or occupation be designated.

Accident or Incident Testing

9. An accident or incident-related test may be ordered by a CO who has a reasonable belief that:

\(^5\) CANFORGEN 179/05 CDS 092/05 291949Z Nov 05, Safety Sensitive Drug Testing.
a. having regard to the nature of the accident or incident, an act or omission of one or more of the members to be tested could have caused or contributed to its occurrence; and

b. if the urine sample were to be provided only after the investigation had established reasonable grounds to test a specific member, it is probable that the sample of urine would be obtained too late for testing to determine whether there was a drug present in the member’s body at the time that the member may have caused or contributed to the accident or incident.\(^6\)

**Testing for Cause**

10. The administrative procedural standards that are applied to ‘Testing for Cause’ are the most rigorous. Although the CF supports the view that the taking of such samples is a reasonable limit to a member’s rights, individuals subjected to these tests must be accorded the full measure of their rights under the *Charter* and in accordance with principles of fairness. Improperly authorized testing orders have resulted in the exclusion of evidence for disciplinary purposes, acquittals, or the reversal of administrative decisions to release CF members.

11. **Components.** *QR&O* 20.11 (Testing for Cause) has three key components. First, *QR&O* paragraph 20.11(1) states that a CO, who has reasonable grounds to believe that an officer or non-commissioned member has used a drug contrary to article 20.04 (*Prohibition*) within a time period during which that use could reasonably be detected by urine testing, may order the member to provide a sample of urine.

12. Second, *QR&O* paragraph 20.11(2) states that, before a CO decides whether reasonable grounds exist to order that the member provide a urine sample, the CO shall cause the member to be: (a) provided with a written or oral summary of the information that forms the grounds upon which the decision would be based; and (b) given a reasonable opportunity to provide additional information and submissions to the CO concerning whether the member should be ordered to provide a urine sample.

13. Third, *QR&O* paragraph 20.11(3) states that there is no obligation on the member under paragraph (2) to provide additional information and make submissions should the member not wish to do so.

14. **Application.** From a practical perspective, the article begins to operate when a CO is informed that a member may have used a drug. That information may emerge from a police investigation or report or even a criminal proceeding in civilian court. Equally, the source may be another member of the unit. The CO must ask himself, at a minimum, several basic questions:

   a. **Is the alleged drug user a CF member?** The CF Drug Control Program applies only to CF members - Regular and Reserve. Civilians are not subject to testing for cause.

   b. **Does the allegation concern “use”?** “Use” is defined in *QR&O* article 20.01. If the allegation does not involve “use”, then no testing order may be issued. Simple possession in some circumstances may be insufficient (but the member may be subjected to an administrative review for “other involvement with drugs”). Equally, simple possession with drug paraphernalia to assist drug use may in some circumstances be sufficient to strongly suggest “use”.

   c. **Does the allegation concern a “drug”?** “Drug” is defined in *QR&O* article 20.01. If the allegation does not involve a “drug”, then no testing order may be issued.

\(^6\) *QR&O* 20.10 (Accident and Incident Related Testing).
One common difficulty is that the source of the information often fails to specify how they knew the substance being used was a drug and what type of drug it may have been.

d. Can urinalysis detect the drug metabolites within a specific time period after use? In all cases, the CO must refer to a scientifically valid, common CF chart specifying the detection times of different drugs through urinalysis. If the use is believed to have occurred outside the detection time, urinalysis cannot reasonably be assumed to have a chance of detecting evidence of use. For example, there would be no authority to test for LSD if the allegation concerned use from 1 year ago; the metabolites would long be out of the member's system.

e. Is the source of the information reliable? If the source is unreliable, then the information provided should be disregarded or corroborated by other sources. Credibility and trustworthiness are essential. If the source is reliable, then the CO should note why he considers the source to be reliable. There is also a distinction between expert and lay observation; a police officer generally should be more attuned to the indicia of drug use than a typical CF member.

15. A CO who wishes to leave open the possibility of disciplinary action if the member tests positive should receive the above information under oath, reduced to writing in a Statutory Declaration or Affidavit. Testing for cause infringes upon a member's rights under the Charter. A failure to receive the testing for cause information under oath may affect the admissibility of the test result in a service tribunal.

16. As a basic element of fairness, the regulations require that the member be provided a written or oral summary of the information, described above, and be able to make representations. A written summary can be provided when time is not pressing. An oral summary is often appropriate when the drug allegedly used will dissipate from the member's body quickly.

17. A member does not have to make any representations. A CO should never cajole, threaten, or otherwise compel a member into making a statement. In particular, a CO should never state that the member will be released if he does not admit to use. Furthermore, a prudent CO will not caution the member pursuant to QR&O article 101.12 (Warning Of Persons In Custody Or Suspected Of Having Committed An Offence) because the prudent CO's focus will be strictly on the proposed testing for cause, not on obtaining incriminating oral evidence.

18. If the member chooses to make representations, then he is not required to do so under oath. Moreover, he should never be asked or directed to do so under oath.

19. The member's representations are relevant if they go to the central issue of reasonable grounds to believe that urinalysis will detect evidence of use within an applicable timeframe. The member could submit, for example, that he is being mistaken for someone else, that the timeframe has expired, or that the substance he used or was seen to have used was not a drug. Moreover, the member may argue that the source of the information is unreliable, unspecific, or incapable of making a reasonable allegation of drug use.

20. At this time, some members might admit to using drugs. Such admissions should be noted. They may corroborate the specific allegation. However, admissions by themselves should not be sought. If they are made, they should only be considered insofar as they touch on the central question: the reasonableness of the belief that urine testing will detect evidence of drug use within the appropriate timeframe.

21. Last, the member may request additional time to make representations. The notion of a 'reasonable' opportunity will depend on the circumstances. It must be long enough to allow the member to consider the information and obtain relevant evidence to contradict the claim; but it
also must not be so long as to substantially prejudice the taking of a urine test by virtue of the member’s natural elimination of the drug. That said, the sample cannot be forcibly extracted and a refusal to provide the urine sample, as ordered, should lead to the laying of a disciplinary charge for refusing to obey a lawful command.\(^7\)

22. It is also important to note that, while the member is entitled to disclosure, certain types of sensitive information can be withheld from the member and disclosure is not required for some administrative issues under the *Privacy Act (PA)* or *Access to Information Act (AIA).*\(^8\) In such a situation, it would be prudent to contact the unit legal adviser.

23. **Decision.** A CO will note all representations made by the member and consider them and the original allegation of drug use before making the decision whether to test the member. Before ordering a test, the CO must have “reasonable grounds to believe” that:

   a. an officer or non-commissioned member;
   b. has used;
   c. a drug;
   d. contrary to article 20.04 (*Prohibition*);
   e. within a time period during which that use could reasonably be detected by urine testing.

24. The legal test for reasonable grounds is objective: whether a reasonable person, standing in the shoes of the CO, would believe that grounds exist to conclude that the offence had been committed.\(^9\) The reasonable grounds cannot be based upon a ‘Deterrent Testing’ result,\(^10\) a ‘High Risk Safety Position Testing’ result,\(^11\) or an ‘Accident and Incident Related Testing’ result.\(^12\) In effect, the results of any other form of testing cannot constitute ‘reasonable grounds’ for the purpose of a ‘Test for Cause.’\(^13\) If a CO fails to apply this standard of proof properly, the testing order may be quashed. In the CF grievance context, if a CO lacked reasonable grounds but ordered a test anyway and if the test produced a positive sample and the member was ordered onto C&P or released and subsequently grieved the matter, the C&P or release would most likely be cancelled.

**Control Testing**

25. Control testing is used when a CF member is put on C&P for previously confirmed drug use following an administrative review. C&P for drug use is normally for a period of 12 months. Control testing may commence only after: 1) DMCARM has directed C&P for a CF member; 2) the CF member has been medically assessed by a CF medical care provider; and 3) the C&P form has been signed by the member. When determining the minimum frequency for testing that is reasonably necessary to confirm continued abstinence from drug use, the CO shall take into consideration all the relevant circumstances, including:

---

\(^7\) QR&O 103.16 (Disobedience of Lawful Command).
\(^8\) QR&O 20.11(4).
\(^10\) QR&O 20.08 (Deterrent Testing) Note (C) indicates that, because the focus on this testing is deterrence and rehabilitation, QR&O 20.15(1) does not permit the results of the urine test to be used as evidence in any disciplinary proceeding against the member who was the subject of the test.
\(^11\) QR&O 20.09 (Testing of Members in High Risk Safety Sensitive Positions), Note (B).
\(^12\) QR&O 20.10 (Accident and Incident Related Testing), Note (C).
\(^13\) QR&O 20.11(S).
a. the nature of the drug that lead to the administrative program being ordered (e.g. whether the drug is addictive);

b. the known length of the CF member's drug use and other involvement with drugs;

c. the elimination rate of the drug concerned; and

d. the CF member's personal and service history.

Blind Testing

26. ‘Blind Testing’ is an obligatory process, initiated by the designate of the CDS, intended to obtain anonymous urine samples from personnel in order to determine "the prevalence of drug use in the CF." The CDS recently announced the commencement of blind testing.

SECTION 3

ADMINISTRATIVE PROCEDURES

Testing Order

27. As noted above, a CO may order a test in respect of the cases listed in QR&O 20.10 (Accident and Incident Related Testing), 20.11 (Testing for Cause) and 20.12 (Control Testing), using DAOD Form 5019-3B (Drug Testing Order). For the other categories of testing, only an officer designated by the CDS may make such an order. Regardless of the category, urine testing may only be conducted on the basis of a written testing order. The subject of the test must be shown a copy of the order which must contain, at a minimum, the following information:

a. the identity of the test subject;

b. the QR&O article under which the subject is being tested;

c. the time period when urine samples are to be obtained; and

d. the person authorized to take the sample.

28. Each type of test has additional requirements. For example, ‘Testing for Cause’ requires that the member be given a reasonable opportunity to make representations to the authority that is making the testing order. Care must be used to ensure strict adherence to the regulations so as to prevent successful challenges to the testing process in subsequent disciplinary or administrative proceedings.

29. Most substances are only detectable within 72 hours of consumption, although cannabis resin (marijuana) is detectable for 30 days. Where a CO orders a test for cause or as a result of an accident or incident, it is therefore imperative that the test be administered promptly and efficiently. Not only may a delayed test fail to provide an accurate result, but a delay may also affect the validity of the testing order.

---

14 Note to QR&O 20.13 (Blind Testing).
15 CANFORGEN 153/07 CDS 033/07 031821Z OCT 07 CF Drug Control Program - Expanded Drug Testing.
16 QR&O 20.07 (Testing Order).
17 QR&O 20.11(2)-(3).
30. A CF member is required to provide a sufficient sample that is undiluted, unadulterated and uncontaminated. A failure or refusal to provide a sample under these provisions, without a reasonable excuse, could result in administrative or disciplinary action against the CF member.

Taking and Testing of Samples

31. When a sample is being taken, it cannot be overemphasized that the regime set out in QR&O Chapter 20 (Canadian Forces Drug Control Program) must be followed explicitly. QR&O 20.17 (Testing Procedures), The CF Drug Testing Manual and instructions contained in the drug testing kits, all contain detailed instructions for the obtaining of samples from a member. The taking of urine samples from an individual could represent a breach of the test subject’s right not to be subjected to unreasonable search and seizure under section 8 of the Charter.

32. Similarly, the testing standards at the testing facility are very strictly prescribed and monitored, in order to ensure that the laboratory meets the technical standards required.

Review of Test Results

33. By virtue of the requirement to ensure fairness, a mere ‘positive’ test result is not sufficient on its own to merit administrative or disciplinary proceedings. The following additional criteria must also be satisfied:

   a. the test must meet the procedural and technical standards for the obtaining and testing of urine samples. A failure to abide by these standards, including the retention of a sufficient sample to permit independent testing, will nullify the test results;

   b. where reasonable doubt exists following the test as to whether a drug was present in the body of the subject member, it must be resolved in favour of the assumption that no drug was present;

   c. once the positive test is received, if the subject member denies that they consumed drugs contrary to the prohibition, a review board (including a medical practitioner), must be established to review the results and determine their validity prior to the commencement of any administrative or disciplinary proceedings. If the validity of the test result is doubted, the review board is entitled to determine that the test was negative, or direct that the sample be re-tested; and

   d. the test subject is entitled to confirm or deny the test results through independent testing. Within 7 days of receipt of the confirmation results from DMCARM, the test subject may request that a portion of the sample that resulted in the positive determination be forwarded to a testing agency of their choice. The agency, so chosen by the test subject, must also comply with the technical standards concerning drug testing, as prescribed by the CDS. An independent test, carried out pursuant to the required standards, which fails to confirm the prior positive test result, is determinative that the final result of the test is negative.

---

19 QR&O 20.06 (Mandatory Urine Testing).
20 Drug testing kits can be ordered from DMCARM.
21 QR&O 20.16 (Limitations).
22 QR&O 20.18(1).
23 QR&O 20.18(2)-(4).
24 QR&O 20.18(5)-(8).
SECTION 4

CONSEQUENCES OF POSITIVE TEST RESULT

34. The consequences of a positive test result vary depending on the purpose of the test administered and the type and quantity of drugs found in the urine. Because the majority of the tests stated above are designed solely to promote the purposes of the CF Drug Control Program, the focus of testing is on general deterrence, rehabilitative assistance, and administrative action. As such, disciplinary proceedings or serious career action cannot flow from most test results, other than ‘Test for Cause’ or ‘Control Testing’ results.

35. A member who contravenes the provisions of QR&O 20.04 (Prohibition), the CDSA or the FDA, is liable to administrative or disciplinary action, or both. Administrative action is controlled by DAOD 5019-3 (CF Drug Control Program) The decision whether to take disciplinary action and the nature of that action is within the authority and at the discretion of the CO, the NIS and the Director of Military Prosecutions (DMP). As soon as a CO determines that a CF member has been involved with illicit drugs, the CO shall make a report to DMCARM, using DAOD Form 5019-3A (Prohibited Drug Use or Drug Offence Notification). DMCARM’s staff will initiate an administrative review to determine what should be the most appropriate administrative measure.

Release

36. A CF member shall normally be released if it has been established based on clear and convincing evidence that the CF member, during the performance of duty, participated in prohibited drug use or committed a drug offence.

37. Release of a member must comply with QR&O 15.21 (Notice of Intent to Recommend Release – Commissioned Officers), QR&O 15.36 (Notice of Intent to Recommend Release - NCMs) and QR&O Chapter 20 (Canadian Forces Drug Control Program), as well as the principles of fairness. Chapter 19 of this manual discusses in greater detail the compulsory release of a member.

Counselling and Probation

38. A CF member who shall normally be retained and placed on C&P if the following conditions are met:
   a. the involvement constitutes a first-time established involvement with drugs;
   b. the involvement was limited to personal use or possession for personal use;
   c. the involvement did not take place on duty and did not create an immediate danger to operational readiness, security or safety;
   d. conduct and performance are otherwise satisfactory and the CF member’s capacity for leadership is not compromised; and
   e. it is unlikely that there will be a repeat or other illegal drug involvement by the CF member.

39. If the CF retains a member who has tested positive for illicit drug use, that person will be placed on C&P for a period of one year. DAOD Form 5019-3E (Counselling and Probation – Prohibited Drug Use or Drug Offence) will be used.

40. C&P for drug involvement precludes the eligibility of members for training selection and promotion (including advancement within the rank of private), as prescribed in CFAO 49-4
(Career Policy – Non-Commissioned Members – Regular Force) and CFAO 49-5 (Career Policy – Non-Commissioned Member – Primary Reserve). The member’s incentive pay may be affected as prescribed in CFAO 204-2 (Incentive Pay - Regular Force and Reserve Force).

41. Further, posting prospects of the member may also be affected as a result of having been placed on C&P. The relevant paragraphs of CFAO 19-21 (Canadian Forces Drug Control Program) should be consulted prior to action in these areas. Once the C&P period is complete, the CO must forward career recommendations to NDHQ within 15 days.  

Medical Assessment

42. Notwithstanding any disciplinary or administrative action taken, if prohibited drug use has been determined, the CO shall immediately refer the member to a CF medical care provider for assessment for drug dependency. The purpose of this assessment is to determine if drug use is adversely affecting the CF member’s health; or the CF member is chemically dependent on drugs.

SECTION 5

REFERENCES

Legislation


Food and Drugs Act, R.S.C. 1985, c. F-27.


Regulations

QR&O Chapter 20 (Canadian Forces Drug Control Program).

QR&O 20.03 (Purpose).

QR&O 20.04 (Prohibition).

QR&O 20.06 (Mandatory Urine Testing).

QR&O 20.07 (Testing Order).

QR&O 20.08 (Deterrent Testing).

QR&O 20.09 (Testing of Members in High Risk Safety Positions).

QR&O 20.10 (Accident and Incident Related Testing).

QR&O 20.11 (Testing for Cause).

QR&O 20.13 (Blind Testing).

25 Ibid., paras. 35-40.
26 A referral is ordered using DAOD Form 5019-3C, Medical Referral and Certification.
QR&O 20.16 (Limitations).
QR&O 20.17 (Testing Procedures).
QR&O 103.16 (Disobedience of Lawful Command).

**Orders, Directives and Instructions**

CANFORGEN 179/05 CDS 092/05 291949Z Nov 05, Safety Sensitive Drug Testing.

DAOD 5019-3 (Canadian Forces Drug Control Program).


CFAO 49-5 (Career Policy – Non-Commissioned Member – Primary Reserve).

**Jurisprudence**


**Secondary Material**

A-AD-007-010/AG-001, *Substance Abuse: Supervisor’s Handbook; Education for First Time Offenders*.

A-AD-007-012/AG-001, *DND Laboratory Standards for Drug Screening in the CF*.

CHAPTER 22
HARASSMENT
SECTION 1
INTRODUCTION

General

1. DND and the CF define ‘harassment’ as “any improper conduct by an individual that is directed at and offensive to another person or persons in the workplace and which the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeanes, belittles or causes personal humiliation or embarrassment, or any act of intimidation or threat.”\(^1\)

2. Harassment in any form constitutes unacceptable conduct and no CF member shall subject any person in the workplace to harassment. Any member who subjects another person to harassment is liable to disciplinary or administrative action or both.\(^2\)

Purpose

3. The procedures to be followed upon receipt of a harassment complaint are clearly stated in the Harassment Prevention and Resolution Guidelines.\(^3\) However, several decision points arise in the harassment resolution process at which Responsible Officers (ROs) must exercise discretion. This chapter is meant to be an aid in exercising that discretion. To that end, this chapter must be read in conjunction with the regulations and orders referred to in section 2 of this chapter.\(^4\)

Historical Development

4. In 1988, the CF promulgated CFAO 19-39 (Harassment). Although the policy found in that order was consistent with the policy applicable to DND civilian employees (i.e., Civilian Personnel Administrative Order (CPAO) 7.18 (Harassment)), there were separate procedures for dealing with incidents of harassment depending on whether the alleged harasser was a military member or a civilian employee. Therefore, in 1992 a review of CFAO 19-39 (Harassment) was initiated. As part of that review process, a survey was conducted of CF members who claimed that they had faced harassment. Of note, the survey found that the majority of CF members subjected to harassment did not take formal action. Respondents to the survey reported that the most common form of harassment was abuse of authority, followed by personal harassment and then sexual harassment. It was noted that, while CFAO 19-39 (Harassment) was clear in many respects, it was lacking clarity with respect to complaint procedure, harassment monitoring and the implementation of the harassment prevention and resolution program. As such, the various commands throughout the CF were employing a variety of resolution procedures. The inconsistent application of CFAO 19-39 amongst commands necessitated that one uniform policy be adopted and applied throughout the CF and DND.\(^5\)

---

1 DAOD 5012-0 (Harassment Prevention and Resolution), marginal note: Definitions/Harassment.
2 Ibid., marginal note: Policy Direction/Policy Statement.
4 For more information specifically relating to the conduct of harassment investigations, see Chapter 3 under Part 2 of this manual.
5. After extensive consultation and review, DAOD 5012-0 (Harassment Prevention and Resolution) was promulgated in December 2000. This DAOD applies equally to civilian employees of DND and to CF members. The following month, the CDS and DM issued a letter announcing the new harassment prevention and resolution policy as well as the supporting Guidelines. The letter stated that:

The emphasis of the policy and guidelines is on harassment prevention, the early resolution of harassment situations where they exist and the use of Alternative Dispute Resolution (ADR) techniques over administrative investigations, whenever appropriate and feasible.⁶

6. The policy stresses that all persons in the workplace have the responsibility to ensure a harassment-free workplace and to treat everyone in the workplace respectfully.⁷ The emphasis of the policy and the Guidelines is on the prevention of harassment. DND and the CF are committed to preventing harassment and resolving harassment situations where they exist.⁸

SECTION 2
LEGISLATION, REGULATIONS AND CASE LAW

Criminal Code

7. In certain cases, harassment may constitute an offence under the Criminal Code.⁹ A CO who suspects that a criminal offence has occurred should immediately suspend any administrative investigation, consult with the unit legal adviser and consider informing the appropriate military police (MP) authorities.

8. It is a criminal offence to engage in certain conduct knowing that another person will be harassed or while being ‘reckless’ as to whether the other person will be harassed. It is also a criminal offence to engage in certain conduct, knowingly or by being reckless as to the consequences, that reasonably causes that other person, in all of the circumstances, to fear for their safety or the safety of anyone known to them. This kind of conduct may consist of: repeatedly following someone, persistently communicating with someone, watching someone’s house or place of work or engaging in threatening conduct directed at someone or any member of their family.¹⁰

9. Although the word ‘harassed’ is found in the Criminal Code, it is not defined. In the criminal context, the courts have said that the words, “tormented, troubled, worried continually or chronically, plagued, bedevilled and badgered” are individually synonymous with the word ‘harassed.’ This list of words is not cumulative and they do not replace the word ‘harassed’ in the Criminal Code.¹¹

10. It is also important to note that it is a criminal offence for someone to convey, or have someone else convey, by letter, telephone, etc., information that one knows, or reasonably ought to know, is false with the intent to injure or alarm any person.¹²

11. Further, it is a criminal offence to make an indecent telephone call to a person with intent to alarm or annoy that person.¹³

---

⁷ DAOD 5012-0 (Harassment Prevention and Resolution), marginal note: Policy Direction/Requirements.
⁸ Guidelines, s. 1.1.
¹⁰ Ibid., s. 264.
¹² Criminal Code, s. 372(1).
¹³ Ibid., s. 372(2).
12. Similarly, it is a criminal offence to make, or have someone else make, repeated telephone calls to a person with intent to harass that person.\textsuperscript{14}

13. It is also a criminal offence to make someone stop doing something that they have a lawful right to do, or make someone do something that they have a lawful right not to do, by either: using violence or threats of violence against that person or their family or property, threatening a relative of that person, persistently following that person, hiding the property of that person or, with one or more other persons, following that person in a disorderly manner on a highway, watching that person’s house or place of work or blocking a highway.\textsuperscript{15}

\textit{National Defence Act}

14. In certain cases, harassment may constitute an offence under the provisions of Part III of the \textit{National Defence Act},\textsuperscript{16} the \textit{Code of Service Discipline (CSD)}. As in the case of criminal offences, a CO who suspects that a service offence has occurred should immediately suspend any administrative investigation, consult with the local representative of the Judge Advocate General (JAG) and consider informing the appropriate MP authorities. For example, harassment directed at a subordinate is an abuse of that subordinate.\textsuperscript{17} In that, or any other context, harassment may also constitute an ‘act to the prejudice of good order and discipline.’\textsuperscript{18}

\textit{Canadian Human Rights Act}

15. Under the \textit{Canadian Human Rights Act},\textsuperscript{19} it is a discriminatory practice to harass an individual on a prohibited ground of discrimination in matters related to employment. Prohibited grounds of discrimination are: race, national or ethnic origin, colour, religion, age, sex (including pregnancy or childbirth), sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.\textsuperscript{20} The CF definition includes harassment within the meaning of the \textit{CHRA} (although the CF definition is wider in scope than the \textit{CHRA} definition).\textsuperscript{21}

\textbf{DAOD 5012-0 (Harassment Prevention and Resolution)}

16. DAOD 5012-0 (Harassment Prevention and Resolution) establishes the CF and DND policy against harassment. Equally important, DAOD 5012-0 (Harassment Prevention and Resolution) establishes that:

Conduct involving the proper exercise of responsibilities or authority related to the provision of advice, the assignment of work, counselling, performance evaluation, discipline and other supervisory/leadership functions does not constitute harassment. Similarly, the proper exercise of responsibilities or authority related to situations where, by virtue of law, military rank, civilian classification or appointment, an individual has authority or power over another individual, does not constitute harassment.

\begin{itemize}
  \item \textsuperscript{14} \textit{Ibid.}, s. 372(3).
  \item \textsuperscript{15} \textit{Ibid.}, s. 423.
  \item \textsuperscript{16} \textit{National Defence Act}, R.S.C. 1985, c. N-5 [NDA].
  \item \textsuperscript{17} NDA, s. 95. See also \textit{R. v. MCpl Kennedy}, 36/91 (DCM).
  \item \textsuperscript{18} NDA, s. 129.
  \item \textsuperscript{19} R.S.C. 1985, c. H-6, s. 14(1)(c) [CHRA].
  \item \textsuperscript{20} \textit{Ibid.}, s. 3.
  \item \textsuperscript{21} For more information on the \textit{CHRA}, see Chapter 37 under Part 5 of this manual.
\end{itemize}
CFAO 19-40 (Human Rights – Discrimination)

17. CFAO 19-40 (Human Rights – Discrimination) establishes the CF’s policy with respect to complaints made under the CHRA. As previously stated, harassment on any of the prohibited grounds is considered to be a discriminatory practice. If a unit is contacted directly by an official of the Canadian Human Rights Commission (CHRC), without prior notice from NDHQ, the unit will take no action other than to politely remind the official that communications must go through the HR Coordinator at NDHQ.

Policies and Guidelines

18. Supervisors must be cognizant of the various policies and guidelines concerning the subject of harassment. These include:

   a. Harassment Prevention and Resolution Guidelines (Guidelines). The Guidelines constitute the keystone policy document relating to harassment and are issued under the authority of the CDS and DM. In DAOD 5012-0 (Harassment Prevention and Resolution), responsible officers (ROs) are ordered to carry out their responsibilities in accordance with the Guidelines. The Guidelines are intended to provide procedural guidance in support of DAOD 5012-0 (Harassment Prevention and Resolution) and should be used in conjunction with the policy in preventing, addressing and resolving harassment situations;

   b. Responsible Officer Guide to Harassment Prevention and Resolution Policy. This guide amplifies the roles and responsibilities of ROs within the context of the CF Harassment Prevention and Resolution Program; and

   c. Policy on the Prevention and Resolution of Harassment in the Workplace. This is a policy of the Treasury Board of Canada (TB). The purpose of this policy is to foster a respectful workplace through the prevention and prompt resolution of harassment. The Guidelines flow directly from, and are consistent with, the TB policy on this subject.

Potential CF Liability Where Superiors Harass Their Subordinates

19. It is the responsibility of all officers and NCMs to promote the welfare and good discipline of subordinates. This includes ensuring that subordinates work in a harassment free environment. It is the institutional responsibility of the CF to ensure that leaders do not harass their subordinates and this principle has been recognized in the civilian courts.

20. In L.(J.) v. Canada (Attorney General), MCpl T took advantage of his rank to sexually harass and sexually assault Cpl L. Cpl L reported the incidents to the base social worker who, in turn, referred the matter to the MP. MCpl T was subsequently charged and tried by way of service tribunal for a number of common assaults and sexual harassment. He was convicted at summary trial and sentenced to seven days detention and reduction in rank to Pte. Pte T was further prosecuted criminally for sexual assault. He was convicted and was sentenced to a fine of $1,500, 18 months’ probation, ordered to pay a victim surcharge fee of $150 and ordered to attend a sexual offenders course. Pte T was released from the CF under QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 2(a) (Unsatisfactory Conduct).
21. Cpl L took her release and sued the CF for damages in civilian court. She argued that the CF was vicariously liable for the sexual assault upon, and sexual harassment of, her by MCpl T because the CF placed MCpl T in a position of authority and control over her.27 That is, Cpl L argued that the position of authority of MCpl T played a role in the harassment and assaults and that the CF was, therefore, partially responsible, as it was the CF who put MCpl T in that position of authority.

22. The Court agreed with Cpl L’s submission. Because of the unique relationship between superiors and subordinates in the CF, the Court ruled that the CF has a greater responsibility for the wrongdoings of its leaders than would a civilian employer. The court stated:

   It is...impossible to equate the military command structure to the type of authority structure found in a civilian corporation. The demands made of military personnel are unique. Orders are given and must be followed. The entire culture of the military involves complete deference to those in command. In the civilian world, relationships between adults do not feature this type of complete subordination of one to another...[Military commanders] can, if necessary, order [subordinates] to their deaths...

   ...The Armed Forces provided [MCpl T] with the military authority over [Cpl L]. The cultural milieu of the military is such that orders must me obeyed. [MCpl T] used this authority to create a situation where he was alone with [Cpl L]. He ordered the other personnel to leave and he ordered her to accompany him to the office. Once he had used his authority to create a favourable situation he assaulted [Cpl L]. The assaults occurred on the Armed Forces’ premises and the power conferred on [MCpl T] by the Armed Forces significantly increased the probability of a wrong occurring.28

The court awarded Cpl L damages in the amount of $10,000.29

23. Accordingly, CF members of any rank who harass their subordinates or others risk exposing the CF to liability in the civil courts. More importantly, however, they violate CF harassment policy, they contravene their duty to promote the welfare of their subordinates and they violate the fourth and sixth Principles of Leadership, namely: “Lead by example” and “Know your [subordinates] and promote their welfare.”30

SECTION 3

HARASSMENT INVESTIGATIONS

24. In the Guidelines, the term ‘administrative investigation’ is defined as follows:

   ...an examination of the circumstances surrounding a situation, event, incident, occurrence, issue, matter, or complaint conducted by an investigator or a team of investigators to determine all relevant factors and circumstances that will assist the RO in making a reasonable decision. In the case of military members, it may also be in the form of an SI or BOI.31

27 Ibid. at 569-70.
28 Ibid. at 573-74.
29 Ibid. at 576.
31 Ibid., at s. 1.3.
25. This definition can lead to some confusion. Harassment investigations, SIs, and BOIs are three distinct forms of administrative investigations. When one speaks of a 'harassment investigation,' one refers to the particular type of administrative investigation described in the Guidelines, and carried out by trained Harassment Investigators (HIs). While circumstances surrounding a harassment complaint may be investigated by other means, normally harassment complaints will be investigated in accordance with the Guidelines.

Harassment - Resolution versus Discipline

26. The purpose of an administrative investigation is to obtain evidence relevant to the terms of reference. To obtain evidence for possible disciplinary proceedings, or to assign criminal responsibility, a disciplinary investigation must be conducted in accordance with QR&O Chapter 106 (Investigation of Service Offences).

27. Simply put, if the RO instinctively feels that the matter would more properly be dealt with by way of service tribunal, the RO should commence a disciplinary investigation and not initiate a harassment investigation, as several complications can arise when a harassment investigation leads to disciplinary or criminal proceedings. For example, the report of a harassment investigation is normally inadmissible as evidence at a court martial, except where the charge involves perjury, giving false or contradictory evidence, or making a false or contradictory statement.

28. Similarly, neither the minutes of a BOI nor the report of an SI may be admitted in evidence at court martial or used at a summary trial, except where the charge involves perjury, giving false or contradictory evidence, or making a false or contradictory statement. While this regulation does not apply to the report of a harassment investigation per se, the situation is analogous: in all three cases (BOI, SI, or harassment investigation), the reports are hearsay. It is therefore recommended that presiding officers do not admit the report of a harassment investigation in evidence at a summary trial.

29. Note that this does not preclude a summary trial from taking place after a harassment investigation has been conducted. Witnesses who gave evidence during the harassment investigation may be called to be witnesses before a summary trial. It is the records of the statements made to the HI, as well as the HI’s report, that should not be admitted as evidence. The oral testimony of such witnesses is acceptable.

30. Particular concerns arise vis-à-vis any statements made by the respondent to the HI if they subsequently become the accused who is charged with an offence before a service tribunal. The right against self-incrimination has been recognized as a principle of fundamental justice under the Canadian Charter of Rights and Freedoms. As such, statements made under compulsion are inadmissible in disciplinary or criminal proceedings against the person who made the statements. In a harassment investigation, the respondent is compelled to answer the questions of the HI. The respondent’s statements to the HI, therefore, must not be admitted as evidence in any disciplinary or criminal proceedings taken against the respondent. A finding of guilt based on the respondent’s statements to the HI would withstand neither review nor judicial scrutiny.

---

32 QR&O Volume IV, Appendix 1.3 (Military Rules of Evidence) at s. 55(d).
33 Ibid., at s. 40(2).
34 QR&O 21.16(2).
35 ‘Hearsay’ is second-hand information that a witness only heard about from someone else. In this case, an SI report contains the investigator’s version or recording of information as first-hand witnesses described it.
39 Guidelines at s. 3.4.2.
31. Another problem concerns a limitation on one’s jurisdiction based on one’s previous involvement in the case. A CO should not preside at a summary trial if the CO “carried out or directly supervised the investigation of the offence.”\(^{40}\) As an RO directly supervises the harassment investigation, neither a CO who acted as an RO, nor an officer delegated by that CO, should preside at a summary trial relating to incidents that were the subject of the harassment investigation. Consequently, if a service tribunal is to be held after CO has ordered a harassment investigation, it may be preferable to refer the disciplinary matter to another CO.\(^{41}\)

32. If, after commencing a harassment investigation, an HI receives evidence that could relate to an allegation of a criminal act or a breach of the CSD, the HI should immediately adjourn the investigation and report the matter to the RO. Upon receiving evidence of a criminal act or a breach of the CSD from the HI, the RO should immediately suspend the harassment investigation and refer the matter to the unit legal adviser for advice.\(^{42}\)

**Responsible Officers**

33. ROs have specific responsibilities with respect to harassment investigations. These include ensuring that:

a. appropriately trained Harassment Advisors and HIs are appointed;

b. assistants are appointed for the complainant and respondent;

c. harassment investigations are convened as required;

d. harassment investigations are conducted fairly, sensitively, impartially, and completely;

e. decisions are rendered based solely on the findings of the investigation; and

f. the complainant and the respondent are advised in writing of the results of the investigation.\(^{43}\)

**Harassment Investigators**

34. HIs must be able to conduct the investigation in the official language of the parties’ choice and should, where possible, be trained in harassment investigation techniques.\(^{44}\)

35. Where impartiality of the HI is concerned, the following legal maxim applies: “It is of fundamental importance that justice should not only be done, but [that it] should manifestly and undoubtedly be seen to be done.”\(^{45}\) An investigator could conduct the most impartial of investigations but, if the investigator is seen as biased by either party, that party might not be able to accept the results of the investigation. Keeping this in mind, ROs must do their utmost to ensure that investigators are impartial and are perceived to be impartial by a reasonable observer.

36. To this end, the RO might consider assigning a team of investigators in certain cases. For example, where the complainant and respondent come from different linguistic groups, races or genders, it may be appropriate to assign investigators of corresponding backgrounds. A joint investigation report issued by two such investigators may appear to be more impartial. In such

---

\(^{40}\) NDA s. 163(2)(a).

\(^{41}\) QR&O 108.16(3)(b) and accompanying Note (C).

\(^{42}\) A-PM-007-000/FP-001 at s. 4.6.

\(^{43}\) Ibid., at s. 3.1.2.

\(^{44}\) A-PM-007-000/FP-001, s. 6.2.

\(^{45}\) R. v. Sussex Justices, Ex parte McCarthy, [1924] 1 KB 256 at 259.
cases, even if a party dislikes the outcome of the investigation, the party may be better able to accept it as being fair.

37. MP personnel will not conduct harassment investigations unless the alleged conduct may constitute a service or criminal offence or the allegations pertain to a member of the MP.  

38. HIs must meet the competency profile found under the Guidelines at Annex B (Competency Profile For HIs). Note the higher qualifications found at paragraph 5 of those guidelines where either the complainant or respondent is a DND employee.

Terms of Reference

39. A harassment investigation is initiated by the RO through written TOR. The TOR should:
   a. identify the HI;
   b. clearly state the allegations to be investigated and delineate the purpose and scope of the investigation;
   c. contain instructions vis-à-vis the:
      i. security designation;
      ii. handling of new allegations; and
      iii. action to be taken if ADR is attempted;
   d. indicate the deadlines for submission of the draft report and final report, respectively; and
   c. indicate the financial and administrative resources available to the HI.  

40. The TOR should also contain specific instructions to the HI concerning the action to be taken upon receipt of information disclosing a potential criminal or CSD offence.  Although not required by regulations, the following paragraphs which paraphrase paragraphs found in DAOD 7002-2 (Summary Investigations) could be included in the TOR:
   a. Should the HI receive evidence that he or she reasonably believes relates to an allegation of a criminal act or a breach of the Code of Service Discipline, the HI shall suspend the investigation, the RO shall be notified, and the matter shall be referred to the unit legal adviser for advice.
   b. The HI must inquire into all matters referred for investigation. If during the course of the investigation, a matter arises which raises issues involving the propriety of an MP investigation or other MP-related conduct, the matter shall be forwarded for further disposition to the RO.

41. At a minimum, the distribution list on the TOR should include the HI, the complainant and the respondent. Sample TOR for a harassment investigation may be found under the Guidelines at Annex C (Terms of Reference For An Administrative Investigation).

---

46 CFAO 22-4 (Security and Military Police Services), para. 12(a)(1).
47 Ibid., at s. 6.2.3.
48 Ibid.
49 Guidelines at s. 8.1.
Stages of the Harassment Investigation

42. There are five stages to a harassment investigation: research and planning, interviews, analysis, the HI’s report and finally, the RO’s decision.50

43. During the research and planning stage, the HI will:
   a. review the applicable regulations and orders, including:
      i. DAOD 5012-0 (Harassment Prevention and Resolution);
      ii. the Treasury Board’s Policy on the Prevention and Resolution of Harassment in the Workplace;
      iii. Harassment Prevention and Resolution Guidelines; and
      iv. Responsible Officer Guide to Harassment Prevention and Resolution Policy;51
   b. ensure that the allegations are clear, that the details of the complaint have been provided to the respondent in writing, and that the respondent has been provided a meaningful opportunity to respond;
   c. ensure that both the complainant and respondent have been provided with Assistants and that they understand their rights and responsibilities in accordance with sections 3.3 and 3.4 of the Guidelines;
   d. obtain all documents relevant to the alleged conduct; and
   e. inform the RO of any opportunity for ADR prior to continuing with the investigation.52

44. During the interview stage, the HI will interview the complainant, respondent and all other witnesses in order to determine the facts of the complaint. Specifically, the HI must determine:
   a. what information, if any, there is to support the allegations;
   b. the period of time over which the impugned conduct took place;
   c. whether there was any motive for the impugned conduct and, if so, what that motive was;
   d. whether the impugned conduct was intentional;
   e. whether the impugned conduct was persistent or pervasive;
   f. whether either party to the complaint has sought assistance to cope with the situation; and
   g. whether the situation has career implications to either party to the complaint.53

50 Ibid., at s. 6.3.
52 Guidelines at Annex C (Terms of Reference For An Administrative Investigation), s. 3.
53 Ibid., s. 4.
If the HI encounters any additional allegations against the respondent during this stage of the harassment investigation, the RO is to be immediately informed of the nature and scope of these particular allegations. If the RO decides that the additional allegations should become part of the present investigation, the respondent must be immediately so informed in writing.  

45. During the analysis stage, the HI will:
   a. isolate the substance of each allegation;
   b. determine whether or not the impugned conduct satisfies the definition of 'harassment,' as found in DAOD 5012-0 (Harassment Prevention and Resolution); and
   c. comment on any factors identified during the investigation that may have contributed to the complaint or may have had a negative effect on the work environment.

