National Defence | Défense nationale

JUDGE ADVOCATE GENERAL

JAG ANNUAL REPORT 2018-2019

of the Judge Advocate General to the Minister of National Defence
on the Administration of Military Justice from 1 April 2018 to 31 March 2019

Canada

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Dear Minister,

I am pleased to present you the 20th Annual Report of the Judge Advocate General on the Administration of Military Justice in the Canadian Armed Forces, made pursuant to section 9.3 of the *National Defence Act*. This report covers the period of 1 April 2018 to 31 March 2019.

Yours Truly,

Commodore Geneviève Bernatchez
Judge Advocate General

Canada

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Communiqué

It is with great pleasure that I present my second annual report to the Minister of National Defence on the administration of military justice in the Canadian Armed Forces in accordance with subsection 9.3(2) of the *National Defence Act* for the period of 1 April 2018 to 31 March 2019.

Pursuant to sections 9.1 and 9.2 of the *National Defence Act*, as the Judge Advocate General, I serve as the legal adviser 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; and I am responsible for the superintendence of the administration of military justice in the Canadian Armed Forces.

As was reported during the last annual report, one of my first priorities as the Judge Advocate General was to develop and issue strategic direction to the Office of the Judge Advocate General (Office of the JAG). The 2018-2021 Office of the JAG Strategic Direction "*Excellence Through Service*" provides our mission statement:[1]

> To deliver client-focused, timely, options-oriented and operationally-driven military legal services in support of Government of Canada, Department of National Defence and Canadian Armed Forces priorities and objectives; and, to superintend the administration of military justice in the Canadian Armed Forces while respecting the independent roles of each statutory actor within the military justice system.

Our mission statement has, and will continue, to shape the activities of the Office of the JAG. We are resolutely committed to deliver concrete results in priority areas, while remaining focused on our clients' needs and upholding the military ethos of dignity and respect for all.

The reporting period marked an exceptionally eventful year in military justice. As I outlined in my last communiqué, my role as the superintendent of the administration of military justice is to ensure that the Canadian military justice system operates efficiently, effectively and in accordance with the rule of law, while continuing to be responsive to the unique requirements of the Canadian Armed Forces.

The purpose of Canada's military justice system is to maintain the discipline, efficiency and morale of the Canadian Armed Forces. Canada's military justice system was developed to deal expeditiously and fairly with service offences, while respecting the *Canadian Charter of Rights and Freedoms* (Charter) and meeting the expectations of Canadians. It is a separate system of justice which forms an integral part of the Canadian legal mosaic and shares many of the same principles with the civilian criminal justice system. Service tribunals have long been recognized in Canadian law, including the Constitution, and the requirement for them has been reinforced by Canadian courts, including the Supreme Court of Canada.

As with the civilian criminal justice system, the military justice system constantly evolves through jurisprudence, legislative amendments as well as regular internal and external reviews. These important developments all contribute to enhance the military justice system that has, and will continue to evolve in order to meet the needs and expectations of the Canadian Armed Forces and Canadians.

Enhancing the Military Justice System — Significant Legislative Developments

This reporting period was marked by significant legislative developments to the military justice system. These developments were strongly supported by the chain of command, and serve to significantly enhance the

1 2018-2021 Office of the JAG Strategic Direction – "*Excellence Through Service*" accessible online at: https://www.canada.ca/en/department-national-defence/corporate/organizational-structure/judge-advocate-general/2018-2021-office-of-the-jag-strategic-direction.html.

promptness, fairness and effectiveness of the military justice system. On 1 September 2018, sections of Bill C-15, the S*trengthening Military Justice in the Defence of Canada Act*, came into force amending provisions of the *National Defence Act* along with related provisions of the *Queen's Regulations and Orders for the Canadian Forces*. The coming into force of the provisions of Bill C-15 represents the Government of Canada's committed response to the recommendations made by the late Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada, in the First Independent Review of the military justice system in 2003 and subsequently by the Standing Senate Committee on Legal and Constitutional Affairs in 2009. The improvements in fairness and flexibility introduced by these amendments enhance the effectiveness, efficiency and legitimacy of the Canadian military justice system. A military justice system reflective of Canadian values is one that will assist the Canadian Armed Forces promote a culture of leadership, respect, and honour – which are the cornerstones of Canada's Defence Policy, *Strong, Secure, Engaged*.

In addition, on 10 May 2018, the Government of Canada tabled Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*. At the end of the reporting period, Bill C-77 was at second reading in the Senate. The proposed legislation demonstrates the Government of Canada's commitment to strengthen victims' rights within the military justice system by introducing the Declaration of Victims Rights to the Code of Service Discipline. Amongst other significant proposed amendments to the *National Defence Act*, Bill C-77 would also include provisions related to indigenous sentencing which mirrors the *Criminal Code*; and simplifying and enhancing military discipline at the unit level.

Further details related to the legislative developments affecting the military justice system are outlined in Chapter Three.

R v Beaudry before the Supreme Court of Canada

Along with the significant legislative developments noted above, this reporting period was highlighted by jurisprudence before the Supreme Court of Canada. On 19 September 2018, in *R v Beaudry*,[2] the Court Martial Appeal Court of Canada declared subsection 130(1)(a) of the *National Defence Act* to be of no force or effect in its application to any civil offence for which the maximum sentence is five years or more. These serious civil offences, traditionally dealt with by the military justice system, include offences under the *Criminal Code* such as sexual assault and assault causing bodily harm.

On 21 September 2018, the Director of Military Prosecutions filed a notice of appeal on behalf of the Minister of National Defence to the Supreme Court of Canada.[3] The appeal before the Supreme Court of Canada was heard on 26 March 2019 and was argued by counsel from the Canadian Military Prosecution Service and Defence Counsel Services. At the end of the reporting period, the Supreme Court of Canada had not released its decision.

Office of the Auditor General and Standing Committee on Public Accounts Reports on the Military Justice System

On 29 May 2018, the Office of the Auditor General tabled its report on the Administration of Justice in the Canadian Armed Forces. The report concluded that the Canadian Armed Forces did not administer the military justice system efficiently and that the Office of the JAG did not provide effective oversight of that system. The report contained nine recommendations to enhance the efficiency of the military justice system. This report was later studied by the House of Commons Standing Committee on Public Accounts, which released its report on 6 December 2018. The Committee's report echoed and supplemented the findings and conclusions of the Office of the Auditor General's report, and also made nine recommendations, three of which differ from the recommendations contained in the Office of the Auditor General's report.

2 *R v Beaudry*, 2018 CMAC 4.
3 *R v Beaudry,* SCC 38308.

As with the civilian criminal justice system, the military justice system is in constant evolution and benefits from internal and external reviews that offer meaningful evidence-based analysis and recommendations that serve to enhance it. In response to the reports of the Office of the Auditor General and the House of Commons Standing Committee on Public Accounts, the Department of National Defence and the Canadian Armed Forces acknowledged the findings and accepted all of the recommendations. The Government of Canada's response to the Committee's report is expected during the next reporting period. At the conclusion of the reporting period, I am pleased to advise that four of the nine recommendations made by the Office of the Auditor General were fully implemented, thereby also addressing the related concerns expressed by the Committee.

The remaining recommendations will be addressed through a critical initiative reported in last year's report that will serve to improve the collection of information on the military justice system and the management of cases progressing through the system. This new tool, named the Justice Administration and Information Management System (JAIMS), is an innovative system that will electronically track discipline files from the time a complaint is received to the time a file is closed. JAIMS will also be integrated with a new military justice performance measurement system expected to be launched concurrently. This system will deliver measureable data on the performance of the military justice system, allowing us to identify any emerging challenges, including delays, while informing measures to address them. During this reporting period, JAIMS underwent pilot testing and roll-out is expected to begin during the next fiscal year.

JAIMS and the Military Justice System Performance Monitoring Framework are scheduled to be launched across the units of the Canadian Armed Forces in September 2019 and will result in the implementation of the remaining five of the nine recommendations from the Office of the Auditor General and will respond to the Committee's recommendations. Further information on the Office of the Auditor General's report and the report of the House of Commons Standing Committee on Public Accounts are provided in Chapter Three.

Enhance Support to Victims and Operation HONOUR

The Office of the JAG remains closely engaged with the Department of National Defence and the Canadian Armed Forces' efforts to enhance victim support in the military justice system. This includes examining how the restorative approaches of the Canadian Armed Forces can assist in creating a more supportive environment that respects the dignity of all employees and military members. In addition, members of the Office of the JAG working with the Military Police have been integral to the launch of the Sexual Assault Review Program. The Director of Military Prosecutions also introduced an initiative enhancing communications with victims, as per the enclosed Director of Military Prosecution Annual Report 2018-2019 at Annex C. Not only will these efforts enhance the mission success of Operation HONOUR, but they will also help to foster a culture of leadership and respect within the Canadian Armed Forces and the Department of National Defence.

Recognizing the Office of the Judge Advocate General — "*Excellence Through Service*"

Beginning in February 2018, the Office of the JAG celebrated and honoured the Legal Branch's 100 years of service in support of the rule of law and democracy in Canada. The Office of the JAG was guided by the centennial's motto: "Honouring our Past, Embracing the Present, Shaping our Future." In February 2019, we concluded our tributes to this important anniversary, but continued the conversation in order to encourage all members of the Office of the JAG to keep our past, present and future in mind. As the Judge Advocate General, it is a true privilege and honour for me to lead such an incredible team of professionals who are trusted and respected at home and abroad.

I would like to take this opportunity to recognize the dedicated team of military and civilian professionals who make up the Office of the JAG and extend my sincerest thanks to

each of them: The exceptional leaders that make up the Senior Council team of the Office of the JAG provide great wisdom and advice to ensure that we properly look after our people; Honorary Captain (Navy) the Right Honourable Beverley McLachlin, P.C. for her wealth of experience and wise counsel; and the military and civilian members of the Office of the JAG, without whose talents, dedication, sacrifice and enduring professionalism, we would not be able to accomplish our mission in support of the Government of Canada, the Department of National Defence and the Canadian Armed Forces priorities and objectives.

Conclusion

As a trusted partner in the Defence Team, the Office of the JAG remains committed to delivering "*Excellence Through Service*" in support of the Government of Canada, the Department of National Defence and the Canadian Armed Forces.

It is an exciting and meaningful time to serve as the superintendent of the administration of military justice in the Canadian Armed Forces. I am confident that the activity during this reporting period has enhanced the ongoing development of the military justice system. Canadians can continue to have confidence in the military justice system and its importance in supporting the operational missions of the Canadian Armed Forces both at home and abroad. To that end, the military justice system serves an integral role in maintaining the discipline, efficiency and morale of the Canadian Armed Forces while respecting the Charter and meeting the expectations of Canadians.

Fiat Justitia

Geneviève Bernatchez, OMM, CD
Commodore

CHAPTER ONE

Who We Are: The Office of the Judge Advocate General

The Judge Advocate General

In accordance with section 9 of the *National Defence Act*, the Judge Advocate General is appointed by the Governor in Council for a renewable term of four years and acts as legal adviser to the Governor General, the Minister of National Defence, the Department of National Defence and the Canadian Armed Forces in matters relating to military law. The Judge Advocate General also has the statutory mandate to superintend the administration of military justice in the Canadian Armed Forces pursuant to section 9.2 of the *National Defence Act*. The Judge Advocate General is responsible to the Minister of National Defence in the performance of her 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 Judge Advocate General (Office of the JAG). The duties of a legal officer posted to a position established within the Office of the JAG are determined by, or under the authority of, the Judge Advocate General and, in respect of the performance of

those duties, a legal officer is not subject to the command of an officer who is not a legal officer.[4] This is to ensure 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.

Office of the Judge Advocate General

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

The Office of the JAG is composed of the Canadian Military Prosecution Service, Defence Counsel Services, the Deputy Judge Advocate General Strategic, and the following Divisions: Military Justice, Administrative Law, Operational and International Law, Regional Services, and the Chief of Staff. The Office of the JAG has regional offices located across Canada and internationally. Figure 1-1 shows a map of all the different Canadian offices of the Office of the JAG.

4 See para 4.081(4) of the *Queen's Regulations and Orders for the Canadian Forces*.

Figure 1-1: Canadian Offices of the Judge Advocate General

The Judge Advocate General Chief Warrant Officer

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

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

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

Director of Military Prosecutions

The Director of Military Prosecutions, the senior military prosecutor in the Canadian Armed Forces, is appointed by the Minister of National Defence for a renewable term of four years pursuant to subsections 165.1(1) and (2) of the *National Defence Act*. The Director of Military Prosecutions acts independently from Canadian Armed Forces and Department of National Defence authorities when exercising his prosecutorial powers, duties and functions. Only the Minister of National Defence may remove the Director of Military Prosecutions from office for cause, and only on the recommendation of an inquiry committee. In accordance with section 165.15 of the *National Defence Act*, the Director of Military Prosecutions may be assisted and represented, to the extent determined by the Director of Military Prosecutions, by officers who are barristers or advocates with standing at the bar of a province or territory. In this regard the Director of Military Prosecutions is assisted by a number of Regular and Reserve Force legal officers appointed to represent the Director of Military Prosecutions, along with a civilian paralegal and support staff. In instances where there is a risk of conflict of interest, the Director of Military Prosecutions may also appoint special prosecutors who are not legal officers but who are Canadian Armed Forces officers and barristers or advocates with standing at the bar of a province or territory. The Office of the Director of Military Prosecutions, known as the Canadian Military Prosecution Service, is organized regionally with Regional Military Prosecutors located in Halifax, Valcartier, Ottawa, Edmonton and Esquimalt.

It is the responsibility of the Director of Military Prosecutions, with the assistance of those legal officers appointed to act as military prosecutors, to prefer all charges to be tried by court martial, to conduct all prosecutions at court martial and for acting 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 to provide 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. The Director of Military Prosecutions also acts as counsel for the Canadian Armed Forces during custody review hearings.

The Director of Military Prosecutions is under the general supervision of the Judge Ad-vocate General and, in this regard, the Judge Advocate General may issue general instructions or guidelines in writing in respect of prosecutions, which the Director of Military Prosecutions must ensure are made available to the public. The Judge Advocate General may also issue instructions or guidelines in writing in respect of a particular prosecution. The Director of Military Prosecutions must ensure that these instructions or guidelines are also available to the public, unless the Director of Military Prosecutions considers that doing so would not be in the best interest of the administration of military justice. During the reporting period, one general instruction was issued by the Judge Advocate General affecting the Director of Military Prosecutions, concerning the duration of postings for legal officers posted to the Canadian Military Prosecution Service and Defence Counsel Services. The Judge Advocate General did not issue any specific instructions or guidelines to the Director of Military Prosecutions in respect of a particular prosecution, during this reporting period.

In accordance with article 110.11 of the *Queen's Regulations and Orders for the Canadian Forces*, the Director of Military Prosecutions annually reports to the Judge Advocate General on the execution of his duties and functions. A copy of the Director of Military Prosecutions Annual Report 2018-2019 is attached as Annex C to this report.

