

JUDGE ADVOCATE GENERAL



### JAG ANNUAL REPORT







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of the Judge Advocate General
to the Minister of National Defence
on the Administration of Military Justice
from 1 April 2020 to 31 March 2021

On the cover: Maj Orme, LCdr Benoit-Gagné, and Maj Tran.

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### COMMUNIQUÉ

Pursuant to Subsection 9.3(2) of the *National Defence Act*,<sup>1</sup> the Judge Advocate General (JAG) is required to report annually to the Minister of National Defence on the administration of military justice in the Canadian Armed Forces.

Under sections 9.1 and 9.2 of the Act, the JAG acts as legal advisor to the Governor General, the Minister of National Defence, the Department of National Defence and the Canadian Armed Forces in matters relating to military law. The JAG also oversees the administration of military justice in the Canadian Armed Forces.

This report covers the period April 1, 2020 to March 31, 2021. This coincided almost exactly with Canada's first year of the COVID-19 global pandemic and Canadians' resilient response to it. Like all Canadian organizations, the Office of the JAG had to adapt to the public health crisis in order to maintain operations. And like many other Canadians, our team rose to the challenges of COVID-19 with innovation, dedication and personal sacrifice. Despite the challenges, we have maintained our support to the military justice system and the chain of command that uses it.

One theme that runs throughout this report is accountability, and more specifically the need to recognize weaknesses in the military justice system, and to be accountable for addressing them. During the period covered by this report, no single issue underscored this imperative more than the public controversy over sexual misconduct in the Canadian Armed Forces.

Several high-profile cases of alleged impropriety cast a long shadow and undermined confidence in the military justice system among both Canadian Armed Forces members and the Canadian public. In turn, the heightened public awareness of this kind of misconduct brought to the forefront issues of discipline and accountability at all levels of the military, and produced an increased sense of urgency throughout the Canadian Armed Forces and the Government of Canada to address

<sup>1</sup> National Defence Act, RSC 1985, c N-5.

key issues such as providing greater support for victims and survivors of sexual misconduct.

But commitments are not enough. Accountability today dictates that everyone involved in the administration of military justice will be judged by our actions and results in helping to restore confidence in the system and the Canadian Armed Forces. For example, a series of extensive consultations that were commenced in late 2020 were recently concluded with victims and survivors of sexual misconduct and other service offences, and with victim and survivor advocacy and support organizations. Their input has proven to be integral to efforts to implement a new Declaration of Victims Rights that forms part of a major reform of the military justice system.

The military justice system is itself a key element of accountability. While it has been in existence since well before the enactment of the *National Defence Act* in 1950, the progressive evolution of Canada's military justice system has been driven by various accountability mechanisms, including judicial decisions, external reviews, and internal regulatory reform – a continuous process of improvement that remains ongoing today.

Throughout so many decades of review and resulting change, the military justice system has been and remains an indispensable tool for maintaining the discipline, efficiency, and morale of the Canadian Armed Forces and its members. Misconduct of all kinds is unacceptable. Misconduct undermines the morale and well-being of members and their families, and it equally impacts the cohesion and operational effectiveness of the military. But as the institutional crisis around sexual misconduct underscored, some aspects of the military justice system need significant reform and modernization.

A statutory review of the military justice system commenced in 2020 has provided a timely and invaluable roadmap to further reform. In November 2020, the Minister of National Defence appointed the Honourable Morris J. Fish, a former justice of the Supreme Court of Canada, to conduct an independent review of certain provisions of the *National Defence Act*. The statutory review required by the Act itself was the third such periodic study since 2003. In total, Justice Fish made

107 recommendations,2 all of which were accepted in principle by the Government of Canada and collectively represent a pathway to help evolve military justice into a new era and make necessary changes to ensure its proper functioning. Although the review by Justice Fish was commissioned during the time period covered by this Annual Report, it was not tabled in Parliament until June 1, 2021, and will therefore be appropriately detailed in our 2021-2022 Annual Report. Likewise, structural reforms pursuant to Justice Fish's recommendations will also be closely covered in future reports. In the meantime, the work of Justice Fish is noted here and selectively referenced elsewhere in this Annual Report to reflect the importance of his recommendations, and their centrality to efforts currently underway to reform the military justice system.

The Office of the JAG is also assisting the Honourable Louise Arbour, a former justice of the Supreme Court of Canada, who was appointed by the Minister of National Defence to conduct a comprehensive and independent external review of existing policies, procedures, programs and culture within the Canadian Armed Forces and Department of National Defence with respect to sexual misconduct and harassment. As the review was launched after the reporting period of this Annual Report, detailed coverage of its findings and recommendations will be provided in future reports.

#### Judicial Independence

During the reporting period, the Court Martial Appeal Court of Canada heard six military prosecution appeals from separate court martial cases, all of them centering on whether military judges are sufficiently independent to satisfy the requirements of the *Canadian Charter of Rights and Freedoms*.<sup>3</sup> After the reporting period of this Annual Report, the Court allowed the appeals and confirmed the independence of military judges, consistent with the *Charter*.<sup>4</sup> More detailed coverage of those decisions will be included in the next Annual Report.

The Honourable Morris J. Fish, *Report of the Third Independent Review Authority to the Minister of National Defence*, (Ottawa: Tabled in Parliament, 1 June 2021), online: *Canada.ca* <www.canada.ca/en/department-national-defence/corporate/policies-standards/acts-regulations/third-independent-reviews-nda.html>.

<sup>3</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].

<sup>4</sup> R v Edwards; R v Crépeau; R v Fontaine; R v Iredale, 2021 CMAC 2; R v Proulx; R v Cloutier, 2021 CMAC 3.

#### Conclusion

This report, and the developments that it describes, would not have been possible without the unwavering dedication and professionalism of the military and civilian members of the Office of the JAG. Despite the constraints and challenges of the past year of pandemic, our team members have remained committed to supporting the Canadian Armed Forces, the Department of National Defence and indeed the whole of Government. At the same time, coping with COVID-19 prompted the Office of the JAG to modernize the way we deliver our services every day, and how we care for our staff and their families in times of crisis.

In his recent report, Justice Fish stated he is "persuaded that the current leadership of the CAF has the will to materially improve its deep-rooted system of justice."<sup>5</sup>

Our mission is to provide our full support to the Canadian Armed Forces and to do our part to make the required improvements happen. We look forward to working with our partners in the military and government to get it done and get it right.

Fiat Justitia

<sup>5</sup> Supra note 2 at vi.



# WHO WE ARE: THE OFFICE OF THE JUDGE ADVOCATE GENERAL

## THE JUDGE ADVOCATE GENERAL

In accordance with section 9 of the *National Defence Act*,<sup>1</sup> the Judge Advocate General is appointed by the Governor in Council for a renewable term of up to four years and acts as legal advisor to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Armed Forces in matters relating to military law. The Judge Advocate General also has the statutory mandate to superintend the administration of military justice in the Canadian Armed Forces pursuant to section 9.2 of the *National Defence Act*. The Judge Advocate General is responsible to the Minister of National Defence in the performance of their duties and functions.

The Judge Advocate General acts as legal adivsor to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Armed Forces in matters relating to military law.

# COMMAND OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General has command over all officers and non-commissioned members posted to a position established within the Office of the JAG. The duties of a legal officer posted to a position established within the Office of the JAG are determined by, or under the authority of, the Judge Advocate General and, in respect of the performance of those duties, a legal officer is not subject to the command of an officer who is not a legal officer.<sup>2</sup> This is to ensure that legal officers provide independent legal services. All qualified legal officers serving in the Office of the JAG are members in good standing at the bar of a province or territory.

The Judge Advocate General has command over all officers and non-commissioned members posted to a position within the Office of the JAG. To ensure the provision of independent legal services, legal officers within the Office of the JAG are not subject to the command of an officer who is not a legal officer.

<sup>1</sup> National Defence Act, RSC 1985, c N-5.

Queen's Regulations and Orders for the Canadian Forces, art 4.081(4).

# OFFICE OF THE JUDGE ADVOCATE GENERAL

The Office of the JAG supports the Judge Advocate General in carrying out her statutory duties and functions. It is composed of Canadian Armed Forces' Regular and Reserve Force legal officers, civilian members of the Public Service, and Canadian Armed Forces' members from other military occupations.

During this reporting period, the Office of the JAG was comprised of five divisions and two directorates, all led by legal officers of the Colonel/Captain (N) rank, whose military members are drawn from both the Regular Force and the JAG Primary Reserve List. These are the Canadian Military Prosecution Service, Defence Counsel Services, the Chief of Staff and Corporate Services Division, the Military Justice Division, the Operational and International Law Division, the Administrative Law Division, and the Regional Services Division.

The Office of the JAG's Strategic Direction "Excellence through Service" is dedicated to delivering client focused, timely, options-oriented and operationally-driven legal services in support of Government of Canada, Department of National Defence, and Canadian Armed Forces priorities and objectives.

The Judge Advocate General also has a Deputy Judge Advocate General-Strategic, a position that was created

Canadian Military Prosecution Service

**Defence Counsel Services** 

Chief of Staff and Corporate Services Division

**Military Justice Division** 

Operational and International Law Division

**Administrative Law Division** 

**Regional Services Division** 

to develop and facilitate strategic initiatives to ensure that the provision of statutorily mandated legal services fully integrates, aligns with, and supports the Government of Canada, Departmental and Canadian Armed Forces objectives and priorities promulgated in Canada's Defence Policy - Strong, Secure, Engaged. During this reporting period, and with a view to obtaining direct and relevant experience with senior management within the Department of Justice, the Deputy Judge Advocate General Strategic was seconded to the Department of Justice as a Visiting Special Advisor/General Counsel within the Office of the Assistant Deputy Minister, Public Law and Legislative Services Sector.



Legal officers and members of the Canadian Forces Military Law Centre during the Legal Officer Qualification Course conducted in Kingston, Ontario, in September and October 2020

FIGURE 1-1: CANADIAN OFFICES OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL



#### JUDGE ADVOCATE GENERAL CHIEF WARRANT OFFICER

The Judge Advocate General Chief Warrant Officer serves as the senior non-commissioned member advisor to the Judge Advocate General. Based on the command team concept, the Judge Advocate General Chief Warrant Officer provides perspective to the Judge Advocate General and her senior leadership team on strategic issues related to the Judge Advocate General's statutory roles, the Canadian Armed Forces, and the Office of the JAG.

Together with the Canadian Armed Forces Chief Warrant Officer, the Judge Advocate General Chief Warrant Officer co-chairs the Canadian Armed Forces Discipline Advisory Council. This council includes the most senior non-commissioned members from each command, and from other key Level One organizations. The council meets to discuss strategic issues relevant to the maintenance of discipline, and provides input to both the Armed Forces Council and the Judge Advocate General.

Other experienced Chief Warrant Officers and Chief Petty Officers First Class are posted to positions in the Assistant Judge Advocate General offices and in certain Deputy Judge Advocate offices within Canada. The Assistant Judge Advocate General and Deputy Judge Advocate Chief Warrant Officers / Chief Petty Officers First Class provide an invaluable link between senior non-commissioned members at the unit, base, wing, and formation levels, and the local legal office in addressing disciplinary and administrative matters.

During the current reporting period, the Judge Advocate General Chief Warrant Officer has:

- Co-chaired the Canadian Armed Forces Discipline Advisory Council
- Coordinated and maintained responsibility for all Office of the JAG ceremonial functions in the National Capital Region
- Formalized and delivered training on unit disciplinary investigations and charge laying
- Coordinated with all Level One Chief Warrant Officers on key files and issues
- Managed the project to mount a historical board, identifying all former Judge Advocate Generals and Judge Advocate General Chief Warrant Officers, at the Judge Advocate General's Office at National Defence Headquaters



Change of Appointment Ceremony for the JAG Chief Warrant Officer from CPO1 Bolduc, to CWO Walhin, on 23 July 2020.

# DIRECTOR OF MILITARY PROSECUTIONS

The Director of Military Prosecutions, the senior military prosecutor in the Canadian Armed Forces, is appointed by the Minister of National Defence for a renewable term of up to four years pursuant to subsections 165.1(1) and (2) of the *National Defence Act*. The Director of Military Prosecutions acts independently from Canadian Armed Forces and Department of National Defence authorities when exercising their prosecutorial powers, duties, and functions. Only the Minister of National Defence may remove the Director of Military Prosecutions from office for cause, and only on the recommendation of an independent inquiry committee.

In accordance with section 165.15 of the National Defence Act, the Director of Military Prosecutions may be assisted and represented, to the extent determined by the Director of Military Prosecutions, by officers who are barristers or advocates with standing at the bar of a province or territory. In this regard, the Director of Military Prosecutions is assisted by a number of Regular and Reserve Force legal officers appointed to represent the Director of Military Prosecutions, along with a civilian paralegal and support staff. In instances where there is a risk of conflict of interest, the Director of Military Prosecutions may also appoint special prosecutors who are not legal officers but who are Canadian Armed Forces officers in another occupation and who are also barristers or advocates with standing at the bar of a province or territory. The Canadian Military Prosecution Service is organized regionally with Regional Military Prosecutors located in Halifax, Valcartier, Ottawa, Edmonton, and Esquimalt.

It is the responsibility of the Director of Military Prosecutions, with the assistance of those legal officers appointed to act as military prosecutors, to prefer all charges to be tried by court martial, to conduct all prosecutions at court martial, and to act as counsel for the Minister of National Defence in respect of appeals to the Court Martial Appeal Court of Canada and the Supreme Court of Canada. The Director of Military Prosecutions is also responsible for providing advice in support of investigations conducted by the Canadian Forces National Investigation Service, a military police service that reports to the Canadian Forces Provost

During the current reporting period, the Canadian Military Prosecution Service:

- Met the challenges of bringing matters before the courts in the midst of the COVID-19 pandemic
- Quickly adapted to the new reality of prosecuting cases in the pandemic environment and proved itself to be operationally focused and responsive
- Supported Courts Martial, including those involving a panel, to proceed safely and efficiently, sometimes virtually where necessary, to fulfil the requirement that prosecutors be globally deployable in any environment
- Under the Director of Military Prosecutions' leadership, ensured that the entire team met regularly to discuss ongoing matters
- Engaged with the chain of command and victims
- Conducted weekly training sessions to ensure that the interests of justice and discipline were advanced
- Successfully prosecuted cases in the new COVID-19 environment, demonstrating that the Director of Military Prosecutions team is small yet highly adaptable and agile and is capable to achieving desired outcomes in any environment

Marshal. The Director of Military Prosecutions also acts as counsel for the Canadian Armed Forces during custody review hearings.

Pursuant to section 165.17 of the National Defence Act, the Director of Military Prosecutions is under the general supervision of the Judge Advocate General and, in this regard, the Judge Advocate General may issue general instructions or guidelines in writing in respect of prosecutions, which the Director of Military Prosecutions must ensure are made available to the public. The Judge Advocate General may also issue instructions or guidelines in writing in respect of a particular prosecution. The Director of Military Prosecutions must ensure that these instructions or guidelines are also available to the public, unless the Director of Military Prosecutions considers that doing so would not be in the best interest of the administration of military justice. The Judge Advocate General did not issue any general or specific instructions or guidelines to the Director of Military Prosecutions during this reporting period.

In its report on the Administration of Justice in the Canadian Armed Forces dated 20 May 2018, the Office of the Auditor General of Canada made nine recommendations designed to enhance the efficiency and effective oversight of the military justice system.<sup>3</sup> In response to this report, and in order to assist the Director of Military Prosecutions in developing a highly competent team of prosecutors with experience and expertise in litigation, the Judge Advocate General issued direction to the Office of the JAG Chief of Staff during the 2018-2019 reporting period, requiring that all legal officers posted to the Canadian Military Prosecution Service remain in their positions for a minimum of five years, subject to the operational requirements of the Director.

In accordance with article 110.11 of the *Queen's Regulations and Orders for the Canadian Forces*, the Director of Military Prosecutions reports annually to the Judge Advocate General on the execution of their duties and functions. A comprehensive review of the Canadian Military Prosecution Service activities over this reporting period can be found in the Director of Military Prosecutions Annual Report 2020-2021, attached as Annex C to this report.

<sup>3 &</sup>quot;Report 3—Administration of Justice in the Canadian Armed Forces" (20 May 2018), online: Office of the Auditor General of Canada <a href="https://www.oag-bvg.gc.ca/internet/English/parl\_oag\_201805\_03\_e\_43035.html">https://www.oag-bvg.gc.ca/internet/English/parl\_oag\_201805\_03\_e\_43035.html</a>.

#### DIRECTOR OF DEFENCE COUNSEL SERVICES

The Director of Defence Counsel Services is appointed by the Minister of National Defence for a renewable term of up to four years pursuant to subsections 249.18(1) and (2) of the National Defence Act. The Director of Defence Counsel Services acts independently from the Canadian Armed Forces and Department of National Defence authorities when exercising their powers, duties, and functions. Only the Minister of National Defence may remove the Director of Defence Counsel Services from office for cause, and only on the recommendation of an independent inquiry committee.

In accordance with section 249.21 of the *National Defence Act*, the Director of Defence Counsel Services may be assisted in their duties and functions by persons who are barristers or advocates with standing at the bar of a province or territory. In this regard, the Director of Defence Counsel Services, located in the National Capital Region, is assisted by a number of Regular and Reserve Force legal officers who act as defence counsel, along with a civilian paralegal and support staff.

In accordance with section 249.19 of the *National Defence Act*, it is the responsibility of the Director of Defence Counsel Services to provide, supervise, and direct the legal services available under article 101.11 of the *Queen's Regulations and Orders for the Canadian Forces* to persons who are liable to be charged, dealt with, and tried under the Code of Service Discipline, at no cost. This includes:

- the provision of legal advice to a person who is the subject of an investigation under the Code of Service Discipline, a summary investigation, or a board of inquiry;
- the provision of legal advice to persons arrested or detained in respect of a service offence;
- the provision of legal counsel to an accused person where there are reasonable grounds to believe that the accused person is unfit to stand trial;
- the provision of legal advice of a general nature to an accused person or assisting officer on matters relating to summary trials;

#### During the current reporting period, Defence Counsel Services:

- Has been successful before several courts martial in raising violations of the *Charter* right to be tried by an independent and impartial tribunal, thus obtaining several stays of proceedings to the benefit of their clients (appeals pending)
- Responded to the call of duty and courageously travelled throughout Canada to protect the rights of Canadian Armed Forces members in the context of the pandemic
- Continued to provide legal advice and representation to members of the military community who were investigated for, or charged with, an offence under the military justice system
- the provision of legal counsel to a person in respect of an application to review a direction for the conditional release of the person from custody following arrest;
- the provision of legal counsel to a person in respect of pre-trial custody hearings, in situations where the accused person is retained in custody following arrest;
- the provision of legal advice to an accused person with respect to the making of an election to be tried by court martial;
- the provision of legal advice to an accused person with respect to the waiver of the limitation periods;
- the provision of legal counsel to an accused person in respect of whom an application to a referral authority has been made;
- the provision of legal advice to an offender, or to an officer or non-commissioned member

appointed to assist an offender, in respect of an application to vary a suspension order or an intermittent sentence order or an application to vary conditions or in respect of a hearing into breach of conditions;

- the provision of legal advice to a person who wishes to preserve the right to appeal under the National Defence Act;
- the provision of legal advice to a person who wishes to apply, or has applied, to the Appeal Committee;
- the provision of legal counsel to a person in respect of an application for release pending an appeal;
- the provision of legal counsel to a person released from custody pending appeal, in respect of an application for review or breach of an undertaking or appeal;
- the provision of legal counsel to the respondent on an appeal or an application for leave to appeal by the Minister of National Defence; and
- the provision of legal counsel to an appellant on an appeal or an application for leave to appeal with the approval of the Appeal Committee.

The relationship between the Director of Defence Counsel Services and the Judge Advocate General is set out at section 249.2 of the National Defence Act. The Director of Defence Counsel Services acts under the general supervision of the Judge Advocate General, but this general supervision must be exercised through general instructions or guidelines in writing in respect of defence counsel services. Furthermore, the Director of Defence Counsel Services must ensure that any such instructions or guidelines are available to the public. Unlike with the Director of Military Prosecutions, the Judge Advocate General has no authority to issue instructions or guidelines in respect of a particular case. The Judge Advocate General did not issue any general instructions or guidelines to the Director of Defence Counsel Services in respect of defence counsel services, during this reporting period.

In its report on the Administration of Justice in the Canadian Armed Forces dated 20 May 2018, the Office of the Auditor General made nine recommendations designed to enhance the efficiency and effective oversight

of the military justice system. In response to this report, and in order to assist the Director of Defence Counsel Services in developing a highly competent team of defence counsel with experience and expertise in litigation, the Judge Advocate General issued direction to the Office of the JAG Chief of Staff during the 2018-2019 reporting period, requiring that all legal officers posted to Defence Counsel Services remain in their positions for a minimum of five years, subject to the operational requirements of the Director.

In accordance with paragraph 101.11(4) of the *Queen's Regulations and Orders for the Canadian Forces*, the Director of Defence Counsel Services is required to report annually to the Judge Advocate General on the provision of legal services as well as other duties that are prescribed by regulations. A copy of the Director of Defence Counsel Services Annual Report 2020-2021 is attached as Annex D to this report.

#### CHIEF OF STAFF AND CORPORATE SERVICES DIVISION

Composed of both civilian and military staff, the Chief of Staff and Corporate Services Division is responsible for providing staff and corporate services and support across a range of functions, including military personnel and civilian human resources management, business planning, comptroller and financial management services, information management and technology, military and civilian training, organization and establishment, and administrative support services.

The Division is further responsible for addressing external corporate requirements, and is the Office of the JAG lead on a number of key departmental and governance processes within the Department of National Defence and Canadian Armed Forces including the Business Plan, the Departmental Plan, the Departmental Results Framework, the Departmental Results Report, the Defence Team Establishment Plan, as well as the development, submission and implementation of Office of the JAG action plans for various programs such as Official Languages, Employment Equity Diversity and Inclusion, and the Public Service Employment Survey. The Division also provides support to the Chief of Staff in their capacity as Legal Branch Advisor, working with Military Personnel Command staff in the recruiting, training, career management and professional development of Canadian Armed Forces legal officers.

The Legal Branch Advisor continues to sponsor a multi-year military employment structure study of the legal officer occupation. The study, which is led by a legal officer posted to the Director Personnel Generation Requirements, analyzes all legal officer work requirements including jobs, positions, occupation structures, and employment qualifications. Among other issues, the study is analyzing the possible specialization of military justice litigators along with other changes to legal officer employment that have the potential to enhance the independence of key actors in the military justice system. It is anticipated that the study will be completed during the next reporting period.

During the current reporting period, the Chief of Staff and Corporate Services Division has

- Led the Office of the JAG's response to the COVID-19 pandemic by activating the Business Continuity Plan, ensuring the physical workspace is compliant with personal health requirements, acquiring personal protective equipment, obtaining and setting up protective equipment for the office, and developing reporting mechanisms to track members and staff who are required to be physically present in the office for essential purposes
- Set up IT infrastructure, including hardware and applications, allowing the office to transition to a predominately work from home posture
- Contributed to the development of the Justice Administration and Information Management System through the identification and assignment of additional personnel and financial resources
- Supported cyclical Department of National Defence and Canadian Armed Forces programs including Business Planning, the Departmental Results Framework, the Departmental Plan, the Departmental Results Report, the Defence Team Establishment Plan, the Annual Military Occupational Review, postings, and Personnel Evaluation Review management
- Supported the completion of the Defence Common Administration and Support Services Transfer Implementation Plan and subsequent transfer of funds to align with the intent of the Vice Chief of the Defence Staff
- Aligned financial resources to foster the successful launch of the National Defence Act Independent Review
- Supported Office of the JAG morale and welfare initiatives during the pandemic
- Provided robust administrative support to members of the Office of the JAG

Finally, the Division serves as the locus of Office of the JAG efforts to work with the broader Defence Team to align personnel and financial resources to achieve Department of National Defence, Canadian Armed Forces and Judge Avocate General priorities. During this reporting period, these efforts included ad hoc requests for "total force" growth to Regular Force, Reserve Force, and civilian components of the Office of the JAG establishment and the preliminary analysis of options to reorient and reorganize the Office to enable the timely analysis and implementation of the forthcoming recommendations of independent reviews impacting the military justice system.



LCdr Vallentgoed accompanied by Col Laforest, Commander of the NATO Enhanced Forward Presence Battle Group Latvia, delivering a lecture at the Riga Graduate School of Law on 15 September 2020

## MILITARY JUSTICE DIVISION

The Military Justice Division assists the Judge Advocate General in superintending the administration of military justice and ensuring its responsible evolution. In this reporting period, it was organized into four directorates: Military Justice Policy, Military Justice Operations, Canadian Forces Provost Marshal Legal Services, and the Judge Advocate General Independent Review Support Team.

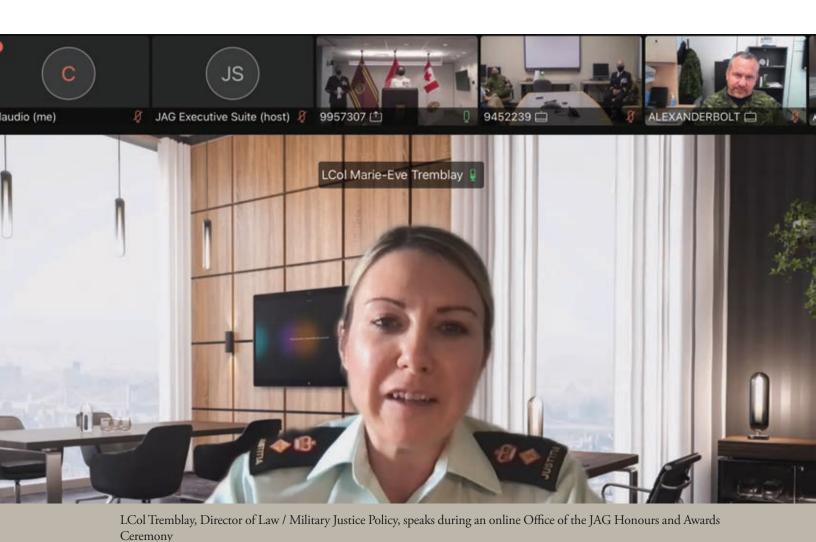
The Military Justice Division directorates support the Judge Advocate General in the implementation of her vision for military justice in three convergent ways. The Directorate of Law/Military Justice Policy plays a key role in the development of legislation and regulations related to the military justice system. These initiatives arise when amendments to the National Defence Act are sought and also when other government departments pursue legislative proposals that would have implications for the military justice system. The Directorate of Law/ Military Justice Operations is responsible for providing direct, operational support to the Judge Advocate General as the superintendent of the administration of military justice in the Canadian Armed Forces. This includes providing support on military justice issues to all legal officers within the Office of the JAG, formulating policy on military justice issues, and providing the necessary support for the appointment of individuals to the various military justice committees. This Directorate is also responsible for the production of the Judge Advocate General's Annual Report to the Minister of National Defence as well as the management of the Superintendence Enhancement and Assessment Project. Finally, the Directorate of Canadian Forces Provost Marshal Legal Services is responsible for providing legal advice and services to the Canadian Forces Provost Marshal and the Canadian Forces Military Police Group. This Directorate enables the efficient and effective lawful conduct of policing operations, investigations, custody, and mandated security tasks. In addition, it also acts as a principal liaison between the Office of the JAG and the Canadian Forces Provost Marshal.

Pursuant to section 273.601 of the *National Defence Act*, the Minister of National Defence must cause an independent review of specific provisions of the Act and their operation, and table a report of the review before Parliament. On 4 November 2020, the Honourable

During the current reporting period, the Military Justice Division has:

- Supported the ongoing implementation of Bill C-77: An Act to amend the National Defence Act and to make related and consequential amendments to other Acts, including drafting instructions to be provided to the Department of Justice in order to fully implement the Declaration of Victims Rights, and engaging in significant stakeholder consultation
- Provided support to the Third Independent Review of the National Defence Act
- Continued to implement the recommendations stemming from Office of the Auditor General of Canada and parliamentary reviews pertaining to the administration of justice in the Canadian Armed Forces
- Supported the Assistant Deputy Minister (Information Management) in the ongoing development of the Justice Administration and Information Management System software and it is rollout to Canadian Armed Forces' units
- Facilitated engagement of key military justice stakeholders to enable strategic exchanges and improve communications system through the Military Justice Stakeholders Forum
- Supported the Judge Advocate General in her role as Superintendent of the administration of military justice during Parliamentary committee appearances
- Provided legal services to the Canadian Forces Provost Marshal and the Canadian Forces Military Police Group

Morris J. Fish, former Justice of the Supreme Court of Canada, was appointed by the Minister of National Defence to conduct the Third Independent Review of the *National Defence Act*. The Military Justice Division instituted and designed the Judge Advocate General Independent Review Support Team to support the departmental independent review secretariat. The Judge Advocate General Independent Review Support Team was responsible for assisting Departmental efforts to support the Independent Review Authority. This support included providing briefings to the Independent Review Authority, developing position papers, and providing liaison with interested organizations and stakeholders. The Third Independent Review of the *National Defence Act* is discussed in detail below, in Chapter 3.



[1] Share

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# OPERATIONAL AND INTERNATIONAL LAW DIVISION

The Operational and International Law Division is responsible for the provision of military legal services for all domestic and international operations. Additionally, this Division oversees all legal officers deployed on operations. These legal officers provide legal support to deployed Canadian Armed Forces elements on all aspects of military law, including the military justice system.

The Operational and International Law Division is made up of seven directorates: the Strategic Joint Staff Legal Advisor, the Directorate of Law - International, the Canadian Joint Operations Command Legal Advisor, the Canadian Special Operations Forces Command Legal Advisor, the Legal Advisor to the Canadian Component at the North American Aerospace Defense Command, the Directorate of Law - Intelligence and Information Operations, and the Directorate of Law - Cyber Operations. In addition, 13 legal officers were deployed in direct support of four overseas operations during this reporting period: Operation REASSURANCE, Operation ARTEMIS, Operation IMPACT, as well as to the NATO Mission in Iraq. Deployed legal officers provide close support to task force commanders and staff to help ensure that missions are conducted in accordance with applicable law.

The Strategic Joint Staff Legal Advisor provides legal advice on all strategic level operational issues affecting Canadian Armed Forces operations around the world such as domestic and international legal authorities, rules of engagement and use of force. The Directorate of Law - International provides strategic legal support and advice on the international legal framework for Canadian Armed Forces activities. This includes advice on the international legal basis for the conduct of operations, and in areas such as the law of armed conflict, international human rights law, and international criminal law. As well, this Directorate is the principal liaison with Global Affairs Canada Legal Services. This Directorate also works closely with partners and allies as well as Non-Governmental Organizations like the Canadian Red Cross and the International Committee of the Red Cross.

The Canadian Joint Operations Command Legal Advisor provides legal advice to the Commander of the

During the current reporting period, the Operational and International Law Division has:

- Provided legal advice and support to Operation LASER and Operation VECTOR, the Canadian Armed Forces operations in support of the whole-of-Government response to the COVID-19 pandemic. These operations include:
  - Efforts to repatriate Canadians affected by the pandemic
  - Support to Long Term Care Facilities in Ontario and Quebec
  - Support to vaccine programs assisting Indigenous and remote communities in Northern Ontario and Manitoba
- Provided legal advice and support to over 20 Canadian Armed Forces operations around the world, including Operation NEON, Operation PROJECTION, Operation CARIBBE, Operation FOUNDATION, Operation RENAISSANCE, and Operation UNIFIER
- Supported the Deployment of 13 legal officers in direct support of four overseas operations, namely Operation IMPACT, Operation ARTEMIS, Operation REASSURANCE, and the NATO Mission in Iraq
- Provided legal advice and support to Canadian Armed Forces operations in support of Canadian civil authorities in their response to humanitarian crises resulting from fires and floods
- Provided support to a wide variety of other domestic operations and activities
- Provided support to the North American Aerospace Defence Command
- Actively engaged in maintaining and developing strategic relationships with external partners like the Department of Justice, Global Affairs Canada, the Canadian Red Cross, as well as allied military and foreign services legal colleagues, academic institutions, and international bodies

Canadian Joint Operations Command on all military law matters related to the conduct of conventional military operations at the operational level, in both continental and expeditionary contexts. In addition, deployed legal officers report to the Canadian Joint Operations Command Legal Advisor. The Canadian Special Operations Forces Command Legal Advisor provides legal advice in all aspects of military law related to the conduct of Canadian Special Operations Forces Command operations including its domestic and international counter-terrorism response and its mandated response to all domestic and international terrorist attacks, international crises, and associated threats.

The Legal Advisor to the Canadian component at the North American Aerospace Defence Command provides legal advice on national issues to the Deputy Commander of North American Aerospace Defence in their role as the senior Canadian officer in the binational command structure as well as advice on North American Aerospace Defence issues generally as part of the overall legal advisor team for the North American Aerospace Defence Command. The Directorate of Law, Intelligence and Information Operations is the primary legal advisor to the Canadian Forces Intelligence Command / Chief of Defence Intelligence and the National Security and Intelligence Review and Oversight Coordination Secretariat. It provides legal advice on strategic, operational and tactical level issues relating to both domestic and international matters of an intelligence nature. Key areas of legal advice include information sharing, open source intelligence, and counter-intelligence investigations. The Directorate of Law - Cyber Operations was stood up during this reporting period. This new directorate provides legal support at the strategic, operational, and tactical level on issues relating to the development and employment of cyber capabilities.