Witnesses

46. Evidence gathered by an HI cannot be taken under oath or solemn affirmation as no regulation exists that would confer legal authority upon an HI to administer an oath or solemn affirmation. Both the complainant and the respondent have the responsibility to meet with and to respond promptly and truthfully to the investigator’s questions. Other witnesses are expected to provide information as required and to co-operate fully in the investigation process, if and when called upon to do so.

47. Retaliation against any individual who gives testimony as a witness in a harassment investigation is prohibited. Anyone who engages in any act of retaliation may be subject to disciplinary or administrative action, or both.

Harassment Investigator’s Report

48. When completing an HI’s report, the HI will prepare a draft that includes the following:
   a. a summary of the complaint;
   b. a statement as to the individual allegations;
   c. a statement of any evidence relevant to each allegation (i.e., evidence is relevant if it tends to make an allegation more likely or less likely); and
   d. an analysis of the credibility of the evidence in respect of each allegation.

In the draft report, the HI will not make a determination as to whether the impugned conduct satisfies the definition of 'harassment.' The HI will submit the draft report to the RO who will then decide if the investigation and report were conducted in accordance with the TOR.

49. If the RO is satisfied, the officer will cause the document to be severed, in accordance with the standards set out in the Privacy Act and Access to Information Act, and forward

---

54 Ibid.
55 Ibid., s. 5.
56 Ibid., at ss. 3.3.2-3.4.2.
58 Guidelines at s. 1.1.
59 Ibid., s. 6(a)(1).
copies of the severed draft to both the complainant and respondent. In order to meet procedural fairness principles, all information relevant to the incident should, to the extent possible, be disclosed to the respondent.

50. Upon receiving the draft report, the complainant and respondent have 14 calendar days to submit further representations, in writing, to the HI. The HI will then consider any further representations of the complainant and respondent and may include such information in the final report.

51. The final report will include the information found in the draft report (see paragraph 68 above), as well as the following additional information:
   a. a determination as to whether each allegation is supported; and
   b. as to each allegation, a determination as to whether the impugned conduct constitutes harassment (i.e., whether the definition of ‘harassment’ is satisfied).

The HI will then forward the final report to the RO for decision. Further, all evidence and notes taken by the HI will be forwarded separately for retention by the RO.

**Responsible Officer’s Decision and Administrative Closure**

52. If the RO is dissatisfied with the HI’s final report, the RO must direct further investigation into the matter. If satisfied with the report, the RO has the discretion to accept, reject, or vary the final report, in whole or in part. The RO must provide written reasons as to whether harassment occurred if the officer does not fully accept the HI’s findings.

53. The RO should come to a final decision within six months of receiving the initial complaint. The decision may include any administrative or restorative action within the RO’s authority. If unusual circumstances exist that prevent the RO from reaching a decision within six months, the reasons must be documented and the complainant and respondent must be so informed in writing.

54. If, upon receiving the final report, the RO decides that disciplinary action is warranted, the RO should seek the counsel of the unit legal adviser before proceeding.

55. The RO will send copies of a decision letter to the complainant and respondent informing them of decisions made concerning the matter. A copy of the severed, final report will be attached to the decision letter. The decision letters will constitute letters of administrative closure. If the RO decides harassment occurred, the RO must disclose in the complainant’s decision letter the nature of any administrative or disciplinary action taken against the respondent.

---

60 The term ‘sever’ means to remove any information from a document that cannot be disclosed in order that the remainder of the document may be disclosed. See also Chapter 9 (Access to Information and Privacy) found in Part 2 of this manual for more information.

61 R.S.C., 1985, c. P-21 [PA].


63 A-PM-007-000/FP-001 at Annex C (Terms of Reference For An Administrative Investigation), s. 6(a)(2).

64 Ibid.

65 Ibid., s. 6(a)(3).

66 Ibid., s. 6(b).

67 Ibid., s. 6.4.1.

68 Ibid., s. 6.5.

69 Ibid.

70 Regarding civilian personnel, the RO should refer the matter to the Director Civilian Human Resource Services.

71 Guidelines at s. 6.6.

72 Ibid.
SECTION 4

ADDITIONAL GUIDANCE

Harassment Prevention and Alternative Dispute Resolution

56. It cannot be overemphasized that the best policy is to prevent harassment from occurring in the first place. Through training and by setting the proper example, supervisors at all levels can help to eliminate harassment from the CF.

57. If prevention fails, where appropriate, alternative dispute resolution, (ADR) is the preferred method for resolving workplace disputes within DND and the CF. ADR refers to “dispute resolution mechanisms and techniques that do not involve the traditional investigative approach. It therefore refers to activities such as self-help, supervisor intervention, facilitation, mediation, etc.”73 ADR is the preferred method of resolving harassment complaints. Harassment investigations should be initiated only where ADR has been unsuccessful, is unfeasible, or is considered inappropriate.74

58. ADR may be attempted even after a harassment investigation has been initiated. If both the complainant and respondent agree to an ADR process, the RO should suspend the harassment investigation. Should the ADR process fail, the RO may then order the resumption of the harassment investigation.75

59. ROs are responsible for ensuring that both the complainant and respondent are aware of and offered ADR as an option for resolving their conflict.76 The success of any ADR technique depends upon the genuine willingness of both parties to settle their dispute. Consequently, both the complainant and the respondent must agree to try the ADR process if it is to be attempted.

Invoking the CF Harassment Process

60. When a harassment complaint is received, one of the first things that an RO must do is perform a ‘situational assessment.’ A situational assessment is a preliminary review of a harassment complaint in order to determine the appropriate course of action. Part of this assessment is a determination as to whether the complainant’s allegations, as stated, meet the definition of harassment. To do so, the RO should:

a. assume for the moment that all of the complainant’s allegations are true (i.e., do not assess the credibility of the complainant at this juncture);

b. adopt a liberal interpretation of the definition of harassment, as prescribed in DAOD 5012-0 (Harassment Prevention and Resolution) (i.e., assume the broadest possible meaning of the definition);

c. apply the definition to the alleged facts and determine if the impugned conduct discloses a possible incident of harassment; and

d. proceed in accordance with sections 4.3 to 4.6 of the Guidelines.

61. To ensure fairness to the parties and the best interests of the CF or DND, complaints will not be dealt with under the CF Harassment policy unless they are made within one year of the occurrence of the last incident on which the complaint is based or, within a longer period as

---

73 Ibid. See also Part 5 for information concerning ADR.
74 Ibid., at s. 6.1.
75 Ibid.
76 Ibid., at s. 3.1.2.
considered appropriate by the RO under the circumstances.\textsuperscript{77} In determining whether a longer period is appropriate, ROs may consider factors such as the reason for the delay in making the complaint, the seriousness of the alleged conduct and any others considered relevant.

62. To be covered by the CF policy, harassment must occur within the ‘workplace’ which is defined as:
   
   e. the physical work location; or
   
   f. the greater work environment where work-related functions and other activities take place and work relationships exist.\textsuperscript{78}

63. Therefore, if a CF member makes a demeaning comment towards one of the member’s peers at a work-related party being held at a civilian restaurant, the objectionable comment would fall within the CF definition of harassment because the party is a work-related function and work relationships exist. If, on the other hand, a member made a demeaning comment towards a peer during a chance, weekend encounter in a shopping mall, the objectionable comment would not fall within the CF definition of harassment because a chance meeting in a shopping mall cannot be described as a work-related function or activity.\textsuperscript{79}

**Mental Element**

64. The respondent must have known, or ought reasonably to have known, that the impugned conduct would cause offence or harm. That is to say, the respondent must either have actual knowledge that the act was offensive or harmful, or a reasonable person in the position of the respondent should have known that the act was offensive or harmful. For example, if a respondent used an offensive racial slur, it would be no defence to suggest that the respondent did not personally know that the complainant would take offence as, objectively, reasonable people know that the use of racial epithets will certainly cause offence or harm.

65. Conversely, it is also possible for someone to be offended by a very benign comment that may not otherwise appear offensive or harmful to a reasonable person. While the possibilities are endless, an illustration may be of assistance. Suppose that for reasons known only to him, Cpl Mackenzie is offended by being referred to as ‘Mac.’ Cpl Smith, who was unaware of Cpl Mackenzie’s dislike of the nickname, said, “Good morning, Mac,” thus offending Cpl Mackenzie. In such a scenario, the impugned conduct would not fall within the CF definition of harassment for several reasons. Firstly, the conduct was not obviously improper as Cpl Smith was merely trying to be polite. Secondly, Cpl Smith did not know that the greeting would cause offence or harm to Cpl Mackenzie. Thirdly, a reasonable person in Cpl Smith’s position could not have known that the greeting would cause offence or harm to Cpl Mackenzie.

66. However, suppose that Cpl Jones was amused by Cpl Mackenzie’s dislike of the nickname ‘Mac.’ Cpl Jones, who dislikes Cpl Mackenzie, began persistently referring to Cpl Mackenzie as ‘Mac.’ In these circumstances, the impugned conduct would fall within the CF definition of harassment. Firstly, the conduct was improper as it was intended to offend Cpl Mackenzie. Secondly, Cpl Smith did not have actual knowledge that using the nickname would cause offence or harm to Cpl Mackenzie.

**Use of Assistants**

67. Both the complainant and respondent have the right to an assistant throughout the harassment resolution process, including the investigation. The assistants are appointed by the

\begin{footnotes}
\item\textsuperscript{77} Guidelines, s. 1.2.
\item\textsuperscript{78} DAOD 5012-0 (Harassment Prevention and Resolution), marginal note: Definitions/Workplace.
\item\textsuperscript{79} While this behaviour may not fall within the definition of harassment pursuant to CF harassment policy, the comments made under such circumstances may constitute an offence under the CSD.
\end{footnotes}
RO but, where possible, the assistants should be members chosen by the complainant and respondent, respectively.\(^{60}\)

68. Assistants are not lawyers and their assistance is not intended to include legal advice.\(^{61}\) Among other considerations, this means that communications between the assistant and the complainant or respondent are not legally protected from disclosure by 'solicitor-client privilege.' Assistants must, however, respect the confidentiality of any information obtained in the course of their duties. Information related to harassment complaints is normally designated as Protected B,\(^{62}\) and must be disclosed only to those with proper clearance and on a need-to-know basis.

69. Respective assistants may be present to support the complainant or respondent while the HI is interviewing them. However, the complainant and respondent will normally speak on their own behalf. Only in exceptional circumstances may the assistant speak on behalf of the complainant or respondent.\(^{63}\)

Disclosure

70. An essential element of procedural fairness is disclosure (also known as discovery), as it is imperative that respondents have sufficient detail to know the case against them. Normally, the respondent should be informed that they are the subject of a harassment complaint within five working days of the RO receiving the complaint. Also, if the RO determines that the harassment criteria are met after conducting the situational assessment, the respondent should be informed without unreasonable delay. These informational requirements will usually be complied with concurrently. In other words, as long as the situational assessment can be completed within five days, the same piece of correspondence will be used to inform the respondent that they are the subject of a harassment complaint and that the complaint satisfies the harassment criteria.

71. The respondent has the right to be informed of the allegations. In the case of a written complaint, the details of the complaint must be provided to the respondent in writing. Should the allegations subsequently change, or new allegations be added, the respondent must also be informed of these changes or new allegations.

72. Upon receiving a satisfactory draft report from the investigator (i.e., a draft report that conforms to the terms of reference), the RO shall forward the draft report to the complainant and the respondent after the completion of any severances that may be required by the Access to Information Act\(^{64}\) and Privacy Act.\(^{65}\)

Representations

73. Another essential element of procedural fairness is the right to make representations. In the case of harassment complaints, there are three circumstances where the respondent has the right to make representations:

   a. as soon as the respondent is presented with the written allegations (or statement of allegations), the respondent has the right to make representations in response to those allegations;

   b. upon being notified of updated or new allegations, the respondent has the right to make representations in response to the updated or new allegations; and

\(^{60}\) Ibid., s. 3.5.1.
\(^{61}\) Ibid., s. 3.5.2.
\(^{62}\) Ibid., s. 8.3.
\(^{63}\) Ibid., s. 3.5.2.
g. upon receiving the draft report, the respondent has 14 days (or such longer period as granted by the RO), to make further representations.

**Making Findings**

74. The question of whether the impugned conduct satisfies the definition of harassment is decided on a balance of probabilities. That is, the investigator (and the RO), must find that it is more probable than not that the alleged, improper conduct constitutes harassment. In particular, the evidence must show that:

a. the conduct was directed at the complainant (i.e., the complainant must be both the subject of the conduct and have personally experienced the conduct or its repercussions);

b. the conduct was offensive to the complainant (i.e. the complainant was actually offended);

c. the conduct occurred in the workplace, as defined in CF policy;

h. the respondent knew or ought reasonably to have known that the conduct would cause offence or harm to the complainant; and

i. the conduct comprised:

   i. an objectionable act, comment or display that demeaned, belittled or caused personal humiliation or embarrassment;

   ii. any act of intimidation; or

   iii. any threat.

**Concurrent Complaint Procedures**

75. A complainant may choose to deal with an allegation of harassment by simultaneously submitting a complaint pursuant to the Guidelines and filing a complaint with the CHRC, pursuant to subsection 40(1) of the CHRA.

76. The CHRC may refuse to deal with a complaint if it appears to the CHRC that the alleged victim ought to exhaust grievance or review procedures otherwise reasonably available or if the complaint could more appropriately be dealt with under another Act of Parliament. In other words, the CHRC may refuse to deal with the complaint of a CF member where that member has not yet availed themselves of CF harassment resolution procedures or CF grievance procedures. Therefore, although the decision belongs solely to the member, the member is well advised to submit a harassment complaint under the CF procedure before going to the CHRC.

**Repercussions of Violating the CF Harassment Policy**

77. As stated above, any member who subjects another person to harassment is liable to disciplinary or administrative action or both.

78. Antisocial behaviour, such as a history of harassment, is a primary indicator that a CO should consider in determining a member’s suitability for overseas posting. Members with a
history of, or clear predisposition towards, unacceptable behaviour shall not be considered for a posting outside Canada. 89

79. If it appears that a member involved in a harassment incident may suffer from a mental or emotional disturbance, that member shall be referred to, and be assessed by, a medical officer. The fact that a member suffers from a mental disorder does not, by itself, preclude the CO from taking disciplinary or administrative action if appropriate under the circumstances. However, in such situations, the CO shall seek advice from the local representative of the JAG. 90

Other Issues

80. In some cases, it may be desirable to separate the parties to a harassment complaint. Separation is not always required but, where there is a great deal of animosity between the complainant and respondent, this action may be considered necessary. The respondent or the complainant or possibly both, may have to be moved out of their current positions. Such decisions must be carefully documented once the RO has determined that such action is considered necessary. It is important to note that personnel are separated in order to ensure harmony in the workplace and that harassment is stopped. Personnel are not separated as an intended form of punishment; the CO may act early in the process, when appropriate, rather than waiting for a final decision.

81. Harassment complaints may concern ‘without prejudice’ communications. If the parties decide to use ADR, the parties will agree that all information exchanged during the process is regarded as being made ‘without prejudice.’ The meaning of this term is that anything said by a party during the ADR procedure cannot form part of any administrative investigation should ADR prove unsuccessful. This is to ensure that participating in the ADR process has no deleterious effects on the parties’ existing rights. As a result, the parties can communicate freely during the process without fear of repercussions. 91

82. The provisions of the AIA and the PA apply to harassment investigations. 92 The following are examples of information that are subject to the provisions of these two statutes and may therefore be released to third parties:
   a. information exchanged during the ADR process; 93
   b. information provided by witnesses during a harassment investigation; 94
   c. the investigator’s draft report, 95 and
   d. information related to administrative decisions resulting from the findings of a harassment investigation. 96

83. Regarding bad faith complaints, it is a serious matter for a complainant to fabricate the particulars of a complaint in order to harm the respondent. Bad faith complaints are normally dealt with by disciplinary action (i.e., a charge under section 96 of the NDA for making a false accusation or statement), but may also be dealt with through administrative action, where appropriate (i.e., by Recorded Warning (RW) or Counselling and Probation (C&P)).
84. Once a complaint is made, it must be investigated and the resolution process should be completed as soon as possible, generally within six months.\footnote{Ibid., s. 8.4.}

85. Unit legal advisers are available to provide legal advice to ROs and the chain of command throughout the harassment resolution process. However, unit legal advisers cannot provide legal advice to individual members concerning an alleged incident of harassment.\footnote{CFAO 56-5 (Legal Assistance), para. 6(d).} In the unusual event that an SI or BOI is convened to investigate an allegation of harassment, the Directorate of Defence Counsel Services (DDCS) may provide legal assistance to the subject of that investigation.\footnote{QR&O 101.20(2)(i).}

SECTION 5

REFERENCES

Legislation


Regulations

*QR&O* 4.02 (General Responsibilities of Officers).

*QR&O* 5.01 (General Responsibilities of Non-Commissioned Members).

*QR&O* 7.16 (Suspension of Grievance).

*QR&O* 101.20 (Duties and Functions of Director of Defence Counsel Services).

Orders, Directives and Instructions

CANFORGEN 023/94 ADM (PER) 035/94 021500Z May 94, Social and Behavioural Suitability Screening.


CFAO 20-50 (Assignment To and From Posts Outside Canada).

CFAO 22-4 (Security and Military Police Services).

CFAO 34-56 (Mental Disorders).

CFAO 56-5 (Legal Assistance).
DAOD 5012-0 (Harassment Prevention and Resolution).

Jurisprudence


R. v. MCpl Kennedy (14-16 May 91), Calgary 36/91 (DCM).


Secondary Material


CHAPTER 23
SEXUAL MISCONDUCT

SECTION 1
INTRODUCTION

1. Due to societal attitudes with respect to sexual behaviour, special provisions are in place to deal with the reporting, investigation and career consequences of sexual misconduct by CF members. It is important to be able to distinguish between sexual misconduct, which has a disciplinary or criminal aspect to it, and sexual harassment which (although equally unacceptable), is dealt with through an administrative process.

SECTION 2
SEXUAL MISCONDUCT AT THE UNIT LEVEL

2. CFAO 19-36 (Sexual Misconduct) sets out CF policy with respect to sexual misconduct. It describes in useful detail the manner for dealing with allegations of sexual misconduct including the types of investigations, the availability of administrative action, reporting requirements and NDHQ review.

3. For an act or behaviour to be considered sexual misconduct pursuant to the CFAO, it must meet two requirements: it must have a sexual purpose or be of a sexual or indecent nature and second, it could constitute an offence under the *Criminal Code* or the *CSD*.3

4. When misconduct of a sexual nature is alleged, the first requirement is for a fair and thorough investigation. The CO must ensure that an investigation is conducted into the allegation as soon as practicable.4 The MP, as the usual first point of contact for investigation of possible offences, must be consulted. Depending on the facts, the MP may involve other civilian police authorities. If there is any doubt as to the most suitable type of investigation, the advice of the unit legal adviser should be sought.5

5. Where an offence under the *CSD* may have been committed, paragraph 7 of CFAO 19-36 (Sexual Misconduct) provides that the CO can order one of a number of different types of investigations, such as an informal investigation, summary investigation (SI), board of inquiry (BOI) or an MP investigation. However, when an MP investigation is conducted, DAOD 7002-1 (Boards of Inquiry) provides that a BOI must be adjourned, the convening authority for the BOI must be notified and legal advice must be sought from a legal officer within the Office of the JAG.6

6. DAOD 7002-2 (Summary Investigations) also provides that an SI will be adjourned and the officer ordering the investigation must be consulted if, during the course of the SI, the

---

1 Examples of sexual misconduct dealt with under the provisions of CFAO 19-36 (Sexual Misconduct) 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.
3 CFAO 19-36 (Sexual Misconduct), para. 3. Violation of an order prohibiting sexual relations (i.e., in an operational theatre), would constitute an offence under the *CSD* and therefore be considered sexual misconduct. See also para. 10 of Chapter 27 under Part 4 of this manual.
4 CFAO 19-36 (Sexual Misconduct), para. 7 provides the CO with the authority to order an investigation into allegations of sexual misconduct.
5 Ibid
6 DAOD 7002-1 (Boards of Inquiry), marginal note: Commencement/Terms of Reference.
investigator receives evidence that leads them to reasonably believe that an offence under the
*Criminal Code* or the *CSD* has been committed.\(^7\)

7. CFAO 19-36 (Sexual Misconduct) further provides that if a police investigation is
conducted, there can still be an informal investigation, SI, or BOI on matters not covered by the
police investigation. If there is any doubt on how to proceed, the unit legal adviser should be
contacted.\(^8\)

8. Notwithstanding CFAO 19-36 (Sexual Misconduct), if the CO is going to order an
investigation based on an allegation that there has been a breach of the *CSD*, the CO must not
order a BOI or an SI if the sole or primary purpose is to obtain evidence for a disciplinary purpose
or to assign criminal responsibility. Should this be the purpose, *QR&O* Chapter 106 (Investigation
of Service Offences) applies.\(^9\) If a BOI or an SI was conducted, any report of the inquiry will not
be admissible as evidence or used at a court martial or summary trial.\(^10\)

9. There is an overlap between sexual misconduct, as defined above, and sexual
harassment. Once investigated, it may be the case that alleged conduct falls short of being so
serious as to warrant a criminal or disciplinary charge, but there may be sufficient evidence to
support a finding that sexual harassment has occurred. If this is the case, the direction provided
in DAOD 5012-0 (Harassment Prevention and Resolution) should be followed. An example
would be lewd comments. While it is not a criminal offence, it can be considered sexual
harassment.\(^11\) CFAO 19-36 (Sexual Misconduct) provides a course of action to follow for acts
that may constitute sexual misconduct and sexual harassment.\(^12\)

10. The CO must consider whether the circumstances of the case require other action. For
example, the CO may wish to consult with a Medical Officer in some instances and, if
recommended, refer the member who is the subject of the complaint for medical examination. By
doing so, the CO is in a better position to ensure that any administrative action taken will be fair
and equitable to the member.\(^13\)

11. When sexual activities take place in circumstances where they are contrary to the
*CSD*, they constitute sexual misconduct even if they are otherwise lawful (i.e., sexual activity
between consenting adults that takes place in a location where such actions are prohibited by CF
orders). Cases of this nature shall be handled at the unit level unless the CO considers them to
be sufficiently serious that release may be warranted.

12. In cases not handled at the unit level under paragraph 12, the CO shall consider the
results of the investigation and all other relevant factors. Where the CO is satisfied that the
member has engaged in sexual misconduct, the CO shall:

   a. decide whether to recommend to NDHQ that the member be retained in or
      released from the CF;

   b. if the decision is to recommend release, prepare and deliver a Notice of Intent to
      Recommend Release in all cases regardless of rank and years of service; and

   c. in those cases not handled at the unit level under paragraph 10, not place
      the member on Counselling and Probation or a Report of Shortcomings, give the
      member a reproof or take any other administrative action that might interfere with
the proper determination of the question of release until the decision with respect to release or retention has been made by NDHQ.

13. There are specific requirements governing the preparation and content of the reports to be forwarded and paragraph 16 of CFAO 19-36 (Sexual Misconduct) should be read carefully. In the interests of fairness, representations from the member who is the subject of the complaint should be included in this report, as indicated in subparagraph 16(f). Such reports are to be forwarded to the Director of Military Careers Administration and Resource Management (DMCARM) on a priority basis. Since information pertaining to an allegation of sexual misconduct is extremely sensitive, it should be safeguarded in order to protect the privacy of all persons involved.

14. DMCARM staff will conduct the administrative review. They will forward their recommendation regarding release or retention to the member prior to the approving authority making a decision concerning the matter. The CO and the member will then be informed of the decision and whatever action, if any, is to be taken.

15. In any case of alleged sexual misconduct, the CO should consider whether a Significant Incident Report (SIR), pursuant to DAOD 2008-3 (Issue and Crisis Management), is warranted. The CF uses SIRs to communicate details regarding issues or significant incidents that could have national repercussions. DAOD 2008-3 (Issue and Crisis Management) defines a ‘significant incident’ as “any incident, even a news report, that could cause concern for DND, the CF or the Minister of National Defence.” Issues are defined as “an actual or potential incident, event or series of events, either internal or external to an organization, that may undermine, cause damage to, or lead to public concern with regards to a policy, program, service, law, activity, person or organization.”

16. SIRs provide information as to the date, time, and location of the significant incident and information pertaining to the person or agency initially reporting the incident. They address who or what was involved, what happened and how it happened. They also address the possible implications of the incident, including the possible effect on future operations. In addition, they provide local public affairs actions, make recommendations and propose further action. Lastly, they detail the actual and probable media interest and involvement, including the number of media calls, interviews and information requests, and whether the media agency was national, local or international. The message format for an SIR can be found in DAOD 2008-3 (Issue and Crisis Management).

17. On completion of any disciplinary action taken for sexual misconduct, the CO shall forward a report to DMCARM containing all of the information required by paragraph 17 of CFAO 19-36 (Sexual Misconduct). If there are any proceedings under the Criminal Code, the CO must forward a report to DMCARM disclosing the results of the court proceedings. If there is a certificate of conviction, a copy should also be included with the report.

---

14 For further information on administrative review, see Chapter 33 under Part 5 of this manual.
15 CFAO 19-36 (Sexual Misconduct), para. 28.
16 DAOD 2008-3 (Issue and Crisis Management), marginal note: Definitions/Significant Incident.
17 Ibid., marginal note: Definitions/Issue.
18 Ibid., marginal note: Reporting Issues and Significant Incidents/SIR Message Format.
19 CFAO 19-36 (Sexual Misconduct), para. 17, requires the following information to be provided upon the completion of disciplinary action: the Report of Disciplinary Proceedings (RDP), a summary of evidence presented, the finding or findings, any sentence imposed and the member’s conduct sheet.
20 Ibid., paras. 17-18.
SECTION 3

ADDITIONAL GUIDANCE

18. Allegations of sexual misconduct are serious. Sexual misconduct not only has an effect on the victim, but it also has the potential to bring discredit to the CF and it can destroy unit discipline and cohesion. All allegations should be taken seriously and, in the interests of fairness to both the victim and the member who is the subject of the complaint, allegations should be dealt with on an urgent basis. Reports of such allegations are to be forwarded to DMCARM staff on a priority basis and, since information pertaining to an allegation of sexual misconduct is extremely sensitive, it should be safeguarded in order to protect the privacy of all involved persons.21

19. A CO must not only act on a complaint of sexual misconduct, but take such disciplinary and administrative action as is warranted by the circumstances of the sexual misconduct. Investigating complaints and taking appropriate action protects all of the parties involved. The victim’s rights are protected in that the incident is dealt with in a prompt and fair manner and the person who is the subject of the complaint is also given the opportunity to make representations and put a case forward; fully and completely, without undue delay.

20. When there are allegations of sexual misconduct, the CO should order an investigation. Normally, due to the fact that there is a disciplinary or criminal aspect to sexual misconduct, the MPs or NIS will conduct the investigation.

21. It is important that a BOI, SI or informal investigation not be used if the purpose of the investigation is to collect evidence to support a possible charge under the CSD. If there is any doubt as to the most suitable type of investigation, the advice of the unit legal adviser should be sought. Any report flowing from such a BOI or SI would be inadmissible as evidence at either a court martial or a summary trial.

22. If the CO is prepared to recommend release in a sexual misconduct case, the CO is responsible for ensuring that the member’s representations are included in the report prior to submitting the report to DMCARM. If the member does not want to make representations, the report should reflect the fact that the member was asked and declined the opportunity to make representations.

SECTION 4

REFERENCES

Legislation


Regulations

QR&O 19.61 (Certificate of Conviction).

QR&O 19.75 (Relief From Performance of Military Duty).


QR&O 101.08 (Relief from Performance of Military Duty – Pre and Post Trial).

21 Ibid., paras. 14-16.
QR&O 106 (Investigation of Service Offences).

Orders, Directives and Instructions

CFAO 19-36 (Sexual Misconduct).

CFAO 34-56 (Mental Disorders).

DAOD 2008-3 (Issue and Crisis Management).

DAOD 5012-0 (Harassment Prevention and Resolution).

DAOD 5019-0 (Conduct and Performance Deficiencies).

DAOD 5019-1 (Personal Relationships and Fraternization).

DAOD 7002-0 (Boards of Inquiry and Summary Investigations).

DAOD 7002-1 (Boards of Inquiry).

DAOD 7002-2 (Summary Investigations).

Secondary Material


CHAPTER 24
MISUSE OF ALCOHOL

SECTION 1
INTRODUCTION

General

1. CF orders define ‘misuse of alcohol’ as use of alcohol by a member which:
   a. interferes with the performance of duty, including regular attendance at the place of duty;
   b. creates an administrative burden by causing domestic or other problems;
   c. interferes with satisfactory social or economic functioning;
   d. interferes with health; or
   e. otherwise reflects discredit upon the CF.¹

2. The CF does not condone the misuse of alcohol. It is CF policy to help members overcome alcohol dependencies through counselling and treatment. Unchecked alcohol misuse may result in disciplinary or administrative action or both, including the potential for release from the CF.²

Purpose

3. The purpose of this chapter is to aid COs with decision-making with respect to administration action concerning the misuse of alcohol by CF members.

SECTION 2
LEGISLATION AND REGULATIONS

Criminal Code

4. In certain cases, misuse of alcohol may constitute an offence under the Criminal Code.³ Examples of misuse of alcohol that may constitute a criminal offence are: operating a motor vehicle while impaired,⁴ operating a motor vehicle with a blood alcohol level of over .08,⁵ failing to comply with a demand to provide a breath sample,⁶ impaired driving causing bodily harm,⁷ and impaired driving causing death.⁸

---

¹ CFAO 19-31 (Misuse of Alcohol), para. 3.
² Ibid., para. 2.
⁴ Ibid., s. 253(a).
⁵ Ibid., s. 253(b).
⁶ Ibid., ss. 254(2)-(3).
⁷ Ibid., s. 255(2).
⁸ Ibid., s. 255(3).
National Defence Act

5. In certain cases, misuse of alcohol may also constitute an offence against the Code of Service Discipline. For example, being unable to perform one’s duties because of consumption of alcohol or behaving in a manner likely to bring discredit on Her Majesty’s Service owing to consumption of alcohol are required elements of the offence of ‘drunkenness.’ The unauthorized possession or consumption of alcohol on CF property is also contrary to regulations, and could constitute an ‘act to the prejudice of good order and discipline.’

CFAO 19-31 (Misuse of Alcohol)

6. CFAO 19-31 (Misuse of Alcohol) provides CF policy on the misuse of alcohol and describes the administrative procedures that apply when a member is believed to be misusing alcohol.

7. The misuse of alcohol policy contains three major principles:
   a. treatment for alcohol-related health concerns and dependency is independent from administrative action related to alcohol-related misconduct;
   b. refusing treatment does not constitute alcohol-related misconduct; and
   c. failing treatment does not, in itself, constitute alcohol-related misconduct.

Policies and Guidelines

8. Alcohol Misuse – A Guide for Supervisors in the Canadian Forces, is a manual written to aid supervisors in dealing with alcohol misuse amongst their subordinates. It explains CF policy, outlines DND alcohol programs and focuses on the areas of the programs that most directly involve supervisors. These are: early recognition, interviews, and the follow-up period after a subordinate receives treatment in an Alcohol Rehabilitation Centre (ARC).

SECTION 3

ADDITIONAL GUIDANCE

9. The Alcohol Rehabilitation Program (ARP) consists of three phases. In phase 1, the recognition stage, the supervisor identifies unsatisfactory performance and behaviour that may be related to alcohol misuse. Prompt intervention by the superior may avoid the need to proceed to phase 2 and phase 3 in that the problem may be corrected at an early stage. In phase 2, the member receives in-house treatment at an ARC. Phase 3 is a mandatory, one-year follow-up period after phase 2, during which time the member resumes employment. During phase 3, the member must abstain from alcohol, attend follow-up meetings and comply with the conditions of a treatment program.

10. Whenever alcohol misuse has occurred, COs shall take immediate administrative action. The CO must be satisfied, on a balance of probabilities, that the member has misused alcohol.

---

9 Part III of the National Defence Act, R.S.C. 1985, c. N-5. [NDA].
10 NDA, s. 97.
11 QR&O 19.04 (Intoxicants).
12 NDA, s. 129.
13 Note that CFAO 19-31 (Misuse of Alcohol) has been amended, in part, by CANFORGEN 092/02, ADM (HR-MIL) 051/02 291209Z Aug 02, Clarification to Misuse of Alcohol Policy, para. 2, online: DIN <http://vcds.dwan.dnd.ca/vcds-exec/pubs/canforgen/2002/092-02_e.asp> [CANFORGEN 092/02].
14 Ibid., at para. 2.
16 Ibid. at 3-1, 3-2, and 6-1.
17 Action must be taken in accordance with CFAO 26-17 (Recorded Warning and Counselling and Probation).
alcohol as described in paragraph 1 of this chapter. A CO must also refer a member for a medical assessment following each alcohol-related incident for which the CO is contemplating administrative action.\(^\text{18}\)

11. An incident will fall within the definition of ‘misuse of alcohol’ if the use of alcohol significantly contributed to the member having committed an offence under the *Criminal Code*, NDA or any other Act of Parliament. The CO must be satisfied, on a balance of probabilities, that alcohol was a significant, contributing factor in the incident. The commission of a criminal offence due to alcohol misuse will normally be sufficiently serious to warrant Counselling and Probation (C&P) (i.e., without the necessity of first issuing a Recorded Warning (RW)).\(^\text{19}\)

12. Refusing treatment, failing treatment and self-referral for treatment are independent from, and have no bearing on, administrative action for alcohol-related misconduct.\(^\text{20}\) COs must make the decision of whether to take administrative action based on incidents stemming from the member’s misuse of alcohol and not on the member’s progress during treatment for misuse of alcohol.

13. CFAO 19-31 (Misuse of Alcohol) provides:

> Except in exceptional circumstances, a member [being treated for alcohol misuse] should not be attached posted, be assigned to UN posts or isolated units or be sent on extended, temporary duty away from the regular place of employment and supportive medical services.\(^\text{21}\)

In order for it to be effective, COs should ensure that the member’s treatment is disrupted as little as possible and that the member receives as much support as possible during the follow-up phases.

14. Members with a history of, or a clear predisposition towards, unacceptable behaviour shall not be considered for a posting outside Canada.\(^\text{22}\) A behavioural history indicating a lack of self-control, as evidenced by alcohol or drug abuse that has not been successfully resolved, is a primary indicator that a CO should reconsider a member’s suitability for overseas posting.\(^\text{23}\)

15. The release item for members released due to alcohol misuse will normally be pursuant to QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 5(d) (Not Advantageously Employable). However, QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 5(f) (Unsuitable for Further Service) may also be used where there is a history of misconduct associated with alcohol misuse.\(^\text{24}\) Regardless, the member will be released under the item that, at the time, reflects most accurately the reason for release.\(^\text{25}\) Director Military Careers Administration and Resource Management (DMCARM) is the release authority for regular CF members up to the rank of major who are released for alcohol misuse.\(^\text{26}\)

---

\(^{18}\) CANFORGEN 092/02, para. 3.

\(^{19}\) Ibid.

\(^{20}\) Ibid., para. 4.

\(^{21}\) CFAO 19-31 (Misuse of Alcohol), para. 17.


\(^{23}\) Ibid.

\(^{24}\) CFAO 19-31 (Misuse of Alcohol), para. 23.

\(^{25}\) CANFORGEN 092/02, para. 5.

\(^{26}\) CFAO 15-2 (Release – Regular Force), Table 2, Note 2. Reference to NDHQ/DPCA 5 in CFAO 15-2 (Release – Regular Force) should be construed as a reference to DMCARM 5.
SECTION 4
REFERENCES

Legislation


Regulations

QR&O 19.04 (Intoxicants).

Orders, Directives and Instructions


CANFORGEN 092/02, ADM (HR-MIL) 051/02 291209Z Aug 02, Clarification to Misuse of Alcohol Policy, online: DIN <http://vcds.dwan.dnd.ca/vcds-exec/pubs/canforgen/2002/092-02_e.asp>.


CFAO 19-31 (Misuse of Alcohol).

CFAO 20-50 (Assignment To and From Posts Outside Canada).

CFAO 26-17 (Recorded Warning and Counselling and Probation).

Secondary Material


24-4
CHAPTER 25
RACIST CONDUCT
SECTION 1
INTRODUCTION

General

1. The CF defines ‘racist conduct’ as:

   …conduct that promotes, encourages or constitutes discrimination or harassment on the basis of race, national or ethnic origin, colour or religion, including the participation in the activities of, or membership in, a group or organization that a CF member knows, or ought to know, promotes discrimination or harassment on the basis of race, national or ethnic origin, colour or religion.¹

2. CFAO 19-43 (Racist Conduct) provides that:

   Racist attitudes are totally incompatible with the military ethos and with effective military service, and any conduct that reflects such attitudes will not be tolerated. Racist conduct is therefore prohibited, and will result in administrative action, disciplinary action, or both and may include release. An applicant for enrolment in the CF who is unable or unwilling to comply with the CF policy against racist conduct will not be enrolled.²

Purpose

3. In dealing with racist conduct, there are several points at which a CO must exercise discretion and this chapter is meant to be an aid in exercising that discretion. This discretion must be applied in accordance with the law as discussed in section 2 of this chapter.

Background

4. The CF is committed to the principle of equality of all persons and the dignity and worth of every human being. This is the principle that must always guide CF members in their relationships with others.³

5. In 1994, in response to the changing fabric of Canadian society and to the conduct of some CF members, CFAO 19-43 (Racist Conduct) was issued as CF policy. In a study prepared for the Commission of Inquiry into the Deployment of the Canadian Forces to Somalia (Somalia Inquiry), the author of the study stated, “The purpose of the policy was to deter CF members from engaging in racist conduct and holding racist attitudes, as well as to determine how CF members who actually engage in such conduct and hold racist attitudes should be dealt with.”⁴

6. The prevention of racist conduct is a leadership issue that must be continuously monitored because racist conduct adversely affects the CF’s effectiveness in a number of ways. Racism directed by CF members at other CF members erodes group cohesion and esprit de corps. Racism directed by CF members at non-CF members brings into question the ability of

¹ CFAO 19-43 (Racist Conduct), para. 3.
² Ibid., para. 5.
³ Ibid., para. 4.
the CF to perform its mission impartially, whether in an international environment or in domestic operations. CF members owe their allegiance to Her Majesty.\(^5\) The mandate of the CF requires its members to be neutral and impartial in respect of their duties and responsibilities. Any participation with racist groups brings the loyalty of CF members into question.\(^6\) In any event, racist conduct adversely affects the public’s perception of the impartiality, tolerance and operational effectiveness of their armed forces. To that end, no member shall do or say anything that, if seen or heard by any member of the public, might reflect discredit on the CF or any of its members.\(^7\)

### SECTION 2

### LEGISLATION

**Canadian Charter of Rights and Freedoms**

7. Subsection 15(1) of the *Canadian Charter of Rights and Freedoms*\(^8\) states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

8. As stated in *Duty with Honour*, “Canadian values are expressed first and foremost in founding legislation such as the *Constitution Act of 1982* and the *Canadian Charter of Rights and Freedoms* (the *Charter*) contained therein, and key values that affect all Canadians are anchored in a number of pieces of foundational legislation and articulated in their preambles.”\(^9\) The *Constitution* is the supreme law of Canada.\(^10\) As such, all members of the CF shall respect the rights and freedoms guaranteed by the *Charter*, including the equality rights set out in subsection 15(1).