Director of Defence Counsel Services

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

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

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

- the provision of legal advice to a person who is the subject of an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry;
- the provision of legal advice to persons arrested or detained in respect of a service offence;
- the provision of legal counsel to an accused person where there are reasonable grounds to believe that the accused person is unfit to stand trial;
- the provision of legal advice of a general nature to an accused person or assisting officer on matters relating to summary trials;
- the provision of legal counsel to a person in respect of an application to review a direction for the conditional release of the person from custody following arrest;
- the provision of legal counsel to a person in respect of pre-trial custody hearings, in situations where the accused person is retained in custody following arrest;

- the provision of legal advice to an accused person with respect to the making of an election to be tried by court martial;

- the provision of legal advice to an accused person with respect to the waiver of the limitation periods;

- the provision of legal counsel to an accused person in respect of whom an application to a referral authority has been made;

- the provision of legal advice to an offender, or to an officer or non-commissioned member appointed to assist an offender, in respect of an application to vary a suspension order or an intermittent sentence order or an application to vary conditions or in respect of a hearing into breach of conditions;

- the provision of legal advice to a person who wishes to preserve the right to appeal under the *National Defence Act*;

- the provision of legal advice to a person who wishes to apply, or has applied, to the Appeal Committee;

- the provision of legal counsel to a person in respect of an application for release pending an appeal;

- the provision of legal counsel to a person released from custody pending appeal, in respect of an application for review or breach of an undertaking or appeal;

- the provision of legal counsel to the respondent on an appeal or an application for leave to appeal by the Minister of National Defence; and

- the provision of legal counsel to an appellant on an appeal or an application for leave to appeal with the approval of the Appeal Committee.

The relationship between the Director of Defence Counsel Services and the Judge Advocate General is statutorily structured at section 249.2 of the *National Defence Act* such that the Director of Defence Counsel Services acts under the general supervision of the Judge Advocate General but this general supervision must be exercised through general instructions or guidelines in writing in respect of defence counsel services. Furthermore, the Director of Defence Counsel Services must ensure that any such instructions or guidelines are available to the public. Unlike with the Director of Military Prosecutions, the Judge Advocate General has no authority to issue instructions or guidelines in respect of a particular case. During the reporting period, one general instruction was issued by the Judge Advocate General affecting the Director of Defence Counsel Services, concerning the duration of postings for legal officers posted to the Canadian Military Prosecution Service and Defence Counsel Services.

In accordance with paragraph 101.11(4) of the *Queen's Regulations and Orders for the Canadian Forces*, the Director of Defence Counsel Services is required to report annually to the Judge Advocate General on the provision of legal services as well as other duties that are prescribed by regulations. A copy of the Annual Report 2018-2019 Director of Defence Counsel Services is attached as Annex D to this report.

Deputy Judge Advocate General Strategic

The Judge Advocate General authorized the position of Deputy Judge Advocate General Strategic to develop and facilitate strategic initiatives to ensure that the provision of statutorily mandated legal services fully integrates, aligns with and supports the Government of Canada, Departmental and Canadian Armed Forces objectives and priorities promulgated in the *Strong, Secure, Engaged:* Defence Policy; Defence Plan (2018-2023); the Defence Results Framework initiative; as well as the Force Posture and Readiness and Defence Program Analytics directives. The mandate of the Deputy Judge Advocate General Strategic includes the renewal of a performance measurement

system and support to the development and implementation of personnel management and professional practice policies and directives.

Military Justice Division

The Military Justice Division assists the Judge Advocate General in superintending the administration of military justice and ensuring its responsible development within the Canadian justice system. It is comprised of four directorates: Military Justice Strategic, Military Justice Policy, Military Justice Operations, and Canadian Forces Provost Marshal Legal Services.

The Directorate of Law/Military Justice Strategic supports the Judge Advocate General in the development of her strategic vision for military justice. This enables the Office of the JAG and the Canadian Armed Forces to anticipate and respond to external and internal challenges, while supporting the positive and responsible development of the military justice system. The other directorates support the Judge Advocate General in the implementation of her vision for military justice in three convergent ways. The Directorate of Law/Military Justice Policy plays a key role in the development of legislation and regulation related to the military justice system. These initiatives arise from projects seeking amendments to the *National Defence Act* as well as from legislative proposals led by other government departments. The Directorate of Law/Military Justice Operations is responsible to provide direct, operational support to the Judge Advocate General as the superintendent of the administration of military justice in the Canadian Armed Forces. This includes providing support on military justice issues to all legal officers within the Office of the JAG, formulating policy on military justice issues and providing the necessary support for the appointment of individuals to the various military justice committees. This Directorate is also responsible for the production of the Judge Advocate General's Annual Report to the Minister of National Defence and is responsible for the Superintendence Enhancement and Assessment Project. Finally, the Directorate of Canadian Forces Provost Marshal Legal Services is responsible to provide legal advice and services to the Canadian Forces Provost Marshal and the Canadian Forces Military Police Group. This Directorate enables the efficient and effective lawful conduct of policing operations, investigations, custody and mandated security tasks. In addition, it also acts as a principal liaison between the Office of the JAG and the Canadian Forces Provost Marshal.

Administrative Law Division

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

The Administrative Law Division is composed of three directorates: Military Personnel; Administrative Law; and Compensation, Benefits, Pensions and Estates. The Military Personnel directorate provides legal advice on the development and application of personnel policies spanning recruitment to release, including such topics as universality of service, remedial measures and terms of service. The Administrative Law directorate provides legal advice and support in relation to complaint and conflict management, including military grievances, grievance-related litigation, admi-

nistrative investigations, and the Canadian Armed Forces organization and command structure. The Compensation, Benefits, Pensions and Estates directorate provides legal advice and support on the full spectrum of financial and compensation policies and instructions that support the military human resources management framework, as well as legal and administrative support in relation to Service Estates and Elections. Additionally, the Administrative Law Division is responsible for the legal advisor assigned to provide legal support to the Office of the Chief of the Defence Staff.

Operational and International Law Division

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

The Operational and International Law Division is comprised of six directorates: Strategic Operational Law, Directorate of Law - International, the Canadian Joint Operations Command Legal Advisor, the Canadian Special Operations Forces Command Legal Advisor, the Legal Advisor to the Canadian Commander at the North American Aerospace Defense Command and the Directorate of Law, Intelligence and Information Operations. In addition, during this reporting period 12 legal officers were deployed in direct support of five overseas operations: OP IMPACT, OP REASSURANCE, OP PRESENCE, OP ARTEMIS and to the NATO Mission in Iraq.

The Strategic Operational Legal Advisor provides legal advice on all strategic level operational issues affecting Canadian Armed Forces operations around the world such as domestic and international legal authorities, rules of engagement and use of force. The Directorate of Law - International provides strategic legal support and advice on the international legal framework for Canadian Armed Forces activities. This includes advice on international legal basis for the conduct of operations, prospective legal instruments as well as areas such as the law of armed conflict, international human rights law and international criminal law. This Directorate is a principal liaison with the Privy Council Office Legal Operations, the Department of Justice and Global Affairs Canada Legal Services. This Directorate also works closely with partners and allies as well as Non-Governmental Organizations like the Canadian Red Cross and the International Committee of the Red Cross. The Canadian Joint Operations Command Legal Advisor provides legal advice to the Commander of the Canadian Joint Operations Command on all legal matters related to the conduct of conventional military operations at the operational level, in both continental and expeditionary contexts. Deployed legal officers report to the Canadian Joint Operations Command Legal Advisor. The Canadian Special Operations Forces Command Legal Advisor provides legal advice in all aspects of military law related to the conduct of Canadian Special Operations Forces Command operations including its mandated response to all domestic and international terrorist attacks, international crisis and associated threats. The Legal Advisor to the Canadian Commander at the North American Aerospace Defence Command provides legal advice on national issues to the Deputy Commander of North American Aerospace Defence in his role as the senior Canadian officer in the bi-national command structure as well as advice on North American Aerospace Defence issues generally as part of the overall legal adviser team for the North American Aerospace Defence Command. The Directorate of Law, Intelligence and Information Operations is the primary legal advisor to the Canadian Forces Intelligence Command and provides legal advice on strategic, operational and tactical level issues relating to both domestic and internal matters of an intelligence nature. Key areas of legal advice include information sharing, open source intelligence, counter-intelligence investigations, and the development of cyber capabilities.

Regional Services Division

The Regional Services Division, the largest of the Divisions within the Office of the JAG, delivers legal services principally to Canadian Armed Forces commanders in Canada and Europe. It has legal offices located across and within various regions, and each region is led by an Assistant Judge Advocate General. There are 8 Assistant Judge Advocate General offices: Ottawa, Halifax, Montreal, Toronto, Winnipeg, Edmonton, Esquimalt and Geilenkirchen (Germany). In addition, there are a number of Deputy Judge Advocate offices located across Canada which report directly to their respective regional Assistant Judge Advocate General.

Regular and Reserve Force legal officers in the Regional Services Division provide legal advice to Regular and Reserve Force commands, formations and units on many aspects of military justice. This includes at the pre-charge and pre-trial phases, to referral authorities when charges are referred to the Director of Military Prosecutions, to presiding officers during the course of a summary trial and to review authorities where there is a request for review by an accused or a review has been independently initiated by a review authority.

Legal officers in the Regional Services Division provide a variety of training to the various Canadian Armed Forces units and other elements they advise, including on topics such as Unit Disciplinary Investigations, Law of Armed Conflict, use of force and administrative legal issues. In support of the Judge Advocate General's role as superintendent of the administration of military justice, legal officers in the Regional Services Division have conducted 78 two-day Presiding Officer Certification Training sessions during this reporting period, 9 of which were delivered in French, with a total of 1190 candidates completing the course.

Legal officers in the Regional Services Division also provide legal advice to commanders on administrative law and operational law matters and support Canadian Armed Forces international and domestic operations.

The Regional Services Division is the principal source for generating legal officers for Canadian Armed Forces exercises, training, and operational deployments in Canada and abroad.

Chief of Staff Division

The Chief of Staff Division is composed of civilian and military staff, who are responsible for providing services and support across a range of areas. They include responding on behalf of the Judge Advocate General to corporate requirements such as access to information and privacy requests, official languages, employment equity and diversity, ethics, and workplace health and safety. The Chief of Staff Division also supports the Legal Branch Advisor in matters such as the recruiting and development of new legal officers from all entry programs (Direct Entry Officer, Component Transfer, and Military Legal Training Plan). Finally, the Division provides administrative and support services to the rest of the Office of the JAG, including information services, financial reporting and oversight, and personnel administration of both military and civilian staff (including the Judge Advocate General primary reserve list).

Deputy Judge Advocate/Reserves

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

Legal Officers Serving Outside the Office of the Judge Advocate General

In addition to the legal officers serving in the above-mentioned organizations, a number of legal officers serve outside the Office of the JAG. They include those working at the Privy Council Office, Global Affairs Canada, the Canadian Forces Military Law Centre and the Department of National Defence/ Canadian Armed Forces Legal Advisor with the Department of Justice.

Civilian Personnel of the Office of the Judge Advocate General

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

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CHAPTER TWO

The Canadian Military Justice System: Structure and Statistics

Canada's military justice system is a separate and parallel system of justice that forms an integral part of the Canadian legal mosaic. It shares many of the same underlying principles as the civilian criminal justice system and it is subject to the same constitutional framework, including the *Canadian Charter of Rights and Freedoms*. On more than one occasion, the Supreme Court of Canada has directly addressed the requirement of a separate, distinct military justice system to meet the specific needs of the Canadian Armed Forces.[5]

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

The Structure of the Military Justice System

The Code of Service Discipline

The Code of Service Discipline, Part III of the *National Defence Act*, is the foundation of the military justice system. It sets out disciplinary

5 See generally *R v Généreux* [1992] 1 SCR 259; *Mackay v R* [1980] 2 SCR 370 at 399; *R v Moriarity* [2015] 3 SCR 485.

jurisdiction and provides for service offences that are essential to the maintenance of discipline and the operational effectiveness of the Canadian Armed Forces. It also sets out the procedures and organization of service tribunals, the jurisdiction of various actors in the military justice system, powers of punishment, 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." Thus, service offences include many disciplinary offences that are unique to the profession of arms, such as disobedience of a lawful command, absence without leave, and conduct to the prejudice of good order and discipline, in addition to more conventional offences such as those found in the *Criminal Code* and other Acts of Parliament. Members of the Regular Force of the Canadian Armed Forces are subject to the Code of Service Discipline everywhere and at all times, whereas members of the Reserve Force are subject to the Code of Service Discipline only in the circumstances specified in the *National Defence Act*.

The Two Tiers of the Military Justice System

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

Summary Trials

The summary trial is the most common form of service tribunal. It allows for relatively minor service offences to be tried and disposed of quickly at the unit level. Summary trials are presided over by members of the chain of command, who are trained and certified by the Judge Advocate General as qualified to perform their duties as presiding officers in the administration of the Code of Service Discipline.[6] All accused members are entitled to an assisting officer in the preparation of their case, during the summary trial[7] and in the preparation of a post-trial review request.[8]

The procedures at summary trial are straightforward and the powers of punishment are limited. This limitation reflects both the relatively minor nature of the offences involved, and the intent that the punishments be primarily corrective in nature.

After a charge is laid, if it is determined that the accused can be tried by summary trial then, except in certain circumstances, an accused person has a right to be offered an election to be tried by court martial.[9] The election process was designed to provide the accused with the opportunity to make an informed choice regarding which type of service tribunal will try the matter.

The jurisdiction of an officer presiding at summary trial is limited by factors such as the rank of the accused and the type of offences. All service offences may be tried by court martial; however, those listed in paragraphs 108.07(2) and 108.07(3) of the *Queen's Regulations and Orders for the Canadian Forces* may also be tried by summary trial. Service members at or above the rank of Colonel cannot be tried by summary trial.[10]

The disposition of charges by summary trial is meant to occur expeditiously. Unless they waive the limitation periods, an accused person may not be tried by summary trial unless the charge is laid within six months after the day on which the service offence is alleged to have been committed and unless the summary trial commences within one year after that day.[11]

6 *Queen's Regulations and Orders for the Canadian Forces* art 101.07 [QR&O].
7 Ibid., art 108.14.
8 Ibid., para 108.45(18).
9 An accused does not have the right to elect his or her mode of trial in two instances. First in cases provided for by the QR&O art 108.17, second where the charges are more serious in nature and require a direct referral to court martial.
10 Military judges may not be tried by summary trial.
11 Two exceptions are specified in the QR&O art 108.05 Note (B).

