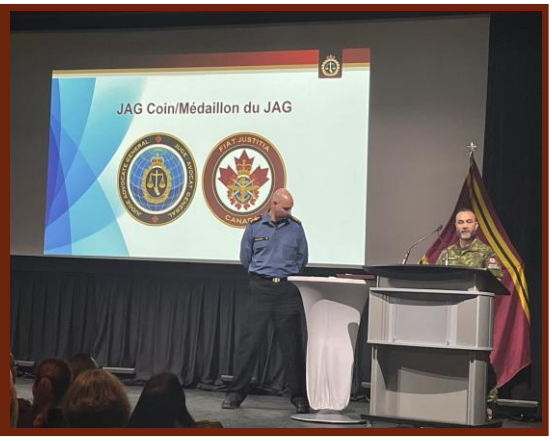
National Defence / Défense nationale

JAG ANNUAL REPORT

2023-2024



Canada

The Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2023 to 31 March 2024.

The Office of the Judge Advocate General
National Defence Headquarters
101 Colonel By Drive
Ottawa, ON K1A 0K2
Telephone: (613) 992-3019
CSN: 992-3019

Cat. No. D1-16
ISSN 1497-7184

Table of Contents

THE YEAR IN REVIEW 4

1 - THE OFFICE OF THE JUDGE ADVOCATE GENERAL 11
The Judge Advocate General 11
Command of the Office of the Judge Advocate General 11
The Office of the Judge Advocate General 11

2 - THE STRUCTURE OF CANADA'S MILITARY JUSTICE SYSTEM 14
The Code of Service Discipline 14
The Two Tiers of the Military Justice System 15
The Summary Hearing System 16

3 - MILITARY JUSTICE SYSTEM STATISTICS 20
Summary Hearings 21
Courts Martial 30

4 - MILITARY JUSTICE JURISPRUDENCE 34
Courts Martial 34
Federal Court of Canada 38
Ontario Court of Justice 39
Court Martial Appeal Court of Canada 40
Supreme Court of Canada 42

CONCLUSION 45

Annex A: Summary of Service Infractions Disposed of at Summary Hearing 46

Annex B: Summary of Service Offences Disposed of at Court Martial 47

Pursuant to subsection 9.3(2) of the *National Defence Act*,[1] the Judge Advocate General is required to report annually to the Minister of National Defence on the administration of military justice in the Canadian Armed Forces. It is with great pleasure that I present my first annual report to the Minister of National Defence on the administration of military justice in the Canadian Armed Forces, covering the period from 1 April 2023 to 31 March 2024.

Highlights of the Year in Military Justice

The 2023/24 reporting period marks yet another full and challenging year for the Office of the Judge Advocate General (Office of the JAG). As noted in previous reports, the military justice system has undergone significant changes in recent years, particularly with the coming into force of Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*.[2] The Bill, among other things, introduced the *Declaration of Victims' Rights* and a new summary hearing system to deal with minor misconduct at the unit level. This evolution continued through the present reporting period with several important developments that are briefly described below.

Bill C-66, *The Military Justice System Modernization Act* - On 21 March 2024, the government tabled Bill C-66, *The Military Justice System Modernization Act*,[3] in the House of Commons. Bill C-66 would introduce changes to the *National Defence Act* aimed at modernizing the military justice system by responding to a number of recommendations made by the *Report of the Independent External Comprehensive Review of the Department of National Defence and the Canadian Armed Forces* (IECR) by former Supreme Court Justice Louise Arbour[4] and the *Report of the Third Independent Review Authority to the Minister of National Defence* (IR3) by former Supreme Court Justice Morris J. Fish.[5]

The Bill's proposed changes to the *National Defence Act* can be divided into four thematic areas. The first area of proposed legislative changes would address IECR Recommendation 5 by definitively removing the Canadian Armed Forces' jurisdiction to investigate and try *Criminal Code* sexual offences alleged to have been committed in Canada. With this change, civilian authorities would have exclusive jurisdiction for investigating and prosecuting such offences alleged to have been committed in Canada.

---

[1] RSC 1985, c N-5 [*National Defence Act*].
[2] 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 (assented to 21 June 2019).
[3] Bill C-66, *Military Justice System Modernization Act,* 1st Sess, 44th Parl, 2024 (first reading 21 March 2024).
[4] Canada, *Report of the Independent External Comprehensive Review*, by Hon Louise Arbour (Ottawa, 2022) [*The Independent External Comprehensive Review*].
[5] Canada, *Report of the Third Independent Review Authority to the Minister of National Defence*, by Hon Morris J Fish (Ottawa, 2021) [*The Third Independent Review*].

The second area of proposed legislative changes would address eight of the IR3 recommendations (2, 7, 8, 10, 13, 14, 15, 16) by modifying the process for the appointment of three key military justice authorities: the Canadian Forces Provost Marshal (who would be retitled Provost Marshal General), the Director of Military Prosecutions, and the Director of Defence Counsel Services, making these positions Governor in Council appointments and providing for their tenure. The Provost Marshal General would be responsible to the Minister of National Defence in the performance of their responsibilities, as prescribed in the *National Defence Act*. Further, the Minister of National Defence would be able to issue general instructions or guidelines in writing to the Provost Marshal General in respect of those prescribed responsibilities, as well as instructions or guidelines in writing to the Director of Military Prosecutions in respect of a particular prosecution. Moreover, the proposed legislation would affirm the Judge Advocate General's respect for the independence of authorities in the military justice system in the exercise of their superintendence of the administration of military justice. The proposed legislation also seeks to expand the eligibility criteria for military judges to include non-commissioned members, which would help diversify the pool of potential candidates. Lastly, the proposed legislation would expand the class of persons who may make an interference complaint in respect of a military police investigation and would provide that a member of the military police or person performing policing duties and functions under the Provost Marshal General's supervision must make such a complaint in certain circumstances.

The third area of proposed changes aims to remove military judges from being charged under the summary hearing system and builds on supports to victims by expanding Victim's Liaison Officer access to individuals acting on behalf of a victim under the *Declaration of Victims Rights.* This expands on previous efforts through former Bill C-77 which introduced the *Declaration of Victims Rights*.

Finally, Bill C-66 proposes amendments to the *National Defence Act* that would harmonize the provisions relating to information on sex offenders and publication bans with the amendments made to the *Criminal Code* in the former Bill S-12[6] which came into force in October 2023. These modifications are necessary to ensure that the military justice system remains consistent with the *Canadian Charter of Rights and Freedoms*[7] and aligned with the civilian criminal justice system.

The Comprehensive Implementation Plan - The Office of the JAG's continuing efforts towards military justice modernization are now captured in the Department of National Defence and Canadian Armed Forces' Comprehensive Implementation Plan, a multi-year plan aimed at creating a more open, transparent, and accountable approach to culture change and military justice modernization initiatives. The Comprehensive Implementation Plan incorporates recommendations from four key external reviews: the IR3, the IECR, the Minister of National

---

[6] *An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act* (Statutes of Canada 2023, c 28). On October 26, 2023, Bill S-12 received Royal Assent and became law. The aim of this legislation is to give victims a greater voice in our justice system and to strengthen the National Sex Offender Registry, including to respond to the Supreme Court of Canada (SCC) decision in *R. v. Ndhlovu*, 2022 SCC 38 [*Ndhlovu*].

[7] *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.

Defence Advisory Panel on Systemic Racism and Discrimination Report,[8] and the No. 2 Construction Battalion National Apology Advisory Committee Report.[9] The Office of the JAG plays an important role in contributing to the overarching institutional priorities for advancing the military justice modernization initiatives which form part of the Comprehensive Implementation Plan.

The Military Judge Selection Process - A new military judge selection process commenced on 31 August 2023, with a Canadian Armed Forces General Message soliciting applications from those interested in becoming a Regular or Reserve Force military judge. The applications of qualified candidates are reviewed by the Military Judges Selection Committee, an independent committee of five Ministerial appointees who evaluate candidates and assist the Minister in the selection process. The Committee provides the Minister with advice on the qualifications, competence, and overall suitability of candidates. The aim of the process is to ensure that a current pool of assessed candidates for the military judiciary is available to fill vacancies on the bench.

The Retirement of the Chief Justice of the Court Martial Appeal Court - On 30 October 2023, the Chief Justice of the Court Martial Appeal Court, the Honourable B. Richard Bell, retired from the Court. Chief Justice Bell had served on the Court Martial Appeal Court since 2015, during which time he led many significant initiatives to improve the court and the military justice system. He directed that Court decisions be published simultaneously in both official languages and instituted a specialized training program for judges on topics such as sexual assault, international humanitarian law, and sentencing. The Honourable Elizabeth A. Bennett will serve as Acting Chief Justice until a new Chief Justice is named. Acting Chief Justice Bennett has been a judge of the Court of Appeal of British Columbia since 2009 and has served on the Court Martial Appeal Court since 1999.

The Report of the Military Judges Compensation Committee - On 31 January 2024, the Military Judges Compensation Committee released the report of its recommendations on the appropriate remuneration for military judges during the period of 2019 to 2023. The Military Judges Compensation Committee is a body created by Parliament to ensure an independent, objective, depoliticized process for establishing judicial salaries. The Committee, which is mandated under the *National Defence Act* to submit recommendations to the Minister of National Defence concerning the adequacy of military judicial compensation every four years, performs a similar role and operates according to similar legal principles as its civilian counterpart, the Judicial Compensation and Benefits Commission. In making its recommendations on remuneration for military judges, the Committee considers such factors as the need to attract outstanding candidates to the Bench, the necessity of ensuring judicial independence, and the prevailing economic conditions in Canada. In its latest report, the Committee's recommendations included that military judges be remunerated to achieve parity with other federally appointed judges and that military judges receive a new annual incidental allowance of $3,000. The Minister accepted these recommendations on 31 July 2024.

---

[8] Canada, *Minister of National Defence Advisory Panel on Systemic Racism and Discrimination Final Report* (Ottawa, 2022).

[9] Canada, *National Apology Advisory Committee Report – Minister of National Defence Report* (Ottawa, 2022).

The Designation of a New Chief Military Judge - On 21 March 2024, the Governor in Council designated a new Chief Military Judge: Capt(N) Catherine Julie Deschênes. Capt(N) Deschênes has been serving as a military judge since 2019. Prior to that, she was a legal officer in the Office of the JAG where she served in numerous roles both in Canada and on operations around the world, including as the Legal Advisor to the Chief of Defence Staff's office. The position of Chief Military Judge had been vacant since March 2020, during which time the position's powers, duties, and functions had been performed by the Deputy Chief Military Judge, LCol Louis-Vincent d'Auteuil.

The Military Justice at the Unit Level Policy 2.0 - The summary hearing process has been in place since 20 June 2022. As part of continuous modernization of the military justice system, the Military Justice at the Unit Level Policy (MJUL Policy) was updated on 12 April 2024, just outside of the current reporting period. The MJUL Policy 2.0 includes annexes which outline elements of service infractions, guidance for appropriate military justice authorities on the rights of victims, and on the entitlements of persons affected by service infractions. The MJUL Policy 2.0 also includes further guidance for officers conducting a summary hearing on determining appropriate sanctions and preparing written reasons. The Office of the JAG will continue to work with Canadian Armed Forces commanders and all stakeholders to modernize the military justice system, including the summary hearing process, to meet the requirements of the Canadian Armed Forces.

Military Justice and the Supreme Court in the *Charter* Era

Another important development occurred in October 2023, when the Supreme Court of Canada heard arguments in the case of *R v Edwards*[10] concerning the independence of military judges. This is the latest military justice case heard by Canada's highest court. The Supreme Court's decision affirming that courts martial meet the constitutional requirements of an independent and impartial tribunal, was released in April 2024, shortly after the conclusion of the reporting period. Nevertheless, the *R v Edwards* case presents an occasion to highlight the instrumental role the Supreme Court has played in guiding the evolution of the military justice system.