**Criminal Code**

9. Certain types of racist conduct may constitute an offence under the *Criminal Code*.\(^11\) For example, it is a criminal offence to incite hatred against any identifiable group by making statements in any public place where such incitement is likely to lead to a breach of the peace.\(^12\) It is also a criminal offence to make statements wilfully promoting hatred against any identifiable group, other than in private conversation.\(^13\)

10. Where an accused has been convicted of an offence, a criminal court should increase the sentence for any relevant, aggravating circumstances, including cases where there is evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin or any other similar factor.\(^14\)

---

\(^5\) QR\&O 6.04 (Oath Taken on Enrolment).
\(^6\) CFAO 19-43 (Racist Conduct), paras. 7-8.
\(^7\) QR\&O 19.14(2)(a).
\(^8\) Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act*].
\(^10\) *Constitution Act*, s. 52(1).
\(^12\) *Ibid.*, s. 319(1).
\(^13\) *Ibid.*, s. 319(2).
\(^14\) *Ibid.*, s. 718.2(a)(i).
**National Defence Act**

11. There is a higher standard of conduct required of CF members in relation to racism and intolerance than that which applies to the Canadian public at large. Where a specific act of inciting hatred or any other racist conduct fails to meet the requirements to constitute an offence under the *Criminal Code*, such acts may still constitute an offence under the *Code of Service Discipline* (CSD).  

15 For example, racist conduct directed at a subordinate may constitute an abuse of that subordinate.  

16 In that, or any other context, racist conduct might also constitute an 'act to the prejudice of good order and discipline.'

**Canadian Human Rights Act**

12. Complaints may be made under the *Canadian Human Rights Act* in relation to discriminatory practices based on prohibited grounds of discrimination including race, national or ethnic origin, colour, and religion.  

18 It is also a discriminatory practice under the *CHRA* to communicate hate messages. Specifically, it is a discriminatory practice for a person, or a group of persons acting in concert, to communicate by telephone or to cause to be so communicated, repeatedly, in whole or in part, by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

13. CFAO 19-43 (Racist Conduct) does not preclude any policy or program authorized by law that has as its object, the amelioration of conditions of disadvantaged individuals or groups. This means that policies and programs designed to help persons disadvantaged because of their race, national or ethnic origin, etc., are not considered to be discriminatory even though they may make distinctions based on one of the prohibited grounds of discrimination.

**SECTION 3**

**ADDITIONAL GUIDANCE**

**Investigation**

14. All harassment complaints shall be resolved in accordance with DAOD 5012-0 (Harassment Prevention and Resolution) and the supporting *Guidelines*. For further information, reference may also be made to Chapter 22 (Harassment) of this manual.

15. Where a CO suspects that racist conduct has occurred, the CO may order an administrative investigation in the form of a Board of Inquiry (BOI) or a Summary Investigation (SI) in accordance with the DAOD 7002 series. If an investigation by means of a BOI or an SI is

---


16 *NDA*, s. 95; *QR&O* 103.28 (Abuse of Subordinates).

17 *NDA*, s. 129.


21 CFAO 19-43 (Racist Conduct), para. 6. The fact that a military occupation may have specific recruiting objectives to enhance the representation of visible minorities does not constitute discrimination or racist conduct. *CHRA* s. 16(1) provides as follows: “It is not a discriminatory practice for a person to adopt or carry out a special program, plan or arrangement designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be based on, or related to, the prohibited grounds of discrimination, by improving opportunities respecting goods, services, facilities, accommodation or employment in relation to that group.”

not required, the CO may informally inquire into the matter. It should be noted that a BOI, SI or informal inquiry must not be conducted if the sole or primary purpose is to obtain evidence for a disciplinary purpose or to assign criminal responsibility. Where information indicates that disciplinary action may be warranted, the CO may order a disciplinary investigation or may request the military police (MP) to investigate the matter. Information obtained from these sources may form the basis of disciplinary and formal administrative measures.

16. Reporting requirements are set out at CFAO 19-43 (Racist Conduct). All incidents of racist conduct are to be reported by message, using the format shown in CFAO 19-43 (Racist Conduct), Annex A (Sample Message Format), to NDHQ/Director Personnel Complaints Resolution (DPCR), with information copies to intermediate headquarters in the chain of command. This message is to be sent as soon as the CO has decided upon the appropriate course of action following a report and investigation of an incident or allegation. In cases where the investigative, administrative or disciplinary process may be protracted, an interim report shall be forwarded no later than 14 days after the CO has been made aware of an allegation or report of racist conduct. In the case of an incident or allegation that is likely to attract public or media attention, a Significant Incident Report shall be submitted in accordance with DAOD 2008-3 (Issue and Crisis Management), which has superseded CFAO 4-13 (Reporting of Significant Incidents), with an information copy to DPCR.

17. A CO who suspects that racist conduct has resulted in a service or criminal offence should immediately suspend any administrative investigation and consult with the unit legal adviser before any charge is laid that relates to racist conduct. The Canadian Forces National Investigative Service (NIS) will normally investigate alleged offences of a serious and sensitive nature. In this regard, ‘sensitive offences’ include any that may arise out of events that could bring discredit to the CF or DND. Offences involving racist conduct may be included in this category. Where there is doubt as to who has jurisdiction for the investigation of an offence, it shall be referred to NIS for assignment.

Making Findings

18. Where a CO is satisfied that there is reliable evidence of racist conduct on the part of a member, the CO shall take appropriate administrative measures. The question of whether the impugned conduct satisfies the definition of racist conduct is decided on a ‘balance of probabilities.’ The CO must find that it is more probable than not that the alleged, improper activity was racist conduct. In particular, the evidence must show that the member:

a. engaged in conduct that promoted, encouraged or constituted discrimination or harassment; or

b. participated in the activities of, or had membership in, a group or organization that the member knew, or ought to have known, promoted discrimination or harassment; and

c. in the case of either subparagraph a. or subparagraph b. above, the discrimination or harassment was based on race, national or ethnic origin, colour, religion or any other similar factor.

---

23 DAOD 7002-0 (Boards of Inquiry and Summary Investigations), marginal note: Policy Direction/Context.
24 Ibid.
25 CFAO 19-43 (Racist Conduct), paras. 22-23.
26 QR&O 107.03 (Requirement to Obtain Advice From Legal Officer – Charges to be Laid) and CFAO 19-43 (Racist Conduct), para. 20.
28 CFAO 19-43 (Racist Conduct), para. 17.
Repercussions of Violating the CF Racist Conduct Policy

19. A member who has engaged in racist conduct may be informally counselled, given a Recorded Warning (RW), placed on Counselling and Probation (C&P) or recommended for release. In addition, there may be implications with respect to the member’s security clearance or enhanced reliability status, which could also lead to release.

20. CFAO 19-43 (Racist Conduct) also contemplates relief from the performance of military duty, which was formerly referred to as ‘suspension from duty.’ Relief from the performance of a military duty is not to be used as a form of discipline or as a sanction. Administrative action taken to relieve a member from the performance of a military duty should only be considered after concluding that other administrative means are inadequate in the circumstances.

21. Antisocial behaviour, such as racist conduct, is a primary indicator that a CO should consider in determining a member’s personal suitability for overseas posting. Members with a history of, or a clear predisposition towards, unacceptable behaviour shall not be considered for a posting outside Canada.

22. If it appears that a member suffers from a mental or emotional disturbance, that member shall be referred to, and be assessed by, a medical officer. The fact that a member suffers from a mental disorder does not necessarily preclude the CO from taking disciplinary or administrative action under appropriate circumstances. However, in such situations, the CO shall seek advice from the unit legal adviser.

Other Issues

23. Racist tattoos are inconsistent with CF values and interests. Serving members are not to acquire visible tattoos of a racist nature or display any such tattoos they may already have. Also, the display of a racist tattoo is an example of racist conduct. COs are not authorized to order members to have tattoos removed, however, if a member displays a racist tattoo on a defence establishment, a CO may:
   a. order that the tattoo be concealed with clothing, bandages or cosmetics;
   b. take administrative action against the member for violating the provisions of CFAO 19-43 (Racist Conduct), where appropriate; and
   c. report the racist conduct to NDHQ, in accordance with paragraph 22 of CFAO 19-43 (Racist Conduct).

---

29 Ibid.
30 Ibid., para. 19.
31 QR&O 19.75 (Relief From Performance of Military Duty) and QR&O 101.08 (Relief From Performance of Military Duty – Pre and Post Trial).
32 QR&O 101.08 (Relief From Performance of Military Duty – Pre and Post Trial), Note (A).
34 Ibid., para. 5.
35 For disciplinary action, see QR&O 108.06 (Jurisdiction of Commanding Officer to Try Accused), QR&O 108.12 (Jurisdiction of Superior Commander to Try Accused) and QR&O Chapter 119 (Mental Disorder). For administrative action, refer to CFAO 34-56 (Mental Disorders), para. 3.
37 CFAO 19-43 (Racist Conduct), para. 9(g).
38 NDA, s. 2 provides that a ‘defence establishment’ is “any area or structure under the control of the MND, and the materiel and other things situated in or on any such area or structure.”
39 CFAO 26-17 (Recorded Warning and Counselling & Probation).
40 CFAO 19-43 (Racist Conduct), Note to para. 9.
Moreover, if a serving member acquires a visible tattoo of a racist nature, or if any member displays a tattoo of a racist nature, that member could be subject to disciplinary action pursuant to section 129 of the NDA. COs should ensure that the prohibition against acquiring and displaying visible tattoos of a racist nature is published at the unit level in a manner as prescribed by QR&O, frequently and prominently.\(^\text{41}\)

24. It is recommended that COs and the chain of command consult unit legal advisers prior to laying charges arising from incidents or evidence of racist conduct. In the event that a BOI or an SI is convened to investigate an allegation of racist conduct, or the member is the subject of an investigation under the CSD, the Director Defence Counsel Services (DDCS) can provide legal assistance to the subject of that investigation.\(^\text{42}\)

SECTION 4

REFERENCES

Legislation


*Constitution Act, 1982*, ss. 52(1), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.


Regulations

QR&O 1.20 (Notification of Regulations, Orders and Instructions – Reserve Force).

QR&O 1.21 (Notice by Receipt of Regulations, Orders and Instructions).

QR&O 6.04 (Oath Taken on Enrolment).

QR&O 7.16 (Suspension of Grievance).

QR&O 19.14 (Improper Comments).

QR&O 19.75 (Relief From Performance of Military Duty).

QR&O 101.08 (Relief From Performance of Military Duty – Pre and Post Trial).

QR&O 101.20 (Duties and Functions of Director of Defence Counsel Services).

QR&O 103.28 (Abuse of Subordinates).

QR&O 107.03 (Requirement to Obtain Advice From Legal Officer – Charges to be Laid).

\(^{41}\) QR&O 1.20 (Notification of Regulations, Orders and Instructions – Reserve Force) or QR&O 1.21 (Notification by Receipt of Regulations, Orders and Instructions).

\(^{42}\) QR&O 101.20(2)(i).
QR&O 108.06 (Jurisdiction of Commanding Officer to Try Accused).
QR&O 108.12 (Jurisdiction of Superior Commander to Try Accused).
QR&O Chapter 119 (Mental Disorder).

Orders, Directives and Instructions

CFAO 19-43 (Racist Conduct).
CFAO 20-50 (Assignment To and From Posts Outside Canada).
CFAO 26-17 (Recorded Warning and Counselling & Probation).
CFAO 34-56 (Mental Disorders).
CPAO 7.18 (Harassment).
DAOD 7002-0 (Boards of Inquiry and Summary Investigations).
DAOD 7002-1 (Boards of Inquiry).
DAOD 7002-2 (Summary Investigations).
DAOD 7002-3 (Investigative Matters and References).
DAOD 7002-4 ( Examination of Witnesses).

Jurisprudence


Secondary Material

CHAPTER 26

FAILURE TO SETTLE PRIVATE DEBTS

SECTION 1

INTRODUCTION

1. There may be times when a member’s unit receives calls from the member’s creditors demanding payment of outstanding debts. Creditors may attempt to bring pressure on a member by contacting the member’s place of employment. Some creditors will merely attempt to have the member’s CO exert pressure on the member to settle a debt. Other times, the creditor will demand that the member’s unit pay the member’s debt in full. As a matter of law, the Crown has no responsibility to creditors with respect to private debts owed by CF members, unless those creditors have obtained a judgment and garnishee order from a court of competent jurisdiction and have followed the applicable procedures as set out in the QR&O.¹

SECTION 2

GENERAL

Authority

2. In the absence of a court order to garnishee a member’s pay, QR&O 19.07 (Private Debts) provides that privately incurred debts are a member’s responsibility. Any complaints received by the CO with respect to the member’s private debts shall be dealt with as prescribed by the CDS. CFAO 19-4 (Failure to Settle Private Debts) outlines CF policy with respect to a member’s failure to settle private debts. This CFAO provides guidance to COs when they are faced with enquiries from creditors and it prescribes the administrative action to be taken when a complaint is received.²

Commanding Officer’s Responsibilities

3. A CO who receives a complaint from a creditor alleging that a member has not settled a private debt must interview the member to determine the facts of the matter.³ If it appears to the CO that the creditor is harassing the member, the CO should consult with the unit legal adviser. If the CO receives a complaint with respect to a released member or a member on terminal leave, the complaint should be forwarded to the Director Military Careers Administration and Resource Management (DMCARM).⁴

4. After interviewing the member, the CO must inform the creditor that the member has been interviewed.⁵ The CO is responsible for ensuring that the creditor is informed that there is no claim against the Crown with respect to an individual’s private debts and that, in the absence of a court order, the CO has no legal authority to enforce the payment of the debt.⁶ The CO must also inform the creditor that recourse may be available through the civilian court system and that the creditor is entitled to proceed against the member as the creditor would against any other

¹ QR&O 19.07 (Private Debts) and QR&O Chapter 207 (Pay Allotments and Compulsory Payments).
² QR&O 19.07 (Private Debts); CFAO 19-4 (Failure to Settle Private Debts).
³ CFAO 19-4 (Failure to Settle Private Debts), para. 2(a).
⁴ ibid., para. 3. The reference to NDHQ/D PERS A in CFAO 19-4 (Failure to Settle Private Debts) should be construed as a reference to DMCARM.
⁵ CFAO 19-4 (Failure to Settle Private Debts), Annex A (Sample Letter to Creditor).
⁶ Garnishment is a formal legal proceeding. Garnishment orders are to be staffed in accordance with QR&O 207.031 (Garnishee Summons – Judgement Debts). Section 267 of the NDA establishes limits on what a creditor can garnish. QR&O 207.031 (Garnishee Summons – Judgement Debts) also deals with garnishments for judgment debts. A creditor cannot enforce a judgment against military equipment, clothes, ammunition, weapons or other instruments used by the member for military purposes. For additional guidance, refer to Chapter 32 under Part 4 of this manual.
debtor. The CO is responsible for ensuring that QR&O 207.031 (Garnishee Summons – Judgement Debts), is brought to the creditor’s attention and may provide a copy to the creditor. This regulation specifies the procedure that creditors must follow before a CO can order compulsory payment to satisfy a member’s outstanding debts.  

Similarly, applicants who seek to collect a debt constituting lump sum arrears arising from a financial support order against a CF member must follow the procedures as set out in QR&O 207.031 (Garnishee Summons – Judgement Debts).

5. The CO’s letter must also provide the creditor with the member’s military address unless security considerations preclude this. The CO should not provide the creditor with the member’s home address, as this is personal information as defined by section 3 of the Privacy Act and is protected from release. The letter must also advise the creditor that, in the absence of a court order, no further assistance can be given to the creditor with respect to the debt.

6. A CO should provide support to a member who is having financial difficulty in the form of financial counseling by a supervisor or superior. The member may also be referred to a base or unit financial counselor for specialized assistance. Where counseling has been provided, but the member’s financial difficulties continue to the point where the member’s efficiency is affected or the member has become an excessive administrative burden on the unit, the CO may consider appropriate career action.

7. Possible career action for indebtedness that becomes an administrative burden includes a verbal warning, Recorded Warning (RW), Counselling and Probation (C&P) or release under QR&O 15.01 (Release of Officers and Non-Commissioned Members) Item 5(d) (Not Advantageously Employable). If the CO is contemplating administrative action, the CO should refer to the appropriate chapters under Part 3 (Career Administration in the CF) of this manual for additional guidance.

8. Extreme financial difficulties may result in a member declaring bankruptcy. Under QR&O 19.08 (Bankruptcy), when CF members declare bankruptcy, they are required to report that fact to their CO for onward transmission to the career manager and the security clearance section at NDHQ. COs should be aware that, where the Crown is owed a debt, it will be considered a preferred creditor. Consequently, the CO of a bankrupt member should inform their unit legal adviser to ensure that appropriate action is taken to protect the Crown’s rights with respect to any public or non-public liabilities of the member.

SECTION 3

REFERENCES

Legislation


Regulations

QR&O Chapter 15 (Release).

7 CFAO 19-4 (Failure to Settle Private Debts), para. 2(c).
8 Ibid., para. 2(c)(3); Privacy Act, R.S.C. 1985, c. P-21, s. 3.
9 Ibid., para. 2(c)(4).
10 Ibid., para. 5.
11 Ibid., para. 6.
QR&O 19.07 (Private Debts).
QR&O 19.08 (Bankruptcy).
QR&O Chapter 207 (Pay Allotments and Compulsory Payments).
QR&O 207.031 (Garnishee Summons – Judgement Debts).

Orders, Directives and Instructions

CFAO 19-4 (Failure to Settle Private Debts).
CFAO 26-17 (Recorded Warning and Counselling and Probation).
CFAO 56-5 (Legal Assistance).
DAOD 7001-2 (Service of Legal Documents Concerning Civil and Criminal Court Proceedings).

Jurisprudence

CHAPTER 27
RELATIONSHIPS

SECTION 1
INTRODUCTION

1. The purpose of this chapter is to aid COs with decision-making in respect of the administration of relationships between military members, fraternization, common-law partnerships and family violence.

SECTION 2
PERSONAL RELATIONSHIPS AND FRATERNIZATION

General

2. The CF defines a ‘personal relationship’ as “an emotional, romantic, sexual or family relationship, including marriage or a common-law partnership or civil union between two CF members or a CF member and a DND employee or contractor or member of an allied force.” The term ‘personal relationship’ must not be confused with that of ‘fraternization,’ which is “any relationship between a CF member and a person from an enemy or belligerent force or a CF member and a local inhabitant within a theatre of operations where CF members are deployed.”

The term ‘adverse personal relationship’ refers to “a personal relationship that has a negative effect on the security, cohesion, discipline or morale of a unit.”

3. As military members train and work together, as well as live in close proximity to one another, it is normal that some members will develop personal relationships. The CF respects the privacy of CF members and acknowledges the right of members to form personal relationships. The CF will not intervene to prevent or restrict the development of relationships except to: (a) prevent the erosion of lawful authority; (b) maintain operational effectiveness; (c) protect vulnerable CF members; (d) maintain standards of professional and ethical conduct; and (e) avoid detrimental effects on unit operational effectiveness.

A CO who purports to intervene in a personal relationship should be able to clearly articulate justifiable reasons for so doing. Any intervention into a personal relationship should only be carried out with the greatest of restraint so as to ensure that the intrusion into, and impairment of, a CF member’s rights is kept to the lowest level possible given all of the circumstances.

4. DAOD 5019-1 (Personal Relationships and Fraternization) addresses consensual relationships. Regarding non-consensual relationships, such as unwelcome remarks of a sexual nature, see Chapter 22 (Harassment) and Chapter 23 (Sexual Misconduct) of this manual.

5. While CF members may engage in consensual personal relationships, such relationships are subject to certain limitations. These limitations are a matter of common sense. First, as CF members are prohibited from any act, if seen by a member of the public, that might reflect discredit on the CF, members in uniform cannot hold hands or kiss (except in greeting and farewell), or caress or embrace in a romantic manner in public. Second, it would be a conflict of interest for one CF member who is involved in a personal relationship with a second CF member to be in a position to make career decisions involving that second CF member. To that end,

---

1 DAOD 5019-1 (Personal Relationships and Fraternization), marginal note: Definitions/Personal Relationship.
2 Ibid, marginal note: Definitions/Fraternization.
3 Ibid, marginal note: Administrative Action/Adverse Personal Relationship.
4 Ibid, marginal note: Overview/Objectives/Table.
5 QR&O 19.14(2)(a).
6 DAOD 5019-1 (Personal Relationships and Fraternization), marginal note: Operating Principles/Personal Conduct.
members are precluded from making career decisions relating to a member with whom they are involved in a personal relationship, including decisions relating to: (a) performance assessments; (b) postings; (c) selection for courses; (d) training; (e) scheduling duties; and (f) maintenance of personal documents or records. CF members have a positive obligation to inform the chain of command of any personal relationship that could compromise the objectives of DAOD 5019-1 (Personal Relationships and Fraternization). Third, the CF seeks to protect vulnerable members from being exploited. For this reason, commanders may establish restrictions on the duties or postings of CF members involved in personal relationships. This is especially important where the duty or posting also involves an instructor and student or superior and subordinate relationship. When establishing local policies, commanders shall apply appropriate situational-specific criteria and should consult with the unit legal adviser.

6. An ‘adverse personal relationship’ is a personal relationship which has a negative effect on the security, cohesion, discipline or morale of a unit. In the event that CF members become involved in an adverse personal relationship, it will normally be necessary to ensure the members are separated. Normally, separation can be achieved within the unit. Where this is not possible, posting or attached posting of one or both members out of the unit may be necessary. Such action is intended to end the adverse relationship and remove the negative effects on the security, cohesion, discipline or morale of the unit. Such postings or attached postings are considered administrative measures only and are not meant to be punitive against the member or members involved. Also, members, who are separated by posting because of an adverse personal relationship are not to be subjected to any stigma or adverse career implications.

7. Members who are involved in a personal relationship should not be posted to the same unit unless the unit is of sufficient size that such a posting is unlikely to have an adverse effect on the security, cohesion, discipline or morale of the unit. In any event, members involved in a personal relationship are not to be posted to the same sub-unit. Members who form a personal relationship during a posting in the same unit may be permitted to complete their postings unless the relationship is considered to be an adverse personal relationship in the judgement of the CO.

8. COs who consider posting members involved in adverse personal relationships, must consult the Director General Military Careers (DGMC) or the Area Headquarters or equivalent for the Reserve Force. COs should consult their unit legal adviser before taking any disciplinary or administrative action related to a breach of a provision contained in DAOD 5019-1 (Personal Relationships and Fraternization).

9. A history of unstable personal relationships is a secondary indicator that a CO should consider in determining a member’s suitability for overseas posting or deployments. Members with a history of, or clear predisposition towards, unacceptable behaviour shall not be considered for a posting or deployment outside Canada. Moreover, members who are known to be experiencing serious marital problems shall not be considered for a posting or deployment outside Canada.

---

7 Ibid.
8 Ibid.
9 Ibid., marginal note: Operating Principles/Administrative Intervention.
10 Ibid.
11 Ibid., marginal note: Administrative Action/Adverse Personal Relationship.
12 Ibid., marginal note: Administrative Action/Postings.
13 Ibid., marginal note: Administrative Action/Criteria for Decision to Post.
16 Ibid., para. 5.
17 Ibid., para. 7(b).
Personal Relationships During Operations

10. Personal relationships can be particularly problematic during operational deployments. Difficult living conditions, long hours of work and separation from family and friends can lead to very high levels of stress. These factors can lead to CF members embarking on personal relationships that, ultimately, can have devastating effects on unit discipline, morale and cohesion. The breakdown of a marriage may also result if the relationship is extra-marital. COs may, therefore, consider restricting or prohibiting personal relationships during operational deployments.\(^{18}\) Where a CO decides to institute measures prohibiting personal relationships between members, the order should be published in unit routine orders (ROs).\(^{19}\) In addition to publication in ROs, the order should be read and explained to subordinates during pre-deployment briefings.\(^{20}\)

11. Fraternization between a CF member and a local inhabitant can also seriously disrupt the operational effectiveness and morale of a unit. For this reason, task force commanders must issue orders and guidance on fraternization.\(^{21}\)

12. DAOD 5019-1 (Personal Relationships and Fraternization) is the authority by which commanders may implement policies prohibiting or restricting personal relationships and fraternization. Any violation of such a policy could constitute a service offence under the Code of Service Discipline (CSD). As stated in CFAO 19-36 (Sexual Misconduct), “When sexual activities take place in circumstances where they are contrary to the Code of Service Discipline, they constitute sexual misconduct even if they are otherwise lawful (i.e., sexual activity between consenting adults that takes place in a location where such actions are prohibited by CF orders).”\(^{22}\) Thus, sexual activity between consenting adults under prohibited circumstances constitutes sexual misconduct.\(^{23}\) CF members who engage in sexual misconduct are liable to disciplinary and administrative action.\(^{24}\)

SECTION 3

SPOUSAL RELATIONSHIPS

Common-Law Partnerships

13. In the CF, a ‘common-law partner’ means, in relation to an officer or non-commissioned member, a person who has been cohabiting with the member in a conjugal relationship:

   a. for a period of at least one year; or

   b. for a period of less than one year if the member and the person have jointly assumed the support of a child.\(^{25}\)

14. In the definition of ‘common-law partner,’ a ‘child’ means “a child or legal ward of the common-law partner or the CF member or both or a child adopted legally or in fact by the common-law partner or the member or both.”\(^{26}\) In the CF, “common-law partnership” means “the relationship between an officer or NCM and the common-law partner of that member.”\(^{27}\) For

\(^{18}\) DAOD 5019-1 (Personal Relationships and Fraternization), marginal notes: Overview/Objectives and Operating Principles/Administrative Intervention.
\(^{19}\) DAOD 1000-2 (Communicating Direction in DND and the CF), marginal note: Other Tools for Communicating Direction/Routine Orders (ROs).
\(^{20}\) QR&O 4.26 (Circulation of Regulations, Orders, Instructions, Correspondence and Publications).
\(^{21}\) DAOD 5019-1 (Personal Relationships and Fraternization), marginal note: Operating Principles/Fraternization.
\(^{22}\) CFAO 19-36 (Sexual Misconduct), para. 10.
\(^{23}\) Ibid., para. 3.
\(^{24}\) Ibid., para. 6.
\(^{25}\) QR&O 1.075(2).
\(^{26}\) QR&O 1.075(3).
\(^{27}\) QR&O 1.075(2).
greater certainty, a common-law partnership does not end solely because the officer or NCM and
the common-law partner are living separately for military reasons.28 When a member is
separated from his or her spouse and enters into a common-law relationship, any reference to a
'spouse or common-law partner' in respect of that member is deemed to refer to the common-law
partner.29

15. CMP Instruction 15/06 (Common-Law Partnerships)30 amplifies QR&O 1.075 (Common-
Law Partner and Common-Law Partnership). The forms that CF members must complete to
notify the CF of a common-law partnership are contained in the Military Human Resources
Records Procedures manual.31 Common law partners may include same-sex and opposite-sex
couples. Common-law partners within Canada are entitled to the same CF benefits as married
couples.32 While the CF will always recognize these relationships, other countries may not
extend the same benefits or entitlements as does Canada.

16. Upon receipt of a 'Common Law Partnership Application,' the CO must review the
application or notification and complete Minute 1 of the application or notification.33 Should the
CO (or designated officer), decide that the member does not meet the prescribed requirements
for recognition, the member must be advised in writing of the reasons for that decision.34 These
reasons must clearly articulate why the application has been denied and should refer to a specific
 provision of QR&O 1.075 (Common-Law Partner and Common-Law Partnership). However, once
the CO exercises the discretion to recognize a common-law relationship, that couple will,
thereafter, be recognized as being in a common-law relationship for all military purposes.

Family Violence

17. The CF and DND define ‘family violence’ as "an abuse of power within a relationship of
family, trust or dependency and includes many forms of abusive behaviour (e.g., emotional
abuse, psychological abuse, neglect, financial exploitation, destruction of property, injury to pets,
physical assault, sexual assault and homicide)."35

18. DAOD 5044-4 (Family Violence) sets out the CF’s policy on family violence and contains
a number of core principles. They are as follows:

a. the safety of the victim(s) is the primary concern;

b. family violence is not acceptable behaviour within the CF;

c. CF leadership must play an active role in the prevention of family violence;

d. all reported incidents of family violence must be acted upon;

e. all possible assistance and support to victims are provided in a discreet and
empathic manner with due regard to family privacy;

f. the importance of gender dynamics when responding to incidents of family
violence is recognized;

___________________________
28 QR&O 1.075(4).
29 QR&O 1.075 (5).
30 A-PM-245-001/FP-001, Military Human Resources Records Procedures, Chapter 13 (Personal Documents and
Statutory Declarations), Annex A (Common Law Partnership Application), online: DIN
<http://hr3.ottawa-hull.mil.ca/docs/instruction/instructions/instruction_docs/word/instruction_15_06_e.doc>
31 Online: DIN <http://hr.dwan.dnd.ca/hrim/mhrmp/engraph/hmrgp/home_e.asp>.
32 CANFORGEN 126/01 ADM (HR-MIL) 073 061800Z Nov 01, Common-Law Partnerships, online: DIN
33 CFACO 19-41 (Common-Law Relationships), para. 15.
34 Ibid., para. 17.
35 DAOD 5044-4 (Family Violence), marginal note: Definition/Family Violence.
g. confidentiality for all individuals involved in family violence cases, including victims, offenders, family members and those who reported the suspected incident(s), is afforded to the maximum extent possible under the law; and

h. counselling and support services will be offered to the offender, as appropriate.  

19. The immediate action to be taken by a supervisor who learns of an alleged or suspected incident of family violence consists of:

   a. informing the MP or appropriate civilian police, without delay, if personal safety is at risk;

   b. notifying child welfare authorities of any child abuse, without delay;

   c. providing support and encouragement to the victim(s) to seek out additional help;

   d. directing that a CF member alleged to have committed, or suspected of having committed, family violence contact the family crisis team; and

   e. informing the CO if the matter is likely to affect the service of the CF member.  

When a CO learns of an alleged or suspected incident of family violence in the family of a CF member, legal advice should be sought from the unit legal adviser in order to determine if the CF or a civilian authority has jurisdiction in respect of the incident.  

COs may wish to make it a matter of unit policy, published in unit orders, that all incidents of family violence are to be immediately reported to the CO.

20. Where a CF member has committed an act of family violence, the CO shall decide whether disciplinary or administrative action or both is appropriate after considering the best interests of the family, the member and the CF.  While contemplating administrative action, personnel support staff, the family crisis team and the unit legal adviser must be consulted.  

Before taking administrative action against an alleged offender, the CO must be convinced, on a balance of probabilities, that the CF member has committed an act of family violence.

21. A number of Criminal Code offences can be committed in the context of family violence.  Some examples are: cruelty to animals, mischief to property, corrupting children, failing to provide the necessaries of life, sexual exploitation, abduction, stalking, sexual assault, manslaughter and murder.  Also, where an accused has been convicted of an offence, a criminal court should increase the sentence for any aggravating circumstances, including cases where there is evidence that the offender, in committing the offence, abused the offender’s spouse or common-law partner or child. 

---

36 Ibid., marginal note: Operating Principles/Core Principles.
37 Ibid., marginal note: CF Response/Immediate Action.
38 Ibid.
39 Ibid., marginal note: CF Response/Administrative Action.
41 Ibid., s. 446.
42 Ibid., s. 430(4).
43 Ibid., s. 172.
44 Ibid., s. 215(2)(a).
45 Ibid., s. 266.
46 Ibid., s. 153.
47 Ibid., ss. 280-286.
48 Ibid., s. 423(1)(c),(e).
49 Ibid., s. 271.
50 Ibid., s. 236(b).
51 Ibid., s. 229.
52 Ibid., s. 718.2(a)(ii).
SECTION 4
REFERENCES

Legislation


Regulations

QR&O 1.075 (Common-Law Partner and Common-Law Partnership).

QR&O 4.26 (Circulation of Regulations, Orders, Instructions, Correspondence and Publications).

QR&O 10.06 (Transfer Between Sub-Components of the Reserve Force).

QR&O 19.14 (Improper Comments).

Orders, Directives and Instructions


CFAO 19-36 (Sexual Misconduct).

CFAO 20-50 (Assignment To and From Posts Outside Canada).

DAOD 1000-2 (Communicating Direction in the DND and the CF).

DAOD 5019-1 (Personal Relationships and Fraternization).

DAOD 5044-1 (Families).

DAOD 5044-4 (Family Violence).

CMP Instruction 15/06 (Common-Law Partnerships), online: DIN <http://hr3.ottawa-hull.mil.ca/docs/instruction/instructions/instruction_docs/word/instruction_15_06_e.doc>.

Secondary Material

A-PM-245-001/FP-001, _Military Human Resources Records Procedures_, online: DIN <http://hr.dwan.dnd.ca/dhrim/mhrrp/engraph/home_e.asp>.
CHAPTER 28
CONFLICT OF INTEREST

SECTION 1
INTRODUCTION

1. The underlying principle of any conflict of interest (COI) policy is that a public official who professes to represent the public interest must refrain from misusing their position and authority to serve their private interests.

2. At the heart of this matter is the requisite confidence that Canadian society must have in the integrity of public office holders and the public service. In 1974, the federal government directed that the Office of the Assistant Deputy Registrar General would be responsible for the administration of its COI guidelines. This marked the beginning of a closer focus on the subject of COI that has only intensified since that time.

3. The Treasury Board of Canada Secretariat (TB) policy, Conflict of Interest and Post Employment Code for the Public Service, came into effect on 1 September 2003. The Office of Public Service Values and Ethics, under the aegis of the Public Service Human Resources Management Agency of Canada, is responsible for the promotion of this policy. The COI guidelines for DND and the CF are based upon this policy.

4. A comprehensive overview and insight into the COI policy is essential in order to understand and ensure the effective application of these principles throughout the CF. The intent of this chapter, therefore, is to address the application of the COI policy to relationships between CF personnel and third parties outside of DND.

5. Key legislation addresses the more serious aspects of the COI regime, such as criminal and quasi-criminal activities. Commanders should be aware of the distinction between those activities that could constitute criminal activities and those that, while not by definition criminal, still contravene CF regulations and directives pertaining to COI. Being mindful of the distinction will help ensure that COs take appropriate measures with respect to the conduct of any investigation and when undertaking any administrative or disciplinary action. Consultation with the unit legal adviser may be appropriate when these acts may constitute an offence.

SECTION 2
RELEVANT LEGISLATION

Criminal Code

6. The Criminal Code contains four primary provisions that relate to COI matters:

   a. section 119 – Bribery of Judicial Officers;

   b. section 120 – Bribery of Officers;

---

3 The bribery provisions under s. 119 of the Criminal Code apply only to dealings with persons holding a ‘judicial office’ or persons who are federal Members of Parliament or members of a legislature of a province (MPPs). Accordingly, except for CF officers appointed by the Governor in Council (GiC) to serve as military judges in the Office of the Chief Military Judge, the offences prescribed in s. 119 of the Criminal Code would not apply to DND employees or CF members.
c. section 121 – Frauds on the Government; and

d. section 122 – Breach of Trust by Public Officer.  

7. In the context of the Criminal Code, offences are committed when there are improper, illegal dealings with a public officer or an official holding office. When determining the applicability of Criminal Code provisions to CF members within this context, it is essential that the definitions, as provided in section 2 and section 118 of the Criminal Code, be first considered. Section 2 of the Criminal Code identifies a ‘public officer’ as:

a. an officer of customs or excise;

b. an officer of the Canadian Forces;

c. an officer of the Royal Canadian Mounted Police; and

d. any officer while the officer is engaged in enforcing the laws of Canada relating to revenue, customs, excise, trade or navigation.

8. Section 118 of the Criminal Code defines an ‘office’ as including:

a. an office or appointment under the government;

b. a civil or military commission; and

c. a position or an employment in a public department.

9. Therefore, a commissioned officer within the CF would, by definition, be a ‘public officer’ or a person who holds an ‘office’ for the purpose of applying these sections of the Criminal Code.

10. Paragraph 120(a) of the Criminal Code makes it an offence for a public officer, including an officer of the CF, to accept, obtain, agree to accept or attempt to obtain for himself or any other person, any money with the intent to:

a. interfere with the administration of justice;

b. procure or facilitate the commission of an offence; or

c. protect from detection or punishment a person who has committed, or who intends to commit, an offence.

11. It is also an indictable offence to give or offer “any money, valuable consideration, office [or] place or employment” to a public officer to carry out any of the prohibited activities as referred to in paragraph 9 of this chapter.

12. The provisions of section 121 and section 122 of the Criminal Code are extensive and concern frauds on the Government of Canada and breach of trust by a public officer, respectively. The underlying element to each is the offer, or acceptance of an offer, to receive a benefit related to official business, in exchange for some form of advantage.

---

4 Criminal Code, R.S.C. 1985, C-46 [Criminal Code].
5 Criminal Code, s. 118.
6 Ibid., s. 120(b).
7 Ibid., ss. 121, 122.
National Defence Act

13. In respect of persons who are subject to the Code of Service Discipline (CSD), there are several offences under the National Defence Act (NDA) that relate to COI scenarios:

a. section 114 – Stealing;

b. section 115 – Receiving;

c. section 116 – Destruction, Loss or Improper Disposal;

d. section 117 – Miscellaneous Offences;

e. section 125 – Offences in Relation to Documents; and

f. section 129 – Conduct to the Prejudice of Good Order and Discipline.

14. Section 117 of the NDA most closely resembles the above-mentioned Criminal Code provisions. It is an offence for any person subject to the CSD to:

a. connive at the exaction of an exorbitant price for property purchased or rented by a person supplying property or services to the CF;

b. improperly demand or accept compensation, consideration or personal advantage in respect of the performance of any military duty or in respect of any matter relating to the CF or DND;

c. receive directly or indirectly, whether personally or by or through any member of his family or person under his control for his benefit, any gift, loan, promise, compensation or consideration, either in money or otherwise, from any person for assisting or favouring any person in the transaction of any business relating to any of Her Majesty’s Forces or to any forces cooperating therewith or to any mess, institute or canteen operated for the use and benefit of members of those forces;

d. demand or accept compensation, consideration or personal advantage for convoying a vessel entrusted to his care;

e. being in command of a vessel or aircraft, take or receive on board goods or merchandise that is not authorized to be taken or received on board; or

f. commit any act of a fraudulent nature not particularly specified in sections 73 to 128 of the NDA.

15. Section 129 of the NDA represents another potential avenue for laying disciplinary charges arising from situations of COI. In particular, a charge for contravening a regulation, order or instruction, (i.e., those contained within the DAOD 7021 series relating to COI), may be appropriate. Nevertheless, COs faced with a potential COI situation should consult with their unit legal adviser to confirm whether a disciplinary charge is appropriate.

8 National Defence Act, R.S.C., 1985, c. N-5, s. 60 [NDA]. Determinations regarding who is subject to the CSD are based upon the facts of a given case. It is possible that persons not normally subject to the CSD may be subject to it under certain circumstances.

9 NDA, s. 117.

10 QR&O 103.60, Note (E).

11 NDA, ss. 129(5). COs should be cautious to ensure that ss. 129(5) of the NDA is complied with; that is to say charges must not be laid where there is a more appropriate charge identified between ss. 73 to 128 of the NDA, unless it appears that an injustice has been done to the person charged by reason of the contravention.

28-3
Financial Administration Act

16. The Financial Administration Act (FAA) also creates civil and quasi-criminal liability for acts related to the “collection, management and disbursement of public money.” In particular, section 80 and section 81 of the FAA set out prohibitions similar to those set out in either the Criminal Code or the NDA for bribery or attempted bribery. A significant element is that section 80 and section 81 of the FAA also apply to any person “acting in any office or employment connected with the collection, management and disbursement of public money.” Hence, the scope of these provisions includes both officers and NCMS who are involved in the management or disbursement of public funds. This is an important distinction because section 130 of the NDA deems an offence under any Act of Parliament to also be an offence under the CSD.  

SECTION 3

CONFLICTS OF INTEREST

General

17. In part, public confidence in DND and the CF is based on the presumption that performance of public duties will be done for the public good and not for personal or private gain. This conceptual underpinning goes beyond the criminal and legislative prohibitions invoked by Canadian law. It carries over into situations where the public’s trust in the integrity, objectivity and impartiality of the CF may be adversely affected by their perceptions of unethical or biased behaviour by CF members.

Standards While Serving in the CF

18. The various QR&Os relating to COI tend to be limited in scope and broad in definition. They are, therefore, less focused on specifics than the amplifications contained in the DAODs. Nevertheless, there are specific prohibitions pertaining to COI in QR&Os that apply to all CF members.