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

A member of the Canadian Armed Forces found guilty of a service offence at summary trial has the right to apply to a review authority for a review of the findings, the punishment imposed, or both. The findings made and/or punishments imposed at summary trial may also be reviewed on the independent initiative of a review authority. A review authority is a more senior officer in the chain of command of the officer who presided over the summary trial, as designated by the *Queen's Regulations and Orders for the Canadian Forces*. A review authority may quash any findings of guilt made at summary trial, substitute any finding of guilt or punishment, or may mitigate, commute or remit any punishment awarded at summary trial. Before making any determination, a review authority must obtain legal advice.[12]

Courts Martial

The court martial – a formal military court presided over by a Military Judge – is designed to deal with more serious offences and has powers of punishment up to and including imprisonment for life. Courts martial are conducted in accordance with rules and procedures similar to those of civilian criminal courts and have 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."[13]

The *National Defence Act* provides for two types of courts martial: General and Standing. These courts martial can be convened anywhere, in Canada and abroad. The General Court Martial is composed of a military judge and a panel of five Canadian Armed Forces members. The panel serves as the trier of fact and decides unanimously on any finding of guilty or not guilty, of unfitness to stand trial or of not responsible on account of mental disorder. A decision in respect of any other matter is determined by a majority vote. The military judge determines the sentence in the event of a finding of guilt or directs the person be discharged absolutely.[14] At a Standing Court Martial, the military judge sits alone, makes any required findings and, if the accused person is found guilty, imposes the sentence or directs the person be discharged absolutely.

In cases that cannot be dealt with by summary trial, the matter is referred to the Director of Military Prosecutions, who determines whether or not to prefer the case for trial by court martial. At a court martial, the prosecution is conducted by a military prosecutor under the authority of the Director of Military Prosecutions. The accused is entitled to be represented by defence counsel assigned by the Director of Defence Counsel Services at no cost, or by civilian counsel at his or her own expense. The accused can also choose not to be represented by a lawyer.

Appeal of a Court Martial Decision

Decisions made at courts martial may be appealed to the Court Martial Appeal Court of Canada by the person subject to the Code of Service Discipline or by the Minister or counsel instructed by the Minister.[15] The Court Martial Appeal Court of Canada is composed of civilian judges who are appointed by the Governor in Council from the Federal Court of Appeal, the Federal Court, or from the superior courts and courts of appeal of the provinces and territories.

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

12 QR&O, *supra* note 6, para 108.45(8).

13 See s 179 of the *National Defence Act*.

14 At the end of this reporting period, two decisions were still expected from the Supreme Court of Canada in the appeals of *R v Beaudry*, 2018 CMAC 4 and *R v Déry*, 2017 CMAC 2. These decisions may potentially affect several cases which would usually be brought before a panel.

15 The Minister of National Defence has instructed the Director of Military Prosecutions to act on his behalf for appeals to the Court Martial Appeal Court of Canada and the Supreme Court of Canada.

Statistics

A number of factors can contribute to variations in statistics reported in this chapter. Due to limitations in statistical analysis capabilities available during the reporting period it is not possible, at this time, to conclusively determine specific reasons for statistical variations. However, the Justice Administration Information Management System and the Military Justice System Performance Monitoring Framework will electronically track discipline files from the time a complaint is received to the time a file is closed, and will deliver measureable data on the performance of the military justice system, allowing for the identification of trends, emerging issues and other factors contributing to changes in statistics. The Justice Administration Information Management System and the Military Justice System Performance Monitoring Framework are scheduled to be operational in the next reporting period and are discussed in further detail in Chapter Three.

Summary Trials

Number of Summary Trials

Summary trials continue to be the most widely used form of service tribunal in the Canadian Armed Forces to deal with service offences under the Code of Service Discipline. During this reporting period, there were 533 summary trials in comparison to 51 courts martial. Summary trials made up approximately 91% of trials held before service tribunals. Figure 2-1 shows the number of summary trials and courts martial for the last two reporting periods as well as the corresponding percentage of cases tried by each type of service tribunal and Figure 2-2 shows the total number of summary trials by reporting period since 2014/15.

Figure 2-1: Distribution of Service Tribunals

	2017-2018[16]		2018-2019	
	#	%	#	%
Number of Courts Martial	62	9.00	51	8.73
Number of Summary Trials	627	91.00	533	91.27
Total	**689**	**100**	**584**	**100**

Figure 2-2:
Number of Summary Trials

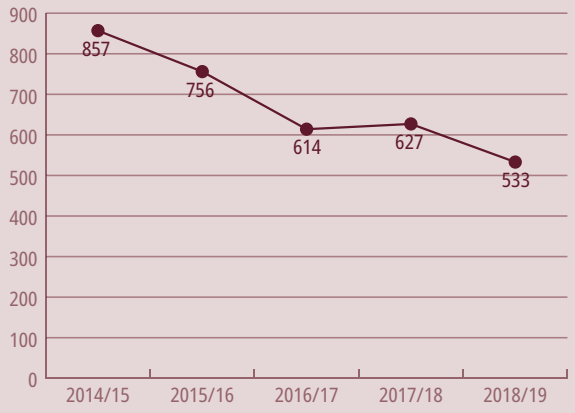


Figure 2-3 shows the total number of summary trials for the last two reporting periods by organization and Figure 2-4 illustrates the number of summary trials specifically for the Canadian Army, the Royal Canadian Navy, the Chief of Military Personnel, the Canadian Joint Operations Command, and the Royal Canadian Air Force since 2014/15.

For the Canadian Army, in this reporting period, there were a total of 209 summary trials as opposed to 240 for the previous reporting period. That is a decrease of 31 summary trials which represents a decrease of approximately 13% in comparison to the previous reporting period. Since 2014/15 there has been a decrease in the number of summary trials within the Canadian Army for each reporting period.

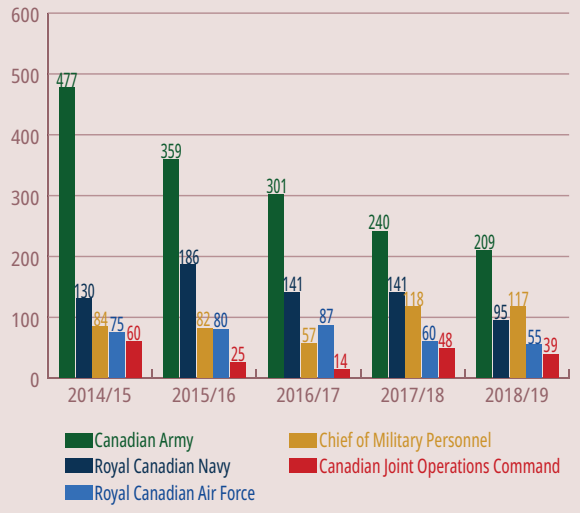
The Royal Canadian Navy has seen a fluctuation in the total number of summary trials since the 2014/15 reporting period. An increase of 43% in the number of summary trials occurred during the 2015/16 reporting

16 Summary trial statistics from the 2017/18 reporting period which are reported in this report may differ from those statistics in the 2017/18 Annual Report of the Judge Advocate General as a result of late reporting by various units across the Canadian Armed Forces.

Figure 2-3: Number of Summary Trials by Organization

	2017-2018		2018-2019	
	#	%	#	%
Canadian Army	240	38.28	209	39.21
Royal Canadian Navy	141	22.49	95	17.82
Chief of Military Personnel	118	18.82	117	21.95
Royal Canadian Air Force	60	9.57	55	10.32
Canada Joint Operations Command	48	7.65	39	7.32
Canada Special Operations Forces Command	11	1.75	11	2.06
Vice Chief of the Defence Staff	3	0.48	3	0.56
Assistant Deputy Minister (Material)	2	0.32	1	0.19
Assistant Deputy Minister (Infrastructure and Environment)	2	0.32	0	0.00
Assistant Deputy Minister (Information Management)	1	0.16	1	0.19
Canadian Forces Intelligence Command	1	0.16	1	0.19
Office of the Judge Advocate General	0	0.00	1	0.19
Total	**627**	**100**	**533**	**100**

Figure 2-4:
Number of Summary Trials for the Canadian Army, the Royal Canadian Navy, the Chief of Military Personnel, the Canadian Joint Operations Command and the Royal Canadian Air Force



period, while the reporting periods 2016/17 and 2017/18 remained steady after a 24% decrease from 2015/2016. In this reporting period, there was an additional decrease of 46 summary trials, or a decrease of 32.62%, from the 2017/18 reporting period.

For this reporting period, the Canadian Joint Operations Command had 39 summary trials, a decrease of nine summary trials from the previous reporting period, representing an approximate decrease of 19%.

For the Royal Canadian Air Force, there were five fewer summary trials, for a total of 55, representing approximately an 8% decrease in the total number of summary trials in comparison to the previous reporting period.

Finally, the Chief of Military Personnel had one less summary trial this reporting period, for a total of 117, representing a 0.85% decrease, in comparison to the last reporting period.

Number of Charges Disposed of at Summary Trial

In this reporting period, there were a total of 742 charges disposed of at summary trial compared to 842 charges disposed of at summary trial during the 2017/18 reporting period. Figure 2-5 shows the total number of charges disposed of at summary trial since 2014/15, which demonstrates a consistent decrease in the overall number of charges disposed of at summary trial.

The two most common types of offences which account for approximately 71% of all charges at summary trial are absence without

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

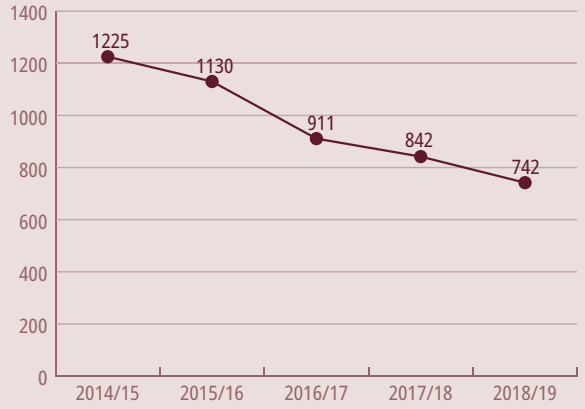
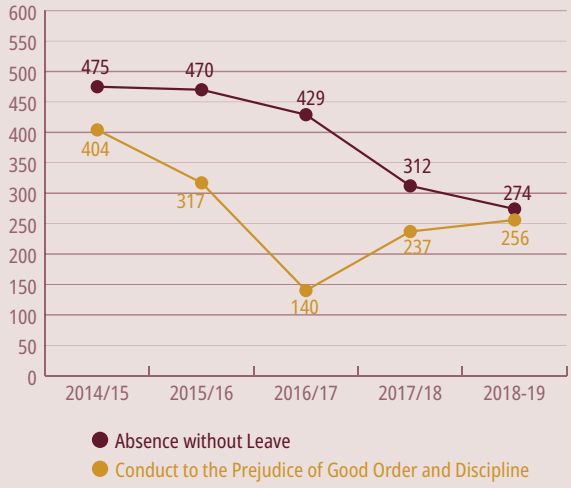


Figure 2-6:
Number of charges for Absence without Leave and Conduct to the Prejudice of Good Order and Discipline



leave and conduct to the prejudice of good order and discipline.[17]

Since the 2014/15 reporting period there has been a consistent decline in the total number of charges reported for absence without leave. In the current reporting period the total number was 274 compared to 475 charges for absence without leave in the 2014/15 reporting period.

In this reporting period there were a total of 256 charges for the offence of conduct to the prejudice of good order and discipline. This is an increase compared to the previous reporting period of 237 charges, or 8%. Figure 2-6 shows the number of charges for absence without leave and conduct to the prejudice of good order and discipline between 2014/15 and 2018/19.

Number of Elections to be Tried by Court Martial

Pursuant to *Queen's Regulations and Orders for the Canadian Forces* article 108.17, an accused person has the right to elect to be tried by court martial rather than summary trial except where the accused: (1) has been charged with one of five minor service offences; and (2) the circumstances surrounding the commission of the offence are sufficiently minor in nature that the officer exercising summary trial jurisdiction over the accused concludes that a punishment of detention, reduction in rank or a fine in excess of 25% of the accused's monthly basic pay would not be warranted if the accused were found guilty of the offence.

The five minor offences are: (1) insubordinate behaviour, (2) quarrels and disturbances, (3) absence without leave, (4) drunkenness, and (5) conduct to the prejudice of good order and discipline where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment.[18]

During this reporting period, 192 elections to be tried by court martial were offered to accused members. Of the 192 elections offered, 145 accused members elected to be tried by summary trial, representing 75.52% of the total elections offered. Of these 145 elections to summary trial, one matter was directly referred to the Director of Military Prosecutions for preferral, because the election had been offered to the accused member in error by the unit. In one other matter, the charge was not proceeded with by the commanding officer. In total, 153 summary trials were completed

17 Section 129 of the *National Defense Act* "Any act, conduct, disorder or neglect to the prejudice of good order and discipline" is referred to throughout this report as "conduct to the prejudice of good order and discipline."

18 An accused will also not have the right to choose to be tried by court martial or summary trial in those circumstances where the charges require a direct referral to court martial.

Figure 2-7:
Percentage of Accused Electing to be Tried by Court Martial

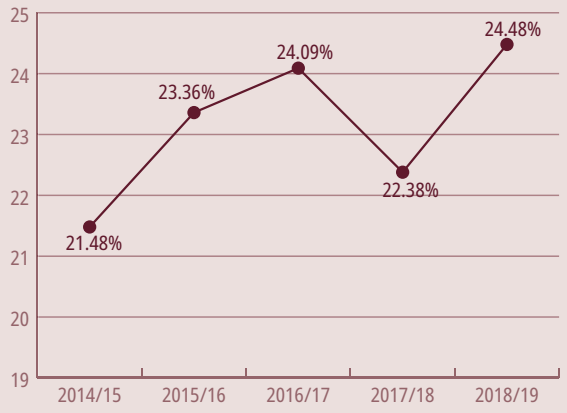


Figure 2-8:
Number of Summary Trials Completed where Election Offered or Not Offered[19]

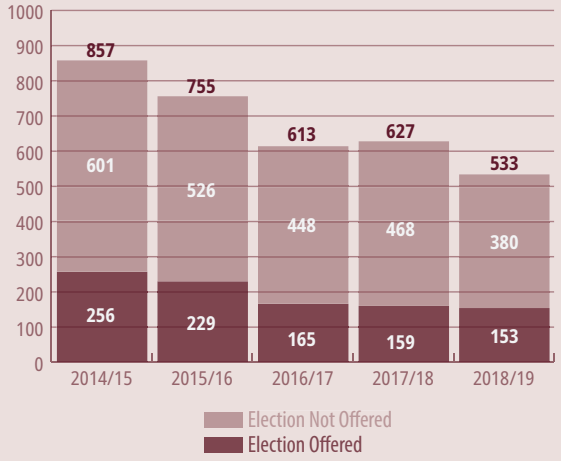
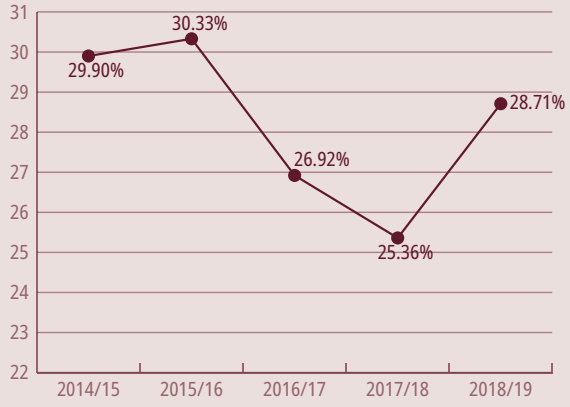


Figure 2-9:
Percentage of Summary Trials Completed where Accused Offered an Election



within this reporting period, where an election was offered, 10 of which were the result of an election offered in the 2017-18 reporting period.