The Supreme Court's first significant contribution to the development of military justice of the *Charter* era was its 1992 decision in *R v Généreux*.[11] The case is foundational for a number of reasons. First, it affirmed the legitimacy, necessity, and constitutionality of the military justice system as a whole. Writing for the majority, Chief Justice Lamer observed that:

> [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. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. […] Recourse to the ordinary criminal courts would, as a general rule, be inadequate

[10] *R v Edwards,* 2024 SCC 15 [*R v Edwards*].

[11] *R v Généreux,* 1992 CanLII 117 (SCC) [*R v Généreux*]. Of note, in the same year as *R v Généreux*, the Supreme Court also issued a decision in another case dealing with the independence military justice, *R v Forster*, 1992 CanLII 118 (SCC). The Court's decision in that case followed the reasoning in *R v Généreux*.

> to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.[12]

At the same time, the Court also addressed the question of whether courts martial were sufficiently independent to meet the requirements of section 11(d) of the *Charter*, the same question considered by the Court in *R v Edwards*. On this point, the Court found that the General Court Martial, as it was then constituted, did not accord with the accused's right to be tried by a fair and independent tribunal. Specifically, the Court found that the *ad hoc* appointment of legal officers from the Office of the JAG to preside at General Courts Martial did not meet the requirements of financial security or security of tenure, while the involvement of senior officers in key stages of the courts martial process undermined their institutional independence. Canada's response to the *R v Généreux* decision, as well as to a report of former Chief Justice Brian Dickson,[13] was *An Act to amend the National Defence Act and to make consequential amendments to other Acts*.[14] At the time the most extensive set of amendments to the *National Defence Act* since its enactment in 1950. The legislation established military judges to be permanent positions, appointed by the Governor in Council, and independent of the Office of the JAG.

In 2016, the Supreme Court again considered the issue of independence in the military justice system in the case of *R v Cawthorne*.[15] That case centered on the authority of the Minister of National Defence to initiate appeals under the *National Defence Act*. The Court rejected arguments that conferring this authority on the Minister violated the right to an independent prosecutor protected under sections 11(d) and 7 of the *Charter*. The Court found that the Minister is entitled to a strong presumption that they exercise prosecutorial discretion independent of partisan concerns and that this presumption is not displaced by the fact that the Minister was a member of Cabinet. Accordingly, the Court upheld the provisions of the *Act* granting the Minister authority to initiate appeals.

In addition to affirming the constitutional underpinnings of the military justice system and addressing issues of independence, decisions of the Supreme Court have also been pivotal in clarifying the scope of that system's jurisdiction. In *R v Moriarity,*[16] the Court considered whether the provisions of the *National Defence Act* that incorporate offences under the *Criminal Code*[17] and other Acts of Parliament into the jurisdiction of the military justice system were unconstitutionally overbroad. The appellants in that case argued that military justice system jurisdiction over *Criminal Code* offences required a nexus between the circumstances of the alleged offence and military duties. The Court rejected this argument, finding that Parliament's objective in creating the military justice system was to establish procedures to ensure the discipline, efficiency, and morale of the military. The Court concluded that criminal conduct, even when committed in circumstances that are not directly related to military duties, may have

---

[12] *Ibid* at 293.
[13] Canada, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, by Right Hon Brian Dickson*, LGen Charles Belzile and J.W. Bud Bird (Ottawa, 1997).
[14] SC 1998, c 35 (commonly referred to as Bill C-25).
[15] *R v Cawthorne,* 2016 SCC 32.
[16] *R v Moriarity*, 2015 SCC 55.
[17] *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

an impact on the standard of discipline, efficiency, and morale and, therefore, fall within the jurisdiction of the military justice system.[18]

The Supreme Court was called upon to consider the question of the military justice system's jurisdiction over *Criminal Code* offences a second time in *R v Stillman*.[19] The central argument before the Court in that case was whether the provision of the *National Defence Act* giving the military justice system jurisdiction over *Criminal Code* offences violated an accused's right to a jury trial guaranteed under section 11(f) of the *Charter*. Section 11(f) provides that anyone charged with an offence, where the maximum punishment is imprisonment for five years or more, has the right to a trial by jury, except in the case of an offence under military law tried by military tribunal. The Court ruled that the impugned *National Defence Act* provision is consistent with section 11(f), confirming that Parliament had validly enacted the service offences referred to as an "offence under military law" in section 11(f) of the *Charter*. Relying on its reasoning in *R v Moriarity*, the Court also held that an accused's status as a service member was sufficient to charge a person with a service offence under the *National Defence Act* and that a military nexus was not required. In reaching this conclusion, the Court reaffirmed its finding in *R v Généreux* that the military justice system exists to ensure the maintenance of discipline, efficiency, and morale of the Canadian Armed Forces. Surveying the development of the military justice system since the *R v Généreux* decision, Justices Moldaver and Brown observed that "the military justice system has come a long way. It has evolved from a command-centric disciplinary model that provided weak procedural safe-guards, to a parallel system of justice that largely mirrors the civilian criminal justice system."[20]

The most recent development in the Supreme Court's ongoing role in the evolution of the military justice system is its decision in *R v Edwards*, in which the Court returned to the question it first considered in *R v Généreux*: whether courts martial are sufficiently independent and impartial tribunals to meet the requirements of section 11(d) of the *Charter*. *R v Edwards* covers a series of cases[21] in which Canadian Armed Forces members appealed their convictions for service offences on the grounds that the military status of their court martial judges violated their 11(d) rights.

In dismissing the appeal, the Court affirmed that accused members of the Canadian Armed Forces who are tried by court martial are entitled to the same guarantee of judicial independence and impartiality as an accused person who is tried in the civilian system. However, the Court found that this does not require that the two systems be identical in every respect and that section 11(d) does not require either absolute or ideal independence. As Justice Kasirer wrote for the majority:

> As presently configured in the [*National Defence Act*], Canada's system of military justice fully ensures judicial independence for military judges in a way that takes account of the military context, and specifically of the legislative policies of maintaining 'discipline, efficiency, and morale' in the Forces and 'public trust in …

[18] *Ibid* at para 49.
[19] *R v Stillman*, 2019 SCC 40.
[20] *Ibid* at para 53.
[21] For a more complete summary of section 11(d) appellate jurisprudence, please refer to JAG Annual Report 2021/22, "Court Martial Appeal Court of Canada Decisions", Chapter 3, pages 41 to 43.

> a disciplined armed force […]. Properly understood, the military context does not diminish judicial independence.'[22]

Woven into the decision of the Court is the central idea that military judges are and can be both military officers and judges. The system of military justice in Canada has evolved to the point of being parallel to the civilian criminal justice system in that members can draw comfort in knowing that if they face trial by court martial, they will be tried by a constitutionally guaranteed independent and impartial judge.

Conclusion

This is an exciting and challenging time for the military justice system as it continues to develop to match Canada's evolving legal and social norms. As this process unfolds, the Office of the JAG remains fully committed to ensuring that the military justice system keeps pace with those changes, guided by the overlapping imperatives of the rule of law, the rights of all participants, and the unique requirements of the Canadian Armed Forces.

Fiat Justitia

Robin F. Holman, MSM, CD
Brigadier-General

[22] *R v Edwards*, *supra* note 10 at para 10.

1 THE OFFICE OF THE JUDGE ADVOCATE GENERAL

The Judge Advocate General

The Judge Advocate General is appointed by the Governor in Council 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. The Judge Advocate General is responsible to the Minister of National Defence in the performance of their duties and functions.

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 such a position 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. 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 in Canada.[23]

The Office of the Judge Advocate General

The Office of the JAG supports the Judge Advocate General in carrying out their 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.

[23] Canada, Department of National Defence, *Queen's Regulations and Orders for the Canadian Forces* (Ottawa: DND, 20 June 2022), [*Queen's Regulations and Orders for the Canadian Forces*] art 4.081 and Ministerial Organization Order 96-082, dated 1 August 1996.

The Office of the JAG is comprised of six divisions and two directorates, all led by legal officers of the Colonel/Captain(N) rank, and whose legal officer members are drawn from both the Regular Force and the JAG Primary Reserve List. The divisions are the Chief of Staff and Corporate Services Division, the Military Justice Division, the Military Justice Modernization Division, the Operational and International Law Division, the Administrative Law Division, and the Regional Services Division.

On 26 January 2024, the Judge Advocate General issued a Policy Directive on the provision of legal services in support of the Judge Advocate General's duties and functions, outlining the intent to empower legal officers to execute aspects of the Judge Advocate General's duties and functions in a deliberate, responsible, and sustainable way. The Policy Directive establishes a framework to determine at which level legal services should be provided, based on a qualitative assessment of two broad criteria: the legal risk and the legal and contextual complexity of the matter. The Policy Directive also emphasizes improving key competencies within the Office of the JAG, such as communication and information sharing, knowledge management, and adopting a learning mindset focused on constant improvement.

In addition, the Judge Advocate General introduced new Strategic Guidance for the Office of the JAG. The Strategic Guidance defines the Office of the JAG's overall mission as consisting of three principal lines of effort. The first is delivering client-focused, timely, options-oriented, and operationally-driven military legal services in support of the Government of Canada, Department of National Defence, and Canadian Armed Forces' priorities and objectives. The second is superintending the administration of the military justice system and promoting the maintenance of discipline, efficiency, and morale in the Canadian Armed Forces by enabling the proper operation of the military justice system. Finally, the third line of effort is leading by example, inspiring excellence, and empowering Office of the JAG team members to reach their full potential.

The Office of the JAG also includes the Director of Military Prosecutions and the Director of Defence Counsel Services. The Director of Defence Counsel Services, assisted by legal officers who act as defence counsel, is responsible for providing, supervising, and directing legal services to persons who are liable to be charged, dealt with, and tried under the Code of Service Discipline, at no cost to the member. The Director of Defence Counsel Services is appointed by the Minister of National Defence for a renewable term of four years and acts independently from Canadian Armed Forces and Department of National Defence authorities when exercising their powers, duties, and functions.

The Director of Military Prosecutions is the senior military prosecutor in the Canadian Armed Forces. It is the responsibility of the Director of Military Prosecutions, with the assistance of legal officers appointed to act as military prosecutors, to prefer 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 Marshal is appointed by the Minister of National Defence for a renewable term of four years, and 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.

The Director of Military Prosecutions and the Director of Defence Counsel Services submit annual reports to the Judge Advocate General. Their reports for the 2023/24 reporting period are available online here:

https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law.html

2 THE STRUCTURE OF CANADA'S MILITARY JUSTICE SYSTEM

Canada's military justice system operates in parallel with its civilian criminal justice counterpart and forms an integral part of the Canadian legal mosaic. It shares many of the same underlying principles as the civilian criminal justice system and is subject to the same constitutional framework, including the *Canadian Charter of Rights and Freedoms*. On several occasions, the Supreme Court of Canada has affirmed the requirement for a separate, distinct military justice system to meet the specific needs of the Canadian Armed Forces[24] and has recognized the military justice system as a "full partner in administering justice alongside the civilian justice system." [25]

The Code of Service Discipline

The Code of Service Discipline, contained in Part III of the *National Defence Act*, is "[t]he foundation of Canada's military justice system."[26] It is "an essential ingredient of service life"[27] 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."[28] The *National Defence Act* describes the Code of Service Discipline's purpose as the maintenance of the discipline, efficiency, and morale of the Canadian Armed Forces.[29] It has also been recognized as serving a public function "by punishing specific conduct which threatens public order and welfare."[30] The Code of Service Discipline sets out the procedures and organization of courts martial and summary hearings, the jurisdiction of various actors in the military justice system, the scale of punishment, and the post-trial review and appeal mechanisms.