19. QR&O 19.42 (Civil Employment) prohibits any officer or non-commissioned member from engaging in civil employment that the member’s CO deems to be either detrimental to the CF or that may bring discredit upon the CF or, in the case of regular force members, is considered continuous employment. Under the regulation, no officer or NCM on full-time service is permitted to authorize the use of their name or photograph to be linked to a commercial product unless the member’s name is part of a firm name. It should be noted that this article does not apply to a member who is on leave without pay or on retirement leave pending release from the CF.

20. QR&O 19.43 (Directorships and Interest in Companies) sets out the broad regulation concerning directorships and other related interests regarding corporate affairs. Accordingly, no regular force or reserve force member on active service will be allowed to act as a company director unless it is a private company, the company stock is not sold on the open market and NDHQ approval is obtained. Reserve force members, however, may retain directorships held prior to being placed on active service.

---

12 R.S.C. 1985, c. F-11, s. 80 [FAA].
13 NDA, para. 130(1)(a).
14 QR&O 19.42(1)(a)-(c).
15 QR&O 19.42(2).
16 QR&O 16.18 (Retirement Leave). Retirement leave includes all leave granted to an officer or NCM immediately prior to release from, or transfer from, the regular force, including, if applicable, annual leave as set out in QR&O 16.14 (Annual Leave), accumulated leave as set out in QR&O 16.15 (Accumulated Leave), rehabilitation leave as set out in QR&O 16.19 (Rehabilitation Leave) and special leave as set out in QR&O 16.20 (Special Leave).
17 QR&O 19.43 (Directorships and Interests in Companies).
21. The CF policy on COI is set out in the DAOD 7021 series. These orders and directives provide a more complete description of the standards enunciated in QR&Os. The series was authorized by the Chief of Review Services (CRS) and is administered by the Director Ethics Program (DEP). It should be noted that DND employees are also required to comply with the provisions of the public service code of ethics.\(^{18}\)

22. For DND and CF purposes, a COI arises “from an activity or situation that places a DND employee or CF member in a real, potential or apparent conflict between their private interest and their official duties and responsibilities.”\(^{19}\)

23. Officially, the policy directive contained within the DAOD 7021 series on COI commits DND and the CF to the minimization of COI and the resolution of those conflicts, when they arise, in favour of the public interest. Therefore, all DND employees and CF members shall be aware of the intent of the COI directive and take appropriate action to ensure that COI do not occur.\(^{20}\)

### Authorities

24. The authorities related to the COI directives are specific. The DM and CDS have the authority to:

   a. rule on whether a COI exists and determine the requirement for a DND employee or CF member to divest an asset;
   
   b. rule on offers of employment for public servants at the level of ‘EX 03’ and above and general/flag officers;
   
   c. designate positions below or equivalent to the level of ‘EX minus 2’ and the rank of LCol/Cdr as being subject to post-employment compliance measures, if such positions involve official duties that raise post-employment concerns;
   
   d. exclude positions from the application of post-employment compliance measures if the official duties of these positions do not raise post-employment concerns;
   
   e. reduce or waive the normal, one-year limitation period on post-DND or CF employment; and
   
   f. approve the acceptance of gifts, hospitality and other benefits by DND employees and CF members.\(^{21}\)

25. Level 1 Advisors (e.g., group principals), have the authority to approve the acceptance of any gifts, hospitality and other benefits received by CF members and DND employees.\(^{22}\) Level 2 Advisors situated outside of the National Capital Region (NCR) have the authority to approve the acceptance of gifts or hospitality received by CF members. Level 1 and 2 Advisors are identified in the Defence Plan On-Line.\(^{23}\)

26. CRS exercises the authority to determine whether a COI exists and decides the subsequent action that is to be taken by a “DND employee or CF member to avoid or withdraw

---


\(^{19}\) DAOD 7021-1 (Conflict of Interest), marginal note: Definitions/Conflict of Interest.

\(^{20}\) Ibid., marginal note: Principles.

\(^{21}\) DAOD 7021-0 (Conflict of Interest and Post-Employment), marginal note: Authorities/Authority Table.

\(^{22}\) Ibid.

from an activity or situation.” CRS also rules on offers of employment for ‘EX 02’ equivalent positions for DND employees and for members at the rank of Col/Capt(N) and below. Finally, CRS may approve the acceptance of a contract with the Government of Canada by a former CF member or DND employee.

Key Definitions

27. There are several important definitions that must be considered when determining policy applicability and the necessary protocols for addressing a potential COI. Whenever a situation arises that meets the requirements of one of these definitions, decision-makers are expected to apply the COI directives.

28. A ‘Former Senior Employee’ refers to “a former DND employee who occupied an executive position (i.e., an ‘EX’ or equivalent position), or a position equivalent to the ‘EX minus 1’ or ‘EX minus 2’ level and who has retired from, or has ceased to be, employed in the Public Service.”

29. A ‘Former Senior Member’ refers to an officer of the rank of LCol/Cdr or above who, if a member of the regular force, has commenced retirement leave or is released from the CF, whichever occurs first or, if a member of the reserve force on full-time service, who ceases to serve on full-time service or is released from the CF, whichever occurs first.

30. A ‘Senior Employee’ is a “DND employee occupying an executive position (i.e., an ‘EX’ or equivalent position), or a position equivalent to the ‘EX minus 1’ or ‘EX minus 2’ level.” A ‘Senior Member’ is an officer of the rank of LCol/Cdr who is in the regular force or is a member of the reserve force employed on full-time service.

Assets, Liabilities and Trusts

31. The nature of a DND employee or CF member’s personal finances is a key aspect in the identification and proper management of potential COI. All CF members and DND employees must be able to determine if their personal financial portfolios contain exempt or non-exempt assets and liabilities.

32. Exempt assets are defined by the DAOD as “all assets and interests of a non-commercial character intended for the private use of DND employees, CF members and their families.” These include:

   a. residences, recreational properties and farms used or intended for use by DND employees, CF members or their family members;
   b. household goods and personal effects;
   c. works of art, antiques and collectibles;
   d. automobiles and other personal means of transportation;
   e. cash and deposits;

---

24 DAOD 7021-0 (Conflict of Interest and Post-Employment), marginal note: Authorities/Authority Table.
25 Ibid.
26 DAOD 7021-1 (Conflict of Interest), marginal note: Definitions.
27 Ibid.
28 Ibid.
29 Ibid., marginal note: Assets, Liabilities and Trusts/Overview.
f. Canada Saving Bonds and other similar investments in securities of fixed value, issued or guaranteed by any level of government in Canada or agencies of those governments;

g. Registered Retirement Savings Plans (RRSPs) and Registered Education Savings Plans (RESPs) that are not self-administered;

h. investments in open-ended mutual funds;

i. guaranteed investment certificates (GICs) and similar financial instruments;

j. annuities and life insurance policies;

k. pension rights;

l. money owed by a previous employer, client or partnership; and

m. personal loans receivable from immediate family members of a CF member or DND employee and small personal loans receivable from other persons to whom a CF member or DND employee has loaned money.  

33. Non-exempt assets and liabilities are simply defined as assets that are not deemed to be exempt assets such as:

a. publicly traded securities of corporations and foreign governments and self-administered RRSPs and RESP that are composed of these securities, if these securities are held directly and not through units in mutual funds;

b. interests in partnerships, proprietorships, joint ventures, private companies and family businesses; in particular, those that own or control shares of public companies or that do business with the government;

c. commercially-operated farm businesses;

d. real property that is not for the private use of a DND employee, CF member or their family members;

e. commodities, futures and foreign currencies held or traded for speculative purposes;

f. assets placed in trust or resulting from an estate of which a DND employee or CF member is a beneficiary;

g. secured or unsecured loans granted to persons other than to members of the immediate family of a DND employee or CF member;

h. any other assets or liabilities that could give rise to a real, apparent or potential COI due to the particular nature of the official duties of a DND employee or CF member; and

i. direct and contingent liabilities in respect of any of the above assets.  

---

31 Ibid., marginal note: Assets, Liabilities and Trusts/Non-Exempt Assets and Liabilities. Note that the list provided here is not exhaustive.
34. All non-exempt assets must be reported where they may give rise to a real or apparent COI in respect of the official duties of a DND employee or CF member. The CRS COI section is available to answer any queries related to the types of assets and liabilities owned by an individual.32

35. The requirement to dispose of, or divest, non-exempt assets held by DND employees or CF members will be determined by either the DM or the CDS. If divestment is required, the divestment of non-exempt assets must occur within 120 days of the appointment, transfer or deployment that precipitated the COI. Assets must either be divested or placed in a blind trust.

36. Proof that the non-exempt asset has been properly disposed of in accordance with the policy standard will be required. A proper arm’s length sale requires a broker’s sales receipt or equivalent that shall be provided to the DM or CDS, as appropriate. The DM or the CDS, based upon the recommendation of their respective Ethics Counsellor, may approve certain divestment-related expenditures.

37. If divestment is by means of a blind trust, the Office of the Ethics Counsellor in Industry Canada assists the DM and DND employee or the CDS and the CF member to determine whether a specific blind trust meets the requirements of the COI measures required under the DAOD. A DND employee must also comply with the Public Service Code.33

Principles of Conduct

38. DND employees and CF members are required to conduct their private affairs in a manner that will maintain public confidence in the performance of their official duties. It is essential that the performance of any duty be able to withstand "the closest public scrutiny."34 Mere compliance with the law is not always sufficient to remain within the conceptual confines of the directive.35 The enunciated guidelines and prohibitions are specific and clear. There are four COI situations that are specifically dealt with in DAOD 7021-1 (Conflict of Interest):

   a. contracts;
   b. post employment;
   c. the acceptance of gifts, hospitality and other benefits; and
   d. sponsorships and donations.

These subjects will be addressed in more detail in subsequent sections of this chapter.

39. All COI decisions must be made in the public interest. If there is a COI between a CF member’s private interests and the interest of the public, the conflict shall be resolved in favour of the public interest.36

40. It is also prohibited for DND employees and CF members to assist a person or private entity with government dealings if this could result in “preferential treatment” for the third party. Furthermore, family members, friends and organizations affiliated with a DND employee or CF member are neither entitled to, nor should they expect to receive, any preferential treatment resulting from the employee or CF member holding a position of public trust. It is important to note that the provision of information that is already readily available to the public is not considered to constitute “preferential treatment” and, as such, is not prohibited by the COI policy.

---

32 Ibid., marginal note: Assets, Liabilities and Trusts/Overview. See also Form 7021-1A (Confidential Report).
33 Values and Ethics Code for the Public Service.
34 DAOD 7021-1 (Conflict of Interest), marginal note: Principles/Requirement.
35 Ibid.
36 Ibid.
41. All DND employees and CF members must avoid being placed, or the appearance of being placed, under any obligation to any person or entity that could profit from any special consideration.\textsuperscript{37} CF members and DND employees are likewise prohibited from taking advantage of any information “obtained in the course of their official duties and that is not generally available to the public.”\textsuperscript{38}

42. DND employees and CF members cannot use or allow the use of any government property for any activity that is not ‘officially’ approved.\textsuperscript{39}

43. There is a positive duty for all CF members to review DAODs concerning COI. DND employees must also adhere to the Public Service Code. A personal review of the COI policies, and the obligations they specify, must be done by:

   a. DND employees upon initial appointment;
   b. CF members on enrolment; or
   c. both, each time a major change occurs in their personal affairs or official duties.

44. DAOD 7021-1 (Conflict of Interest) requires a DND employee or a CF member to complete and submit the form at DAOD 7021-1A (Confidential Report) if an identified activity or change occurs that could be deemed a COI. Any information provided by the employee or member is considered personal information and must be designated Protected. It is retained in the personal information bank, DND/P-PE-864, and is subject to the provisions of the Privacy Act.\textsuperscript{40}

45. When a DND employee is first appointed, transferred or deployed into the department or at the time a person is initially enrolled into the CF as a member, those persons are required to submit the Confidential Report to the CRS COI section within 60 days if there is anything in their personal circumstances that could give rise to a COI.\textsuperscript{41}

46. If there is a change involving official duties, personal affairs or the ownership of non-exempt assets or liabilities that could give rise to a COI, a Confidential Report must be submitted to the CRS COI section when the change occurs.\textsuperscript{42}

47. If a DND employee or CF member engages in outside activities, including employment, that creates a potential COI, a Confidential Report must be submitted to the CRS COI section prior to commencing the activity or prior to accepting the employment. CF members must also refer to QR&O 19.42 (Civil Employment) and CFAO 19-7 (Civil Employment – Military Personnel) for direction and restrictions on engaging in activities or employment outside their military duties. Any such Confidential Report submitted to the CRS COI section must also include the CO’s permission for the member to engage in the activity or employment.\textsuperscript{43} If a DND employee or a CF member wishes to contract with the Government of Canada, the Confidential Report must be submitted to the CRS COI section prior to the contract coming into effect.\textsuperscript{44}

\textsuperscript{37} Ibid.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid.
\textsuperscript{40} Ibid., marginal notes: Conflict of Interest Measures/Submitting a Confidential Report; Conflict of Interest Measures/Privacy Issues.
\textsuperscript{41} Ibid., marginal note: Conflict of Interest Measures/Submitting a Confidential Report.
\textsuperscript{42} Ibid.
\textsuperscript{43} Ibid.
\textsuperscript{44} Ibid.
SECTION 4

CONTRACTS

48. QR&O 19.39 (Dealing with Contractors) prohibits officers and NCMs from having private dealings with contractors, their agents or employees that could lead to a “suspicion of being influenced in the discharge of the member’s duty.” Further, CF members are precluded from giving testimonials regarding the quality of products or the services provided by a contractor. Finally, CF members are not permitted to receive any “pecuniary benefit or personal advantage” from any contract made for DND.

49. In general, all contracts must follow the provisions outlined in DAOD 3004-0 (Contracting), DAOD 3004-1 (Procedural Overview – Contracting) and DAOD 3004-2 (Service Contracts) in order to ensure compliance with DAOD 7021-2 (Post-Employment) or chapter 3 of the Public Service Code. All negotiators and drafters of contracts must adhere to these orders and directives.

50. Specific attention must also be given to ensure the insertion of appropriate COI-related clauses when drafting contracts. Regarding contracts concerning former employees and service personnel, the following clause is to be inserted in the contract:

It is a term of this contract that no individual, for whom the post-employment provisions of the Conflict of Interest and Post-Employment Code for Public Office Holders (1994) or the Conflict of Interest and Post-Employment Code for the Public Service (1985) apply, shall derive a direct benefit from this contract unless that individual is in compliance with the applicable post-employment provisions.

51. Regarding contracts concerning the employment of a specific individual, the following clause is to be inserted in the contract:

It is a term of this contract that no individual, for whom the post-employment provisions of the Conflict of Interest and Post-Employment Code for Public Office Holders (1994) or the Conflict of Interest and Post-Employment Code for the Public Service (1985) apply, shall derive a benefit from this contract unless that individual is in compliance with the applicable post-employment provisions; and that during the term of the contract any persons engaged in the course of carrying out this contract shall conduct themselves in compliance with the principles in the Conflict of Interest and Post-Employment Code for Public Office Holders (1994), which are the same as those in the Conflict of Interest and Post-Employment Code for the Public Service (1985), with the addition that decisions shall be made in the public interest and with regard to the merits of each case. Should an interest be acquired during the life of the contract that would cause a conflict of interest or seem to cause a departure from the principles, the Contractor shall declare it immediately to the Departmental Representative.

---

45 QR&O 19.39(1).
46 DAOD 7021-1 (Conflict of Interest), marginal note: Conflict of Interest Measures/Control of Contracts.
48 Ibid.
49 Ibid.
52. Former and current DND employees and CF members at every level are permitted to contract for services but the contract process must be done honestly and prudently in order to stand the test of public scrutiny. The TB Contracting Policy requires all DND employees and CF members who wish to provide contract services to the Government of Canada to first seek approval from CRS. All parties engaged in the contracting process must make all potential employees and contractors aware of this provision.  

53. Any letter of offer to a prospective DND employee must include the following statement, "You will find enclosed a copy of the Values and Ethics Code for the Public Service [Code]. This Code is a key policy for the management of human resources and is part of your conditions of employment."  

Follow-up Actions  

54. A DND employee or a CF member may grieve any decision made with respect to the appropriate arrangements necessary to comply with DAOD 7021-1 (Conflict of Interest). A DND employee who does not comply with this DAOD or the Values and Ethics Code for the Public Service could be disciplined and such action may include the termination of their employment. Additionally, a CF member who fails to comply with DAOD 7021-1 (Conflict of Interest) may have their duties changed, have any pending promotion deferred or be subject to administrative or disciplinary action or both.  

SECTION 5  

POST EMPLOYMENT STANDARDS  

55. DND employees and CF members shall not act in such a manner as to take improper advantage of their previous office. In general, this policy applies to senior employees, senior members, former senior employees and former senior members. Where the duties of the position raise COI concerns, it is also possible that the DM or the CDS may designate specific positions where the incumbent holds a lower employment level or rank. A senior member is identified as an officer of the rank of LCol/Cdr who is in the regular force or is on full-time service with the reserve force.  

56. The Assistant Deputy Minister Human Resources – Military (ADM(HR-Mil)) is required to ensure that promotion messages for officers being promoted to the rank of LCol/Cdr inform the officers of their post-employment responsibilities. ADM(HR-Mil) is also required to inform CRS of senior CF members who are intending to leave the CF in order that sufficiently worded ‘exit letters,’ reiterating post-employment responsibilities, will be sent to the members.  

57. Ultimately, the responsibility for reporting potential COI rests with the DND employee or CF member. Any offer of employment received by a senior employee or a senior member that could put them in a “real, apparent or potential” COI must be reported to the CRS COI section using Parts I and II of Form 7021-2A (Post-Employment Declaration) at DAOD 7021-2 (Post-Employment). Accordingly, senior employees and senior members must report all such offers of employment they accept.
58. It is important for the senior employee or senior member to identify any significant official dealings they may have had with their prospective employer in their official capacities within the Public Service or the CF. A ‘significant official dealing’ is defined as, “any dealings of substance involving a government-approved business or activity, including negotiations and major contracts.” The DM or CDS decision regarding the COI will be provided in writing by CRS to the individual who has disclosed the offer.

59. During the one-year post employment period, former senior employees and former senior members are prohibited from engaging in certain activities. They cannot accept an appointment to a board of directors or employment with entities with which they had significant official dealings, either personally or through their subordinates. They cannot make “representations for, or on behalf of, persons to any department” with which they had significant official dealings, either directly or through their subordinates. They also cannot give advice to their clients by using non-public information relating to programs or policies of the CF or DND or departments with which “they had a direct and substantial relationship.”

60. Within this context, ‘making a representation’ refers to “becoming involved on behalf of a new employer in relation to any contract in any negotiating activities,” with the CF or DND when the former senior member, or their subordinates, “had significant official dealings during the last year of employment or service.” This may also include the former senior member’s attendance at a meeting in any capacity or the seeking of information regarding a project.

61. The one-year limitation period may be reduced or waived by the DM or the CDS based upon an assessment of:
   a. the circumstances under which the termination of employment or service occurred;
   b. general employment prospects;
   c. the significance to the federal government of information possessed by virtue of that person’s position in the CF or DND;
   d. the desirability of a rapid transfer of that person’s knowledge and skills from the CF or DND to private, other government or non-government sectors;
   e. the degree to which the new employer might gain unfair commercial or private advantage by hiring that employee;
   f. the authority and influence possessed while in the CF or DND; and
   g. the disposition of other cases.

62. It is possible for a panel to be convened to address special cases. These cases usually relate to the nature of significant official dealings or a request for a waiver or a reduction in the one-year limitation period. ADM(HR-Civ) and ADM(HR-Mil) jointly chair the panel. The panel membership is comprised of the following:
   a. Assistant Deputy Minister (Materiel);

---

59 Ibid., marginal note: General Rules/Decision on Offer of Employment.
60 Ibid., marginal note: General Rules/Prohibitions of Certain Activities.
61 Ibid., marginal note: General Rules/Making Representations.
62 Ibid.
63 Ibid.
64 Ibid., marginal note: General Rules/Reduction of the One-Year Limitation Period.
b. Assistant Deputy Minister (Public Affairs);

c. DND/CF Legal Advisor;

d. CRS; and

e. Ethics Counsellor.  

63. The COI policies have the potential to have an adverse impact on all involved if they are mishandled or misapplied. In the event of a significant breach of the COI guidelines, the public trust in the CF or DND would be put at risk and the CF member or DND employee could be subject to disciplinary or administrative sanctions. Quite significantly, however, any contract signed between DND and a contractor is subject to scrutiny and may be at risk if any COI policy provisions are contravened. Such a contravention occurred and the contract was rescinded in the case of LGS Group Inc. v. Canada (Attorney General).  

Relevant Jurisprudence

64. LGS Group Inc. (LGS), applied to the Federal Court of Canada (FCC) to review a decision by the Minister of Public Works and Government Services to rescind a contract between LGS and the Government of Canada. The background to the case is as follows: a former CF officer took his release from the CF under the terms of the Forces Reduction Program (FRP). He was then hired by LGS to provide consulting services in respect of a work proposal that was to be submitted to DND. LGS paid the former officer a total of $38,000 for 3 months of consulting work. LGS’s work proposal was submitted to the same NDHQ directorate where the former officer had been the director until taking his release. The proposal was accepted and LGS was awarded a government contract to perform the work.  

65. The Minister of Public Works and Government Services decided to rescind the contract with LGS based on a violation of a condition of the contract where LGS had agreed that, “no former public office holder of the Government of Canada, who is not in compliance with the provisions of the Conflict of Interest and Post Employment Code for Public Office Holders, shall derive any direct benefit from this contract.”  

66. The FCC determined that the former officer had violated the provisions of CFAO 19-37 (Conflict of Interest and Post-Employment Compliance Measures) prohibiting CF members or former CF members, for a period of one year, from giving counsel to any commercial venture regarding CF programs or policies or affecting any department with which the member or former member had “a direct and substantial relationship” during the preceding year.  

67. The Court determined that the former officer was in violation of this order because the amount of recompense and the short duration of the consulting contract indicated that, “the applicant [LGS] would not have employed him to provide it with information or counsel which could be found in a government-issued pamphlet or at the public library or through services of a professionally trained editor.” Accordingly, the FCC upheld the Minister’s decision to rescind the contract with LGS.  

---

66 Ibid., marginal note: Special Cases/The Panel. The Ethics Counsellor is an Industry Canada officer appointed by the Prime Minister who is charged with the administration of the Public Service Code under the general direction of the Clerk of the Privy Council.
67 Ibid., at para. 7.
69 Ibid., at para. 31.
70 Ibid., at para. 40.
SECTION 6

ACCEPTANCE OF GIFTS, HOSPITALITY AND OTHER BENEFITS

68. There is a common practice in business and diplomacy to offer gifts, hospitality and other benefits for the purposes of facilitating working relationships. Gifts and hospitality are unlimited in their variety but, in many cases, are of nominal value. Nevertheless, DND employees and CF members are often faced with the decision of whether to accept tokens of appreciation or promotional items.

69. QR&O 19.40 (Acceptance of Gifts From Foreign Sources) precludes CF members from accepting gifts, rewards or favours from a foreign sovereign, state or functionary without the approval of the MND. Moreover, paragraph 117(c) of the NDA makes it an offence to receive any gift in exchange for assisting or favouring any person in the “transaction of any business relating to any of Her Majesty’s Forces.” The important element is that there must be the intent to assist or favour the person as part of the transaction of receiving the gift. Hence, caution must be exercised and approval should be sought from CRS in order to protect the interests of the CF member who is receiving the gift.71

70. DND employees and CF members are also prohibited from soliciting gifts or transfers of economic benefit. Moreover, they cannot accept gifts unless the gifts are incidental gifts, customary hospitality or other benefits of minimal value. To do otherwise requires written permission from the proper authority.72 The prohibition includes free or discounted tickets to sporting events or other recreational activities and events that result from a business relationship, be it real or potential. The fact that employees or members pay for discounted tickets out of their own pockets does not avoid the perception of a COI.73

71. The policy allows the acceptance of gifts, hospitality or other benefits without written approval if they are infrequent, of minimal value and relate to official duties. These items must relate to acceptable courtesies as a function of hospitality or protocol. Under no circumstances should the acceptance of these items adversely affect the integrity of the individual concerned or public confidence in DND or the CF.74

72. Gifts, hospitality or other benefits may include:
   a. a token gift, such as a mug;
   b. an occasional dinner or lunch, provided the cost is reasonable;
   c. a relatively modest and reasonably priced invitation to a public reception;
   d. an invitation to a conference or professional development activity; or
   e. an invitation to a government-sanctioned event, if it will be of benefit to the Government of Canada, DND or the CF.75

73. When CF members or DND employees are uncertain whether they may accept an offer without written approval,76 they must not accept the offer without first seeking guidance from their CO or supervisor. Regardless of any guidance received, however, the ultimate responsibility to

71 DAOD 7021-3 (Acceptance of Gifts, Hospitality and Other Benefits), marginal note: General Rules/Senior Authority Responsibilities.
72 Ibid., marginal note: General Rules/Accepting an Offer Without Written Approval.
73 Ibid., marginal note: General Rules/Offers.
74 Ibid., marginal note: General Rules/Accepting an Offer Without Written Approval.
75 Ibid., marginal note: General Rule/Examples.
76 Examples of such offers that may be accepted without written approval are set out in DAOD 7021-3 (Acceptance of Gifts, Hospitality and Other Benefits), marginal note: General Rules/Examples.
comply with DAOD 7021-3 (Acceptance of Gifts, Hospitality and Other Benefits), and accountability for the acceptance of any offer, remains with the member or employee.  

74. With the prior written approval of an approving authority, a CF member or DND employee may accept a gift, hospitality or other benefit.  

The DM, the CDS, a Level 1 Advisor or Level 2 Advisor outside of the NCR may authorize the acceptance of the following:

a. accommodation;

b. goods or services, including transportation, not of a minimal value;

c. gifts, rewards or favours from foreign sources that are not of a minimal value; or

d. tickets or fees for, or invitations to, sporting, cultural or recreational activities.

75. Acceptance can only be authorized if there is no real or potential COI or there is no potential for an adverse perception. Acceptance must also be premised on the larger public or DND or CF interest, as per this DAOD.

76. Under exceptional circumstances, a gift or hospitality offer may be accepted without prior written approval, but all such acceptances must be disclosed in writing as soon as possible through the chain of command. If a CO or supervisor is of the opinion that there is a COI, the CF member or DND employee must submit a completed DAOD 7021-1A (Confidential Report), as found at DAOD 7021-1 (Conflict of Interest), through the chain of command to the approving authority.

SECTION 7

SPONSORSHIP AND DONATIONS

77. DAOD 7021-4 (Sponsorship and Donations) permits the CF and DND to engage in sponsorships or to receive donations from an outside entity.

78. A ‘donation’ is defined as:

...the provision by contribution, gift or bequest by a person, group or organization external to the CF and DND of funds, goods, facilities or services without cost to the CF or DND and without expectation of any benefit in return (other than public acknowledgement, if agreed to by both parties) which may or may not support a particular DND or CF event or activity.

79. A ‘sponsorship’ is defined as:

... a collaborative arrangement between the CF and DND and persons, groups or organizations external to the CF and DND. In such an arrangement, funds, goods, facilities or services are provided to the CF and DND to support a particular CF or DND event or activity in exchange

---

77 DAOD 7021-3 (Acceptance of Gifts, Hospitality and Other Benefits), marginal note: General Rules/Accepting an Offer Without Written Approval.
78 Ibid., marginal note: General Rules/Accepting an Offer With Written Approval.
79 Ibid.
80 Ibid.
82 DAOD 7021-4 (Sponsorships and Donations), marginal note: Definitions/Donation.
Every sponsorship or donation involving the CF or DND must be in the public interest and especially in the interest of the CF and DND. It must accord with national aims and be politically neutral. Each sponsorship must represent an equitable exchange between the sponsor and the CF or DND. The instances of the sponsorship or donation must be thoroughly documented to withstand public scrutiny. Most importantly, there must not be any “expectation or perception of preferential treatment” for current or future interaction with the sponsor or donor and there must not be any product or service endorsement attributable in any way to the CF, DND or the Government of Canada.

Accountability in the management of all sponsorships or donations is critical. All resources that have been provided must be accounted for either internally or publicly. DAOD 7021-4 (Sponsorships and Donations) specifies the exact accounting procedures that must be followed in given instances. The general practice requires complete records of the following:

- all resources being sought or provided;
- written or verbal agreements made by all parties;
- specific direction from the donor or sponsor on how the resources are to be used (if provided by the donor or sponsor);
- how the resources were used;
- disposition of unused sponsorship or donation resources; and
- if applicable, what benefits or advantages will be provided to the sponsors or donors.

All sponsorships or donations require the completion of Form DAOD 7021-4A (Department of National Defence and Canadian Forces Sponsorship and Donation Summary and Approval Form), as found at DAOD 7021-4 (Sponsorships and Donations); copies of which are to be forwarded to the sponsorship or donation coordinator and the local comptroller.

The following is a list of approving authorities and their respective financial approving authority limits as they relate to the total value of any sponsorship or donation:

- MND may approve values above $1,000,000;
- DM and CDS may approve values up to $1,000,000;
- Level 1 Advisors may approve values up to $100,000;
- Level 2 Advisors may approve values up to $50,000;
- Directors and COs of bases, wings, brigades, area support groups, area support units, HMC Ships and depots may approve values up to $25,000; and
- COs of stations, units and single points of responsibilities (SPR) may approve values up to $15,000.

---

83 Ibid.
84 Ibid., marginal note: Planning/Records Keeping.
85 Ibid., marginal note: Financial Administration/Identifying and Approving Sponsorships and Donations.
86 Ibid., marginal note: Planning/Approval.
SECTION 8
ADDITIONAL GUIDANCE

84. COs should ensure that all their military and civilian personnel are acquainted with the provisions of the COI policies in order that private interests and the professional integrity of their personnel are maintained. When making decisions related to business and community-related activities, the appropriate legal prescriptions, orders and guidelines should be reviewed to determine the appropriateness of DND and CF participation. While final decisions will, in many cases, be made by authorities higher than the CO, a comprehensive understanding of COI policy on the part of COs, and familiarity on the part of all CF members and DND employees, will avoid confusion and minimize the possibility of embarrassing situations for the individual, the CF, DND or the Government of Canada. In that context, it should be noted that Level 1 Advisors should ensure that appropriate oversight and control are maintained within their respective areas of responsibility.

SECTION 9
REFERENCES

Legislation


Regulations

QR&O 15.01 (Release of Officers and Non-Commissioned Members).


QR&O 16.15 (Accumulated Leave).

QR&O 16.18 (Retirement Leave).

QR&O 16.19 (Rehabilitation Leave).

QR&O 16.20 (Special Leave).

QR&O 19.39 (Dealings with Contractors).

QR&O 19.42 (Civil Employment).

QR&O 19.43 (Directorships and Interest in Companies).

QR&O 103.60 (Conduct to the Prejudice of Good Order and Discipline).

Orders, Directives and Instructions

CFAO 19-7 (Civil Employment – Military Personnel).

DAOD 3004-0 (Contracting).
DAOD 3004-1 (Procedural Overview – Contracting).
DAOD 3004-2 (Service Contracts).
DAOD 7021-0 (Conflict of Interest and Post-Employment).
DAOD 7021-1 (Conflict of Interest).
DAOD 7021-2 (Post-Employment).
DAOD 7021-3 (Acceptance of Gifts, Hospitality and Other Benefits).
DAOD 7021-4 (Sponsorship and Donations).
DAOD Form 7021-1A (Confidential Report).

Jurisprudence


Secondary Material


Letter of Treasury Board of Canada (17 August 1998), Contracting with Current and Former Public Servants.

Letter from DM and CDS (3 March 2000), Conflict of Interest.

Public Service Human Resources Management Agency of Canada (PSHRMAC), Delegation of Authority under the Conflict of Interest and Post-Employment Code for the Public Service (Ottawa: Office of Public Service Values and Ethics, 2003).


VCDS, Defence Plan On-Line, online: DIN <http://vcds.mil.ca/DPOnline/Main_e.asp>.
CHAPTER 29

POLITICAL ACTIVITIES

SECTION 1

INTRODUCTION

1. The CF and its members must refrain from taking an active role in the political affairs of any level of government in Canada where such activity may bring into question the political neutrality of the Forces. For example, in respect of federal and provincial elections, members of the regular force do not enjoy the ordinary right of Canadian citizens to run for and hold political office (although they may participate in municipal politics with the permission of the CDS). If a member of the regular force was elected to Parliament or a provincial legislature, it would be impossible to maintain the appearance and the separation between the duties of the member and those performed while holding public office. It is imperative that the public does not perceive that the CF favours one political party over another or that the CF has any role to play in the political affairs of the country at any level.

2. Supreme Court of Canada (SCC) judgments have recognized the importance of the political neutrality of the Public Service. Although CF members are not public servants as such and are not subject to the Public Service Employment Act (PSEA), the principle of political neutrality and loyalty to the Government of Canada is, at a minimum, comparable to that of the Public Service. The CF must remain politically neutral. The mandate of the CF and the obligations it imposes on its members demand neutrality and impartiality in the execution of their military duties. CF members may still hold political membership or views and express political opinions as individuals provided there is no connection, real or perceived, between their personal opinions and government policies and actions or how they are implemented.

SECTION 2

POLITICAL ACTIVITIES ON DEFENCE ESTABLISHMENTS

3. QR&O 19.44 (Political Activities and Candidature for Office) specifically addresses the issue of political activities in the CF. It sets out the responsibilities of COs, the CDS and the MND. It also addresses the prohibition against the involvement of CF members in certain political activities.

4. The CDS publication dealing with federal, provincial and territorial electoral events sets out rules governing political activities on defence establishments and the political activities of CF members. It also governs a CF member’s entitlement to vote and the procedures associated with that entitlement. For the purposes of this chapter, we will deal with political activities on defence establishments and the political activities of CF members only. The procedures associated with CF members voting in federal general elections are explained in Chapter 10 (Elections) of this manual.

5. COs are to ensure that any activity that takes place on a base or defence establishment under their command does not affect the actual or perceived political neutrality of the CF.
6. COs shall ensure that no political meetings, speeches, political advertising in areas exposed to public view, political canvassing or advertising (except by mail), takes place on the base or defence establishment under their command. COs are to avoid making any decisions that will lead to the use of the base or defence establishment under their command for any of the political purposes outlined above.  

7. The definition of ‘political meetings’ and ‘political speeches’ is prescribed in QR&O 19.44(1). A political meeting is defined as “a meeting that is planned for a specific time and place and is designed to promote political action by those attending.” Examples of political meetings and political speeches are meetings and speeches that are intended to solicit votes or funds for a candidate in a federal, provincial, territorial or municipal election or to lobby to maintain or change public policy at the federal, provincial, territorial or municipal levels.  

8. QR&O 19.44(1) also provides the definition for ‘political advertising’ and ‘political canvassing.’ Political advertising is any “advertising, the purpose of which is to gain support for the election of a candidate for federal, provincial or municipal office or to gain support for, or to encourage some action in support of, the maintenance or change of a policy that is the responsibility of government at the federal, provincial or municipal level.” Political canvassing is defined as “an activity by which an individual approaches another individual to gain support for the election of a candidate for federal, provincial or municipal office or to gain support for, or to encourage some action in support of, the maintenance or change of a policy that is the responsibility of government at the federal, provincial or municipal level.”  

9. Subject to the prohibitions against the active involvement of regular force members in political activities, the prohibitions against political activities on a defence establishment do not apply to any activity that takes place within the confines of military quarters in Canada.  

10. COs shall permit political canvassing or distribution of political materials in military quarters, if security permits.  

11. The CDS has the authority to authorize certain political activities on a defence establishment. For instance, the CDS may allow free-time political broadcasting using CF broadcasting facilities. During a federal general election, the Canada Elections Act (CEA) regulates political broadcasting. Free-time political broadcasting by political parties on CF broadcasting facilities, as permitted by the CEA, may be authorized pursuant to QR&O 19.44(5). No CF broadcasting facilities shall broadcast any paid political publicity.  

12. There are also certain political activities that require authorization by the MND. The use of a defence establishment for political meetings or political speeches would be one such activity. The MND may authorize this use in exceptional circumstances and where no practical, alternative location can be found.  

---

6 ibid.  
7 QR&O 19.44(1) and Note (A) thereto.  
8 QR&O 19.44(1).  
9 QR&O 19.44(7).  
10 QR&O 19.44(3).  
11 QR&O 19.44(4).  
12 ‘Broadcasting’ means “any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place.” Broadcasting Act, S.C. 1991, c.11, s. 2(1).  
13 QR&O 19.44(5).  
14 S.C. 2000, c. 9, Part 16 [CEA].  
15 A-LG-007-000/AF-001.  
16 QR&O 19.44(6).
13. “Every citizen of Canada has the right to vote in an election of a member of the House of Commons or in an election of a member of a provincial legislative assembly and to be qualified for membership therein.” When it comes to political activities, regular force members do not enjoy all of the rights afforded civilians. Certain political activities are prohibited because they may be seen as affecting the actual or perceived neutrality of the CF. For example, CF regulations prohibit regular force members from taking an active part in the affairs of a political party or organization. Regular force members are also prohibited from making a political speech to electors or announcing themselves or allowing themselves to be announced as a candidate or prospective candidate for election to the Parliament of Canada or a provincial legislature. Civil courts have significantly reduced similar restrictions that were applied to members of the Public Service. However, the CF prohibitions remain in effect for regular force members. When it comes to accepting an office in a municipal corporation or other local government body or allowing themselves to be nominated for election to such an office, CF members must first obtain the permission of the CDS.

14. CF regulations provide that no CF member shall organize or take part in a political meeting on a defence establishment. It is the position of the CF that it is the ultimate protector of Canadian democracy. Further, a CF member’s duty to safeguard the political neutrality of the CF is an important and valid objective and the limits set out in the regulations are reasonable and justifiable in a free and democratic society.

15. In the 1991 case of Osborne v. Canada (Treasury Board), a number of public servants challenged the constitutionality of paragraphs 33(1)(a) and (b) of the PSEA that prohibited public servants from working for or against a candidate or political party, respectively. Comparatively, subsection 33(2) of the Act allowed public servants to attend political meetings or contribute money to a candidate or a political party.

16. Osborne was seeking a declaration that section 33 of the Act was of no force or effect because it violated the freedom of expression rights as guaranteed in paragraph 2(b) of the Charter. The SCC held that section 33 of the PSEA did, indeed, violate Osborne’s section 2 Charter rights and determined that the violation could not be saved by section 1 of the Charter. The SCC ruled that:

While the legislative objective of maintaining the neutrality of the public service is of sufficient importance to justify a limitation on freedom of expression, the impugned legislation fails to meet the proportionality test. The restriction of partisan political activity is rationally connected to the objective but section 33 of the PSEA does not constitute a measure carefully designed to impair freedom of expression as little as reasonably possible. The section bans all partisan-related work by all public servants, without distinction either as to the type of work, or as to their relative role, level or importance in the public hierarchy...Section 33, therefore, is over-inclusive and, in many of its applications, goes beyond what is necessary to achieve the objective of an impartial and loyal civil service.

---

19 *QR&O* 19.44(7).
20 *QR&O* 19.44(8).
21 *Osborne* at 84.
22 Section 1 of the Charter permits reasonable limits on rights guaranteed elsewhere in the Charter only when such limits are prescribed by law and can be “demonstrably justified in a free and democratic society.”
23 *Osborne*, head notes.
17. The SCC recognized that the objective of the legislation was to maintain the neutrality of the civil service and its loyalty to the Government of Canada. The SCC considered this to be a valid objective. However, although there is a need for an impartial civil service, the SCC did not agree with an outright prohibition on political activities of civil servants without distinction as to the activity undertaken and the position, visibility and importance of the person in the public service hierarchy. The SCC found that there was a requirement to meet the proportionality test, in that the limits prescribed by law should impair the public servants’ freedom of expression as little as possible.\textsuperscript{24}

18. As it concerns members of the CF, \textit{QR&O} 19.44 (Political Activities and Candidature for Office) places a number of restrictions on the political activities in which members may lawfully engage. COs must keep in mind that restrictions on political activities are intended to ensure that the CF is publicly seen as an impartial organization and that its members are similarly regarded as being loyal to the Government of Canada. All members of the CF must remain loyal to the Government of Canada and remain conscious of the need to protect the neutrality of the CF in political matters. Failure to do so may result in disciplinary or administrative action or both.