In the current reporting period, 47 accused elected to be tried by court martial, representing 24.48% of the elections offered. Figure 2-7 represents the percentage of accused persons electing court martial when an election was offered over the past five reporting periods.

Figure 2-8 shows the number of summary trials completed for the past five reporting periods in which the accused person was offered an election as well as the number of summary trials in which no election was offered. Figure 2-9 shows the percentage of summary trials completed per reporting period where an accused was offered an election.

Waiver of Limitation Periods

Pursuant to *Queen's Regulations and Orders for the Canadian Forces* article 108.171, which came into force 1 September 2018, an accused person has the right to waive the six month limitation period by which a charge must be laid and/or the one year limitation period to commence a summary trial.

Between 1 September 2018 and 31 April 2019, there were 27 waivers offered to the accused. Of those 27 waivers offered, in 20 cases the accused chose to waive one or both of the limitation periods.

Results by Charge at Summary Trial

The percentages of all findings by charge have remained relatively consistent over the last five years. For example, the percentage of guilty findings has held steady at approximately 89%. The percentage of not guilty findings has decreased by 0.31% compared to the previous reporting period. A complete breakdown of the total number of findings by charge and the corresponding percentage for the last two reporting periods can be found at Figure 2-10.

19 In some cases, an election can be offered during one reporting period but the summary trial is not completed until the following reporting period.

Figure 2-10: Results by Charge

	2017-2018		2018-2019	
	#	%	#	%
Guilty	753	89.43	672	90.57
Guilty – Special Finding	8	0.95	2	0.27
Guilty of related, less serious or attempted offences	0	0.00	1	0.13
Not guilty	65	7.72	55	7.41
Charge stayed	15	1.78	10	1.35
Charge not proceeded with	1	0.12	2	0.27
Total	**842**	**100**	**742**	**100**

Punishments and Absolute Discharges at Summary Trial

In this reporting period, there were a total of 664 punishments and absolute discharges at summary trial.[20] Of those possible punishments which can be imposed at summary trial, fines and confinement to ship or barracks continue to be imposed more frequently. Figure 2-11 shows the total number of punishments and absolute discharges imposed at summary trial for the last two reporting periods as well as the corresponding percentage of each over that same period.

In this reporting period the punishment of detention was imposed 11 times, which is relatively consistent with the last two reporting periods. An overview of the number of times the punishment of detention was imposed at summary trial over the past five years can be found in Figure 2-12.

Summary Trial Reviews

In the current reporting period, a total of 32 summary trials were reviewed based on requests by members found guilty at summary trial or on a review authority's own initiative. Of a total of 533 summary trials, the percentage of cases that were subject to a review was approximately 6%. This percentage is slightly higher than that of the previous reporting period when approximately 4.63% of cases were reviewed. Of those reviews, nine were

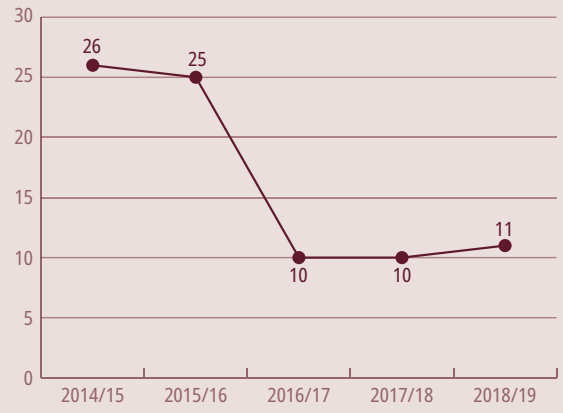
Figure 2-11: Punishments and Absolute Discharges at Summary Trial

	2017-2018		2018-2019	
	#	%	#	%
Detention	10*	1.20	11**	1.66
Reduction in rank	4	0.48	0	0.00
Severe reprimand	2	0.24	3	0.45
Reprimand	32	3.86	18	2.71
Fine	462	55.73	393	59.19
Confinement to ship or barracks	222	26.78	174	26.20
Extra work and drill	45	5.43	40	6.02
Stoppage of leave	24	2.90	10	1.51
Caution[21]	28	3.38	6	0.90
Absolute Discharge[22]	0	0.00	9	1.36
Total	**829**	**100**	**664**	**100**

* Includes three punishments for which the execution was suspended

** Includes one punishment for which the execution was suspended

Figure 2-12: Total Punishments of Detention



20 More than one type of punishment may be imposed at a summary trial.

21 Effective 1 September 2018, caution has been removed as a punishment.

22 Effective 1 September 2018, in accordance with ss 203.8(1) and (2) of the *National Defence Act*, an accused person who pleads guilty or is found guilty of an offence – other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life – may be directed by the service tribunal to be discharged absolutely, the effect of which is that the offender is deemed not to have been convicted of the offence.

based on finding, 16 on sentence, and seven were based on both finding and sentence. Figure 2-13 shows the percentage of cases for which a review of the finding, the sentence or both were conducted since 2014-15.

Based on the nature of the request for review, a review authority has several options to deal with the matter, including upholding the decision of the presiding officer, quashing the finding of guilt, and substituting the finding or punishment. In approximately 31% of all decisions, a reviewing authority quashed the decision of the presiding officer. In approximately another 31% of all decisions, a reviewing authority upheld the decision of the presiding officer. In the previous reporting period, in approximately 58% of reviews, the review authority upheld the finding of the presiding officer. A complete breakdown of all decisions of a review authority and the corresponding percentage of each decision for the past two reporting periods can be found at Figure 2-14.

Figure 2-13:
Percentage of Summary Trials Reviewed

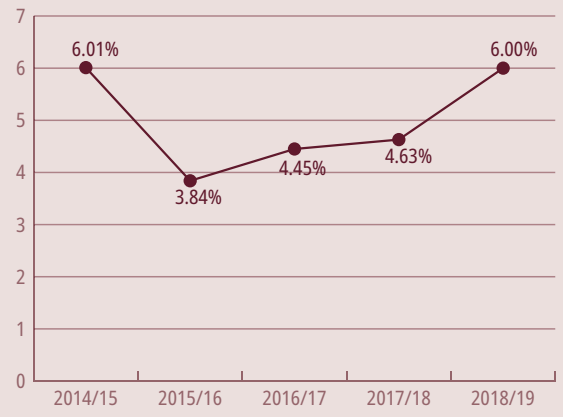


Figure 2-14: Decisions of Review Authority

	2017-2018		2018-2019	
	#	%	#	%
Upholds decision	17	58.62	11	31.43
Quashes findings	6	20.69	11	31.43
Substitutes findings	2	6.9	2	5.71
Substitutes punishment	1	3.45	5	14.29
Mitigates / commutes / remits punishment	3	10.34	6	17.14
Total	**29**	**100**	**35**[23]	**100**

Harmful and Inappropriate Sexual Behaviour and Sexual Misconduct

At the summary trial level, Harmful and Inappropriate Sexual Behaviour and Sexual Misconduct are most frequently charged pursuant to section 129 of the National Defence Act, conduct to the prejudice of good order and discipline. In the current reporting period, there were a total of 35 charges for Harmful and Inappropriate Sexual Behaviour and Sexual Misconduct compared to 24 charges in the previous reporting period.

Of the 35 charges during this reporting period, there were 30 findings of guilt, three findings of not guilty, and two charges which were stayed. Two reviews were requested by the offender, one for a review of both the findings and sentence in which the decisions were upheld, and one request for a review of the sentence which was commuted by the review authority.

This is compared to the previous reporting period in which there were 18 findings of guilt, six findings of not guilty and one charge which was stayed. Four requests for review were conducted. Three at the request of the offenders for both the findings and the sentence in which the review authority upheld all decisions. One request was initiated by the review authority which resulted in the sentence being substituted.

Language of Summary Trials

As an accused may choose to have his or her summary trial conducted in either official language, the presiding officer must be able to understand the language in which the proceedings are to be conducted without the assistance of an interpreter. Where the

23 In three cases, the review authority took two separate decisions in one request for review. The review authority reviewed both findings and punishments at the request of the accused.

presiding officer lacks the required language ability, he or she should refer the case to another presiding officer who has the required language ability to try the case.

In this reporting period, approximately 80% of summary trials were conducted in English and 20% were conducted in French. These percentages are consistent when compared to previous reporting periods. Figure 2-15 shows the number of summary trials conducted in both English and French for the past two reporting periods.

Figure 2-15: Language of Summary Trials

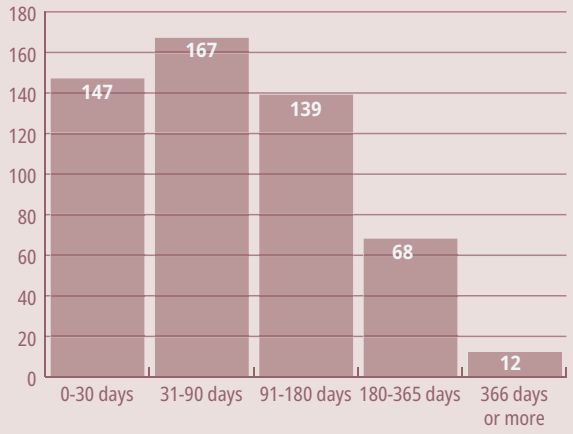
	2017-2018		2018-2019	
	#	%	#	%
Number in English	519	82.78	426	79.92
Number in French	108	17.22	107	20.08
Total	**627**	**100**	**533**	**100**

Timelines for Summary Trials

The purpose of the summary trial system is to provide prompt but fair justice in respect of minor service offences, and as such, these trials are required to begin within one year of the date on which the offence is alleged to have been committed, unless this limitation period is waived by the accused.[24]

This reporting period, there were 533 summary trials and the average number of days from the last date of the alleged offence to the conclusion of the summary trial was approximately 99 days. Of those 533 summary trials, 314 were concluded within 90 days of the last date of the alleged offence, representing approximately 59% of all summary trials for the reporting period. Further, approximately 85% of all summary trials were concluded within 180 days of the last date of the alleged offence. Figure 2-16 shows a breakdown of the number of days from the last date of the alleged offence to the conclusion of the summary trial.

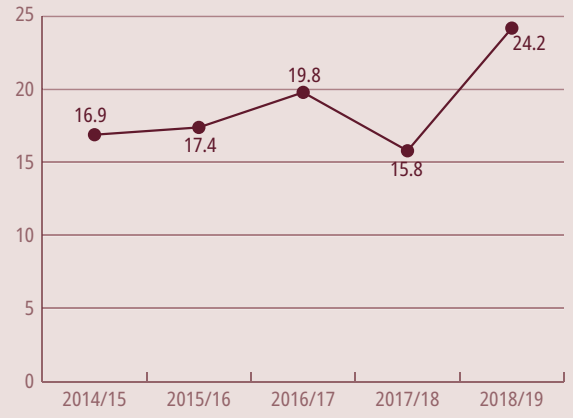
Figure 2-16:
Number of Days from Alleged Offence to the Conclusion of the Summary Trial for Reporting Period 2018/19[25]



Once a charge has been laid by the appropriate authority and is referred to a presiding officer, the presiding officer may be required to obtain legal advice before commencing the summary trial.[26] Once that advice has been received from the unit legal adviser, the presiding officer may commence the summary trial.

Over the past five years, the number of days between the time a charge is laid to the conclusion of the summary trial has fluctuated, reaching a low of 15.8 days in the previous reporting period. During the current reporting period, this number has increased to approximately 24 days. Figure 2-17 shows the average number of days from charge laid to the conclusion of the summary trial over the last five reporting periods.

Figure 2-17:
Number of Days from Charge Laid to Conclusion of the Summary Trial



24 See ss 163(1.1) and (1.2) and 164(1.1) and (1.2) of the *National Defence Act*.

25 Effective 1 September 2018, the accused may waive the one year limitation period to commence a summary trial.

26 QR&O, *supra* note 6, art 107.11.

Courts Martial

Number of Courts Martial

During this reporting period, there were a total of 51 courts martial completed, representing approximately 9% of all trials held before service tribunals and remaining relatively consistent with the previous reporting period. Figure 2-18 demonstrates the number of courts martial by year since 2014/15.

Results by Case at Court Martial

Of the 51 courts martial held this year, 43 cases resulted in a finding of guilt on at least one charge and six cases resulted in a finding of not guilty on all charges. Figure 2-19 shows disposition by case over the past two reporting periods.

Director of Military Prosecutions Case Management

Referrals

During this reporting period, the Director of Military Prosecutions received a total of 102 referrals compared to 118 in the previous reporting period, a decline of 13.56%. There were also fewer cases carried over from the previous reporting period, resulting in a total of 172 referrals processed in 2018/19 as compared to 199 in 2017/18, a decrease of 13.57%. Of these 172 cases, post-charge decisions were made by the Canadian Military Prosecution Service in 154 of them with the remainder carried over to the next reporting period.

Figure 2-20 shows the number of referrals received by the Director of Military Prosecutions over the last five reporting periods with a comparison as to how many were processed within each respective reporting period.