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."[31] Thus, service offences include many disciplinary offences that are unique to the profession of arms, such as disobedience of a lawful command,[32] absence

---

[24] *R v Généreux*, *supra* note 11; *MacKay v The Queen,* 1980 CanLII 217 (SCC) [*MacKay v The Queen*]; *R v Moriarity*, supra note 16.
[25] *R v Stillman*, *supra* note 19 at para 20.
[26] *Ibid*, at para 55.
[27] *MacKay v The Queen*, *supra* note 24 at 398.
[28] *R v Généreux*, *supra* note 11 at 297.
[29] *National Defence Act*, *supra* note 1*,* s 55.
[30] *R v Stillman*, *supra* note 19 at para 55.
[31] *National Defence Act*, *supra* note 1, s 2.
[32] *Ibid*, s 83.

without leave,[33] and conduct to the prejudice of good order and discipline,[34] as well as the more conventional offences such as those found in the *Criminal Code,*[35] and other Acts of Parliament. Members of the Regular Force of the Canadian Armed Forces are always subject to the Code of Service Discipline, whereas members of the Reserve Force are subject to the Code of Service Discipline only in specified circumstances, which include when they are in uniform or when they are present on a defence establishment.

Further, since the introduction of the new system of summary hearings during the previous reporting period, the Code of Service Discipline now incorporates the concept of "service infractions," which are discussed in greater detail below.

The Two Tiers of the Military Justice System

The military justice system has a tiered structure comprised of two types of procedures for addressing misconduct through service offences and service infractions. The Code of Service Discipline and the *Queen's Regulations and Orders for the Canadian Forces*[36] outline procedures for the disposal of a charge.

The following sections describe each tier of the military justice system: courts martial and summary hearings. Courts martial are military courts, presided over by military judges that try service offences under the Code of Service Discipline. Summary hearings are non-penal, non-criminal processes designed to address minor breaches of military discipline at the unit level. The summary hearing system was introduced in June 2022, concurrent to the retirement of the former summary trial system.

Courts Martial

A court martial is a formal military court presided over by a military judge who possesses all the constitutional hallmarks of judicial independence. It is designed to deal with more serious offences and a military judge 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. They 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."[37]

Courts martial may take place 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

---

[33] *Ibid*, s 90.
[34] *Ibid*, s 129.
[35] *Criminal Code*, RSC 1985, c C-46.
[36] *Queen's Regulations and Orders for the Canadian Forces, supra* note 23.
[37] *National Defence Act*, *supra* note 1, s 179(1)(d).

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 a 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 to the member, or by civilian counsel at their own expense.[38]

Appeal of a Court Martial Decision

Decisions made at court martial may be appealed to the Court Martial Appeal Court of Canada.[39] The Court Martial Appeal Court of Canada is composed of civilian judges who are designated 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.[40] 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.[41]

The Summary Hearing System

Purpose

The summary hearing system aims to improve the chain of command's ability to address minor breaches of military discipline fairly and efficiently at the unit level. This process enhances the responsiveness and efficiency of the military justice system, thereby contributing to the operational effectiveness of the Canadian Armed Forces.

Service Infractions

Service infractions are breaches in military discipline defined in the *Queen's Regulations and Orders for the Canadian Forces*[42] that are generally less serious than the misconduct covered by service offences. There are currently three categories of service infractions. The first category of infractions relates to property and information and covers acts or omissions such

---

[38] In some cases, civilian counsel can be provided at no cost to the member by the Director of Defence Counsel Services.

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

[40] *National Defence Act*, *supra* note 1, s 234(2).

[41] *Ibid*, s 245.

[42] *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 23, arts 120.02–120.04.

as unauthorised possession of public property and failure to disclose a conflict of interest.[43] The second category is composed of infractions related to military service. These cover breaches of discipline such as unauthorised discharge of a firearm and other behaviour that adversely affects the discipline, efficiency, or morale of the Canadian Armed Forces.[44] The final category deals with infractions related to drugs and alcohol. This includes behaviour such as the possession of an intoxicant or use of a drug, such as cannabis, while on duty.[45]

Summary Hearings

Summary hearings can only be held to deal with service infractions[46] and may be held anywhere the Canadian Armed Forces operate.[47] They are conducted by an officer which must be at least one rank above the member charged with the infraction.[48] However, officers may be precluded from conducting a hearing in certain circumstances which are listed in the *National Defence Act*.[49]

The Officer Conducting the Summary Hearing (OCSH) may be a superior commander, a commanding officer, or a delegated officer. Where it is determined that the member has committed a service infraction, the status of the OCSH conducting the hearing will impact the sanctions that are available.[50]

In order to conduct a summary hearing, an OCSH must successfully complete the Military Justice at the Unit Level training course and exam to be certified by the Judge Advocate General. During the reporting period, close to 4,500 people successfully completed the requisite training and over 15,000 people have completed it since the training's introduction in 2022.

Summary hearings are generally open for the public to attend. However, in certain circumstances, they may be closed where classified information will form part of the evidence, or where information that may impact an individual's safety or security arises as part of the evidence.[51]

At the start of the hearing, the OCSH will take an oath or make a solemn affirmation[52] before asking the member charged with the infraction three preliminary questions: did the member have adequate time to prepare, does the member wish to challenge the capacity of the officer to hold the summary hearing, and does the member wish to admit to any of the details of the

[43] *Ibid*, art 120.02.
[44] *Ibid*, art 120.03.
[45] *Ibid*, art 120.04.
[46] *National Defence Act*, *supra* note 1, s 162.4.
[47] *Ibid*, s 163.5.
[48] *Ibid*, s 163.
[49] *Ibid*.
[50] *National Defence Act*, *supra* note 1, s 163.1.
[51] *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 23, art 122.02.
[52] *Ibid*, art 122.06.

charge.[53] The OCSH must ensure that a member had adequate time to prepare and is required to adjourn the hearing if the first question is answered in the negative.[54]

Summary hearings are conducted in accordance with the principles of Canadian administrative law, particularly the principles of procedural fairness and natural justice.[55] As such, the member charged with the service infraction must be given the opportunity to request the presence of witnesses, present evidence, and make representations at all stages of the hearing.[56]

Unlike at a court martial or in the retired summary trial system, the standard of proof at a summary hearing is on a balance of probabilities.[57] A member will, therefore, be deemed to have committed a service infraction if "it is more likely than not that the alleged event occurred."[58] However, it is insufficient for the OCSH to simply state that it is more likely than not that the member committed the infraction. To be a valid determination, the decision of the OCSH must be "transparent, intelligible, and justified."[59] As such, the OCSH must provide the reasons underpinning their determination.

Should the member be found to have committed a service infraction, the OCSH must impose one, or a combination of, the authorized sanctions. Prior to doing so, they must allow the member to make representations regarding the sanction that will be imposed.[60] Finally, after imposing a sanction, the OCSH must provide written reasons to the member and to their commanding officer no later than three days following the hearing.[61]

Sanctions

The *National Defence Act* enumerates the sanctions available when a member is found to have committed a service infraction. These are (from most severe to least severe): reduction in rank, severe reprimand, reprimand, deprivation of pay and allowances for no more than 18 days, and minor sanctions.[62] Minor sanctions are defined in the *Queen's Regulations and Orders for the Canadian Forces* and include confinement to ship or barracks for no more than 14 days, extra work and drill for no more than 14 days, and the withholding of leave for no more than 30 days.[63] Sanctions may be combined so that, for example, a member may be sanctioned to both a reprimand and a deprivation of pay and allowance.[64]

The status of the OCSH (i.e., whether the officer is a superior commander, commanding officer, or delegated officer) impacts which of these sanctions are available. A superior commander

---

[53] *Ibid*, art 122.07.
[54] *Ibid,* art 122.07(a).
[55] *Ibid*, art 122.08.
[56] *Ibid*.
[57] *National Defence Act*, *supra* note 1, s 163.1.
[58] *FH v McDougall*, 2008 SCC 53 at para 49.
[59] *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65 at para 15.
[60] *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 23, art 122.09.
[61] *Ibid*.
[62] *National Defence Act*, *supra* note 1, s 162.7.
[63] *Ibid*, art 123.02.
[64] *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 23, art 122.09(3).

may impose any sanction,[65] whereas a commanding officer may not impose a sanction more severe than a reprimand.[66] A delegated officer may only impose a minor sanction and/or a sanction of deprivation of pay and allowance for no more than 7 days.[67]

Reviews

A member who has been found to have committed a service infraction may request a review of the decision by applying in writing to a review authority within 14 days following receipt of the written reasons.[68] A review authority is normally the superior of the officer who conducted the hearing.[69] Alternatively, a review authority may undertake a review of the decision on their own initiative.[70] In both cases, a review authority must obtain legal advice from a legal officer of the Office of the JAG prior to conducting the review.[71]

Following the review, the review authority may leave the decision unchanged, quash entirely or part of the decision,[72] substitute one or more findings,[73] substitute one or more sanctions,[74] or commute, mitigate, or remit the sanction(s).[75] A member who is unsatisfied with the outcome of the review can only seek further redress by filing an application for judicial review before the Federal Court of Canada.

---

[65] *National Defence Act*, *supra* note 1, s 163.1(1).
[66] *Ibid*, s 163.1(2).
[67] *Ibid*, s 163.1(3).
[68] *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 23, art 124.03.
[69] *Ibid*, art 124.02(1).
[70] *National Defence Act*, *supra* note 1, s 163.6(2).
[71] *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 23, art 124.02(2).
[72] *Ibid*, art 124.04.
[73] *Ibid*, art 124.05. Of note, the current *Military Justice at the Unit Level Policy* restricts an OCSH's authority to substitute findings.
[74] *Ibid*, art 124.06.
[75] *Ibid*, art 124.07.

3 MILITARY JUSTICE SYSTEM STATISTICS

As it has in previous years, the Office of the JAG continues to collect the most accurate quantitative data available regarding the military justice system throughout the 2023/24 reporting period. In addition, the Office of the JAG has been actively engaged in upgrading the military justice statistical monitoring and analysis processes in order to enhance transparency and accountability in the system. These improvements are an ongoing process that are integral to the military justice system's evolution.

The 2023/24 reporting period marks the first full reporting period since the introduction of the summary hearing system. This comprehensive reconfiguration of the military justice system's summary tier is reflected in the way the statistical information is presented in this chapter, which differs in a number of respects from the presentation of military justice statistics in previous annual reports. One change is that certain types of data that were relevant to the functioning of the former summary trial system, such as the number of elections to courts martial or the number of service offences tried by summary trial, are not applicable to the summary hearing system and are no longer included.

More broadly, the comprehensive change in the system of summary proceedings means that meaningful comparative data from previous reporting periods is not available. Though they serve similar purposes, the summary hearing and summary trial systems are fundamentally different processes. They are designed to address different types of misconduct and are built upon different legal principles. Unlike its predecessor, the summary hearing system has no authority to hear charges for service offences and is expressly a non-penal, disciplinary proceeding based upon administrative law principles. Consequently, a comparison between this reporting period's summary hearing statistics and previous years' statistics for summary trials would have little analytical value and could potentially be misleading.

Comparisons with the summary hearing statistics from the approximately nine months of the 2022/23 reporting period when the system was functioning would be similarly unhelpful. The summary hearing system was in its introductory stage during those months, so the statistics from that time do not present a complete picture of the system's uptake at the unit level. Moreover, as is illustrated below at Figure 3.2, the use of summary hearings fluctuates from month to month, so statistics that do not capture a complete reporting period, such as those from 2022/23, do not provide useful comparators for analytical purposes.