## ADMINISTRATIVE LAW DIVISION

The Administrative Law Division provides legal advice to Canadian Armed Forces leaders at the strategic level on matters pertaining to the administration of the Canadian Armed Forces. This includes military personnel policies, administrative investigations, compensation, benefits, pensions and estates, as well as on matters relating to the governance, organization, and command structure of the Canadian Armed Forces and the operation of the military grievance system. Given the size and complexity of the Canadian Armed Forces and the multitude of important administrative decisions made each day, one of the objectives of providing legal advice in the military administrative law realm is to ensure that these decisions are made in accordance with applicable law and policy.

The Administrative Law Division is composed of three directorates: Military Personnel; Administrative Law; and Compensation, Benefits, Pensions and Estates. The Military Personnel directorate provides legal advice on the development and application of personnel policies spanning from recruitment to release, including such topics as universality of service, human rights, and conduct deficiencies. The Administrative Law directorate provides legal advice and support in relation to complaint and conflict management, including military grievances, grievance-related litigation, administrative investigations, and the Canadian Armed Forces organization and command structure. The Compensation, Benefits, Pensions and Estates directorate provides legal advice and support on the full spectrum of this framework, as well as legal and administrative support in relation to Service Estates and Elections. Additionally, the Administrative Law Division is responsible for the legal advisor assigned to provide legal support to the Office of the Chief of the Defence Staff.

#### During this reporting period, the Administrative Law Division has:

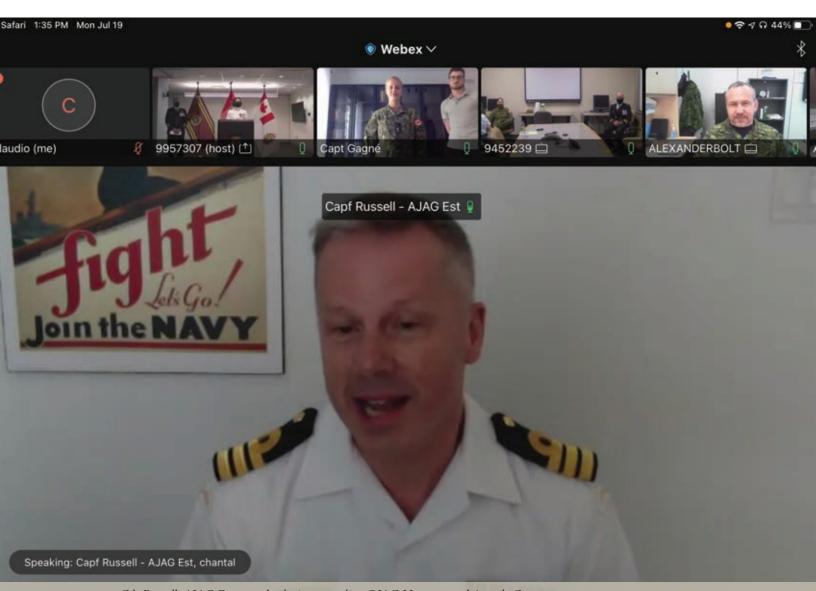
- Provided critical support to the Chief of Military Personnel in implementing Canada's Defence Policy - Strong, Secure and Engaged
- Supported the Chief of Military Personnel in addressing key Canadian Armed Forces priorities, such as modifying military personnel policies to address the impact of the COVID-19 pandemic, and developing new military personnel policies in relation to "Hateful Conduct"
- Supported those responsible for proposing modifications to a significant number of Compensation and Benefits Instructions, as well as to those administering the grievance system and boards of inquiry
- Provided support to the reponse to the sexual misconduct crisis within the Canadian Armed Forces

#### REGIONAL SERVICES DIVISION

Regional Services is the largest Division within the Office of the JAG, and delivers legal services principally to Canadian Armed Forces commanders across Canada and abroad. There are eight regions within Regional Services, each of which is led by an Assistant Judge Advocate General (AJAG). The AJAG offices are located

in: Ottawa, Halifax, Montreal, Toronto, Winnipeg, Edmonton, Esquimalt, and Geilenkirchen (Germany). Additionally, there are several legal officers who hold the position of Deputy Judge Advocate (DJA) and work directly for their respective AJAGs. They are situated in satellite DJA offices located across Canada, typically in more remote areas.

The Regional Services Division is comprised of both Regular and Reserve Force legal officers, all of whom provide legal advice to both Regular and Reserve Force commands, formations, and units on various aspects of military law. One of those aspects is military justice,



Cdr Russell, AJAG East, speaks during an online OJAG Honours and Awards Ceremony

which captures pre-charge and pre-trial advice at the summary trial level, and at times, pre-trial advice at the court martial level. Legal officers within the Regional Services Division also assist Referral Authorities in their duties to outline public interest factors or lack of those factors when referring files to the Director of Military Prosecutions for potential trial by way of court martial. Additionally, legal officers may advise Presiding Officers during the course of a summary trial, and are responsible for providing advice on any requests for reviews of findings and/or sentences at the summary trial level. These legal officers function as an independent safeguard to ensure that the summary trial process is carried out in accordance with the law.

Another key aspect of the duties of the legal officers within the Regional Services Division is to provide training to Canadian Armed Forces commands, formations, and units. Examples of the variety of training topics include: Unit Disciplinary Investigations; the Law of Armed Conflict; use of force; and administrative legal issues. In support of the Judge Advocate General's role as superintendent of the administration of military justice, legal officers within the Regional Services Division have conducted 46 two-day Presiding Officer Certification Training sessions during this reporting period, six of which were delivered in French, with approximately 994 candidates completing the course. Regional Services also conducted 87 Unit Disciplinary Investigation courses in this reporting period.

Two other critical areas in which legal officers within the Regional Services Division provide legal advice is in the fields of administrative law and operational law. The Regional Services Division is the principal source of generating legal officers for Canadian Armed Forces exercises, training, and operational deployments in Canada and abroad. In this reporting period, legal officers from Regional Services provided support to domestic operations including Operation LASER and Operation VECTOR. Regional Services members also deployed internationally as part of Operation IMPACT, Operation REASSURANCE, Operation ARTEMIS, and the NATO Mission in Iraq.

During this reporting period, legal officers from the Regional Services Division have:

- Advised on all aspects of military justice at the tactical level, including: custody review; during investigations; and at the pre-charge and pre-trial, trial, and administration phases with an emphasis on providing practical and operationallyfocused advice to allow the military justice system to function effectively and fairly
- Responded to high demands in all areas of military law, supporting the initiation of over 1000 discipline cases, approximately 20 Boards of Inquiry, and many other issues including the provision of advice on strategic policies, high profile grievances, and removal from command
- Provided critical advice on the application of the North Atlantic Treaty Organization Status of Forces Agreement and other related agreements
- Supported operations in the Arctic, including support to northern communities and Operation NANOOK (defence and security of Canada's North), and Operation NEVUS (maintenance of the High Arctic Data Communications System)
- Supported Canadian NORAD region operations and exercises
- Provided direct support to domestic operations such as Operation LENTUS (assistance during floods, fires, and natural disasters), Operation LASER (response to the COVID-19 pandemic), Operation VECTOR (support to the Federal, Provincial, and Territorial government for the distribution of COVID-19 vaccines), Search and Rescue, and Assistance to Law Enforcement Agencies
- Supported force generation by participating in exercises designed to ensure the operational readiness of the Canadian Army, including in Wainright and Suffield, exercises to test Five-Eyes Interoperability, Northern exercises, as well as Maritime and Air operation exercises

#### DEPUTY JUDGE ADVOCATE GENERAL/RESERVES

The Deputy Judge Advocate General/Reserves is a member of the Office of the JAG Senior Council and provides critical advice to the Judge Advocate General and Office of the JAG senior leadership in matters of Primary Reserve policy and employment in relation to Reserve Force legal officers.

Reserve Force Legal Officers provide tactical legal support to Canadian Armed Forces reserve elements, offer unique legal skills and provide a surge capacity to complete tasks which exceed the Office of the JAG's regular force capacity. Members on the Office of the JAG Primary Reserve List are located throughout Canada and principally support the Regional Services Division, the Canadian Military Prosecution Service, and Defence Counsel Services. Reserve Force legal officers undergo the same training and development as their Regular Force counterparts to ensure the readiness and capacity of the Office of the JAG to support the full range of Canadian Armed Forces operations. Primary Reserve List members in the Regional Services Division maintain personal readiness and may voluntarily deploy on domestic and international operations.

During the current reporting period, members on the Office of the JAG Primary Reserve List have:

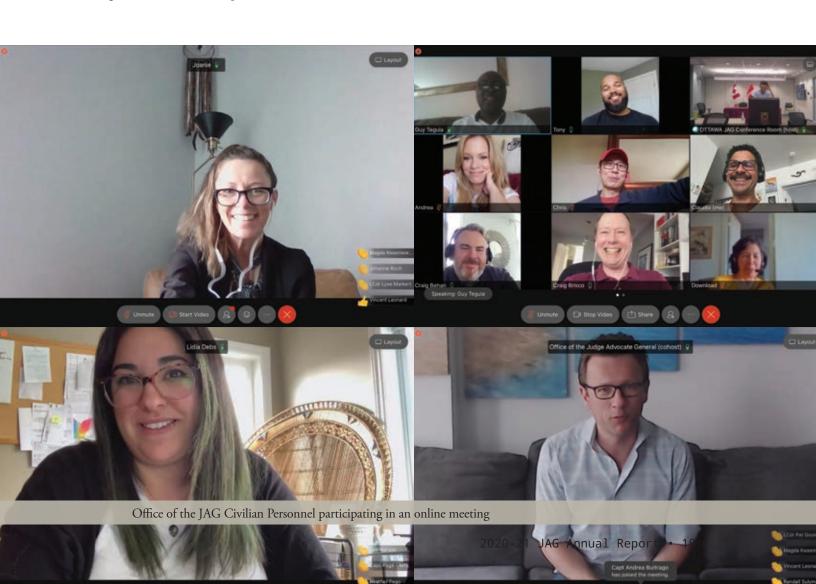
- Deployed in support of Operation REASSURANCE
- Worked on special assignments with the Military Justice Division and the Canadian Forces Military Law Centre
- Supported the initiatives of the Office of the JAG as well as the full range of Canadian Armed Forces operations

#### LEGAL OFFICERS CIVILIAN SERVING OUTSIDE THE OFFICE OF THE JUDGE ADVOCATE GENERAL

In addition to the legal officers serving in the abovementioned organizations, a number of legal officers serve outside the Office of the JAG. They include the Deputy Judge Advocate General Strategic, who is seconded within senior leadership at the Department of Justice, and legal officers serving with the Department of Justice at the Privy Council Office, Global Affairs Canada, the Canadian Forces Military Law Centre, and the Department of National Defence/Canadian Forces Legal Advisor with the Department of Justice.

### PERSONNEL OF THE OFFICE OF THE JUDGE ADVOCATE **GENERAL**

Civilian personnel form an integral and essential part of the Office of the JAG and contribute greatly to its continued success. They occupy positions located throughout Canadian Armed Forces bases and wings in Canada and abroad to provide key support to legal officers and their non-legal military personnel through their work in administrative, analytical, and technical tasks.





### THE CANADIAN MILITARY JUSTICE SYSTEM: STRUCTURE AND STATISTICS



#### CANADA'S MILITARY JUSTICE SYSTEM

Canada's military justice system is a separate and parallel system of justice that forms an integral part of the Canadian legal mosaic. It shares many of the same underlying principles as the civilian criminal justice system, and it is subject to the same constitutional framework, including the Canadian Charter of Rights and Freedoms. On several occasions, the Supreme Court of Canada has considered the requirement for a separate and distinct military justice system to meet the specific needs of the Canadian Armed Forces<sup>2</sup> and has recently recognized the military justice system as a "full partner in administering justice alongside the civilian justice system."3

The military justice system is designed to promote the operational effectiveness of the Canadian Armed Forces by contributing to the maintenance of discipline, efficiency, and morale, while ensuring that justice is administered fairly and with respect to the rule of law. These objectives give rise to many of the substantive and procedural differences that distinguish the military justice system from the civilian justice system.

In R v Stillman, 2019 SCC 40 (at para 20) the **Supreme Court of Canada** recognized that the military justice system is a "full partner in administering justice alongside the civilian justice system."

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

R v Généreux, [1992] 1 SCR 259; Mackay v R, [1980] 2 SCR 370; R v Moriarity, 2015 SCC 55.

R v Stillman, 2019 SCC 40 at para 20.

# THE STRUCTURE OF THE MILITARY JUSTICE SYSTEM

### The Code of Service Discipline

As noted by the Supreme Court of Canada, the Code of Service Discipline, which is contained in Part III of the National Defence Act, 4 is "[t]he foundation of Canada's military justice system." The Code of Service Discipline has been recognized as "an essential ingredient of service life"6 that "defines the standard of conduct to which military personnel and certain civilians are subject and provides for a set of military tribunals to discipline breaches of that standard."7 While the Code of Service Discipline is "primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces,"8 it "serves a public function as well by punishing specific conduct which threatens public order and welfare."9 It also sets out the procedures and organization of service tribunals, the jurisdiction of various actors in the military justice system, the powers of punishment, and the posttrial review and appeal mechanisms.

- 4 National Defence Act, RSC 1985, c N-5.
- 5 R v Stillman, supra note 3 at para 55.
- 6 MacKay v R, supra note 2 at 398.
- 7 R v Généreux, supra note 2 at 297.
- 8 *Ibid* at 281.
- 9 R v Stillman, supra note 3 at para 55.

"The military justice system is therefore designed to meet the unique needs of the military with respect to discipline, efficiency, and morale ... [T]o maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently."

\*R v Stillman, 2019 SCC 40 (at para 36).

The term "service offence" is defined in the National Defence Act as "an offence under this Act, the Criminal Code, or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline."10 Thus, service offences include many disciplinary offences that are unique to the profession of arms, such as disobedience of a lawful command,11 absence without leave,12 and conduct to the prejudice of good order and discipline, 13 as well as more conventional offences such as those found in the Criminal Code14 and other Acts of Parliament. Members of the Regular Force of the Canadian Armed Forces are subject to the Code of Service Discipline everywhere and at all times, whereas members of the Reserve Force and other categories of persons are subject to the Code of Service Discipline only in the circumstances specified by section 60 of the National Defence Act.

# THE TWO TIERS OF THE MILITARY JUSTICE SYSTEM

The military justice system currently has a tiered tribunal structure comprised of two types of service tribunals: summary trials and courts martial. The *Queen's Regulations* and *Orders for the Canadian Forces*<sup>15</sup> outline procedures for the disposal of a charge by each type of service tribunal.

The following sections describe the two tiers of the military justice system as they currently exist; however, with the implementation of *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, <sup>16</sup> the summary trial process will be transformed into a non-penal, non-criminal summary hearing process designed to address minor breaches of military discipline at the unit level. With this reform, courts martial alone will have jurisdiction over service offences. A more detailed description of the work undertaken during the reporting period to implement these changes can be found in Chapter 3 under the heading *Legislative Developments*.

- 10 National Defence Act, supra note 4, s 2.
- 11 Ibid, s 83.
- 12 Ibid, s 90.
- 13 Ibid, s 129.
- 14 Criminal Code, RSC 1985, c C-46.
- 15 Canada, Department of National Defence, *Queen's Regulations and Orders for the Canadian Forces* (Ottawa: DND, 28 June 2019).
- Bill C-77, An Act to amend the National Defence Act and to make related and consequential amendments to other Acts, 1st Sess, 42nd Parl, 2019 (royal assent 21 June 2019) [Bill C-77].

#### Summary Trials

The summary trial is the most commonly used form of service tribunal. It allows for relatively minor service offences to be tried and disposed of quickly and fairly at the unit level. Summary trials are presided over by commanding officers or other specified classes of officers, who are trained and certified by the Judge Advocate General as qualified to perform their duties as presiding officers in the administration of the Code of Service Discipline.<sup>17</sup> All accused members are entitled to be assigned an assisting officer who will aid the accused member in the preparation of their case, during the summary trial, 18 and in the preparation of any post-trial request for review.<sup>19</sup> At summary trial, the procedures are staightforward and the powers of punishment are limited in scope,<sup>20</sup> which is reflective of the relatively minor nature of the offences involved and the intent that the punishments be primarily corrective in nature.

The jurisdiction at summary trial is limited by factors such as the rank of the accused and the offence or offences charged. All service offences may be tried by court martial, and while some offences must be tried by court martial, those listed in article 108.07 of the *Queen's Regulations and Orders for the Canadian Forces* may also be tried by summary trial. Military judges<sup>21</sup> and other officers at or above the rank of Colonel<sup>22</sup>, however, cannot be tried by summary trial.

For the majority of offences that can be dealt with by summary trial, the accused member will have the right to elect a trial by court martial.<sup>23</sup> The election process has been designed to provide the accused member with the opportunity to make an informed choice regarding the type of service tribunal that will try the matter.

It is required that charges laid under the Code of Service Discipline be dealt with as expeditiously as the

- Most commonly used form of service tribunal
- Designed to quickly and fairly try minor service offences at the unit level
- Presided over by members of the chain of command
- Accused persons are entitled to an assisting officer throughout the process
- Except in certain circumstances, accused persons have the right to elect to be tried by court martial or summary trial
- A person found guilty at summary trial has the right to apply for a review of the finding, the sentence imposed, or both

circumstances permit.<sup>24</sup> Unless the accused member waives the limitation periods, they may not be tried by summary trial unless the charge is laid within six months after the day on which the service offence is alleged to have been committed, and the summary trial commences within one year after that day.<sup>25</sup>

<sup>17</sup> Queen's Regulations and Orders for the Canadian Forces, supra note 15, art 101.07.

<sup>18</sup> Ibid, art 108.14.

<sup>19</sup> Ibid, art 108.45(18).

<sup>20</sup> R v Stillman, supra note 3 at para 62.

<sup>21</sup> National Defence Act, supra note 4, s 164(1.3).

<sup>22</sup> Ibid, s 164(1)(a).

<sup>23</sup> An accused does not have the right to elect his or her mode of trial in two instances. First in cases provided for by article 108.17(1) of the Queen's Regulations and Orders for the Canadian Forces, second where the charges are more serious in nature and require a direct referral to court martial.

<sup>24</sup> National Defence Act, supra note 4, s 162.

<sup>25</sup> Ibid, ss 163(1.1), 164(1.1). Pursuant to the National Defence Act, supra note 4 at 69(2), "if the service offence is punishable under section 130 or 132 and the act or omission that constitutes the service offence would have been subject to a limitation period had it been dealt with other than under the Code, then that limitation period applies."

#### Review of a Finding Made and/or Sentence Imposed at Summary Trial

A member of the Canadian Armed Forces found guilty of a service offence at summary trial has the right to request that a review authority review the finding rendered, the punishment imposed, or both.<sup>26</sup> A review authority may also, on their own initiative, undertake a review of the finding and/or punishment.27 As provided for under articles 108.45 and 116.02 of the Queen's Regulations and Orders for the Canadian Forces, a review authority is typically a more senior officer in the chain of command of the officer who presided over the summary trial. A review authority has the power to quash any finding of guilty; substitute a new finding for any finding of guilty; alter any sentence; and mitigate, commute or remit any punishment imposed at summary trial.<sup>28</sup> Before making any determination, a review authority must first obtain legal advice.29

Bill C-77 will transform the summary trial process into a non-penal, non-criminal summary hearing process, limited in jurisdiction to service infractions to be created by regulations, and designed to address minor breaches of military discipline.

#### Courts Martial

The court martial is a formal military court presided over by a military judge. It is designed to deal with more serious offences and has powers of punishment up to and including imprisonment for life. Courts martial are conducted in accordance with rules and procedures similar to those of civilian criminal courts, while taking into account the unique requirements of the military justice system. Courts martial exercise the same rights, powers and privileges as a superior court of criminal jurisdiction with respect to all "matters necessary or proper for the due exercise of [their] jurisdiction."<sup>30</sup>

Courts martial, like summary trials, can be convened anywhere in Canada and abroad. The *National Defence Act* provides for two types of courts martial: General and Standing. The General Court Martial is composed of a military judge and a panel of five Canadian Armed Forces members. The panel serves as the trier of fact and decides on any finding of guilt. In the event of a guilty finding, it is the military judge who determines the sentence or directs that the offender be discharged absolutely. At a Standing Court Martial, the military judge sits alone, makes any required findings and, if the accused person is found guilty, imposes the sentence or directs that the individual be discharged absolutely.

At court martial, the prosecution is conducted by a military prosecutor under the authority of the Director of Military Prosecutions. The accused is entitled to be represented by defence counsel assigned by the Director of Defence Counsel Services at no cost, or by civilian counsel at their own expense.<sup>31</sup>

<sup>26</sup> Queen's Regulations and Orders for the Canadian Forces, supra note 15, art 108.45(1).

<sup>27</sup> *Ibid*, art 116.02.

<sup>28</sup> *Ibid*, art 108.45 Note B.

<sup>29</sup> *Ibid*, art 108.45(8).

<sup>30</sup> National Defence Act, supra note 4, s 179.

<sup>31</sup> In some cases, civilian counsel can be provided at no cost by the Director of Defence Counsel Services.

#### Appeal of a Court Martial Decision

Decisions made at court martial may be appealed to the Court Martial Appeal Court of Canada by the person subject to the Code of Service Discipline or by the Minister of National Defence or counsel instructed by the Minister.<sup>32</sup> The Court Martial Appeal Court of Canada is composed of civilian judges who are appointed by the Governor in Council from the Federal Court of Appeal, the Federal Court, or from the superior courts and courts of appeal of the provinces and territories.

Court Martial Appeal Court of Canada decisions may be appealed to the Supreme Court of Canada on any question of law on which a judge of the Court Martial Appeal Court of Canada dissents, or on any question of law when leave to appeal is granted by the Supreme Court of Canada.

32 The Minister of National Defence has instructed the Director of Military Prosecutions to act on his behalf for appeals to the Court Martial Appeal Court and the Supreme Court of Canada, pursuant to s 165.11 of the *National Defence Act*.



Maj Day, DJA Edmonton, participates in Exercise UNIFIED RESOLVE at CFB Edmonton in January 2021

- Formal proceedings presided over by a military judge. Military judges are appointed by the Governor in Council, similarly to their civilian counterparts
- Designed to deal with more serious offences
- There are two types of court martial: 1) Standing Court Martial presided over by a military judge alone; and 2) General Court Martial presided over by a military judge and a panel composed of five Canadian Armed Forces members, who serve as the triers of fact and decide unanimously on any finding
- For both Standing and General courts martial, the military judge determines the sentence
- Accused persons have the right to be represented by counsel from Defence Counsel Services at no cost, or by civilian counsel at their own expense. In some cases, civilian counsel can be provided at no cost by Defence Counsel Services
- A person subject to the Code of Service Discipline has the right to appeal from court martial to the Court Martial Appeal Court in relation to a number of matters including the legality of any finding of guilty and the legality of the the whole of any part of the imposed sentence

#### **STATISTICS**

The statistics provided in this chapter reflect the quantitative data collected on the military justice system over the 2020/21 reporting period. This reporting period marks the first full reporting period affected by the COVID-19 pandemic.

In response to the COVID-19 pandemic, the Department of National Defence and the Canadian Armed Forces took unprecedented measures to protect the health and well-being of its members, prevent the spread of the virus, and continue essential military operations including contributing to the national response to the pandemic in support of civilian authorities. Although the military justice system adapted quickly to the circumstances to meet the disciplinary needs of the Canadian Armed Forces, the reporting period saw a dramatic decrease in the number of trials held with a 44% reduction in the number of completed summary trials and a 38% reduction in the number of completed courts martial. While it is not possible to identify an exact cause for this decrease, certain measures taken by the Canadian Armed Forces in the face of the pandemic, including activating business continuity plans that limited the number of personnel in the workplace and working together, restricting gatherings and closing social gathering places such as messes, halting the parading of reserve units, as well as transitioning from in-person to online training, may have influenced the number of offences charged and the number of service tribunals held during the reporting period.

#### Summary Trials

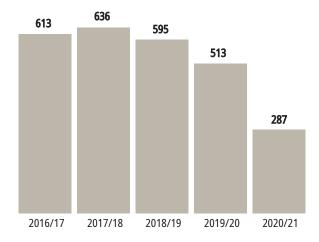
#### NUMBER OF SUMMARY TRIALS

During this reporting period, there were 287 summary trials and 34 courts martial conducted. Summary trials made up approximately 89% of trials held before service tribunals. Summary trials continued to be the most widely used form of service tribunal in the Canadian Armed Forces.

Figure 2-1 shows the number of summary trials and courts martial held over the last two reporting periods as well as the corresponding percentage of cases tried by each type of service tribunal. Figure 2-2 shows the total number of summary trials by reporting period since 2016/17.

Figure 2-1: Distribution of Service Tribunals								
	2019	2019-202033		2020-2021				
	#	%	#	%				
Number of Courts Martial	55	9.68	34	10.60				
Number of Summary Trials	513	90.32	287	89.40				
Total	568	100	321	100				

FIGURE 2-2: NUMBER OF SUMMARY TRIALS



<sup>33</sup> All summary trial statistics from the 2019/20 reporting period that are reported in this report may differ from those statistics in the 2019/20 Annual Report of the Judge Advocate General as a result of late reporting by various units across the Canadian Armed Forces.

FIGURE	2-	3:			
Number	OF	SUMMARY	TRIALS	BY	ORGANIZATION

	2019-2020		2020-2021	
	#	%	#	%
Canadian Army	230	44.84	129	44.94
Royal Canadian Navy	98	19.10	52	18.12
Chief of Military Personnel	56	10.92	19	6.62
Royal Canadian Air Force	65	12.67	44	15.33
Canada Joint Operations Command	44	8.58	28	9.76
Canada Special Operations Forces Command	7	1.36	7	2.44
Vice Chief of Defence Staff	10	1.95	4	1.39
Assistance Deputy Minister (Material)	1	0.19	0	0.00
Assistance Deputy Minister (Information Management)	2	0.39	1	0.35
Assistance Deputy Minister (Infrastructure and Environment Branch)	0	0.00	2	0.70
Canadian Forces Intelligence Command	0	0.00	1	0.35
Total	513	100	287	100

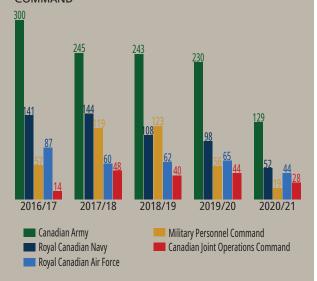
Figure 2-3 shows the total number of summary trials held over the last two reporting periods by organization. Figure 2-4 specifically illustrates the number of summary trials held since the 2016/17 reporting period within the following five commands: the Canadian Army, the Royal Canadian Navy, the Royal Canadian Air Force, Military Personnel Command, and the Canadian Joint Operations Command.

In this reporting period, the Canadian Army held a total of 129 summary trials as compared to 230 in

the previous reporting period. This is a decrease of 102 summary trials, or approximately 44% from the 2019/20 reporting period. Since 2016/17 the number of summary trials held within the Canadian Army has decreased each year.

Since 2017/18, the Royal Canadian Navy has seen a steady decrease in summary trials. During this reporting period, there were a total of 52 summary trials, as compared to 98 in the previous reporting period. This is a decrease of approximately 47%.

FIGURE 2-4:
NUMBER OF SUMMARY TRIALS FOR THE CANADIAN
ARMY, THE ROYAL CANADIAN NAVY, THE ROYAL
CANADIAN AIR FORCE, MILITARY PERSONNEL
COMMAND, AND THE CANADIAN JOINT OPERATIONS
COMMAND



The Royal Canadian Air Force conducted 44 summary trials in this reporting period, which is a decrease of 32% from the 65 held during the last reporting period. Summary trials in the Royal Canadian Air Force have been generally trending downward since 2016/17, when 87 summary trials were held.

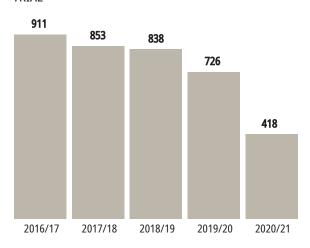
In this reporting period, 19 summary trials were conducted within the Military Personnel Command, compared to 56 in the previous reporting period. This represents approximately 66% fewer summary trials than the previous reporting period. Percentage-wise, this decrease is consistent with numbers observed during the last reporting period, when summary trials decreased from 123 to 56.

Finally, the Canadian Joint Operations Command held 28 summary trials in comparison to 44 in the previous reporting period. This represents a decrease of approximately 36%. Since 2016-17, the Canadian Joint Operations Command summary trial numbers have varied, displaying no significant pattern of increase or decrease.

#### NUMBER OF CHARGES DISPOSED OF AT SUMMARY TRIAL<sup>34</sup>

In this reporting period, there were a total of 418 charges disposed of at summary trial compared to 726 during the 2019/20 reporting period. Figure 2-5 shows the total number of charges disposed of at summary trial since 2016/17, and demonstrates a consistent decrease.

Figure 2-5: Number of Charges Disposed of at Summary Trial

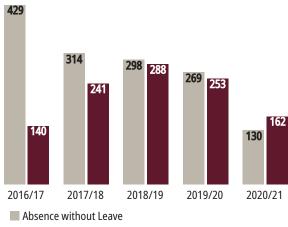


The most commonly charged service offences, which account for approximately 70% of all charges disposed of at summary trial, are under section 90 of the *National Defence Act*, absence without leave, and under section 129, conduct to the prejudice of good order and discipline.<sup>35</sup>

Since the 2016/17 reporting period, there has been a consistent decrease in the total number of charges reported for absence without leave. In the current reporting period the total number was 130, compared to 269 in the 2019/20 reporting period. Although the quantitative decrease appears significant, proportionally the number of charges for absence without leave was 31%, and saw only a 6% decrease as compared to 37% in the previous reporting period.

In this reporting period, there were a total of 162 charges for the offence of conduct to the prejudice of good order and discipline. Although this reporting period saw a significant decrease in the number of charges from the 253 charges reported in the 2019/20 reporting period, the proportional number of charges for conduct to the prejudice of good order and discipline increased slightly from 35% in the previous reporting to 39%. Figure 2-6 shows the number of charges for absence without leave and conduct to the prejudice of good order and discipline between 2016/17 and 2020/21.

FIGURE 2-6:
NUMBER OF CHARGES FOR CONDUCT TO THE
PREJUDICE OF GOOD ORDER AND DISCIPLINE
AND ABSENCE WITHOUT LEAVE



Conduct to the Prejudice of Good Order and Discipline

#### Number of Elections to be Tried by Court Martial

Pursuant to article 108.17 of the *Queen's Regulations and Orders for the Canadian Forces*, an accused person will be offered an election to be tried by court martial, unless the following two criteria are met:

- a. each offence with which the individual has been charged is one of the following: insubordination, drunkenness, absence without leave, quarrels and disturbances, and conduct to the prejudice of good order and discipline (where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment); and
- b. the circumstances surrounding the commission of the offences are so minor in nature that the

<sup>34</sup> See Annex A, below, for a complete breakdown of all charges disposed of at summary trial and corresponding percentage.

<sup>35</sup> See generally *R v Tomczyk*, 2012 CMAC 4 at para 24 ("[s]ection 129 is a broad provision that criminalizes any conduct judged prejudicial to good order and discipline in the CF."; *R v. Golzari*, 2017 CMAC 3 at para 78 ("[m]ilitary discipline requires that conduct be punished if it carries a real risk of adverse effects on good order within the unit; this is more than a mere possibility of harm. If the conduct tends to or is likely to adversely affect discipline, then it is prejudicial to good order and discipline.)".

presiding officer concludes that a punishment of detention, reduction in rank, or a fine in excess of 25 percent of monthly basic pay would not be warranted if the accused person were found guilty.

During this reporting period, a total of 112 elections to be tried by court martial were offered to accused persons. Out of the 112 elections offered, 88 accused persons elected to be tried by summary trial, which represents 79% of the total elections offered. The remaining 24 accused persons elected to be tried by court martial, which represents 21% of the total elections offered. The percentage of accused persons electing to be tried by court martial has increased by 22% from the 2019/20 reporting period.

Figure 2-7 represents the percentage of accused members who elected to be tried by court martial over the past five reporting periods.

Figure 2-8 shows the number of summary trials completed over the past five reporting periods where the accused person was offered an election to be tried by court martial, as well as the number of summary trials completed where no election was offered.

Figure 2-9 shows the percentage of summary trials completed over the past five reporting periods where the accused person elected to be tried by summary trial.

#### WAIVER OF LIMITATION PERIODS

Pursuant to article 108.16(1.1) of the *Queen's Regulations* and *Orders for the Canadian Forces*, a charge must be laid against an accused person within six months from the date the service offence is alleged to have been committed, and the summary trial must commence within one year of that date. Pursuant to article 108.171 of the *Queen's Regulations and Orders for the Canadian Forces*, an accused person has the right to waive one or both of these limitation periods.<sup>37</sup>

FIGURE 2-7: PERCENTAGE OF ACCUSED ELECTING TO BE TRIED BY COURT MARTIAL

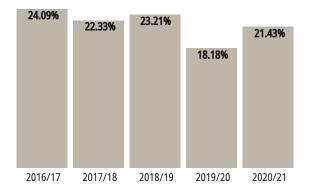


FIGURE 2-8: NUMBER OF SUMMARY TRIALS COMPLETED WHERE ELECTION OFFERED OR NOT OFFERED<sup>36</sup>

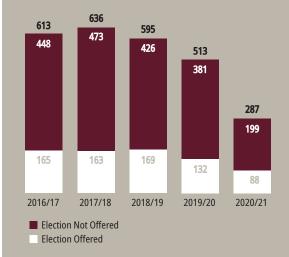
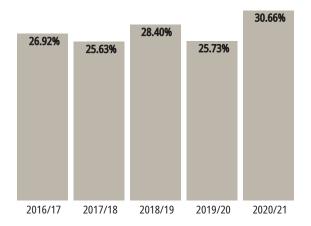


FIGURE 2-9: NUMBER OF SUMMARY TRIALS COMPLETED WHERE ACCUSED OFFERED AN ELECTION, EXPRESSED AS A PERCENTAGE



<sup>36</sup> In some cases, an election can be offered during one reporting period, but the summary trial is not completed until the following reporting period.