Figure 2-18:
Number of Courts Martial

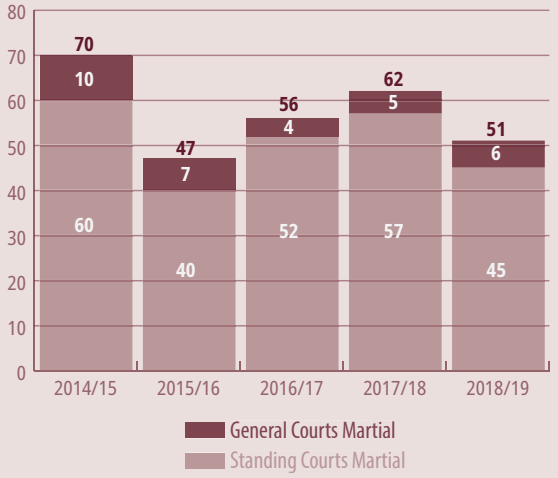
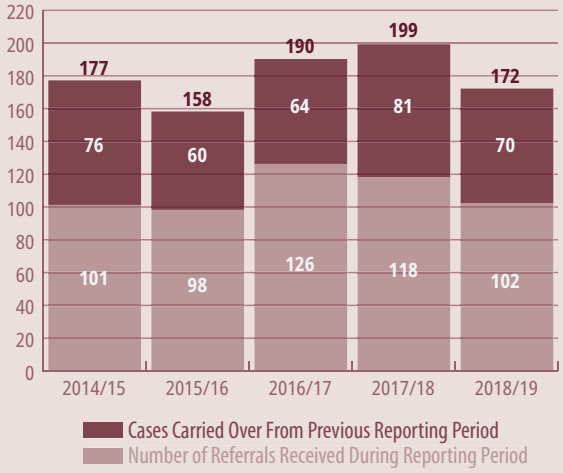


Figure 2-19: Disposition of Cases at Court Martial

	2017-2018		2018-2019	
	#	%	#	%
Found Guilty of at Least One Charge	51	82.26	43	84.31
Not Guilty of All Charges	11	17.74	6	11.77
Stay of All Charges	0	0	0	0.00
Withdrawal of All Charges	0	0	1	1.96
Termination of Proceedings	0	0	1	1.96
Total	**62**	**100**	**51**	**100**

Figure 2-20:
Number of Referrals

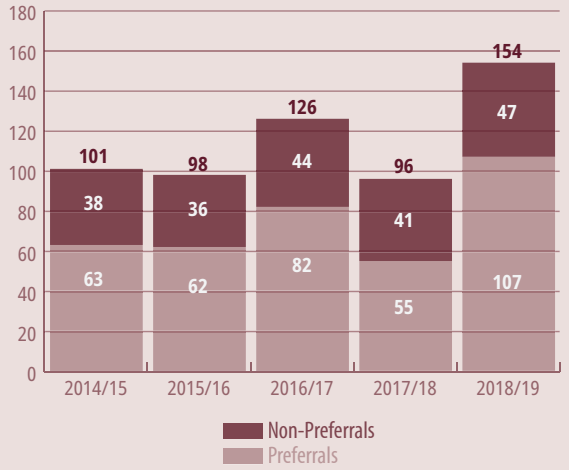


Preferrals and Non-Preferrals[27]

During this reporting period, there were 107 cases preferred for trial by court martial and 47 cases in which no charges were preferred. The percentage of cases preferred for trial by court martial for this reporting period was approximately 69%. Unlike the 2017/18 reporting period in which 55 files were preferred, or 57%, this reporting period saw a sharp rise in the rate of preferrals. In the past five reporting periods, the highest rate of preferrals was 69% during this reporting period and the lowest rate of preferrals was 57% in 2017/18.

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

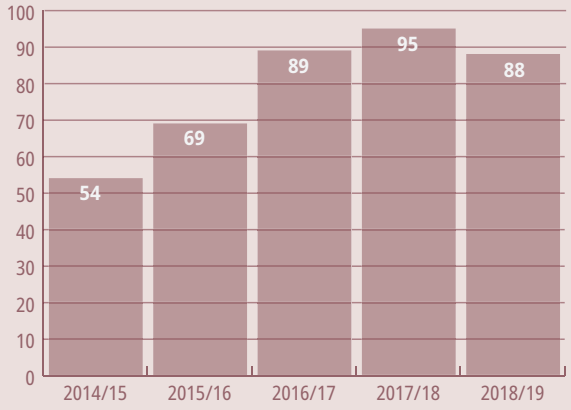
Figure 2-21:
Number of Preferrals and Non-Preferrals



Timelines

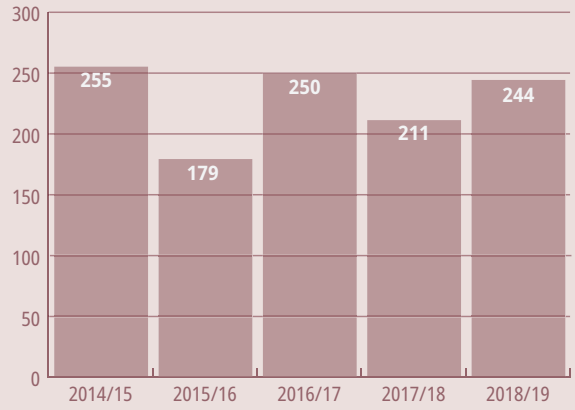
During this reporting period, the average number of days from referral of a matter to the Director of Military Prosecutions until post-charge decision against an accused was approximately 88 days, a decrease of approximately seven days, or 7.37%, from the previous year. Figure 2-22 illustrates the average number of days from referral to post-charge decision over the course of the past five reporting periods.

Figure 2-22:
Number of Days from Referral of File to the Director of Military Prosecutions to Post-Charge Decision



During this reporting period, the average length of time it took for the commencement of a court martial following the preferral of charges against an accused was 244 days, an increase from the previous reporting period by an average of 33 days, or 15.64%. The total number of days from the preferral of a charge to the commencement of a court martial in the previous reporting period was 211 days.

Figure 2-23:
Number of Days from Preferral of Charges to Beginning of Court Martial



27 In accordance with the Director of Military Prosecutions Policy Directive # 003/00, Post Charge Review, when considering whether or not a charge will be preferred, the Prosecutor must determine if there is a reasonable prospect of conviction and whether the public interest requires that a prosecution be pursued at the post-charge stage. Further information concerning the Director of Military Prosecutions Policies regarding post-charge review can be found at https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/post-charge-review.html.

Figure 2-23 demonstrates the average length of time for a court martial to commence once charges against an accused were preferred over the course of the past five years.

Punishments at Court Martial

While only one sentence may be passed on an offender at a court martial, more than one punishment may be given as part of the sentence. In the 2018/19 reporting period, 43 sentences were pronounced by courts martial, involving a total of 57 punishments. The most common punishments imposed were fines, 35 in total, representing 61.40% of punishments, followed by 10 severe reprimands, or 17.54% of punishments. A total of four custodial punishments, representing approximately 7.01% of punishments, were imposed by courts martial, including three imprisonments and one detention, which was suspended. Figure 2-24 breaks down the punishments imposed by courts martial over the past two reporting periods.

Figure 2-24: Punishments at Courts Martial

	2017-2018	2018-2019
Dismissal	3	2
Imprisonment	7	3
Detention	4*	1**
Reduction in rank	9	2
Severe reprimand	11	10
Reprimand	20	4
Fine	38	35
Confinement to ship or barracks	1	0
Stoppage of leave	1	0
Caution[28]	1	0
Total	**95**	**57**

* The execution of three of these punishments were suspended.
** The execution of this punishment was suspended.

Sexual Misconduct

A total of 20 courts martial dealing with sexual misconduct charges were completed during this reporting period with 14 of those resulting in a finding of guilt on at least one charge. There was the same number of courts martial dealing with sexual misconduct charges during the 2017/18 reporting period with 14 of those resulting in a guilty finding, one court martial resulting in a guilty finding of a lesser and included offence and five courts martial resulting in findings of not guilty.

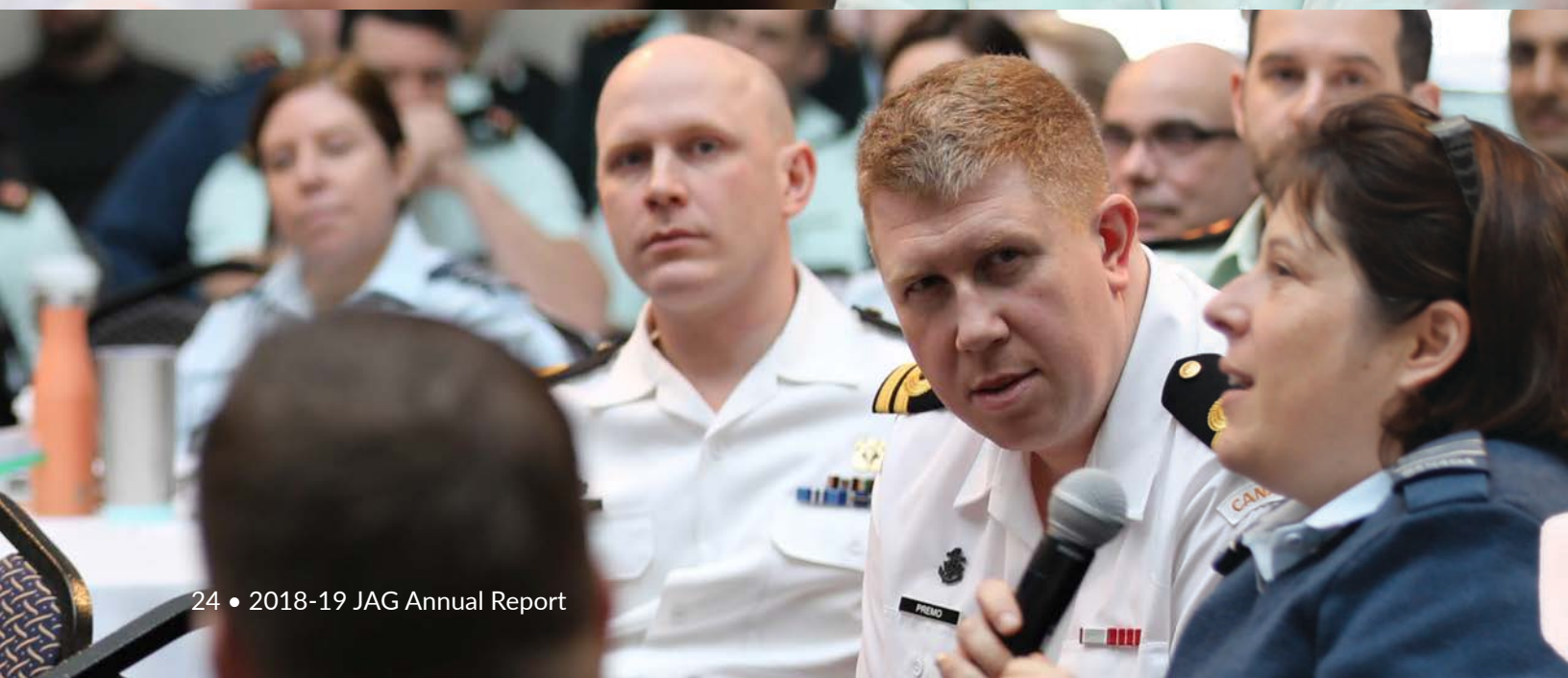
Director of Defence Counsel Services Representation

When a person appears before a military judge, a court martial, the Court Martial Appeal Court or the Supreme Court of Canada, they may have the right to be represented by counsel assigned by the Director of Defence Counsel Services at public expense or they may retain civilian counsel at their own expense or choose to self-represent.

During this reporting period, the Director of Defence Counsel Services provided legal representation to accused persons in 170 referred files, which included 82 cases from the previous reporting period. Of these 170 files, 96 were completed during this reporting period. Of the completed files, 51 members had the charges withdrawn without proceeding to a trial but requiring some level of legal representation by the Director of Defence Counsel Services. The remaining 45 cases resulted in four cases where the accused was found not guilty on all of the charges, one case which was terminated by a military judge and 40 cases in which the accused was either found guilty or pled guilty to at least one of the charges.

28 Effective 1 September 2018, caution has been removed as a punishment.

CANADA



CHAPTER THREE

Military Justice: Developments, Policy Initiatives and Jurisprudence

Introduction

The reporting period signified a particularly eventful year in the military justice system. This chapter highlights the developments, policy initiatives and jurisprudence that impacted the military justice system over the course of the reporting period. It includes legislative and policy initiatives supported or undertaken by the Office of the Judge Advocate General (Office of the JAG) in furtherance of the objectives and priorities of the Government of Canada, the Department of National Defence and the Canadian Armed Forces. This chapter will also highlight a number of cases heard by the Supreme Court of Canada, the Court Martial Appeal Court of Canada and by courts martial.

Developments and Policy Initiatives

Legislative Developments

Bill C-15: *Strengthening Military Justice in the Defence of Canada Act*

During this reporting period, the Military Justice Division continued its work towards the completion of the regulatory amendments required to implement the majority of the remaining sections of the *Strengthening Military Justice in the Defence of Canada Act*[29]

29 Statutes of Canada, 2013, c 24.

(Bill C-15). The legislative and corresponding regulatory amendments came into force on 1 September 2018.

Bill C-15 amended the *National Defence Act* by implementing the Government of Canada's response to the majority of the recommendations related to military justice, the grievance process, military police and the Military Police Complaints Commission made by the First Independent Review Authority, the late Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada, in his report tabled in Parliament in November 2003.[30] Bill C-15 also responded to a number of recommendations made by the Standing Senate Committee on Legal and Constitutional Affairs in its report of May 2009.[31]

This last set of amendments to the *National Defence Act* and *Queen's Regulations and Orders for the Canadian Forces* are the culmination of a complex process, requiring years of effort and cooperation by the Military Justice Division and numerous stakeholders within the Canadian Armed Forces, the Department of National Defence and the Department of Justice.[32]

Some of the amendments to the *National Defence Act* which came into force on 1 September 2018 include:

- The addition of purposes, objectives and principles of sentencing in the military justice system;
- The addition of absolute discharges, intermittent sentences, restitution orders and conditions when a service tribunal suspends the execution of a punishment of imprisonment or detention;
- The addition of a limitation period for charges to be tried at summary trial and of a waiver of limitation periods;
- The expansion of summary trial jurisdiction over lieutenant-colonels with the exception of military judges;
- The addition of victim impact statements to be considered at courts martial where victims may describe physical, emotional and financial harm suffered;
- The amendment of General Court Martial panel composition;
- The addition of a review of direction on release from custody by a military judge following a commanding officer's review of the direction on release; and
- The addition of circumstances where a person convicted of certain offences will not have a criminal record if they are sentenced to a punishment below a certain threshold.

During this reporting period, legal officers completed a training session regarding the changes to the military justice system resulting from the Bill C-15 amendments to the *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces*. In addition, the Office of the JAG and the Canadian Forces Military Law Centre collaborated to create a training package entitled "Presiding Officer Certification Training – Update" designed to bridge the gap between the previous curriculum of the Presiding Officer Certification Training and the changes to the military justice system for Canadian Armed

30 Canada, Department of National Defence, *The First Independent Review by the Right Honourable Antonio Lamer, P.C., C.C., C.D., of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998*, *c 35* [Lamer Report].

31 Senate, Standing Committee on Legal and Constitutional Affairs, *Equal Justice: Reforming Canada's System of Courts Martial – Final Report. A Special Study on the provisions and operation of An Act to amend the National Defence Act (Court Martial) and to make a consequential amendment to another Act, S.C. 2008, c 29*, Final Report, 2nd Session, 40th Parliament, May 2009.

32 Upon receiving Royal Assent, certain sections of Bill C-15 came into force, such as those related to the security of tenure for military judges and the appointment of reserve force military judges. Given the magnitude of the amendments to the *National Defence Act* resulting from the passing of Bill C-15 and the associated necessary regulatory amendments, it was decided that the coming into force of certain sections of Bill C-15 would be staggered and would occur at dates to be fixed by order of the Governor in Council. On 18 October 2013, other sections, meant to ensure the use of consistent terminology throughout the *National Defence Act* and corresponding regulatory amendments, came into force. On 1 June 2014, various sections related to the administration of justice came into force and corresponding regulatory amendments, including those concerning the Canadian Forces Provost Marshal, the military police, grievances, inquiry committees, civil enforcement of fines, the Military Police Complaints Commission, and independent reviews.