\textbf{SECTION 3}

\textbf{ADDITIONAL GUIDANCE}

19. COs must ensure that any base or defence establishment under their command is not used in such a way as to give the appearance that there is an actual or perceived bias in respect of the political neutrality of the CF.

20. During any period of time preceding a federal general election, it is important that COs familiarize themselves with \textit{QR&O} 19.44 (Political Activities and Candidature for Office) and the CDS publication on federal, provincial and territorial electoral events.\textsuperscript{25} COs must have a clear understanding as to the types of political activities in which CF members may participate. When it comes to political activities, CF members do not have the same rights as afforded other civilians. A member’s duty to protect the political neutrality of the CF, and to perform their duties in an impartial and loyal manner outweigh the member’s individual right to actively engage in political activities.

21. Even though there must be no political activity on a defence establishment, political canvassers and the distribution of political advertising are to be permitted in military quarters, subject to security requirements.\textsuperscript{26}

\textbf{SECTION 4}

\textbf{REFERENCES}

\textbf{Legislation}


\textsuperscript{24} \textit{Osborne} at 99.
\textsuperscript{25} A-LG-007-000/AF-001.
\textsuperscript{26} \textit{QR&O} 19.44(4).
Regulations

QR&O 19.14 (Improper Comments).
QR&O 19.36 (Disclosure of Information or Opinion).
QR&O 19.37 (Permission to Communicate Information).
QR&O 19.375 (Communications to News Agencies).
QR&O 19.42 (Civil Employment).
QR&O 19.44 (Political Activities and Candidature for Office).
QR&O 29.09 (Use of Works and Buildings for Other Than Military Purposes).

Jurisprudence


Secondary Material


DCDS, Elections, online: DIN <http://dcds.mil.ca/im/tl/pages/elect_e.asp>.
CHAPTER 30
LEGAL PROCEEDINGS

SECTION 1
ATTENDANCE AT CIVILIAN COURT

General

1. A CF member may become involved in proceedings in courts of either civil or criminal jurisdiction, in Canada or abroad. This involvement may arise out of a member’s military service or it may relate to the member’s private activities.

2. Normally, a CF member who is obliged to attend civilian court proceedings will be issued with an official court document (e.g., a summons), requiring attendance. For witnesses, the summons or subpoena should be accompanied by instructions for the payment of ‘conduct money’ to defray travel expenses.

3. DAOD 7001-0 (Civil and Criminal Court Proceedings) sets out the policy with respect to civil and criminal court proceedings. DAOD 7001-1 (Attendance at Civil and Criminal Court Proceedings) provides specific details concerning the implementation of the policy. DAOD 7001-2 (Service of Legal Documents Concerning Civil and Criminal Court Proceedings) deals with the service of legal documents upon CF members.

4. DAOD 7001-0 (Civil and Criminal Court Proceedings) defines various types of courts. A ‘civil court’ is a court in Canada where civil litigation is conducted. A ‘criminal court’ is a court in Canada where criminal offences are tried. The term ‘criminal court’ includes a provincial court of summary jurisdiction, but does not include CF service tribunals (i.e., courts martial or summary trials). A ‘foreign court’ is a court of another country. While CF courts martial or summary trials are conducted in foreign states, the fact that they take place outside of Canada does not qualify them as foreign courts.\(^1\)

Member’s Status While Attending Court

5. A member’s duty status while attending court, be it a civil, criminal or foreign court, will depend on the reason why the member is in court:

   a. a member who is compelled to attend court as a witness in a criminal proceeding will attend on duty;

   b. a member who has been ordered to attend a civil court, a criminal court or any other judicial proceeding as a witness for the Crown will attend on duty;

   c. a member who is compelled to attend as a witness in a military capacity at a civil court will attend on duty. An example of having to attend in a military capacity would be an accounting officer who is required to give testimony about a member’s pay records;

   d. a member who is compelled to attend as a witness before a foreign court will attend on special leave unless the CO considers the member’s attendance to be in the public interest. In that case, the CO must request that the officer commanding a command order the member to attend on duty;

   e. a member who is compelled to attend as a witness in a civilian capacity at a civil court will attend, subject to the exigencies of the service, on special leave. An

\(^1\) DAOD 7001-0 (Civil and Criminal Court Proceedings), marginal note: Definitions/Foreign Court.
example would be a member issued a summons or subpoena to attend a civil court as a witness to a motor vehicle accident; and

f. a member who wishes to attend any judicial proceedings as a plaintiff or defendant, as the accused in a criminal proceeding, or as a witness in circumstances not covered by DAOD 7001-1 (Attendance at Civil and Criminal Court Proceedings) may attend, subject to the exigencies of the service, on annual leave or leave without pay.²

Financial Arrangements and Compensation

6. A CF member who has been compelled to attend as a witness at a criminal or civil court proceeding and is required to proceed on duty, will have expenses paid by the unit as in the case of other temporary duty travel. The CO is responsible for ensuring that ‘conduct money’³ is obtained from the party seeking the member’s attendance before a member attends the court proceeding. Conduct money is not required if the member is a witness in a court proceeding to which DND is a party.⁴ Conduct money includes money for transportation, meals and accommodations.

7. When a member attends court on duty, any money received by the member as conduct money or as remuneration for the member’s attendance will be set off against the entitlement under the member’s travel claim.⁵ The financial benefits to which a member may be entitled under the Compensation and Benefits Instructions for the Canadian Forces (CBI) Chapter 209 (Transportation and Travelling Expenses) will be reduced by the amount received from the third party. Prior to proceeding to court, the member may elect to waive the financial benefits provided under CBI Chapter 209 (Transportation and Travelling Expenses) and accept the expenses or remuneration paid by the third party.⁶ Civilian court authorities often issue a summons covering a blanket period of time to ensure that witnesses are available for the entire period, without considering the inconvenience or disruption to the witness or the witness’ employer. A member who has received a summons to attend court over a lengthy period should try to determine when the member’s presence is actually required, so that any absence from normal duties will be minimized. The unit may also wish to consult with its unit legal adviser to resolve this issue.

Service of Legal Documents

8. ‘Legal documents’ include documents arising out of civil or criminal court cases, such as a statement of claim, a petition for divorce or a subpoena, but does not include documents arising out of a court martial or summary trial.⁷

9. Where a person or agency seeks to serve legal documents on a CF member, a reasonable opportunity, as defined in orders, may be provided but military compulsion shall not be used to force the member to accept or submit to service.⁸

10. Where a member is not willing to accept service, the person requesting service must, subject to security considerations, be provided with the member’s military (i.e., unit) postal address so that substituted service may be effected. The member’s home address is personal

² DAOD 7001-1 (Attendance at Civil and Criminal Court Proceedings), marginal note: Status While Attending Court/Member’s Status.
³ Ibid., marginal note: Definitions/Conduct Money. ‘Conduct money’ is a nominal fee payable to a witness to defray expenses involved in attending a trial in order to testify.
⁴ DAOD 7001-1 (Attendance at Civil and Criminal Court Proceedings), marginal note: Financial Arrangements/Before Attending Court.
⁵ Ibid., marginal note: Financial Arrangements/Application of Monies and Fees to Travel Claim.
⁶ Ibid., marginal note: Financial Arrangements/Payment of Travel Expenses by a Third Party.
⁷ DAOD 7001-2 (Service of Legal Documents Concerning Civil and Criminal Court Proceedings), marginal note: Definitions/Legal Document.
⁸ Ibid., marginal note: Service of Legal Documents/Consent to Service by Member.
information as described by the *Privacy Act* (PA).\(^9\) Any requests for the member’s home address, including an address in single quarters, shall be referred to the Director Access to Information and Privacy (DAIP) at NDHQ. If the member is deployed or away at sea, the person requesting service should be provided with the member’s expected date of return to Canada (subject to security concerns).\(^10\)

11. Persons seeking access to a defence establishment remain subject to the *Defence Controlled Access Area Regulations (DCAARs)*.\(^11\) Subject to military requirements and the DCAARs, a party who seeks to effect service on a CF member should be afforded every reasonable opportunity to do so. However, before the person is granted access to a defence establishment, the CO may require that the person produce identification to substantiate their identity, evidence of the capacity in which the person acts and their authority for doing so.\(^12\) It may also be prudent to assign an escort to convey the person requesting service to and from the location of the CF member.

**Jury Service**

12. Pursuant to section 268 of the *National Defence Act*,\(^13\) members of the regular force and special force, as well as members of the reserve force on active service, are exempt from jury duty. Where a CF member receives a notice to serve on a jury, the member should ensure that the statutory exemption is immediately brought to the attention of the Court office that issued the notice. Order in Council 583/89\(^14\) places officers and NCMs of the regular force on active service anywhere in or beyond Canada. It also places officers and NCMs of the reserve force on active service anywhere beyond Canada. Consequently, reserve officers and NCMs serving beyond Canada are on active service and are exempt from jury duty, pursuant to section 268 of the *NDA*. Officers and NCMs of the reserve force serving in Canada on Class “A”, Class “B” or Class “C” service are not on active service and are, therefore, liable to be called upon to perform jury duty.

**SECTION 2**

**CRIMINAL PROCEEDINGS**

**General**

13. Canadian military personnel consent to being subject to the *NDA* and the *Code of Service Discipline (CSD)* when they join the CF. This special status within Canadian society does not negate a CF member’s continuing obligation to obey the laws that apply to all citizens and residents of Canada. In their private capacity, all CF personnel remain subject to the jurisdiction of the civilian legal system and they may be charged to the same extent as a civilian with committing an offence under any federal statute, including the *Criminal Code*\(^15\) or applicable provincial legislation.

14. Military personnel who are charged with a criminal offence could face very serious consequences in terms of their personal lives, as well as their careers. Depending on the nature of the offence, the outcome of a particular trial could reflect on the member’s unit, the support base and the CF in general. It is important for COs to maintain situational awareness whenever any of their personnel are being dealt with under the civilian criminal justice system. Accordingly,

---

\(^9\) R.S.C. 1985, c. P-21 [PA].
\(^10\) DAOD 7001-2 (Service of Legal Documents Concerning Civil and Criminal Court Proceedings), marginal note: Service of Legal Documents/No Consent to Service by Member.
\(^11\) Ibid.
\(^12\) Ibid.
\(^13\) R.S.C. 1985, c. N-5 [NDA].
\(^15\) R.S.C. 1985, c. C-46
regulations require, and make provision for, COs to appoint an officer as an ‘attending officer.’ An attending officer’s duty is to attend court, observe the proceedings and report back to the CO. The role of attending officers does not include assisting or advising CF members who are being dealt with in civil or criminal court proceedings.

**Duty of Members to Report When Arrested**

15. **QR&O 19.56 (Report of Arrest by Civil Authority)** imposes a positive duty on all officers and NCMs to advise their CO when placed under arrest by a civil authority. This legal obligation is often neglected, probably due to fear on the part of the member that there will be additional sanctions levied by the CO as a result of their arrest. Apart from the difficulties that can arise by deliberately hiding an involvement with the civil justice system, members may create other problems for themselves if they are unaware of, misunderstand or simply ignore the requirement to inform their CO. There is a common misperception that any legal matter that is unrelated to the military, even if it involves a criminal offence, can be shielded from scrutiny by the chain of command.

16. **QR&O 19.56 (Report of Arrest by Civil Authority)** deals with CF members arrested by civil authority. There is also another common misconception as to what it means to be ‘arrested.’ Arrest simply refers to the process of being taken into custody by any lawful authority. Even though there is a common law power for citizens to arrest persons committing a crime, the scope of the QR&O is focused on arrest by lawfully empowered civil authority. ‘Civil authority’ generally means a police officer or other competent agent or peace officer that is responsible for enforcing the laws of the state. Some CF members may try to rationalize their failure to report an arrest by indicating that charges have not yet been laid or that a conviction has not yet been secured. Whether or not this is the case, it does not override the underlying duty to report when the individual has been arrested. It is possible to subject CF members who fail to report their arrest in accordance with the QR&O to disciplinary or administrative action or both.

17. COs should further be aware that **QR&O 19.56 (Report of Arrest by Civil Authority)** does not account for all possibilities. The regulation only applies to the arrest of a CF member. Under the **Criminal Code**, it is possible for an individual to be charged with an offence and, ultimately, convicted without ever having been arrested. For instance, a peace officer may charge an individual by serving the accused with an ‘appearance notice’ requiring the person to appear in a criminal court. Members who fails to inform their CO that they have been charged under the **Criminal Code** are not in violation of the specific provisions of **QR&O 19.56 (Report of Arrest by Civil Authority)** because they were not actually arrested. This could leave a CO unaware of legal proceedings against unit members. Accordingly, COs are recommended to issue an order in unit standing orders that creates a general duty for all members to immediately report any incident where a member has been arrested, charged or detained by civil authorities.

**Duty to Detail Attending Officer**

18. If a CO becomes aware that a subordinate has been charged with an offence in a criminal court, the CO must arrange for an officer to attend and observe the proceedings, unless it involves a minor traffic act violation or an alleged breach of a municipal by-law. If the distance from the unit to the court where the matter is being dealt with is substantial, a CO may decide not to send an attending officer. In such cases, however, an officer commanding a command must be notified. The commander of a command could decide whether to order the CO to appoint an attending officer regardless of the distance or, alternatively, detail a unit closer to the court to

---

16 **QR&O 19.56 (Report of Arrest by Civil Authority).**
17 *Black’s Law Dictionary, 8th ed., s.v. “arrest.”*
18 **Criminal Code** s. 495(2) provides that a peace officer shall not arrest a person when it is not necessary to establish the identity of the person, secure or preserve evidence or prevent the repetition of the offence.
19 **Criminal Code**, s. 496.
20 **QR&O** 19.57(1).
provide an attending officer. If another unit is tasked, the member’s CO will liaise directly with the CO of the unit providing the attending officer.21

Duties of Attending Officer

19. An attending officer is required to be informed of, or collect, certain documents and information prior to attending the civil court proceeding of a CF member, including:
   a. the member’s record of service;
   b. the member’s pay account or pay records;
   c. the member’s conduct sheet or at least information related to the member’s conduct generally; and
   d. whether the CO authorizes the attending officer to pay any fine in the event the member is convicted and a fine is imposed.22

20. The attending officer must also make the CF member aware that the attending officer is not acting in any way as the member’s solicitor, representative or agent. Ultimately, the attending officer is not there on behalf of the member. Rather, the attending officer is there to represent the CF and to inform the CO. If the court makes a specific request to an attending officer, the officer is authorized to provide the court with all of the information related to the member’s service conduct, as well as the particulars of any convictions under section 130 of the NDA. However, attending officers are not legally authorized to disclose any particulars of members’ convictions of other offences under the CSD, nor can they provide copies of the members’ conduct sheet to the court, the prosecutor or defence counsel. Under no circumstances can the attending officer act as the member’s solicitor, counsel or advocate.23

21. It is important to remember that the lack of situational awareness encountered by COs in relation to court appearances are typically precipitated by a failure to assign an attending officer or by the attending officer’s failure to appreciate their responsibilities vis-à-vis the member who is before the court.

22. In one recent CDS-level grievance, the grievor asserted that the lack of an attending officer at his civilian criminal trial precipitated a less favorable ruling by the court and precluded the unit from accurately appreciating the nature of the offence for which he was convicted. In responding to this aspect of the grievance, the CF Grievance Authority responded that, despite the failure of the CO to assign an attending officer and the lack of information regarding the trial dates, “the purpose of the attending officer is to act as a witness [observer] to the proceedings and only provide [certain] career-related information if requested by the court.”

Sureties

23. Another frequent use of attending officers occurs during judicial interim release (i.e., bail), hearings. If a member is arrested and detained for an offence, the local police will usually notify the unit or base immediately. Occasionally, a situation will arise where a bail hearing is conducted and the CO sends a unit representative, who is often a junior officer or senior NCM, to attend the hearing. In order to release the member from custody, a court may require that the individual be released ‘with sureties.’ A ‘surety’ is the term given to a person who has personally pledged to pay back money or perform a certain action if the accused fails to live up to conditions of release.24 Acting as a surety is an onerous task and one that is difficult to withdraw from after having been initially accepted by the court. While the desire of units and individual officers to look

---

21 QR&O 19.57(2)-(4).
22 QR&O 19.59(1).
23 QR&O 19.80 (Duties of Attending Officer During Trial). If a member wishes to engage a lawyer, it will be at the member’s own personal expense.
24 Criminal Code, ss. 515(1)(c), 764.
after their members is laudable, the legal responsibilities associated with acting as a surety are not appropriate for attending officers. This could be particularly troublesome in foreign jurisdictions where, once a member is released from custody and subsequently leaves the country, extradition proceedings may be required to cause the member to return to the foreign jurisdiction. Legal advice should be sought from the unit legal adviser before members or representatives of the CF assume any such obligations solely to facilitate the release of a member from custody.

Post Conviction Action

24. If the member is convicted of an offence, the CO is responsible for securing a copy of the Certificate of Conviction or a certified copy of the court order for onward transmission, with the amended conduct sheet, to the appropriate career manager at NDHQ. Prior to the unit forwarding those documents to NDHQ, the local JAG representative is required to review the conduct sheet to ensure that the civilian conviction is properly recorded. A statement indicating that this review has taken place must accompany the documents.

SECTION 3

AFFIDAVITS AND STATUTORY DECLARATIONS

General

25. Members of the CF, their dependants and civilians associated with the CF or DND are often required to produce sworn documents. These documents may be required for CF, DND or personal purposes. Therefore, it is important that COs understand that affidavits and statutory declarations are legal documents and that failure to properly execute them will likely render them ineffective.

26. Affidavits and statutory declarations must be sworn, affirmed or declared before officials authorized by law to receive the oath, affirmation or declaration. The law, which varies from province to province, authorizes lawyers and other qualified individuals to receive or administer oaths, affirmations or declarations.

27. In recognition of the special circumstances of service in the CF, including the requirement of CF members to live and serve in locations where access to such officials may be difficult or impossible, all Canadian provinces and territories have provisions in their respective laws that authorize certain CF officers to administer or receive oaths, affirmations and declarations. It should be noted, however, that each province has its own specific requirements. The CF officers who may be authorized to perform these functions and the format for recording these acts are not uniform from province to province. Each province has its own particular statute dealing with this issue. For example, in Ontario, section 44 of the Evidence Act authorizes commissioned officers on “full-time service” to administer or receive oaths, affirmations and declarations. In the Province of Quebec, there is a requirement that CF officers hold the rank of Maj/LCdr or above in order to perform the same functions. Consequently, it is important that officers refer to the special provisions for the province in question before administering oaths or affirmations.

26 DAOD 7006-1 (Preparation and Maintenance of Conduct Sheets), marginal note: Conviction by Civil Authority/Transmission of Documents.
27 QR&O 19.61 (Certificate of Conviction), QR&O 19.62 (Action Following Conviction By Civil Authority) and DAOD 7006-1 (Transmission of Documents).
28 Black’s Law Dictionary, 8th ed., defines an ‘oath’ as “an affirmation [or promise made under an immediate sense of responsibility to God] of the truth of a statement, which renders one willfully asserting untrue statements punishable for perjury.” An ‘affirmation’ is defined by Black’s Law Dictionary, 8th ed., as “a solemn and formal declaration or asseveration that [a] witness will tell the truth, etc.; this being substituted for an ‘oath’ in certain cases.”
Affidavits and Statutory Declarations

28. DAOD 7000-0 (Affidavits and Statutory Declarations) sets out CF policy with respect to the completion of affidavits and statutory declarations. DAOD 7000-1 (Completion of Affidavits and Statutory Declarations) describes, in useful detail, the manner in which such documents are prepared. This DAOD cautions readers on the importance of certain legal documents and the possible need for legal advice before performing these formal acts. This DAOD also brings to the CO's attention the different limitations to the authority of commissioned officers in each of the provinces of Canada to administer oaths, affirmations or declarations. It provides the officer with a series of required steps to properly complete an affidavit or statutory declaration. It also sets out the penalties under the Criminal Code for misuse of affidavits and statutory declarations.

30. This DAOD also brings to the CO's attention the different limitations to the authority of commissioned officers in each of the provinces of Canada to administer oaths, affirmations or declarations.

31. In this section of the DAOD, the statutory authority in each province, the form of the jurat and any limitations considered pertinent to an officer's authority to administer oaths, affirmations or statutory declarations are set out.

30. In order to properly administer or receive an oath, affirmation or declaration for an affidavit or statutory declaration, officers must understand the meaning of these terms. Affidavits and statutory declarations are documents. Oaths, affirmations and statutory declarations are the means by which the maker of the document confirms the accuracy of the information it contains, although oaths and affirmations are also used for confirming the accuracy of oral testimony. Either an oath or an affirmation can be used with respect to an affidavit. An oath is a solemn confirmation based on religious belief. When individuals cannot by conscience or religion swear an oath, they are asked to solemnly affirm that the information is correct. The maker of a statutory declaration confirms the accuracy of the information contained in a document by making a solemn declaration, acknowledging that it has the same legal force and effect as if it was given under oath. DAOD 7000-1 (Completion of Affidavits and Statutory Declarations) contains the appropriate wording and procedures for oaths, affirmations and statutory declarations.

31. DAOD 7000-0 (Affidavits and Statutory Declarations) and DAOD 7000-1 (Completion of Affidavits and Statutory Declarations) provide the following definitions:

An 'affidavit' is "a statement made in writing, sworn to or affirmed in front of, a person having the authority to administer the oath or affirmation."
A 'statutory declaration' is "a solemn declaration made in writing by a party knowing and intending it to have the same force and effect as though it were a declaration made under the Canada Evidence Act." 35

32. The person who is swearing the oath or making the affirmation or solemn declaration must repeat the applicable words to the person commissioning the document. The oath, affirmation or statutory declaration must be provided prior to the signing of the document. Normally, an affidavit is prepared in the proper form for use in court or other judicial proceedings.

---

30. DAOD 7000-1 (Completion of Affidavits and Statutory Declarations), marginal note: General Rules/Caution as to Important Documents.
31. If an officer has any doubts as to whether they have the proper authority to complete an affidavit or statutory declaration, the officer should contact the unit legal adviser for advice before proceeding to complete the documents.
32. DAOD 7000-1 (Completion of Affidavits and Statutory Declarations), marginal note: General Rules/Penalty for Misuse.
33. Ibid., marginal note: Procedures/Affidavits.
34. Ibid., marginal note: Definitions/Jurat. A 'jurat' is "the clause at the bottom of an affidavit or statutory declaration that states when, where and before whom the affidavit or statutory declaration was sworn, affirmed or declared."
35. Ibid., marginal note: Definitions/Statutory Declaration.
The statutory declaration is appropriate for use in most other circumstances, particularly for CF administrative matters.

33. When preparing to administer an oath, affirmation or statutory declaration, it is essential that DAOD 7000-1 (Completion of Affidavits and Statutory Declarations) be consulted in detail to ensure that all legal conditions are met for the proper preparation of the document and the administration of the oath, affirmation or statutory declaration.

34. Before administering or receiving an oath, affirmation or statutory declaration, the officer who will receive the oath, affirmation or statutory declaration must first ensure that they are legally empowered to do so. The officer must keep in mind that provincial laws vary in determining who has the proper authority to receive and administer oaths, affirmations and statutory declarations. Further, in some provinces, oaths, affirmations or statutory declarations may only be received and administered in respect of other members of the CF, whereas in other provinces there are no such limitations. For example, a dependant may swear an affidavit or make a statutory declaration on behalf of a member before an officer. It is, therefore, essential to consult DAOD 7000-1 (Completion of Affidavits and Statutory Declarations) in order to determine who has the authority to administer or receive oaths, affirmations or statutory declarations on a case-by-case basis.

35. In order to determine who has the proper authority to receive or administer an oath, affirmation or statutory declaration, reference must be made to the requirements of the province where the affidavit or statutory declaration will be used and not necessarily the jurisdiction where it is being sworn or affirmed. The officer must also prepare the form of the document in accordance with the law of the province or territory in which it will be officially used. For example, an affidavit prepared in Ontario for use in a legal proceeding in British Columbia (B.C.), must be prepared in accordance with the law in B.C. The officer must also be authorized to receive oaths or affirmations in B.C. The proper jurat to be used in this scenario would be the jurat for B.C. If an Ontario court form is being used and it contains a pre-printed jurat, the B.C. jurat should be added to the form under the Ontario jurat and properly completed. There is no need to sign the document twice, but the B.C. statutory authority that authorizes the commissioned officer to act should be entered immediately below the B.C. jurat.

36. If there is any doubt as to whether an officer has the authority to administer oaths, affirmations or statutory declarations, legal advice should be obtained. Moreover, if the document to be sworn, affirmed or statutorily declared affects the member’s legal rights (i.e., under family law, etc.), the member should be encouraged to seek legal advice from a civilian lawyer, at the member’s own personal expense, in order to be fully advised of all legal rights.

37. The procedure on how to administer an oath, affirmation or statutory declaration, as well as the particular oath, affirmation or statutory declaration to be used, is also found in DAOD 7000-1 (Completion of Affidavits and Statutory Declarations). This DAOD should be consulted as a guide on how to proceed with the giving or receiving of oaths, affirmations or statutory declarations once the officer has determined that he or she has the legal authority to proceed. The formats for affidavits and statutory declarations are also provided in DAOD 7000-1 (Completion of Affidavits and Statutory Declarations).

36 As noted herein, any commissioned officer in Ontario on full-time service is authorized to receive or administer oaths or statutory declarations. However, in Quebec, only officers who hold the rank of Maj/LCdr or above are authorized to do so, and only for members (i.e., not spouses or common-law partners of members).

37 DAOD 7000-1 (Completion of Affidavits and Statutory Declarations), marginal notes: Procedures/Affidavits; Procedures/Statutory Declarations; Ontario Affidavit Form/Sample Ontario Affidavit Form; Ontario Statutory Declaration Form/Sample Ontario Statutory Declaration Form and Provincial and Territorial Statutory Authorities and Jurats/Ontario.

38 Ibid., marginal note: Provincial and Territorial Statutory Authorities and Jurats/British Columbia.

39 Ibid.
Misuse of Affidavits or Statutory Declarations

38. Not only must COs be extremely careful in ensuring that oaths, affirmations and statutory declarations are administered correctly, they must also be careful not to knowingly participate in any misuse of an affidavit or statutory declaration. Officers are liable to a number of penalties for knowingly executing a false affidavit or statutory declaration.

39. Section 131 of the Criminal Code provides that a person who, knowingly and with the intent to mislead, makes a false statement under oath or solemn affirmation by affidavit, solemn declaration or disposition or orally, is guilty of an indictable offence and is liable to imprisonment for up to 14 years. 40

40. Section 138 of the Criminal Code provides that certain improper activities in respect to affidavits and statutory declarations are indictable offences, punishable on conviction by imprisonment for up to two years. Improper activities include, but are not limited to:
   a. the signing of a document and saying that it is an affidavit or statutory declaration when it was not sworn, affirmed or statutorily declared as such;
   b. knowingly administering an oath or statutory declaration when no authority to administer it exists; and
   c. knowingly using an affidavit or statutory declaration that is not properly sworn or statutorily declared. 41

41. Section 125 of the NDA provides that a person who willfully or negligently makes a false statement or entry in a document made or signed by that person and required for official purposes, is guilty of an offence and, on conviction, is liable to imprisonment for a term not exceeding three years or to less punishment. 42

SECTION 4

REFERENCES

Legislation

Canada Evidence Act, R.S.C. 1985, c. C-5.


Regulations

QR&O 19.55 (Attendance as Witness in Civil Court).

QR&O 19.56 (Report of Arrest by Civil Authority).

QR&O 19.57 (Officer in Attendance at Trial by Civil Authority).

40 Criminal Code, ss. 131-132.
41 Criminal Code, s. 138.
42 NDA, s. 125.
QR&O 19.59 (Duties of Attending Officer Prior to Trial).
QR&O 19.60 (Duties of Attending Officer During Trial).
QR&O 19.61 (Certificate of Conviction).
QR&O 19.62 (Action Following Conviction By Civil Authority).


Orders, Directives and Instructions

CBI Chapter 209 (Transportation and Travelling Expenses).
DAOD 7000-0 (Affidavits and Statutory Declarations).
DAOD 7000-1 (Completion of Affidavits and Statutory Declarations).
DAOD 7001-0 (Civil and Criminal Court Proceedings).
DAOD 7001-1 (Attendance at Civil and Criminal Court Proceedings).
DAOD 7001-2 (Service of Legal Documents Concerning Civil and Criminal Court Proceedings).
DAOD 7006-1 (Preparation and Maintenance of Conduct Sheets)


Jurisprudence


Secondary Material

CHAPTER 31
GARNISHMENTS AND FAMILY SUPPORT ORDERS

SECTION 1
INTRODUCTION

1. In addition to their obligations under military law, CF members are also subject to the civil and criminal laws that apply to other citizens and residents of Canada. For example, the Garnishment, Attachment and Pension Diversion Act (GAPDA)\(^1\) provides that the pension benefits of a CF member are subject to provincial garnishment law, to the extent as prescribed in QR&Os, pursuant to the NDA. Federal public servants are governed by the GAPDA, CF members are subject to the specific regime set out in QR&O Chapter 207 (Pay Allotments and Compulsory Payments) in respect of their pay and allowances and to GAPDA if they are receiving pension benefits. Former CF members may have their pensions garnished under GAPDA. This includes the various court orders and judgment debts that arise from civil claims and family law matters. COs are given specific responsibilities under QR&O regarding the enforcement of such orders. These responsibilities focus on the welfare of their subordinates, as well as the need to ensure that all representatives of the CF respect their legal obligations.

2. There are two principal methods used to ensure the payment of financial obligations ordered by a court. Debts owed to third parties are generally secured by a ‘garnishee summons’ (GS) of a member’s wages. Similarly, family support obligations, whether they are for spousal or child support, may be complied with voluntarily or involuntarily through the use of a ‘financial support order’ (FSO). Each method has specific and unique procedural requirements that must be followed.

SECTION 2
COMPULSORY PAYMENTS

3. In general, all CF members may agree to payroll deductions from their pay and allowances for their own purposes, including family support payments. Such deductions are referred to as voluntary payments. In contrast, compulsory payments are deductions from a member’s pay and allowances that are ordered by a CO. Compulsory payments have priority over voluntary payments.

4. Compulsory payments may be applied against members of the regular force and members of the reserve force who are on a Class “A,” Class “B” or Class “C” reserve service.\(^2\) For the purposes of QR&O Chapter 207 (Pay Allotments and Compulsory Payments), an FSO refers to a “decree, order or judgment that contains provisions for periodic payments for maintenance or alimony” that is made by a court in accordance with the Divorce Act (DA),\(^3\) provincial laws that relate to family financial support or the laws of a jurisdiction external to Canada, if that country’s laws are enforceable within Canada.\(^4\) A prudent CO would confirm the validity and enforceability of an FSO with their unit legal adviser prior to ordering a compulsory payment. For example, in order to have a court judgment rendered by a court of foreign jurisdiction recognized by a Canadian court, the judgment must be registered in Canada so that it becomes enforceable under the laws of Canada or a province thereof.\(^5\)

---

\(^{1}\) R.S.C. 1985, c. G-2, s. 15 [GAPDA].
\(^{2}\) QR&O 207.02(1).
\(^{3}\) R.S. 1985, c. 3 (2nd Supp.) [DA].
\(^{4}\) QR&O 207.02(3)(b).
\(^{5}\) QR&O 207.03(1)(a); QR&O 207.031(2)(a).
5. FSOs must be distinguished from a ‘judgment debt,’ which is “an order or judgment, other than a financial support order,” which obliges a CF member to pay a sum of money to an applicant.\(^6\) A judgment debt could be an order made by a court to pay lump sum arrears of spousal or child support in accordance with the DA or a provincial family law provision. A judgment debt may also relate to an order made by a court to settle an unpaid account with a finance company.\(^7\) Judgment debts are collected from the pay of the member/debtor by means of a GS.\(^8\)

6. The distinction between these two grounds for ordering compulsory payments is critical. Those who administer compulsory payments on behalf of a CO must be able to distinguish between an FSO and a GS for a judgment debt as each is administered differently. In particular, confusion often occurs when a GS for support arrears accompanies an FSO for periodic spousal or child support. By virtue of the above-mentioned definitions, periodic support payments are processed as an FSO while arrears for maintenance or alimony can only be paid by way of a GS. A failure to recognize this distinction in QR&O Chapter 207 (Pay Allotments and Compulsory Payments) could result in a compulsory payment being ordered against a member without legal authority and, ultimately, the invalidation of a compulsory payment already in effect – to the unintended detriment of the person legally entitled to receive the payment(s).

7. A CF member is deemed to be serving in a province or jurisdiction outside Canada if they perform the duties associated with their current posting in that province or external jurisdiction.\(^9\) All documents and notices required to institute a compulsory payment when the member is serving in a jurisdiction other than that of their current posting must be submitted to the following military authorities:

a. the CO of the CF member’s home unit or the person designated to receive the documents by the CO; or

b. if it is not possible to identify the member’s CO or, if otherwise unable to submit documents to the member’s CO, the CDS or the person designated by the CDS to receive such documents.\(^10\)

8. There are several other aspects of compulsory payments that should be considered. If there is an overpayment to the applicant, the amount overpaid becomes a debt owed to Her Majesty and it may be collected by “set-off against future monies payable” to the applicant.\(^11\) The effective date for a compulsory payment is the last day of the month following the month in which the compulsory payment is ordered.\(^12\) Finally, there is an obligation on the part of a military authority to advise the CF member concerned when an FSO or a GS is to be processed against the member’s pay account.\(^13\)

9. It should be noted that an FSO has precedence over a GS.\(^14\)

---

\(^6\) QR&O 207.02(3)(d).
\(^7\) Ibid.
\(^8\) QR&O 207.02(3)(c); QR&O 207.031 (Garnishee Summons – Judgement Debts).
\(^9\) QR&O 207.02(4).
\(^10\) QR&O 207.02(5). NDHQ/DPS is the authority that receives documentation pertaining to a GS or an FSO on behalf of the CDS.
\(^11\) QR&O 207.02(6).
\(^12\) QR&O 207.02(7).
\(^13\) QR&O 207.02(9).
\(^14\) QR&O 207.031(12).
SECTION 3
FAMILY SUPPORT ORDERS

10. In order for a CO to order a compulsory payment, an applicant who wishes to enforce an FSO must submit the following to the proper military authority:
   a. a certified copy of the court order;
   b. the identity and location of the court in which the order was obtained;
   c. the identification particulars of the CF member in question;
   d. the applicant's name and address;
   e. the address where documents and notices may be sent, either to the applicant or any person authorized by the applicant to receive such mailings (i.e., such as the applicant’s lawyer or a provincial maintenance enforcement official); and
   f. a statutory declaration by the applicant stating that the amount in the order has not already been paid by the CF member.¹⁵

11. Once a CO has received all of these documents and is satisfied that the court order is valid under the laws of Canada or a province, they are required (usually within 30 days), to order compulsory payments by the member on a periodic basis as set out in the order.¹⁶ For CF members serving outside of Canada, COs should be vigilant to ensure that all necessary documents are received because the member may not have had the same ready access to Canadian courts as the person seeking to have the FSO enforced. If, after receiving the above-noted documents, the compulsory payment is not ordered, the CO is obliged to advise the officer commanding a command of the reasons for not making the order. The officer commanding a command is authorized to direct the CO to order a compulsory payment by a specific date.¹⁷

12. Where the CF member is serving in Canada, in most cases the monthly payments will simply be the amount specified in the FSO. In Canada, the provinces govern family support enforcement matters. The payment amount that may be ordered, pursuant to an FSO, cannot surpass the member's monthly pay, after deductions, and is subject to certain limitations, as specified under the law of the province where the member is serving.¹⁸ It may be necessary, therefore, to contact the unit legal adviser in order to determine the amount that may be properly garnisheed under provincial law.

13. If the member is serving outside of Canada, the amount payable by a member on a monthly basis can be significantly reduced to reflect the pressures of international service. Under normal circumstances, the maximum amount payable by a member in this situation is the equivalent of 10 days pay. The CO can further reduce the monthly contribution in only the most exceptional of cases. For example, where a member shows that they have suffered a substantial change in their financial circumstances but, because they are serving outside of Canada they are unable to attend court to seek a variation of the FSO, it is the CO's prerogative to make such a variation. In such rare cases, the CO is required to inform the recipient of funds of the reasons for reducing the monthly contribution and the CO must refer the matter to the CDS for further review.¹⁹

¹⁵ QR&amp;O 207.03(2).
¹⁶ QR&amp;O 207.03(3).
¹⁷ QR&amp;O 207.03(4).
¹⁸ QR&amp;O 207.03(3)(a).
¹⁹ QR&amp;O 207.03(8)(b).
14. There is a positive duty on COs to advise the recipient(s) of compulsory payments, in writing, if the CF member who is making the payments is posted. The CO is obligated to identify the member’s change of strength date and the mailing address of the member’s new CO. Further, there may be additional information that the CO is obliged to provide to the recipient when a member is posted to a different province or a jurisdiction outside of Canada.\(^{20}\)

15. It is also important to note that, where a CF member is subject to more than one compulsory payment for maintenance or alimony, and the total of those payments exceeds the maximums referred to earlier in this chapter, the CO must ensure that the amount is divided proportionally amongst all entitled recipients as long as the total of the payments does not exceed the maximum for a single compulsory payment. The CO should give notice in writing to each applicant explaining the reasons for the reduced payments.\(^{21}\)

SECTION 4

GARNISHEE SUMMONS FOR JUDGMENT DEBTS

16. CF members may also be required to satisfy civil judgment debts whereby a third party, also referred to as judgment creditor, seeks to enforce their financial legal rights against the CF member through the use of a court order authorizing the garnishment of the member’s wages. As with FSOs, COs have very specific obligations when dealing with a GS for a judgment debt.\(^{22}\) In this regard, COs should be aware that there are different authorities and procedures specified in QR&O for processing a GS for a judgment debt.

17. In this context, a compulsory payment can be ordered only if the applicant has served the proper military authority with a ‘Notice of Intention to Garnishee Her Majesty’ and if the GS is served on the same military authority within the first 30 days after the first summons could be validly served.\(^{23}\)

18. In order to secure compulsory payment of the amount owed, the judgment creditor (i.e., a bank), must provide to the member’s CO a notice of its intention to garnishee Her Majesty in right of Canada. No sooner than 30 days after the notice, the following documents can be received:

   a. a GS or certified copy of a GS (enforceable under the laws of the province in which the member is serving), within 30 days of the date it was issued;

   b. a certified copy of the judgment debt;

   c. the identity and location of the court in which the order was obtained;

   d. the identification particulars of the CF member in question;

   e. the applicant's name and address;

   f. the address where documents and notices may be sent, either to the applicant or any person authorized by the applicant to receive such mailings (i.e., such as the applicant’s lawyer or, in the case of family support arrears, a provincial maintenance enforcement official); and

---

\(^{20}\) QR&O 207.03(5). Postings to new jurisdictions may involve a variance of the payment amount.

\(^{21}\) QR&O 207.03(10).

\(^{22}\) QR&O 207.031 (Garnishee Summons – Judgment Debt).