<sup>37</sup> Where one (or both) of the limitation periods have lapsed and the accused person has not provided a waiver, the presiding officer cannot proceed with the matter by way of summary trial. In such circumstances, pursuant to paragraph 108.16(3) of the *Queen's Regulations and Orders for the Canadian Forces*, the presiding officer is required to refer the matter to the next superior officer within the disciplinary chain, who can then refer the matter to the Director of Military Prosecutions for consideration. If the Director of Military Prosecutions makes the decision to prefer charges, the matter can proceed by way of court martial.

In this reporting period, there were 46 waivers offered to accused persons, an increase of four from the 2019/20 reporting period. Of the 46 waivers offered, the accused person chose to waive one or both of the limitation periods in 37 cases.

#### **RESULTS BY CHARGE AT SUMMARY TRIAL**

The findings at summary trial, by charge, have remained relatively consistent over the last five reporting periods. This reporting period saw a decrease in the percentage of guilty findings, from approximately 91% in the 2019/20 reporting period, to approximately 88% in this reporting period. Although the number of not guilty findings has decreased from 42 to 35, not guilty findings made up approximately 8% of findings in this reporting period as opposed to approximately 6% in the previous reporting period. A complete breakdown of the total number of findings by charge and the corresponding percentages for the last two reporting periods can be found at Figure 2-10.

Figure 2-10: Findings by Charge				
	2019	9-2020	2020	)-2021
	#	%	#	%
Guilty	658	90.65	367	87.80
Guilty – Special Finding	3	0.41	2	0.48
Not guilty	42	5.77	35	8.37
Charge stayed	17	2.34	5	1.20
Charge not proceeded with	6	0.83	9	2.15
Total	726	100	418	100

#### PUNISHMENTS AND ABSOLUTE DISCHARGES AT SUMMARY TRIAL

In this reporting period, there were a total of 356 punishments and absolute discharges imposed at summary trial.<sup>38</sup> Fines and confinement to ship or barracks continued to be the most commonly imposed punishments. Figure 2-11 shows the number of absolute discharges and punishments by type that were imposed at summary trial for the last two reporting periods as well as the corresponding percentages.

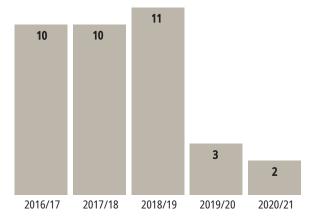
Figure 2-11:
Punishments and Absolute Discharges at Summary
Trial

	2019-2020		2020	-2021		
	#	%	#	%		
Detention	3*	0.47	2	0.56		
Reduction in rank	3	0.47	2	0.56		
Severe reprimand	2	0.31	3	0.84		
Reprimand	24	3.72	22	6.18		
Fine	401	62.16	237	66.58		
Confinement to ship or barracks	147	22.79	46	12.92		
Extra work and drill	56	8.68	33	9.27		
Stoppage of leave	6	0.93	7	1.97		
Absolute Discharge 39	3	0.47	4	1.12		
Total	645	100	356	100		
* Includes one punishment which was a Suspended Detention						

In this reporting period, the punishment of detention was imposed twice. This number is consistent with the previous reporting period, where three punishments of detention were imposed, and one was suspended. An

overview of the number of punishments of detention imposed at summary trial over the last five reporting periods can be found in Figure 2-12.

Figure 2-12: Total Punishments of Detention



<sup>38</sup> More than one type of punishment may be imposed at a summary trial.

Effective 1 September 2018, in accordance with sub-sections 208.8(1) & (2) of the *National Defence Act*, an accused person who pleads guilty or is found guilty of an offence for which a minimum punishment is prescribed by law or an offence punishable by 14 years or for life – may be directed by a service tribunal to be discharged absolutely, and as a result the offender is deemed to have not been convicted of the offence.

#### **SUMMARY TRIAL REVIEWS**

In the current reporting period, a total of 24 summary trials were reviewed pursuant to articles 108.45 (requests by members found guilty at summary trial) and 116.02 (on the review authority's own initiative) of the *Queen's Regulations and Orders for the Canadian Forces*. This represents approximately 8% of the 287 summary trials conducted in this reporting period. The number also represents a relative increase of approximately 33% of cases reviewed compared to the 6% reported in the 2019/20 reporting period. Of the reviews, eight were based on findings, seven were based on punishment, and nine were based on both findings and punishment. Figure 2-13 shows the percentage of cases for which a review has been conducted since 2016/17.

In relation to a review, a review authority can render one of the following decisions: to uphold the presiding officer's decision; to quash a guilty finding; or to substitute a finding or punishment. In this reporting period, review authorities quashed 50% of the findings of guilty for which a review was undertaken. Additionally, review authorities upheld 33% of the decisions of presiding officers. A complete breakdown of all decisions of review authorities for the past two reporting periods can be found at Figure 2-14.

FIGURE 2-13:
PERCENTAGE OF SUMMARY TRIALS REVIEWED

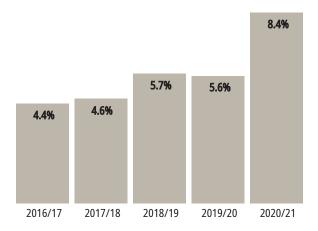


Figure 2-14: Decisions of Review Authority						
	2019-2020		2020-2021			
	#	%	#	%		
Upholds decision	9	26.47	8	33.33		
Quashes findings	15	44.12	12	50		
Substitutes findings	1	2.94	0	0		
Substitutes punishment	3	8.82	1	4.17		
Mitigates / commutes / remits punishment	6	17.65	3	12.50		
Total	34	100	24	100		

#### HARMFUL AND INAPPROPRIATE SEXUAL BEHAVIOUR AND SEXUAL MISCONDUCT

At the summary trial level, charges of harmful and inappropriate sexual behaviour and sexual misconduct that do not meet the threshold of sexual assault, are most frequently charged under section 129 of the *National Defence Act*, conduct to the prejudice of good order and discipline. This includes but is not limited to behaviours such as sexual harassment, verbal and/or physical harassment, and sharing and displaying inappropriate materials such as videos or photos of a sexual nature.

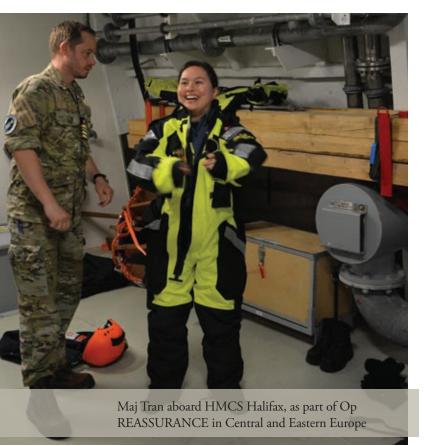
In the current reporting period, there were a total of 20 charges for the offence of conduct to the prejudice of good order and discipline in relation to harmful and inappropriate sexual behaviour and sexual misconduct, compared to 33 charges in the previous reporting period. Of these 20 charges, 19 resulted in a guilty finding and one in a finding of not guilty. Furthermore, of these 20 charges, 12 were related to verbal comments of a sexual nature, four related to physical acts of a sexual nature, three related to displaying materials of a sexual nature, and in one case the nature of the alleged behaviour was not specified in the Record of Disciplinary Proceedings.

#### **LANGUAGE OF SUMMARY TRIALS**

Pursuant to article 108.16 of the *Queen's Regulations and Orders for the Canadian Forces*, accused persons have the right to be tried in the official language of their choice. The presiding officer must be able to understand the language in which the proceedings are to be conducted without the assistance of an interpreter.

In this reporting period, 77% of summary trials were conducted in English and 23% were conducted in French. These numbers are consistent with the previous reporting period. Figure 2-15 shows the total number of summary trials conducted in both English and French for the past two reporting periods.

Figure 2-15: Language of Summary Trials						
	2019	9-2020	2020	)-2021		
	#	%	#	%		
Number in English	394	76.80	221	77		
Number in French	119	23.20	66	23		
Total	513	100	287	100		

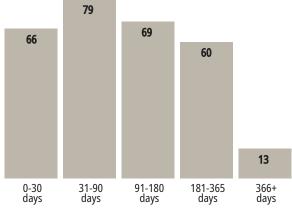


#### **Timelines for Summary Trials**

The purpose of the summary trial system is to provide prompt and fair justice in respect of minor service offences. As such, these trials are required to begin within one year of the date on which the offence is alleged to have occurred, unless this limitation period is waived by the accused person.<sup>40</sup>

This reporting period saw 287 summary trials completed, and the average time from the alleged offence to the conclusion of the summary trial was approximately 127 days. Of these 287 summary trials, 145 concluded within 90 days of the alleged offence, representing approximately 51% of all summary trials for the reporting period. Further, approximately 75% of summary trials were concluded within 180 days of the alleged offence. Figure 2-16 shows a breakdown of the number of days from the alleged offence to the conclusion of the summary trial.

FIGURE 2-16: NUMBER OF DAYS FROM ALLEGED OFFENCE TO THE CONCLUSION OF THE SUMMARY TRIAL FOR REPORTING PERIOD 2020/21<sup>41</sup>



Once a charge is laid by the appropriate authority and is referred to a presiding officer, the presiding officer may be required to obtain legal advice before commencing the summary trial.<sup>42</sup> Once legal advice has been received from the unit legal advisor, the presiding officer may commence the summary trial.

<sup>40</sup> National Defence Act, supra note 4, ss 163(1.1)—(1.2), 164(1.1)—(1.2).

<sup>41</sup> Effective 1 September 2018, the accused person may waive the one year limitation period to commence a summary trial.

<sup>42</sup> Queen's Regulations and Orders for the Canadian Forces, supra note 15, art 107.11.

Over the past five reporting periods, the average time between the laying of a charge to the conclusion of the summary trial has fluctuated, reaching a low of 15 days in the 2017/18 reporting period. This number increased during the current reporting period to approximately 35 days. Figure 2-17 shows the average time from charge laid to the conclusion of the summary trial over the last five reporting periods.

At this time, reporting capabilities do not provide data on the length of summary trials from start to finish, however, with the ongoing development and rollout of the Justice Administration and Information Management System, this data will be available to the Office of the JAG in future reporting periods.

#### Courts Martial<sup>43</sup>

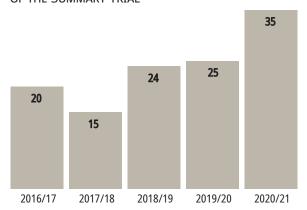
#### NUMBER OF COURTS MARTIAL

During this reporting period, there were a total of 34 courts martial, representing approximately 11% of all trials held before service tribunals. This is a decrease of 21 courts martial from the previous reporting period. Figure 2-18 demonstrates the number of courts martial by year since 2016/17.

#### **RESULTS BY CASE AT COURT MARTIAL**

Of the 34 courts martial held during this reporting period, 25 cases resulted in a finding of guilty on at least one charge; seven cases<sup>44</sup> resulted in a stay of proceedings; one case resulted in a termination of proceedings; and one case resulted in all charges being withdrawn. Figure 2-19 shows the disposition by case over the past two reporting periods.

Figure 2-17:
Average Time from Charge Laid to Conclusion
of the Summary Trial



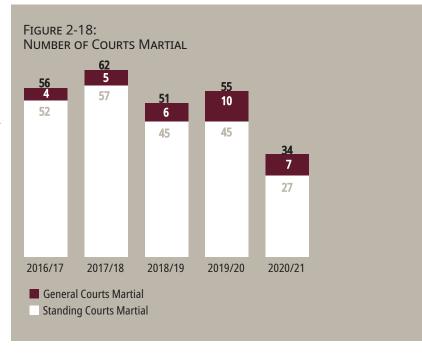


Figure 2-19: Disposition of Cases at Court Martial							
	2019-2020		2020-2021				
	#	%	#	%			
Found Guilty of at Least One Charge	44	80.00	25	73.53			
Not Guilty of All Charges	7	12.73	0	0.00			
Stay of All Charges	0	0.00	7	20.59			
Withdrawal of All Charges	3	5.45	1	2.94			
Termination of Proceedings	1	1.82	1	2.94			
Total	55	100	34	100			

<sup>43</sup> See Annex C, *below*, for the Director of Military Prosecutions' Annual Report and further statistical data.

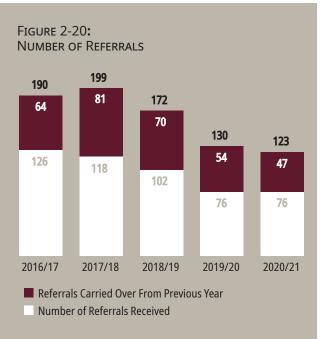
<sup>44</sup> For further information, please refer to the "Jurisprudence" section of Chapter 3, below.

#### DIRECTOR OF MILITARY PROSECUTIONS CASE MANAGEMENT

#### **REFERRALS**

During this reporting period, the Director of Military Prosecutions received a total of 76 referrals for trial by court martial, remaining consistent with the 76 cases received in the previous reporting period. There were 47 cases carried over from the previous reporting period resulting in a total of 123 referrals processed in 2020/21. This represents a decrease of 5% when compared to the 130 referrals processed in the previous reporting period.

Figure 2-20 shows the number of referrals received by the Director of Military Prosecutions over the last five reporting periods and the number of referrals processed within each respective reporting period.

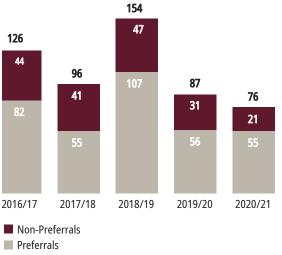


#### PREFERRALS AND NON-PREFERRALS

During this reporting period, 55 cases were preferred for trial by court martial and there were 21 cases in which no charges were preferred by the Director of Military Prosecutions. The percentage of cases preferred for trial by court martial in this reporting period was 72%. Although the number of cases preferred represents a slight decrease from the 2019/20 reporting period in which 56 cases were preferred, the percentage of preferrals has increased by 8%. This reporting period marks the highest rate of preferrals over the past five reporting periods. The lowest rate of preferrals was 57% in the 2017/18 reporting period.

Figure 2-21 illustrates the number of files preferred by the Director of Military Prosecutions and the number of files where no charges were preferred over the past five reporting periods.

FIGURE 2-21: NUMBER OF PREFERRALS AND NON-PREFERRALS<sup>45</sup>



<sup>45</sup> In accordance with the Director of Military Prosecutions Policy Directive #003/00, Post Charge Review, when considering whether or not a charge will be preferred, the prosecutor must determine if there is a reasonable prospect of conviction and whether the public interest requires that a prosecution be pursued at the post-charge stage. Further information concerning the Director of Military Prosecutions Policies regarding post-charge review can be found at: "Post-Charge Review" (last modified 14 September 2018), online: Canada.ca <a href="www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/post-charge-review.html">www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/post-charge-review.html</a>.

#### TIMELINE

During this reporting period, the average time from the referral of a matter to the Director of Military Prosecutions to a post-charge decision was approximately 81 days. <sup>46</sup> This represents an increase of approximately 11 days, or 16% from the previous reporting period. Figure 2-22 illustrates the average time from referral to post-charge decision over the course of the past five reporting periods.

FIGURE 2-22: AVERAGE NUMBER OF DAYS FROM REFERRAL OF FILE TO THE DIRECTOR OF MILITARY PROSECUTIONS TO POST-CHARGE DECISION

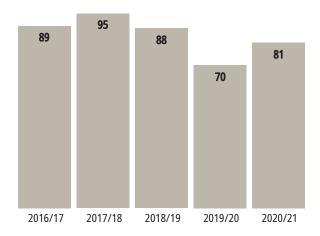
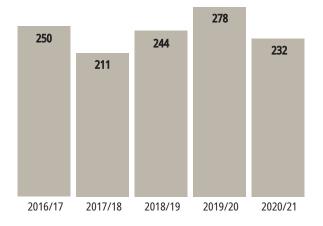


FIGURE 2-23: AVERAGE NUMBER OF DAYS FROM PREFERRAL OF CHARGES TO BEGINNING OF COURT MARTIAL



During this reporting period, the average length of time for the commencement of a court martial following the preferral of charges was approximately 232 days, a decrease of 46 days from the previous reporting period, or 17%. The average time from the preferral of a charge to the commencement of a court martial in the previous reporting period was 278 days. Figure 2-23 demonstrates the average length of time for a court martial to commence once charges against an accused person were preferred over the past five reporting periods.

#### PUNISHMENTS AT COURT MARTIAL

In the 2020/21 reporting period, 25 sentences were pronounced by courts martial with a total of 37 punishments. The most common punishments imposed continue to be fines (20), representing approximately 54% of punishments, followed by severe reprimands (5), representing 13% of punishments. A total of three custodial punishments of imprisonment, representing approximately 8% of punishments, were imposed. Figure 2-24 breaks down the punishments imposed by courts martial over the past two reporting periods.

Figure 2-24: Punishments at Courts Mar	RTIAL					
	2019-2020	2020-2021				
Dismissal*	1	0				
Imprisonment	2**	3				
Detention	1***	0				
Reduction in Rank	3	4				
Forfeiture of Seniority	1	0				
Severe Reprimand	15	5				
Reprimand	6	3				
Fine	32	20				
Confinement to ship or barracks	0	2				
Stoppage of Leave	0	0				
Absolute Discharge	2	0				
Total	57	37				
* Includes dismissal with disgrace						

- Includes dismissal with disgrace.
- \*\* One of these punishments was suspended by the Military Judge.
- \*\* This punishment was suspended by the Military Judge.

<sup>46</sup> Two retrials were excluded from calculation to avoid double-counting.

#### SEXUAL MISCONDUCT

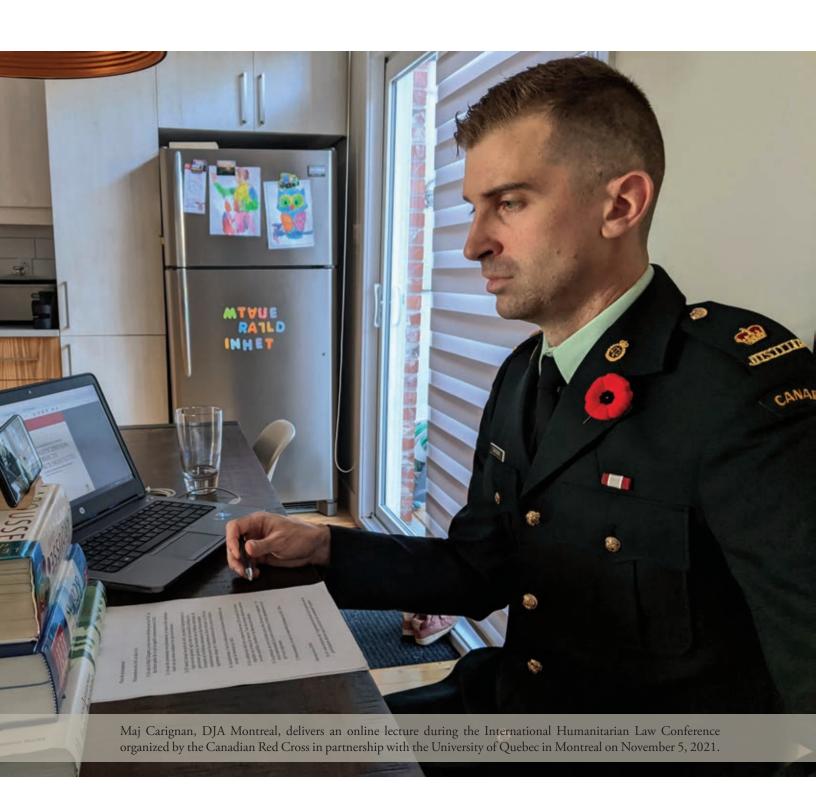
During this reporting period, a total of 14 completed courts martial (or approximately 41% of all courts martial) dealt with allegations of sexual misconduct. Of those, nine cases resulted in a finding of guilty on at least one charge; three cases resulted in a stay of proceedings; one case resulted in a termination of proceedings; and one case resulted in all charges being withdrawn by the Director of Military Prosecutions. In the previous reporting period, a total of 25 courts martial (or approximately 45%) dealt with charges of sexual misconduct, with 18 resulting in a finding of guilty. This reporting period saw a decrease of 44% in the number of courts martial dealing with sexual misconduct. Relative to the total number of courts martial held, however, the decrease for the 2020/21 reporting period as compared to the last two reporting periods was approximately 4%, with an increase of approximately 8% in the number of findings of guilty.

Across the 14 cases, 26 charges relating to sexual misconduct were laid. A total of nine charges were laid under section 130 of the National Defence Act alleging sexual assault under section 271 of the Criminal Code; eight charges were laid under section 129 of the National Defence Act, conduct to the prejudice of good order and discipline; four charges were laid under section 93 of the National Defence Act, cruel or disgraceful conduct; three charges were laid under section 97 of the National Defence Act, drunkenness; and one charge was laid under each section 95 of the National Defence Act, abuse of subordinates, and section 279(2) of the Criminal Code, forcible confinement. Figure 2-25 sets out the sexual misconduct cases tried at courts martial during this reporting period, including the pleas and findings on each charge.



Capt Huyquart and Capt Gagné during Ex ABLE ADVOCATE as part of the Legal Officer Qualification Course in October 2020

CASE	NEUTRAL CITATION	Charges	PLEA	FINDINGS
R v Bankasingh T. O.	2021 CM 5009	Charge 1: S. 130 NDA, sexual assault (s. 271 CCC)	Not guilty	Not guilty
(Acting Sub-Lieutenant)		Charge 2: S. 93 NDA, behaved in a disgraceful manner	Guilty	Guilty
R v Bourque D.G. (Major)	2020 CM 2008 2020 CM 2009	Charge 1: S. 129 NDA, conduct to the prejudice of good order and discipline	Guilty	Guilty
R v Brown C.A.I. (Lieutenant (Navy))	2021 CM 4003	Charge 1: S. 130 NDA, sexual assault (s. 271 CCC)	N/A	Stay of Proceeding
		Charge 2: S. 130 NDA, forcible confinement (s. 279(2) CCC)	N/A	Stay of Proceeding
	*Notice of a	ppeal/Leave to appeal (s. 232, National Defence Act). Allo	owed on Febr	ruary 8, 202
R v Bruce J.M. (Private)	2020 CM 5011	Charge 1: S. 129 NDA, conduct to the prejudice of good order and discipline	Guilty	Guilty
R v Chauhan S.R.	2020 CM 2012		N/A	Withdraw
(Warrant Officer)		Charge 2: S. 93 NDA, behaved in a disgraceful manner	N/A	Withdraw
R v Chiasson M.D. (Petty Officer 2nd Class)	2020 CM 2006	Charge 1: S. 97 NDA, drunkenness	Guilty	Guilty
R v Christmas K.L. (Corporal)	2020 CM 3009	Charge 1: S. 130 NDA, sexual assault (s. 271 CCC)	N/A	*Stay of Proceeding
		Charge 2: S. 93 NDA, behaved in a disgraceful manner	N/A	*Stay of Proceeding
		Charge 3: S. 97 NDA, drunkenness	N/A	*Stay of Proceedin
		*Retrial Pending (R v C	Christmas 20	22 CMAC
R v Cloutier J.R.S. 2020 CM 4013 (Sergeant)		Charge 1: S. 93 NDA, behaved in a disgraceful manner	N/A	*Stay of Proceeding
		Charge 2: S. 129 NDA, conduct to the prejudice of good order and discipline	N/A	*Stay of Proceeding
		Charge 3: S. 97 NDA, drunkenness	N/A	*Stay of Proceeding
		*Retrial Pending (R v Proulx; R v	. Cloutier 20	21 CMAC
R v Duquette J.R.E.	2019 CM 3016	Charge 1: S. 130 NDA, sexual assault (s. 271(b) CCC)	Not guilty	Guilty
(Major)		Charge 2: S. 129 NDA, conduct to the prejudice of good order and discipline	Not guilty	Guilty
		Charge 3: S. 95 NDA, ill-treatment of subordinates	Not guilty	Guilty
R v Iredale M.J. (Captain)	2020 CM 4008 2020 CM 4009	Charges 1, 2, 3: S. 130 NDA, sexual assault (s. 271 CCC)	N/A	*Stay of Proceeding
	2020 CM 4011	Charges 4, 5, 6: S. 129 NDA, conduct to the prejudice of good order and discipline	N/A	*Stay of Proceeding
	*Re	trial Pending (R v Edwards; R v Crepeau; R v Fontaine; R		21 CMAC
			Guilty	Guilty
· ·	2020 CM 2010	Charge 1: S. 129 NDA, conduct to the prejudice of good order and discipline	Gunty	,
(Private) R v Morissette J.N.S.		1 /	Guilty	Guilty
(Private) R v Morissette J.N.S. (Sergeant) R v Robertson A.J.	2020 CM 2010	good order and discipline Charge 1: S. 129 NDA, conduct to the prejudice of	•	
R v Koutsogiannis P. (Private) R v Morissette J.N.S. (Sergeant) R v Robertson A.J. (Private) R v Thibault A.J.R.	2020 CM 2010 2020 CM 5008	good order and discipline Charge 1: S. 129 NDA, conduct to the prejudice of good order and discipline	Guilty	Guilty



# MILITARY JUSTICE: JURISPRUDENCE, LEGISLATIVE DEVELOPMENTS, EXTERNAL REVIEWS, POLICY INITIATIVES, AND OTHER DEVELOPMENTS

#### INTRODUCTION

This chapter highlights key developments that have occurred over the reporting period, which include important court martial and other court decisions, progress towards the implementation of Bill C-77, An Act to amend the National Defence Act and to make related and consequential amendments to other Acts¹ (Bill C-77), the Third Independent Review, and the advancement of the Justice Administration and Information Management System. Individually and collectively, these developments further the necessary and ongoing evolution and improvement of the military justice system to enable it to do more to combat all types of misconduct and to strengthen its effectiveness in supporting the discipline, efficiency, and morale of the Canadian Armed Forces.

Court Martial - Decisions of Note

JUDICIAL INDEPENDENCE – SECTION 11(D) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

#### **BACKGROUND**

Military judges are appointed by the Governor in Council, after evaluation by the Military Judges Selection Committee and with the recommendation of the Minister of National Defence. To be eligible for selection as a military judge, an individual must be a Canadian Armed Forces officer with at least ten years' experience, and have at least 10 years' standing as a lawyer at the bar of a province. As a result of their status as Regular Force officers, military judges are subject to the Code of Service Discipline.<sup>2</sup>

**JURISPRUDENCE** 

Bill C-77, An Act to amend the National Defence Act and to make related and consequential amendments to other Acts, 1st Sess, 42nd Parl, 2019 (royal assent 21 June 2019) [Bill C-77].

<sup>2</sup> See *National Defence Act*, RSC 1985, c N-5, ss 60(1)(a), 69. Further information on military judges can be found at ss 165.21–165.37(1).

In the previous reporting period, accused persons in two cases raised challenges at court martial with respect to the independence and impartiality of the military judiciary.<sup>3</sup> In both cases, the applicants argued that a Chief of the Defence Staff Order dated 2 October 2019 (CDS Order),<sup>4</sup> violated their right to a hearing before an independent and impartial tribunal protected under section 11(d) of the *Canadian Charter of Rights and Freedoms* (*Charter*).<sup>5</sup>

These applications alleged that the CDS Order violated the *Charter* because it subjected military judges to the disciplinary regime administered by the Canadian Armed Forces' chain of command, and as a consequence, threatened the right of accused persons to be tried by an independent and impartial tribunal. In both cases, the presiding Military Judges ruled that the CDS Order violated the accused person's rights protected under section 11(d) of the *Charter* and declared the relevant provisions of the Order to be of no force or effect. The Military Judges allowed both trials to proceed, reasoning that the declaration of invalidity alleviated the section 11(d) *Charter* concerns.

#### 2020-21 REPORTING PERIOD

Similar applications were made by accused persons in 16 additional cases during this reporting period.<sup>6</sup>

In the cases of *R v Edwards*, <sup>7</sup> *R v Crépeau*, <sup>8</sup> *R v Fontaine*, <sup>9</sup> and *R v Iredale*, <sup>10</sup> the presiding Military Judges concluded that the CDS Order violated section 11(d) of the *Charter*. The Military Judges also ruled that because the

3 See R v Pett, 2020 CM 4002; R v D'Amico, 2020 CM 2002.

Chief of the Defence Staff had not rescinded that Order in light of the decisions rendered in the earlier cases, it was no longer an appropriate remedy to simply find the relevant provisions to be of no force and effect. As such, the Military Judge in each case stayed the proceedings. The Director of Military Prosecutions, on behalf of the Minister of National Defence, appealed the four decisions to the Court Martial Appeal Court of Canada.

Following these decisions, on 15 September 2020, the Chief of the Defence Staff issued an order to temporarily suspend the CDS Order (Suspension Order)11 pending the result of the appeals of these decisions. Of note, the Suspension Order included a provision confirming that Canadian Forces Organization Order 3763, which was issued on 27 February 2008, and pertained to the Office of the Chief Military Judge,12 remained in effect. A Canadian Forces Organization Order is an order promulgated by the Chief of the Defence Staff to formalize the organization of a unit, formation or command of the Canadian Armed Forces. Paragraph 9 of Canadian Forces Organization Order 3763 provided that military personnel in the Office of the Chief Military Judge were considered to be on strength at National Defence Headquarters and were to be disciplined in accordance with the regime applicable to the Canadian Forces Support Unit (Ottawa).

Following this Suspension Order, court martial decisions on section 11(d) of the *Charter* began to diverge along three different streams.

In the first stream, which involved the case of *R v MacPherson and Chauhan and J.L.*,<sup>13</sup> the accused members brought an application alleging that Canadian Forces Organization Order 3763 as well as the Suspension Order violated section 11(d) of the *Charter*. The Military Judge dismissed the application, rejecting the argument that the Office of the Chief Military Judge was not sufficiently independent. The Military Judge concluded that the Suspension Order satisfied section 11(d) of the *Charter* and the Military Judges Inquiry

<sup>4</sup> Chief of the Defence Staff, ORDER, DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO OFFICERS AND NON-COMMISSIONED MEMBERS ON THE STRENGTH OF THE OFFICE OF THE CHIEF MILITARY JUDGE DEPT ID 3763, 2 October 2019 [CDS Order].

<sup>5</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter].

<sup>6</sup> R v Bourque, 2020 CM 2008; R v Edwards, 2020 CM 3006; R v Crépeau, 2020 CM 3007; R v Fontaine, 2020 CM 3008; R v Iredale, 2020 CM 4011; R v MacPherson and Chauhan and J.L., 2020 CM 2012; R v Christmas, 2020 CM 3009; R v Proulx, 2020 CM 4012; R v Jacques, 2020 CM 3010; R v Cloutier, 2020 CM 4013; R v Pépin, 2021 CM 3005; R v Thibault, 2021 CM 5002; R v Brenton (22 March 2021), 201932 (CM); R v Brown, 2021 CM 4003.

<sup>7</sup> Supra note 6.

<sup>8</sup> Supra note 6.

<sup>9</sup> Supra note 6.

<sup>10</sup> Supra note 6.

<sup>11</sup> Chief of the Defence Staff, ORDER, SUSPENSION OF THE ORDER – DESIGNATION OF COMMANDING OFFICERS WITH RESPECT TO OFFICERS AND NON-COMMISSIONED MEMBERS ON THE STRENGTH OF THE OFFICE OF THE CHIEF MILITARY JUDGE DEPT ID 3763, DATED 2 OCTOBER 2019, 15 September 2020 [Suspension Order].

<sup>12</sup> NDHQ C PROG OTTAWA, DDSM, CANADIAN FORCES ORGANIZATION ORDER 3763 – OFFICE OF THE CHIEF MILITARY JUDGE, 27 February 2008.

<sup>13</sup> Supra note 6.

Committee<sup>14</sup> served as a sufficient safeguard to alleviate concerns of impartiality.

The second stream included the cases of *R v Christmas*, <sup>15</sup> *R v Jacques*, <sup>16</sup> *R v Pépin*, <sup>17</sup> and *R v Brenton*. <sup>18</sup> In *R v Christmas*, the Military Judge declared paragraph 9 of Canadian Forces Organization Order 3763 to be of no force and effect and stayed the proceedings. He reasoned that Canadian Forces Organization Order 3763 subjected military judges to the same disciplinary regime as other officers, contrary to Parliament's intention that the Military Judges Inquiry Committee should have the sole authority to deal with the conduct of military judges under the Code of Service Discipline.

Following this decision, the Chief of the Defence Staff reissued Canadian Forces Organization Order 3763 on 18 November 2020, with paragraph 9 removed.

In *R v Jacques*, *R v Pépin*, and *R v Brenton*, the Military Judge in each case concluded that the reissuance of Canadian Forces Organization Order 3763 with the impugned paragraph removed, and combined with the Suspension Order, cured any residual concerns regarding section 11(d) of the *Charter* when considered with the Military Judges Inquiry Committee as an independent mechanism to review Code of Service Discipline misconduct by military judges.