In light of these considerations, the most effective long-term approach is to treat the 2023/24 reporting period as "year one" for the purposes of summary hearing statistics. Accordingly, this chapter does not present comparative statistics for summary proceedings from pervious reporting periods. Instead, the statistics presented in this chapter will only cover the present reporting period, and it will serve as the baseline for comparisons in future annual reports.

Summary Hearings

During this reporting period, 46 courts martial and 417 summary hearings were conducted. Summary hearings were by far the most widely used form of disciplinary procedure (compared with courts martial) in the Canadian Armed Forces, comprising approximately 90% of disciplinary proceedings. The preponderance of summary hearings is in keeping with expectations given that the system was designed to provide a fast and accessible tool for addressing relatively minor misconduct at the unit level. Figure 3.1 shows the number of courts martial and summary hearings held over the reporting period as well as the corresponding percentage of cases tried by each type of service proceeding.

Figure 3.1: Distribution of Service Proceedings

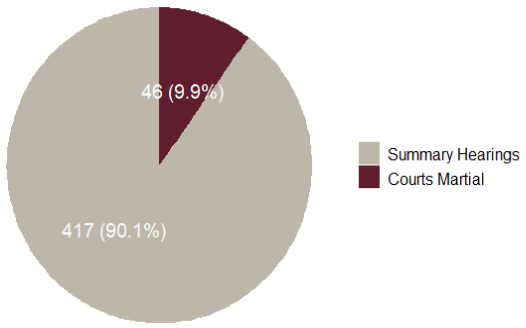
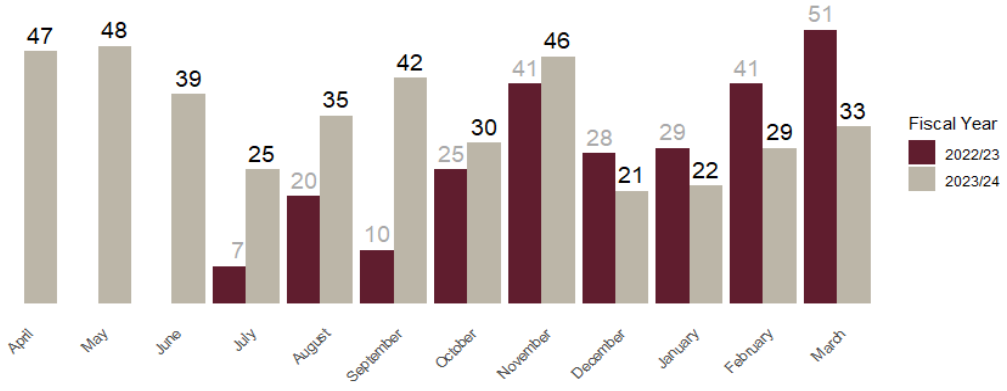


Figure 3.2 shows the distribution of summary hearings by month since the introduction of the new system on 20 June 2022. Overall, the statistics suggest a relatively steady use of summary hearings by units with some seasonal fluctuations. The system appears to have been readily adopted throughout the final months of the 2022/23 reporting period, a trend that continued into the first three months of the present period, though the number of summary hearings dropped in the final months of this reporting period (December 2023 to March 2024).

Figure 3.2: Number of Summary Hearings by Month

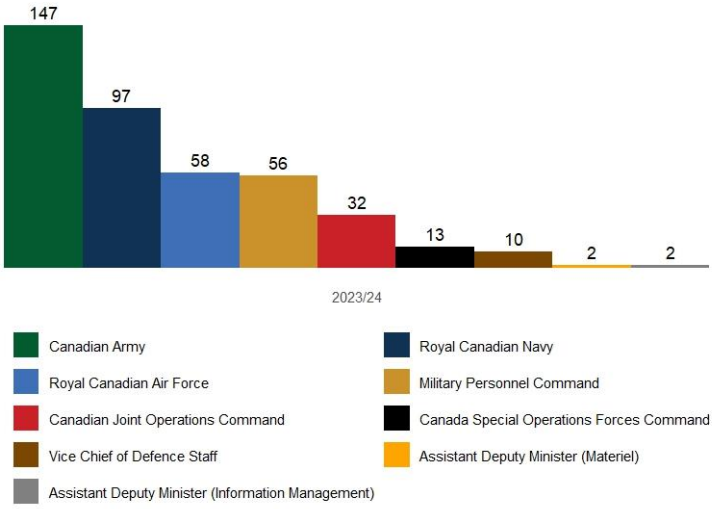


Summary Hearings by Organization

Figure 3.3 shows the total number of summary hearings held over the reporting period within the following nine organizations: Canadian Army, Royal Canadian Navy, Military Personnel Command, Royal Canadian Air Force, Canadian Joint Operations Command, Canadian Special Operations Forces Command, Vice Chief of Defence Staff, Assistant Deputy Minister (Materiel), and Assistant Deputy Minister (Information Management).

The distribution of summary hearings across organizations, with the Canadian Army accounting for the highest number of hearings (147 or 35.25%) followed by the Royal Canadian Navy (97 or 23.26%), is in keeping with the distribution of summary proceedings in previous years.

Figure 3.3: Number of Summary Hearings by Organization



Charges Disposed of at Summary Hearing

During this reporting period, 641 charges for service infractions were disposed of at summary hearing. Chapter 120 of the *Queen's Regulations and Orders for the Canadian Forces* sets out three categories of service infractions that cover a broad range of relatively minor disciplinary misconduct: infractions in relation to property and information, infractions in relation to military service, and infractions in relation to drugs and alcohol. Service infractions are distinct from service offences over which courts martial have jurisdiction.

There were 41 charges disposed of at summary hearing for service infractions in relation to drugs and alcohol under article 120.04 of the *Queen's Regulations and Orders for the Canadian Forces*, accounting for approximately 6% of the total. The most common charge disposed of under this article was paragraph 120.04(c) (introduces, possesses, or consumes an intoxicant contrary to article 19.04 (Intoxicants)), accounting for 3% of all charges. There were 21 charges disposed of for service infractions in relation to property and information under article 120.02, accounting for 3% of the total. Figure 3.4 provides the number and percentage of charges for

each category of service infraction disposed of at summary hearing during the 2023/24 reporting period. A more detailed list of each infraction disposed of at summary hearing is provided at Annex A.

Figure 3.4 Number of Charges Disposed of at Summary Hearing

	2023/24	
	#	%
120.02 - INFRACTIONS IN RELATION TO PROPERTY AND INFORMATION	21	3.28
120.03 - INFRACTIONS IN RELATION TO MILITARY SERVICE	579	90.32
120.04 - INFRACTIONS IN RELATION TO DRUGS AND ALCOHOL	41	6.40
Total	**641**	**100.00**

Of the three categories of service infractions, the most frequently charged is service infractions in relation to military service, under article 120.03 of the *Queen's Regulations and Orders for the Canadian Forces*. Charges under this article accounted for 579 of the 641 charges for service infractions during this reporting period, representing approximately 90% of the total. Article 120.03 includes nine individual service infractions, the highest number of the three categories. It also includes the two most common infractions disposed of at summary hearings: paragraph 120.03(f) (without reasonable excuse, fails to attend or is tardy to their place of duty) and paragraph 120.03(i) (behaves in a manner that adversely affects the discipline, efficiency, or morale of the Canadian Forces). These two infractions account for approximately 32% and 42% of charges under article 120.03, respectively. The other service infractions in relation to military service most commonly disposed of at summary hearing were paragraph 120.03(e) (in relation to military service, furnishes false or misleading information or engages in deceitful conduct) accounting for approximately 6% of charges under article 120.03, and 120.03(b) (discharges a firearm without authorization) accounting for over 4%. Figure 3.5 set outs the breakdown of the charges disposed of at summary hearing for infractions in relation to military service under article 120.03.

Figure 3.5 Number of Charges Disposed of for Infractions in Relation to Military Service

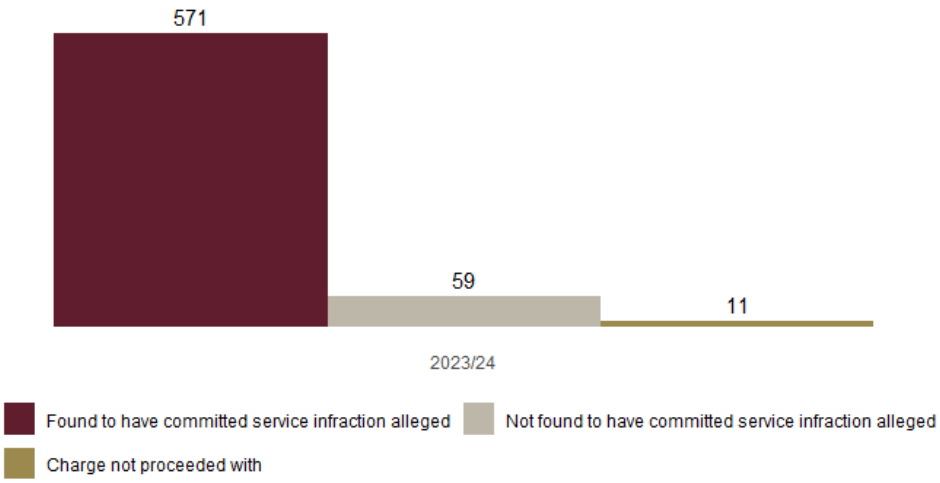
	2023-24	
120.03 - INFRACTIONS IN RELATION TO MILITARY SERVICE	#	%
(a) A person commits a service infraction who handles a weapon, explosive substance, or ammunition in a dangerous manner	9	1.55
(b) A person commits a service infraction who discharges a firearm without authorization	26	4.49

(c) A person commits a service infraction who behaves in a manner that could reasonably undermine the authority of a superior officer	26	4.49
(d) A person commits a service infraction who fails or while on duty is unfit to effectively perform their duties or carry out responsibilities	31	5.35
(e) A person commits a service infraction who in relation to military service, furnishes false or misleading information, or engages in deceitful conduct	37	6.39
(f) A person commits a service infraction who without reasonable excuse, fails to attend or is tardy to their place of duty	187	32.30
(g) A person commits a service infraction who dresses in a manner or adopts an appearance or demeanour that is inconsistent with Canadian Forces requirements	13	2.25
(h) A person commits a service infraction who fails to maintain personal equipment or assigned quarters in accordance with Canadian Forces requirements	6	1.04
(i) A person commits a service infraction who otherwise behaves in a manner that adversely affects the discipline, efficiency, or morale of the Canadian Forces	244	42.14
Total	**579**	**100.00**

Findings at Summary Hearing

During the reporting period, there were 571 findings that the alleged service infraction was committed, representing approximately 89% of summary hearing findings. There were 59 findings that the alleged service infraction was not committed, representing approximately 9% of findings. There were 11 charges not proceeded with at summary hearing. Based on these numbers, it appears that the move from summary trials to non-criminal and non-penal summary hearings, which included a move to the less onerous “balance of probabilities” standard of proof, has not had a significant impact on the outcome of summary proceedings because it is consistent with statistics found in previous annual reports concerning the now retired summary trial system. The statistics for findings at summary hearings are set out at Figure 3.6.