\(^{23}\) QR&O 207.031(1).
g. a statutory declaration of the applicant stating that the amount in the GS has not been and is not being paid as required.\textsuperscript{24}

Before ordering a compulsory payment, the CO must be satisfied that the court order is enforceable under the laws of the jurisdiction in which the member is serving. In the case of a court judgment rendered by a court of foreign jurisdiction, it must be registered in a Canadian court that will allow enforcement of the foreign order under the laws of Canada or a province thereof.\textsuperscript{25}

19. In the event there is issued a subsequent GS that relates to the same parties and the same judgment debt, the documents identified above in subparagraphs 18(b) through 18(f) need not be served again. All that is required is the new GS or certified copy thereof (per subparagraph 18(a) above), a new statutory declaration (per subparagraph 18(g) above), and a copy of the previous GS. These documents must be served on the same military authority that was served with the previous GS within 60 days of the date when the previous GS was served.\textsuperscript{26} If the applicant fails to serve a GS within the prescribed time limits, the applicant’s rights are not prejudiced but they will be required to recommence the process with service of a new Notice of Intention to Garnishee Her Majesty document, issued by the court.\textsuperscript{27}

20. Upon the timely receipt of this documentation, the member’s CO must order that the amount specified in the judgment be deducted on a monthly basis as a compulsory payment from the member’s pay. That amount (or any combination of compulsory payments), cannot exceed the net pay of the CF member or any limits imposed under the law of the province in which the member is serving.\textsuperscript{28}

\section*{SECTION 5}

\textbf{ADDITIONAL GUIDANCE}

21. FSOs and GSs are, by their nature, legally technical but, given the provisions of QR&O Chapter 207 (Pay Allotments and Compulsory Payments), they are relatively straightforward to administer. While individual units and bases tend to process these compulsory payments using locally designed protocols, it is incumbent upon COs to ensure that the applicants for compulsory payments strictly meet all the requirements as set out in QR&O. The Notes to QR&O 207.03 (Financial Support Order) and QR&O 207.031 (Garnishee Summons – Judgement Debts) both recommend that when COs receive an FSO or a GS, they contact their unit legal adviser to verify the order’s enforceability and in order to determine the maximum amount that may be garnished under the laws of the province where the member is serving.\textsuperscript{29}

\section*{SECTION 6}

\textbf{REFERENCES}

\textbf{Legislation}

\textit{Divorce Act}, R.S. 1985, c. 3 (2\textsuperscript{nd} Supp.).


\textsuperscript{24} QR&O 207.031(3)(a)-(g).
\textsuperscript{25} QR&O 207.03(1)(a); QR&O 207.031(2)(a).
\textsuperscript{26} QR&O 207.031(8).
\textsuperscript{27} QR&O 207.031(9).
\textsuperscript{28} QR&O 207.031(11).
\textsuperscript{29} Note to QR&O 207.03 (Financial Support Order) and Note to QR&O 207.031 (Garnishee Summons – Judgement Debts).
Regulations

QR&O Chapter 207 (Pay Allotments and Compulsory Payments).
QR&O 207.01 (General Conditions).
QR&O 207.02 (Compulsory Payments – General Provisions).
QR&O 207.03 (Financial Support Order).
QR&O 207.031 (Garnishee Summons – Judgement Debts).
CHAPTER 32
LEGAL ASSISTANCE TO CF MEMBERS

SECTION 1
INTRODUCTION

Purpose

1. Just as the nature of military service occasionally requires exposure by CF members to a variety of physical risks while in the performance of their duties, military personnel may also be similarly exposed to certain legal risks and the potential for legal liability as they execute their assigned duties. Further, within the context of addressing potential legal issues and concerns affecting the personal lives of CF members, the fact that military personnel are required to deploy to remote areas, or are employed away from their home base for extended periods of time, can potentially make it difficult for many CF members to get immediate access to legal advice and legal services.

2. The purpose of this chapter, therefore, is to outline the varying circumstances in which legal assistance may be provided at public expense to CF members.

General

3. CF members are often under the wrong impression that they can rely on unit legal advisers for personal legal advice. Regardless of whether the advice being sought relates to their military careers or their personal lives, members are not normally entitled to receive legal advice from CF legal officers. As a matter of policy, government and CF authorities have determined that legal officers will be utilized to assist government interests. Other than in extremely limited circumstances, CF legal officers will not provide counsel to individual CF members on any aspect of their military service. To provide advice to CF members in this context would be contrary to the lawyer’s professional obligations as a member governed by a provincial law society and would constitute a conflict of interest (COI) with the legal officer’s solicitor/client obligations to the CF and the Government of Canada.

4. Different nations have varying standards as to the legal aid that their military personnel may receive from their military lawyers. The possibility for CF members to receive specific legal services or compensation for civilian legal services exists in certain circumstances. However, these services can only be provided under certain conditions and only when the appropriate authorities give prior approval.

SECTION 2
LEGAL ASSISTANCE BY CF LEGAL OFFICERS

5. Under the NDA, the Judge Advocate General (JAG) is appointed to act as the legal adviser to the Governor General in Council (GiC), the MND, DND and the CF on military law matters.¹ The JAG is also responsible for the “superintendence of the administration of military justice in the Canadian Forces.”² QR&O 4.081 (Command of the Office of the Judge Advocate General) assigns legal officers to the positions established within the Office of the JAG to provide legal services to the CF.³ The JAG determines the nature of these legal services and legal officers are only subject to the command of another legal officer with respect to their

¹ National Defence Act, R.S.C. 1985, c. N-5, s. 9.1 [NDA].
² NDA, s. 9.2(1).
³ QR&O 4.081(1).
performance. This regulation underscores the fact that legal officers, with the exception of those assigned to the Directorate of Defence Counsel Services (DDCS), have the primary duty of advising units of the CF on military law on behalf of the JAG. The provision of legal assistance, in extremely limited circumstances, to CF members by legal officers of the Office of the JAG is governed by orders.

6. Orders issued by the CDS provide the conditions under which CF members can receive personal legal assistance from military lawyers. The intent of this provision is not to replace civilian legal services that are otherwise available within the community. Rather, the intent is to advise CF members of three issues, namely:
   a. their legal rights and obligations;
   b. to assist when deciding whether to seek civilian legal counsel; and
   c. to assist when presenting their case properly to their civilian lawyer.

7. Lawyers are ethically required to limit their practise to matters in which they have a measure of professional experience and competence (i.e., a family law lawyer should not normally provide advice on employment and labour law matters). For these reasons, legal officers providing advice under the terms of CFAO 56-5 (Legal Assistance) are limited in the extent to which they can provide legal advice to individual CF members. Moreover, the legal officer can only advise a CF member when it is urgent or operationally necessary, where the member’s welfare and effectiveness is impacted or when no other “civilian legal assistance is readily available.” Ultimately, the decision of whether to provide legal assistance is warranted and should be provided remains that of the legal officer. In the event the legal officer is comfortable with providing the legal assistance, any such advice will be provided free to the member.

8. In the context of this order, legal officers are specifically precluded from providing legal advice to anyone other than the chain of command (i.e., an officer or NCM receiving advice while acting in their official capacity as a representative of the CF), on matters related to the Code of Service Discipline (CSD) unless the legal officer works for the DDCS. All legal officers are precluded from advising CF members, other than the chain of command, on civilian criminal offences, the conduct of any litigation or any administrative matter, particularly applications for redress of grievance.

9. All applications for legal assistance must be in writing and all information provided shall be treated in the strictest of confidence. There will be no charge for the provision of this service.

10. COs should be aware of the availability and limitations of this assistance for their personnel. For example, the need for legal advice may occur in preparation for, or during, a deployment overseas. In this regard, the legal services that can be provided by a legal officer include the areas of wills and power of attorney preparation, as well as other related personal
administrative matters having a legal component to them through unit-held briefings or on an individual basis.

11. While deployed on operations, the most common form of legal advice that is provided to a CF member comes within the context of CFAO 56-5 (Legal Assistance) or as a result of the member having been charged with one or more CSD offences. As noted at paragraph 8 above, the CF member charged with one or more CSD offences will normally choose to consult a legal officer assigned to the DDCS for specific legal advice in this area.

12. Similarly, CF members in theatre may become involved in civil or criminal incidents during the course of conducting normal operations. In order to avoid potential, civil claims consequences for the CF and CF members, the assistance of the deployed legal adviser is often required. Consequently, although the nature and extent to which the provision of legal advice by legal officers is limited to CF members, the legal adviser nevertheless remains a useful resource to explain and guide CF members when they are forced to deal with personal legal issues under certain circumstances.

SECTION 3

INDEMNIFICATION OF LEGAL FEES AND THE PROVISION OF LEGAL ASSISTANCE

13. CF members and DND employees perform duties that can result in damage to public and private property and cause harm to individuals. This fact can potentially leave CF members and DND employees exposed to legal liabilities as a consequence of performing their duties or employment. Accordingly, the Treasury Board of Canada Secretariat (TB) policy acknowledges that an employer “should indemnify its servants and protect them from certain financial costs arising from the performance of their duties.”

14. This policy was revised in July 2004, with a retroactive applicability to 1 June 2001, in order to incorporate the more recent harassment policy amendments. The TB policy stipulates that if a Crown servant has “acted honestly and without malice,” within the parameters of their duties and, having achieved “reasonable departmental expectations,” the Government of Canada shall:

   a. indemnify a Crown servant against personal civil liability;
   b. not initiate a claim against a Crown servant; and
   c. provide legal assistance to a Crown servant when:
      i. they must appear before, or be interviewed by, a judicial, investigative or other inquest or inquiry;
      ii. they are threatened with a lawsuit;
      iii. they are to be charged with an offence; or
      iv. when legal assistance is justified in other circumstances.


14 Policy on the Indemnification of and Legal Assistance for Crown Servants at s. 1 (Effective Date).

15 Ibid., at s. 4 (Policy Statement).
15. The TB policy does not normally permit the provision of legal assistance for Crown servants to initiate their own lawsuits. Further, the policy does not apply to the application of QR&O Chapter 38 (Liability for Public and Non-Public Property) whereby a Crown servant is responsible for the “care, custody or control of money.” Not only is a CF member not entitled to legal assistance in such a case, there is every possibility that the member may actually be the subject of disciplinary or administrative action with regard to their role in the loss of public or non-public property. The government department will provide legal assistance for harassment complaints to a CF member or Crown servant if it has been determined that the respondent CF member or DND employee has acted within departmental expectations and the matter has been elevated to a court or tribunal level.

16. The TB definition of a ‘Crown servant’ for the purposes of this indemnification policy includes “individuals employed (or formerly employed), by a department, the Canadian Forces and the Royal Canadian Mounted Police.”

17. In order to qualify for indemnification or legal assistance, a Crown servant must inform the employer at the earliest reasonable opportunity when they become aware of the possibility of a claim or proceeding. A Crown servant must provide a comprehensive report to the appropriate chain of command and complete the form at Appendix A (Authorization Forms) to Policy on the Indemnification of and Legal Assistance for Crown Servants that authorizes the Attorney General to defend the action.

18. The TB has authorized the deputy heads of the various government departments to approve indemnification and the provision of legal services. The DM of the Department of Justice (DoJ) has authorized the DND/CF Legal Advisor (DND/CF LA) to designate the Director of Claims and Civil Litigation (DCCL) to perform the approval function on his behalf. The approval of this undertaking is not automatic and the decision-maker may be required to seek legal advice regarding potential COI or other aspects of the policy. Under certain circumstances, if the DoJ is in a position of COI, it may be deemed appropriate for the employee or member to be represented by civilian legal counsel as opposed to a lawyer from the DoJ. Nevertheless, private counsel cannot be retained at public expense until DCCL has granted proper authorization. A Crown servant who engages the services of a civilian attorney prior to the receipt of the proper authority from DCCL will be personally responsible for the payment of any resulting legal fees.

19. There are also other limitations with respect to the nature of the indemnification provided. As previously identified, indemnification or legal assistance cannot be authorized for a Crown servant in order to commence a lawsuit. Legal assistance cannot be approved as an Ex gratia payment. Crown servants are not automatically entitled to indemnification relating to a harassment complaint unless it is determined at the departmental level that the complaint was unfounded. Finally, if it is determined during the proceedings that the Crown servant acted outside the scope of their duties, the costs for the provision of legal assistance could be recovered from the Crown servant.

---

16 Ibid., at para. 4(c).
17 Ibid., at para. 4(f).
18 Ibid., at para. 6(i).
19 Ibid., at s. 7.1 (Notification).
20 Ibid., at s. 7.2 (Authorization).
21 Minute from the Deputy Minister of Department of National Defence (10 June 2000).
22 Policy on the Indemnification of and Legal Assistance for Crown Servants at s. 7.3.3 (Servant's personal responsibility).
23 Ibid., at para. 4(f).
24 Ibid., at subpara. 7.3.4(b)(iv).
SECTION 4
ADDITIONAL GUIDANCE

20. While legal officers normally provide legal advice to the chain of command, the ‘client’ for all military law advice is the Crown. Solicitor-client privilege attaches to all legal advice provided to the CF and DND. Only the MND is authorized to waive solicitor-client privilege on behalf of the Crown in order for privileged information to be released to third parties. Military lawyers serving in the DDCS are mandated to assist CF members who are placed under arrest or in detention by military authorities or are being investigated, questioned or have been charged with an offence under the CSD. Only in these particular circumstances is the individual CF member the ‘client.’ Consequently, only the CF member can waive the privilege that attaches to the communications between themselves and their DDCS legal adviser.

21. Legal officers, if they are qualified and competent in a particular area of law, may provide legal assistance to CF members on private matters not related to the CF or their military service. The scope of any legal assistance available to CF members is restricted under CFAO 56-5 (Legal Assistance) and can never relate to areas that can bring the legal officer into potential conflict with their primary duties.

22. With respect to indemnification of legal fees and the provision of legal services, the TB Policy on the Indemnification of and Legal Assistance for Crown Servants sets out the conditions in which this policy applies. It is important to note that CF members requesting indemnification/legal assistance must apply for such, through the local Assistant Judge Advocate General (AJAG) or deployed legal adviser, in order to obtain the requisite authorization from the DCCL prior to engaging the services of a civilian lawyer. Urgent requests can be reviewed and approved or not approved within 48 hours, if necessary.

SECTION 5
REFERENCES

Legislation


Regulations

QR&O 4.081 (Command of the Office of the Judge Advocate General).
QR&O 101.20 (Duties and Functions of Director of Defence Counsel Services).

Orders, Directives and Instructions

CFAO 56-5 (Legal Assistance).

Secondary Material


Minute from the Deputy Minister of Department of National Defence (10 June 2000).

---

25 QR&O 101.20 (Duties and Functions of Director of Defence Counsel Services).
CHAPTER 33
ADMINISTRATIVE REVIEW

SECTION 1
INTRODUCTION

General
1. Formerly known as career review boards (CRBs), administrative reviews (ARs) are “the process to evaluate the career administrative action that is being considered for a CF member”.\(^1\) AR policy is established by the Chief of Military Personnel. CMP. The conduct of an AR is the responsibility of Director General Military Careers (DGMC) for the regular force or the appropriate Area Headquarters (HQ) or equivalent for the reserve force. The aim of this chapter is to familiarize COs with the AR process.

SECTION 2
ADMINISTRATIVE REVIEW PROCESS

2. Generally, an AR can be initiated several ways. For instance, a CO may recommend administrative action other than RW or C&P or may recommend an AR on receipt of a SIR, MPIR, BOI minutes of proceedings or following an incident. DMCARM or the area HQ or equivalent staff may commence an AR once a CF member has been assigned a permanent MEL by D Med Pol. Equally, a career manager or Reserve Force equivalent, training establishment, CFRG HQ, or CFSTG HQ might initiate an AR following a member’s training failure. The following table identifies the AR analyst by type of AR and component or sub-component:

<table>
<thead>
<tr>
<th>AR Type</th>
<th>Component or Sub-component</th>
<th>AR Analyst</th>
</tr>
</thead>
<tbody>
<tr>
<td>Performance</td>
<td>Regular Force</td>
<td>D Mil C</td>
</tr>
<tr>
<td></td>
<td>Reserve Force</td>
<td>area HQ or equivalent staff</td>
</tr>
<tr>
<td>Drugs and sexual</td>
<td>Regular Force</td>
<td>DMCARM</td>
</tr>
<tr>
<td>misconduct</td>
<td>Reserve Force</td>
<td></td>
</tr>
<tr>
<td>General Misconduct</td>
<td>Regular Force Officers</td>
<td>DMCARM</td>
</tr>
<tr>
<td></td>
<td>Primary Reserve officers with more than 10 years service</td>
<td></td>
</tr>
<tr>
<td></td>
<td>CIC</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Canadian Rangers</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Supplementary Reserve members attached posted to the CIC and Canadian Rangers</td>
<td></td>
</tr>
</tbody>
</table>

\(^1\) DAOD 5019-2 (Administrative Review)
3. DAOD 5019-2 further describes the AR process. Upon receiving all required information and documentation, the AR staff prepares a synopsis and formulates a recommendation to be forwarded to the approving authority. A copy of the AR file is disclosed to the member who is then provided a reasonable period of time within which to respond in writing to the appropriate AR staff. At the end of this period, the AR staff must forward the entire file and, in particular, any representations submitted by the member to the approving authority (AA). Based on the information contained within the disclosure material and any written representations submitted by the member, the approving authority makes a decision in the case and notifies the member of that decision.

4. Once an AR case file has been reviewed, the approving authority may take or direct administrative action, including:
   a. retention without career restrictions;
   b. RW;
   c. C&P;
   d. re-course;
   e. retention with career restrictions;
   f. compulsory occupational transfer; and
   g. release or recommendation for release, as applicable.

5. The approving authority (AA) for an AR depends upon the nature of the AR and the rank of the member involved. The AA for an AR could be DGMC, Director Military Careers (D Mil C) or

<table>
<thead>
<tr>
<th>AR Type</th>
<th>Component or Sub-component</th>
<th>AR Analyst</th>
</tr>
</thead>
<tbody>
<tr>
<td>Officers with 10 years or less service and NCMs of the Primary Reserve, including Supplementary Reserve members attached posted to the Primary Reserve</td>
<td>area HQ or equivalent staff</td>
<td></td>
</tr>
<tr>
<td>All other Supplementary Reserve members</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MEL</td>
<td>Regular Force</td>
<td>DMCARM</td>
</tr>
<tr>
<td>Reserve Force</td>
<td>area HQ or equivalent staff</td>
<td></td>
</tr>
<tr>
<td>TOS</td>
<td>Regular Force</td>
<td>DMCARM</td>
</tr>
<tr>
<td>Reserve Force</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>NES</td>
<td>Reserve Force officers on NES</td>
<td>DMCARM</td>
</tr>
<tr>
<td>Reserve Force NCM on NES</td>
<td>area HQ or equivalent staff</td>
<td></td>
</tr>
<tr>
<td>Untrained CF members</td>
<td>Regular Force</td>
<td>DMCARM</td>
</tr>
<tr>
<td>Reserve Force</td>
<td>area HQ or equivalent staff</td>
<td></td>
</tr>
</tbody>
</table>
Director Military Careers Administration and Resource Management (DMCARM). In some cases, it may be an equivalent Reserve Force authority or other senior CF officer, such as a commander of a command. It is also important that the administrative action following an AR be ordered by an AA who has the jurisdiction to order that specific administrative action. For example, the reversion of a Reserve Force Sgt as a result of a civil conviction can only be ordered by an AA who is an officer not below the rank of BGen and who has been designated by the CDS. However, the release of that same Sgt under Item 1(b) can only be ordered by DMCARM.

SECTION 3
PROCEDURAL FAIRNESS

6. Procedural fairness is vital to the AR process. Procedural fairness requires that the four following fundamental steps be followed, namely: notice, disclosure, the right to make representations and reasons for decision.

7. A CF member must first be given timely notification that they are to be made the subject of an AR and the notice must be sufficiently detailed for the member to ascertain the case against them. A member cannot make representations if they are not aware of the AR. In Hutton v. Canada (Chief of Defence Staff), for example, a CRB was hastily convened and a decision was rendered the same day. The court determined that Hutton had neither received notification of the proceedings, nor been given a reasonable opportunity to make submissions. On that basis, the court found that the principles of natural justice were breached and ordered the matter be remitted for re-consideration by CF authorities. Another application of the notice rule is the case where a service member is recommended for compulsory release; in such cases, the notification requirement may be satisfied by serving the member with a properly completed Notice of Intent to Recommend Release form.

8. All information that is to be considered by the approving authority as part of the decision-making process must be disclosed to the member (i.e., synopsis, recommendations, etc.). According to principles of natural justice, where a member has been given sufficient disclosure to enable them to make ‘meaningful’ representations on the issues forming the basis of the AR, then the ‘test’ for disclosure will have been met. It is important to note that, in any given case, it is acceptable if some records on file are not disclosed to the member as long as the undisclosed records are not placed before the approving authority. While disclosure does not, in all cases, require that there be complete disclosure of all documentation, the member must, at minimum, be informed of the gist or substance of the case against them.

9. There may be some cases where full disclosure is necessary. In Rockman, for example, the member was released on the basis of a Military Police (MP) report. The member took issue with the allegations contained in the MP report, thereby making credibility an issue. An edited version of the MP report was disclosed to Rockman but, as the credibility of the allegations...
contained in the report was at issue, the court suggested that an unedited version of the report should have been disclosed to the member.\footnote{10}

10. The member must be given the opportunity to make representations to the decision-maker. Generally, there is no legal requirement to make, nor provision for, oral representations during an AR. In most cases, as long as the member is given the chance to make written representations, and the decision-maker considers those representations, the right to make representations (i.e., the legal principle ‘to be heard’) is satisfied.\footnote{11} In release proceedings, for example, the right to make representations is stated on the Notice of Intent to Recommend Release form.\footnote{12} However, notwithstanding the CF’s current policy that a member may only submit written representations, there may be truly exceptional cases where the duty of fairness will compel an oral hearing. These cases would be rare and most likely to arise where credibility is a most significant issue in making a decision.\footnote{13} The local JAG representative should be consulted before conducting an oral AR.

11. Finally, an unbiased decision-maker must make the decision. That is to say, the decision-maker cannot have any personal interest in the outcome of the decision or prior involvement in the specific case\footnote{14} as it is of fundamental importance that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."\footnote{15} Moreover, the decision-maker must give reasons for the decision.\footnote{16} Any AR may be subject to the grievance process or judicial review by civilian courts.

SECTION 4

REFERENCES

Legislation


Regulations

\textit{QR&O} Chapter 11 (Promotion, Reversion, and Compulsory Remustering)

\textit{QR&O} Chapter 15 (Release).

Orders, Directives and Instructions

DAOD 5019-2 (Administrative Review)

DAOD 5019-4 (Remedial Measures)

\footnote{10} \textit{Rockman} at paras. 18-19. Note, however, that Rockman’s application for judicial review was dismissed. Even after receiving an unedited version of the MP report, Rockman failed to show there was anything in the report that could have been used to challenge its reliability.


\footnote{13} \textit{Brown and Evans, Judicial Review of Administrative Action in Canada}, (Toronto: Canvasback, loose-leaf) at §10:1000 (Oral Hearings)

\footnote{14} The mere fact that an order being challenged was issued under the authority of the decision-maker does not necessarily mean the decision-maker is biased.

\footnote{15} \textit{The King v. Sussex Justices, Ex parte McCarthy}, [1924] 1 K.B. 256, at 259.

\footnote{16} See \textit{Baker}. See also Chapter 2 under Part 1 of this manual for a more complete definition of ‘bias.’
Jurisprudence


The King v. Sussex Justices, Ex parte McCarthy, [1924] 1 K.B. 256.


Secondary Material

Brown and Evans, Judicial Review of Administrative Action in Canada, (Toronto: Canvasback, loose-leaf)
CHAPTER 34
CF GRIEVANCES
SECTION 1
INTRODUCTION

1. The CF has developed an internal grievance procedure to allow members of the CF who feel that they have suffered an injustice to submit an application for redress of grievance. This provides the CF member with a process in which to grieve a perceived wrong or injustice to a higher authority within the CF organization, normally without any personal expense to the member.\(^1\)

2. The *NDA*, QR&O, CFAOs and the *Grievance Manual*\(^2\) provide detailed information on the process itself and the key players that operate within it. It is essential that each CF member understand the various steps in the grievance process and the responsibilities of the key players involved in the decision-making process.

SECTION 2
GENERAL

Authority

3. Subsection 29(1) of the *NDA* provides the statutory authority for a CF member’s right to grieve a perceived injustice or wrong. It states “an officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.”\(^3\) The grievor does not have to establish, at the time the grievance is brought, the loss of an actual benefit pursuant to a CF decision. It is sufficient only that the matter grieved involves a decision, act or omission in the administration of the affairs of the CF, and that it directly and personally affects the grievor.

4. A member, however, is not entitled to grieve every decision with which they do not agree. There is no right to grieve:

   a. a decision of a court martial or the Court Martial Appeal Court;

   b. a decision (or findings and recommendations) of a board, commission or tribunal established pursuant to the *NDA*; or

   c. a matter or case prescribed by the Governor in Council (GIC) in regulations. Under this restriction, QR&O article 7.01(2) provides that there is no right to grieve any decision made under the *Code of Service Discipline* (CSD). It would also include any other decisions identified in QR&O as decisions precluded from the operation of section 29 of the *NDA*. However, to date, no other matter has been so prescribed by the GIC in regulations.\(^4\)

Members cannot grieve the above-mentioned decisions because each court, tribunal, board or commission has its own appeal or review process. A member who disagrees with the decision should use the appeal or review process for that particular adjudicative body.

---

1 The right to grieve does not preclude a member from making an oral complaint to their CO prior to submitting a grievance in an effort to informally resolve the matter.
3 *National Defence Act*, R.S.C. 1985, c. N-5, s. 29(1) [NDA].
4 *Ibid.*, s. 29(2).
5. The *NDA* provides that a member is not to be penalized for submitting a grievance. It will not be placed on the member’s personnel file unless it is necessary to implement some aspect of the redress sought and, even then, only in exceptional circumstances and only to the extent necessary to properly implement the remedy. The *NDA* provides that any error or omission uncovered during the grievance process may be corrected, even if the correction will adversely affect the member.

6. A member must submit a grievance within six months after the day when the member knew, or ought reasonably to have known, of the decision, act or omission about which the member is now grieving. When a member does not submit a grievance within the 6-month period, the member must provide a sufficient explanation for the delay to the initial authority (IA). Whether the IA accepts a grievance after the 6-month time limitation will be at the IA’s discretion. The IA may accept the grievance if the IA believes that it would be in the interests of justice to do so. For instance, the IA may accept a grievance after the expiration of the 6-month time limit if the grievor was on a deployment during that time and, as a result, was unable to submit a grievance within the allotted time. Also, it may be in the interests of justice to accept a grievance where not all of the information was available to the grievor within six months. If the IA refuses to accept the explanation for the delay, the IA must provide the grievor with the reasons for the decision.

7. A member may submit a grievance prior to their release from the CF. Once released, however, a grievor is not entitled to submit a grievance as of right, even though the act, decision or omission that forms the subject matter of the grievance occurred while the member was still in the CF. Rather, the former member is entitled to submit a ‘complaint’ in writing. Where this occurs, the complaint will not be decided by an IA or a final authority (FA) within the grievance process. Instead, the complaint will normally be responded to by the authority responsible for the decision or action that is the subject of the complaint or by the authority responsible for the policy in question.

### Assistance to Grievor

8. A grievor is entitled to an assisting member (AM). When a grievor requests an AM, the CO is responsible for assigning an officer or NCM to assist the grievor. If the grievor requests a particular officer or NCM, the CO should provide the grievor with their choice, where practical. If it is not practical to appoint the requested AM, the CO may appoint someone else. The grievor is not obliged to use the AM assigned by the CO.

9. An AM is not a grievor’s representative in the grievance process. The AM is not permitted to speak on behalf of a grievor. Further, CFAO 56-5 (Legal Assistance) provides that the AM cannot be a legal officer and that legal officers cannot assist a grievor or an AM. Advising a grievor as well the chain of command would place legal officers in a conflict of interest (COI).

10. The function of an AM is to ensure that a grievor is familiar with the grievance process, including its rules and procedures at any level of the grievance process. An AM is to assist a grievor in articulating their grievance in a clear and concise manner. An AM may also assist a

---

5 *Grievance Manual*, s. 2.4.
6 *NDA*, ss. 29(4)-(5) and *Doyle v. Canada (Chief of Defence Staff)*, [2004] F.C.J. No. 1563 at para. 27, 261 F.T.R. 227, 2004 FC 1294 [*Doyle*].
7 *QR&O* 7.02(2); *QR&O* 7.06 (Who May Act as Initial Grievance Authority); *QR&O* 7.07 (Duties of Initial Grievance Authority). The IA is the first decision-making level in the grievance process.
8 *QR&O* 7.02 (Time Limit).
10 *QR&O* 7.08 (Chief of the Defence Staff). The FA is the final decision-making level in the grievance process.
11 *QR&O* 7.03(1); CFAO 19-32 (Redress of Grievance), para. 10.
12 *Grievance Manual*, s. 5.3; *QR&O* 7.03 (Assistance); Canadian Forces Grievance Authority (CFGA), *Assisting Member Handbook*, s. 3.2 (The Assisting Member), online: DIN <http://cfga.mil.ca/pubs/griev_instruments/ao-handbook_e.asp>.
grievor with gathering information and evidence. However, a grievor is ultimately responsible for formulating and advancing their own grievance.  

11. Any officer or NCM who is assigned as an AM should familiarize themselves with the CF Grievance Authority’s *Assisting Member Handbook*. The handbook will provide an AM with information pertaining to their role and responsibilities in the grievance process.

12. Grievors are not entitled to legal representation at public expense from the CF, DND or the Department of Justice (DoJ). Grievors can, however, hire civilian counsel at their own personal expense in order to assist them with their grievance. When a grievor retains civilian counsel, the grievor must sign a consent form allowing access to the process for their civilian counsel. It should be noted that, in such cases, all further correspondence will then be forwarded to the civilian counsel identified as having been retained by the member. It will then be the responsibility of the grievor to obtain copies of all correspondence related to their grievance from their named representative.

SECTION 3
GREVIANCE PROCESS/LEVELS

Initial Authority

13. There are two decision-making levels in the CF grievance process. The first is the initial authority (IA). The second is the final authority (FA). To initiate the grievance process, a member must submit the grievance in writing to their CO. The CO is the person responsible for reviewing the member’s grievance and determining whether they can act as the IA. The CO will be the IA if the CO has the power to grant the redress sought. If the CO cannot act as the IA, then the CO must forward the grievance, and any other additional information that the CO considers relevant, to the proper IA within 10 days of receiving the grievance. The CO is also responsible for informing the grievor of the action taken and for providing the grievor with a copy of any additional information forwarded to the IA.

14. When the CO is unable to act as the IA, the CO is responsible for forwarding the grievance, including their comments as to the merit of the grievance, to the commander or officer holding the appointment of director general or above at NDHQ who has the power to grant the redress sought. The actual director general responsible is dependent on the subject matter of the grievance.

15. Where the officer’s decision, act or omission gave rise to the grievance or was involved in the matter being grieved, that officer cannot act as the IA. Attempting to deal with the grievance will create an appearance of bias since the IA would be deciding whether their own decision, act or omission was incorrect or improper. In such cases, the officer must refer the grievance to the next superior officer who is responsible for dealing with the matter. This superior officer then becomes the IA.

---

13 *Grievance Manual*, s. 5.4.
14 *Ibid.*, s. 2.10.
15 Time lines are in calendar days, not working days. CANFORGEN 070/00 CDS 045 151205Z Jun 00, CDS, CF Streamlined Grievance Process – Implementation, at para. 4, online: DIN <http://vcds.dwan.dnd.ca/vcds-exec/pubs/canforgen/2000/070-00_e.asp> [CANFORGEN 070/00].
16 QR&O 7.05(1)-(2).
17 QR&O 7.06(1); CANFORGEN 070/00 at para. 3.
18 QR&O 7.06(2).
**Initial Authority’s Duties and Responsibilities**

16. CF grievance procedure requires the IA to consider and determine a grievance within 60 days of receipt. When an IA has made a decision, the IA must inform the grievor of the decision and the reasons for it. An IA must also inform the grievor of the entitlement to submit the grievance to the CDS within 90 days should the grievor be dissatisfied with the decision or any aspect of the decision. An IA must forward this information to the grievor through the grievor’s CO, which ensures the CO has ‘situational awareness’. An IA is also responsible for returning all documents or things submitted by a grievor, if their return is requested.

17. Prior to making a decision, an IA must consider all relevant information. In order to resolve the grievance, further investigation may be required. The information being relied upon by the IA must be disclosed to a grievor and the grievor must be provided with the time and opportunity to make representations to the IA regarding any new information.

18. The grievor should be given sufficient time (i.e., usually 14 days), to provide their representations or feedback. Not all information in the hands of the decision-maker must be disclosed to the grievor. For instance, any document to which solicitor-client privilege applies is not to be disclosed.

19. Disclosure is the process where a decision-maker provides the grievor with a copy of all the information that they will be relying on in order to make their decision. A grievor must be provided an opportunity to respond to the information by either making written representations about the information or by submitting new information to the decision-maker.

20. Disclosure and the right to respond are part of procedural fairness, a critical phase within the legal process. The duty of procedural fairness is a minimum requirement and the Federal Court of Canada (FCC) will not hesitate in intervening when it sees a breach of this duty.

21. In a recent FCC decision, the Court stated:

> It is difficult to imagine any lesser guarantees than the right to be informed of the reasons for the employer’s dissatisfaction and the right to answer.

22. Moreover, the Court added that the grievor’s right to respond is a determinative factor in the Court’s consideration that procedural fairness was observed.

23. When an IA is unable to consider and determine the grievance within 60 days of receipt, the grievor may request that the IA forward the grievance to the CDS for consideration and determination. It is important to note that the onus rests on the grievor to request that their grievance be submitted to higher authority.

---

20. Where a member has been released, the IA may communicate directly with the member.
21. QR&O 7.07 (Duties of Initial Grievance Authority).
22. Grievance Manual, s. 4.1 and Part 6. CFAO 19-32 (Redress of Grievance) provides that 14 days will normally be provided to the member to make representations to any newly disclosed information being relied upon by an IA. At para. 22, CFAO 19-32 provides that a grievor may request from the IA an extension beyond the normal 14 days due to the complexity of the grievance, exigencies of the service or any other valid reasons.
23. Grievance Manual, s. 4.1.
25. Ibid.
26. QR&O 7.07(2).
CF Grievance Board

24. The CF Grievance Board (CFGB) is an external body independent from DND and the CF that has been established by section 29.16 of the NDA. The role of the CFGB is to provide findings and recommendations on grievances referred to it by the CDS. It does not have the authority to grant or deny redress regarding any grievance.  

25. There are certain grievances for which the CDS is required to request CFGB findings and recommendations. These grievances relate to:

   a. administrative action resulting in the forfeiture of, or deductions from, pay and allowances, reversion to a lower rank or release from the CF;
   b. the application or interpretation of CF policies relating to expression of personal opinions, political activities and candidature for office, civil employment, conflict of interest and post compliance measures, harassment or racist conduct;
   c. pay, allowances and other financial benefits; and
   d. the entitlement to medical care or dental treatment.

26. The CDS is also responsible for ensuring that any grievance that concerns a decision or action of the CDS is forwarded to the CFGB for its findings and recommendations.

27. When the CFGB reviews a grievance that has been forwarded to it by the CDS, it must send a copy of its findings and recommendations to both the CDS and the grievor. On receiving the written findings and recommendations from the CFGB, the CDS is then responsible for considering the findings and recommendations and deciding the outcome of the grievance. However, if the CDS does not act on a finding or recommendation of the CFGB, the CDS shall include the reasons for not having done so in the decision respecting the disposition of the grievance. The CDS is required by regulation to inform the grievor and the CFGB of any decision in this regard. The CDS must consider the findings and recommendations made by the CFGB before rendering a decision. Although the CDS is not bound by such findings and recommendations, the CDS must justify the reason for not acting on them. The CDS’s failure to consider all of the issues may result in the FCC setting aside or quashing the decision if the grievor seeks judicial review.

Final Authority Level

28. Section 29.11 of the NDA provides the CDS with the authority to act as the FA in the CF grievance process. When a member is dissatisfied with the IA’s decision, the member has 90 days to submit their grievance to the FA for consideration. The grievance must be made in writing and signed by the grievor. The FA may accept a grievance after the expiry of 90 days if the FA is of the opinion that it would be in the interests of justice to do so. If the FA decides against an extension, the grievor must be provided notice of this fact, with reasons. In this regard, the CDS must exercise discretion properly, as decisions made in this area are also subject to judicial review by the FCC.

---

28 NDA, s. 29.2; Grievance Manual, s. 3.3.
29 QR&O 7.12 (Referral to Grievance Board).
30 QR&O 7.12(2).
31 QR&O 7.13 (Duties and Functions of Grievance Board).
32 NDA, ss. 29.13(2); QR&O 7.14 (Action after Grievance Board Review); Doyle at para. 28.
33 QR&O 7.14 (Action after Grievance Board Review).
34 NDA, s. 29.13.
35 Doyle, note 6.
36 QR&O 7.10 (Submission to Chief of the Defence Staff).
37 QR&O 7.10 (4).
38 Doyle.
29. With two exceptions, the NDA provides that the CDS may delegate to any officer any of the powers, duties or functions that the CDS possesses or performs as an FA in the grievance process.\(^{39}\) The CDS has delegated the FA authority to an officer referred to as the Director General CF Grievance Authority (DGCFGA). The process for handling a grievance by DGCFGA is essentially the same as it is for the CDS. The DGCFGA must not adjudicate any grievance that is to be forwarded to the CFGB. Also, if the decision, act or omission of the DGCFGA, whether in a former capacity as an IA or in one of that officer’s previous appointments, becomes the subject of the grievance, the DGCFGA must not act as the FA. In such cases, the grievance must be forwarded to the CDS for final adjudication.\(^{40}\) The DGCFGA is subject to the same time limits as the CDS and also has the same power to extend the 90-day deadline in those cases that are within the DGCFGA’s decision-making authority.

30. As noted, the CDS is responsible for considering and determining grievances that have been referred to the FA. On making a decision, the FA is responsible for informing the grievor of the decision and the reasons supporting the decision. The grievor is to be advised of the FA’s decision and supporting reasons through their own CO. The FA is also responsible for returning all documents or things submitted by the grievor in all cases where the grievor has submitted a request for their return.\(^{41}\)

31. Like the IA, the FA must consider all relevant information when making a decision. Further investigation may be required. The information being relied upon must be disclosed to the grievor. The grievor must be provided an opportunity to respond to the information by either making written representations with respect to the information or submitting new information to the decision-maker. A grievor should be given reasonable time (i.e., at least 14 days) to provide their response. Not all information in the hands of a decision-maker must be disclosed to the grievor. For instance, any document to which solicitor-client privilege applies is not to be disclosed.\(^{42}\)

32. The IA and the FA are responsible for ensuring that there is a record of the grievance, the decision and the action taken.\(^{43}\) This is to protect all parties involved in the grievance process, to ensure that everyone is working from the same information and because the decision may be the subject of an application for judicial review filed in the FCC. The IA and FA are also responsible for ensuring that any documents or things submitted as part of the grievance process are returned to the grievor upon request.\(^{44}\)

33. A decision by the FA constitutes the end of the grievance procedure within the CF. The FA’s decision is not subject to an appeal or review by any other authority except for an application for judicial review before the FCC under the Federal Courts Act (FCA).\(^{45}\) The FCC may choose not to entertain an application for judicial review until the CF grievance procedure has been exhausted.\(^{46}\)

### Suspension of Grievance

34. If a grievor with an active grievance decides to commence legal action, a claim or any other proceeding under another Act of Parliament with respect to the subject matter of the grievance, CF grievance authorities are responsible for ensuring that the grievance is suspended.

---

\(^{39}\) NDA, s. 29.14. The exceptions to the CDS’ delegation power are: (a) the duty to act as an FA in respect of a grievance that must be referred to the CFGB; and (b) the power to sub-delegate.

\(^{40}\) Ibid.

\(^{41}\) QR&O 7.11 (Duties Where Grievance Not Referred to Grievance Board).

\(^{42}\) Ibid., c. 3, para. 3.

\(^{43}\) QR&O 7.11(d).

\(^{44}\) QR&O 7.14(c).

\(^{45}\) NDA, s. 29.15.