In the third stream, which involved the cases of  $R \ v \ Proulx$ ,  $^{19} \ R \ v \ Cloutier$ ,  $^{20}$  and  $R \ v \ Brown$ ,  $^{21}$  the Military Judge found that the section 11(d) of the *Charter* violation persisted despite the issuance of the Suspension Order. In  $R \ v \ Proulx$ , the Military Judge held that the content and duration of the Suspension Order breached section 11(d) of the *Charter* as it failed to acknowledge the law set out in  $R \ v \ Pett$  that an officer holding the office of military judge cannot, while in office, be charged and dealt with under the disciplinary regime administered by members of the executive. As a result, the Military Judge directed a stay of proceedings.

In R v Cloutier, the Military Judge found that the amended Canadian Forces Organization Order 3763 failed to rectify the issues affecting the independence of the military judiciary. He reasoned that the Military Judge in R v Jacques erred as the section 11(d) of the Charter violation could only be cured by a clear and unequivocal statement by the Chief of the Defence Staff and the Director of Military Prosecutions recognizing the state of the law as set out in R v Pett, to the effect that military judges cannot be charged and dealt with under the Code of Service Discipline. In recognition of the fact that attempts had been made to respond to the military judiciary's concerns, the Military Judge directed a termination of proceedings in lieu of a stay of proceedings. The effect of this decision was that an appeal of the decision could be initiated immediately and there remained a possibility for the charges to be reinstated in the future.

In *R v Brown*, prior to the hearing on the section 11(d) of the Charter application, the Military Judge issued a court order requiring that the Chief of the Defence Staff be informed that he could assuage the court's concerns regarding section 11(d) of the Charter by acknowledging that the Chief of the Defence Staff, subordinate commanders, and commanding officers were bound by the law as set out by Military Judges in the previous section 11(d) of the *Charter* decisions. The Military Judge also ordered that the Director of Military Prosecutions be informed that he could satisfy the court's concerns regarding section 11(d) of the Charter by providing a similar acknowledgement of the binding force of the previous section 11(d) of the *Charter* jurisprudence. The Military Judge ultimately concluded that the responses provided by the Acting Chief of the Defence Staff and the Director of Military Prosecutions were to the effect that they did not intend to provide the acknowledgment requested. The Military Judge ruled that the accused person's right under section 11(d) of the Charter was violated by the obligation imposed on him to appear before a court martial, and that the court must impose a stay of proceedings.

#### APPEALS TO THE COURT MARTIAL APPEAL COURT OF CANADA

The Director of Military Prosecutions, on behalf of the Minister of National Defence, appealed the decisions in *R v Edwards*, *R v Crépeau*, *R v Fontaine*, *R v Iredale*, *R v Proulx* and *R v Cloutier*, to the Court Martial Appeal Court of Canada.

<sup>14</sup> The Military Judges Inquiry Committee is established pursuant to the *National Defence Act, supra* note 2, s 165.31(1). The Military Judges Inquiry Committee's purpose is, on request by the Minister of National Defence, to complete an inquiry into whether a military judge should be removed from office.

<sup>15</sup> Supra note 6.

<sup>16</sup> Supra note 6.

<sup>17</sup> Supra note 6.

<sup>18</sup> Supra note 6.

<sup>19</sup> Supra note 6.

<sup>20</sup> Supra note 6.

<sup>21</sup> Supra note 6.

The appeals in *R v Edwards*, *R v Crépeau*, *R v Fontaine*, and *R v Iredale* were heard online on 29 January 2021. These appeals focused on whether the Military Judges erred in finding that the CDS Order violated section 11(d) of the *Charter* and in ordering stays of proceedings.

The appeals in *R v Proulx* and *R v Cloutier* were heard online on 11 March 2021. These appeals focused on whether the Military Judge erred in finding that the respondents' rights under section 11(d) of the *Charter* were infringed and in directing that the proceedings be stayed in *R v Proulx* and terminated in *R v Cloutier*.

On behalf of the accused persons in *R v Crépeau*, *R v Proulx* and *R v Cloutier*, the Director of Defence Counsel Services filed cross appeals on the basis that the Military Judge in each case erred by failing to make a declaration of invalidity in relation to sections 12, 17, 18 and 60 of the *National Defence Act*, which pertain to the application of the Code of Service Discipline, the appointment and authority of the Chief of the Defence Staff, and the power of the Governor in Council to make regulations relating to the organization of the Canadian Armed Forces. Defence counsel argued that these sections of the *National Defence Act* allow military judges to be tried under the Code of Service Discipline and provide the military hierarchy with the tools necessary to exert undue pressure on the military judiciary.

Each of these appeals were heard by the same panel of Court Martial Appeal Court of Canada judges. The Court reserved its decisions, and indicated its intention to render a decision first on the *R v Edwards*, *R v Crépeau*, *R v Fontaine*, and *R v Iredale* appeals. The Court further acknowledged the anticipated impact the decision in the first appeal would have on the military justice system. While neither decision was rendered during the reporting period, the Court Martial Appeal Court of Canada did render its decision on the *R v Edwards*, *R v Crépeau*, *R v Fontaine*, and *R v Iredale* appeals on 11 June 2021.<sup>22</sup> The decision in the *R v Proulx* and *R v Cloutier* appeals was rendered on 17 June 2021.<sup>23</sup>

The details of these appeals will be examined in detail in the 2021-2022 Annual Report, but it should be noted that in its 11 June 2021 decision, the Court Martial Appeal Court of Canada allowed the prosecution's appeals in *R v Edwards*, *R v Crépeau*, *R v Fontaine*, and *R v Iredale*, vacated the stays of proceedings ordered in each case, dismissed the defence cross-appeal in *R v Crépeau*,

and directed new trials in each case. The Court found that military judges meet the minimum requirements of judicial independence, that military judges can be charged under the Code of Service Discipline, and that the CDS Order does not violate section 11(d) of the *Charter*. Similarly, in its 17 June 2021 decision, the Court Martial Appeal Court of Canada allowed the prosecution's appeals in *R v Proulx* and *R v Cloutier*, dismissed the cross-appeals, and ordered new trials for substantially the same reasons.

#### Court Martial Appeal Court of Canada

#### EXTRATERRITORIAL APPLICABILITY OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

#### R v McGregor, 2020 CMAC 8

Corporal McGregor was stationed in Washington, D.C. and resided in Alexandria, Virginia, when he became the subject of a criminal investigation by the Canadian Forces National Investigation Service after another Canadian Armed Forces member discovered an audio recording device in his residence. The Canadian Forces National Investigation Service sought assistance from the Alexandria Police Force to execute a search warrant for Corporal McGregor's residence and seize any electronic devices found therein.

The Canadian Forces National Investigation Service investigators were unable to obtain a search warrant under Canadian law as, pursuant to article 106.05 of the *Queen's Regulations and Orders for the Canadian Forces*, <sup>24</sup> a commanding officer only has the authority to issue a warrant in relation to property under the control of the Canadian Armed Forces. The Alexandria Police Force agreed to assist but advised that they were unable to apply for a search warrant due to Corporal McGregor's status as a diplomatic agent throughout his posting abroad, which afforded him immunity of his person, property and residence pursuant to article 31(1) of the *Vienna Convention on Diplomatic Relations*. <sup>25</sup>

<sup>22</sup> R v Edwards; R v Crépeau; R v Fontaine; R v Iredale, 2021 CMAC 2.

<sup>23</sup> R v Proulx; R v Cloutier, 2021 CMAC 3.

<sup>24</sup> Canada, Department of National Defence, Queen's Regulations and Orders for the Canadian Forces (Ottawa: DND, 28 June 2019).

<sup>25</sup> Vienna Convention on Diplomatic Relations, 18 April 1961, 500 UNTS 95 (entered into force 24 June 1964).

As a result, the Canadian Embassy in Washington waived Corporal McGregor's diplomatic immunity with respect to his residence, pursuant to article 30 of the *Vienna Convention of Diplomatic Relations*. This waiver enabled the Alexandria Police Force to obtain a search warrant, issued by a magistrate of the State of Virginia Court. The Canadian Forces National Investigation Service conducted the search alongside the Alexandria Police Force and seized electronic devices found within Corporal McGregor's residence.

Corporal McGregor was subsequently arrested and charged with seven offences, five of which were under the *Criminal Code*, <sup>26</sup> and charged pursuant to section 130 of the *National Defence Act* for voyeurism (two counts), possession of a device for surreptitious interception of private communication (two counts), and sexual assault (one count). The remaining two charges were for disgraceful conduct contrary to section 93 of the *National Defence Act* and, in the alternative, for conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act*.

At court martial, Corporal McGregor brought a motion pursuant to section 24(2) of the *Charter* to exclude the evidence obtained from the search on the basis of a violation of his right under section 8 of the *Charter* to be free from unreasonable search and seizure. The Military Judge dismissed the motion and held that the Charter, as Canadian law, did not apply extraterritorially.<sup>27</sup> Corporal McGregor was found guilty of two counts of voyeurism, one count of possession of a device for surreptitious interception of private communication and one count of sexual assault, contrary to the *Criminal Code* and pursuant to section 130 of the *National Defence Act* as well as one count of disgraceful conduct contrary to section 93 of the *National Defence Act*.<sup>28</sup> He appealed the decision to the Court Martial Appeal Court of Canada.

The Court Martial Appeal Court of Canada conducted an analysis into whether the test for the admissibility of evidence obtained on foreign soil by foreign authorities had been met in order to determine if the admission of that evidence in a Canadian trial violated the appellant's right to a fair trial under sections 7 and 11(d) of the *Charter.*<sup>29</sup>

In conducting this analysis, the Court first considered the applicability of the Charter based on the facts of the case. The Court referred to Rv Hape<sup>30</sup> to assert that the principles of sovereignty and non-intervention precluded the applicability of the Charter to investigations on foreign soil, except where the host nation consents or where rules of international law allow for the exercise of enforcement jurisdiction in a foreign state. The Court held that while under the North Atlantic Treaty Organization Status of Forces Agreement,<sup>31</sup> Canada retained primary criminal jurisdiction to prosecute Corporal McGregor, this did not amount to a waiver of American territorial sovereignty with respect to real property in the United States of America.

The Court then considered whether any *Charter* breaches arose from the conduct of the search and if so, whether those breaches warranted exclusion of the evidence.

In unanimously dismissing the appeal, the Court Martial Appeal Court of Canada held that the test for admissibility favoured the inclusion of evidence as the conduct of the investigation would have complied with the *Charter* had it been wholly conducted in Canada. The Court also concluded that the search and seizure were executed in a reasonable manner and in accordance with the authorization obtained by the Virginia State magistrate.

Corporal McGregor filed a notice of application for leave to appeal to the Supreme Court of Canada on 25 January 2021. The Supreme Court's decision on the application was not rendered before the end of the reporting period, but it should be noted that in a decision issued on 14 October 2021, leave to appeal to the Supreme Court of Canada was granted.<sup>32</sup>

#### DETERMINATION OF A MOOT MATTER

#### R v CHAMPION, 2021 CMAC 1

On 13 November 2020, Sailor Third Class Champion was arrested for drunkenness and released with conditions by a custody review officer. He was arrested again on 17 November 2020 for drunkenness and for breaching his conditions. He was released on conditions by a Military Judge following a custody review hearing.

<sup>26</sup> Criminal Code, RSC 1985, c C-46.

 $<sup>27 \</sup>quad \textit{R v McGregor}, \, 2018 \; \text{CM 4023}.$ 

<sup>28</sup> R v McGregor, 2019 CM 4015.

<sup>29</sup> R v McGregor, 2020 CMAC 8, leave to appeal to SCC granted, 39543 (14 October 2021).

<sup>30</sup> R v Hape, 2007 SCC 26.

<sup>31</sup> North Atlantic Treaty Organization Status of Forces Agreement, 19 June 1951, UNTS 67, Art. VII.

<sup>32</sup> Corporal C.R. McGregor v Her Majesty the Queen, 2021 CanLII 98081 (SCC), leave to appeal to SCC granted.

At the time of his release, Sailor Third Class Champion had not yet been charged with an offence.

Shortly after his release, Sailor Third Class Champion filed a notice of motion to the Court Martial Appeal Court of Canada, seeking that his release conditions be cancelled and that he be released without conditions. Sailor Third Class Champion relied on the Court's decision in *R v Larocque*<sup>33</sup> in support of his position that Canadian Armed Forces members are to be released without conditions if charges have not been laid by the time the member appears before a military judge at a custody review hearing.

Although Sailor Third Class Champion was eventually charged with one count of absence without leave, contrary to section 90 of the *National Defence Act*, and one count of drunkenness, contrary to section 97 of the *National Defence Act*, his commanding officer ultimately decided not to proceed with either charge. Despite the subject matter of the motion being moot, Sailor Third Class Champion requested that the motion still be heard. After receiving written submissions from the parties, the Court first had to decide whether it should hear the matter despite its mootness.

The Court Martial Appeal Court of Canada rendered its decision on the motion to proceed despite mootness on 19 February 2021.34 In its decision the Court referred to the five non-exhaustive factors laid out by the Supreme Court of Canada in R v. Smith<sup>35</sup> and R v Paulin<sup>36</sup> to assess whether a moot matter should nevertheless be considered by the Court. Prior to reaching a determination, the Court also reviewed its earlier decision in R v Larocque and acknowledged that it had created confusion among commanding officers, prosecutors and even military judges as to whether charges must be laid before a custody review hearing. The Court considered that the issue raised by the applicant constituted "special circumstances" and that the military justice system would benefit from clarity on the correct procedure to follow in these instances. The Court Martial Appeal Court of Canada therefore ordered that the motion be set down for a hearing despite its mootness.

The motion was heard outside the reporting period on 7 May 2021, and the Court subsequently rendered its decision on 29 September 2021. This decision will be

reported in greater detail in the 2021-2022 Annual Report, but it should be noted that the Court dismissed the motion and found that, based on the legislative scheme that allows for the imposition of release conditions when no charge has been laid, the manner by which the conditions were imposed in this case met the applicable constitutional norms.<sup>37</sup>

#### Federal Court

#### RECUSAL OF A MILITARY JUDGE

#### THIBAULT V CANADA (DIRECTOR OF MILITARY PROSECUTIONS), 2020 FC 1154

On 18 February 2020, Sergeant Thibault was found guilty at court martial of one count of sexual assault contrary to section 271 of the *Criminal Code*, pursuant to section 130 of the *National Defence Act.*<sup>38</sup> Prior to his sentencing, however, decisions were rendered in a series of courts martial<sup>39</sup> in which a CDS Order dated 2 October 2019 was found to have violated the right of the accused members to a hearing before an independent and impartial tribunal protected under section 11(d) of the *Charter.*<sup>40</sup>

In light of these decisions, Sergeant Thibault filed a motion for a mistrial before the presiding Military Judge on 8 July 2020,41 on the basis that he had been found guilty by a tribunal which was not independent and impartial, contrary to section 11(d) of the *Charter*. On 7 October 2020, Sergeant Thibault filed a subsequent motion seeking a preliminary hearing for the mistrial motion for the purpose of seeking recusal of the Military Judge from hearing his motion for a mistrial. The motion for recusal was formally filed on 1 December 2020, and it alleged a reasonable apprehension of bias on the part of the Military Judge based on the following factors: her previous role as legal advisor within the Office of the Chief of Defence Staff; her comments made during a conference call regarding the motion for a mistrial wherein she indicated her intention to recuse herself, and her decision to recuse herself in another case involving a similar application alleging a section 11(d) of the Charter violation.

 $<sup>33 \</sup> Rv$  Larocque, 2001 CMAC 2 at para 16.

<sup>34</sup> Rv Champion, 2021 CMAC 1.

<sup>35</sup> R v Smith, 2004 SCC 14.

<sup>36</sup> R v Paulin, 2009 SCC 47.

<sup>37</sup> R v Champion, 2021 CMAC 4.

<sup>38</sup> R v Thibault, 2020 CM 5005.

<sup>39</sup> R v Pett; R v D'Amico, supra note 3. R v Edwards; R v Crépeau; R v Fontaine; R v Iredale, supra note 6.

<sup>40</sup> See the court martial jurisprudence section, above, for further information on this line of cases.

<sup>41</sup> A new motion for a mistrial was filed on 30 September 2020, replacing the 08 July 2020 application.

Concurrent with these motions, Sergeant Thibault filed an application with the Federal Court on 30 October 2020, seeking a writ of prohibition under sections 18 and 18.1 of the *Federal Courts Act*<sup>42</sup> for the purpose of preventing the Military Judge from hearing the mistrial motion. Also, on 13 November 2020, Sergeant Thibault filed a motion for an interim writ of prohibition under section 18.2 of the *Federal Courts Act* in order to prevent the Military Judge from hearing the recusal motion on the basis of an appearance of bias on the part of the Military Judge and supported this motion using the same arguments as those relied on for the recusal motion.

The Federal Court issued its decision on the motion for an interim writ of prohibition on 14 December 2020, 43 and found that the applicant's assertion that there was a reasonable apprehension of bias was based on mere speculation. The Court indicated that the evidence presented neither met the threshold for flagrant bias, which was the test to be met in order to prevent the Military Judge from hearing the motion for recusal, nor was sufficient for the Military Judge to be unable to consider the matter with an open mind. The Federal Court also highlighted that the Military Judge had already demonstrated her capacity to consider the matter with an open mind as she had recently heard a motion for recusal in another case and determined that she was indeed required to recuse herself.

Additionally in its consideration of the matter, the Federal Court reviewed the three-prong test in *RJR MacDonald Inc v Canada (Attorney General)*,<sup>44</sup> which outlines the criteria for granting an interim relief order and concluded that the requirements for obtaining interim relief had not been satisfied. According to the Court, Sgt Thibault failed to demonstrate that he would suffer irreparable harm if the relief was not granted and that the balance of convenience<sup>45</sup> leaned in his favour.

The Court dismissed the application and stressed that the motion was premature as the Military Judge had not yet had the opportunity to render a decision on the motion for recusal.

On 21 December 2020, the Military Judge heard the recusal motion and a mistrial motion at the same time and rendered her decision on 27 January 2021.46 The Military Judge found that Sergeant Thibault's claim that he was not tried before an independent and impartial tribunal to be baseless and speculative. In dismissing the motion for a mistrial, the Military Judge held that her previous position as a legal advisor in the Chief of the Defence Staff Office did not create a reasonable apprehension of bias and stressed that her comments made during the pre-trial conference were simply an expression of intent and not a judicial decision. She further noted that, in accordance with R v Quinn, 47 neither her communication of such an intent nor her recusal in another case were sufficient to raise bias concerns, and that such claims must be analysed on a case by case basis, so her recusal in another case was not binding.

On 5 February 2021, Sergeant Thibault abandoned his application for a writ of prohibition.

<sup>42</sup> Federal Courts Act, RSC 1985, c F-7.

<sup>43</sup> Thibault v Canada (Director of Military Prosecutions), 2020 FC 1154.

<sup>44</sup> RJR MacDonald Inc v Canada (Attorney General), [1994] 1 SCR 311 (the applicant must demonstrate that: 1) there is a serious question to be tried; 2) they will suffer irreparable harm if denied the relief; and 3) the balance of inconvenience favours the applicant).

<sup>45</sup> This test will normally determine the result in applications involving *Charter* rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. Determining the "balance of convenience" requires a "determination of which of the two parties will suffer greater harm from the granting or refusal of the stay sought pending a decision on the merits." (*Falkiner v. Director, Income Maintenance Branch* (2000) OJ No. 2750, at para 13).

<sup>46</sup> R v Thibault, supra note 6.

<sup>47</sup> R v Quinn, 2006 BCCA 255.

## LEGISLATIVE DEVELOPMENTS

#### Bill C-77

Once fully implemented, the amendments to the *National Defence Act* that were introduced in Bill C-77 will strengthen the military justice system and further align it with the civilian criminal justice system while respecting the unique requirements of the Canadian Armed Forces. Most significantly, those amendments will establish the Declaration of Victims Rights as part of the Code of Service Discipline and provide the victims of service offences with specific rights within the military justice system. The amendments will also transform the summary trial process into a non-penal, non-criminal summary hearing process designed to address minor breaches of military discipline at the unit level, and give to courts martial the sole jurisdiction over service offences.

During this reporting period, the substantial work required to implement the remaining provisions of Bill C-77 continued and was focused on three principal activities: conducting meaningful consultations with key stakeholders including victim and survivor advocacy groups; enabling consultation with individual victims and survivors of service offences; and developing the specific regulations required to support implementation of the remaining provisions. Details of this work is provided below.

#### VICTIMS AND SURVIVORS OF SERVICE OFFENCES WEB PAGE

In order to consolidate the key policies related to military justice in one place, relevant Department of National Defence and Canadian Armed Forces stakeholders were consulted to develop the Victims and Survivors of Service Offences web page, which became operational in March 2021. 48 The web page was developed to provide a one-stop source for information relevant to victims and survivors, which included details on the military justice system, a listing of services and programs available to victims and survivors of service offences, as well as

information about investigations and court martial proceedings. Victims and survivors of service offences can also use the web page to learn about victim impact statements, restitution orders, and issues such as privacy and identity protection. The web page also contains a link to a comprehensive list of services and programs available outside the Department of National Defence and the Canadian Armed Forces.

While the web page went live in March 2021, its official launch occurred in May 2021. This important resource will remain in place and will continue to be updated throughout the next reporting period in order to maintain information necessary for victims and survivors, even after the remaining provisions of Bill C-77 have come into force.

#### THE DECLARATION OF VICTIMS RIGHTS SURVEY AND FEEDBACK PAGE

The Office of the JAG moved forward with developing the Declaration of Victims Rights Survey. The online survey was created to gather information from Canadian Armed Forces members and Department of National Defence employees (particularly the victims and survivors of service offences) in order to receive important input from survey participants to inform and facilitate the development of the regulations and policies relevant to the Declaration of Victims Rights. <sup>49</sup> At the same time, a feedback page was developed for inclusion on the Victims and Survivors of Service Offences web page to give the Canadian public the opportunity to provide input on the implementation of the Declaration of Victim Rights.

The Survey and that feedback page were launched on 13 and 14 May 2021, respectively. Details pertaining to both as well as the survey results will be included in the 2021 - 2022 Annual Report. On a related note, a second Survey aimed at providing former Canadian Armed Forces members the opportunity to give input on the implementation of the Declaration of Victims Rights was launched on 19 July 2021, in collaboration with Veterans Affairs Canada. This Survey and its results will also be examined in the 2021-2022 Annual Report.

<sup>48 &</sup>quot;Victims and Survivors of Service Offences" (last modified 23 August 2021), online: Canada.ca <www.canada.ca/en/ department-national-defence/services/benefits-military/legalservices/victim-service-offence.html>.

<sup>49 &</sup>quot;Victims and Survivors Survey to inform the regulatory development in support of the Declaration of Victims Rights" (last modified 17 May 2021), online: Canada.ca <a href="mailto:canada.ca/en/department-national-defence/maple-leaf/defence/2021/05/victims-survivors-survey-declaration-of-victims-rights.html">canada.ca/en/department-national-defence/maple-leaf/defence/2021/05/victims-survivors-survey-declaration-of-victims-rights.html</a>>.

<sup>50</sup> The Declaration of Victims Rights Survey was launched on 14 May 2021, and remained open until 28 June 2021.

#### **OTHER IMPORTANT CONSULTATIONS**

A number of other critical consultations took place during the reporting period. In total, consultations occurred with more than 16 external organizations, which included the Sexual Misconduct Response Centre, the Office of the Federal Ombudsman for Victims of Crime, the Policy Center of Victims Issues at the Department of Justice, the Public Prosecution Service of Canada, the Royal Canadian Mounted Police, the Correctional Service of Canada and the Parole Board of Canada. Furthermore, the following four victims' advocacy groups have been consulted including "It's Not Just 700", the Canadian Resource Centre for Victims of Crime, the Ontario Office for Victims of Crime, and the Association québécoise Plaidoyer-Victimes. Additionally, the Canadian Armed Forces chain of command was consulted regarding key aspects of the summary hearing system. The information garnered from these various consultations was of vital importance providing invaluable insight that greatly enabled the ongoing policy and regulatory development efforts.

#### THE C-77 CANADIAN ARMED FORCES SECRETARIAT

In January 2021, the Vice Chief of the Defence Staff took on the role of the Canadian Armed Forces representative responsible for providing the strategic policy orientations required to ensure the regulations developed in support of Bill C-77 implementation would meet the needs of the Canadian Armed Forces. To support the Vice Chief of the Defence Staff in discharging this essential responsibility, the decision was made to establish a Secretariat that would coordinate consultations with and inputs received from representatives across the Canadian Armed Forces in order to develop the necessary strategic framework and policy orientations. To this end, an Initiating Directive that provided for the launch of the Canadian Armed Forces Bill C-77 Secretariat (C-77 Secretariat) was issued on 23 March 2021, and on 20 April 2021, the C-77 Secretariat was launched. The work of the Secretariat and its important contribution to the regulatory and policy development process will be detailed in the 2020-2021 Annual Report.

#### THE REGULATORY DRAFTING EFFORT

The Office of the JAG has worked closely with the Department of Justice to develop the regulatory scheme required to bring the remaining provisions of Bill C-77 into force. To this end, the *Queen's Regulations and Orders for the Canadian Forces* Drafting Section within the Department of Justice provided the Office of the JAG with specialized advice related to the choice of legislative instruments, the enabling authorities, and the legal risks associated with the proposed regulatory scheme, and at the request of the Office of the JAG, began the process of drafting the necessary supporting regulatory amendments and Governor in Council orders. At the end of the reporting period the drafting of the required regulations was well underway.

## THE THIRD INDEPENDENT REVIEW OF THE NATIONAL DEFENCE ACT

The *National Defence Act* requires that the Minister of National Defence cause an independent review of specified provisions of the *National Defence Act* be conducted, and that the report of the independent review be tabled in Parliament within specified timelines.<sup>51</sup> The relevant timelines are provided in section 273.601 of the *National Defence Act* and are defined in relation to particular events, which trigger a seven year clock. The report must be tabled by the expiration of the seven years, unless a subsequent triggering event re-sets the clock. Triggering events include the coming into force of the governing section, the tabling of a previous report, and amendments to the *National Defence Act* if based on an independent review.

The Supreme Court of Canada has recognized the importance of conducting periodic independent reviews as mandated by section 273.601 of the *National Defence Act* for ensuring that the reviewed provisions, including those that underpin the military justice system, are rigorously scrutinized, analyzed, and refined at regular intervals to enable the continuing evolution of the military justice system.<sup>52</sup> These regular examinations help to ensure that the military justice system continues to serve as a full partner alongside the Canadian criminal justice system, and that it continues to effectively support the maintenance of discipline, efficiency and morale in the Canadian Armed Forces while reflecting their evolving cultural attitudes along with the values and norms of Canadian society.

On 5 November 2020, the Minister of National Defence appointed the Honourable Morris J. Fish, former Justice of the Supreme Court of Canada, as the Third Independent Review Authority to review specified provisions of the *National Defence Act* and

their operation.<sup>53</sup> These specified provisions comprise approximately 60% of the *National Defence Act* and include the Code of Service Discipline, the Canadian Forces grievance process, the Canadian Forces Provost Marshal, and military policing and oversight.

The Ministerial Direction enabled the Third Independent Review Authority to enjoy full discretion to sit at such times and at such places in Canada, and to adopt the methods and procedures that the Independent Review Authority deemed appropriate in the discharge of his mandate. To enable access to all the information needed to effect the review, the Minister of National Defence granted the Third Independent Review Authority, subject to the requirements and limitations of applicable laws and regulations, complete access to:

- a. the employees of the Department of National Defence:
- b. the officers and non-commissioned members of the Canadian Armed Forces;
- c. the members and staff of the Military Grievances
   External Review Committee;
- d. the members and staff of the Military Police Complaints Commission;
- e. the Ombudsman for the Department of National Defence and the Canadian Armed Forces and staff; and
- f. any information held by the Department of National Defence and the Canadian Armed Forces relevant to the review.

To provide the necessary legal support and assistance to the Minister of National Defence, the Department of National Defence and the Canadian Armed Forces, the Judge Advocate General established the JAG Independent Review Support Team during the previous reporting period to enable the successful fulfillment of the statutory requirement for the Third Independent Review. This dedicated team continued its work during the current reporting period, which spanned from conception and planning to support during the conduct of the review itself.

<sup>51</sup> Supra note 2, s 273.601.

<sup>52</sup> R v Stillman, 2019 SCC 40 at para 53.

<sup>53 &</sup>quot;Minister of National Defence appoints the Independent Review Authority to conduct the Third Independent Review of the National Defence Act" (last modified 16 November 2020), online: Canada.ca <a href="https://www.canada.ca/en/department-national-defence/news/2020/11/minister-of-national-defence-appoints-the-independent-review-authority-to-conduct-the-third-independent-review-of-the-national-defence-act.html">https://www.canada.ca/en/department-national-defence-news/2020/11/minister-of-national-defence-appoints-the-independent-review-authority-to-conduct-the-third-independent-review-of-the-national-defence-act.html</a>>.

In December 2019, the JAG Independent Review Support Team temporarily assumed a secretariat function and conducted initial project planning and engaged the Department of National Defence and the Canadian Armed Forces to coordinate the Independent Review until the Independent Review Secretariat was formally established. The JAG Independent Review Support Team directly supported the Department of National Defence and Canadian Armed Forces Independent Review Secretariat during both the contracting process and the conduct of the review. The Independent Review Secretariat served a liaison function between organizations within the Department of National Defence, the Canadian Armed Forces and external partners, assisted with managing the contract, scheduled meetings, and tracked the Independent Review Authority's requests for information.

To assist the Independent Review Authority and his team in their preparations for conducting their review, the Office of the JAG and the JAG Independent Review Support Team prepared extensive reference materials and provided the Independent Review Authority with approximately 15 hours of familiarization briefings on the military justice system and other subjects relevant to the review mandate. Furthermore, over the course of the review itself, the Office of the JAG and the JAG Independent Review Support Team responded to approximately 50 requests for information from the Independent Review Authority on a range of complex subjects that involved significant qualitative and quantitative research and analysis, including historical research spanning a 25-year period.

In pursuing his mandate, the Third Independent Review Authority and his team adopted a methodology which included receiving educational briefings, interviewing officials from the Department of National Defence and the Canadian Armed Forces, conducting interviews with external commentators and foreign experts, receiving written submissions from actors and organizations across the Canadian Armed Forces, and holding 16 online town hall meetings with members of the Canadian Armed Forces.

The Report of the Third Independent Review Authority was tabled in Parliament on 1 June 2021,<sup>54</sup> after the

close of the reporting period, and while the report will be examined in detail in the 2021-2022 Annual Report, it is important to note that in the report, the Independent Review Authority made 107 wide-ranging recommendations to the Minister of National Defence with the majority of which pertaining to the military justice system. The Minister of National Defence has accepted all of the recommendations in principle, and the significant work involved with implementing the recommendations has already begun. A whole-of-government approach will be required to implement the recommendations.

The Judge Advocate General has welcomed the Report of the Third Independent Review Authority. The Independent Review Authority has made recommendations that will provoke profound and critical changes for the military justice system and has provided an important opportunity to further the evolution of the military justice system, bring it into a new era of modernization, and enable it to fully support culture change within the Canadian Armed Forces.

<sup>54</sup> The Honourable Morris J. Fish, Report of the Third Independent Review Authority to the Minister of National Defence, (Ottawa: Tabled in Parliament, 1 June 2021), online: Canada.ca <a href="mailto:swww.canada.ca/en/department-national-defence/corporate/policies-standards/acts-regulations/third-independent-reviews-nda.html">mailto:swww.canada.ca/en/department-national-defence/corporate/policies-standards/acts-regulations/third-independent-reviews-nda.html</a>>.

### POLICY INITIATIVES

## Support to Victims and Survivors of Service Offences

Aligned with its commitment to support culture change and the elimination of sexual misconduct in the Canadian Armed Forces and to ensure that victims and survivors of service offences are appropriately recognized and supported, the Office of the JAG was engaged with a number of related initiatives over the reporting period.

One such initiative was the Defence Administrative Order and Directive 9005-1 - Sexual Misconduct Response,<sup>55</sup> which was issued on 18 November 2020, to enhance the response of the Canadian Armed Forces to sexual misconduct by defining and prohibiting sexual misconduct, clarifying reporting obligations, and providing a comprehensive Victim Support section. During the reporting period, the Office of the JAG contributed to the development of this Directive through the provision of direct legal support to the multiple stakeholders engaged in the development, drafting, and approval processes.

Over the reporting period, the Office of the IAG also continued the work to implement the remaining amendments to the National Defence Act introduced in Bill C-77, which includes the establishment of the Declaration of Victims Rights. In particular, the Office of the JAG moved forward on a number of initiatives to advance the regulatory amendments required to support implementation of the remaining Bill C-77 provisions and to ensure that victims and survivors of service offences as well as the organizations that support and represent them were able to provide input during the regulatory development process. In total, 16 external organizations, the majority of which provide advocacy and other support services for victims and survivors of crime, were consulted and provided input relevant to the policies and regulations being developed to support implementation of the Declaration of Victims Rights.

A further initiative undertaken during the reporting period was the launch of the Victims and Survivors of Service Offences web page, which was developed to provide a one-stop source for information relevant to victims and survivors. The web page went live in March 2021.<sup>56</sup> An important feature of the web page is a feedback tool which provides an avenue for victims and survivors of service offences as well as other interested persons to provide input on the implementation of the Declaration of Victim Rights.