Figure 3.6: Findings by Charge (Summary Hearing)



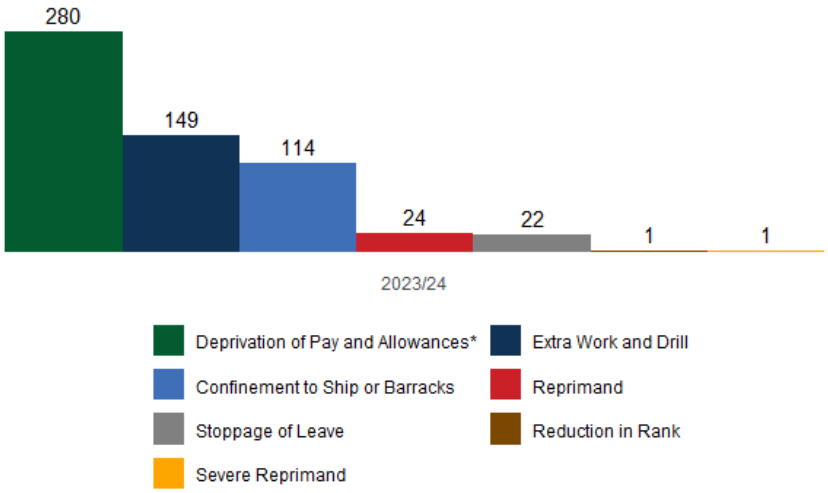
Sanctions at Summary Hearing

OCSH's are limited in the types of sanctions they may impose on a member found to have committed a service infraction. Arranged from the most severe sanction to the least severe, the available sanctions are: reduction in rank, severe reprimand, reprimand, deprivation of pay and allowances for no more than 18 days, and minor sanctions, which include confinement to ship or barracks for no more than 14 days, extra work and drill for no more than 14 days, and the withholding of leave for no more than 30 days. Reflecting the non-penal nature of the summary hearing system, OCSH's do not have authority to impose either detention or a fine as a sanction.

Deprivation of pay and allowances was the most common sanction imposed at summary hearing during this reporting period, accounting for over 46% of sanctions. Extra work and drill was the second most frequently imposed sanction, accounting for over 25% of sanctions, while confinement to ship or barracks accounted for nearly 20% of sanctions imposed. Figure 3.7 shows the number of sanctions by type that were imposed at summary hearing during the 2023/24 reporting period.

On 7 July 2023, the processing of the sanction of deprivation of pay was placed on hold in Guardian and the Canadian Armed Forces pay system by the Director of Human Resources and Business Management in consultation with the Director of Pay and Policy Development and the Director of Military Pay and Processing. The processing hold was placed to ensure that a uniform method of administering the sanction is being used at the unit level, and to ensure that members deprived of pay are not deprived of allowances. No regulations have been created by the Governor in Council to authorize the deprivation of an allowance as is currently required by law. The Office of the JAG is collaborating with all stakeholders to resolve the processing hold and improve the administration of the sanction. It is anticipated that a solution will be forthcoming.

Figure 3.7: Sanctions at Summary Hearing



*There is currently no authority to deprive members of allowances. When this sanction is imposed members are to be deprived of pay only.

Summary Hearings by Rank

All members of the Canadian Armed Forces may be charged with service infractions and subject to a summary hearing regardless of their rank. During the reporting period, there were a total of 290 summary hearings for junior non-commissioned members (between Private (Basic)/Sailor 3rd Class and Master Corporal/Master Sailor) and 69 for senior non-commissioned members (between Sergeant/Petty Officer 2nd Class and Chief Warrant Officer/Chief Petty Officer 1st Class). For officers, there were 16 summary hearings for subordinate officers (officer cadets/naval cadets), 39 hearings for junior officers (between Second Lieutenant/Acting Sub-Lieutenant and Captain/Lieutenant (Navy)), and 3 hearings for senior officers (Major/Lieutenant Commander and above). There were no summary hearings for any officers above the rank of Major. Figure 3.8 sets out the number and percentage of summary hearings organized by the rank of the person alleged to have committed the service infraction.

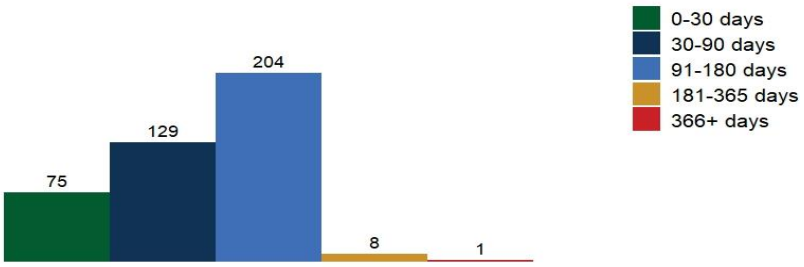
Figure 3.8: Number of Summary Hearings by Rank of Person Charged

	2023/24	
	#	%
Private (Basic) / Sailor 3rd Class	40	9.59
Private / Aviator / Sailor 2nd Class	77	18.46
Corporal / Sailor 1st Class	132	31.65
Master Corporal / Master Sailor	41	9.83
Sergeant / Petty Officer 2nd Class	39	9.35
Warrant Officer / Petty Officer 1st Class	19	4.56
Master Warrant Officer / Chief Petty Officer 2nd Class	9	2.16
Chief Warrant Officer / Chief Petty Officer 1st Class	2	0.48
Officer Cadet / Naval Cadet	16	3.84
Second Lieutenant / Acting Sub-Lieutenant	13	3.12
Lieutenant / Sub-Lieutenant	7	1.68
Captain / Lieutenant (Navy)	19	4.56
Major / Lieutenant Commander	3	0.72
Lieutenant Colonel / Commander	0	0.00
Colonel / Captain (Navy)	0	0.00
General Officer / Flag Officer	0	0.00
Total	**417**	**100.00**

Timeline for Summary Hearings

An essential feature of the summary hearing system is its ability to dispose of charges quickly. To that end, a summary hearing must be commenced within six months of the alleged commission of the service infraction. Summary proceedings are intended to allow Canadian Armed Forces units to address misconduct as promptly as possible, while still maintaining a fair process. Delays in addressing disciplinary issues allow problems to persist and adversely impacts a unit's morale and efficiency. In this regard, the summary hearing system appears to be functioning as intended. The average number of days between an alleged infraction and the conclusion of the summary hearing during the reporting period was 93.5 days. Only 9 summary hearings, or 2.16% of the total, were completed more than 180 days following the alleged infraction. Figure 3.9 shows the amount of time that elapsed between an alleged service infraction and the completion of a summary hearing during the 2023/24 reporting period.

Figure 3.9: Number of Days between Alleged Infraction and Completion of Summary Hearing



Reviews of Summary Hearings

The review of a summary hearing can be initiated at the request of the member who was found to have committed a service infraction or on the initiative of a review authority. During the 2023/24 reporting period, there were 21 reviews of summary hearings, representing approximately 5% of summary hearings.

Review authorities for summary hearings can uphold the finding that the member committed the service infraction, quash the finding, or substitute a finding or sanction imposed at a summary hearing.[76] During this reporting period, review authorities upheld 14 findings, quashed 4 findings, and substituted 1 finding. With respect to sanctions imposed at summary hearing, review authorities substituted 3 sanctions and mitigated 3 sanctions. A breakdown of all

[76] As noted previously, the current Military Justice at the Unit Level Policy restricts an OCSH's authority to substitute findings.

decisions by summary hearing review authorities for the reporting period can be found at Figure 3.10.

Figure 3.10: Decisions of Summary Hearing Review Authorities

	2023/24	
	#	%
Mitigates sanction	3	12.00
Quashes finding	4	16.00
Substitutes finding	1	4.00
Substitutes sanction	3	12.00
Upholds finding	14	56.00
Total	**25***	**100.00**

*In two cases the review authority made multiple decisions.

Language of Summary Hearings

Persons charged with having committed a service infraction have the right for the hearing to be conducted in the official language of their choice. An OCSH is required to be able to understand the language in which a summary hearing is to be conducted without the assistance of an interpreter.

In this reporting period, approximately 85% of summary hearings were conducted in English. Approximately 15% of summary hearings were conducted in French. These numbers are broadly consistent with the previous reporting period. Figure 3.11 shows the total number of summary hearings conducted in English and French for the reporting period.

Figure 3.11: Language at Summary Hearing

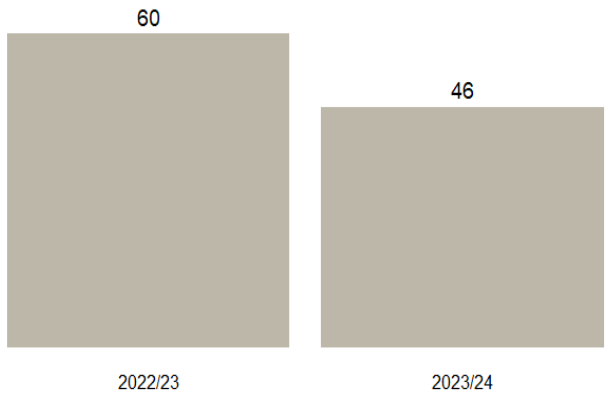
	2023/24	
	#	%
English	353	84.65
French	64	15.35
Total	**417**	**100.00**

Courts Martial

Referrals Received by the Director of Military Prosecutions

During this reporting period, the Director of Military Prosecutions received a total of 46 new referrals or requests for charges to proceed for trial by court martial, a decrease of 14 cases from the 2022/23 reporting period. This number does not include referrals that were carried over from the previous reporting period. It is notable that, since the coming into force of Bill C-77 in June 2022, all service offences are referred directly to the Director of Military Prosecutions. There were no referrals during the reporting period in respect of *Criminal Code* sexual offences. Figure 3.12 shows the number of referrals received by the Director of Military Prosecutions over the last two reporting periods.

Figure 3.12: Referrals Received by the Director of Military Prosecutions



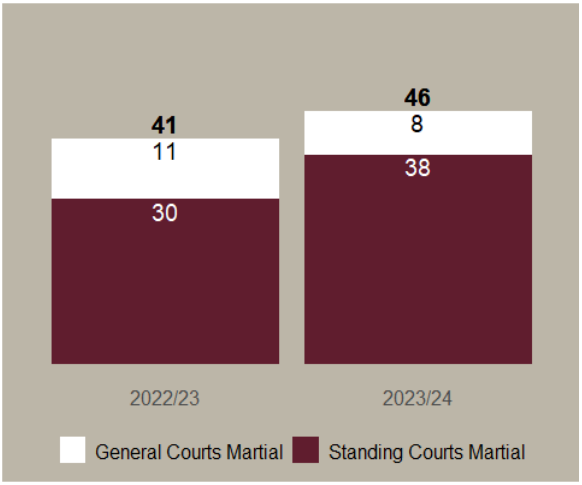
Number of Courts Martial

During this reporting period, 46 courts martial were conducted, representing approximately 10% of all proceedings held by service tribunals. This is a slight increase from the 41 courts martial held during the previous reporting period. Of the 46 courts martial, 19 involved contested trials (including two with joint submissions on sentencing), 23 were guilty pleas with joint submissions on sentencing (including one where the accused changed their plea to guilty mid-trial), and 3 were guilty pleas where the sentence was contested. Figure 3.13 sets out the number of courts martial for the past two reporting periods.

The most common service offence disposed of at court martial during this reporting period was conduct to the prejudice of good order and discipline under section 129 of the *National Defence Act*, which accounted for over 14% of offences. This is a significant decrease from the previous reporting period when prejudice of good order and discipline charges accounted for 25% of service offences. The second most common service offence disposed of at court martial was sexual assault under section 271 of the *Criminal Code*, accounting for approximately 11% of offences. This is roughly on par with the previous reporting period, when sexual assault accounted for approximately 14% of service offences, but notably lower than the 2021/22

reporting period, when sexual assault accounted for over 21% of service offences disposed of at court martial. This decrease may in part be attributable to the release in November 2021 of the Director of Military Prosecution's "Interim Direction Regarding the Implementation of Madame Arbour Interim Recommendation" which addressed the transfer of sexual assault cases from the military to the civilian justice system.