Forces members already Presiding Officer Certification Training qualified. All Canadian Armed Forces members who completed the 2-day Presiding Officer Certification Training course after 1 September 2018 have been trained with the updated Presiding Officer Certification Training curriculum.

Bill C-66: *Expungement of Historically Unjust Convictions Act*

The *Expungement of Historically Unjust Convictions Act*[33] (Bill C-66), introduced by the Minister of Public Safety and Emergency Preparedness, received Royal Assent on 21 June 2018.

Bill C-66 creates a procedure for expunging, under certain circumstances, specific historically unjust convictions and provides for the destruction or removal of any related judicial records from federal repositories and systems. Bill C-66 also deems a person who is convicted of an offence for which expungement is ordered never to have been convicted of that offence.

The schedule to Bill C-66 lists various offences in respect of which the expungement of a conviction may be ordered. Eligible offences include a number of sexual offences involving consensual sexual activity between same-sex persons, whether they were prosecuted under the *Criminal Code* or the *National Defence Act*.

The Office of the JAG worked with Public Safety Canada to ensure that corresponding service offences under the *National Defence Act* were included in Bill C-66 in order for persons convicted in the military justice system to be able to apply to the Parole Board of Canada for an expungement order.[34]

33 Statutes of Canada, 2018, c 11.

34 Ibid., For service offences listed in the schedule to the Act a person would apply for expungement under s 7 of the Act and the Parole Board of Canada has the authority to either order expungement pursuant to s 13 of the Act or to refuse to expunge pursuant to s 14 of the Act.

Bill C-77: *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*

On 10 May 2018, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts* (Bill C-77) was introduced in the House of Commons and represents the most recent effort to legislate significant improvements to Canada's military justice system.[35]

The Military Justice Division has provided direct legal support for this important legislative initiative through the parliamentary process. At the end of the reporting period, Bill C-77 had begun second reading before the Senate.

Bill C-77 is part of the Government of Canada's commitment to align victims rights in the military justice system with those in the civilian criminal justice system as outlined in the *Canadian Victims Bill of Rights*. More specifically, the addition of the Declaration of Victims Rights into the Code of Service Discipline would establish rights for victims of services offences in the military justice system such as the right to information, protection, participation and restitution. The amendments would also include the establishment of a complaint mechanism should a victim be of the opinion that any of their rights under the Declaration of Victims Rights have been infringed or denied. The proposed legislation would also provide for the appointment of a Victim's Liaison Officer, who would meaningfully assist victims of a service offence by explaining how service offences are dealt with under the Code of Service Discipline and by obtaining and providing information to victims relating to a service offence.

Bill C-77 also proposes to improve the efficiency of the military justice system by modifying the summary trial system by creating a non-penal, non-criminal summary hearing system to dispose of service infractions to be created in regulations.

35 Bill C-77 is the successor to the *Victims Rights in the Military Justice System Act* (Bill C-71) which died on the order paper at First Reading when Parliament was dissolved in August 2015.

In addition, Bill C-77 seeks to add two important sentencing provisions that mirror the *Criminal Code* while taking into account the unique requirements of the military justice system. First, Bill C-77 would provide that evidence of a service offence or service infraction that was motivated by bias, prejudice or hate based on gender identity or expression constitutes aggravating circumstances that must be taken into consideration when a sentence or sanction is imposed. Second, Bill C-77 would require that particular attention be afforded to the circumstances of Indigenous offenders, mirroring the *Criminal Code* provision known as the *Gladue* principle, when considering the appropriate punishment. The punishment must be reasonable in the circumstances and consistent with the harm done to victims or to the community.

Bill C-45: *Cannabis Act*

On 21 June 2018, *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts* (Bill C-45) – received Royal Assent. Bill C-45 legalized access to recreational cannabis in Canada and introduced regulations on how cannabis may be grown, distributed and sold. In order to facilitate a seamless transition to the new legal framework for members of the Canadian Armed Forces, and to mitigate any issues in the workplace that may arise with cannabis consumption or possession, the Office of the JAG provided legal support to the chain of command in developing two important policy documents concerning cannabis – Defence Administrative Order and Directive 9004-1,[36] which addresses the use of cannabis by members of the Canadian Armed Forces; and Defence Administrative Order and Directive 2007-2,[37] which deals with the use of cannabis by Department of National Defence civilian employees. To promote a healthy and safe workplace these Defence Administrative Orders and Directives establish the parameters under which it is permissible for Canadian Armed Forces members and Department of National Defence civilian employees to possess and consume cannabis. These Defence Administrative Order and Directives came into effect on 17 October 2018.

Support to Victims' Initiatives

Enhancing support to victims and survivors of service offences is a top priority for the Government of Canada, the Department of National Defence and the Canadian Armed Forces, as clearly articulated in Canada's Defence Policy - *Strong, Secure, Engaged* and Operation HONOUR. As outlined in last year's Annual Report, the development of policies providing support to victims and survivors at all stages of the military justice system was a priority and remained a priority over this reporting period.

During this reporting period, the Military Justice Division worked in close collaboration with key stakeholders including the Canadian Armed Forces Strategic Response Team on Sexual Misconduct, the Sexual Misconduct Response Centre and the Canadian Forces Provost Marshal with a view to identify and develop policies that would address gaps in existing services to victim and survivor support in the military justice system. In addition, internal and external consultations continued to ensure that victims and survivor support within the military justice system is fulsome and responsive while tailored to the Canadian Armed Forces context. Work on these important initiatives will continue during the next reporting period.

This reporting period is noteworthy as the coming into force of certain provisions of Bill C-15 provided that victims of service offences have the ability to present a victim impact statement before a court martial. In addition, as Bill C-77 advances through the parliamentary process during the next

36 Defence Administrative Order and Directive 9004-1, "Use of Cannabis by CAF Members," accessible online at: https://www.canada.ca/en/department-national-defence/corporate/policies-standards/defence-administrative-orders-directives/9000-series/9004/9004-1-use-cannabis-caf-members.html.

37 Defence Administrative Order and Directive 2007-2, "Use of Cannabis by DND Employees," accessible online at: https://www.canada.ca/en/department-national-defence/corporate/policies-standards/defence-administrative-orders-directives/2000-series/2007/2007-2-use-cannabis-dnd-employees.html. Note the focus of the support provided by the Office of the JAG was focused on guidance to officers and non-commissioned members of the Canadian Armed Forces who act as managers or supervisors of DND civilian employees.

reporting period, the introduction of the Declaration of Victims Rights would signify significant enhancements to the military justice system as the bill would provide clear rights to victims of service offences.

Independent Reports and Recommendations

Office of the Auditor General of Canada's Reports and Recommendations

During this reporting period, the Office of the Auditor General of Canada released a report relating to the administration of military justice, and a report regarding the efforts undertaken by the Canadian Armed Forces to address inappropriate sexual behaviour in the Canadian Armed Forces. These reports and the accompanying recommendations highlight areas to improve the military justice system, Operation HONOUR and other policies and programs which impact every employee of the Department of National Defence and member of the Canadian Armed Forces.

1. Report on the Administration of Justice in the Canadian Armed Forces

On 29 May 2018, the Office of the Auditor General tabled its report entitled "Report 3 – Administration of Justice in the Canadian Armed Forces." It concluded that the Canadian Armed Forces "did not administer the military justice system efficiently,"[38] and that the Office of the JAG "did not provide effective oversight of the military justice system."[39] The Office of the Auditor General made nine recommendations to improve the administration of military justice. The Department of National Defence and the Canadian Armed Forces agreed with all nine recommendations, as they serve to improve the effectiveness and efficiency of the military justice system and assist the Judge Advocate General in the execution of her statutory responsibility to superintend the administration of military justice in the Canadian Armed Forces.

Within one year of the release of the report, the Office of the JAG has implemented four of the nine recommendations. The remaining five recommendations will be implemented primarily through a suite of new and updated initiatives advanced during this reporting period including: the Justice Administration and Information Management System; the Military Justice Stakeholder Engagement Project; the Military Justice System Performance Monitoring Framework; and the Military Justice Round Table, re-named the Military Justice Stakeholders' Forum.

In addition, in response to a recommendation from the Office of the Auditor General, the Judge Advocate General committed to conduct a review of time standards for every phase of the military justice system. During this reporting period, the Office of the JAG commenced an internal review of the time standards and also started extensive external consultations with key military justice actors to seek their views on existing and preferred time standards within the respective areas of responsibility of these actors. This internal review and external consultation process will allow for the identification and introduction of appropriate time standards that would benefit the military justice process in a manner that respects rules of fairness and legal requirements. Moreover, once these time standards are identified, they will be incorporated into the Justice Administration and Information Management System, which will allow for real-time tracking of military justice files and will prompt actors when they are required to take action to meet a time standard.

Finally, in response to two recommendations of the Office of the Auditor General, the Judge Advocate General has directed that legal officers will be posted to the Canadian Military Prosecution Service or Defence Counsel Services for a minimum of five years, subject only to the availability of a vacant position on the establishment at the appropriate rank or to operational requirements. This posting directive ensures that litigation expertise is developed and maintained.

The Office of the JAG welcomed the Auditor General's findings and fully agrees with the

38 Office of the Auditor General of Canada, "Report 3 — Administration of Justice in the Canadian Armed Forces," para 3.87 [OAG Report on the Administration of Justice].
39 Ibid., para 3.88.

recommendations as they provide critical insight towards enhancing the military justice system. As the Judge Advocate General stated following receipt of the report "as with the civilian criminal justice system, the military justice system is in constant evolution and benefits significantly from internal and external reviews." To that end, significant progress has been made in responding to the recommendations during the reporting period and this important work will continue through the next reporting period. Additional detail related to these initiatives can be found later in this Chapter.

2. Report on Inappropriate Sexual Behaviour in the Canadian Armed Forces

On 30 November 2018, the Office of the Auditor General of Canada tabled another report related to the military justice system, entitled "Report 5 – Inappropriate Sexual Behaviour – Canadian Armed Forces." This report assessed Operation HONOUR's impact towards changing the culture and eliminating inappropriate sexual behaviour in the Canadian Armed Forces. The report found that while Operation HONOUR increased awareness of inappropriate sexual behaviour within the Canadian Armed Forces, it did not adequately address victim support initiatives[40] and produced unintended consequences resulting in the underreporting of sexual harassment and assault within the Canadian Armed Forces.[41] The Office of the Auditor General made seven recommendations, and the Department of National Defence and the Canadian Armed Forces agreed with all of them.

As Operation HONOUR is a top institutional priority for the Canadian Armed Forces, the Office of the JAG remains fully committed to supporting the chain of command in changing the culture and eliminating inappropriate sexual behaviour in the Canadian Armed Forces. During this reporting period, the Office of the JAG provided ongoing legal support to the initiatives aimed to address the recommendations of the Office of the Auditor General's report, and towards the creation and implementation of a more robust and effective victim and survivor support framework.

Standing Committee on Public Accounts

During the reporting period, the House of Commons Standing Committee on Public Accounts studied the Office of the Auditor General's report on the Administration of Justice in the Canadian Armed Forces. On 22 October 2018, the the Deputy Minister of National Defence and the Judge Advocate General appeared before the Standing Committee on Public Accounts to answer the Committee's questions regarding the report.

On 6 December 2018, following conclusion of its study, the Standing Committee on Public Accounts tabled "Report 3, Administration of Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada." The Committee's report echoed the Office of the Auditor General's findings regarding inefficiencies and delays in the military justice system and made nine recommendations. The Department of National Defence and the Canadian Armed Forces agreed to all of the Committee's recommendations. In order to proactively address these recommendations, the Office of the JAG continues to work towards the key initiatives linked to the Office of the Auditor General's recommendations; namely, the Justice Administration and Information Management System, the Military Justice Stakeholder Engagement Project, the Military Justice System Performance Monitoring Framework, the Military Justice Stakeholders Forum and a review of time standards in the military justice system. The Government of Canada's formal response and status update will be submitted to the Committee during the next reporting period.

Military Judges Compensation Committee Report

The Military Judges Compensation Committee, established pursuant to section 165.33 of the *National Defence Act*, is an independent panel comprised of three members. It is responsible

40 Office of the Auditor General of Canada, "Report 5 — Inappropriate Sexual Behaviour — Canadian Armed Forces," para 5.21.
41 Ibid., para 5.64.

for safeguarding judicial independence within the military justice system by depoliticizing the determination of the compensation of military judges. On 22 February 2019, the Committee submitted its fifth quadrennial report to the Minister of National Defence, on the adequacy of the remuneration of military judges, pursuant to section 165.34 of the *National Defence Act*. The Minister of National Defence subsequently released the report to the public, in accordance with subsection 165.37(1) of the *National Defence Act*. The Committee considered a variety of factors and documentation before concluding that military judges are entitled to parity of salary with those of other federally appointed judges. The Committee recommended to the Minister of National Defence that the military judges' salaries be adjusted to the same level as the salaries of other federally appointed judges as of 1 September 2015. Once this basic adjustment is made, the Committee further recommended that the salaries be indexed as of 1 April 2016 and annually thereafter based on the Industrial Aggregate of Canada and a formula similar to the one provided in subsection 25(2) of the *Judges Act*. The Minister of National Defence is required to respond to the Committee's report in accordance with subsection 165.37(2) of the *National Defence Act*, and the response is expected during the next reporting period.

Developments and Policy Initiatives Related to the Recommendations of the Office of the Auditor General and the Standing Committee on Public Accounts

As noted earlier in this Chapter, there are a number of initiatives that were undertaken during the current reporting period that address a number of the recommendations made in the reports of the Office of the Auditor General and the Standing Committee on Public Accounts respectively. These initiatives: the Justice Administration and Information Management System, the Military Justice Stakeholder Engagement Project, the Military Justice System Performance Monitoring Framework, implementing time standards in the military justice system, establishing the Military Justice Stakeholders' Forum and enhancing the litigation experience all serve to ensure that the military justice system continues to evolve to meet the expectations of Canadians and the needs of the Canadian Armed Forces.

Superintendence Enhancement and Assessment Project

In the 2015-2016 Judge Advocate General's Annual Report, the Judge Advocate General announced the initiation of an audit team in order to "develop and pilot a process for [...] the collection of objective and measurable data from a variety of sources and through a variety of mechanisms in order to assess the unit level administration of the Code of Service Discipline."

Based on this mandate, the Superintendence Enhancement and Assessment Project was created and the Superintendence Enhancement and Assessment Team was tasked with its implementation. In order to achieve the Judge Advocate General's direction, the team began work on two sub-projects under the Superintendence Enhancement and Assessment Project: the Justice Administration and Information Management System and the Military Justice Stakeholder Engagement Project. Both of these key initiatives will combine to provide institutional strategic oversight and will enhance the Judge Advocate General's ability to carry out her statutory mandate of the superintendence of the administration of the military justice system.