Additional details relating to the initiatives undertaken to support the implementation of Bill C-77 and the Declaration of Victims Rights can be found in the Legislative Development section of this chapter.

Additionally, the Office of the JAG developed in partnership with the Director General Military Personnel Research and Analysis two online surveys to enable consultation with individual victims and survivors of service offences for the purpose of receiving important input that would be used to inform the development of regulations and policies relevant to the Declaration of Victims Rights. These surveys were created to gather information directly from current and former members of the Canadian Armed Forces and Department of National Defence employees and were launched after the close of the current reporting period.

<sup>55</sup> Canada, Department of National Defence, Sexual Misconduct Response (Defence Administrative Orders and Directives), No 9005-1 (Ottawa: DND, 18 November 2020).

## OTHER DEVELOPMENTS

#### The Military Justice Stakeholders' Forum

The Military Justice Stakeholders' Forum provides an opportunity for the key stakeholders in the military justice system to assemble on a regular basis and engage in a sustained exchange of knowledge, expertise and best practices in relation to subjects of common interest while respecting the professional obligations and independence of the participants. The regular membership of the Forum includes the Judge Advocate General, the Chief Justice of the Court Martial Appeal Court of Canada, the Chief Military Judge, the Canadian Forces Provost Marshal, the Director of Defence Counsel Services, the Director of Military Prosecutions, and the Deputy Judge Advocate General (Military Justice).

Owing to the COVID-19 pandemic, the Forum's regular rhythm of meeting was interrupted during the reporting period with the Forum being convened once for an online meeting on 28 May 2020. In attendance at this meeting were the Judge Advocate General, the Chief Justice of the Court Martial Appeal Court of Canada, the Acting Chief Military Judge, the Canadian Forces Provost Marshal, the Deputy Judge Advocate General (Military Justice), the Director of Military Prosecutions, the Director of Defence Counsel Services, the Court Martial Administrator, the Legal Counsel to the Office of the Chief Military Judge, and the Executive Director and General Counsel to the Federal Court of Appeal and Court Martial Appeal Court of Canada. This meeting was the fifth since the Forum's inception, and the discussion centred on the challenges that the COVID-19 pandemic presented for the administration of military justice.

#### The Justice Administration and Information Management System

Justice Administration and Information Management System is an electronic case management tool for the military justice system. With the support of the Office of the JAG, it is being designed by the Assistant Deputy Minister (Information Management) to seamlessly and electronically track military justice files from the reporting of an alleged offence, through to investigation, charge laying, trial disposition and review in both the summary trial and court martial processes. Development of the Justice Administration and Information Management System<sup>57</sup> is a key initiative within the Superintendence Enhancement and Assessment Project,<sup>58</sup> which was established to enable the gathering of objective and measurable data to facilitate the assessment of the administration of the Code of Service Discipline at the unit level and the enhancement of the military justice system.

While the COVID-19 pandemic and the resulting health protection measures caused development to be halted during the early months of the reporting period, development resumed in June and led to the achievement of improved functionality, a more stable system platform, and a simplified user interface. In November 2020, a system update was delivered to existing Justice Administration and Information Management System users that improved functionality and introduced the ability to support all service offences and military justice cases at every stage in the process beginning with the investigation of an alleged offence through to post-trial administration and the summary trial review process. Additionally, the Military Justice Time Standards,<sup>59</sup> which set out the time standards applicable to every phase of the military justice process were also fully incorporated into the system at this time to facilitate their tracking and application. With this

<sup>57</sup> See for more information on this innovative electronic case management tool and database, The Annual Rapport of the Judge Avocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2019 to 31 March 2020 (Cat. No. D1-16, ISSN 1497-7184) at p. 52, online: Canada.ca <www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2019-2020.html>.

<sup>58</sup> *Ibid*, at page 51.

<sup>59</sup> Ibid, at page 56 and Annex G.

upgrade, the Justice Administration and Information Management System is enabled to require that decision makers provide a justification when the established time standards are not met, which will assist in identifying and resolving the causes of delay in the military justice system.

With the further upgrades introduced in March 2021, the security of personal information was strengthened, and the system's ability to generate a Record of Disciplinary Proceeding based on data already entered into Justice Administration and Information Management System was improved. Moreover, this upgrade also saw the introduction of a new Legal Officer Document Review process that will further facilitate the oversight and superintendence of the military justice system.

Also during the reporting period, the Office of the JAG and the Assistant Deputy Minister (Information Management) continued in their efforts to integrate the Justice Administration and Information Management System with other departmental platforms, including the Security and Military Police Information System (SAMPIS), and the Director of Military Prosecutions' Court Martial System (CMS).

Over the next reporting period, the Office of the JAG and the Assistant Deputy Minister (Information Management) will undertake the next phase of development for the Justice Administration and Information Management System, which will incorporate the changes to the *National Defence Act* that will be implemented with the coming into force of the remaining provisions of Bill C-77. These changes will see the transformation of summary trials into a summary hearing process, and with that, the introduction of service infractions and the resulting sanctions. Additionally, the changes will require the addition of new software functionality to incorporate the protections that will be provided for with the implementation of the Declaration of Victims Rights.

#### CONCLUSION

Despite the COVID-19 pandemic and the significant challenges it brought, especially at the beginning of the reporting period, the 2020/21 reporting period saw a number of important developments for the military justice system. For example, significant strides were taken to complete the needed consultations with stakeholders, victim and survivor advocacy groups and individual victims and survivors of service offences and to further the regulatory development required to implement the remaining amendments to the National Defence Act introduced in Bill C-77, including the Declaration of Victims Rights. Additionally, the Honourable Morris J. Fish, former Justice of the Supreme Court of Canada was appointed to conduct the Third Independent Review of specific provisions of the National Defence Act. The Review was conducted during the reporting period and its report, which was tabled in Parliament on 1 June 2021, sets out critical direction that will see profound and essential change within the military justice system.

The processes of growth and improvement seen over the reporting period are essential for the continuing modernization of the military justice system and for ensuring that the system undergoes the changes needed to remain in step with Canadian law and societal values, and at the same time, provide the chain of command with an effective tool for holding members accountable for all forms of misconduct.



Legal officers of the Office of the JAG working from home over the reporting period





## IMPACT OF THE COVID-19 PANDEMIC

#### INTRODUCTION

The COVID-19 pandemic deeply affected Canadian society over the reporting period. The effects of the pandemic have been felt by the Canadian Armed Forces, the Office of the JAG, and the military justice system as a whole. This chapter outlines the impact the pandemic has had on the Office of the JAG and on the administration of military justice and discusses the support that was provided by the Office of the JAG to the domestic operations undertaken by the Canadian Armed Forces to ameliorate the harm caused by COVID-19.

## IMPACT OF THE PANDEMIC ON THE OFFICE OF THE JAG

In March 2020, and as part of the larger collective effort within the Canadian Armed Forces to limit the spread of COVID-19, the Office of the JAG activated its Business Continuity Plan and adopted a remote-work posture. With the exception of those legal officers and office staff members whose presence was required in a place of work for operational or other essential reasons, this posture remained in place throughout the reporting period.

To enable remote work and the continued provision of responsive, high-quality legal services in an effective and safe manner, the Office of the JAG significantly increased its use of available technological tools, such as videoconferencing, collaborative software programs and online conferencing. At the same time, the Office of the JAG adapted its approach to legal and administrative service and support delivery in order to continue supporting the operational requirements of the Canadian Armed Forces while concurrently providing for the personal and family circumstances and challenges brought about by the pandemic and the realities of working remotely.

## IMPACT OF THE PANDEMIC ON SERVICE TRIBUNALS

The COVID-19 pandemic had a significant impact on the operation of the military justice system. Like the civilian criminal justice system, the military justice system was challenged to continue functioning while respecting all necessary public health precautions. At both summary trial and court martial, innovative and functional solutions were utilised to keep the military justice system operating in a safe and responsible manner.

#### Summary Trials

While summary trials continued to be conducted throughout the reporting period, there was a notable reduction in the number of summary trials as compared to the 2019-2020 reporting period.

Figure 4-1 illustrates the month over month comparison of summary trials between this reporting period and the previous reporting period. The most significant decrease was observed at the beginning of the reporting period, which was followed by a notable increase in June 2020.

A further decline was observed in September 2020. It is noted that these fluctuations align with the introduction and subsequent alteration of applicable public health measures and the related changes to the Canadian Armed Forces' posture.

The lower number of summary trials conducted at the beginning of the reporting period coincides with the introduction of provincial and federal public health restrictions and the Canadian Armed Forces' adoption of an aggressive posture in March 2020 with the aim of minimizing the risk of COVID-19 exposure, preserving operational capability, and avoiding becoming a transmission vector.<sup>1</sup>

At this time, commanders were required to carefully scrutinize all travel and training activities to ensure that only those assessed as being essential to immediate and near term mission success were conducted.<sup>2</sup> Concurrently, access to many defence establishments and Canadian Armed Forces facilities and activities, such as sports centres, messes, cafeterias, as well as individual and collective training was limited or temporarily halted.<sup>3</sup> This posture along with the existing public health measures resulted in a cessation of many regular activities and in-person interactions between Canadian Armed Forces members.

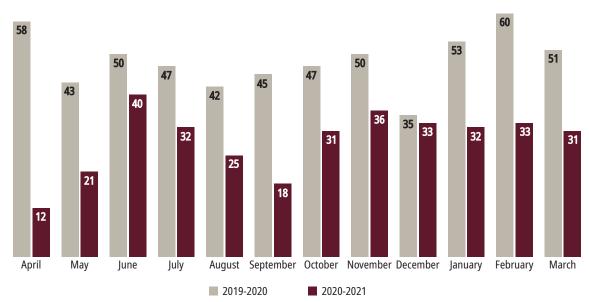


FIGURE 4-1: SUMMARY TRIALS PER MONTH (2019-2020 AND 2020-2021 REPORTING PERIODS)

<sup>1</sup> Chief of the Defence Staff, FRAGO 001 to CDS TASKORD - OP LASER 20-01 PH 3 ACTIVATION, 13 March 2020.

<sup>2</sup> Ibid, paras 8.b(4), (15)-(16), and (18).

<sup>3</sup> Ibid, para 8.b.

As noted in Figure 4-1, there was a significant increase in the number of summary trials in June 2020. Over this same time period leading into the summer, public health measures and restrictions were being relaxed and the posture of the Canadian Armed Forces was adjusted to allow the resumption of certain training, institutional and operational activities while respecting public health measures and ensuring the protection of personnel.<sup>4</sup>

In circumstances where public health restrictions precluded the conduct of in-person summary trials, and with due regard to the rights of the accused member, units were able to leverage telecommunication technology to enable the conduct of summary trials and the continuing administration of unit-level discipline. Article 108.21 of the *Queen's Regulations and Orders for the Canadian Forces* authorizes presiding officers to receive evidence at summary trial using a telecommunication device that permits the presiding officer and the accused to hear and examine a witness who has been sworn.<sup>5</sup>

The use of telecommunication platforms at summary trial also provided a unique opportunity for a wider audience to attend the proceeding remotely without the constraints of courtroom space and the applicable public health measures.

Over the reporting period, telecommunication technology was also successfully leveraged to allow the delivery of Presiding Officer Certification Training despite the pandemic environment. Presiding Officer Certification Training is required for any officer to act as a presiding officer at summary trial and is normally conducted as a two-day in-person classroom session. However, to address the need to provide the training to a growing number of officers while respecting the pandemic related restrictions on travel and gathering, training delivery pivoted to online platforms.

Through the shift to online training delivery, officers from across the Canadian Armed Forces were able to receive the training required for their presiding officer certification and participate in group discussions and

#### Courts Martial

In the early stages of the pandemic, as was the situation in the civilian criminal justice system, many cases at court martial were adjourned and postponed until safe and effective measures could be implemented for the resumption of proceedings.

Beginning in March 2020, at the end of the previous reporting period, and continuing into the current reporting period, a series of directives and letters containing direction and guidance pertaining to the administration and conduct of courts martial and other judicial proceedings in the context of the COVID-19 pandemic were issued.

The first directive was issued by the Chief Military Judge on 16 March 2020.<sup>6</sup> Taking into account the COVID-19 virus and the directives issued by the Government of Canada and the Chief of the Defence Staff, the Court Martial Administrator was directed to "cancel all convening orders for courts martial to be held between 16 March and 5 April 2020." The directive also provided that other judicial hearings could be held at the discretion of the presiding military judge, subject to the limitations imposed by the existing situation, including "any means allowing the involved parties to engage is simultaneous visual and oral communications."

Two following directives were issued on 3 April 2020<sup>7</sup> and 5 May 2020<sup>8</sup>, in which the Acting Chief Military Judge effectively extended the direction in the 16 March 2020 directive to the periods between 6 April and 10 May 2020 and between 11 and 31 May 2020 respectively.

activities that would not have otherwise been possible. In total, legal officers with the Office of the JAG conducted 34 online Presiding Officer Certification Training sessions and succeeded in providing the necessary training to 809 candidates.

<sup>4</sup> Deputy Minister of National Defence and Chief of the Defence Staff, *Joint CDS/DM Directive for the Resumption of Activities*, 22 May 2020, online: *Government of Canada* <a href="https://www.canada.ca/en/department-national-defence/corporate/policies-standards/joint-cds-dm-directive-for-the-resumption-of-activities.html">https://www.canada.ca/en/department-national-defence/corporate/policies-standards/joint-cds-dm-directive-for-the-resumption-of-activities.html</a>>

<sup>5</sup> Canada, Department of National Defence, Queen's Regulations and Orders for the Canadian Forces (Ottawa: DND, 28 June 2019), art 108.21(4)–(5).

<sup>6 &</sup>quot;CMJ Directive dated 16 March 2020" (16 March 2020) online: Government of Canada <a href="https://www.canada.ca/en/chief-military-judge/covid19acmj.html">https://www.canada.ca/en/chief-military-judge/covid19acmj.html</a>>.

<sup>7 &</sup>quot;A/CMJ Directive dated 3 April 2020" (3 April 2020), online: \*Government of Canada <a href="https://www.canada.ca/en/chief-military-judge/covid19acmj.html">https://www.canada.ca/en/chief-military-judge/covid19acmj.html</a>.

<sup>8 &</sup>quot;A/CMJ Directive dated 5 May 2020" (5 May 2020), online: Government of Canada <a href="https://www.canada.ca/en/chief-military-judge/engcoviddirective5may2020.html">https://www.canada.ca/en/chief-military-judge/engcoviddirective5may2020.html</a>.

On 12 May 2020, the Acting Chief Military Judge issued a lengthy letter to "inform all participants, and anyone else interested in a trial by court martial and any other judicial hearing, about the related temporary policies and procedures that have been in place since the date when the usual activities of court martial administration were disrupted due to the health emergency caused by COVID-19."9 As explained in the letter, it was also meant to complement any judicial instructions that were issued from time to time by the Chief Military Judge and the Acting Chief Military Judge to the Court Martial Administrator, and as such, it included the following factors that had made it temporarily impossible to hold courts martial in the context of the distancing and containment measures established by federal and provincial public health authorities and the Chief of the Defence Staff:

- a. the inability of participants to travel and attend the location for the trial or hearing;
- b. the unavailability of commercial housing for some or all participants;
- c. the inaccessibility of premises that are usually available or provided for holding the court martial;
- d. the unavailability of administrative support and necessary staff from the unit where the court is being held to proceed in a dignified and military manner; and
- e. the inability of units to implement public health measures relating to participants and locations that are necessary for holding the court martial.

The letter also detailed the various temporary policies and procedures that had been put into practice relating to court martial administration and the conduct of judicial proceedings since the usual court martial activities had first been disrupted due to the pandemic and include the following:

- a. in relation to the preferral of a charge and the notice of withdrawal of a preferral of a charge, that the Court Martial Administrator would accept electronically filed documents rather than the original paper versions, which were to be subsequently submitted;<sup>10</sup>
- 9 "A/CMJ Letter dated 12 May 2020 on COVID-19 situation courts martial and other judicial hearings" (12 May 2020), online: *Government of Canada* <a href="https://www.canada.ca/en/chiefmilitary-judge/encovid1912may2020.html">https://www.canada.ca/en/chiefmilitary-judge/encovid1912may2020.html</a>
- 10 Ibid, para 10.

- b. in relation to the use of the military court room located at the Asticou Centre in Gatineau, Québec, the issuance of direction to the Court Martial Administrator to implement a health protocol for the use of the court room in consideration of the public health measures relating to the COVID-19 health emergency;<sup>11</sup> and
- c. in relation to the conduct of courts martial and other judicial proceeding before a military judge, the introduction of a procedure to enable remote access to the proceeding for members of the public and the media.<sup>12</sup>

Additionally, in the 12 May 2020 letter, the Acting Chief Military Judge identified the following factors that a presiding military judge may take into account when exercising their discretion to hold a judicial hearing and identify the terms and conditions applicable to the conduct of that hearing, including the use of telecommunications:

- a. the position of the parties on the need to hold the hearing without the physical presence of the participants, in recognition of the fact that the applicable legal framework often requires the consent of all parties to do so;
- b. the limitations caused by the circumstances that will be in effect at the time of the proposed hearing, including the physical presence or mode of technological participation of participants;
- c. the need to receive the proposed documentary or testimonial evidence, and the means, technological or otherwise, to allow this evidence to be admitted so that it can be properly considered by the parties and the military judge;
- d. the ability to audio-record debates and the ability to identify and preserve evidence in a satisfactory manner:
- e. the complexity of the issues to be debated, the receipt of the evidence and the time required to hold the proposed hearing;
- f. the possibility of using alternative means such as written arguments and affidavits in order to minimize the time required and the complexity of a hearing; and

<sup>1</sup> Ibid, para 19.

<sup>12</sup> Ibid, paras 27-29.

g. any other factor considered relevant by the military judge. 13

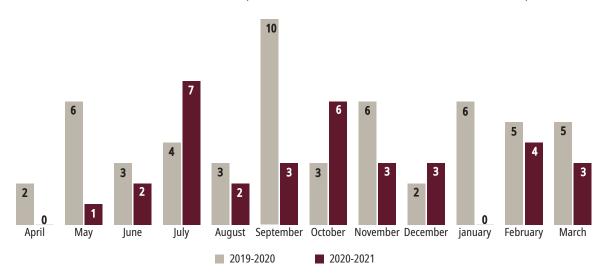
On 8 October 2020, the Acting Chief Military Judge issued his second and final letter of the reporting period, which addressed the "resumption and maintenance of the activities of the court martial with the in person presence of participants." In this letter the Acting Chief Military Judge outlined the cessation of the five factors referenced in the 12 May 2020 letter that had rendered it impossible to conduct court martial proceedings as usual and referenced the Chief of the Defence Staff's 9 June 2020 directive on the Resumption of Activities, in which the Chief of the Defence Staff specifically noted the need to support the gradual resumption of courts martial. 15

The Acting Chief Military Judge noted that while a gradual resumption of court martial activities had begun during the summer of 2020 and was continuing, it would remain the responsibility of the presiding military judge to ultimately determine the feasibility and appropriateness of proceedings in each individual case, given the ever-changing landscape of provincial and federal health restrictions. Whether in-person, via telecommunication, or some combination of the two, it was confirmed that courts martial would continue to operate in an effective and safety-conscious manner.

Figure 4-2 depicts the number of courts martial conducted by month during the 2020-2021 reporting period as compared to the 2019-2020 reporting period. In addition to illustrating an overall reduction in the number of courts martial conducted, the figure shows particularly low numbers at the beginning of the reporting period and again in January 2021.

For further statistics and details on court martial cases conducted in this reporting period, see Chapter 2.





<sup>13 &</sup>quot;A/CMJ Letter dated 12 May 2020 on COVID-19 situation – courts martial and other judicial hearings," para 24.

<sup>14 &</sup>quot;Resumption and maintenance of the activities of the court martial with the in person presence of participants" (8 October 2020), online: Government of Canada <a href="https://www.canada.ca/en/chief-military-judge/resumption-and-maintenance-of-the-activities-of-the-cm.html">https://www.canada.ca/en/chief-military-judge/resumption-and-maintenance-of-the-activities-of-the-cm.html</a>.

<sup>15</sup> Chief of the Defence Staff, CDS TASKORD 004 OP LASER 20-01 – RESUMPTION OF ACTIVITIES, 19 June 2020, at paras 8.a.(15), 9.e.(2)(c).

## IMPACT OF THE PANDEMIC ON DISCIPLINE

Over the reporting period, the Canadian Armed Forces and its members, like others in Canada, were subject to various public health measures and restrictions introduced in an effort to keep the population safe and minimize the health impacts of the COVID-19 pandemic.

In this context, charges were laid against Canadian Forces members in 9 cases for breaching the applicable public health measures. Based on the particulars of each case, the offences charged were under section 83 of the *National Defence Act*, disobedience of a lawful command, section 90 of the *National Defence Act*, absence without leave, and section 129 of the *National Defence Act*, conduct to the prejudice to good order and discipline. A summary of these cases is found in Figure 4-3.

FIGURE 4-	3: Violations of	COVID-19	PRECAUTIONS ADDRESSED BY	SUMMARY TRIAL
Case	Date	Offence	Circumstances	Result
Bdr R	24 April 2020	s. 83 NDA	Violation of order to self-isolate	Guilty Fine: \$445 Confinement to Ship or Barracks: 14 days
MCpl W	26 June 2020	s. 129 NDA	Violation of COVID-19 precautions	Guilty Fine: \$500
Cpl M	20 July 2020	s. 90 NDA	Violation of COVID-19 geographic restrictions	Guilty Fine: \$500
Sgt G	22 October 2020	s. 129 NDA	Violation of COVID-19 precautions	Guilty Fine: \$1200
Pte C	22 October 2020	s. 129 NDA	Violation of COVID-19 precautions	Guilty Fine: \$100 Confinement to Ship or Barracks: 4 days
Avr D	5 November 2020	s. 129 NDA	Violation of COVID-19 geographic restrictions	Guilty Fine: \$200
MCpl S	5 November 2020	s. 129 NDA	Violation of COVID-19 geographic restrictions	Guilty Reprimand Fine: \$400
Sgt K	6 November 2020	s. 129 NDA	Violation of COVID-19 precautions	Guilty Stoppage of Leave: 7 days
Avr T	8 February 2021	s. 129 NDA	Violation of COVID-19 precautions	Guilty Fine: \$500

## OFFICE OF THE JAG SUPPORT FOR OPERATIONS LASER AND VECTOR

Over the reporting period the Canadian Armed Forces engaged in two domestic operations directly related to the COVID-19 pandemic: Operation Laser<sup>16</sup> (OP LASER) and Operation Vector<sup>17</sup> (OP VECTOR). The Office of JAG supported the Canadian Armed Forces in the conduct of both operations through the provision of direct legal support and services to all levels of the chain of command by Regular and Reserve Force legal officers located across Canada.

#### Op LASER

Op LASER is the activation of the Canadian Armed Forces' Contingency Plan LASER for the response to a pandemic of an influenza-like disease. In March 2020, the Chief of the Defence Staff activated Op LASER, which is the Canadian Armed Forces' response to the COVID-19 pandemic. The strategic objectives for Op LASER are to:

- save lives:
- assist federal, provincial, territorial and regional partners; and
- maintain Canadian Armed Forces readiness, effectiveness and resilience.

During the reporting period and under the ambit of Op LASER, the Canadian Armed Forces responded to requests for assistance from provincial and territorial partners pursuant to subsection 273.6(1) of the *National Defence Act*, which allows the Governor in Council or the Minister of National Defence to authorize the

Canadian Armed Forces to perform public service duties. The process of requesting assistance involves official communication between the provincial/territorial and federal governments.

The assistance provided over the reporting period took several forms. Three examples include support to long-term care facilities, support to remote northern communities, and assistance at Land Ports of Entry.

#### SUPPORT TO LONG-TERM CARE FACILITIES

From April to July 2020, the Canadian Armed Forces responded to requests for assistance in support of 54 long-term care facilities in Quebec and Ontario.

The assistance provided included on-site medical and support staff as well as off-site support involving planning, liaison, general services, maintenance, and delivery of personal protective equipment.

From 20 April to 26 June 2020,
47 facilities identified by the
Government of Quebec received
support from Regular Force
and Reserve Force
Canadian Armed Forces members
to ensure the safety of residents,
help maintain adequate staffing
levels, and assist with infection
control and prevention.
From 28 April to 3 July 2020,
seven facilities identified by the
Government of Ontario received
similar assistance.

<sup>16 &</sup>quot;Operation LASER" (last modified 16 September 2021), online: Government of Canada <a href="https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/laser.html">https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/laser.html</a>>.

<sup>17 &</sup>quot;Operation VECTOR" (last modified 9 July 2021), online: Government of Canada <a href="https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/operation-vector.html">https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/operation-vector.html</a>.

#### SUPPORT FOR NORTHERN AND REMOTE COMMUNITIES

From April to July 2020, the 2nd Canadian Ranger Patrol Group deployed more than 200 Canadian Rangers to assist 28 communities in response to various requests for assistance from the Government of Quebec. Similarly, 157 members of the 3rd Canadian Ranger Patrol Group were activated on 5 April 2020, to provide assistance in Northern Ontario. In all, the Canadian Armed Forces provided requested assistance to more than 15 First Nations across the country, and the Office of the JAG supported this response, in part, by ensuring a common understanding between the supporting government entities of the relevant legal authorities.

#### SUPPORT AT LAND PORTS OF ENTRY

From 19 February to 28 March 2021, Canadian Armed Forces personnel provided planning and logistical support to the Public Health Agency of Canada to establish screening sites at 16 land ports of entry in Canada. In particular, assistance was provided at the Queenstown border crossing in Ontario, the St-Armand/Lacolle border crossing in Quebec, the St. Stephen border crossing in New Brunswick, the Coutts border crossing in Alberta, and the Douglas border crossing in British Columbia.

Legal officers with the Office of the JAG, from both the Regular and Reserve Forces and located across Canada, were directly involved in providing support to the Canadian Armed Forces in furtherance of the various government requests for assistance related to Op LASER activities. This support was provided to the regional Joint Task Forces and ensured an understanding of relevant subjects ranging from the applicable legal authorities to the implicated provincial legal regimes to issues of personal and institutional liability. Additionally, legal officers from across Canada engaged and consulted extensively throughout these domestic operations with their federal and provincial counterparts.

#### Op VECTOR

Op VECTOR commenced on 27 Nov 2020 and is the Canadian Armed Forces' support to the federal, provincial and territorial governments in relation to the distribution of COVID-19 vaccines. Through Op VECTOR, support was provided to federal, provincial and territorial partners with:

- logistical and planning support;
- assistance from well-trained military personnel; and
- capability to transport medical supplies and equipment to remote communities.

In particular, support was provided by the Canadian Armed Forces through Indigenous Services Canada in partnership with First Nations in Manitoba, to accelerate the pace of immunization in 23 on-reserve communities. Legal officers with the Office of the JAG, from both the Regular and Reserve Forces, were again directly involved in providing support to the Canadian Armed Forces in furtherance of the various government requests for assistance related to Op VECTOR activities. As with Op LASER, this support was provided to the regional Joint Task Forces and ranged in nature from supporting the acquisition of temporary facilities and infrastructure to ensuring an understanding of the relevant legal authorities and applicable provincial legal regimes.

#### CONCLUSION

The COVID-19 pandemic has had a significant impact on the demands of the Canadian Armed Forces, the military justice system, and the Office of the JAG. Notwithstanding the challenges and constraints imposed by the pandemic, both the Office of the JAG and the military justice system demonstrated the agility and adaptability required to continue supporting the disciplinary needs and operational effectiveness of the Canadian Armed Forces.

From the onset of the pandemic, and throughout the reporting period, the Office of the JAG took a measured and adapted approach. Personnel were enabled to continue providing legal and administrative support services remotely or, when essential, from the office, and were supported when confronted with personal and family challenges brought on by the pandemic. At the same time, legal officers from across Canada continued to provide the Canadian Armed Forces with needed legal support, contributing to vital domestic missions, which over the reporting period was dominated by the provision of much needed assistance to help mitigate the effects of the pandemic.



LCdr MacLean (right), legal officer, pictured with a French LEGAD and Danish Political Advisor as they provide an update brief to the NATO HQ Legal Advisors on supplementary arrangement negotiations as part of NATO Mission Iraq

#### THE WAY AHEAD

In November 2020, the Minister of National Defence appointed the Honourable Morris J. Fish, a former justice of the Supreme Court of Canada, to conduct an independent review of the *National Defence Act*. The statutory review, required by the Act itself, was the third such periodic study since 2003. In total, Justice Fish made 107 recommendations, most of which were aimed at improving the military justice system, and all of which being immediately accepted in principle by the Government of Canada.

Collectively, these recommendations represent a pathway to help evolve military justice into a new era and make necessary changes to the system to ensure its proper functioning and the public's confidence in it. While his report identifies shortcomings in the current system, Justice Fish was nonetheless moved to express a hopeful vote of confidence in the command of the Canadian Armed Forces. He stated: "I am persuaded that the current leadership of the Canadian Armed Forces has the will to materially improve its deep-rooted system of justice. And I have endeavored ... to help show the way."<sup>2</sup>

While the statutory review by Justice Fish was conducted within the reporting period of this Annual Report, the tabling of his findings were not, and therefore will be appropriately included in the 2021-2022 Annual Report. In the meantime, his recommendations have indeed helped to "show the way" on key issues such as sexual misconduct and harassment, and will guide the Office of the Judge Advocate General as it further engages in its mission to support the Canadian Armed Forces in making material improvements to the system of military justice.

The events of 2020 have shone a harsh but useful spotlight on the military justice system. In particular, several high-profile cases of alleged sexual misconduct in the Canadian Armed Forces undermined confidence, both internally and among the public, in the military justice system. But they also heightened public awareness of vulnerabilities in the system, catalyzed both an institutional introspection and a public dialogue, and created momentum for change. As we look to the future, we know that the status quo is not an option.

Eradicating sexual harassment, sexual assault and other forms of discriminatory and hateful conduct within the Canadian Armed Forces will require a profound culture change.

The military justice system is a key contributor to that culture change, and represents an important tool to combat service misconduct of all kinds, while supporting victims, survivors, and others impacted by it.

The Office of the Judge Advocate General is committed to helping lead this change. During the reporting period, for example, the Office of the Judge Advocate General undertook a series of extensive consultations with victim and survivor advocacy and support organizations, and with individual victims and survivors of sexual misconduct and other service offences. The input received through these consultations has proven to be integral to implement a new Declaration of Victims Rights that forms part of a major reform of the military justice system. For the first time, victims and survivors of service offences will have statutory rights to information, protection, participation in the judicial process, and restitution. These and other reforms are expected to come into force during 2022.

The Honourable Morris J. Fish, Report of the Third Independent Review Authority to the Minister of National Defence, (Ottawa: Tabled in Parliament, 1 June 2021), online: Canada.ca < www.canada.ca/en/department-national-defence/corporate/policies-standards/acts-regulations/third-independent-reviews-nda.html>.

<sup>2</sup> *Ibid* at vi.

The Office of the Judge Advocate General is also assisting the Honourable Louise Arbour, a former justice of the Supreme Court of Canada, who was appointed by the Minister of National Defence to conduct a comprehensive and independent external review of existing policies, procedures, programs and culture within the Canadian Armed Forces and Department of National Defence with respect to sexual misconduct and harassment. The review will seek to identify barriers to reporting inappropriate behaviour; determine whether the system of responding to complaints is adequate; and make recommendations for the prevention and ultimately elimination of sexual misconduct and harassment. Detailed coverage of the review's findings and recommendations related to military justice will be provided in future reports.

One of the more prominent challenges in the administration of the military justice system has been the lack of comprehensive data about the operation of the system and the members of the Canadian Armed Forces impacted by it. This has understandably impeded the work of fact-finders, most recently Justice Fish. But more fundamentally, Canadian Armed Forces leaders cannot remedy problems that cannot be recognized or identified due to a lack of full and accurate data.

This issue is now being addressed with the development and deployment of a powerful new data management tool called the Justice Administration and Information Management System (JAIMS). Throughout the 2020-2021 reporting period, the system was being developed and deployed at Canadian Forces Base Petawawa, and will be adapted to align with the Bill C-77 amendments and expanded to more new users going forward.

Once the new system is fully deployed, the Office of the Judge Advocate General will be able to analyze and report all relevant aspects of the military justice system. This data-driven effort will transform the government's ability to strengthen operations and service delivery, while empowering the chain of command to monitor its disciplinary files in real time and resolve underlying causes of delays in the delivery of military justice.

COVID-19 continues to be a disruptive and destructive force in every corner of Canada and indeed around the

world, and the Office of the Judge Advocate General is no exception. Coping with the pandemic has, of necessity, driven innovation in our use of technology, and accelerated modernization of the administration and delivery of military justice. The Office of the Judge Advocate General will continue to adapt to the pandemic context while ensuring it meets its overall mission goals.<sup>3</sup>

#### CONCLUSION

In a landmark case in 2019 known as *R v Stillman*, the Supreme Court of Canada noted that:

The military justice system has come a long way. It has evolved from a command-centric disciplinary model that provided weak procedural safeguards, to a parallel system of justice that largely mirrors the civilian criminal justice system ... The continuing evolution of this system is facilitated by the periodic independent reviews mandated by s. 273.601 of the *NDA*, ensuring the system is rigorously scrutinized, analyzed, and refined at regular intervals ... Just as the civilian criminal justice system grows and evolves in response to developments in law and society, so too does the military justice system. We see no reason to believe that this growth and evolution will not continue into the future.<sup>4</sup>

As we close the book on the 2020-2021 reporting period and look to the future, our mission in the months and years ahead is to ensure that growth and evolution continue to give Canadians a military justice system that is fair, efficient, and takes a more victim-centered approach; a system that helps to rid the Canadian Armed Forces of racism, sexism, misogyny, harassment and sexual misconduct; and a system that promotes a culture where every uniformed and civilian member is respected and valued.