The IA or FA can only resume the grievance process if the other claim, proceeding or action is discontinued or abandoned prior to the matter being decided on its merits.47

SECTION 4
JUDICIAL REVIEW

35. When a member of the CF is dissatisfied with the decision of the CDS, the member may, at their own personal expense, make an application for judicial review of the grievance decision in the FCC. The member should keep in mind that judicial review is not a form of appeal. Section 29.15 of the NDA provides that the decision of the FA is final and binding and, with the exception of judicial review, the decision is not subject to an appeal or review by any court.

36. Normally, courts will not accept an application for judicial review unless the grievance process has been exhausted. In Anderson v. Canada (Operations Officer, Fourth Maritime Operations Group), the Court acknowledged that the grievance process was an adequate alternative remedy. The Court also ruled that when an adequate alternative remedy exists, judicial review would not be granted until the alternative remedy has been exhausted.48

37. Subsection 18.1(3) of the FCA49 allows the FCC to order one of the following remedies in an application for judicial review:
   a. it can order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do, or has unreasonably delayed in doing; or
   b. it can declare invalid or unlawful, or quash, set aside, or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

38. The FCC may grant the above-mentioned relief if the Court determines that the decision-maker in the grievance process has:
   a. acted without jurisdiction or beyond its jurisdiction;
   b. refused to exercise its jurisdiction;
   c. failed to observe principles of natural justice, procedural fairness or other procedures that it was required by law to observe;
   d. erred in law in making a decision or an order, whether or not the error appears on the face of the record;
   e. based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;
   f. acted or failed to act by reason of fraud or perjured evidence; or
   g. acted in any other way that was contrary to law.50

39. The degree of scrutiny that the FCC applies to an FA grievance decision will depend on the standard of review that the court adopts. For judicial reviews, the standard of review ranges

---

47 QR&O 7.16 (Suspension of Grievance). A claim, proceeding or action is decided ‘on its merits’ when the decision rendered is based on the real issues of the case before the court and not on so-called, ‘technicalities.’

48 Anderson, supra n. 47, at p. 57. See also, Vaughan v. Canada, [2005] 1 S.C.R. 146. However, in certain exceptional circumstances, the court may find that the grievance process does not provide adequate alternate remedy - see Jones v. Canada, [2007] F.C.J. No. 532 (QL) in which the court found that a lack of disclosure prior to release prevented the applicant from exercising his right to grieve.

49 R.S.C. 1985, c. F-7 [FCA].

50 Ibid., 18.1(4).
from ‘patently unreasonable’\textsuperscript{51} to ‘correctness.’\textsuperscript{52} To date, although the FCC has often applied the ‘patently unreasonable’ standard of review when reviewing CF grievances,\textsuperscript{53} it has recently applied other standards of review, as well. For example, in the recent CF grievance decision of Armstrong,\textsuperscript{54} the court stated that it had applied the ‘patently unreasonable’ standard in some aspects of its decision. However, as it specifically concerned other aspects of that same case, the FCC also found it appropriate to apply the ‘reasonableness’ standard of review.

40. In Canada (Director of Investigation and Research) v. Southam Inc., the Supreme Court of Canada (SCC) held that decisions of administrative boards, commissions and tribunals were reviewed using different standards of review depending on the nature of the decision. The SCC introduced a spectrum of judicial review describing the level of deference the courts would grant administrative decision-makers. On one end of the spectrum, the courts granted the highest degree of deference to administrative decision-makers and would only over-turn decisions that were patently unreasonable. At the other end of the spectrum were those decisions for which the courts would grant little or no deference and would apply a standard of correctness. In the middle were decisions for which the courts would grant some deference, and would not over-turn decisions that were ‘reasonable’ (i.e., this was known as ‘reasonableness \textit{simpliciter},’ to distinguish it from patently unreasonable).

41. For greater certainty, ‘patently unreasonable’ refers to a level of review in which the courts grant the greatest degree of deference to the decision-maker. Under this standard of review, a court will over-turn a decision by an administrative commission, board, or tribunal if, based upon the facts presented to the decision-maker and the applicable law, the decision was patently unreasonable.

42. ‘Correctness’ refers to the standard of review in which courts grant the least amount of deference to an administrative commission, board or tribunal. The reviewing court will assess whether the administrative decision-maker made the correct decision. It is, therefore, the most stringent standard of review and, when applying this standard, courts are permitted to substitute their own decision if the administrative decision-maker is found to have made an incorrect decision. This standard of review is commonly applied when a decision-maker is adjudicating facts dealing with subject matter that is normally within the purview of the courts, rather than administrative tribunals (i.e., human rights or Charter law).

SECTION 5
REFERENCES

Legislation


Regulations

QR&O Chapter 7 (Grievances).

QR&O 7.02 (Time Limit).

\textsuperscript{51} See also para. 16 of s. 2 to Chapter 2 under Part 1 of this manual for a discussion concerning the definition of ‘patently unreasonable.’


\textsuperscript{54} Armstrong v. Canada (Attorney General), 2006 FC 505, aff’d 2007 FCA 157. Also, see: McManus v. Canada (Attorney General), 2005 FC 1281, where the court indicated that it was using the ‘reasonable \textit{simpliciter},’ standard in its review.
QR&O 7.03 (Assistance).
QR&O 7.06 (Who May Act as Initial Grievance Authority).
QR&O 7.07 (Duties of Initial Grievance Authority).
QR&O 7.08 (Chief of the Defence Staff).
QR&O 7.10 (Submission to Chief of the Defence Staff).
QR&O 7.11 (Duties Where Grievance Not Referred to Grievance Board).
QR&O 7.12 (Referral to Grievance Board).
QR&O 7.13 (Duties and Functions of Grievance Board).
QR&O 7.14 (Action after Grievance Board Review).
QR&O 7.16 (Suspension of Grievance).

Orders, Directives and Instructions
CFAO 19-32 (Redress of Grievance).
CFAO 56-5 (Legal Assistance).

Jurisprudence


McManus v. Canada (Attorney General), 2005 FC 1281.


Secondary Material


Canadian Forces Grievance Authority (CFGA), Assisting Member Handbook, online: DIN <http://cfga.mil.ca/pubs/griev_instruments/ao-handbook_e.asp>.

Canadian Forces Grievance Board (CFGB), main page, online: CFGB <http://www.cfgb-cqfc.gc.ca/index-e.php>.

CHAPTER 35
CLAIMS BY AND AGAINST THE CROWN

SECTION 1
INTRODUCTION

1. The Treasury Board Policy on Claims and Ex gratia Payments\(^1\) (TB claims policy) sets out the Government of Canada’s policy with regard to claims by and against the Crown. It is Government of Canada policy to deal with claims by or against the Crown in an efficient and effective manner. In this regard, it is important to note that the CF is subject to the provisions contained within the TB claims policy and must, therefore, proceed in accordance with its direction. In all cases, the CF should attempt to effect the proper, adequate and timely settlement of claims by or against the Crown.

SECTION 2
GENERAL

Authority

2. Section 3 of the Crown Liability and Proceedings Act (CLPA)\(^2\) sets out the statutory authority concerning Crown liability for damages regarding torts committed by Crown servants or for situations involving “a breach of duty attaching to the ownership, occupation, possession or control of property.” Section 3 of the CLPA only relates to the liability of the Crown. Liability of Crown servants and agents exists under common law.\(^3\) In the Province of Quebec, however, the Crown is liable for damages caused by the fault of a Crown servant or for damages “…resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner.”\(^4\)

3. Section 9 of the CLPA provides that no proceeding lies against the Crown or one of its servants in respect of a claim where a pension is payable. Further, there cannot be a claim against the Crown or its servant if “compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.”\(^5\)

4. The Deputy Minister (DM) of the Department of National Defence (DND) has the authority to settle claims against the Crown on the basis of liability and the DM can make Ex gratia payments.\(^6\) The CF chain of command has no authority to settle claims using operations and maintenance (O&M) funds. The funds allocated to the chain of command are not appropriated for the purpose of claims settlement.\(^7\) The following persons have been authorized to accept an amount in settlement of claims by the Crown, to recover from a Crown servant amounts owing to the Crown and to pay amounts in settlement of a liability claim against the Crown:

---

\(^1\) Treasury Board of Canada Secretariat (TB), Policy on Claims and Ex gratia Payments, online: TB <http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/TBM_142/claiexgratipaym1_e.asp> [Policy on Claims and Ex gratia Payments].


\(^3\) Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 3 [CLPA].

\(^4\) CLPA, s. 9.

\(^5\) Policy on Claims and Ex gratia Payments. The TB policy defines both ‘claim’ and ‘Ex gratia’ payment. A claim is a request for some form of compensation to cover a loss, expenditure or damage sustained by either the Crown or a claimant. Claims can be settled in or out of court. An Ex gratia payment is a benevolent payment made to a person even though there is no legal liability on the part of the Crown. It is an exceptional vehicle to be used only if there is no other system for payment in existence (i.e., no other system exists for payment under a statute, regulation or other policy vehicle).

a. the Director Claims and Civil Litigation (DCCL), for amounts up to $200,000;
b. Assistant Judge Advocates General (AJAGs), for amounts up to $25,000;\(^7\) and
c. JAG legal officers on operations, for amounts up to $10,000.

DCCL, AJAGs and JAG legal officers while on operations also have the authority to make \textit{Ex gratia} payments up to $2,000.\(^8\) The JAG has the lawful authority to make \textit{Ex gratia} payments for any amount.\(^9\)

5. Not all claims against the Crown are covered by the TB claims policy. Claims arising from contract disputes, claims for losses and recovery of money, claims for damages occasioned to personal effects belonging to CF members and DND employees while on relocation or travel status and claims related to bodily injury while on duty are not covered.\(^10\)

SECTION 3
CLAIMS PROCEDURE

Reporting

6. If an incident related to the CF or DND occurs which may result in legal action or a monetary claim by or against the Crown, the CO whose personnel or materiel are involved in the incident must forward a report to the nearest regional JAG representative. The CO is also responsible for ensuring that any other report required under the \textit{NDA}, \textit{QR&O}, CFAO or DAODs with respect to the incident is provided to the appropriate authority.\(^11\)

7. DAOD 7004-1 (Claims and Ex gratia Procedures), which sets out the information that must be included in a report of an incident that may result in a claim by or against the Crown, should be reviewed in detail. In such reports, the following information must be included:
   a. name and address of the people involved in the incident;
   b. the date, time and precise location of the incident;
   c. a brief statement with respect to the damage and/or injury involved and an appropriate damage estimate;
   d. a brief statement setting out the details surrounding the incident;
   e. information as to whether a civilian or military police (MP) agency is involved; and
   f. a recommendation as to what type of investigation is needed. If an investigation is already under way, a statement to that effect should be provided.\(^12\)

8. When an incident involves a death or serious injury, the CO is responsible for ensuring that a report is sent within 48 hours to DCCL, Director Casualties Support Administration (DCSA) and the regional AJAG. Concerning such incidents that occur during operations, this report is to be forwarded to the deployed legal adviser, accordingly.\(^13\) The CO is also responsible for ensuring that any other report required as a result of a death or injury is forwarded to the appropriate OPI.\(^14\)

\(^7\) This authority cannot be sub-delegated.
\(^8\) DAOD 7004-0 (Claims By or Against the Crown and Ex gratia Payments), marginal note: Authorities.
\(^9\) \textit{Policy on Claims and Ex gratia Payments} at para. 5(c).
\(^10\) \textit{Ibid.}, at s. 6.
\(^11\) DAOD 7004-1 (Claims and Ex gratia Procedures), marginal note: Reporting of an Incident/When to Report. For example, motor vehicle accidents must be reported in accordance with the procedures as set out in A-LM-158-005/AG-001, \textit{Transportation Manual, Mobile Support Equipment}, c. 7, Vol. 4, Annexes M and N.
\(^12\) \textit{Ibid.}, marginal note: Reporting of an Incident/What to Report.
\(^13\) \textit{Ibid.}, marginal note: Reporting of an Incident/Serious injury or Death; \textit{QR&O} 21.46 (Investigation of Injury or Death); \textit{CFAO} 24-1 (Casualties – Reporting and Administration).
\(^14\) For example, any BOI, SI, CF98 form or Significant Incident Report (SIR).

35-2
Investigation

9. When a CO becomes aware that an incident may lead to a claim by or against the Crown, the CO is responsible for contacting DCCL or the regional AJAG at the earliest opportunity in order to determine whether an investigation is needed and what type of investigation is to be conducted. If an investigation is needed, terms of reference (TOR) will have to be drafted. Prior to drafting the TOR for an administrative investigation, COs should contact the Administrative Investigation Support Centre (AISC) at NDHQ after reviewing the following orders and policy:

   a. DAOD 7002 series (Boards of Inquiry and Summary Investigations);
   b. The Treasury Board Policy on Claims and Ex gratia Payments;
   c. CFAO 24-6 (Investigations of Injuries or Death); and
   d. QR&O Chapter 21, Section 4 (Claims By and Against the Crown).  

10. SIs and BOIs are essentially fact-finding investigations. When investigating an incident that may lead to a claim by or against the Crown, the investigation must be conducted in contemplation of litigation. Accordingly, it is important that the information be protected by solicitor-client privilege in order to ensure that the Crown’s position is safeguarded and any potential settlement negotiations are not compromised. The investigation report must therefore be designated ‘solicitor-client privilege.’

11. The following caveat which highlights this protection must be added to the TOR of a BOI or SI and should appear at the outset of the investigation report of any incident that may reasonably lead to a claim by or against the Crown:

   This investigation was conducted for claims purposes in contemplation of litigation and its contents are protected by solicitor-client privilege.

Claims Assessment – Information Required

12. In order to properly assess a claim by or against the Crown, the following information must be compiled and reviewed:

   a. a full statement of the duties of any Crown servant involved. ‘Crown servant’ includes CF members and DND employees;
   b. if Crown property is involved, detailed information relating to its use and authority for such use;
   c. names, addresses, phone numbers and statements from Crown servants and other persons who have knowledge of the circumstances surrounding the incident;
   d. a description of the incident and any plans, sketches or photographs that are necessary to understand the nature of the incident;
   e. a description of third party vehicles involved in a motor vehicle accident, if any;
   f. the nature and extent of injuries reported and copies of medical, dental or hospital bills, if any;
   g. if a claimant is unable to work as a result of the incident, a medical certificate should be provided substantiating the claim. The claimant must also provide a

---

15 DAOD 7004-1 (Claims and Ex gratia Procedures), marginal note: Reporting of an Incident/Commencing Investigation.

16 Ibid., marginal note: Investigation of an Incident/Solicitor-Client Privilege.
statement from their employer detailing the claimant’s rate of pay and actual time lost from work; and

h. any other relevant information to assist counsel in reviewing the claim.  

All CF members and DND employees who have information that is relevant to a claim by or against the Crown are required to fully cooperate with, and provide complete information to, the claims authority (e.g., DCCL or legal officer) assigned to the file.

13. DAOD 7004-1 (Claims and Ex gratia Procedures) provides details as to the information required for various types of incidents. This DAOD should be closely reviewed, especially when dealing with claims arising out of incidents involving damage to property, general damages, damages for pain and suffering and loss of property claims.

Resolution

14. Once a claim by or against the Crown has been reported and investigated, DCCL or the regional AJAG is responsible for providing a legal analysis on the matter. The legal analysis must address the possibility of liability on the part of the Crown or its servants or the liability of individuals or corporations that may be subject to a claim by the Crown. The legal analysis should address the steps to be taken to resolve the claim and the terms and conditions on which it would be advisable to resolve the claim.

15. A decision must be made in accordance with the TB claims policy to either approve or deny the claim. The legal merits and the administrative expediency and cost-effectiveness of the claim must be considered. A claimant who disagrees with the decision to deny a claim or any settlement amount offered by the Crown can commence a lawsuit at their own expense in accordance with the CLPA.

16. When settling a claim against the Crown, the claims authority (e.g., DCCL, the regional AJAG or operational legal adviser), shall prepare a Release in Settlement of Claim and obtain the claimant’s signature acknowledging receipt of payment. In respect of a claim by the Crown, only DCCL, the regional AJAG or operational legal adviser, as applicable, may sign a release.

Compensation Claims for Lost or Damaged Personal Property of Members

17. When a CF member suffers a loss or damage to their personal effects during the performance of their duties, they may make a claim against the Crown under the TB claims policy, or under CBI 210.03 (Claims for Compensation). Items eligible for compensation under this CBI are only those items that are not issued by the CF, are necessary for duty and are lost or irreparably damaged. Compensation is payable only when:

a. the loss or damage is attributable to the claimant’s service in the CF;

b. in the case of loss, replacement is necessary for the proper performance of the claimant’s duties;

---

17 Ibid., marginal note: Investigation of an Incident/Required Information.
18 Ibid., marginal note: Investigation of an Incident/General Damages.
19 Ibid., marginal note: Resolution of a Claim/Legal Opinion for a Claim By or Against the Crown.
20 Policy on Claims and Ex gratia Payments at para. 7.3.3.
21 Claims against the Crown arising in a theatre of operations are usually dealt with pursuant to claims provisions contained in a Status of Forces Agreement (SOFA) or other status arrangement.
22 DAOD 7004-1 (Claims and Ex gratia Procedures), marginal notes: Resolution of a Claim/Release by the Crown; Resolution of a Claim/Release by Claimant.
23 Policy on Claims and Ex gratia Payments at para. 7.3.5.
24 DAOD 7004-2 (Compensation for Loss or Damage to Personal Property), marginal note: Loss or Damage to Personal Property/Personal Property. Claims that do not meet the conditions of CBI 210.01 (Conditions Governing Compensation) will be dealt with as a claim against the Crown under the TB claims policy.
25 CBI 210.01(3).
c. the loss or damage was unavoidable and not caused by improper packing or use or shipping without authority;

d. the loss was promptly reported;

e. there is no private insurance compensation;

f. the loss occurred on duty or during sick leave; or

g. if the items were intentionally destroyed by military authority, it was either to prevent the enemy from taking them or to prevent the spread of an infectious or contagious disease.

18. The CF member must complete a statutory declaration setting out the full particulars of the circumstances surrounding the loss or damage to their property. DAOD 7004-2 (Compensation for Loss or Damage to Personal Property) sets out the information required in the statutory declaration. Receipts or any other documents substantiating the loss or damage must also be attached. For instance, in the case of loss or damage to a member’s glasses, the claimant must attach the actual receipt representing the cost of replacing the glasses.

19. When a member submits a claim for loss or damage to personal property under CBI 210.03 (Claims for Compensation), the claimant must submit the information required under paragraph 1 of that CBI. The claimant must also provide a written undertaking that they will comply with the provisions contained in CBI 210.06 (Recovery of Articles for Which Compensation Paid) and CBI 210.07 (Assignment of Legal Rights) if compensation is paid.

20. Claimants must submit their claims to their respective COs. The CO is responsible for ensuring that the claim is reviewed in order to determine whether all applicable supporting documentation has been provided, as required. When a claim has been made under CBI 210.03 (Claims for Compensation), the CO is responsible for ensuring that the claim is valid, for certifying that the claim has been thoroughly investigated and for determining that the claim falls under the provisions set out in the relevant sections of the CBI. In cases where the article has been partially damaged, the CO is responsible for certifying the amount of compensation that should be awarded.

21. The CO is also responsible for ensuring in cases of claims for compensation for loss of, or damage to, personal property made under the TB claims policy, that a written confirmation is provided that confirms that the loss or damage was related to the reasonable performance of the member’s duties to the Crown.

22. The CO is responsible for ensuring that the claim and any supporting documentation are forwarded to DCCL, the regional AJAG or the operational legal adviser, as applicable. DCCL or the appropriate legal officer will review the claim to assess the amount of compensation payable and action any payment, if any.

23. There will be no compensation paid for claims for lost or damaged items of clothing or material:

26 CBI 210.01(5).
27 See s. 3 to Chapter 30 under Part 4 of this manual for more information concerning affidavits and statutory declarations.
28 DAOD 7004-2 (Compensation for Loss or Damage to Personal Property), marginal notes: Loss or Damage to Personal Property/Replacement Value; Submission of Claims/Submission.
29 Ibid.
30 CBI 210.03 (Claims for Compensation).
31 DAOD 7004-2 (Compensation for Loss or Damage to Personal Property), marginal notes: Loss or Damage to Personal Property/Replacement Value; Submission of Claims/Submission/Step 2; CBI 210 (Miscellaneous Entitlements and Grants), s. 1 (Compensation for Loss of or Damage to Personal Property); CBI 210.03(1)(g).
32 DAOD 7004-2 (Compensation for Loss or Damage to Personal Property), marginal note: Submission of Claims/Submission/Step 2.
33 Ibid., marginal note: Submission of Claims/Submission/Step 3.
a. where the CO may authorize free replacement in accordance with the CF Supply Manual;
b. where the items are covered by private insurance; or
c. where the lost items are cash, jewellery, fur coats, precious metals, gem stones or coin or gun collections, except under exceptional circumstances.34

Indemnification of Members

24. There may be times where a CF member will be a party to a claim made against the Crown for an act or omission on the part of the CF member. The member may claim indemnification35 in accordance with the Treasury Board Policy on the Indemnification of and Legal Assistance for Crown Servants,36 provided they meet the indemnification criteria under the policy. All requests for indemnification should be sent to DCCL.37 Chapter 32 (Legal Assistance to CF Members) should be referred to as it sets out the policy on the indemnification of legal fees in greater detail.

SECTION 4

REFERENCES

Legislation


Regulations


QR&O Chapter 21 (Summary Investigations and Boards of Inquiry).

Orders, Directives and Instructions

CBI 210 (Miscellaneous Entitlements and Grants).

CBI 210.01 (Conditions Governing Compensation).

CBI 210.03 (Claims for Compensation).

CBI 210.06 (Recovery of Articles for Which Compensation Paid).

CBI 210.07 (Assignment of Legal Rights).

CFAO 24-1 (Casualties – Reporting and Administration).

34 Ibid., marginal note: Loss or Damage to Personal Property/No Compensation Payable.
35 The Black’s Law Dictionary, 8th ed., defines ‘indemnification’ as “the action of compensating for loss or damage sustained.”
37 DAOD 7004-1 (Claims and Ex gratia Procedures), marginal note: Resolution of a Claim/ Indemnification of Crown Servants.
CFAO 24-6 (Investigations of Injuries or Death).

DAOD 7004-0 (Claims by or Against the Crown and Ex gratia Payments).

DAOD 7004-1 (Claims and Ex gratia Procedures).

DAOD 7004-2 (Compensation for Loss or Damage to Personal Property).

**Jurisprudence**


**Secondary Material**


CHAPTER 36
OTHER ADMINISTRATIVE PROCESSES

SECTION 1
INTRODUCTION

1. The CF has a variety of mechanisms for investigating and resolving issues of an administrative nature. These include informal investigations, summary investigations, harassment investigations, boards of inquiry and applications for redress of grievance. In each of these schemes, someone other than the members involved in the issue makes determinations as to the facts and then suggests or implements a course of action intended to resolve the problem.

2. In situations involving workplace disputes, it is usually preferable that the members involved resolve the issue amongst themselves. There may be situations where a facilitator can assist the parties to arrive at a mutually acceptable resolution. One available process incorporates the assistance and guidance of the Director General Alternate Dispute Resolution (DGADR) using the ‘alternative dispute resolution’ (ADR) process. Alternatively, in circumstances where it is preferable to involve a third party external to DND and the CF, the Ombudsman for the Department of National Defence and the Canadian Forces (Ombudsman) may have a role to play.

SECTION 2
ALTERNATIVE DISPUTE RESOLUTION

General

3. In the CF, ADR is defined as “any voluntary conflict management method where choices are made by the parties themselves and decisions are not imposed by a third party. ADR encourages parties to deal with conflict constructively and to find their own mutually satisfying solutions.”

4. ADR complements other formal processes by providing users with opportunities to resolve issues at the lowest level and at the earliest stage of a dispute. The goal in implementing these ADR processes is to prevent disputes from arising or escalating wherever possible and, if they do arise, to facilitate their resolution quickly and informally. Where appropriate, ADR is the preferred approach for preventing the escalation of disputes and resolving workplace disputes within DND and the CF. ADR is normally successful because it makes use of ‘interest-based processes,’ which focus more on people’s needs as a basis for seeking agreement and resolution, rather than insisting on their legal rights. Moreover, it is worthwhile noting that:

   Interest-based processes are consensual and, therefore, the conflict will only be resolved if all of the disputants agree to the solution. In an interest-based solution, there is neither a winner nor a loser and the disputants try to persuade each other, not third parties, about the merits of their case.

---

1 DAOD 5046-0 (Alternative Dispute Resolution).
2 DAOD 5047-1 (Office of the Ombudsman).
3 Dispute Resolution Centre (DRC), Alternative Dispute Resolution - Frequently Asked Questions, online: DRC <http://hr.d-ndhq.dnd.ca/adr-marc/english/faq_e.asp?q=1#answ1> [Alternative Dispute Resolution - Frequently Asked Questions].
4 DAOD 5046-0 (Alternative Dispute Resolution).
5. The processes mentioned in paragraph 1 above (i.e., informal investigations, summary investigations, harassment investigations, boards of inquiry and applications for redress of grievance), are ‘rights-based processes’ in which “a person other than the disputants determines who is correct or who should win; that is, a third party makes a judgment on the disputant’s rights.” ADR processes do not replace existing formal, traditional, legal methods of resolving disputes. DND employees and CF members continue to have the right to use other available DR processes and to return to any of these processes even after ADR has been attempted.

6. Many prefer ADR as a method for resolving certain workplace disputes within the CF due to its many advantages. A dispute is resolved through an interest-based process only when all parties agree that the terms of agreement they have negotiated are satisfactory. This allows parties to have input into the solution, and to exercise control over its suitability, resulting in a “win-win” dynamic. Conversely, if a rights-based process is used, although the 'successful' party may leave feeling relatively satisfied, the 'unsuccessful' party will likely harbour feelings of even greater resentment. This is rarely conducive to workplace harmony. Overall, ADR supports the priorities of the DND and the CF, promotes unit cohesion and morale and contributes to operational effectiveness by reducing the organizational cost of conflict.

7. There are situations, however, where ADR is inappropriate. For example, if, in the course of a workplace dispute, a superior assaults a subordinate, the situation might require that the matter be dealt with by way of disciplinary or administrative processes or both. Further, situations could arise involving power balances that cannot be equalized or parties who are unable to participate in good faith. Such matters may be better addressed through either rights-based or disciplinary/administrative processes, either alone or in conjunction with ADR. Ultimately, because ADR processes are voluntary, the parties and the chain of command choose the appropriate method for resolving the situation.

8. In the CF, the lead agency for ADR is the DGADR who has stewardship over the Conflict Management Program (CMP). The CMP supports the chain of command through the operation of dispute resolution centres (DRCs) across the country that offer ADR services including mediation, training, conflict coaching, facilitation and group interventions. When a workplace conflict occurs, COs are expected to inform their subordinates of ADR options at an early stage in the process. It is expected that all managers and supervisors within DND and the CF ensure that subordinates are given opportunities to consider the various ADR processes available for addressing their disputes.

Confidentiality and Privilege in the ADR Process

9. ‘Confidentiality’ is the ethical obligation of certain professionals not to disclose or to attribute the statements or information of a person who expects their confidences to be safeguarded. This concept is extended to any contracting party who agrees to be bound by an expectation of confidentiality regarding any matter brought up during a confidential process. For example, before commencing a mediation, the mediators and the parties are required to sign an ‘Agreement to Mediate’ in which, amongst other things, all parties promise to maintain confidentiality within the bounds of the law. Confidentiality is one of the fundamental operating principles of ADR by ensuring open communication and guarding against an ADR process being “used as a means to gather facts and information for use in other processes.”

---

6 Ibid., at 125.
7 DAOD 5046-0 (Alternative Dispute Resolution).
8 Ibid.
9 For example, Rule 2.03(1) of the Law Society of Upper Canada’s (LSUC) Rules of Professional Conduct states: “A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.” Online: LSUC <http://www.lsuc.on.ca/regulation/aprofconduct/rule2/>.
10 Alternative Dispute Resolution - Frequently Asked Questions.
10. ‘Privilege,’ particularly ‘solicitor-client privilege,’ is a legal doctrine whereby a lawyer cannot be compelled to reveal communications between a client and the lawyer – both information received from a client and the legal advice provided to a client. This doctrine operates in circumstances where the lawyer would otherwise be required by law to reveal the information. Examples where the doctrine may apply would be where a lawyer is subpoenaed to testify as a witness in a court proceeding or where an order to produce a document was issued in the course of legal proceedings or under the provisions of a statute, such as the Access to Information Act. Solicitor-client privilege is recognized under the law because it serves an "over-riding societal interest" – the right of clients to seek and obtain legal services and representation secure in the knowledge that their lawyer cannot legally be compelled to divulge their information.

11. Communications made in the course of ADR mediation can attract both confidentiality and privilege. Within the context of the ADR process, ‘confidentiality’ retains its common meaning. One of the fundamental operating principles of ADR is that it is a confidential process. As stated on the CF ADR homepage, "open communication is a fundamental principle of ADR. To ensure ADR is not used as a means to gather facts and information for use in other processes, confidentiality is agreed upon by the Dispute Resolution Centre and by all the parties." Accordingly, ADR practitioners are bound by ethical standards that prevent them from betraying the confidences of the parties, "unless given permission by all participants or unless required by law or other public policy."

12. With respect to ‘privilege,’ the situation is somewhat different. Before commencing an ADR process, the mediators and the parties are required to sign an ‘Agreement to Mediate’ in which, amongst other things, all parties promise to maintain confidentiality within the bounds of the law. However, ADR practitioners cannot promise that communications will never be revealed because an ethical imperative to protect confidentiality can be overridden by an obligation to release information imposed by law and will not be saved by a doctrine of ‘privilege.’ A few examples may be of assistance:

   a. Firstly, all CF members are required under QR&O to report any breach of a law, regulation, order or instruction by any person subject to the Code of Service Discipline (CSD) for which they are unable to deal with. Consequently, if one CF member, in the process of an ADR mediation, admits to having committed an offence, other CF members who hear this admission are legally obligated to report this information to the proper authority;

   b. Secondly, a promise of confidentiality will not necessarily override another person’s legal right to obtain information under the provisions of a law such as the AIA. By making a request for access to departmental records, a person could obtain a mediator’s notes made during an ADR process. It should be noted that under the provisions of the Library and Archives of Canada Act (LACA), such notes are government records that cannot be destroyed.

---

16 S.C. 2004, c. 11 [LACA].
Thirdly, various provincial statutes require that any allegation of child abuse must be reported to a Children’s Aid Society. This is a common dilemma for physicians who encounter cases of suspected child abuse in the course of their medical practice. While ‘doctor-patient confidentiality’ would normally apply, there is an overriding societal interest that allows a promise of confidentiality to be violated namely, the need to protect children from harm. There are numerous other situations where persons having ‘confidential’ information can be required by law to reveal the information known to them.

Before commencing ADR, and to ensure that there are no misunderstandings with respect to confidentiality, it is important that CMP ADR practitioners discuss with the respective parties the limitations of ‘confidentiality’ in accordance with the law.

13. For mediations in the CF, all parties must also be aware that the chain of command may need to know the outcome of an ADR process. For example, if a harassment complaint is resolved by way of mediation, the disposition of the mediation and any withdrawal of the complaint should be placed on the complaint file. Generally, the contents of the ‘Minutes of Settlement’ are not disclosed unless persons in the chain of command or the Responsible Officer (RO) have a role in implementation, enforcement or monitoring of the agreement. Specifically, DND and CF policy does not require that the chain of command be informed of the details discussed during the mediation, only the results of the process that must be implemented.

14. While the application of confidentiality in ADR is essentially the same in most situations, the concept of ‘privilege’ in ADR is narrower in scope than the more familiar doctrine of solicitor-client privilege. However, in addition to lawyer and client relationships, Canadian courts have acknowledged the societal interest in allowing disputants to resolve their differences without having them resort to litigation. To that end, the courts have recognized a category of privilege for communications made ‘in furtherance of settlement’:

…the courts have protected from disclosure, communications, whether written or oral, made with a view toward reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming.

15. Because successful negotiations often require the involvement of a third-party mediator, courts have begun to extend the ‘communications in furtherance of settlement privilege’ to mediators, effectively providing them with protection from legal compulsion to reveal information. Although the law pertaining to this protection of confidentiality agreements is in its early stages, this protection or privilege has periodically been applied in family law cases and has recently been extended to other actions:

The same principles must apply not only to matrimonial disputes but also to all disputes where the parties have submitted to mediation. To hold otherwise would be to destroy the process. Parties would never freely and voluntarily enter mediation. Furthermore, if they were forced into such a process it is unlikely that there would be free and frank…
discussions of the issues between the parties that required resolution. In other words, the process would wither and die.\footnote{Sharp v. Edsam Holdings Ltd., [1999] S.J. No. 183 at para. 17, 176 Sask.R. 248 (Q.B.).}

16. The protection afforded to ADR confidentiality agreements is subject to exceptions. For example, courts have required a mediator to reveal information that could shed light on concerns regarding the safety of children.\footnote{See Pearson v. Pearson, [1992] Y.J. No. 106 (S.C.); Kunzelman v. Kunzelman, [1995] M.J. No. 357, 105 Man.R. (2d) 161 (Q.B.).} The courts have also declined to respect confidentiality on pragmatic grounds where a settlement was reached but, subsequently, the parties interpreted the settlement conditions differently. In \textit{Rudd v. Trossacs Investments Inc.},\footnote{Rudd v. Trossacs Investments Inc., [2004] O.J. No. 2918, 72 O.R. (3d) 62 (Sup. Ct.).} the Court permitted communications made during the mediation to be admitted into evidence, stating:

The notions of privilege and confidentiality which cloak mediation sessions encourage parties to be frank and candid in seeking resolution without concern that, if no settlement is forthcoming, anything that they may have said at the mediation could be used against them. However, once a settlement is achieved, but its interpretation is in question, disclosure of mediation discussions may be necessary to ensure substantive justice. In such circumstances, disclosure of discussions will not undermine the mediation process as it is sought not as an admission against a party’s interest, but solely for the purpose of determining the specific terms of an agreement that both parties have arrived at.\footnote{\textit{Ibid.}, at para. 19.}

17. It should be noted that Canadian criminal courts do not recognize the protection attached to communications made during the ADR process.\footnote{Sopinka, Lederman & Bryant at para. 14.232.} In \textit{R. v. Pabani},\footnote{R. v. Pabani, [1994] O.J. No. 541, 89 C.C.C. (3d) 437 (C.A.), leave to appeal to S.C.C. refused [1994], S.C.C.A. No. 294, 91 C.C.C. (3d).} the accused and his wife had been experiencing marriage difficulties. In an attempt to reconcile, they had engaged in mediation during which Pabani admitted to having beaten his wife. The wife was subsequently killed and Pabani was charged with her murder. At the trial, the Crown sought to have Pabani’s admission that he beat his wife received into evidence by the Court. Defence counsel objected on the ground that there existed “a privilege for such discussions in order to encourage full and frank discourse during reconciliation.”\footnote{\textit{Ibid.}, at 440.} The Court rejected defence counsel’s submission, stating:

The law has always encouraged discussion between parties to civil litigation that is directed to settling their differences. To foster the resolution of these disputes, the parties are encouraged to speak freely and without the concern that statements will be used against them in the event that a settlement is not arrived at…There is, however, no such common law position recognized by the criminal law…There does not…appear to have been any recognition by the criminal law of “without prejudice” statements outside of a plea bargaining structure.\footnote{\textit{Ibid.}, at 442-43.}

18. Accordingly, communications made during mediation may be both ‘confidential’ and ‘privileged’ (i.e., protected from disclosure under legal compulsion). However, both concepts have limitations in their application. As in any contractual relationship, any party to mediation might decide to renge on their confidentiality agreement. CF members considering resolving a conflict through ADR need to recognize that the confidentiality of the process is not absolute.\footnote{Members contemplating ADR should read CMP’s \textit{Technical Bulletin}. In this regard, one caveat needs to be made. At p. 4 of the bulletin, it states that the parties may agree to the destruction of the mediator’s notes as a term to the

\textit{Milpex ADM-Law Manual} A-LG-007-000/AF-010
19. This is not to say that members should be discouraged from attempting ADR (particularly as "interest-based" processes usually produce far more amicable results than those that can be achieved by traditional "rights-based" processes), but rather, that they do so while knowing beforehand that certain limitations in the law exist with regard to the principles of confidentiality and privilege.

SECTION 3
OFFICE OF THE OMBUDSMAN

General

20. The Governor in Council (GiC), on the recommendation of the MND, created the Office of the Ombudsman in 1998 under the authority of section 5 of the NDA to carry out its mandate, pursuant to ministerial directives first promulgated in 1999. The appointment of an Ombudsman reporting to the Minister, outside the chain of command, is a complimentary initiative to other mechanisms established under the NDA. The mandate of the Ombudsman may be found at DAOD 5047-1 (Office of the Ombudsman), Annex A (Ministerial Directives Respecting the Ombudsman for the Department of National Defence and Canadian Forces).

21. The Concise Oxford Dictionary definition of an ‘ombudsman’ is “an official appointed to investigate individuals’ complaints against an organization, especially a public authority.” The Ombudsman is independent from the CF chain of command and DND hierarchy and reports directly to and is accountable to the MND. On behalf of the MND, the Ombudsman:

   a. acts as a neutral and objective sounding board, mediator, investigator and reporter on matters related to the CF and DND;

   b. acts as a direct source of information, referral and education to assist individuals in accessing existing channels of assistance and redress within the CF and DND; and

   c. serves to contribute to substantial and long-lasting improvements in the welfare of members and employees of the CF and DND community.

22. Except in compelling circumstances, the Ombudsman cannot deal with a complaint unless the complainant has first made use of an existing mechanism, such as the CF redress of grievance process or the military police (MP) complaints process. When determining whether there are compelling circumstances, the Ombudsman shall consider if access to an existing complaint mechanism will cause the complainant undue hardship; the complaint raises systemic issues; or the complainant and the person with authority to deal with the matter agree to refer the complaint to the Ombudsman.

23. If a complaint is made to the Ombudsman with respect to the handling of a complaint under existing mechanisms (e.g., the CF grievance process or the Military Police Complaints Commission (MPCC)), the Ombudsman may review the process only, to ensure that the member

---

1'Agreement to Mediate.' It is suggested that, in any mediation conducted under the auspices of the CF, the destruction of notes would constitute a violation of the AIA and the LACA.

35 DAOD 5047-1 (Office of the Ombudsman).

36 The Ombudsman’s website can be accessed online: <http://www.ombudsman.forces.gc.ca/>.


38 DAOD 5047-1 (Office of the Ombudsman), Annex A (Ministerial Directives Respecting the Ombudsman for the Department of National Defence and the Canadian Forces), para. 3(2).

39 Ibid., at para. 3(1).

40 Ibid., at para. 13(1).

41 Ibid., at para. 13(2).
was dealt with in a fair and equitable manner.\(^42\) The Ombudsman cannot act in a manner that interferes with or obstructs an authority responsible for administering an existing mechanism in the discharge of the authority’s statutory duties (e.g., a CO’s responsibility to administer Counselling and Probation).\(^43\)

24. Among other matters, the Ombudsman does not have the authority to investigate any complaint or matter relating to: the exercise of discretion in laying charges by the chain of command\(^44\); a military judge, court martial or summary trial\(^45\); or any legal advice to DND or the CF, employees of DND, members of the CF or the Crown\(^46\). The Ombudsman will not purport to perform the function of a member of the MP in investigating any matter in which there may be an allegation of criminal activity.\(^47\) However, the Ombudsman may report complaints of abuse or delay related to the administration of the CSD.\(^48\)

**Co-operation with the Ombudsman**

25. Members or former members of the CF are among those who may bring a complaint relating directly to DND or the CF to the Ombudsman, directly (i.e., they do not have to go through the chain of command) and free of charge.\(^49\) As such, the flow of communications between a complainant and the Ombudsman cannot willfully be interfered with except as authorized by law.\(^50\) Also, such communications are private and confidential.\(^51\) No step may be taken without lawful authority (e.g. a judicial search warrant issued pursuant to the *Criminal Code*\(^52\)) that could breach the complainant’s right to privacy or confidentiality.\(^53\)

26. CF members must not make false or misleading statements to the Ombudsman.\(^54\) Further, no CF authority may take retributive measures against a CF member who makes a complaint in good faith to the Ombudsman or who lawfully assists the Ombudsman.\(^55\) Moreover, all CF members must comply with the lawful requests of the Ombudsman.\(^56\) This means that, within the boundaries of legal, operational and security requirements, all members must cooperate with the Ombudsman by providing timely compliance to requests for access to facilities, personnel, information, copies of documents and any other items of interest to the Ombudsman.\(^57\) Breaches of the duty to cooperate, as set out in DAOD 5047-1 (Office of the Ombudsman), must be reported to the CO or supervisor for further investigation. Failure to comply with requests made by the Office of the Ombudsman may result in disciplinary or administrative action or both.\(^58\)

27. The Ombudsman may be denied access to information for reasons of security in accordance with the Government Security Policy.\(^59\) Similarly, denial of access to facilities, employees, members or information may be made for operational requirements, but only for as

---

\(^{42}\) *Ibid.*, at para. 3(3).