The Justice Administration and Information Management System

The first sub-project under the Superintendence Enhancement and Assessment Project is the Justice Administration and Information Management System. The Justice Administration and Information Management System is an innovative electronic case management tool and database designed by the Associate Deputy Minister (Information Management) with subject matter expert advice from the Office of the JAG, to seamlessly

and electronically track military justice files from the reporting of an alleged infraction, through to investigation, charge laying, trial disposition and review in both the summary trial and court martial processes. Front-end users of the system (including investigators, charge layers, presiding officers, review authorities, referral authorities and legal advisers) will input data at each stage of the process thereby allowing the progress of a file to be tracked in real-time.

The Justice Administration and Information Management System will deliver the means to provide commanders at all levels with a user-friendly, responsible, effective and efficient real-time workflow tool that will facilitate the administration of military justice at the unit level. It will also ensure that a case proceeds through the system in a timely manner by confirming that it proceeds in the proper order and prompting key actors, at the appropriate time, when they are required to take specific action. The Justice Administration and Information Management System will also compile all relevant statistics on the administration of military justice and provide critical data to assist the strategic oversight of the system.

Development of the Justice Administration and Information Management System commenced during this reporting period, with testing and refining of the system continuing. The system began its pilot phase in November 2018 and is scheduled to launch across the Canadian Armed Forces during the next reporting period.

Military Justice Stakeholder Engagement Project

The second sub-project under the Superintendence Enhancement and Assessment Project is the Military Justice Stakeholder Engagement Project. The Military Justice Stakeholder Engagement Project consists of an online survey, developed in cooperation with the Director General Military Personnel Research and Analysis, and designed to collect subjective and qualitative data from a variety of actors involved in the summary trial process during the 2018/19 reporting period. The objective of the Military Justice Stakeholder Engagement Project is to connect with military justice stakeholders in order to better assess the efficiency and effectiveness of the administration of the military justice system and to correct any identified weaknesses in the system. Improved stakeholder engagement will complement the quantitative data which will be available through the Justice Administration and Information Management System once it is fully launched during the next fiscal year. The Superintendence Enhancement and Assessment Team has commenced work on the planning and implementation of the Military Justice Stakeholder Engagement Project during the reporting period and work will continue into the next reporting period.

Military Justice System — Performance Monitoring Framework

The Office of the JAG is providing subject matter expert advice in the development and implementation of a new military justice performance monitoring system. The Military Justice System Performance Monitoring Framework is expected to be launched concurrently with the Justice Administration and Information Management System during the next reporting period. The introduction of the Military Justice System Performance Monitoring Framework will provide access to a breadth of new data that was previously unavailable to the Office of the JAG. Together with the Military Justice Stakeholder Engagement Project and the Justice Administration and Information Management System, the Military Justice System Performance Monitoring Framework will further support the effective and efficient superintendence of the administration of military justice on an ongoing basis. These new sources of data will also further enable the Office of the JAG to conduct evidence-based analysis and decision-making to ensure the effective development of the military justice system. As with the Justice Administration and Information Management System and the Military Justice Stakeholder Engagement Project, the Military Justice System Performance Monitoring Framework will serve to address a number of the

recommendations outlined in the Office of the Auditor General's report and the report of the Standing Committee on Public Accounts.

Implementation of Time Standards within the Military Justice System

The Office of the Auditor General's Report on the Administration of Justice in the Canadian Armed Forces and the report of the Standing Committee on Public Accounts found that time standards for every phase of the military justice system had not been expressly defined, implemented and communicated. The Office of the Auditor General's Report specifically recommended that the "Canadian Armed Forces should define and communicate time standards for every phase of the military justice process and ensure there is a process for tracking and enforcing them."[42] In response to this recommendation, the Office of the JAG commenced an internal review of the time standards for every phase of the military justice system and has started extensive consultations with key stakeholders during this reporting period. These consultations will collect feedback on existing and preferred time standards within the respective areas of responsibility for key stakeholders in the military justice system. The stakeholders consulted include: the Vice Chief of the Defence Staff, the Canadian Forces Provost Marshal, the Director Military Prosecutions, the Director of Defence Counsel Services and the Canadian Armed Forces' Disciplinary Advisory Council. Once appropriate time standards have been identified, they will be implemented into the military justice system. In addition, the approved time standards will be incorporated into the Justice Administration and Information Management System, which will allow for real-time tracking of files as they proceed through the military justice system while prompting actors when they are required to take action to meet a time standard. In so doing, the Judge Advocate General's ability to identify and address causes of any delays within the military justice system will be significantly enhanced.

Military Justice Stakeholders' Forum

In this reporting period, the Judge Advocate General successfully re-established the Military Justice Round Table, now named the Military Justice Stakeholders' Forum, in response to the Office of the Auditor General's recommendations. The Military Justice Stakeholders' Forum respects the independence and professional obligations of each military justice actor, and benefits from their respective experience and breadth of knowledge. Membership includes members of the military judiciary including the Chief Justice of the Court Martial Appeal Court of Canada and representatives of the Office of the Chief Military Judge, the Judge Advocate General, the Canadian Forces Provost Marshal, the Deputy Judge Advocate General for Military Justice, the Director of Military Prosecutions, the Director of Defence Counsel Services and the Court Martial Administrator.

With meetings occurring on a semi-annual basis, the Military Justice Stakeholders' Forum had two informative meetings during this reporting period. The Military Justice Stakeholders' Forum provides a valuable platform enabling strategic exchanges between the key stakeholders in the military justice system that serve to improve communication between key independent actors in the military justice system.

Enhancing Litigation Experience

The Office of the Auditor General's Report on the Administration of Justice in the Canadian Armed Forces and the report of the Standing Committee on Public Accounts identified a risk that sufficient military litigation expertise was not being developed, with the current posting policies and practices of the Office of the JAG. The Office of the Auditor General's Report specifically recommended that "[t]he Judge Advocate General [...] ensure that its human resource practices support the development of litigation expertise necessary for prosecutors and defence counsel."[43] In response, the Judge Advocate General issued direction designed to ensure that legal

42 OAG Report on the Administration of Justice, *supra* note 38, para 3.43.

43 Ibid., para 3.57.

officers will be posted to the Canadian Military Prosecution Service or Defence Counsel Services for a minimum of five years, subject only to the availability of a vacant position on the establishment at the appropriate rank or to operational requirements. Additionally, the Office of the JAG will commence an occupational analysis during the next reporting period with a view to determining potential personnel management options in order to best mitigate the risk identified by the Office of the Auditor General's Report, while balancing the service and operational requirements of the Canadian Armed Forces.

Appointments and Designations

Honorary Colonel of the Office of the Judge Advocate General

The former Chief Justice of the Supreme Court of Canada, Honorary Captain (Navy) the Right Honourable Beverley McLachlin, P.C., was appointed by the Minister of National Defence on 1 March 2018. Subsequent to her appointment, the Office of the JAG held a change of appointment ceremony on 20 June 2018 with the attendance of many distinguished guests including three former Judge Advocate Generals. The ceremony served as an opportunity for the Judge Advocate General and the Office of the JAG to welcome Honorary Captain (Navy) McLachlin and to pay tribute and wish farewell to Honorary Colonel John Hoyles who held the position since 2014.

The Office of the JAG Honorary Colonel serves as an important link with the legal community as well as the Canadian public. Honorary Captain (Navy) McLachlin has immersed herself in her role and fosters a strong *esprit de corps* within the Office of the JAG through her interactions and advice. Some of her activities included visiting with members of the Office of the JAG, attending the annual Office of the JAG Mess Dinner, and sharing her unique views and wisdom with legal officers and the broader Canadian Armed Forces community through a Defence Team video. The Judge Advocate General and the entire Office of the JAG are most appreciative of the Honorary Colonel's ongoing support and service to Canada.

Appointment of New Judge Advocate General Chief Warrant Officer

On 25 July 2018, Chief Petty Officer 1st Class Sylvain Bolduc, MMM, CD, was appointed as the Judge Advocate General Chief Warrant Officer. Chief Petty Officer 1st Class Bolduc replaced the outgoing Judge Advocate General Chief Warrant Officer, Chief Petty Officer 1st Class Serge Lavigne, who retired from the Canadian Armed Forces after 36 years of service. Chief Petty Officer 1st Class Bolduc adds an invaluable element to the Judge Advocate General command team, by virtue of his experience and knowledge of the Canadian Armed Forces and, in particular, the military justice system. Chief Petty Officer 1st Class Bolduc was the recipient of the Order of the Marechaussee in Bronze for his extensive work in establishing a formal partnership with the United States Army Criminal Investigation Department. He has served as the Chief Warrant Officer for the Canadian Forces National Investigation Service, the Canadian Forces Military Police Branch and the Canadian Forces Leadership and Recruit School before assuming his current position as the Judge Advocate General Chief Warrant Officer.

Re-appointments of the Director of Military Prosecutions and the Director of Defence Counsel Services

Pursuant to sections 165.1 and 249.18 of the *National Defence Act*, the Minister of National Defence is responsible to appoint individuals to serve in the positions of Director of Military Prosecutions and Director of Defence Counsel Services for a term of four years, which may be renewed. During this reporting period, the terms of both the Director of Military Prosecutions and the Director of Defence Counsel Services expired and the Minister of National Defence re-appointed both Directors to a further term. The Director of Military Prosecutions, Colonel Bruce MacGregor, Q.C., was appointed to a term that expires on 20

October 2022, and the Director of Defence Counsel Services, Colonel Delano Fullerton, was appointed to a term that expires on 6 March 2020.

Designation of Deputy Chief Military Judge

On 14 June 2018, upon the recommendation of the Minister of National Defence, Lieutenant-Colonel Louis-Vincent d'Auteuil was designated as the Deputy Chief Military Judge by an order in council, pursuant to section 165.28 of the *National Defence Act*. The Deputy Chief Military Judge exercises and performs the powers, duties and functions of the Chief Military Judge in the event that the Chief Military Judge is absent, unable to act or the office of the Chief Military Judge is vacant.

Appointment of new Canadian Forces Provost Marshal and Commander of the Canadian Forces Military Police Group

On 28 May 2018, Brigadier-General Simon Trudeau assumed the position of the Canadian Forces Provost Marshal and Commander of the Canadian Forces Military Police Group. The Canadian Forces Provost Marshal is the functional authority for Military Police within the Canadian Armed Forces, the designated advisor to the Chief of the Defence Staff on policing matters and the Commander of the Canadian Forces Military Police Group. Brigadier-General Trudeau replaced Brigadier-General Robert Delaney. The change of command ceremony took place on 28 May 2018 in Ottawa, and was presided over by Lieutenant-General Alain Parent.

Other Developments

Military Judges Selection Committee – Public Competition

During this reporting period, the Office of the JAG provided support for the establishment of the Military Judges Selection Committee and the military judges' selection process as prescribed by the Guidelines for the Military Judges Selection Process. The committee is established pursuant to an agreement between the Minister of National Defence and the Minister of Justice regarding the selection process for military judges. The committee is comprised of a panel of five individuals who are appointed by a ministerial order by the Minister of National Defence for a term of five years. The Office of the JAG worked with the Office of the Commissioner for Federal Judicial Affairs to administer the judicial application process. Applications from candidates were solicited for potential appointment as a regular or reserve force military judge under subsections 165.21(1) and 165.22(1) of the *National Defence Act*. The list of candidates is valid for a period of three years and will expire in November 2021.

Chief Military Judge Charged with Offences under the Code of Service Discipline

During the previous reporting period, the Canadian Forces National Investigation Service laid three charges against the Chief Military Judge in January 2018: one count of an act of a fraudulent nature, under section 117(f) of the *National Defence Act*; one count for willfully making a false entry in a document signed by him that was required for an official purpose, under section 125 of the *National Defence Act*; and one count of conduct to the prejudice of good order and discipline, under section 129 of the *National Defence Act*. In February 2018, Lieutenant-Colonel Mark Poland was appointed as Special Prosecutor but was later appointed as a justice in the Ontario Court of Justice. In December 2018, Second Lieutenant Cimon Senécal, initially appointed to assist the Special Prosecutor, assumed the role of lead prosecutor. In June 2018, following a post-charge review by the Special Prosecutor, eight charges were preferred to court martial and the hearing is expected to commence in the next reporting period.

Military Law Course at the University of Ottawa

In January 2019, the University of Ottawa Law School (Common Law Section) offered an intensive three-week course on military justice

in collaboration with the Office of the JAG. This course was directed by Commander Mark Létourneau, Appellate Counsel from Defence Counsel Services. Military prosecutors, military defence counsel and other legal officers instructed during this course. In addition, Chief Justice Richard Bell of the Court Martial Appeal Court of Canada, the Judge Advocate General, and Colonel Richard Garon, Commander 35th Canadian Brigade Group, met with the students and shared their insight on the military justice system.

Jurisprudence

Supreme Court of Canada — Decisions

Defence of honest but mistaken belief in consent

R v Gagnon, 2018 SCC 41

This case involved a challenge to the Military Judge's decision to put the defence of honest but mistaken belief to the General Court Martial panel, which led to the acquittal of the accused on one count of sexual assault.

The Court Martial Appeal Court found that the Military Judge erred in law by submitting to the court martial panel a defence of honest but mistaken belief in consent without having considered whether the statutory preconditions in paragraph 273.2(*b*) of the *Criminal Code* had been met. The majority concluded that a judge applying the proper legal framework would likely consider that reasonable steps had not been taken by the accused to ascertain consent, and deny the defence of honest but mistaken belief in consent. On this basis, the majority overturned the acquittal and ordered a new trial. In dissent, the Chief Justice concluded that there was evidence of reasonable steps and an air of reality to the defence of honest but mistaken belief on the facts of the case sufficient to put the defence to the panel.

On 16 October 2018, hearing the appeal of the accused as of right, the Supreme Court of Canada, with a unanimous decision from the bench, dismissed the case. The Supreme Court of Canada was of the opinion that there was no evidence from which a trier of fact could find that the appellant had taken reasonable steps to ascertain that the complainant was consenting. Therefore, the defence of honest but mistaken belief should not have been put to the panel.

Of note, Warrant Officer Gagnon is one of the parties to the appeal to the Supreme Court of Canada in *Stillman v R*[44] concerning section 11(f) of the *Canadian Charter of Rights and Freedoms* (Charter).

Supreme Court of Canada — Ongoing Appeals

Right to a jury trial pursuant to section 11(f) of the Charter

R v Beaudry, SCC 38308 / *Stillman v R*, SCC 37701

These appeals were joined together with eight other appeals, all concerning a common question regarding the constitutionality of paragraph 130(1)(a) of the *National Defence Act*. The appellants argued that paragraph 130(1)(a) of the *National Defence Act* violated their right to a jury trial guaranteed under section 11(f) of the Charter. Section 11(f) of the Charter provides that anyone charged with an offence has the right to the benefit of a trial by jury where the maximum punishment for the offence is imprisonment for five years or more, except in the case of an offence under military law tried by military tribunal.