Our ultimate mission moving forward is to earn the trust of all members of the Canadian Armed Forces, and indeed all Canadians. They deserve nothing less.

<sup>3 &</sup>quot;2018-2021 OFFICE OF THE JAG STRATEGIC DIRECTION" (last modified 2 March 2018), online: Canada.ca <a href="https://www.canada.ca/en/department-national-defence/corporate/organizational-structure/judge-advocate-general/2018-2021-office-of-the-jag-strategic-direction.html">https://www.canada.ca/en/department-national-defence/corporate/organizational-structure/judge-advocate-general/2018-2021-office-of-the-jag-strategic-direction.html</a>>.

<sup>4</sup> R v Stillman, 2019 SCC 40 at para 53.



# ANNEXES

#### ANNEX A:

# SUMMARY OF CHARGES DISPOSED OF AT SUMMARY TRIAL

1 April 2020 — 31 March 2021 Current as of 2 June 2021

ND 4 C	Description		2020	2020-2021		
NDA Section			%	#	%	
83	Disobedience of Lawful Command	9	1.24	3	0.72	
84	Striking or Offering Violence to a Superior Officer	3	0.41	0	0	
85	Insubordinate Behaviour	36	4.96	18	4.31	
86	Quarrels and Disturbances	31	4.27	23	5.50	
90	Absence Without Leave	269	37.10	130	31.10	
93	Cruel or Disgraceful Conduct	4	0.55	1	0.24	
95	Abuse of Subordinates	4	0.55	7	1.67	
97	Drunkenness	81	11.16	49	11.72	
101.1	Failure to Comply with Conditions	0	0	3	0.72	
102	Hindering Arrest or Confinement or Withholding Assistance When Called On	0	0	1	0.24	
107	Wrongful Acts in Relations to Aircraft or Aircraft Material	1	0.14	1	0.24	
108	Signing Inaccurate Certificate	0	0	1	0.24	
112	Improper Use of Vehicles	4	0.55	3	0.72	
114	Stealing	4	0.55	5	1.20	
116	Destruction, Damage, Loss or Improper Disposal	4	0.55	1	0.24	
117	Miscellaneous Offences		1.65	3	0.72	
125	Wilfully made a false statement in a document	8	1.10	5	1.20	
127	Negligent Handling of Dangerous Substances	1	0.14	0	0	
129	Conduct to the prejudice of good order and discipline - Alcohol Related	25	3.44	21	5.02	
129	Conduct to the prejudice of good order and discipline - Drug Related	18	2.48	8	1.91	
129	Conduct to the prejudice of good order and discipline - Sexual Misconduct - Personal Relationship	7	0.96	1	0.24	
129	Conduct to the prejudice of good order and discipline - Sexual Misconduct - Sexual Harassment	25	3.44	20	4.78	
129	Conduct to the prejudice of good order and discipline - Unauthorized Discharge	50	6.89	15	3.59	
129	Conduct to the prejudice of good order and discipline - Other	128	17.63	97	23.20	
130 (266 CC*)	Assault		0.14	1	0.24	
130 (270 CC)	Assaulting a Peace Officer		0	1	0.24	
130 (430 CC)	Mischief	1	0.14	0	0	
Total		726	100	418	100	

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.

<sup>\*</sup> Criminal Code, R.S.C., 1985, c. C-46.

#### ANNEX B:

# SUMMARY OF CHARGES DISPOSED OF AT COURT MARTIAL

1 April 2020 — 31 March 2021 Current as of 2 June 2021

CURRENT AS OF 2			2020	2020-2021	
NDA Section	Description	#	%	#	%
77(f)	Offence against the property or person of any inhabitant or resident of a country in which he is serving	0	0	1	0.94
83	Disobedience of lawful command	1	0.76	4	3.77
85	Insubordinate behaviour	5	3.79	7	6.61
86	Quarrels and disturbances	4	3.03	3	2.83
87	Resisting or escaping from arrest or custody	0	0.00	1	0.94
90	Absence without leave	1	0.76	5	4.72
93	Cruel or disgraceful conduct	14	10.61	7	6.61
95	Abuse of subordinates	6	4.54	0	0.00
97	Drunkenness	5	3.79	6	5.66
101.1	Failure to comply with conditions	2	1.51	0	0.00
108	Signing inaccurate certificate	2	1.51	0	0.00
111	Improper driving of vehicle	0	0.00	1	0.94
112	Improper use of vehicles	1	0.76	0	0.00
114	Stealing	4	3.03	2	1.89
115	Receiving	2	1.51	1	0.94
116	Destruction, damage, loss or improper disposal	2	1.51	1	0.94
117 (f)	Miscellaneous offences	6	4.54	0	0.00
124	Negligent performance of a military duty	0	0.00	1	0.94
125	Wilfully made a false statement in a document	4	3.03	0	0.00
129	Conduct to the prejudice of good order and discipline	50	37.88	24	22.65
130 (5(1) CDSA*)	Trafficking in substance	0	0.00	1	0.94
130 (5(2) CDSA)	Possession for purpose of trafficking	0	0.00	2	1.89
130 (87 CC**)	Pointing a firearm	0	0.00	1	0.94
130 (122 CC)	Breach of trust by public officer	1	0.76	0	0.00
130 (139 CC)	Obstructing justice	1	0.76	0	0.00
130 (162 CC)	Voyeurism	2	1.51	0	0.00
130 (191 CC)	Possession of a device for surreptitious interception of private communication	2	1.51	0	0.00
130 (264(1) CC)	Uttering threats	1	0.76	1	0.94
130 (266 CC)	Assault	4	3.03	0	0.00
130 (267CC)	Assault with a weapon or causing bodily harm	1	0.76	0	0.00
130 (271 CC)	Sexual assault	4	3.03	10	9.44
130 (279(2) CC)	Forcible confinement	0	0.00	1	0.94
130 (320.13(1) CC)	Dangerous operation	0	0.00	1	0.94
130 (354 CC)	Possession of property obtained by crime	3	2.27	0	0.00
130 (355(2) CC)	Trafficking in property obtained by crime	1	0.76	1	0.94
130 (356 CC)	Theft from mail	1	0.76	0	0.00

### ANNEX B: SUMMARY OF CHARGES DISPOSED OF AT COURT MARTIAL

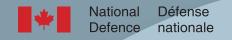
CONTINUATION					
NDA C. d. D. d. d.		2019-2020		2020-2021	
NDA Section	Description	#	%	#	%
130 (366(1) CC)	Forgery	0	0.00	12	11.33
130 (368(1) CC)	Uttering a forged document	0	0.00	11	10.38
130 (380 CC)	Fraud	1	0.76	0	0.00
130 (430 CC)	Mischief	1	0.76	1	0.94
Total		113	100	106	100

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.

<sup>\*</sup> Controlled Drugs and Substances Act, S.C. 1996, c. 19.

\*\* Criminal Code, R.S.C., 1985, c. C-46.

### ANNEX C: 2020-2021 DIRECTOR OF MILITARY PROSECUTIONS ANNUAL REPORT



### DMP ANNUAL REPORT 2020-2021



Canada





National Defence

Défense nationale

Director of Military Prosecutions

National Defence Headquarters Major-General George R. Pearkes Building 101 Colonel By Drive Ottawa, ON K1A 0K2 Directeur des poursuites militaires

Quartier général de la Défense nationale Édifice Major-général George R. Pearkes 101, promenade du Colonel-By Ottawa (Ontario) K1A 0K2

23 June 2021

Rear Admiral Geneviève Bernatchez, OMM, CD Judge Advocate General National Defence Headquarters 101 Colonel By Drive Ottawa, Ontario K1A 0K2

Rear Admiral Bernatchez,

Pursuant to article 110.11 of the Queen's Regulations and Orders for the Canadian Forces, I am pleased to present you with the 2020-2021 Annual Report of the Director of Military Prosecutions. The report covers the period from 1 April 2020 to 31 March 2021.

Yours sincerely,

Colonel Bruce MacGregor, CD, Q.C.

Director of Military Prosecutions

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## MESSAGE FROM THE DIRECTOR OF MILITARY PROSECUTIONS



As the Commanding Officer of the Canadian Military Prosecution Service, I am honoured to present publicly the Director of Military Prosecutions Annual Report for the 2020/21 reporting period. It is my seventh and final Annual Report as I will release from the Canadian Armed Forces (CAF) in September 2021.

The CAF has been faced with unprecedented challenges in this reporting period due to the COVID-19 pandemic, failures of leadership, and further victimization of CAF members and non-members by those in uniform who choose to disrespect the rights of others and disregard the Rule of Law.

In March 2020, courts martial and appeals were understandably disrupted for health and safety reasons. This resulted in the significant delays of trials and impeded the goal of ensuring that justice is done fairly and expeditiously. With input and sincere efforts by independent Military Justice System participants, courts martial and appeals got back on track earlier than many of our civilian counterparts in the civilian criminal and civil justice systems. Fortunately, these challenges have contributed to improved uses of technology and efficiencies to reduce delay within the court martial and appeal processes as well as making trials and appeals more available to the public.

This reporting period has publicly exposed remarkable failures of leadership at all levels within the CAF. These failures have existed for years. Military leaders wield great power for good reason. Used appropriately, that power is effective in fulfilling the responsibilities and obligations of a functional and professional armed force. Allegations related to failures of leadership to respect the Rule of Law and exercise self-discipline erodes trust in the institution and dangerously undermines operational effectiveness and national and international security.

As a military prosecution service, we have had to remain focussed on prosecuting cases, seeking to protect the rights of individuals, and upholding the Rule of Law in accordance with the Charter of Rights regardless of the rank of a suspect or accused. No one is above the law. While public interest continues to factor into our prosecutorial decision making, political partisan sentiment will never influence our quasi-judicial duties. Since the creation of the CMPS in 1999 this fundamental principle has been reinforced daily within our military prosecution service, in keeping with the Supreme Court of Canada's 2016 decision in Cawthorne. Under our watch, military prosecutors are not and will not be unlawfully influenced by the senior chain of command or persons in power with partisan interests. We have fought hard for our prosecutorial independence and Canadians can have confidence that we will fulfill our duties independently and ethically.

Public sentiment and discourse has intensified this reporting period with respect to sexual misconduct and victimization. Since 2014, support to victims throughout the military justice process has been a priority for the Canadian Military Prosecution Service. Fully accepting Madame Justice Deschamps' report of 2015, we quickly updated our prosecution policies to better support victims, significantly augmented our training to include trauma informed prosecution perspectives, and intensified our communications efforts with victims throughout the court martial process. Recognizing early that the legislative and regulatory process might be slow to implement the protections of the Victims' Bill of Rights, we immediately incorporated them into our own prosecution policies and practices. Support to victims in both the military and civilian systems still has a long way to go, but military prosecutors will continue to provide support without waiting for legislative and regulatory top-cover.

In closing, I want to say that it has been a privilege to have served as your Director of Military Prosecutions for almost seven years. I have been fortunate to have had an extremely strong and dedicated team of military prosecutors and civilian support staff. They understand and implement our independent mandate to promote discipline, efficiency and morale of the CAF through open and fair processes. I have also been supported by an extremely professional Judge Advocate General who recognizes that her duties as the Superintendent of the administration of military justice include steadfast protection of the independence of military prosecutors from unlawful influence. Rear Admiral Bernatchez's support has been crucial to ensuring that our service remains legitimate and consistent with the expectations and values of Canadians. Despite this level of cooperation, however, legislative changes must be made to crystallize the independence of the Canadian Military Prosecution Service. We hope to work closely with Mr. Justice Fish in establishing a way forward to make this happen in a military context.

ORDO PER JUSTITIA

Colonel Bruce MacGregor, CD, Q.C. Director of Military Prosecutions





# THE CANADIAN MILITARY PROSECUTION SERVICE: ORDO PER JUSTITIA

# DUTIES AND FUNCTIONS OF THE DMP

The DMP is the senior military prosecutor in the Canadian Armed Forces (CAF). He is appointed by the Minister of National Defence (MND) for a fixed term, pursuant to subsection 165.1(1) of the National Defence Act (NDA). Under the NDA, the DMP is responsible for the preferral of all charges to be tried by court martial and for the conduct of all prosecutions at courts martial. The DMP acts as counsel to the MND, when instructed, with respect to appeals to the Court Martial Appeal Court (CMAC) and the Supreme Court of Canada (SCC). The DMP is also responsible to provide advice in support of investigations conducted by the Canadian Forces National Investigation Service (CFNIS), which is the investigative arm of the Canadian Forces Military Police. The DMP represents the CAF at custody review hearings before military judges and the CMAC.

The DMP operates under the general supervision of the Judge Advocate General (JAG) and, in this regard, the JAG may issue general instructions or guidelines in writing in respect of prosecutions, which the DMP must ensure are made available to the public. The JAG may also issue instructions or guidelines in writing regarding a particular prosecution. The DMP must ensure that these instructions or guidelines are available to the public, unless the DMP considers that doing so would not be in the best interest of the administration of military justice.

Appointed for a four-year term, the DMP acts independently of the CAF and Department of National Defence (DND) authorities when exercising his prosecutorial powers, duties, and functions, and fulfils his mandate in a manner that is fair and impartial. Although the DMP acts under the general supervision of the JAG, he exercises his prosecutorial mandate independently of the JAG and the chain of command. The DMP has a constitutional obligation, like any other public official exercising a prosecutorial function, to act independently of partisan concerns and other improper motives.

In accordance with sections 165.12 and 165.13 of the NDA, when a charge is referred to him, the DMP determines whether to:

- Prefer (or not prefer) the charge;
- Prefer any other charge that is founded on facts disclosed by evidence in addition to, or in substitution for the charge; or
- Refer it for disposal by an officer who has
  jurisdiction to try the accused person by summary
  trial in those cases where the DMP is satisfied that
  a charge should not be proceeded with by court
  martial.

The DMP may also withdraw a charge that has been preferred.

<sup>1</sup> National Defence Act, RSC 1985, c N-5.

# MISSION AND VISION

#### Our Mission

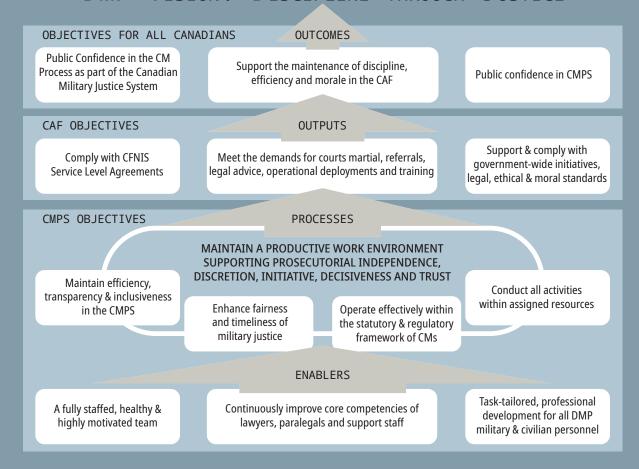
#### To provide competent, fair, swift, and deployable prosecution services to the CAF in Canada and overseas.

#### Our Vision

"ORDO PER JUSTITIA" or "DISCIPLINE THROUGH JUSTICE". The DMP is a key player in the Canadian military justice system, helping to promote respect for the law, as well as discipline, good order, high morale, esprit de corps, group cohesion, and operational efficiency and capability.

FIGURE 1-1: DMP VISION: DISCIPLINE THROUGH JUSTICE

#### DMP Vision: Discipline through Justice



# CANADIAN MILITARY PROSECUTION SERVICE

In accordance with section 165.15 of the NDA, the DMP may be assisted and represented, to the extent determined by the DMP, by officers who are barristers or advocates with standing at the bar of a province. In this regard, the DMP is assisted by a number of Regular and Reserve Force legal officers appointed to act as military prosecutors, along with a civilian paralegal and support staff. This organization, known as the Canadian Military Prosecution Service (CMPS) is headquartered in Ottawa and comprised of several Regional Military Prosecutor (RMP) offices located across Canada.

#### CMPS Headquarters

The CMPS Headquarters (HQ) consists of the DMP, the Assistant Director of Military Prosecutions (ADMP), two Deputy Directors of Military Prosecutions (DDMPs), the Appellate Counsel, the Senior Counsel – Policy & Training, and the CFNIS Legal Advisor.

#### **ADMP**

The ADMP is responsible to assist the DMP in the day-to-day management of the CMPS. In addition, the ADMP supervises the Senior Counsel – Policy & Training.

#### **DDMPs**

During this reporting period, CMPS has redefined the role the DDMPs. DDMP Operations (DDMP Ops) is responsible to supervise and mentor all of the RMPs.<sup>2</sup> DDMP Strategic (DDMP Strat) supervises the Appellate Counsel and the CFNIS Legal Advisor. DDMP Strat is also in charge of all the matters of national interest at trial level.

#### **Appellate Counsel**

The Appellate Counsel prepares and files written materials and appears as counsel on behalf of the MND for all matters at the CMAC and the SCC.<sup>3</sup>

#### Senior Counsel - Policy & Training

The Senior Counsel – Policy & Training is a senior military prosecutor who provides advice and support to the DMP on all policy-related matters. They also assist in the coordination of all training opportunities for members of the CMPS, including the organization of an annual Continuing Legal Education workshop.

#### **CFNIS Legal Advisor**

The CFNIS Legal Advisor is a military prosecutor embedded with the CFNIS and responsible to provide legal advice to members of the CFNIS HQ. The CFNIS Legal Advisor also provides advice to investigators throughout all stages of investigations, as well as updates on developments in the criminal law.

#### Regional Military Prosecutor Offices

Regional offices are located in Halifax, Valcartier, Ottawa, Edmonton and Esquimalt. The Halifax office, the Valcartier office and the Edmonton office each have two RMPs and one civilian administrative support staff. The Ottawa office has five RMPs and one civilian administrative support staff, while the Esquimalt office has one RMP and one civilian administrative support staff. RMPs are responsible for the conduct of courts martial, for representing the CAF at custody review hearings, and for the provision of legal advice and training to their respective CFNIS detachments.

<sup>2</sup> The DDMP Ops also supervises prosecutions which occur outside of Canada.

<sup>3</sup> Depending on the caseload for appeal files, it is common for other officers within the CMPS to also appear as counsel or co-counsel at the CMAC and at the SCC.

#### Sexual Misconduct Action Response Team

The DDMP for the Sexual Misconduct Action Response Team (SMART) is primarily responsible for mentoring prosecutors in the performance of their duties related to serious sexual misconduct prosecutions. The DDMP SMART is an experienced Reserve Force prosecutor who holds the rank of Lieutenant-Colonel.

#### Reserve Force Prosecutors

The CMPS relies on eight experienced civilian prosecutors who are members of the Reserve Force. These members consist of a DDMP Reserve, at the rank of Lieutenant-Colonel, who is responsible for the overall supervision and management of Reserve Force prosecutors, the DDMP SMART, and six prosecutors who assist their Regular Force counterparts in the prosecution of cases at courts martial.

The organizational chart for DMP can be found at Figure 1-2.

FIGURE 1-2: ORGANIZATIONAL CHART FOR THE **DIRECTOR OF MILITARY PROSECUTIONS DMP** ADMP Senior Counsel DDMP DDMP **DDMP DDMP** Ops Strat Reserve **SMART** RMP RMP RMP **RMP RMP Appellate RMP** CFNIS LA Counsel Reserve **Atlantic** Eastern Central Western Pacific

# CMPS PERSONNEL UPDATE

#### Regular Force

During this reporting period, CMPS went through an organizational transformation by redefining the role of the DDMPs. This reorganisation of roles was done in order to ensure a better standardisation at the national level.

Also during this reporting period, a new RMP with a solid knowledge of the military justice system was posted to the Halifax office, following the posting of one RMP from the Atlantic region to another position within the Office of the JAG (OJAG). In Central Region, a RMP who had articled with CMPS was called to the Ontario Bar in February 2021. Prior to joining the legal branch, this prosecutor brought a wealth of operational experience to the office through his prior service as a member of Canada's elite Special Forces.

Recognizing the needs and challenges associated with developing experienced military prosecutors, the JAG issued an instruction to ensure that Regular Force members can remain with the CMPS for a minimum of five years before being considered for another OJAG posting. Before this instruction, Regular Force members of the OJAG were normally considered for postings outside of the CMPS within three years. This instruction has helped the CMPS in building a pool of experienced RMPs, the benefits of which are coming to fruition. During this reporting period, the JAG renewed her commitment to this five-year minimum posting approach.

#### Reserve Force

During this reporting period two Reserve Force prosecution positions have become vacant and are expected to be staffed in the next fiscal year.

#### Civilian Personnel

During this reporting period the civilian administrative support staff position for the Pacific Region was filled on a part-time basis, from January to July 2020. The civilian member who occupied the position of Office Manager/Administrative Assistant for the Pacific Region

office, who took a year of leave without pay during the last reporting period, left the organisation after her leave in September 2020. In November 2020, the civilian member who had occupied the part-time position in 2020 was permanently hired to fill the position.

# TRAINING AND CONTINUING LEGAL EDUCATION

The need to continue to develop legal skills and keep abreast of key developments in the law is important for any lawyer, but is critical for prosecutors. Criminal law is constantly evolving through judicial decisions at the trial and appellate levels, as well as through changes to the *Criminal Code* and the NDA.

The DMP places a premium on training opportunities for members of the CMPS and, aside from a yearly Continuing Legal Education workshop, relies heavily on external organizations to fulfill much of its training requirements. The following sections describe those training opportunities undertaken by members of the CMPS as well as those training activities which were provided by members of the CMPS to other organizations.

## CMPS Continuing Legal Education Workshop

The CMPS held its annual Continuing Legal Education (CLE) workshop from 14 to 18 December 2020 for its Regular Force and Reserve Force military prosecutors. In response to the COVID-19 pandemic, the CLE workshop was held remotely. During this training, RMPs heard presentations on a variety of topics, including from civilian counsel who represent victims of sexual assault in criminal proceedings.

#### Partnership with the Directeur des poursuites criminelles et pénales du Québec

During the last reporting year, the CMPS continued its partnership with the Directeur des poursuites criminelles et pénales (DPCP) for the temporary employment of an RMP as a Crown prosecutor with the province of Quebec.

One RMP from the Eastern Region was seconded to the Quebec City DPCP's Office. This RMP assisted Crown prosecutors in the conduct of military matters that had been referred to the civilian justice system following the decision of the CMAC in the matter of *R v Beaudry*.<sup>4</sup>

These exchanges are invaluable for fostering relationships with other Canadian prosecution services, developing well-rounded advocates, and providing an experiential opportunity that help further advance our practices and policies.

#### External organizations

During this reporting period, RMPs participated in continuing legal education programs delivered by a number of organizations, including the Advocates' Society, Public Prosecution Service of Canada, the Ontario Crown Attorneys' Association, le Barreau du Québec, the Government of Canada, Ombudsman for Victims of Crime, and Osgoode Professional Development. These programs benefited the CAF not only through the knowledge imparted and skills developed, but also through the professional bonds developed by individual military prosecutors with their colleagues from the provincial and federal prosecution services.

For a complete breakdown of training opportunities provided by external organization, please refer to Table 1-1.

TABLE 1-1: EXTERNAL TRAINING OPPORTUNITIES

Host Organization	Name of Course	Number of Attendees
Public Prosecution Service of Canada	PPSC School for Prosecutions – Major Case Presentation Series	2
Public Prosecution Service of Canada	PPSC School for Prosecutions – Written Advocacy Course	1
Osgoode Professional Development	National Symposium on Sexual Assault Cases in the Criminal Court	5
Osgoode Professional Development	Written Advocacy Course	1
Osgoode Professional Development	Intensive Trial Advocacy Workshop	2
Osgoode Professional Development	Drafting and Reviewing Search Warrants	2
Ontario Crown Attorneys' Association	Crown Law (Summer School)	1
Advocates' Society	Pozner on Cross: Advanced Techniques	5
Barreau du Québec	Les relations Poursuivant-Défense sous l'angle de la déontologie	3
Barreau du Québec	Le droit criminel et la personne atteinte de troubles mentaux	1
Barreau du Québec	Séquelles d'un passage à la cour criminelle	1
Barreau du Québec	Comment négocier avec les personnalités difficiles : le coffre à outils	1
Barreau du Québec	L'obligation de confidentialité imposée à l'avocat n'est pas limitée à l'application du principe du secret professionnel	2
Barreau du Québec	Éthique et courtoisie se comporter professionnellement en tout temps	1
Government of Canada	Diversity and Inclusion Conference 2020	1
Government of Canada	Powers of the UNGA to prevent and respond to Atrocities	1
Ombudsman for Victims of Crime	Moving towards enforceable rights for victims of crime in Canada	1

<sup>4</sup> R v Beaudry, 2018 CMAC 4.

### Training provided by the CMPS

CMPS also provides support to the training activities of the OJAG and other CAF entities. During the reporting period, this support included the mentoring and supervision by RMPs of a number of junior legal officers from the OJAG who completed a portion of their "on the job training" by assisting at courts martial. The CMPS also provided support to military justice briefings given to JAG legal officers and military justice briefings offered by the Regional Services division of the OJAG to other members of the CAF.

From time to time legal officers serving outside the CMPS may, with the approval of their supervisor and the DMP, participate in courts martial as "second chair" prosecutors. The objective of this program is "to contribute to the professional development of unit legal advisors as well as to improve the quality of prosecutions through greater local situational awareness".<sup>5</sup>

#### TEMPORARY DUTY

The portability of the court martial system means that courts martial can occur anywhere in Canada or around the world. Unlike their civilian counterparts, military prosecutors are called upon to travel away from their home for significant periods of time to conduct courts martial and appeals, or to attend training events. Travel away from home - referred to as temporary duty (TD) - has a significant impact on the well-being of CMPS personnel and their families. This year, members of the CMPS were on TD for a total of 146 days. This is a significant decrease in comparison to the last reporting period (from 806 to 146). The decrease in total number of TD days for this reporting period is attributable to the COVID-19 pandemic, which resulted in greater use of technological innovations, allowing legal proceedings and training activities to take place remotely.

Table 1-2 shows the breakdown of temporary duty for CMPS personnel by Region for this reporting period.

TABLE 1-2: CMPS TEMPORARY DUTY

Region	Court Martial Related TD	Appeal Related TD	Training Related TD	Other TD	Total TD
CMPS HQ	16	0	19	5	40
Atlantic	7	0	0	0	7
Eastern	49	0	0	5	54
Central	42	0	0	0	42
Western	5	0	0	0	5
Pacific	14	0	0	0	14
Total	133	0	19	10	1626

The DMP and the Deputy Judge Advocate General Regional Services have an agreement whereby unit legal advisors may participate as second chairs to RMPs in preparation for and conduct of courts martial. Please see DMP Policy Directive #: 009/00 (https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/communications-with-unit-legal-advisors.html) for further information.

<sup>6</sup> The total number of TD days for this reporting period does not account for TD days spent by two Regular Force prosecutors while following the Legal Officer Qualification Course (LOQC). The LOQC, which was held from 9 September to 10 October 2020 in Canadian Force Base Kingston, is a necessary training requirement for all legal officers in order to become occupationally qualified and provide legal services as members of the OJAG



## MILITARY JUSTICE AND THE COURT MARTIAL SYSTEM

#### INTRODUCTION

The nature of the operational missions entrusted to the CAF requires the maintenance of a high degree of discipline among CAF members. Parliament and the SCC have long recognized the importance of a separate military justice system to govern the conduct of individual soldiers, sailors, and air force personnel, and to prescribe punishment for disciplinary breaches. In 1980 and 1992, the SCC in *MacKay v the Queen*<sup>7</sup> and *R v Généreux*,<sup>8</sup> unequivocally upheld the need for military tribunals to exercise their jurisdiction in order to contribute to the maintenance of discipline and associated military values, as a matter of vital importance to the integrity of the CAF as a national institution.

These principles were unanimously reaffirmed by the SCC in 2015 in *R v Moriarity*: "I conclude that Parliament's objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and morale of the military." In *Moriarity*, the SCC also reinforced that "... the behavior of members of the military relates to discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base." 10

These views were directly in line with earlier comments by Chief Justice Lamer in *Généreux*, which noted that the Code of Service Discipline (CSD) "does not serve merely to regulate conduct that undermines such discipline and integrity. The CSD serves a public function as well by punishing specific conduct which threatens public order and welfare" and "recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve

the particular disciplinary needs of the military. In other words, criminal or fraudulent conduct, even when committed in circumstances that are not directly related to military duties, may have an impact on the standard of discipline, efficiency and morale in the CAF. There is thus a need for separate tribunals to enforce special disciplinary standards in the military."<sup>11</sup>

Following *Moriarity*, the SCC delivered another unanimous decision related to the military justice system. In 2016, the SCC confirmed in the case of *R v Cawthorne*<sup>12</sup> that the authority conferred to the MND over appeals was in compliance with the *Canadian Charter of Rights and Freedoms (Charter)*. This decision not only confirmed the organizational structure of the CMPS, but also was important for all prosecution services across Canada, as the court touched upon the concept of prosecutorial independence and abuse of process.<sup>13</sup> This clearly shows that the military justice system is a legitimate and respected parallel justice system within the broader Canadian legal mosaic.

On 26 July 2019, the SCC ruled yet again, in *R v Stillman*, that section 130(1)(a) of the NDA is constitutional, finding it consistent with section 11(f) of the *Charter*. In its decision, the SCC seized the opportunity to summarize and affirm its prior jurisprudence relating to the military justice system. Among other things, the SCC referred to its decision in *Mackay v The Queen*, which recognized the constitutionality of section 130(1) (a) as a valid exercise of Parliament's power under section 91(7) of the *Constitution Act*, 1867. The SCC also

<sup>7</sup> MacKay v the Queen, [1980] 2 SCR 370 at paras 48 and 49.

<sup>8</sup> R v Généreux, [1992] 1 SCR 259 at para 50 [Généreux].

<sup>9</sup> R v Moriarity, 2015 SCC 55 at para 46.

<sup>10</sup> Ibid at para 54.

<sup>11</sup> Généreux, supra note 2 at 281 and 293.

<sup>12</sup> R v Cawthorne, 2016 SCC 32.

<sup>13</sup> The Attorney General of Canada, the Attorney General of Ontario, the Attorney General of Quebec, the Attorney General of British Columbia and the Director of Criminal and Penal Prosecutions of Quebec, all intervened in this appeal to the SCC.

<sup>14</sup> R v Stillman, 2019 SCC 40.

<sup>15</sup> Ibid at paras 4 and 113 citing Mackay v The Queen at 397.

reemphasized its decision in *Généreux*, which recognized the uniqueness of the military justice system as an essential mechanism to properly perform the public function of "maintaining discipline and integrity in the Canadian Armed Forces." Finally, the SCC upheld its decision in *Moriarity*, and refused to require a military nexus when charging a service member under section 130(1)(a) of the NDA other than "the accused's military status." <sup>17</sup>

#### COURTS MARTIAL

Courts martial are formal military courts presided over by independent military judges. These tribunals are similar in nature to civilian criminal courts and are designed to deal predominantly with offences that are more serious in nature. Courts martial are conducted in accordance with rules and procedures similar to those followed in civilian criminal courts, while maintaining the military character of the proceedings. This chapter provides a basic overview of the court martial system. For further information regarding the court martial process, please refer to Table 2-1.

The court martial system has many features in common with the civilian justice system. For example, the *Charter* applies to both the military justice system as well as the civilian justice system. As such, in both systems of justice, the accused person is presumed innocent until the prosecution has proven the guilt of the accused beyond a reasonable doubt.

Additionally, courts martial are independent and impartial tribunals whose hearings are open to the public. Before a court martial takes place, it is announced in the Routine Orders of the base where it is to occur and the media is notified. Once a court martial is completed, the results are communicated publicly through a variety of means, including through social media.

Statutorily, pursuant to section 179 of the NDA, courts martial have the same rights, powers, and privileges as superior courts of criminal jurisdiction with respect to all "matters necessary or proper for the due exercise of its jurisdiction," including the attendance, swearing in, and examination of witnesses, the production and inspection of documents, and the enforcement of their orders.

16 *Ibid* at paras 35, 36 and 55 citing *Généreux* at 293, 295, 297.

There are two types of courts martial provided for under the NDA: General Courts Martial (GCM) and Standing Courts Martial (SCM). A GCM is comprised of a military judge and a panel of five CAF members. The panel is selected randomly by the Court Martial Administrator and is governed by rules that reinforce its military character. At a GCM, the panel serves as the trier of fact while the military judge makes all legal rulings and imposes the sentence. Panels must reach unanimous decisions on the ultimate finding as to whether or not an accused is guilty beyond a reasonable doubt.

An SCM is conducted by a military judge sitting alone, who is responsible for the finding on the charges and imposing a sentence if the accused is found guilty.

At a court martial, the prosecution is conducted by a legal officer appointed by the DMP. In determining whether to prefer a matter for trial by court martial, military prosecutors must conduct a two-stage analysis. They must consider whether there is a reasonable prospect of conviction should the matter proceed to trial and whether the public interest requires that a prosecution be pursued. This test is consistent with those applied by Attorneys General throughout Canada and by prosecution agencies elsewhere in the Commonwealth.