Figure 3.13: Number of Courts Martial



Results by Case at Court Martial

Of the 46 courts martial held during this reporting period, 35 resulted in a finding of guilty on at least one charge, 9 resulted in a finding of not guilty on all charges or a stay of proceedings, in 1 case the accused was found guilty of a less serious offence, and in 1 case all charges were withdrawn. Figure 3.14 shows the disposition by case for the current reporting period.

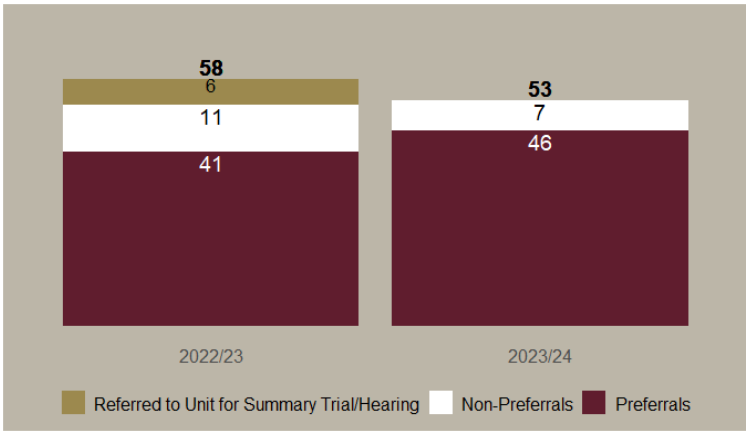
Figure 3.14: Disposition of Cases at Court Martial

	2023/24	
	#	%
Found Guilty of at Least One Charge	35	76.08
Found Guilty of a Less Serious Offence	1	2.18
Not Guilty of All Charges or Stay of Proceedings	9	19.56
Withdrawal of All Charges	1	2.18
Total	**46**	**100.00**

Preferrals and Non-Preferrals

During this reporting period, the Director of Military Prosecutions proceeded with charges or preferred charges in 46 cases for trial by courts martial. There were 7 cases where the Director of Military Prosecutions did not proceed with or prefer any charges and no files were referred back to a unit to try the accused person by summary proceeding. Figure 3.15 illustrates the number of cases preferred by the Director of Military Prosecutions and the number of files where no charges were preferred over the past two reporting periods.

Figure 3.15: Number of Cases Disposed of by the Director of Military Prosecutions



Punishments at Court Martial

Figure 3.16 breaks down the punishments imposed by courts martial over the last reporting period. The most common punishments imposed continue to be fines, followed by reprimands.

Figure 3.16: Punishments at Court Martial

	2023/24	
	#	%
Imprisonment for two years or more	2	3.39
Dismissal with disgrace from His Majesty's service	0	0.00
Imprisonment for less than two years	3	5.08
Dismissal from His Majesty's service	0	0.00
Detention	3	5.08

	2023/24	
	#	%
Reduction in Rank	0	0.00
Forfeiture of Seniority	0	0.00
Severe Reprimand	8	13.56
Reprimand	12	20.34
Minor Punishments	4	6.78
Fine	25	42.38
Absolute Discharge*	2	3.39
Total	**59**	**100.00**

* An absolute discharge is not a punishment. If a court martial, finding that it is in the best interests of the offender and not contrary to the public interest, directs that an offender be discharged absolutely of an offence, the offender is deemed not to have been convicted of the offence except with respect to appeals and pleas in subsequent proceedings that the offender has already been tried for and convicted of the same offence.

4 MILITARY JUSTICE JURISPRUDENCE

This chapter examines some of the key military justice jurisprudence over the reporting period. These decisions, from courts martial, the Federal Court of Canada, the Ontario Court of Justice, the Court Martial Appeal Court of Canada, and the Supreme Court of Canada will have a significant impact in guiding the military justice system's future development.

Courts Martial

The Constitutionality of Mandatory Sex Offender Registration

R v Kohlsmith[77]

In *R v Kohlsmith*, a military judge found the *National Defence Act* provision requiring mandatory sex offender registration to be invalid on grounds of unconstitutionality. Following a Supreme Court decision that found that a similar *Criminal Code* provision was unconstitutional, the judge found that the impugned *National Defence Act* provision was also unconstitutional and suspended the declaration of invalidity in accordance with the Supreme Court's decision.[78]

After his conviction at a Standing Court Martial for sexual assault, Sgt Kohlsmith brought a motion challenging the constitutionality of subsection 227.01(1) of the *National Defence Act,* which requires the mandatory lifetime registration of a sex offender. The defence cited the Supreme Court's decision in *R v Ndhlovu*[79] that found similar provisions in the *Criminal Code* to be unconstitutional infringements of the right to liberty protected under section 7 of the *Charter*. In *R v Ndhlovu,* the Supreme Court found the registration to be overbroad because it captured offenders that are not at risk of re-offending. The Court reasoned that there was no connection between the purpose of the registry and the future prevention of sexual crime for certain offenders.

The parties agreed that section 227.01 of the *National Defence Act* effectively mirrored the impugned *Criminal Code* provisions in *R v Ndhlovu* and suffered from the same constitutional flaw. As a result, the military judge extended the declaration of invalidity from *R v Ndhlovu* to section 227.01 of the *National Defence Act* and applied the Supreme Court's suspension of the declaration of invalidity, noting the strong public interest for doing so.[80]

---

[77] 2023 CM 3002 [*R v Kohlsmith*].
[78] *Ibid* at paras 58, 59.
[79] *Ndhlovu*, supra note 6.
[80] *R v Kohlsmith, supra* note 77 at para 37.

R v O'Dell[81]

R v O'Dell is the second case from the reporting period where a military judge was required to consider the *National Defence Act* provisions requiring sex offender registration and impact of the Supreme Court's *R v Ndhlovu* decision on those provisions.[82]

Following his conviction for sexual assault, Cpl O'Dell applied at his sentencing hearing for a personal remedy exempting him from the application of the registration provisions on the grounds that they violated his right to liberty, protected under section 7 of the *Charter*. The prosecution opposed the application principally on the grounds that there was insufficient evidence regarding the low risk of recidivism.

Considering the various ways the *R v Ndhlovu* decision had been interpreted, the military judge agreed with the prosecution's position that *R v Ndhlovu* should not be read as reinstating a discretion to trial judges to decide on their own motion, whether to impose a sex offender registration order when they are sentencing an offender. Nevertheless, the judge found that the Supreme Court's ruling did not preclude a sentencing judge from considering a *Charter* application to decide to grant a personal remedy when the applicable burden of proof is met by the applicant.[83] The military judge found that Cpl O'Dell had not adduced sufficient evidence to support his application, particularly on the issue of his risk of reoffending, and declined to issue the exemption order.[84] On 25 July 2024, the Court Martial Appeal Court dismissed Cpl O'Dell's appeal of his conviction, but upheld his appeal of the imposition of the sex offender registration order.[85]

The Constitutionality of Sentencing Provisions for Young Offenders

R v J.L.[86]

In *R v J.L*., the military judge considered the application of the military justice system to young persons. Finding that certain sentencing provisions were unconstitutional when applied to young persons, the judge read down the jurisdiction of the Code of Service Discipline so that it will no longer apply to young persons charged with offences under the *Criminal Code* and

---

[81] 2023 CM 5004 [*R v O'Dell*].

[82] Note that the constitutional issues raised by the Supreme Court in *R v Ndhlovu* were addressed in Bill S-12, *An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act*, which received royal assent in October 2023. Bill C-66, *Military Justice System Modernization Act*, proposes to make similar amendments to the *National Defence Act.*

[83] *R v O'Dell,* supra note 81 at para 40.

[84] *Ibid* at para 41.

[85] *R v O'Dell,* 2024 CMAC 5.

[86] 2023 CM 2010 [*R v J.L.*].

certain service offences in the *National Defence Act*[87] until the sentencing provisions are amended.

Pte J.L. was a reservist charged with sexual assault and disgraceful conduct. He was 17 years old at the time of the offences. Prior to his court martial, which occurred outside the reporting period, he brought an application alleging that the Code of Service Discipline did not apply to young persons. In response to this application, the military judge determined that the military justice system had concurrent jurisdiction to try young persons but declined to make any findings with respect to sentencing until the sentencing stage of the proceedings. Following his conviction, Pte J.L. brought another application challenging the constitutionality of the *National Defence Act*'s sentencing provisions as they applied to young persons. The defence argued that the sentencing procedures failed to recognize the presumption of diminished moral culpability that young persons are owed as a principle of fundamental justice under section 7 of the *Charter*. In response, the prosecution argued that, among other things, Parliament chose to have young persons in the military judged and sentenced under the Code of Service Discipline in the same manner as their adult counterparts in order to maintain the discipline, efficiency, and morale of the Forces.

The military judge found that the mandatory nature of some *National Defence Act* sentencing provisions obstructed military judges from giving effect to the presumption that young persons have less moral blameworthiness and culpability than adults.[88] The judge determined that the *National Defence Act*'s failure to recognize the reduced moral culpability of young persons infringed the principles of fundamental justice as protected by section 7 of the *Charter* and could not be saved under section 1 as a reasonable limit in a free and democratic society.[89] As a result, the judge prospectively read down the ambit of section 60 of the *National Defence Act*, the provision that establishes who is subject to the Code of Service Discipline, so that it would not apply to young persons charged with offences under the *Criminal Code* and certain, more serious service offences under the *National Defence Act,* that are *not* set out at paragraph 249.27(1)(a).[90] As a *Charter* remedy, the judge determined that both the public interest and the interests of the accused were best served by granting J.L. an absolute discharge so that there was no criminal conviction.[91] Both the defence and prosecution sought leave to appeal this decision to the Court Martial Appeal Court of Canada. The appeal was heard in February 2024.[92]

---

[87] Paragraph 249.27(1)(a) lists the service offences under the *National Defence Act* for which a conviction is not considered to be a conviction of a criminal offence and does not result in a criminal record under the *Criminal Records Act* (R.S.C. 1985, c C-17).
[88] *R v J.L., supra* note 86 at para 121.
[89] *Ibid* at para 126.
[90] *Ibid* at para 143.
[91] *Ibid* at para 163.
[92] *R v J.L.,* 2023 CM 2010, appeal to CMAC heard, decision reserved at time of publication, 2024 CMAC 636.

The Authority of Military Judges to Suspend Sentences

R v Meeks[93]

R v Meeks involves the question of whether a military judge has the authority to suspend the execution of a sentence following the completion of a court martial.

Sgt Meeks had previously been found guilty of the offence of assault causing bodily harm and sentenced to 30 days detention but filed an application for release pending appeal. At the application hearing, the military judge, concerned for Sgt Meeks' mental health, suggested he attend a nearby hospital for an assessment prior to his release. Sgt Meeks spent several weeks in hospital and when he was released to appear before the military judge, he had served eight of the thirty days of detention that had been imposed. At the hearing, counsel for Sgt Meeks requested that the military judge suspend the remainder of his sentence based upon new information regarding his mental health. The prosecution argued that the military judge was *functus officio* with respect to suspending the sentence, as military judges are not listed as "suspending authorities" in the relevant regulatory provisions. The doctrine of *functus officio* means that once a decision-maker has rendered a decision on a matter, they cannot go back and revise that decision except in limited circumstances. The purpose of the doctrine is to provide finality of decision-making and to allow for potential review by an appellate level of court or other review authority.