\(^{43}\) *Ibid.*, at para. 3(4).


\(^{47}\) *Ibid.*, at para. 15 and DAOD 5047-1 (Office of the Ombudsman), Annex B (Letter from the VCDS and the Senior General Counsel and Legal Advisor for DND and the CF (20 July 2001), 1456-63 (DND/CF LA)).


\(^{50}\) *Ibid.*, at paras. 31(1)(c)-(g).

\(^{51}\) *Ibid.*, at para. 27.

\(^{52}\) R.S.C. 1985, c. C-46., ss. 487, 487.01 [*Criminal Code*].


\(^{54}\) *Ibid.*, at para. 31(1)(b).

\(^{55}\) *Ibid.*, at paras. 31(1)(i)-(j).

\(^{56}\) *Ibid.*, at para. 31(1)(a).

\(^{57}\) *Ibid.*, at paras. 28(1)-(3), 29.

\(^{58}\) DAOD 5047-1 (Office of the Ombudsman), marginal note: Operating Principles/Failure to Comply.

\(^{59}\) DAOD 5047-1 (Office of the Ombudsman), Annex A, (Ministerial Directives Respecting the Ombudsman for the Department of National Defence and the Canadian Forces), para. 24(1).
long as justified for operational requirements. Access to documents, records or personnel by the Office of the Ombudsman is subject to the Privacy Act (PA), Government Security Policy, police informant identity privilege, spousal privilege, solicitor-client privilege and penitential communications.

28. If a member receives a request for information or assistance directly from the Ombudsman, the member may consult with their CO prior to accommodating the request, but such consultation should be made as soon as possible. In considering the request, the CO may wish to consult with the unit legal adviser. If the request cannot be accommodated, the CO is to report the matter to the commander of the command as soon as reasonably possible in the circumstances.

29. Where a member has obstructed, impeded, interfered with or failed to co-operate fully with the Ombudsman in the course of their duties, the Ombudsman has a duty to report that fact to the CO or other competent military authority. Upon receiving such a report, the military authority should advise the Ombudsman of the steps that have been or will be taken in response to the report, including the reasons for taking those steps, or if it is determined that no steps are to be taken, the reasons for that determination. If an investigation is conducted pursuant to a report made by the Ombudsman, the Ombudsman should be provided with a report of the investigation, including reasons for any recommendations or decisions made or action taken resulting from the investigation.

Investigations by the Ombudsman

30. If, upon investigating a matter, the Ombudsman determines that a formal inquiry (e.g., a board of inquiry) is necessary and appropriate, the Ombudsman may refer the matter to the competent authority. If the competent authority carries out the formal inquiry, the competent authority is to inform the Ombudsman of the results and of any action taken and is to refer the matter back to the Ombudsman. If the competent authority decides that no formal inquiry is necessary, the competent authority is to inform the Ombudsman of that fact and of the reasons for that decision.

31. If the Ombudsman is investigating a matter involving a unit that is deployed in international operations, the Ombudsman must inform the contingent commander prior to commencing the investigation. In carrying out the investigation, the Ombudsman must keep the contingent commander informed about the progress of the investigation, maintain liaison with the contingent commander and seek advice as to any impact the investigation may have on the mission in order to minimize the any impact the investigation may have on the operational mission. Visits by the Ombudsman to an operational theatre shall occur only where there is a serious and urgent need having regard to the necessity to protect the safety and security of the personnel deployed. The CDS is the authority to make such determination.

---

60 Ibid., at para. 24(2).
61 Ibid., at para. 25(1) and Schedule 1. If any of the aforementioned privileges becomes an issue, the CO should consult the unit legal adviser.
62 Ibid., at para. 28(5).
63 Ibid., at para. 28(4).
64 Ibid., at para. 32(1).
65 Ibid., at para. 32(2).
66 Ibid., at para. 32(3).
67 Ibid., at para. 21(1).
68 Ibid., at para. 21(2)(a).
69 Ibid., at para. 21(2)(b).
70 Here, the term ‘commander’ refers to “the contingent commander on international operations or the joint force commander on domestic operations”: DAOD 5047-1 (Office of the Ombudsman), Annex A (Ministerial Directives Respecting the Ombudsman for the Department of National Defence and the Canadian Forces), para. 22(6).
71 DAOD 5047-1 (Office of the Ombudsman), Annex A, (Ministerial Directives Respecting the Ombudsman for the Department of National Defence and the Canadian Forces), paras. 22(1)(b)-(e).
72 Ibid., at paras. 22(2)-(3).
and a contingent commander cannot agree on a manner of investigation that would not impede or negatively impact the operational mission, the contingent commander shall refer the matter to the CDS for direction.\textsuperscript{73}

**Information and Reports**

32. The Ombudsman has a duty to provide information to the complainant and other involved parties as to the progress and disposition of the complaint.\textsuperscript{74} Upon completing an investigation, the Ombudsman shall, in specified circumstances, send a report, including any recommendations, opinions and reasons, to the competent DND or CF authority.\textsuperscript{75} Upon receiving such a report, the competent authority has a duty to inform the Ombudsman within a reasonable time of all steps taken or proposed to be taken in response to the recommendations in the Ombudsman’s report, including reasons for not following any recommendation.\textsuperscript{76} If no response to a report is received, or if the response is insufficient, the Ombudsman may forward a copy of the report to the CDS or DM who shall inform the Ombudsman within a reasonable time of all steps taken or proposed to be taken in response to recommendations in the report, including reasons for not following any recommendation.\textsuperscript{77} If the response to a report received from the CDS or DM is insufficient, or no response is received, the Ombudsman may send a copy of the report to the MND.

33. If the Ombudsman anticipates that a report will contain an adverse comment about any DND employee or CF member, the Ombudsman is required to inform the employee or member of the nature of the intended comment and allow the employee or member 14 days to submit representations in response.\textsuperscript{78} The Ombudsman may allow a longer period of time if the Ombudsman considers it in the public interest to do so.\textsuperscript{79} The response shall be in writing but the Ombudsman has the discretion to allow oral representations to be made.\textsuperscript{80} The Ombudsman is required to append a copy of all written representations to a report.\textsuperscript{81}

**Confidentiality and the Ombudsman**

34. The Office of the Ombudsman operates in a confidential and secure manner so as to protect the information received by it in the course of its operations and will not disclose information except as authorized by law.\textsuperscript{82} For example, the Ombudsman may report any evidence of a service offence or a criminal wrongdoing to the Provost Marshal or other competent authorities.\textsuperscript{83} The AIA, the PA and the Government Security Policy apply to all documents, records and information received by the Ombudsman.\textsuperscript{84}

**SECTION 4**

**REFERENCES**

**Legislation**


\textsuperscript{73} Ibid., at paras. 22(4)-(5).
\textsuperscript{74} Ibid., at para. 34.
\textsuperscript{75} Ibid., at para. 36.
\textsuperscript{76} Ibid., at para. 36.
\textsuperscript{77} Ibid., at para. 37(1).
\textsuperscript{78} Ibid., at para. 37(2).
\textsuperscript{79} Ibid., at para. 37(2).
\textsuperscript{80} Ibid., at para. 35(1).
\textsuperscript{81} Ibid., at para. 35(2).
\textsuperscript{82} Ibid., at para. 35(3).
\textsuperscript{83} Ibid., at para. 35(4).
\textsuperscript{84} Ibid., at para. 27.
\textsuperscript{85} Ibid., at para. 23(1).
\textsuperscript{86} Ibid., at para. 25(2).

Library and Archives of Canada Act, S.C. 2004, c. 11.


**Regulations**

QR&O 4.02 (General Responsibilities of Officers).

QR&O 5.01 (General Responsibilities of Non-Commissioned Members).

QR&O 19.09 (Use of Outside Influence Forbidden).

QR&O 19.12 (Communication with the Commanding Officer).


**Orders, Directives and Instructions**

CANFORGEN 064/03 ADM (HR-MIL) 022 071545Z May 03, Conflict Management Programme (CMP).

DAOD 5046-0 (Alternative Dispute Resolution).

DAOD 5047-1 (Office of the Ombudsman).

**Jurisprudence**


**Secondary Material**


CHAPTER 37
EXTERNAL ADMINISTRATIVE PROCESSES

SECTION 1
INTRODUCTION

1. The human rights and privacy rights of Canadians, as well as bilingualism in Canada, are protected by legislation, namely the Canadian Human Rights Act (CHRA),1 the Privacy Act (PA),2 and the Official Languages Act (OLA).3 A number of agencies and tribunals created by these Acts are mandated with the administration and protection of these fundamental rights. They are: the Canadian Human Rights Commission (CHRC), the Canadian Human Rights Tribunal (CHRT), the Office of the Privacy Commissioner of Canada (Privacy Commissioner) and the Office of the Commissioner of Official Languages (OLC).

2. As members of Canadian society, CF members may choose to avail themselves of the auspices of these statutorily created bodies. This chapter is intended to provide COs with an understanding of the framework under which the CHRC, CHRT, Privacy Commissioner and OLC operate and how their operations relate to the CF.

SECTION 2

Canadian Human Rights Act

3. The CHRA is an anti-discrimination law that is applicable to employers, unions and service providers within the jurisdiction of the federal government. Although the CF is not an ‘employer’ and its members are not ‘employees,’ they are deemed to be employed by the Crown for the purposes of the CHRA.4 This means that the provisions of the CHRA protect the human rights of CF members.

4. The CHRA prohibits certain practices based upon proscribed grounds of discrimination.5 These discriminatory practices are listed in sections 5 to 14.1 of the CHRA and include, among others, refusing to hire or refusing to continue to employ someone on a prohibited ground of discrimination,6 establishing policies that deprive individuals of employment opportunities on a prohibited ground of discrimination7 and harassing individuals on a prohibited ground of discrimination.8 In order to engage the protection of the CHRA, the impugned act must be based on one or more prohibited grounds of discrimination.9 The prohibited grounds of discrimination are enumerated in section 3 of the CHRA, as follows:

   a. race;
   b. national or ethnic origin;
   c. colour;

---

1 R.S.C. 1985, c. H-6 [CHRA].
4 CHRA, s. 64.
5 Ibid., s. 3.
6 Ibid., s. 7(a).
7 Ibid., s. 10(a).
8 Ibid., s. 14(1)(c).
9 Ibid., s. 3.1.
d. religion;

e. age;

f. sex (including pregnancy or childbirth);

g. sexual orientation;

h. marital status;

i. family status;

j. disability; and

k. conviction for which a pardon has been granted.

5. Complaints may be made under Part III of the CHRA about any discriminatory practice described in sections 5 to 14.1 of the Act that are based on a prohibited ground of discrimination as enumerated in section 3 of the Act. Where a complaint of discrimination is found to be valid, action may be taken against persons found to be engaging in the discriminatory practice.  

Where a complaint has been filed under the CHRA, it is a discriminatory practice to retaliate against the complainant. Any person who threatens, intimidates or discriminates against a person for making a complaint, or for giving evidence before the CHRT, is liable, on summary conviction by a civilian court or military tribunal, to a fine of up to $50,000.

6. A practice is discriminatory regardless of whether it results in ‘direct discrimination’ or ‘adverse effect discrimination.’ Direct discrimination refers to a policy that is discriminatory on its face, whereas adverse effect discrimination refers to a standard that is neutral on its face but discriminates in effect. For example, a policy requiring an employer to hire only men would be considered direct discrimination. A policy requiring all employees to be over two meters tall would be considered adverse effect discrimination as such a requirement would tend to exclude women and members of certain racial and ethnic origins.

7. Affirmative action programs are not considered discriminatory practices. An affirmative action program is one that seeks to improve the conditions of traditionally disadvantaged individuals or groups. For example, it would be a discriminatory practice if CF recruiting advertisements expressed enrolment restrictions against persons over the age of 28; age being a prohibited ground of discrimination under the CHRA. However, it would not be a discriminatory practice if CF recruiting advertisements were targeted at recruiting members of minority groups that are currently under-represented in the CF.

8. Employment restrictions based on bona fide occupational requirements are also not considered to be a discriminatory practice. A restriction is a bona fide occupational requirement if accommodating the needs of the individual would impose undue hardship on the person or organization required to accommodate those needs.

10 Ibid., s. 4.
11 Ibid., s. 14.1.
12 Ibid., ss. 59, 60(1)(c), 60(2).
13 Ibid., s. 15(8).
15 CHRA, s. 16(1). Note that this provision is consistent with s. 15(2) of the Canadian Charter of Rights and Freedoms which also provides for the implementation of affirmative action programs.
16 Ibid., s. 8(b).
17 Ibid., s. 15(2). See also c. 14, s. 4, as found under Part 3 of this manual, for more information on this topic.
Canadian Human Rights Commission

9. The CHRC is established pursuant to subsection 26(1) of the CHRA. The duties of the CHRC include providing information to the public, research programs and liaison with provincial human rights organizations. Any individual, or group of individuals, who have reasonable grounds for believing that a person is engaging in, or has engaged in, a discriminatory practice may file a complaint with the Commission.

10. Persons other than the alleged victim may also make a complaint. However, the CHRC may refuse to deal with the complaint unless the alleged victim consents. The CHRC may also initiate a complaint on its own accord where there are reasonable grounds for believing that a discriminatory practice is taking place. Of particular note, in cases involving CF members and the CF, the CHRC has jurisdiction to consider complaints whether the alleged discriminatory act occurs within or outside of Canada.

11. There are circumstances when the CHRC may decline to deal with a complaint. Most commonly this will occur when it appears that the alleged victim has yet to avail themselves of all internal complaint mechanisms that are otherwise reasonably available or if the complaint could more appropriately be dealt with under another Act of Parliament. Also, the CHRC has the discretion to refuse to deal with a complaint if the impugned act occurred more than a year before the CHRC received the complaint.

12. Upon receiving a complaint, the CHRC may assign an investigator. The investigator may apply to a judge of the Federal Court of Canada (FCC) for a search warrant that, if granted, could authorize the investigator to enter premises and require the production of books and other documents containing information relevant to the investigation. Anyone who obstructs an investigator in the investigation of a complaint is liable, on summary conviction, to a fine of up to $50,000.

13. On completion of the investigation, the investigator will submit a report to the CHRC. The CHRC may then dispose of the complaint by taking one of three courses of action. Firstly, if the CHRC considers that the complainant ought to exhaust other available internal complaint mechanisms, or if the complaint could more appropriately be dealt with under another Act of Parliament, the CHRC can refer the complainant to the appropriate authority (e.g., the CF grievance process, pursuant to QR&O Chapter 7 (Grievances)). Secondly, if the CHRC is satisfied that an inquiry into the complaint is not warranted or that the complaint should be dismissed on other grounds, the CHRC can dismiss the complaint.

---

18 Ibid., s. 27(1).
19 Ibid., s. 41(1).
20 Ibid., s. 40(1).
21 Ibid., s. 40(2).
22 Ibid., s. 40(3).
23 Ibid., s. 40(5).
24 Ibid., para. 41(1)(a). However, the CHRC must be satisfied that it was the complainant’s fault that the alternate grievance procedures were not exhausted (i.e., where a superior interferes with a member’s attempt to submit a grievance, the CHRC would deal with a complaint filed under the CHRA by that member), pursuant to CHRA, s. 42(2).
25 Ibid., s. 41(1)(b).
26 Ibid., s. 41(1)(e).
27 Ibid., s. 43(1).
28 Ibid., s. 43(2.2).
29 Ibid., s. 43(2.1).
30 Ibid., s. 43(2.4).
31 Ibid., ss. 43(3), 60(1)(c), 60(2).
32 Ibid., s. 44(1).
33 Ibid., s. 44(2).
34 Ibid., s. 44(3)(b). The other grounds upon which the CHRC may dismiss a complaint are: the complaint is beyond the jurisdiction of the CHRC, pursuant to CHRA, s. 41(1)(c); the complaint is trivial, frivolous, vexatious or made in bad faith,
satisfied that an inquiry into the complaint is warranted and that the complaint should not be referred to another authority or dismissed, the CHRC can request that the CHRT institute an inquiry into the complaint.\textsuperscript{35} In any event, the CHRC must notify the complainant and the respondent of its course of action and may give notice to any other affected party as the CHRC sees fit.\textsuperscript{36}

14. Additionally, the CHRC may appoint a mediator or conciliator to assist the parties in settling the complaint. Mediation is a process in which a neutral third party helps the parties reach a solution to a problem themselves. In the case of CHRC mediations, the mediator is not an uninterested party in so much as the CHRC has a mandate to protect and advance human rights and to act in the public interest. Conciliation is similar to mediation, but differences exist between the two.

15. For example, mediation is voluntary while conciliation is mandatory. The [CHRC] encourages use of mediation early in the complaint process, although it is available at any stage up to [CHRT] hearings. Conciliation generally takes place after an investigation of the facts [but] before a case is referred to the [CHRT]. However, the [CHRC] can order conciliation at an earlier stage. The roles of the conciliator and the mediator are quite similar. But, unlike mediators, conciliators give direct feedback on the strengths and weaknesses of arguments, opinions and proposals.\textsuperscript{37}

16. Any information communicated to the conciliator is considered confidential and may not be disclosed without the permission of the party who gave the information.\textsuperscript{38} Also, if conciliation fails, the conciliator cannot testify before a hearing conducted by a CHRT.\textsuperscript{39}

17. If the parties agree on a settlement after a complaint is filed, but before the commencement of a hearing before the CHRT, the proposed settlement must be submitted to the CHRC. The CHRC will either approve or reject the proposed settlement and will notify the parties accordingly.\textsuperscript{40} If the proposed settlement is approved, the CHRC or any of the parties to the settlement may apply to the FCC to have the settlement made an order of the court in order to facilitate enforcement of the settlement.\textsuperscript{41}

**Canadian Human Rights Tribunal**

18. The CHRT is established under subsection 48.1(1) of the CHRA. The CHRT is somewhat akin to a ‘court’ that hears cases alleging discriminatory practices.

19. When the CHRT receives a request for a hearing from the CHRC, the Chairperson of the CHRT will respond by assigning one member of the CHRT or, in the case of a complex matter, a panel of three members to institute an inquiry.\textsuperscript{42} The member or panel will give notice of the hearing to the CHRC, the complainant, the respondent and other interested parties. All these parties may appear before the hearing, in person or through counsel to present evidence and to make representations.\textsuperscript{43}

\textsuperscript{35} Ibid., s. 44(3)(a). Note that the CHRC may request the CHRT institute an inquiry into the complaint at any time after the filing of the complaint, pursuant to CHRA, s. 49(1).

\textsuperscript{36} Ibid., s. 44(4).


\textsuperscript{38} CHRA, s. 47(3).

\textsuperscript{39} Ibid., s. 50(5).

\textsuperscript{40} Ibid., ss. 48(1)-(2).

\textsuperscript{41} Ibid., s. 48(3).

\textsuperscript{42} Ibid., s. 49(2).

\textsuperscript{43} Ibid., s. 50(1).
20. Much like a court, the CHRT may decide questions of law and fact, may summon witnesses and compel them to give oral or written evidence and produce documents, may administer oaths and may decide procedural and evidentiary questions. Unlike a court, however, the CHRT may receive any evidence that it sees fit to accept, even if that evidence would be inadmissible in a court of law.

21. In addition to the complainant and respondent, counsel for the CHRC may also appear before the CHRT. It is important to note that when the CHRC counsel appears before the CHRT, they do not represent either the complainant or respondent. Rather, counsel for the CHRC advocates the position that the CHRC considers to be in the public interest.

22. If the CHRT determines that the complaint is unsubstantiated, the complaint will be dismissed. If the CHRT determines that the complaint is substantiated, the CHRT may make an order against the person or organization that has engaged in the discriminatory practice. CHRT orders may be made orders of the FCC for enforcement purposes. CHRT orders may include any of the following terms:

a. that the discriminatory practice cease,

b. that full rights, opportunities and privileges be made available to the victim,

c. that the victim be compensated for lost wages, expenses and additional costs,

d. that the victim be compensated for pain and suffering up to an amount not exceeding $20,000,

e. that the victim be further compensated up to an additional $20,000 where the discriminatory practice is deemed wilful or reckless, and

f. interest.

23. Both the CHRC and the CHRT fall within the definition of a “federal board, commission or other tribunal,” pursuant to the Federal Courts Act. As such, any of the parties to the complaint may apply to the FCC for judicial review of a decision made by either the CHRC or the CHRT. The appropriate standard of review of administrative decision-makers is determined on a case-by-case basis. In the case of human rights tribunals, it may generally be said that the standard of review applied is the most stringent standard, namely that of ‘correctness.’

---

44 Ibid., s. 50(2).
45 Ibid., s. 50(3)(a).
46 Ibid., s. 50(3)(b).
47 Ibid., s. 50(3)(e).
48 CHRA, s. 50(3)(c) indicates that the discretion to receive any evidence is subject only to the evidentiary rules relating to privilege and the proviso that a conciliator appointed to settle the complaint cannot testify before the CHRT.
49 Ibid., s. 51.
50 Ibid., s. 53(1).
51 Ibid., s. 57.
52 Ibid., s. 53(2)(a).
53 Ibid., s. 53(2)(b).
54 Ibid., ss. 53(2)(c)-(d). Victims have a duty to mitigate their losses (i.e., to search for comparable employment).
55 Ibid., s. 53(2)(e).
56 Ibid., s. 53(3).
57 Ibid., s. 53(4).
58 R.S.C. 1985, c. F-7, s. 2 [FCA].
59 Ibid., ss. 18-18.1.
SECTION 3
PRIVACY COMMISSIONER

Introduction

24. The primary role of the Privacy Commissioner (PC) is to oversee the protection of an individual’s privacy rights through the application of the PA. The PC provides for independent oversight and monitoring of the application of the PA.

25. The PC has the authority to receive complaints, conduct investigations and make recommendations relating to the protection of personal information. The PC is responsible for ensuring that government departments apply the PA to personal information under their control.

Authority

26. Subsection 53(1) of the PA provides the statutory authority for the appointment of a PC. The GiC is responsible for the appointment of the PC upon the approval of the appointment in the House of Commons and Senate. Subsection 53(1) of the PA provides that “the Governor in Council shall, by commission under the Great Seal, appoint a PC after approval of the appointment by resolution of the Senate and House of Commons.”

27. The PC holds office during good behaviour. The PC holds office for a seven year period but may be removed by the GiC at any time after addressing the House and Senate on the issue. The PC, on the expiration of a first or any subsequent term of office, is eligible to be re-appointed for a further term not exceeding seven years.

28. Should the PC be unable to perform the functions of the Office or if the Office is vacant, the GiC may appoint another individual as PC for a six month period.

29. The PC has the powers of, and is considered to be the equivalent to, a deputy head of a department. The PC is assigned exclusively to duties of the Office of the PC and shall not participate in any other employment for reward.

30. The PC may request the Governor in Council to appoint an Assistant PC (APC). The APC also holds their Office during good behaviour. However, an APC is not to hold the Office for more than a five year term, although the five year term may be renewed. As with the PC, the APC is assigned exclusively to duties of the Office of the PC and should not participate in any other employment for reward.

Responsibilities – Complaints

31. The PC’s main responsibilities are to receive and investigate complaints:

   a. from people who have been denied access to their personal information under subsection 12(1) of the PA;

   b. concerning the use or release of personal information about a person, otherwise than in accordance with sections 7 or 8 of the PA;

   c. from persons who have been denied, without justification, the right to correct their personal information, in accordance with subsection 12(2) of the PA;

---

62 Privacy Act, ss. 53(2)-(3).
63 Ibid., s. 53(4).
64 Ibid., s.54(1).
d. from persons who believe that the government institution’s extension of the time limit to address the individual’s request under section 15 of the PA is unreasonable;

e. from persons who have been denied access to their personal information in the official language of their choice;\textsuperscript{65}

f. from persons who have a right to access their personal information in an alternative format under subsection 17(3) of the PA as a result of a sensory disability, and that right has been denied;

g. involving a denial of rights under subsection 12(2) of the PA which include the right to correct errors or omissions, notation to information where corrections have been requested but not made, notification of any person or body that has requested personal information two years prior to the correction or notation and require the government institution to correct or notate any copy of information under its control;\textsuperscript{66}

h. with respect to inappropriate fees;

i. with respect to ‘Personal Information Indexes,’ in accordance with subsection 11(1) of the PA; and

j. with respect to the collection, use, disclosure, retention or disposal of personal information under the PA.\textsuperscript{67}

32. Complaints are to be made to the PC in writing. A complainant may authorize another person to initiate a complaint with the PC on the complainant’s behalf.\textsuperscript{68} The PC may authorize an investigation of a complaint if the PC believes there are reasonable grounds to investigate the complaint.

Responsibilities – Investigations

33. The PC must notify the government department that is the subject of a complaint that a complaint has been made and further, inform that department that an investigation will be conducted into the matter, where appropriate. The PC, in making such notification, should also provide the department with information concerning the substance of the complaint.\textsuperscript{69}

34. The PC may also decide on the procedure for investigating a complaint. In this regard, any investigation undertaken must be conducted in private. The complainant and the institution that are the subjects of a complaint must be given an opportunity to make representations to the PC. However, they are not entitled to be present while another party is providing comments or representations to the PC.\textsuperscript{70}

Investigative Powers

35. During investigations, the PC has the power under the PA:

a. to administer oaths;

\textsuperscript{65} Ibid., ss. 17(2), 29(1)(e).
\textsuperscript{66} Ibid., ss. 12(2), 29(c).
\textsuperscript{67} Ibid., s. 29(1).
\textsuperscript{68} Ibid., ss. 29(2)-(3), 30.
\textsuperscript{69} Ibid., s. 31.
\textsuperscript{70} Ibid., ss. 32-33.
b. to summon and enforce the appearance of persons before the PC. The PC can also compel the person to give oral or written evidence under oath. Further, a person can be compelled to produce documents or other things that the PC deems necessary in order to conduct a full and proper investigation;

c. to receive any evidence that the PC deems important to the investigation of a complaint, regardless of whether the evidence or information would be admissible in a court of law;

d. to enter the premises of any government institution for the purposes of carrying out their functions under the PA, provided the PC satisfies the security requirements of the location;

e. upon entering a government institution, to speak in private with any person in the premises; and

f. to examine or obtain copies of any information found in a government institution relevant to the investigation.\(^{71}\)

36. The PC may examine any information in any form held by a government institution that the PC considers relevant to an investigation of a complaint under the PA, with the exception of a ‘confidence’ of the Queen’s Privy Council for Canada to which subsection 70(1) of the PA applies. All other information is not to be withheld from the PC on any grounds.\(^{72}\) The PC is required to return any document, accessed and examined for the purposes of carrying out an investigation within 10 days of the government institution’s request for the return of the document. However, the PC may request the document again.\(^{73}\)

37. On completion of an investigation, the PC must, if the complaint is deemed to be well founded, provide the government institution that is the subject of the complaint with a report that sets out the findings and recommendations of the PC. The PC may also provide the government institution with a time limitation for responding to the PC’s recommendations. The government institution is required to provide details on what actions have been taken or will be taken. If the institution decides that no action will be taken, the institution must provide the PC with reasons for the decision.\(^{74}\)

38. The complainant is to be provided with the results of the investigation. If the PC has provided the government institution with a set period of time to report on the recommendations, the PC is not to send a report to the complainant until the deadline has expired.\(^{75}\) If the institution does not respond within the time limit set by the PC, or the action to be taken in the view of the PC by the government institution is inadequate or inappropriate, the PC must advise the complainant of this fact in the report.\(^{76}\)

39. When a government institution informs the PC that access to the personal information will be provided to the complainant, access must be provided forthwith upon the giving of the notice. If access is denied, the PC must inform the complainant that access has been denied and that the complainant may apply to the FCC for a review of the matter.\(^{77}\)

40. The complainant may apply to the FCC to review a complete or partial refusal to disclose information within 45 days of receiving the PC’s report or any other amount of time fixed or


\(^{72}\) PA, s. 34(2); Lavigne at para. 33.

\(^{73}\) PA, s. 34(5).

\(^{74}\) Ibid., s. 35(1); Lavigne at para. 34.

\(^{75}\) PA, s. 35(2).

\(^{76}\) Ibid., s. 35(3).

\(^{77}\) Ibid., ss. 35(4)-(5).
allowed by the Court. The PC may also apply, within the same time lines, to the Court for a review of a refusal to disclose, provided that the PC has the consent of the person who requested access to their personal information. The PC may also appear before the Court on behalf of the person who has been denied access to their personal information or, with leave of the Court, may appear as a party to a review under section 41 of the **PA**.79

**SECTION 4**

**OFFICIAL LANGUAGES COMMISSIONER**

Introduction

41. The **Constitution** provides that English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use within the Government. The primary role of the Official Languages Commissioner (OLC) is to ensure recognition of the status of each of the official languages of Canada and that federal institutions comply with the spirit and intent of the **OLA**. The OLC provides for independent oversight and monitoring of the application of the **OLA**. The OLC has the authority to receive complaints, conduct investigations and make recommendations that will promote the equality of the two official languages and provide people with the right to use the language of their choice within federal institutions.

Authority

42. Subsection 49(1) of the **OLA** provides the statutory authority for the appointment of an OLC. The OLC is appointed upon receiving approval of the appointment from the Senate and the House of Commons. Subsection 49(1) of the **OLA** provides that the OLC...“shall be appointed by commission under the Great Seal" after approval of the appointment by resolution of the Senate and House of Commons.82

43. The OLC holds office during good behaviour for a period of up to 7 years, but may be removed by the GIC at any time on address of the House of Commons and Senate. The OLC may be re-appointed for additional terms, each term being a period not exceeding 7 years in length.84

44. Should the OLC be unable to perform the functions of their Office or if the Office is vacant, the GIC may, after consulting with the Speaker of the House of Commons and Speaker of the Senate, appoint another individual as the OLC for a period not exceeding six months.85

45. The OLC has the powers of, and is the equivalent to, a deputy head of a department. The OLC is assigned exclusively to duties of the Office of the Commissioner of Official Languages and must carry out the duties and functions assigned to that Office or any other duties or functions authorized by the GIC. The OLC should not participate in any other employment or hold any other Office under Her Majesty.

---

78 Ibid., s. 41.
79 Ibid., s. 42.
80 Official Languages Act, Preamble.
81 Ibid.
82 A ‘Great Seal’ is the official seal of a State. Black’s Law Dictionary, 8th ed., s.v. “seal.”
83 Official Languages Act, s. 49(1).
84 Ibid., ss. 49(2)-(3).
85 Ibid., s. 49(4).
Responsibilities

46. The OLC is responsible for taking any action within the authority of the Office, as set out in the OLA, in order to ensure that the status of both official languages of Canada are recognized and that federal institutions comply with the spirit and intent of the OLA. The OLC has the power to conduct investigations on their own behalf, or as result of a complaint made pursuant to the OLA.

Complaints

47. The main responsibility of the OLC under the OLA is to investigate complaints concerning acts or omissions of a federal institution with respect to the following:

a. the federal institution has not or is not recognizing the status of an official language;

b. the federal institution has not or is not complying with the spirit or intent of the OLA; and

c. the federal institution has not or is not complying with provisions of an Act of Parliament or regulation relating to the status or use of the official languages.\(^90\)

It should be noted that any person may make a complaint regardless of whether they speak the language that is the subject of the complaint.\(^86\)

48. A-AD-102-001/AG-001 Official Languages in DND and the CF\(^87\) provides further instructions on how complaints and investigations pertaining to official languages are dealt with in the CF and DND. This publication provides information concerning the duties of the OLC as well as CF and DND procedures for dealing internally with official languages complaints.\(^88\) It should, therefore, be consulted when dealing with a complaint and subsequent investigation of a violation of a member’s official languages rights.

Investigations

49. The OLC must notify and inform the government department that is the subject of a complaint that an investigation will be conducted into the matter.\(^89\) The OLC may also decide on the procedure for investigating a complaint. In this regard, any investigation undertaken must be conducted in private.\(^90\) Moreover, unless provided by the OLA, any information that comes to the knowledge of the OLC, or anyone acting on behalf of the OLC while performing the duties or functions of the Office of the OLC, must not be disclosed.\(^91\) It should also be noted that the Office of the OLC is itself subject to the provisions of the PA and, as such, it is conceivable that an individual could request personal information in the possession of the OLC. Upon receipt of such a request, the OLC must release the personal information unless the information is subject to one or more exemptions as set out in the PA. According to the Federal Court of Appeal (FCA) in Lavigne, “Parliament has made the Office of the Commissioner of Official Languages subject to the [PA] and only when a government institution is able to justify the exercise of its discretion to refuse disclosure may it do so.”\(^92\)

\(^{86}\) Ibid., s. 58(2); Lavigne at para. 35.
\(^{87}\) A-AD-102-001/AG-000, Official Languages in DND and the CF, online: DIN <http://dcms.mil.ca/exec/gms/perssvcs/civil_doc/OL-%20Manual_e.pdf>. Issued on the authority of the CDS and the DM.
\(^{88}\) Ibid.
\(^{89}\) Official Languages Act, s. 59; Lavigne at para. 36.
\(^{90}\) Ibid., ss. 59, 60; Lavigne at para. 36.
\(^{91}\) Ibid., s. 72; Lavigne at para. 36.
\(^{92}\) Lavigne at para. 69.
50. There is no right to be heard by the OLC, nor is the OLC required to hold hearings. However, if, during an investigation, the OLC believes that there are sufficient grounds to make an adverse finding against a person, the OLC must provide the person with the opportunity to make representations with respect to any allegation or criticism. The person potentially affected by an adverse finding can be assisted or represented by counsel.\(^93\)

51. The OLC may discontinue an investigation if the OLC believes that no further investigation is needed. The OLC may also refuse to commence an investigation or cease an investigation already started, if the OLC believes that the:

a. subject matter of the complaint is trivial;

b. complaint was not made in good faith or the complaint is frivolous or vexatious;

c. subject matter of the complaint does not disclose a contravention of the OLA; or

d. complaint does not come within the authority of OLC.\(^94\)

The OLC must provide a complainant with notice of any refusal to commence an investigation or a decision to discontinue it. Reasons for the decision must also be provided.\(^95\)

### Investigative Powers

52. When conducting an investigation under the OLA, the OLC has the power:

a. to administer oaths;

b. to summon and enforce the appearance of persons before the OLC. The OLC can compel the person to give either oral or written evidence under oath. A person can also be compelled to produce documents or other things that the OLC deems necessary in order to conduct a full investigation;

c. to receive any evidence that the OLC deems important to the investigation of a complaint, regardless of whether the evidence or information would be admissible in a court of law; and

d. to enter the premises of any government institution for the purposes of carrying out their functions under the OLA, provided the OLC satisfies the security requirements of the location.\(^96\)

### Post-Investigation

53. If, on the completion of an investigation, the OLC is of the opinion that:

a. the act or omission that was the subject of the complaint and investigation should be referred to the federal institution concerned for consideration and action, if necessary;

b. any Act or regulations or any directive of the GIC or the Treasury Board (TB) should be reconsidered, or any practice that would lead to or has led to a contravention of the OLA, should be altered or discontinued; or

---

\(^{93}\) *Official Languages Act*, s. 60(2); *Lavigne* at paras. 11, 36. The TB policy concerning indemnification and the provision of legal assistance to Crown servants may also have application in these circumstances. See Chapter 32 under Part 4 of this manual for more details concerning the provision legal assistance to Crown servants).

\(^{94}\) *Official Languages Act*, s. 58(4).

\(^{95}\) *Ibid.*, s. 58(5).

\(^{96}\) *Ibid.*, s. 62(1).
c. any other action should be taken, the OLC must report that opinion and the
reasons for it to the president of the TB and to the deputy head or other
administrative head of any institution concerned. For the CF and DND, any such
report is to be sent to the CDS and the DM, respectively. 97

54. The OLC may also provide the government institution which is the subject of the
complaint with a report that sets out the findings and recommendations of the OLC and they may
provide the government institution with a time limitation for responding to the recommendations.
The government institution is required to provide details on what actions have been taken or will
be taken in response to the OLC’s report. 98

55. The complainant is to be provided with the results of the investigation into their complaint,
along with the OLC’s recommendations and comments. If, in the opinion of the OLC, the
government institution has not taken appropriate action within a reasonable amount of time, the
OLC may inform the complainant of this fact. 99

56. The OLC has the discretion to forward any copy of their report to the GiC if the
government institution that was the subject of an investigation did not take appropriate and
adequate action with respect to the OLC’s recommendations within a reasonable period of time.
The OLC should consider any reply from the federal institution that is the subject of the
investigation prior to sending a copy of the report to the GiC. 100 The GiC may take whatever
action it deems is appropriate. However, if the OLC is of the opinion that the actions of the GiC
are inadequate or inappropriate, the OLC may forward a report and a copy of any reply from the
federal institution to Parliament. 101

57. A complainant may, within 60 days, apply to the FCC after receiving:
   a. the results of an investigation of a complaint made pursuant to subsection 64(1)
of the OLA;
   b. the recommendations of the OLC, in accordance with subsection 64(2) of the
OLA; or
   c. the decision by the OLC to refuse or cease an investigation into the matter, in
accordance with subsection 58(5) of the OLA or any other amount of time fixed
or allowed by the court. 102

58. In this regard, the complaint must be in respect of a right or duty under sections 4 to 7
(Proceedings of Parliament, Legislative and other Instruments), sections 10 to 13 (Legislative and
other Instruments), Part IV (Communications with or Services to the Public), Part V (Language of
Work) or section 91 (Staffing Action) of the OLA. 103

59. The OLC may also apply within the same time period to the Court for a remedy with
respect to the investigation of a complaint, provided that the OLC has the consent of the
complainant. The OLC may also appear before the Court on behalf of the complainant or, with
leave of the Court, appear as a party to the proceeding. 104

97 Ibid., s. 63(1); A-AD-102-001/AG-000 at 11.
98 Ibid., s. 63(1), 63(3).
99 Ibid., ss. 64(1)-(2).
100 Ibid., s. 65(1); Lavigne at para. 35.
101 Official Languages Act, ss. 65(2)-(4); Lavigne at para. 35.
102 Official Languages Act, s. 77(2).
103 Ibid., s. 77(1).
104 Ibid., s. 78(1).
SECTION 5
REFERENCES

Legislation


Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.).


Regulations

QR&O Chapter 7 (Grievances).

Official Languages (Communications with and Services to the Public) Regulations, SOR/92-48.

Privacy Regulations, SOR/83-508.

Orders, Directives and Instructions

DAOD 1002-0 (Personal Information).

DAOD 1002-1 (Requests under the Privacy Act for Personal Information).

DAOD 1002-2 (Informal Requests for Personal Information).

DAOD 1002-3 (Management of Personal Information).

DAOD 5039-0 (Official Languages).

Jurisprudence


Secondary Material

A-AD-102-001/AG-000, Official Languages in DND and the CF.

Black’s Law Dictionary, 8th ed.


Office of the Privacy Commissioner of Canada (OPC), main page, online: OPC <http://www.privcom.gc.ca/index_e.asp>.