In contrast with the public interest analysis applied elsewhere, the military justice system must take additional factors into account, such as:

- the likely effect on public confidence in military discipline or the administration of military justice;
- the prevalence of the alleged offence in the unit or military community at large and the need for general and specific deterrence; and
- the effect on the maintenance of good order and discipline in the CAF, including the likely impact, if any, on military operations.

Information relating to these and other public interest factors comes, in part, from the commanding officer of the accused, when they send the matter to their next superior officer in matters of discipline. That superior officer may also comment on public interest factors when referring the matter to the DMP.

An accused person tried by court martial is entitled to legal representation by or under the supervision of the Director of Defence Counsel Services. This legal

<sup>17</sup> Ibid at paras 92 and 96.

representation is provided to an accused person at no cost. An accused person may also choose to retain a lawyer at their own expense.

In most cases, the accused person has the right to choose between trial by GCM or SCM. However, for the most serious offences, a GCM will generally be convened while an SCM will be convened for less serious offences.

Both an offender convicted by court martial and the MND have a right to appeal court martial decisions to

the CMAC, a court comprised of civilian judges who are designated from the Federal Court of Canada and the Federal Court of Appeal, or appointed from the Superior Courts and Courts of Appeal of the provinces and territories.

CMAC decisions may be appealed to the SCC on any question of law on which a judge of the CMAC dissents, or on any question of law if leave to appeal is granted by the SCC.

TABLE 2-1: ADDITIONAL FACTS ABOUT THE COURT MARTIAL SYSTEM

Торіс	Remarks
Purpose of the Military Justice System	The purpose of the military justice system is to contribute to the operational effectiveness of the CAF by maintaining discipline, efficiency, and morale.
Jurisdiction of the Military Justice System	Courts martial only have jurisdiction over those persons who are subject to the CSD. When a person joins the CAF, they remain subject to all Canadian laws, but also become subject to the CSD. Therefore, members of the CAF are subject to the concurrent jurisdiction of both the civilian and the military justice system.
Requirement for Pre-charge Legal Advice	In the majority of cases, the person authorized to lay a charge in the military justice system must first obtain pre-charge legal advice concerning the sufficiency of the evidence, whether or not a charge should be laid, and the appropriate charge.
	Military prosecutors provide pre-charge legal advice to all cases investigated by the CFNIS. In some cases, military prosecutors will also assist legal officers with the OJAG by providing pre-charge legal advice in cases investigated by those members of the military police who are not a part of the CFNIS, as well as by unit investigators.
Custody Review Process	If a person is arrested under the CSD, they may be released by the person making the arrest or by a custody review officer. If the individual is not released, the matter will go before a military judge to determine if the individual is to be released, with or without conditions, or if they are to remain in custody. Military prosecutors represent the CAF at all custody review hearings which are held before a military judge.
Disclosure Obligations	Accused persons in the military justice system have the constitutional right to make full answer and defence. Therefore, military prosecutors must disclose all relevant information to the accused, including both inculpatory and exculpatory evidence, whether or not the prosecution intends to introduce it at court martial.
Sentencing	Under the NDA, military judges have a wide variety of sentencing options available for those members found guilty at court martial. Aside from fines and periods of imprisonment, which are also available in the civilian justice system, military judges are able to sentence offenders to dismissal with disgrace, dismissal, reprimands, detention, reduction in rank, and minor punishments.
	In addition, new provisions added to the NDA, effective 1 September 2018, allowed military judges to grant absolute discharges, an order that the offender serve his or her sentence intermittently, as well as an order to suspend the execution of any sentences of imprisonment or detention.



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# COURT MARTIAL PROCEEDINGS: YEAR IN REVIEW



The information and analysis provided below reflects the operations of the CMPS pertaining to pre-charge advice, referrals, post-charge reviews, courts martial, and custody review hearings over the course of the reporting period.

#### **OVERVIEW**

The CMPS's total court martial caseload for the reporting period consisted of 123 files: 76 referrals were received during the reporting period and 47 files were carried over from the previous reporting period.

In addition, the CMPS handled 87 requests for precharge advice, 16 appeals to the CMAC and one (1) appeal to the SCC, for a total of 227 files over the course of the current reporting period (pre-charge, referral and appeal files combined).

Military judges are, in certain circumstances, required to review orders made to retain a CAF member in service custody. The DMP represents the CAF at all such hearings. One pre-trial custody review hearing was conducted during this reporting period and the member was released with conditions. Please refer to Annex D for an overview of the disposition of this custody review hearing.

Finally, a total of 34 courts martial were completed. Two (2) of those were new trials following appeals and orders made by the CMAC for the conduct of new courts martial: *R v LS Edwards* and *R v Cpl Thibault*.

# THE COVID-19 PANDEMIC

The COVID-19 pandemic presented prosecution services across Canada with unprecedented challenges and limitations on bringing matters before the courts. While the CMPS was not spared, it was able to quickly adapt to the new reality of prosecuting cases in the pandemic environment and has proven itself to be operationally focused and responsive. Courts martial, including those involving a panel, have proceeded safely and efficiently, sometimes virtually where necessary, to fulfil the requirement that our prosecutors be globally deployable in any environment. Under CMPS leadership, the entire team met regularly to discuss ongoing matters, engage with the chain of command and victims, and conducted weekly training sessions to ensure that the interest of justice and discipline were advanced. Successfully prosecuting cases in the new COVID-19 environment has demonstrated that the CMPS is a small, but highly adaptable and agile component of the military justice system which can achieve desired outcomes in any environment

#### PRE-CHARGE ADVICE

RMPs within the CMPS are responsible to provide precharge advice to both the CFNIS<sup>18</sup> and to unit legal advisors.<sup>19</sup> In this reporting period, 82 requests for precharge advice were sent to the CMPS and 5 requests had been pending from the previous reporting period. Of the 87 total requests, 71 pre-charge advice files were completed during this reporting period, leaving 16 files still pending at the end of the current reporting period.

The number of completed pre-charge advice files is lower than the average number of completed files over the past four reporting periods (118). It is likely that the pandemic had a direct impact on the number of requests for advice received by CMPS during the reporting period. It is anticipated that as pandemic restrictions subside, and the Canadian Armed Forces returns to normal operational activities, the number of requests for pre-charge advice will increase in the next reporting year.

Figure 3-1 shows the number of completed pre-charge files for the last five reporting periods.

### REFERRALS AND POST-CHARGE REVIEWS

#### Number of Referrals Received During the Reporting Period

During this reporting period, 76 referrals were received by the DMP. This number represents the same number of cases referred to the DMP during the last reporting period.

## Caseload for the Reporting Period

When combined with the 47 files that were carried over from the previous reporting period, the caseload for this reporting period was 123 files.<sup>20</sup>

Figure 3-2 shows the number of files handled for the past five reporting periods.

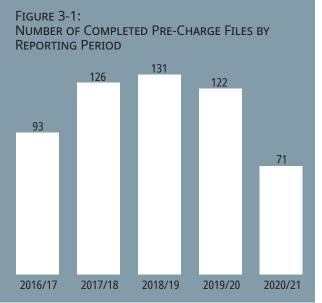
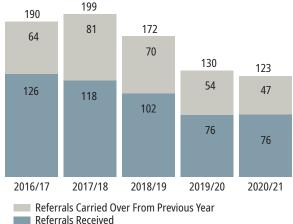


FIGURE 3-2: CASELOAD BY REPORTING PERIOD



<sup>18</sup> DMP Policy Directive 002/99: Pre-Charge Screening - https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/pre-charge-screening.html

<sup>19</sup> JAG Policy Directive 048/18 – Pre-Charge Screening requires unit legal advisors to seek the opinion of a prosecutor for pre-charge advice when the evidence reasonably supports the conclusion that a charge will not proceed by way of summary trial but is likely to be referred for trial by court martial.

<sup>20</sup> Carried over files are files that were not closed at the end of the previous reporting period, that is, files where one or more charge had already been preferred, but the court martial has not yet commenced, and files that still required a post-charge decision by the end of the previous reporting period.

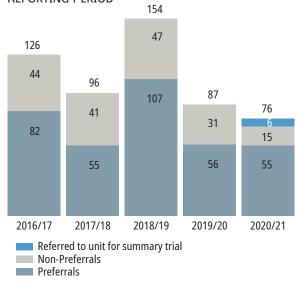
#### Preferrals, Non-Preferrals and Referral of charge to unit for summary trial

During this reporting period, post-charge decisions were made by an RMP in 76 files, while eleven (11) files were still pending a prosecutorial decision at the end of the current reporting period.

Of the 76 completed files, 55 files led to one or more charge being preferred for court martial, 15 files were not preferred and 6 files were referred back to the originating unit to try the accused person by summary trial. The preferral rate for this reporting period is 72%.

Figure 3-3 shows the number of preferrals, non-preferrals and referral of charge to unit for summary trial for the past five reporting periods.<sup>21</sup>

FIGURE 3-3: Number of Preferrals and Non-Preferrals by Reporting Period

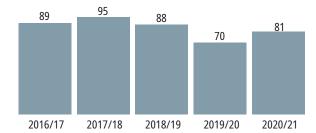


### Time to Make a Prosecutorial Decision

The average number of days from the time a file was referred to the DMP until a RMP made a post-charge decision was approximately 81 days.<sup>22</sup> This represents an increase of 11 days from the previous reporting period. It is also below the average number of days for the past five reporting periods, which is 85 days.

Figure 3-4 illustrates the average number of days from referral to a post-charge decision for the past five reporting periods.

FIGURE 3-4: AVERAGE NUMBER OF DAYS FROM REFERRAL TO POST-CHARGE DECISION BY REPORTING PERIOD



## Preferral Rates by Investigative Agency

Although all files referred to the DMP are received through a referral authority, the incident giving rise to the charge may be investigated by one of three military investigative agencies: the CFNIS, an investigator with the military police who is not a member of the CFNIS, or a unit investigator. As such, the rate of preferrals varies between investigative agencies as their investigators have different levels of experience, proficiency and training.

During this reporting period, the preferral rate for those files investigated by the CFNIS was 96%. This preferral rate is slightly higher than that of the regular military police (95%), but is markedly higher than that of unit investigators (46%).

This divergence of preferral rates has been consistent over the past several years, with those investigations conducted by the CFNIS being preferred at a higher rate than unit investigators. However, the preferral

<sup>21</sup> Cases where a decision has been made to refer the charge for disposal by an officer who has jurisdiction to try the accused person by summary trial pursuant section 165.13 of the NDA are only tracking for this reporting period.

<sup>22</sup> This statistic accounts only for cases where a post-charge decision was made during the current reporting period.

rates by military police has increased significantly when compared to previous reported periods.

The DMP has identified the discrepancy in preferral rates, and in particular the low preferral rate of unit investigations, as an issue and has taken a number of steps to improve the preferral rates of investigative agencies. For example, in the past reporting period, the CMPS amended a number of its policy directives to require RMPs to provide feedback to the investigator both when there is a decision not to prefer a charge and also at the conclusion of a court martial, with the aim of improving the quality of future investigations. The DMP also provided two RMP's to attend and assist with the CFMPA Military Police Investigators Course, conducted in Borden in October 2020.

For a complete overview of preferral rates by investigative agency over the past five reporting periods, please refer to Figure 3-5.

#### COURTS MARTIAL

This section provides an overview and analysis of cases heard at a court martial during the reporting period. For a complete list of all courts martial heard during the reporting period, please refer to Annex A.

#### Number of Courts Martial

A total of 34 courts martial were completed during this reporting period. Of those, 27 were SCMs and 7 were GCMs. This number is lower than the historical average of courts martial for the past five years (52).

This difference is due to the fact that the Court Martial Administrator, acting on direction from the Chief Military Judge and the Acting Chief Military Judge, canceled convening orders for courts martial that were scheduled from 16 March to 31 May 2020.

#### Court Martial Outcomes

Of the 34 courts martial that were held, accused persons were found guilty of one or more charges in 25 cases, had all charges withdrawn in one (1) case,<sup>23</sup> had a stay

Figure 3-5: Preferral Rates by Investigative Agency and by Reporting Period

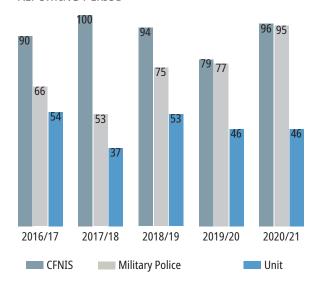
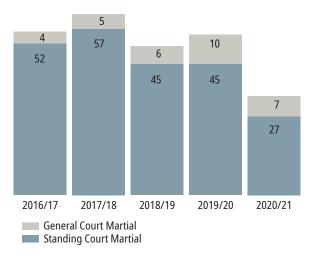


FIGURE 3-6: NUMBER OF COURTS MARTIAL BY TYPE AND BY REPORTING PERIOD



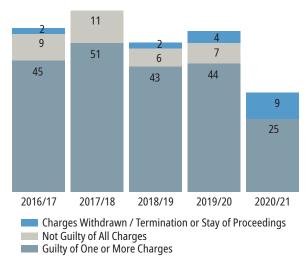
of proceedings in seven (7) and had a termination of proceedings in one (1) case.

In addition, two (2) of the 34 courts martial were new trials following appeals and orders made by the CMAC for the conduct of a new court martial: *R v LS Edwards* and *R v Cpl Thibault*. In *R v Cpl Thibault*, the accused was found guilty following a new court martial while a stay of proceeding was ordered in *R v LS Edwards*.

<sup>23</sup> The seven cases which resulted in a stay and the one case which resulted in a termination of proceedings were all related to military judges finding breaches of the 11d Charter rights of the accused due to a lack of judicial independence. All of these cases were appealed by the DMP on behalf of the MND.

Figure 3-7 shows a breakdown of court martial outcomes for the last five reporting periods.

FIGURE 3-7: COURTS MARTIAL OUTCOMES BY REPORTING PERIOD



#### Punishments at Courts Martial

In this reporting period, a total of 25 sentences were handed down by courts martial, involving a total of 37 punishments. While only one sentence may be given at a court martial, a sentence may involve a combination of more than one punishment.

Again this year, the most common punishment awarded at courts martial was a fine, with a total of 20 fines awarded representing 54% of all punishments. The next most common punishment awarded was a severe reprimand, which accounted for approximately 8% of all punishments. Three (3) custodial punishments were awarded.

A complete breakdown of all punishments imposed at courts martial for the last five reporting periods can be found in Table 3-1.

TABLE 3-1: PUNISHMENTS AT COURT MARTIAL

Punishment	2016/17	2017/18	2018/19	2019/20	2020/21
Dismissal	1	3	2	1	0
Imprisonment	4	7	3	2****	3
Detention	4*	4**	1***	1****	0
Reduction in Rank	9	9	2	3	4
Forfeiture of Seniority	0	0	0	1	0
Severe Reprimand	6	11	9	15	5
Reprimand	17	20	4	6	3
Fine	39	38	35	32	20
Minor Punishment	0	3	0	0	2
Absolute Discharge*****	N/A	N/A	0	2	0
Total	80	95	56	63	37

<sup>\*</sup> One of these punishments was suspended by the presiding military judge.

<sup>\*\*</sup> Three of these punishments were suspended by the presiding military judge.

<sup>\*\*\*</sup> This punishment was suspended by the presiding military judge.

<sup>\*\*\*\*</sup> One of these punishments was suspended by the presiding military judge.

<sup>\*\*\*\*\*</sup> This punishment was suspended by the presiding military judge.

<sup>\*\*\*\*\*\*</sup>Absolute discharges became available to presiding military judges as of 1 September 2018 under section 203.8 of the NDA.

## Time from Preferral of Charge(s) until Commencement of Court Martial

During this reporting period, the average number of days from the preferral of charge(s) until the commencement of the court martial was 232 days.<sup>24</sup> This is an decrease of 46 days in comparison to the previous reporting period and is 12 days above the past five year average of 244 days.

Figure 3-8 shows the average number of days from the preferral of charges until the commencement of the court martial for the last five reporting periods.

#### Offence Categories

All files prosecuted by the DMP are categorized into one of four broad offence categories: sexual misconduct, alcohol and drugs, conduct offences and fraud and other property-related offences. Table 3-2 provides an overview of the number of completed courts martial for each offence category.

Figure 3-8:
Average Number of Days from Preferral to
Commencement of Court Martial by Reporting
Period

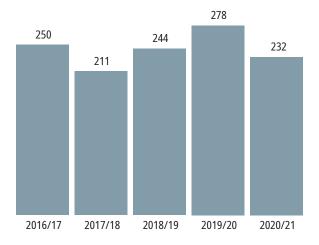


TABLE 3-2: COURTS MARTIAL BY OFFENCE CATEGORY

	Completed Courts Martial							
Offence Category	2016/17	2017/18	2018/19	2019/20	2020/21			
Sexual Misconduct	21	20	20	25	14			
Alcohol and Drugs	7	2	5	1	3			
Conduct	21	34	21	20	13			
Fraud and Property	8	6	5	9	4			
Total	57 <sup>25</sup>	62	51	55 <sup>26</sup>	34			

<sup>24</sup> This statistic only includes cases where the court martial actually commenced during this reporting period, even if the preferral of charge(s) was completed during previous reporting periods.

<sup>25</sup> A discrepancy was noted in the DMP Annual Report 2016-17. Figure 21 indicates that 56 courts martial were completed in 2016-17. However, the number of completed courts martial by offence category found at Figure 27 amounts to 57 completed courts martial. The latter number was used in Table 3-2 of this reporting period.

<sup>26</sup> In the DMP Annual Report 2019-20, two courts martial (*R v Maj Duquette* and *R v Cpl Thibault*) were considered completed because the accused persons were found guilty but the sentencing hearings had not yet started. However, the two courts martial (*R v Maj Duquette* and *R v Cpl Thibault*) were completed during this reporting period. These two courts martial are then counted as completed during this reporting period.

## NOTABLE COURT MARTIAL CASES

This section provides a summary of three notable courts martial that were held during this reporting period. Please refer to Annex A for an overview of all the courts martial held during this reporting period.

#### R v Thibault, 2020 CM 5005

Sergeant Thibault was originally charged in 2014 with one count of an offence contrary to the section 130 of the NDA, that is, sexual assault, contrary to section 271 of the *Criminal Code*. This court martial was a new trial following appeals that proceeded to the SCC. After the decision in *R v Stillman*, 2019 SCC 40, the new trial order made by the CMAC in 2017 was reinstated.

On 18 February 2020, Sergeant Thibault was convicted. The defence requested an adjournment to obtain a presentencing report for the purposes of the sentencing hearing. In March 2020, the COVID-19 pandemic caused further delays to the sentencing hearing. In the intervening time, Sergeant Thibault changed counsel and filed an application alleging a breach of his right to be tried by a fair and independent tribunal protected under section 11d) of the Charter and a motion for recusal. Before the hearing on these applications could be held, Sergeant Thibault also filed an application for judicial review and a motion for a provisional writ of prohibition at the Federal Court, seeking to preclude the presiding military judge to decide on the motion for recusal and to order the designation of another military judge to preside over his court martial.

On 14 December 2020, in the decision *Thibault c Canada* (*Directeur des poursuites militaires*), 2020 CF 1154, the Federal Court denied Sergeant Thibault's motion for a writ of prohibition. On 21 December 2020, the presiding military judge heard the motion for recusal and the DMP's motion to quash the *Charter* application. On 3 February 2021, Sergeant Thibault withdrew his application for judicial review at the Federal Court. On 12 January 2021, Sergeant Thibault filed a motion to adduce new evidence as part of the motion for recusal, which was denied on 20 January 2021. Finally, on 27 January 2021, the presiding military judge denied the motion for recusal and quashed the application alleging a breach of Sergeant Thibault's rights protected under section 11d) of the *Charter*.

On 26 February 2021, Sergeant Thibault was sentenced to imprisonment for a term of 18 months, but was released pending appeal. On 29 March 2021, Sergeant Thibault filed a notice of appeal to the CMAC.

#### R v Lévesque, (citation not yet available)

Sergeant Lévesque was charged with ten offences for incidents that took place while he was deployed as part of a military operation in Senegal. These incidents involved pointing his service weapon towards children; uttering threats towards his subordinates; dangerous driving of a military vehicle; mischief; and uttering racist and sexualized comments about the local population.

He pleaded guilty to 4 counts: one for having pointed a firearm at another person under section 130 of the NDA contrary to section 87 of the *Criminal Code*; one count of having driven a vehicle of the Canadian Forces in a dangerous manner under section 111 of the NDA; and two counts of conduct to the prejudice of good order and discipline under section 129 of the NDA. As part of the resolution, the other six counts were withdrawn.

A sentencing hearing took place at the Valcartier Garrison (Québec) from 2 to 6 November 2020. An expert witness testified as to the impact a custody sentence would have on the mental health of Sergeant Lévesque. While she did recognize that rehabilitation was an important factor, the military judge felt that the principles of denunciation and deterrence, in this case, required a custodial sentence.

Sergeant Lévesque was sentenced to three months of imprisonment in military prison and a reduction in rank to corporal. He appealed the legality of the sentence as it pertains to the location of his imprisonment.

#### R v Duquette, 2019 CM 3016

Major Duquette was charged under section 130 of the NDA for sexual assault contrary to section 271 of the *Criminal Code*; under section 129 of the NDA for conduct prejudicial to good order and discipline for sexual harassment; and for ill-treating a person that was subordinate to him under section 95 of the NDA.

The incidents took place in CFB Bagotville during a Christmas party. On the dance floor, Major Duquette touched the buttocks of his subordinate without her consent while rubbing his torso on hers. He also whispered sexualized comments in her ears. The scene was observed by two civilian witnesses.

Following his trial, which took place in November 2019, he was found guilty on all counts.

Because of the pandemic, the sentencing hearing only took place in June of 2020. After a contested hearing, Major Duquette was sentenced to a reduction in rank to Captain. It was also ordered he be registered on the sex offender registry for 10 years and that a sample of his DNA be collected.

Captain Duquette appealed this decision and it will be heard by the CMAC on 29 June 2021.

#### **APPEALS**

This section provides an overview of those cases which were appealed to the CMAC as well as to the SCC. Please refer to Annex B for an overview of the disposition of cases appealed to the CMAC and to Annex C for those cases referred to the SCC.

### Decisions Rendered by the CMAC

#### R v Banting, 2020 CMAC 2

On 7 November 2019, Lieutenant Banting filed a motion seeking costs at trial and on appeal, on a solicitor-client basis. The total amount claimed was \$61,155.00. The motion followed the decision of the Court, rendered on 6 November 2019, to dismiss DMP's appeal of the no *prima facie* determination made by the military judge at trial, who found that there was no evidence of prejudice to good order and discipline.

On 22 April 2020, party-and-party costs in the amount of \$10,000 were awarded by the CMAC after a determination that the Respondent should not bear the costs of what the CMAC referred to as a test case with major implications across the whole of the military justice system pertaining to what constitutes prejudice to good order and discipline.

#### R v Duquette, 2020 CMAC 4

On 23 November 2019, a military judge found Major Duquette guilty of sexual assault under section 130 of the NDA (contrary to section 271 of the *Criminal Code*), of conduct to the prejudice of good order and discipline contrary to section 129 of the NDA, and of ill treatment of a person who by reason of rank was subordinate to him contrary to section 95 of the NDA.

The military judge imposed a sentence of reduction in rank to the rank of captain and ordered his registration on the sex offender registry. Captain Duquette appealed the legality of the findings of guilty and of the sentence imposed on him on 26 June 2020. He also filed an application on 23 July 2020, requesting a stay of execution of the reduction in rank pending appeal.

On 29 October 2020, the Court dismissed Captain Duquette's motion for a stay of execution of the sentence pending appeal. The appeal is scheduled to be heard on 29 June 2021.

#### R v Renaud, 2020 CMAC 5

Captain Renaud was charged with five offences and was found guilty by the SCM of two counts (fourth and fifth counts on the charge sheet) of conduct to the prejudice of good order and discipline, contrary to section 129 of the NDA, for inappropriate sexualized comments made during his deployment on Operation REASSURANCE in Romania. He was sentenced to a severe reprimand and a fine in the amount of \$2,500.

Captain Renaud appealed the legality of the military judge's findings on both counts of conduct to the prejudice of good order and discipline.

In relation to the fourth count, the Court held that the issue was purely one of fact and that the military judge did not err and considered the entirety of the evidence. On the fifth count, the Court confirmed that the military judge had correctly applied the principles previously set out in *R v Golzari*, 2017 CMAC 3 and *Canada v Bannister*, 2019 CMAC 2 pertaining to the proof of prejudice to good order and discipline.

#### R v Duquette, 2020 CMAC 6; 2020 CMAC 7

The Court, having initially dismissed a motion for an extension of time within which to serve and file the Appellant's Memorandum of Fact and Law after Captain

Duquette had failed to meet the deadline imposed by the CMAC rules, reinstated the appeal on 10 December 2020 after receiving a motion to reconsider from the Appellant. The hearing of the appeal is set for 29 June 2021.

#### R v McGregor, 2020 CMAC 8

Following an SCM, Corporal McGregor was found guilty of sexual assault under section 130 of the NDA (contrary to section 271 of the *Criminal Code*); two counts of voyeurism under section 130 of the NDA (contrary to section 162(1) of the *Criminal Code*); one count of possession of a device for surreptitious interception of private communications under section 130 of the NDA (contrary to section 191(1) of the *Criminal Code*); one count of cruel or disgraceful conduct, contrary to section 93 of the NDA; and, one count of conduct to the prejudice of good order and discipline, contrary to section 129 of the NDA. He was sentenced to imprisonment for a period of 36 months and dismissal with disgrace from Her Majesty's service.

At trial, Corporal McGregor made an application pertaining to the extraterritorial application of the *Charter*, alleging that the search of his home in Virginia, USA and the subsequent seizure and search of electronics was unlawful, in breach of section 8 of the *Charter*. This was dismissed by the military judge after a contested hearing on 13 September 2018. The evidence seized was admitted in evidence.

Corporal McGregor appealed the legality of the finding concerning his application under section 8 of the *Charter*.

The appeal was heard on 26 June 2020. The Court, on the basis of the previous decision of the SCC in *R v Hape*, 2017 SCC 26, held that the *Charter* did not apply in this case as the issuance and execution of the search warrant in Virginia was an exercise of American sovereign authority. The Court further stated that this does not end the matter as the trial judge retains the residual discretion to exclude evidence that would render a Canadian trial unfair. However, in this case, the Court found that the search was properly authorized under Virginia law, including for the search and seizure of electronic devices, that it was conducted reasonably and that it would have been in compliance with *Charter* standards had the search been wholly conducted in Canada under Canadian warrants.

Corporal McGregor is seeking leave to appeal to the SCC.

#### R v Champion, 2021 CMAC 1

Sailor third class Champion was arrested for drunkenness on 13 November 2020 and released on conditions by his unit Custody Review Officer (CRO) the following day. On 15 November 2020, Sailor third class Champion was arrested again for breach of conditions. This time, the CRO decided not to release him and Sailor third class Champion was taken before a military judge for a Custody Review Hearing on 17 November 2020. At the hearing, and despite the fact that no charges had been laid, the military judge ordered the release of Sailor third class Champion but chose to impose conditions aimed at insuring that Sailor third class Champion would remain under military authority and report for duty as required.

On 23 November 2020, Sailor third class Champion applied to the CMAC under paragraph 159.9(1) NDA for a review of the military judge's direction to release with conditions. On the same day, Sailor third class Champion was charged with one count of absence without leave contrary to section 90 of the NDA and one count of drunkenness contrary to section 97 of the NDA. On 24 November 2020, Sailor third class Champion's Commanding Officer decided not to proceed with the charges and, as a result, all conditions imposed were cancelled in accordance with article 105.303(1)(a) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O).

On 19 February 2021, the Court decided to hear the application despite its mootness to consider the law applicable on whether it is open to a military judge to impose conditions upon release in instances where the member has not yet been charged.

### Appeals Initiated at the CMAC

#### *R v Edwards et al*, CMAC-606, 607, 608 and 609

The DMP appealed decisions rendered by military judges holding that the right to be tried by an independent and impartial tribunal under section 11(d) of the *Charter* was breached by an order issued by the Chief of the defence staff (CDS) designating a commanding officer for matters of discipline involving military judges (CDS Order, Designation of Commanding Officers with respect to officers and non-commissioned members on

the strength of the Office of the Chief Military Judge DEPT ID 3763, 19 January 2018), and subsequently by the Canadian Forces Organization Order 3763 (Canadian Forces Organization Order 3763 Office of the Chief Military Judge, 27 February 2008). The military judges have concluded that they are not liable to be charged, dealt with and tried by court martial. They held that it would be to interfere with the role of the Military Judges Inquiry Committee (MJIC) and would affect the independence and impartiality of the military judges in a way that would violate an accused's rights under section 11(d) of the *Charter*.

The appeal was heard on 29 January 2021. The judgment of the Court is under reserve.

#### R v Christmas, CMAC-610

This appeal raises the same issues as in *R v Edwards et al.*, CMAC-606, 607, 608 and 609. It has been adjourned *sine die* until the decision in *R v Edwards et al.* is rendered.

#### *R v Proulx*, CMAC-612 and *R v Cloutier*, CMAC-614

These appeals raise the same issues as in *R v Edwards et al.*, CMAC-606, 607, 608 and 609 as well as the constitutionality of sections 12, 18, 17 and 60 of the NDA. The appeal was heard on 11 March 2021 and the Court has reserved judgment.

#### R v Lévesque, CMAC-613

Corporal Lévesque pleaded guilty to one count of having pointed a firearm at another person under section 130 of the NDA contrary to section 87 of the Criminal Code, one count of an act to the prejudice of good order and discipline under section 129 of the NDA, one count of having driven a vehicle of the Canadian Forces in a dangerous manner under section 111 of the NDA and one count of conduct to the prejudice of good order and discipline under section 129 of the NDA. He was sentenced to imprisonment for three months and to a reduction in rank from sergeant to corporal. The military judge decided that the exigencies of service required that the imprisonment sentence be served at the military prison, having regard to the COVID-19 situation and the requirement for Corporal Lévesque to receive treatment for a post-traumatic stress disorder condition resulting from military service.

Corporal Lévesque is appealing the legality of the committal order, alleging that the military judge erred in her interpretation of the "exigencies of service" requirement under article 114.06(2) of the QR&Os and failed to consider the legal obligation for civilian prisons to abide by specific norms pertaining to the provision of healthcare to prisoners.

A hearing date has not been set.

### Decision Rendered by the SCC

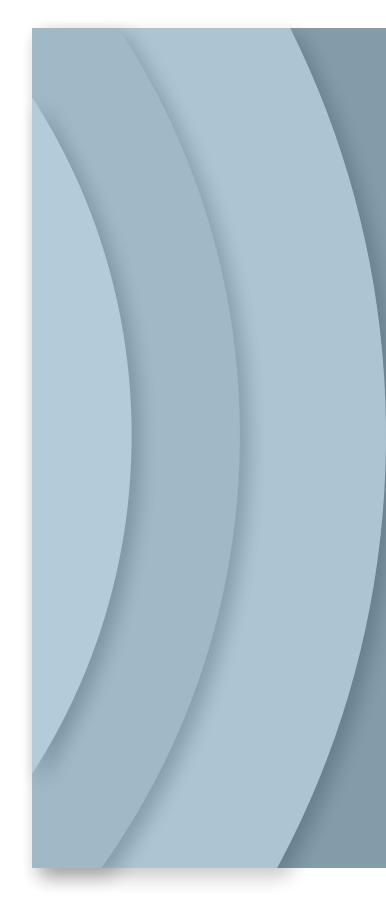
No decision was rendered by the SCC during this reporting period.

## Applications for Leave to Appeal to the SCC

#### R v McGregor

Corporal McGregor sought leave to appeal the case of *R v McGregor*, 2020 CMAC 8 to the SCC on 11 February 2021. A decision of the SCC is pending.

Please refer to Annex C for an overview of all appeals at the SCC during the reporting period.





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## COMMUNICATION AND OUTREACH

Communication and outreach activities play a vital role in the legitimization of Canada's military justice system. From key players in the military justice process, as well as national and international strategic partners and organizations, communication and outreach activities form an integral part of the DMP's strategic view to promoting Canada's military justice system. In that regard, the DMP has made a concerted effort to engage a number of organizations to further enhance the legitimacy of Canada's military justice system. This Chapter sets out those communications and outreach activities by the DMP over the course of the current reporting period.

efficiency through a robust military justice system. Despite the constraints related to the COVID-19 pandemic, RMPs made sure to keep regular communication with senior members of the chain of command on the various military bases in Canada when required during this reporting period, in accordance with the instructions of the DMP.

While protecting the prosecutorial independence of

the CMPS, the DMP recognizes the importance of

maintaining collaborative relationships with the chain

of command of the CAF. Collaborative relationships

with the chain of command ensure that both entities

work together to strengthen discipline and operational

## CAF CHAIN OF COMMAND

The military justice system is designed to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency, and morale. It also ensures that justice is administered fairly and with respect for the rule of law. As the military justice system is one of several tools available to the chain of command in order to help it reach these objectives, it is imperative that the DMP, and prosecutors within the CMPS, actively and effectively engage the chain of command throughout the court martial process.

Recent amendments to the NDA have expressly recognized principles and purposes of sentencing within the military justice system distinct from the sentencing regime within the civilian criminal justice system, along with unique military factors that must be taken into consideration in sentencing, such as the effect the offence had on the conduct of a military operation. In order for CMPS to fulfil its role, it is important for prosecutors to understand the context in which CAF units and formations are operating, and their needs in relation to the maintenance of discipline, efficiency, and morale.