In considering the issue, the military judge addressed jurisprudence on the doctrine of *functus officio*, noting that a decision cannot be re-visited simply because a court has changed its mind, made an error within its jurisdiction, or because there has been a change of circumstances. It can only do so if authorized by statute, there has been an issue in preparing the decision, or there has been an error in expressing the manifest intention of the court. The military judge also considered the relevant statutory and regulatory authorities. Under the *National Defence Act*, a sentence that has already been imposed can only be suspended by the specified suspending authorities listed in the *Queen's Regulations and Orders for the Canadian Forces*; a list that does not include military judges. Based on these considerations, the military judge determined that they did not have the authority to suspend the sentence under these specific circumstances.[94] However, the military judge found that they did have authority to order a release pending appeal, provided, among other things, that the member established that they would surrender themselves when required and that their detention or imprisonment was not necessary in the interest of the public or the Canadian Armed Forces.[95] The military judge, finding that these criteria had been met, ordered Sgt Meeks to be released pending appeal subject to conditions imposed. As of writing this report, the decision of the military judge has been appealed and will be heard in October 2024.[96]

---

[93] 2023 CM 2018.
[94] *Ibid* at para 12.
[95] *Ibid* at para 25.
[96] *R v Meeks,* 2023 CM 2018, appeal to CMAC requested, 2024 CMAC 642.

Federal Court of Canada

The Entitlement to Elect Trial by Court Martial

Noonan v Canada (Attorney General of Canada)[97]

The case of *Noonan v Canada*, and its companion case, *Strecker v Canada*, involved applications for judicial review of the summary trial Review Authorities' decisions. Both cases turned on the common issue of whether the Reviewing Authorities reasonably interpreted the phrase "dress and deportment" as it appeared in *Queen's Regulations & Orders for the Canadian Forces* article108.17(1)(a) to mean that the Applicants had no right to elect a court martial. The provision was repealed in June 2022 with the introduction of the summary hearing system, after the decisions under review were rendered.

The applicants, Sgt Noonan and LCdr Strecker, were charged under section 129 of the *National Defence Act* for conduct to the prejudice of good order and discipline based on allegations that they made inappropriate comments. They sought to elect trial by court martial, but in both cases, the Presiding Officer and Review Authority determined that the offences were minor and related to dress and deportment and, therefore, the Applicants were not entitled to elect court martial. They were found guilty at summary trial and sentenced to fines. Both sought review of their Presiding Officers' findings. In both cases the Review Authorities agreed that the nature of the offences did not give rise to a right to elect court martial. Both applied for judicial review at the Federal Court of Canada.

The Federal Court granted the applications, finding that the Review Authorities had failed to observe modern principles of statutory interpretation and to consider the meaning of the words "dress and deportment" within the context of section 129 of the *National Defence Act* or with a view to the overall purpose of the *Queen's Regulations and Orders for the Canadian Forces* provision.[98] According to the Court, "dress and deportment" must be interpreted conjunctively to cover issues relating to the wearing of uniforms, cleanliness of uniforms, or other dress related infractions. The Court based this conclusion on three considerations: first, following the limited class rule of statutory interpretation, the Court explained that *Queen's Regulations and Orders for the Canadian Forces* article 108.17(1)(a) uses the expression "dress and deportment" as a single term of art, as one of the three enumerated categories pertaining to s.129 of the *National Defence Act*, and in relation to the two other related categories.[99] Second, the Court reasoned that reading "dress and deportment" disjunctively would lead to the absurd result of subsuming serious service offences into minor non-electable offences.[100] Finally, the Court stated that, if the legislative intent was to read the phrase disjunctively, the provision would have read "dress or deportment" instead of "dress and deportment."[101] The Court quashed the findings as to guilt and sentence and granted each of the applicants their costs.

---

[97] 2023 FC 618.
[98] *Ibid* at paras 47-48.
[99] *Ibid* at para 54.
[100] *Ibid* at para 56.
[101] *Ibid* at para 57.

Ontario Court of Justice

Unreasonable Trial Delay due to Transferring to the Civilian Justice System

R v Harrison[102]

In *R v Harrison*, the Ontario Court of Justice stayed proceedings against a former Canadian Armed Forces member for sexual assault on the ground that the delay in bringing the case to trial had violated the accused's *Charter* right to be tried within a reasonable time.

The alleged sexual assault, in which the complainant was also a Canadian Armed Forces member, occurred at Canadian Forces Base Petawawa in April 2020. The complaint was originally investigated by military police who laid service offence charges at the end of March 2021. Following Mme Arbour's interim recommendation that sexual offences be referred to civilian authorities, the Director of Military Prosecutions issued an Interim Direction in November 2021 to implement this recommendation. In accordance with the Interim Direction, military prosecutors consulted all affected complainants in cases of this nature as soon as possible in order to make them aware of the interim recommendation and to seek their views on jurisdiction for the case to proceed. This direction was fully implemented in all cases, including in the case of *Harrison.* The direction further emphasized that "the views of a victim complainant on whether a case should proceed in one jurisdiction or another, or not proceed at all, are considered as determinative in all but the most exceptional circumstances."[103]

On 21 December 2021, the service offence charges were withdrawn following a request from the complainant. On 23 December 2021, an information under the *Criminal Code* was laid against the accused in the Ontario Court of Justice. After several delays, a trial was eventually scheduled to commence in August 2023, prior to which counsel for the accused brought an application to stay the charges on the grounds of unreasonable delay.

Under the analytical framework established by the Supreme Court of Canada in *R v Jordan*,[104] an accused's right to be tried within a reasonable time under section 11(b) of the *Charter* will be presumptively violated if the time between the laying of charges and the conclusion of a trial in a provincial court, exceeds 18 months. This presumption can be rebutted in situations where the delay is attributable to the defendant's own conduct or as the result of extraordinary circumstances. In the case of *R v Harrison*, the delay between the laying of the initial charges by the military police and the scheduled conclusion of the trial was slightly longer than 29 months.[105] The Crown argued that, among other things, a significant portion of this delay was attributable to the extraordinary circumstances of having the case transferred from the military to the civilian justice system in response to the recommendations of both the IR3[106] and the IECR.[107]

---

[102] 2023 ONCJ 392 [*R v Harrison*].
[103] Canada, Director of Military Prosecutions, *Interim Direction on the Implementation of Mme Arbour Interim Recommendations*, (Ottawa: Canadian Military Prosecution Service, 2021) at para 6.
[104] 2016 SCC 27.
[105] *R v Harrison, supra* note 102 at para 5.
[106] *The Third Independent Review, supra* note 5.
[107] *The Independent External Comprehensive Review, supra* note 4.

The Court rejected this argument, finding that it must take "a fairly restrictive approach to the issue of exceptional circumstances where there has been a dramatic change in the law which affects the military justice process."[108] In light of this approach, the Court found that the Crown had not proven a clear link between the recommendations and the decision to discontinue the military proceeding and commence the case in the civilian system. Importantly, the Court found that it had not been provided with evidence regarding the steps taken to implement the Director of Military Prosecutions' Interim Directive[109] or taken to mitigate the impact of the decision to transfer the case to the civilian system.[110] Ultimately, the Court stayed the proceedings against the accused.

Court Martial Appeal Court of Canada

Application of the No (Prima Facie) *Case Test*

R v Ellison[111]

In *R v Ellison*, the Court Martial Appeal Court considered whether the military judge erred in law by misapplying the no *prima facie* case test. The no *prima facie* case test applies where the defence contends that the prosecution has failed to adduce any evidence to establish an essential element of the offence with which the defendant has been charged.

The accused, a now retired medical officer, was charged with four fraud-related charges under sections 130 and 117(f) of the *National Defence Act*. Maj Ellison wrote medical prescriptions in the name of two service members for the benefit of his wife. The defence put forward a no *prima facie* case motion regarding the charges on the basis that the prosecution failed to introduce any evidence concerning the essential elements of the charge, namely dishonesty and an economic deprivation. The military judge found the prosecution had not discharged its burden of proving the essential element of a deprivation, and concluded there was no *prima facie* case, acquitting all charges. The prosecution appealed the acquittals on the grounds that the judge erred in the application of the no *prima facie* case test.

The Court Martial Appeal Court allowed the appeal, set the acquittals aside, and ordered a retrial. The Court concluded that the military judge made significant errors in applying the test for the essential element of deprivation on the basis that Maj Ellison did not financially profit from writing the illicit prescriptions since his wife already was eligible for reimbursement through her health insurance.[112] The appeal judges were of the opinion that some evidence of the risk of deprivation existed because the service members were eligible for reimbursement from the Government of Canada, through Blue Cross, of which Maj Ellison had subjective knowledge.[113]

---

[108] *R v Harrison, supra* note 102 at para 188.
[109] *Ibid* at para 168
[110] *R v Harrison, supra* note 102 at para 201.
[111] 2024 CMAC 3.
[112] *Ibid* at para 11.
[113] *Ibid* at para 14.

The Necessary Procedure for Rejecting a Joint Sentencing Submission

R v El Zein[114]

In *R v El Zein*, the Court Martial Appeal Court considered whether the military judge erred in law by rejecting a joint sentencing submission and imposing a stricter sentence, without giving the parties prior notice of his intention, and the opportunity to make further submissions regarding sentencing.

The accused, Cpl El Zein, was charged with sexual assault. Cpl El Zein and the victim were friends. During a run together, he suggested the possibility of sexual relations between them, kissed her, then proceeded to touch her in a sexual manner, despite her insistence that she wanted to get to know him better first. While Cpl El Zein contested the charges, prosecution and defence counsel agreed on a joint submission on the sentence if found guilty: reduction in rank from Corporal to Private, a fine of $5,000, and 30 days of detention in the Canadian Forces Service Prison and Detention Barracks in Edmonton. On 1 December 2021, a military judge convicted Cpl El Zein, applying the recommended sentence from the joint submission but ordering 30 days imprisonment instead of 30 days detention.[115] Cpl El Zein appealed both his conviction and the sentence imposed on him by the military judge.

The Court found that the military judge erred in principle by failing to give notice to the parties that he was going to impose a sentence that exceeded what the prosecution had submitted, and in failing to provide counsel with a second opportunity to address the court martial in that knowledge. They found the additional information provided at the appeal hearing respecting detention and imprisonment, including the rehabilitative aspects of detention, would have impacted the sentence the judge imposed.[116] The Court Martial Appeal Court dismissed the conviction appeal but allowed the sentence appeal, amending the sentence to include 30 days detention instead of 30 days imprisonment, as per the joint submission.

Inferences Concerning Myths and Stereotypes Surrounding Sexual Assault

R v Crouch[117]

In this appeal, the Court Martial Appeal Court of Canada considered the threshold to overturn an acquittal when inferences are made concerning impermissible myths and stereotypes surrounding sexual assault.

Cpl Crouch was accused of twice exposing himself to the complainant, a higher-ranking service member with whom he had a previous friendship, at their place of work. The case relied on the credibility of the two witnesses, the complainant, and the accused. Cpl Crouch denied that any such acts occurred and was acquitted of all charges in October 2022 by a General Court Martial.

---

[114] 2023 CMAC 9 [*R v El Zein*].
[115] *R v El Zein*, 2021 CM 301.
[116] *El Zein, supra* note 114 at para 75.
[117] 2023 CMAC 11.

The prosecution appealed the acquittals primarily on the basis that the military judge allowed inferences of myths and stereotypes relating to the complainant.