#### **CFNIS**

The CFNIS was established in 1997 with a mandate to investigate serious and sensitive matters related to DND and the CAF. It performs a function similar to that of a major crimes unit of the RCMP or large municipal police agency. It is important for all prosecutors to maintain a strong relationship with investigative agencies, while at the same time respecting the independence of each organization. Good relationships with investigative agencies ensure that the prosecutor and the investigator exercise their respective roles independently but co-operatively, and help to maximize the effectiveness and efficiency of the CMPS as a prosecution service.

Over the course of this reporting period, the DMP, along with the CFNIS Legal Advisor, participated in the training of new CFNIS investigators during the CFNIS Indoctrination Course. Their presentations enhanced the knowledge of the military justice system for the new CFNIS investigators particularly in relation to disclosure obligations.

# FEDERAL, PROVINCIAL AND TERRITORIAL HEADS OF PROSECUTIONS COMMITTEE

The Federal, Provincial and Territorial Heads of Prosecutions (HoP) Committee was established in 1995. The Committee is made up of the heads of each of Canada's 12 prosecution agencies. This includes the heads of prosecution for the ten provincial prosecution services, as well as the Director of Public Prosecutions for the Public Prosecution Service of Canada, and the DMP. The mandate of the HoP Committee is to serve as a national forum for the discussion of prosecutions and prosecution-related issues, and to facilitate the exchange of information and best practices on legal and managerial issues among the prosecution services of Canada. Since its inception, the Committee has helped promote assistance and cooperation among prosecution services and facilitated the coordination of national prosecution issues and the adoption of consistent prosecution positions on those issues whenever possible. The HoP Committee also serves as a national advisory body on prosecution issues in Canada, providing a venue where stakeholders can consult and seek the views of the Canadian prosecution community.<sup>27</sup>

During this reporting period, the DMP and the Acting DMP attended the HoP Committee general meetings during the months of April and December 2020. The HoP Committee general meetings were held virtually, due to the COVID-19 pandemic.

The DMP and the Acting DMP were active participants during the discussions, ensuring that the interests of the military justice system remain at the forefront of criminal law in Canada. Moreover, the Acting DMP also presented an update regarding the constitutional challenges relating to the independence of military judges.

## CMAC EDUCATION SEMINAR

The DMP and the ADMP both presented at this year's CMAC Education Seminar, an annual legal education seminar conducted for judges assigned to the CMAC, organized by the Canadian Judicial Council.

#### NATIONAL CRIMINAL LAW PROGRAM

The National Criminal Law Program (NCLP)<sup>28</sup> is delivered by the Federation of Law Societies of Canada, and is the largest criminal law conference in Canada. The 47th Annual NCLP was supposed to be held in Victoria, British Columbia, in July 2020. As a full member of the NCLP faculty, the DMP has prepared articles and made presentations on a number of areas of criminal and military law topics at previous iterations of the conference. Unfortunately, the NCLP was canceled in 2020, due to the COVID-19 pandemic.

https://www.ppsc-sppc.gc.ca/eng/tra/tr/05.html.

<sup>28</sup> https://flsc.ca/national-initiatives/national-criminal-law-program.





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## INFORMATION MANAGEMENT AND TECHNOLOGY

#### CASE MANAGEMENT SYSTEM (CMS)

The CMPS Case Management System (CMS) launched on 1 June 2018. The CMS is a file management tool and database used to monitor the progress of all cases referred to the DMP through the court martial process. In addition, it provides the DMP with statistics in real time about all cases proceeding through the court martial system.

The CMS tracks the status of files and collects data at the pre-charge, referral, post-charge, pre-trial, and trial stages. All important dates associated with these files are recorded in the CMS including, but not limited to, the dates when the file was referred to the DMP, when the file was assigned to a prosecutor, the date of the decision of the prosecutor on whether or not to prefer charges, and key dates in the court martial process. In addition, the CMS allows for the automatic creation of documents from compiled data including, but not limited to, charge sheets and letters informing key actors when a charge has been preferred by a prosecutor.

The CMS continues to be improved through a continual development process. The newest version of CMS was due to be released during this reporting period. This version would also have included interoperability with the Justice Administration Information Management System (JAIMS), digitizing all aspects of the military justice process, from charge laying to final disposition. Due to the CAF response to the COVID-19 pandemic, the release date was delayed. The newest version of CMS will be launched during the next reporting period.



#### FINANCIAL INFORMATION

#### OPERATING BUDGET

The DMP's operating budget is allocated primarily to operations and is divided into four main categories: Regular Force Operations and Maintenance, Civilian Salary and Wages, Reserve Force Pay, and Reserve Force Operations and Maintenance. Operations and Maintenance includes items such as travel, training costs, general office expenditures, and other costs that support personnel and maintain equipment. A complete overview of the DMP's budget, including initial allocation and expenditures, can be found at Table 6-1.

Figure 6-1 shows the DMP's operating budget over the last five reporting periods.

In previous reporting periods, court martial expenses were included as part of the DMP's operating budget. Beginning last fiscal year, court martial expenses have been administered through a centralized fund. Due to various factors, such as the number of courts martial, the duration of courts martial, as well as unpredictable expenses, including the requirement for expert witnesses, court martial expenditures can vary greatly from one reporting period to the next. This reporting period, the prosecution's portion of the expenditures for courts martial was \$35.418.81.

TABLE 6-1: SUMMARY OF DMP'S OPERATING BUDGET

Fund	Initial Allocation	Expenditures	Balance
Regular Force Operations & Maintenance	\$25,250.00	\$21,383.42	\$3,866.58
Civilian Salary & Wages	\$425,233.00	\$452,078.17	(\$26,855.58)
Reserve Force Pay	\$109,600.00	\$88,728.12	\$20,871.88)
Reserve Force Operation and Maintenance	\$7,500.00	\$0	\$7,500.00
Totals	\$567,573.00	\$562,190.12	\$5,382.88



## ANNEXES

## ANNEX A: COURTS MARTIAL

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
A/Slt Bankasingh	SCM	130 NDA (271 CCC)	Sexual Assault	Not guilty	N/A	Halifax, NS	08 Feb 2021	English
		93 NDA	Behaved in a disgraceful manner	Guilty	60 days imprisonment			
Cpl Bolger	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	Fine of \$600	Trenton, ON	01 March 2021	English
		129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn				
Maj Bourque	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	Fine of \$200	Gatineau, QC	13 July 2020	French
PO2 Breadner	SCM	83 NDA	Disobeyed a lawful command of a superior officer	Withdrawn	Fine of \$200	Esquimalt, BC	22 June 2020	English
		85 NDA	Behaved with contempt toward a superior officer	Guilty				
LS Brinton	SCM	114 NDA	Stealing	Withdrawn	Severe reprimand	Halifax, NS	05 Feb 2021	English
		130 NDA (355.2 CCC)	Trafficking in property obtained by crime	Withdrawn	and a fine of \$3000	INS	2021	
		129 NDA	An act to the prejudice of good order and discipline	Withdrawn				
		116(a) NDA	Sold improperly public property	Guilty				
Lt(N) Brown	SCM	130 NDA (271 CCC)	Sexual assault	Stay of proceedings		Halifax, NS	23 March	English
		130 NDA (279(2) CCC)	Forcible confinement				2021	
Pte Bruce	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	Reprimand and fine of \$3000	Saint- Jean-sur- Richelieu, QC	06 Oct 2020	English
Maj Castagner	SCM	86 NDA	Quarrelled with a person subject to the Code of Service Discipline	Guilty	Reduction in rank to Captain and fine of \$3500	Trenton, ON	31 July 2020	English
		97 NDA	Drunkenness	Guilty				

#### COURTS MARTIAL

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
WO Chauhan	SCM	130 NDA (271 CCC)	Sexual assault	Withdrawn	N/A	Petawawa, ON	14 Oct 2020	English
		93 NDA	Behaved in a disgraceful manner					
PO2 Chiasson	SCM	97 NDA	Drunkenness	Guilty	Severe reprimand and a fine of \$2000	Gatineau, QC	08 July 2020	English
Cpl Christmas	GCM	130 NDA (271 CCC)	Sexual assault	Stay of proceedings		Sydney, NS	10 Nov 2020	English
		93 NDA	Behaved in a disgraceful manner					
		97 NDA	Drunkenness					
Sgt Cloutier	SCM	93 NDA	Behaved in a disgraceful manner	Proceeding terminated		Bagotville, QC	09 Dec 2020	French
		129 NDA	Conduct to the prejudice of good order and discipline	without adjudication				
		97 NDA	Drunkenness					
Pte Coulter	SCM	90 NDA	Absented himself without leave	Guilty	Fine of \$500	Trenton	09 Sept 2020	English
Capt Crépeau	SCM	83 NDA	Disobeyed to a lawful command of a superior officer	Stay of proceedings		Québec, QC	14 Aug 2020	French
		129 NDA	Conduct to the prejudice of good order and discipline					
		85 NDA	Behaved with contempt toward a superior officer					
A/Slt Demers	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	Fine of \$1500	Esquimalt, BC	09 Dec 2020	French
Maj Duquette	SCM	130 NDA (271 CCC)	Sexual assault	Guilty	Reduction in rank to Capt	Valcartier, QC	18 June 2020	French
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				
		95 NDA	Abuse of subordinate	Guilty				
LS Edwards (Retrial)	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Stay of proceedings		Halifax, NS	14 August 2020	English
Pte Fischl	SCM	90 NDA	Absented himself without leave	Guilty	Fine of \$200	Gatineau, QC	08 July 2020	English

#### COURTS MARTIAL

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
Gnr Fontaine	GCM	130 NDA (5(1) of the CDSA)	Traffic.	Stay of proceedings		Gagetown, NB	10 Sept 2020	French
		130 NDA (5(2) of the CDSA)	Possession for the purpose of traffic					
		130 NDA (5(2) of the CDSA)	Possession for the purpose of traffic					
Sgt Holt	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	Fine of \$200	Red Deer, AB	26 Oct 2020	English
Capt Iredale	GCM	130 NDA (271 CCC)	Sexual assault	Stay of proceedings		Esquimalt, BC	11 Sept 2020	English
		130 NDA(271 CCC)	Sexual assault					
		130 NDA (271 CCC)	Sexual assault					
		129 NDA	Conduct to the prejudice of good order and discipline					
		129 NDA	Conduct to the prejudice of good order and discipline					
		129 NDA	Conduct to the prejudice of good order and discipline					
PO2 Isabelle	GCM	Charges 1 to 12: 130 NDA (366(1) CCC)	Forgery	Guilty of charge 1	Severe reprimand and fine of \$3000	Esquimalt, BC	29 May 2020	English
		Charges 13 to 24: 130 NDA (368(1) CCC)	Uttering forged document	Guilty of charge 13  Withdrawn				
		Charge 25: 129 NDA	Conduct to the prejudice of good order and discipline					
				All other charges were withdrawn				

#### COURTS MARTIAL

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
Pte Kanaar	SCM	90 NDA	Absented himself without leave	Guilty	Reprimand and a fine of \$300	Edmonton, AB	21 July 2020	English
		90 NDA	Absented himself without leave	Withdrawn				
		90 NDA	Absented himself Withdrawn without leave					
Pte Koutsogiannis	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	Severe reprimand and fine of \$4000	Gatineau, QC	13 July 2020	English
Sgt Lévesque	GCM	77(f) NDA	Offence against the property or person of any inhabitant or resident of a country in which he is serving	Withdrawn	Imprisonment for 3 months and reduction in rank to Cpl	Valcartier, QC	02-06 Nov 2020	French
		130 NDA (87 CCC)	Pointed a firearm at another person	Guilty				
		93 NDA	Behaved in a disgraceful manner	Withdrawn				
		130 NDA (264.1 CCC)	Uttering threats	Withdrawn				
		129 NDA	An act to the prejudice of good order and discipline	Guilty				
		130 NDA (320(13) CCC)	Dangerous operation of a conveyance	Withdrawn				
		111 NDA	Improper driving of vehicle	Guilty				
		130 NDA (430 CCC)	Mischief	Withdrawn				
		93 NDA	Behaved in a disgraceful manner	Withdrawn				
			Conduct to the prejudice of good order and discipline	Guilty				
Pte MacDonald	SCM	86(a) NDA	Quarrelled with a person subject to the Code of Service Discipline	Quarrelled with a Guilty person subject to the Code of Service		Meaford, ON	10 March 2021	English
Sgt Morissette	SCM	129 NDA	Conduct to the prejudice of good order and discipline	Guilty	Severe reprimand and a fine of \$2000	Valcartier, QC	03 July 2020	French

#### COURTS MARTIAL

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
MCpl Penner	SCM	87 NDA	Broke out of barracks	Guilty	Reduction in rank	Edmonton,	07 Dec	English
		97 NDA	Drunkenness	Guilty	to Pte and a fine of \$1500	AB	2020	
		97 NDA	Drunkenness	Guilty				
Sgt Pépin	GCM	114 NDA (alternate to charges 2, 3)	Stealing when entrusted by reason of his employment, with the custody, control or distribution of the thing stolen	Guilty	Reprimand and a fine of \$300	Montréal, QC	03 Feb 2021	French
		115 NDA (alternate to charges 1, 3)	Received property obtained by the commission of a service offence, knowing the property to have been so obtained	Withdrawn				
		129 NDA (alternate to charge 1, 2) An act to the prejudice of good order and discipline		Stay of proceedings				
		124 NDA	Negligently performed a military duty imposed on him	Withdrawn				
Sgt Proulx	GCM	83 NDA	Disobedience of a lawful command of a superior officer	Stay of proceedings	N/A	Gatineau, QC	24 Nov 2020	French
		83 NDA	Disobedience of a lawful command of a superior officer					
		85 NDA	Behaved with contempt toward a superior officer					
		129 NDA	Conduct to the prejudice of good order and discipline					
Pte Robertson	SCM	130 NDA (271 CCC)	Sexual assault	Not guilty	21 days confinement to	Petawawa, ON	13 Oct 2020	English
		93 NDA	Behaved in a disgraceful manner	Guilty	barracks and a fine of \$1900			

#### COURTS MARTIAL

Accused	Туре	Offence	Description	Disposition	Sentence	Location (CM)	Dates	Language
OCdt Sangha	SCM 129 NDA		Conduct to the prejudice of good order and discipline	Withdrawn	Fine of \$3000	Toronto, ON	06 Oct 2020	English
		129 NDA	Conduct to the prejudice of good order and discipline	Guilty				
		129 NDA	Conduct to the prejudice of good order and discipline	Withdrawn				
	85 NDA		Behaved with contempt towards a superior officer	Guilty				
		85 NDA	Behaved with contempt towards a superior officer	Withdrawn				
Sgt Thibault (Retrial)	SCM	130 NDA (271 CCC)	Sexual assault	Guilty	Imprisonment of 18 months	Valcartier, QC	10-18 Feb 2021	French
Cpl Watson	SCM	85 NDA	Insubordinate behaviour	Guilty	Fine of \$500	Petawawa, ON	13 Oct 2020	English
		85 NDA	Insubordinate behaviour	Guilty				
		86 NDA	Fought with a person subject to the code of service discipline	Guilty				

#### ANNEX B:

## APPEALS TO THE COURT MARTIAL APPEAL COURT OF CANADA

CMAC	Appellant	Respondent	Type of Appeal	Proceedings	Result	Dates	Citation
598	Her Majesty the Queen	Lt Banting	Legality of finding		Appeal dismissed	06 Nov 2019 <sup>1</sup>	2019 CMAC 5
				Motion for cost	Award of party-and-party costs	22 Apr 2021	2020 CMAC 2
602	Cpl McGregor	Her Majesty the Queen	Legality of finding and sentence		Appeal dismissed	31 Dec 2020	2020 CMAC 8
603	MCpl Pett	Her Majesty the Queen	Legality of finding		Appeal abandoned by Appellant	23 Apr 2020	
604	Capt Renaud	Her Majesty the Queen	Legality of finding		Appeal dismissed	17 Nov 2020	2020 CMAC 5
605	Capt Duquette	Her Majesty the Queen	Legality of finding and sentence		Ongoing		
				Motion for a stay of the order to reduce rank	Dismissed	29 Oct 2020	2020 CMAC 4
				Motion for an extension of time within which to serve and file the Appellant's Memorandum of Fact and Law	Dismissed	17 Nov 2020	2020 CMAC 6
				Motion seeking leave to file a Memorandum of Fact and Law in excess of 30 pages	Moot	17 Nov 2020	
				Motion seeking rescission of the Court's Order from 17 Nov 2020	Granted	10 Dec 2020	2020 CMAC 7
606	Her Majesty the Queen	LS Edwards	Legality of finding		Ongoing		
				Motion for consolidation of Court files CMAC-606, CMAC-607, CMAC-608 and CMAC-609	Granted <sup>2</sup>	19 Oct 2020	2020 CMAC 3
607	Her Majesty the Queen	Capt Crépeau	Legality of finding		Ongoing		
		-		Motion for consolidation of Court files CMAC-606, CMAC-607, CMAC-608 and CMAC-609	Granted	19 Oct 2020	2020 CMAC 3
608	Her Majesty the Queen	Gunner Fontaine	Legality of finding		Ongoing		
			Ü	Motion for consolidation of Court files CMAC-606, CMAC-607, CMAC-608 and CMAC-609	Granted	19 Oct 2020	2020 CMAC 3

<sup>1</sup> As reported in previous Annual report of 2019-2020.

<sup>2</sup> CMAC 606, 607, 608 and 609 are now referred to as *R v Edwards et al.* 

#### ANNEX B:

#### APPEALS TO THE COURT MARTIAL APPEAL COURT OF CANADA

CMAC	Appellant	Respondent	Type of	Proceedings	Result	Dates	Citation
609	Her Majesty	Capt Iredale	Appeal Legality of	· ·	Ongoing		
	the Queen		finding	Motion for consolidation of Court	Granted	19 Oct	2020
				files CMAC-606, CMAC-607, CMAC-608 and CMAC-609	Gianica	2020	CMAC 3
610	Her Majesty the Queen	Cpl Christmas	Legality of finding		Ongoing		
				Motion for consolidation of files CMAC-610, CMAC-612 and CMAC 614.	Order expediting the proceedings and adjourning CMAC-610 Sine Die	19 Jan 2021	
					Considering the stay in the proceedings of CMAC-610, it is to be excluded in all further Court filings in relation to the appeals CMAC-612 and CMAC-614	26 Jan 2021	
611	S3 Champion	Her Majesty the Queen	Custody Review Hearing		Ongoing		2021 CMAC 1
				Motion to proceed despite mootness	Granted	19 Feb 2021	
612	Her Majesty the Queen	Sgt Proulx	Legality of finding		Ongoing		
				Motion for consolidation of files CMAC-610, CMAC-612 and CMAC 614.	Partially granted		
					Order expediting the proceedings and adjourning CMAC-610 Sine Die	19 Jan 2021	
613	Cpl Lévesque	Her Majesty the Queen	Legality of finding		Ongoing		
614	Her Majesty the Queen	MCpl Cloutier	Legality of finding		Ongoing		
				Motion for consolidation of files CMAC-610, CMAC-612 and CMAC 614.	Partially granted		
					Order expediting the proceedings and adjourning CMAC-610 Sine Die	19 Jan 2021	
615	Sgt Pépin	Her Majesty the Queen	Legality of finding		Ongoing		
616	Sgt Thibault	Her Majesty the Queen	Legality of finding		Ongoing		

## ANNEX C: APPEALS TO THE SUPREME COURT OF CANADA

SCC#	Appellant	Respondent	Type of Appeal	Result
39543	Cpl McGregor	Her Majesty the Queen	Legality of Finding (appeal by leave)	Ongoing

## ANNEX D CUSTODY REVIEW HEARINGS

Accused	Date	Offences		Decision
S3 Champion	13 Nov 2020	97 NDA	Drunkenness	Released with conditions
	15 Nov 2020	101.1 NDA	Breach of conditions	

## ANNUAL REPORT 2020-2021 DIRECTOR OF DEFENCE COUNSEL SERVICES



Service d'avocats de la défense Centre Asticou, Bloc 300 241 boulevard Cité des jeunes GATINEAU (Québec) Canada J8Y 6L2 Tél: (819) 994-9151 QGDN Ottawa, On. K1A 0K2

#### National Defence

Defence Counsel Services Asticou Centre, Block 300 241Cité des jeunes Blvd GATINEAU (Québec) Canada J8Y 6L2 Fax: (819) 997-6322 NDHQ Ottawa ON, K1A 0K2

20 May 2021

Rear admiral Bernatchez, OMM, CD Judge Advocate General National Defence Headquarters 101 Colonel By Drive Ottawa, Ontario K1A 0K2

Read adminral Bernatchez,

Pursuant to article 101.11(4) of the Queen's Regulations and Orders for the Canadian Forces, enclosed please find the annual report of the Director of Defence Counsel Services. The report covers the period from 1 April 2020 through 31 March 2021.

Yours sincerely,

CLOUTIER, JEAN-BRUNO 941 Digitally signed by CLOUTIER, JEAN-BRUNO 941 Date: 2021.10.05 09:48:56 -04'00'

J.-B. Cloutier
Colonel
Director of Defence Counsel Services







#### ANNUAL REPORT 2020- 2021

Director
Defence
Counsel
Services



#### **OVERVIEW**

- 1. This report covers the period from 1 April 2020 to 31 March 2021. It is prepared in accordance with article 101.11(4) of the *Queen's Regulations and Orders for the Canadian Armed Forces* (*Queen's Regulation and Orders*), which sets out the legal services prescribed to be performed by the Director of Defence Counsel Services and requires that he report annually to the Judge Advocate General on the provision of legal services and the performance of other duties undertaken in furtherance of the Defence Counsel Services mandate.
- 2. During the pandemic, the Director of Defence Counsel Services has continued to fulfill his legislated mandate to provide legal advice on the duty line and legal representation for custody review hearings, pre-trial conferences, preliminary motions, courts martial and appeals.

#### ROLE OF DEFENCE COUNSEL SERVICES

- 3. Under section 249.17 of the *National Defence Act (NDA)* individuals, whether civilian or military, who are "liable to be charged, dealt with and tried under the Code of Service Discipline" have the "right to be represented in the circumstances and in the manner prescribed in regulations." Defence Counsel Services is the organization that is responsible for assisting individuals exercise these rights.
- 4. The Director of Defence Counsel Services is, under section 249.18 of the *National Defence Act*, appointed by the Minister of National Defence. Section 249.2 provides that the director acts under the "general supervision of the Judge Advocate General" and makes provision for the JAG to exercise this role through "general instructions or guidelines in writing in respect of Defence Counsel Services." Subsection 249.2(3) places on the director the responsibility to ensure that general instructions or guidelines issued under this section are made available to the public. No such directive was issued this year.
- 5. The director "provides, and supervises and directs" the provision of the legal services set out in Queen's Regulations and Orders. These services may be divided into the categories of "legal advice" where advice of a more summary nature is provided, often delivered as a result of calls to the duty counsel line, and "legal counsel" which typically involves a more sustained solicitor-client relationship with assigned counsel and representation of an accused before a Military Judge, a Court Martial, the Court Martial Appeal Court or the Supreme Court of Canada. Historically and occasionally, counsel have also appeared before provincial Mental Health Review Boards and, as this year, the Federal Court.
- 6. Legal advice is provided in situations where:

#### DEFENCE COUNSEL SERVICES

- a) members are the subject of investigations under the Code of Service Discipline, summary investigations, or boards of inquiry, often at the time when they are being asked to make a statement or otherwise conscripted against themselves;
- b) members are arrested or detained, especially in the 48 hour period within which the custody review officer must make a decision as to the individual's release from custody;
- c) members are considering electing summary trial or waiving their right to court martial;
- d) members are seeking advice of a general nature in preparation for a hearing by summary trial; and
- e) members are considering an Application before a Commanding Officer to vary an intermittent sentence or the conditions imposed by a summary trial.
- f) members are considering or preparing a Request for Review of the findings or punishment awarded to them at summary trial.
- 7. Legal representation by assigned counsel is provided in situations where:
  - a) custody review officers decline to release arrested individuals, such that a pre-trial custody hearing before a military judge is required;
  - b) members request or require a judicial review of release conditions imposed by a custody review officer;
  - c) there are reasonable grounds to believe that an accused is unfit to stand trial;
  - d) applications to refer charges to a court martial have been made against individuals;
  - e) members apply to a Military Judge to vary an intermittent sentence or the conditions imposed by a court martial or to a judge of the Court Martial Appeal Court in the case of conditions imposed by that Court;
  - f) members are appealing to the Court Martial Appeal Court or to the Supreme Court of Canada, or have made an application for leave to appeal and the Appeal Committee, established in Queen's Regulations and Orders, has approved representation at public expense; and
  - g) in appeals by the Minister of National Defence to the Court Martial Appeal Court or the Supreme Court of Canada, in cases where members wish to be represented by Defence Counsel Services.

#### DEFENCE COUNSEL SERVICES

- 8. The statutory duties and functions of Defence Counsel Services are exercised in a manner consistent with our constitutional and professional responsibility to give precedence to the interests of clients. Where demands for legal services fall outside the Defence Counsel Services mandate the members are advised to seek civilian counsel at their own expense.
- 9. Defence Counsel Services does not normally have the mandate to represent accused at summary trial. The military justice system relies upon the unit legal advisor, generally a Deputy Judge Advocate, to provide advice to the chain of command on the propriety of charges and the conduct and legality of the summary trial process, all with a view to ensuring that the accused is treated in accordance with the rule of law.

#### THE ORGANIZATION, ADMINISTRATION AND PERSONNEL OF DEFENCE COUNSEL SERVICES

10. Throughout the reporting period, the organization has been situated in the Asticou Centre in Gatineau, Quebec. The office has consisted of the Director, the Deputy Director and 6 trial counsel at the rank of major/lieutenant-commander. In addition to these Regular Force officers, 7 Reserve Force legal officers at various locations in Canada assisted on matters part-time.

#### **Administrative Support**

11. Administrative support was provided by two clerical personnel occupying positions classified at the levels of CR-4 and AS-1, as well as a paralegal at the level of EC-3. Many AS-1 positions within the Office of the Judge Advocate General have been reviewed. Our AS-1 position will be reclassified as a CR-5 position.

#### **Regular Force Resources**

12. Defence Counsel Services are part of, and resourced through, the Office of the Judge Advocate General. During the reporting period, all Regular Force positions were filled. One Regular Force major was on parental leave for 2 months.

#### **Reserve Counsel**

- 13. As indicated, at the commencement of the year there were a total of 7 Reserve Force defence counsel within the organization.
- 14. Our Reserve Force counsel are located throughout Canada; with one in Newfoundland & Labrador, one in Quebec, four in Ontario, and one in British Columbia. They are an important component of our organization. They have made, and continue to make, a significant contribution to the Defence Counsel Services mandate.

#### **Civilian Counsel**

15. Under the *National Defence Act*, the Director of Defence Counsel Services may hire civilian counsel to assist accused persons at public expense in cases where, having received a request for representation by Defence Counsel Services, no uniformed counsel are in a position to represent the particular individual. This occurs primarily as a result of a real or potential conflict of interest, often involving Defence Counsel Service's representation of a co-accused. It may occur for other reasons as well. During this reporting period, civilian counsels were hired by the director to represent members in 2 files.

#### **Funding**

16. During this fiscal year the following funds were spent.

	FUND	EXPENDITURE	
C125	Contracting (Counsel, Experts, and Services)	\$134,703.07	
L101	Operating Expenditures	\$6.928.40	
L111	Civilian Pay and Allowances	\$206,041.53	
L127	Primary Res Pay, Allowance, Ops, Maintenance	\$419,987.84	
	TOTAL	\$767,660.84	

17. This amount is less than our initial operating budget of \$792,115.00 and represents stable funding over the past few years. Expenditures related to the Primary Reserve have increased because: (1) 4 reservist captains have undergone their mandatory training to become qualified legal officer within the Office of the Judge-Advocate General; (2) regular attendance of our 7 reservists to weekly virtual meetings as a result of the pandemic; and (3), files were assigned to reservists geographically proximate to court martial hearings to minimize air travel of regular force defence counsel in the context of the pandemic.

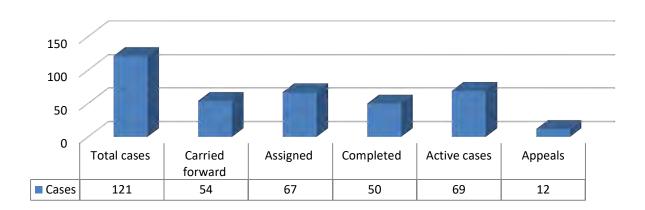
#### SERVICES, ACTIVITIES AND TRAINING

#### **Duty Counsel Services**

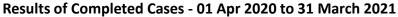
18. Legal advice is available twenty-four hours a day, seven days a week, to members who are under investigation or in custody. Duty counsel receives 10 to 15 calls per day and sometimes more. Legal advice is typically provided through our duty counsel line, a toll-free number which is distributed throughout the Canadian Armed Forces and is available on our website or through the military police and other authorities likely to be involved in investigations and detentions under the Code of Service Discipline.

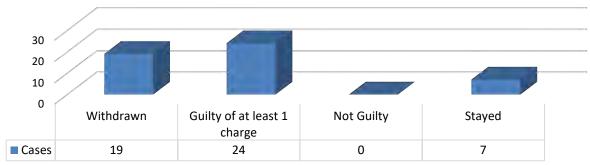
#### **Court Martial Services**

- 19. When facing court martial, accused persons have the right to be represented by lawyers from Defence Counsel Services at public expense, they may retain legal counsel at their own expense, or they may choose not to be represented by counsel.
- 20. Defence Counsel Services provided legal representation to accused persons in 121 cases referred for prosecution before a court martial. This number includes 54 cases carried over from the previous reporting year. It also includes 67 new cases assigned by the Director during this reporting period. Of these 121 cases, 50 were completed. Of these 50, 19 members had their charges withdrawn. Of the remaining 31 cases, 7 cases were stayed and in 24 cases the accused was either found guilty or pled guilty to at least one charge. Eleven cases are under appeal.



DDCS Cases - 01 Apr 2020 to 31 March 2021





#### **Appellate Services**

#### DEFENCE COUNSEL SERVICES

- 21. Ten appeals at the Court Martial Appeal Court of Canada (the "CMAC") and one application for leave at the Supreme Court of Canada occurred during this reporting period. Seven appeals were filed by the Minister and 3 were filed on behalf of the accused.
- 22. Where a member is the appellant and is requesting representation at public expense by Defence Counsel Services, he or she is required to make an application to the Appeal Committee, established under *Queen's Regulations and Orders*, who assesses whether the appeal has merit. Members who are responding to appeals by the Minister may receive representation by Defence Counsel Services as a matter of right.

#### Supreme Court of Canada

23. On 29 January 2021, the Appeal Committee granted the request of Cpl McGregor for legal representation at public expense for the purpose of filing an application for leave to appeal to the Supreme Court of Canada (the "SCC") from the judgment of the CMAC, *R. v. McGregor*, 2020 CMAC 8. The question raised is about the extraterritorial application of the *Canadian Charter of Rights and Freedoms*. The SCC judgment on leave is under reserve.

#### Court Martial Appeal Court

- 24. In the cases of *R v Crepeau*, 2020 CM 3007, *R v Edwards*, 2020 CM 3006, *R v Fontaine*, 2020 CM 3008 and *R v Iredale*, 2020 CM 4011, the military judge found that the court martial was not an independent and impartial tribunal under s. 11d) of the *Charter* because sitting military judges can be charged under the Code of Service Discipline. Stays of proceedings were ordered. The Minister appealed these cases. Judgment is under reserve.
- 25. In the cases *R v Christmas*, 2020 CM 3009, *R v Proulx*, 2020 CM 4012 and in *R v Cloutier*, 2020 CM 4013, the military judge also found that the court martial was not independent. Again, stays of proceedings were ordered, and again, the Minister appealed these cases. Judgment is under reserve.
- 26. In the case of *R v Lévesque*, docket 201962, the appeal is about whether the military judge erred in law in ordering the member to be incarcerated in a military prison as opposed to a civilian prison. The hearing is expected in the next months.
- 27. In the case of *R v Pépin*, 2021 CM 3005, the member appeals his conviction before a General Court Martial for theft and conduct to the prejudice of good order and discipline. Several grounds of appeal are raised, some of which are related to the *WD* warning, voluntariness of statements to a person in authority and a no *prima facie* case application.
- 28. In *R v Thibault*, 2021 CM 5002, the member appeals his conviction of sexual assault in which a sentence of incarceration for 18 months was imposed. The grounds of appeal relate to

#### **DEFENCE COUNSEL SERVICES**

the required legal analysis to assess the credibility of the accused. (Of note, the Federal Court of Canada was seized of this matter after the military judge had stated that she would recuse herself, but later decided not to do so. The Federal Court dismissed the member's Application for an interim prohibition order.)

#### **Professional Development**

29. Due to the COVID pandemic, professional development opportunities have been limited to *ad hoc* on-line individual legal training.

#### **CONCLUSION**

30. This year again, legal officers within Defence Counsel Services have provided outstanding legal services to qualifying members of the military community who request our assistance. I am particularly proud of our legal officers who responded to the call of duty and courageously travelled throughout Canada to protect the rights of our members in the context of the pandemic. We owe them our greatest respect for their dedication. My priority remains to promote an environment where clients can trust that their defence counsel is not only professionally competent but also independent from government.

CLOUTIER, JEAN-BRUNO 941 J-B. Cloutier

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**Director of Defence Counsel Services** 

May 2021