In considering the case, the Court noted that Canadian courts have, for many years, identified that myths and stereotypes may incorrectly impact the fact-finding process and unfairly inform the deliberation of some jurors, primarily in trials for sexual assault and related offences. There is no dispute that a trier of fact cannot rely on myths and stereotypes of how a complainant is expected to respond to a sexual assault to make adverse findings in relation to their credibility.[118]

In their ruling, the appeal judges stated that an error did arise from the defence counsel's closing submission on the basis that it invited the panel to engage in impermissible reasoning in relation to the complainant's credibility. However, they also found there were inconsistencies and deficiencies in the complainant's evidence that cast a reasonable doubt on guilt without reliance on myths and stereotypes.[119] The appeal was dismissed.

Supreme Court of Canada

The Capacity to Consent to Sexual Activity

R v Vu[120]

R v Vu involved an appeal by the prosecution of a Court Martial Appeal Court decision finding that a military judge had correctly determined the issue of a complainant's capacity to consent to sexual activity.

Pte Vu had been acquitted in November 2021 of sexual assault by a standing court martial, where the presiding military judge had determined, based on a video Pte Vu had made, that the complainant had consented to the acts in question. The prosecution appealed the acquittal and in February 2023, the Court Martial Appeal Court dismissed the appeal.[121] The majority of the Court concluded that the military judge had not committed an error in law and had correctly determined the issue of consent, though they did find that the judge had improperly engaged in speculation about the complainant's conduct.

The prosecution appealed to the Supreme Court of Canada in January 2024. In its decision delivered from the bench, the Supreme Court dismissed the appeal, concurring with the reasons of the majority of the Court Martial Appeal Court. The Supreme Court found that the military judge did not apply the wrong legal principles and the judge's assessment of the evidence was thorough and cumulative. While the Supreme Court found that the military judge

[118] *Ibid* at paras 18-20.
[119] *Ibid* at para 59.
[120] 2024 SCC 1.
[121] *R v Vu*, 2023 CMAC 2.

engaged in some improper speculation, they found that these comments did not undermine the military judge's fundamental findings.

Whether Military Judges are Sufficiently Independent

R v Edwards[122]

In October 2023, the Supreme Court heard the appeal in *R v Edwards* and several related cases covered in previous annual reports in which Canadian Armed Forces members had appealed their convictions for service offences on the grounds that the military status of the military judge that presided over their respective courts martial violated their *Charter* right to be tried by an independent and impartial tribunal.

Each of the appellants filed a preliminary application seeking a stay of proceedings, alleging that a Chief of Defence Staff order designating a commanding officer for military judges for matters of discipline infringed their right under section 11(d) of the *Charter* to be tried by an independent and impartial tribunal. In all the applicable cases, the military judges agreed that the Chief of Defence Staff's order infringed the accused's section 11(d) rights and stayed the proceedings under subsection 24(1) of the *Charter*. The Court Martial Appeal Court overturned the court martial decisions, ruling that no reasonably informed person would conclude that there was an apprehension of bias or that the independence of courts martial was compromised by the Chief of Defence Staff order. The Court Martial Appeal Court held that a complete separation between judicial and executive functions is not practicable in Canadian law, and need not be absolute to preclude the arrangement found in the military justice system where a judicial official is both a judge and an officer in the Canadian Armed Forces.[123]

In April 2024, following the conclusion of the present reporting period, the Supreme Court released its decision dismissing the appeal. In so doing, the Court affirmed that accused members of the Canadian Armed Forces who are subject to courts martial in the military justice system are entitled to the same *Charter* guarantee of judicial independence and impartiality as those who are tried in the civilian system. However, the Court found that this does not require that the two systems be identical in every respect and that section 11(d) does not require absolute or ideal independence. "As presently configured in the [*National Defence Act*]," wrote Justice Kasirer for the majority, "Canada's system of military justice fully ensures judicial independence for military judges in a way that takes account of the military context, and specifically of the legislative policies of maintaining 'discipline, efficiency, and morale' in the Forces and 'public trust in . . . a disciplined armed force' […]. Properly understood, the military context does not diminish judicial independence."[124] The fact that military judges are also

---

[122] *R v Edwards*, *supra* note 10.

[123] *R v Edwards; R v Crépeau; R v Fontaine; R v Iredale* 2021 CMAC 2; *R v Proulx; R v Cloutier* 2021 CMAC 3; *R v Christmas,* 2022 CMAC 1; *R v Thibault,* 2022 CMAC 3; and *R v Brown,* 2022 CMAC 2.

[124] *R v Edwards*, *supra* note 10 at para 10.

military officers and subject to legitimate military laws does not undermine their judicial independence.[125]

[125] *Ibid* at para 148.

CONCLUSION

The 2023/24 reporting period was a period of consolidation for both tiers of the military justice system in which new procedures reached a sustained operational tempo and existing authorities were reaffirmed and reinforced. These developments at both levels paint a picture of a military justice system that serves an important function: maintaining the discipline, morale, and efficiency of the Canadian Armed Forces while ensuring the rights and freedoms of its members are adequately protected.

At the unit level, this was reflected in the steady adoption of the summary hearing system as a means of addressing minor misconduct. As the statistics in chapter three illustrate, summary hearings were used consistently throughout the reporting period, with some fluctuation, across all organizations within the Canadian Armed Forces. This suggests that the new system is meeting its desired goal of providing units with a fair and effective tool to maintain discipline. Moreover, the encouraging statistics with respect to the number of days between an alleged infraction and the completion of a summary hearing provide evidence that the system is operating efficiently, allowing units to deal with disciplinary issues in an expeditious manner with minimal demand on time and resources. As the Office of the JAG continues to collect the best available statistical information on the operation of the summary hearing system going forward, the statistics presented in this Annual Report will serve as a crucial baseline, allowing us to track developments in the system, both positive and negative, in future reports.

In the court martial system, the *R v Edwards* case saw a continuation of the long-standing role of the Supreme Court of Canada in guiding the evolution of the military justice system. The Court's decision in *R v Edwards* confirmed the constitutionality of a critical feature of the court martial system, namely the status of military judges as members of the Canadian Armed Forces. In so doing, the Court reviewed its involvement in the development of military justice, going back to *R v Généreux*, its first major decision of the *Charter* era. In that case, and in the cases that followed, the Court found that a separate military justice system, operating alongside its civilian counterpart as an integral part of the Canadian legal mosaic, was both a constitutionally sound exercise of Parliament's authority and consistent with *Charter* requirements. Where the Supreme Court has found specific aspects of the system to be unconstitutional, this has been the impetus for improvement and reform that has ensured military justice remains aligned with developing legal norms. Overall, the Court has consistently found the modern building blocks of military justice, with independent military judges who are also military officers, to be constitutionally sound.

The fact that the 2023/24 reporting period was one of consolidation for the military justice system in no way means that its evolution has come to an end. As society changes, military justice must keep pace, and the coming year will undoubtedly bring a new set of challenges to engage the talent and energy of the Office of the JAG. These may include such tasks as supporting parliamentarians in their study of Bill C-66, the continuation of the Comprehensive Implementation Plan, and the rollout of the new Justice Administration and Information Management System, an electronic case management tool designed to modernize the military justice system at the unit level. Whatever the task, the Office of the JAG is committed to supporting the Minister and the Defence community in their efforts to meet those challenges.

Annex A: Summary of Service Infractions Disposed of at Summary Hearing

		2023/24	
QR&O Section	**Description**	**#**	**%**
120.02 (a)	Takes or uses, for other than authorized purposes, non-public property, public property, materiel or government-issued property or damages that property or materiel	17	2.65%
120.02 (b)	Without permission or legal justification, takes property that belongs to another person	1	0.15%
120.02 (c)	Accesses, possesses, uses or communicates information for a purpose unrelated to the performance of their duties	2	0.31%
120.02 (d)	Fails to disclose actual, apparent or potential conflicts between their duties and private interests	1	0.15%
120.03 (a)	Handles a weapon, explosive substance, or ammunition in a dangerous manner	9	1.40%
120.03 (b)	Discharges a firearm without authorization	26	4.06%
120.03 (c)	Behaves in a manner that could reasonably undermine the authority of a superior officer	26	4.06%
120.03 (d)	Fails or while on duty is unfit to effectively perform their duties or carry out responsibilities	31	4.84%
120.03 (e)	In relation to military service, furnishes false or misleading information or engages in deceitful conduct	37	5.77%
120.03 (f)	Without reasonable excuse, fails to attend or is tardy to their place of duty	187	29.17%
120.03 (g)	Dresses in a manner or adopts an appearance or demeanor that is inconsistent with Canadian Forces requirements	13	2.03%
120.03 (h)	Fails to maintain personal equipment or assigned quarters in accordance with Canadian Forces requirements	6	0.94%
120.03 (i)	Otherwise behaves in a manner that adversely affects the discipline, efficiency, or morale of the Canadian Forces	244	38.07%
120.04 (a)	While on duty, is impaired by a drug or alcohol	12	1.87%
120.04 (b)	Uses a drug contrary to article 20.04 (Prohibition)	11	1.72%
120.04 (c)	Introduces, possesses, or consumes an intoxicant contrary to article 19.04 (Intoxicants)	18	2.81%
Total		**641**	**100%**

Annex B: Summary of Service Offences Disposed of at Court Martial

		2022/23		2023/24	
NDA Section	**Description**	**#**	**%**	**#**	**%**
81	Offences related to mutiny	1	1.31%	0	0%
83	Disobedience of lawful command	3	3.95%	1	1.01%
84	Struck a superior officer	0	0%	3	3.03%
85	Insubordinate behaviour	0	0%	1	1.01%
86	Quarrels and disturbances	4	5.26%	8	8.08%
88	Desertion	0	0%	1	1.01%
90	Absence without leave	1	1.31%	2	2.02%
92	Scandalous conduct by officers	1	1.31%	0	0%
93	Cruel or disgraceful conduct	3	3.95%	2	2.02%
95	Abuse of subordinates	2	2.64%	3	3.03%
97	Drunkenness	4	5.26%	8	8.08%
101.1	Failure to comply with conditions	0	0%	2	2.02%
108	Signing inaccurate certificate	0	0%	1	1.01%
112	Improper use of vehicles	1	1.31%	1	1.01%
114	Stealing	4	5.26%	1	1.01%
117 (f)	Miscellaneous offences	1	1.31%	4	4.04%
125	Offences in relation to documents	2	2.64%	3	3.03%
127	Injurious handling of dangerous substances	0	0%	1	1.01%
129	Conduct to the prejudice of good order and discipline	19	25%	14	14.14%
130 (91(2) CC*)	Unauthorized possession of prohibited weapon	0	0%	1	1.01%
130 (122 CC)	Fraud by public officer	2	2.64%	1	1.01%
130 (173 CC)	Indecent acts	2	2.64%	0	0%
130 (264(1) CC)	Uttering threats	1	1.31%	3	3.03%

130 (266 CC)	Assault	8	10.53%	9	9.09%
130 (267 CC)	Assault causing bodily harm	0	0%	6	6.06%
130 (268 CC)	Aggravated assault	0	0%	1	1.01%
130 (271 CC)	Sexual assault	11	14.49%	11	11.11%
130 (320.13 CC)	Operation of motor vehicle while impaired	0	0%	1	1.01%
130 (334(a) CC)	Theft (value stolen exceeds $5000)	1	1.31%	0	0%
130 (342.1 CC)	Unauthorized use of a computer	1	1.31%	0	0%
130 (354 CC)	Possession of stolen property	0	0%	3	3.03%
130 (366(1) CC)	Forgery	1	1.31%	0	0%
130 (367 CC)	Forgery	0	0%	1	1.01%
130 (374) CC)	Drawing a document without authority	0	0%	1	1.01%
130 (380(1) CC)	Fraud	3	3.95%	5	5.05%
Total		**76**	**100%**	**99**	**100%**

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

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