The Court Martial Appeal Court had previously dealt with the central issue raised in this appeal in three separate cases. In *R v Royes*,[45] a unanimous panel of the Court concluded that the offences referred to in paragraph 130(1)(a) are offences under military law properly

44 Supreme Court of Canada docket number 37701 (see section *Supreme Court of Canada - Ongoing Appeals* below).
45 *R v Royes*, 2016 CMAC 1.

tried by a military tribunal, not requiring a military nexus test. As such, paragraph 130(1)(a) was determined to fall within the exception to the right to a trial by jury in section 11(f) of the Charter.

The Court Martial Appeal Court considered the same constitutional issue for a second time, by a new panel, in the case of *R v Déry*,[46] which was heard alongside the case of *R v Stillman*.[47] In *R v Déry*, the Court concluded that it was bound by the decision in *R v Royes* due to the principles of judicial comity and horizontal *stare decisis*. While Chief Justice Bell was in support of the unanimous decision in *R v Royes*, the majority of the Court delivered extensive reasons as to why they would have found paragraph 130(1)(a) of the *National Defence Act* unconstitutional. The majority of the Court reasoned that, absent a military nexus test, paragraph 130(1)(a) violates section 11(f) of the Charter.

The same issue was considered for a third time, by another panel of the Court Martial Appeal Court, in the case of *R v Beaudry*.[48] The majority of the Court departed from the principles of judicial comity and horizontal *stare decisis* and decided against following the decisions rendered in *R v Royes* and *R v Déry*. They reasoned that paragraph 130(1)(a) of the *National Defence Act*, which effectively converts certain civil offences into service offences to be tried under the military justice system absent a jury, was an impermissible exercise of Parliamentary authority because it limited a right guaranteed by the Charter. The Court declared paragraph 130(1)(a) to be unconstitutional and of no force or effect in its application to any civil offence for which the maximum sentence is five years of imprisonment or more. As a consequence, the military justice system could no longer prosecute serious offences committed in Canada, including sexual assault and other offences committed in Canada, punishable by five years of imprisonment or more.

On 21 September 2018, the Director of Military Prosecutions, on behalf of the Minister of National Defence, appealed the Court Martial Appeal Court's decision in *R v Beaudry* and filed a motion requesting that the appeal of *R v Beaudry* be joined with that of *R v Stillman* as they both relate to the same legal issue. The Supreme Court of Canada granted leave to appeal and heard these matters together on 26 March 2019. At the end of this reporting period, the Supreme Court of Canada had not released its decision with respect to these matters.

Federal Court — Decisions

Constitutionality of the Summary Trial Process

Thurrott v Canada (A.G.), 2018 FC 577

Petty Officer 2nd Class Thurrott was found guilty at summary trial of being absent without leave, contrary to section 90 of the *National Defence Act*. He was sentenced to a fine of $1,000. On review, the Review Authority determined that the guilty verdict was appropriate and the sentence was fair and justified. Subsequently, the offender applied to the Federal Court for judicial review, arguing that the summary trial process is unconstitutional as the process violates constitutionally guaranteed rights protected under the Charter. The matter was heard on 14 May 2018 and the Court rendered its decision on 4 June 2018.

The Federal Court assessed the Review Authority's decision, concluding that the decision satisfied the standard of reasonableness and did not merit being overturned. The Court also found that Petty Officer 2nd Class Thurrott had failed to duly serve a notice of constitutional question to the Attorney Generals of Canada and of each province, and he had failed to provide a proper factual foundation necessary for constitutional litigation. As a result the Court refused to consider the constitutional issues raised.

Furthermore, the Court noted that the offender had failed to establish that his

46 *R v Déry*, 2017 CMAC 2.
47 Ibid.
48 *R v Beaudry*, 2018 CMAC 4.

Charter rights had been engaged, let alone breached, during the summary trial process. Given that he had been ordered to pay a fine of $1,000 and did not face true penal consequences, the Court stated that the section 7 and section 12 Charter arguments could be readily dismissed. With respect to the offender's argument under section 11(d) of the Charter, the Court stated that this protection was only available in limited circumstances where true penal consequences flow from the sanction imposed, which was not the case before the Court. Consequently, the section 11(d) Charter argument was not available to Petty Officer 2nd Class Thurrott.

Court Martial Appeal Court of Canada — Decisions

Requirement for charge-layer to have an actual belief that the accused committed the alleged offence

R v Edmunds, 2018 CMAC 2

Master Corporal Edmunds ran a fraudulent scheme whereby he contracted on behalf of the Canadian Armed Forces with a company of which he was the sole owner. He pleaded guilty to one count of fraud over $5,000 involving two fraudulent transactions, contrary to section 380 of the *Criminal Code* and punishable under paragraph 130(1)(a) of the *National Defence Act*, and was sentenced to 30 days imprisonment. He was subsequently charged with several additional counts of fraud which resulted in a second court martial. At his second trial, Master Corporal Edmunds argued that the conduct of the investigators and prosecution was abusive, primarily because the prosecution had improperly split its case. The issues at appeal arose from his second trial.

During a pre-trial disclosure and abuse of process application, the charge-layer testified that he did not know any information about the alleged offences. He had been presented with a Record of Disciplinary Proceedings containing a number of charges and simply signed it. The Military Judge found that the charge-layer did not have an actual and reasonable belief that an offence had been committed, incorporating this finding into his decision on the abuse of process.

In his decision on the abuse of process, the Military Judge found that the prosecution had not acted in bad faith or maliciously, but determined that subjecting Master Corporal Edmunds to two trials was an abuse of process. The Military Judge reasoned that the prejudice arising from this abuse was the possibility that Master Corporal Edmunds would be subjected to two separate periods of incarceration. However, he concluded that this prejudice could be remedied through mitigation of sentence.

Master Corporal Edmunds appealed the Military Judge's refusal to grant a stay of proceedings. After a review of the appeal record, the Director of Military Prosecutions agreed that the error at the charge laying stage was fatal to the charges and that the court martial had therefore been without jurisdiction. This invalidated the proceedings and required the Court Martial Appeal Court to quash the conviction. The Court Martial Appeal Court heard the matter on 19 March 2018 and, in its decision on 9 May 2018, agreed and held that the requirement that a charge-layer possess reasonable grounds to believe that the accused committed the offence charged constitutes a safeguard against the irresponsible laying of charges. The Court Martial Appeal Court went on to hold that the failure to meet this standard is fatal to a Record of Disciplinary Proceedings and results in a loss of jurisdiction. Consequently, the convictions from the second trial of Master Corporal Edmunds were quashed.

Interpretation of the charge of drunkenness and of the defence of honest but mistaken belief in consent

R v Cadieux, 2018 CMAC 3

Corporal Cadieux was charged with having committed a sexual assault, contrary to section 271 of the *Criminal Code*, punishable under paragraph 130(1)(b) of the *National*

Defence Act, and with drunkenness, contrary to section 97 of the *National Defence Act*.

Corporal Cadieux was acquitted of these charges at a Standing Court Martial. The Director of Military Prosecutions appealed the acquittal on the basis that the Military Judge erred in his assessment of the defence of honest but mistaken belief in consent, in his assessment of witness credibility and in his interpretation of the offence of drunkenness.

The Court Martial Appeal Court allowed the appeal and the matter was heard on 12 March 2018. In its decision on 10 September 2018, the Court Martial Appeal Court ordered a new trial. The Court Martial Appeal Court held that where an accused individual raises the defence of honest but mistaken belief, courts must engage in a complete analysis of the statutory preconditions provided in section 273.2 of the *Criminal Code*, to determine if the defence is available to the accused. The Court Martial Appeal Court found that the Military Judge failed to engage in a fulsome analysis of the statutory preconditions which was a reversible error.

With respect to the charge of drunkenness, the Court Martial Appeal Court found that the trial court erred in its conclusion that the state of being hungover cannot be considered as conduct owing to the influence of alcohol. The Court also found that the Military Judge erred in concluding that where an accused is manageable, in that he/she complies with lawful orders, the accused cannot be guilty of "disorderly" behaviour, which is one of the elements of a charge of drunkenness. The Court Martial Appeal Court held that the state of being hungover is a direct result of excessive drunkenness. Therefore, conduct which otherwise meets the definition of drunkenness cannot be disregarded because it arises from the state of being hungover. The Court found the offence of drunkenness is meant to address fitness for duty or behaviour that is disorderly or discredits Her Majesty's service, and manageability is not curative of disorderly behaviour.

Right to a jury trial pursuant to section 11(f) of the Charter

R v Beaudry, 2018 CMAC 4

Corporal Beaudry was charged with two counts under section 130 of the *National Defence Act*; the first for committing sexual assault causing bodily harm, and the second for overcoming resistance to the commission of an offence, contrary to paragraph 272(1)(c) and subsection 246(a) of the *Criminal Code*. The Court Martial Administrator issued a convening order requiring the accused to appear before a Standing Court Martial.

The accused brought an application challenging the constitutionality of paragraph 130(1)(a) of the *National Defence Act*, on the grounds that the provision violated his right to a jury trial, guaranteed under section 11(f) of the Charter. The Military Judge rejected the application and proceeded with the trial. The accused was subsequently found guilty of committing sexual assault causing bodily harm.

Corporal Beaudry appealed to the Court Martial Appeal Court, contending that paragraph 130(1)(a) of the *National Defence Act* was unconstitutional as it deprived him of his constitutionally guaranteed right to a trial by judge and jury. The matter was heard by the Court Martial Appeal Court on 23 February 2017, 31 October 2017 and 30 January 2018. In a majority decision delivered on 19 September 2018, the Court Martial Appeal Court allowed the appeal and declared paragraph 130(1)(a) of the *National Defence Act* to be unconstitutional and to be of no force or effect in its application to any civil offence for which the maximum sentence is five years of imprisonment or more. As a result, the military justice system could no longer try Canadian Armed Forces members for a variety of civil offences pursuant to paragraph 130(1)(a) of the *National Defence Act*, if committed in Canada, including assault, assault causing bodily harm, assaulting a police officer, sexual assault, as well as for the offences of possession and trafficking of a controlled substance.

The Director of Military Prosecutions filed a notice of appeal to the Supreme Court of Canada on 21 September 2018.[49] The Supreme Court of Canada heard the appeal on 26 March 2019 and reserved judgment. At the end of this reporting period, the Supreme Court of Canada had not released its judgment in the matter.

The Director of Military Prosecutions also filed an initial motion to stay the declaration of invalidity made in the judgment of the Court Martial Appeal Court. This motion was heard by the Supreme Court of Canada on 14 January 2019 and was dismissed, based on the fact that the applicable criteria to grant a stay were not met. The Supreme Court of Canada concluded that the Director of Military Prosecutions had failed to establish that the balance of convenience favoured granting the stay of the declaration of invalidity.

Release pending appeal

R v Stillman, 2019 CMAC 1

In 2013, Corporal Stillman was found guilty at a Standing Court Martial of various offences under paragraph 130(1)(a) of the *National Defence Act*. Corporal Stillman appealed his conviction, contending that paragraph 130(1)(a) of the *National Defence Act* is unconstitutional. While the appeal was dismissed by the Court Martial Appeal Court, the subsequent appeal of *R v Beaudry* to the Supreme Court of Canada was accepted. On 14 February 2019, the Court Martial Appeal Court heard Corporal Stillman's motion seeking judicial interim release. On consent of the parties, the Court Martial Appeal Court, in its decision of 18 February 2019, ordered a partial stay of the sentence imposed at the Standing Court Martial, and ordered the conditional release of Corporal Stillman from incarceration.

49 For more details, see section *Supreme Court of Canada - Ongoing Appeals*.

Court Martial Appeal Court of Canada — Ongoing Appeals

Appropriate interpretation of a trier of fact relying on experience and general service knowledge regarding what constitutes conduct to the prejudice of good order and discipline

R v Bannister, 2018 CM 3003

Captain Bannister was charged with three offences for having allegedly behaved in a disgraceful manner contrary to section 93 of the *National Defence Act*. Alternatively, he was charged with three offences for conduct to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act* for inappropriate sexual comments made in the workplace. At the court martial, the Military Judge acquitted Captain Bannister of all charges. The Director of Military Prosecutions appealed the acquittal on the basis that the Military Judge erred in his interpretation of the offence of disgraceful conduct and erred in his interpretation of prejudice to good order and discipline. More specifically, the grounds of appeal focused on the extent to which the Military Judge was entitled or obliged to use his/her military experience and general service knowledge when deliberating upon these charges.

The Court Martial Appeal Court heard the appeal on 21 November 2018.[50] At the end of this reporting period, the Court Martial Appeal Court had not released its decision in the matter.

Availability of the defence of honest but mistaken belief in consent

R v MacIntyre, 2018 CM 4014

Sergeant MacIntyre was charged with one count of sexual assault contrary to section 271 of the *Criminal Code* and punishable under paragraph 130(1)(a) of the *National Defence Act*. At the end of the evidentiary stage of the

50 *R v Bannister*, CMAC docket number 592.

court martial, the accused requested that a defence of honest but mistaken belief in consent be put to the General Court Martial panel. The Military Judge refused to put the defence to the panel for its consideration after having determined that, on the facts, there was no air of reality to the defence of honest but mistaken belief in consent. The Military Judge reasoned that the defence of honest but mistaken belief in consent should not be put to the panel for consideration when the sole issue is one of credibility, as it was in the present case. Despite the defence of honest but mistaken belief in consent not being put to the panel, Sergeant MacIntyre was found not guilty of the charge.

The Director of Military Prosecutions appealed to the Court Martial Appeal Court, which heard the appeal on 27 March 2019.[51] At the end of this reporting period, the Court Martial Appeal Court had not released its decision in the matter.

Reliability of a voluntary confession

R v Edwards, 2018 CM 4018

Leading Seaman Edwards was charged with one count of prejudice to good order and discipline for the use of cocaine, contrary to section 129 of the *National Defence Act*. On 16 November 2018 the Standing Court Martial found him not guilty. The evidence was based on the accused's voluntary admission of having purchased and consumed cocaine. The Military Judge expressed concerns about the voluntary confession of the accused and gave the benefit of the doubt to the accused, stating that the prosecution failed to prove guilt beyond a reasonable doubt. The Court also found the prosecution did not prove that the use of a prohibited drug occurred at or near Halifax, as particularized in the charge. The Military Judge acquitted the accused.

The Director of Military Prosecutions appealed this case to the Court Martial Appeal Court and the appeal is expected to take place during the next reporting period.[52]

51 *R v MacIntyre*, CMAC docket number 594.
52 *R v Edwards*, CMAC docket number 595.

Court Martial — Decisions of Note

Courts Martial following the decision of *R v Beaudry*, *2018 CMAC 4*

R v Ryan, 2018 CM 2033

Leading Seaman Ryan was charged with two counts of sexual assault contrary to section 271 of the *Criminal Code* and punishable under paragraph 130(1)(a) of the *National Defence Act*. Following the release of the Court Martial Appeal Court's decision in *R v Beaudry,* the accused filed an application seeking the termination of the proceedings against him for lack of jurisdiction.

The matter was heard on 15 November 2018 and the Court rendered its decision on 22 November 2018. The Military Judge, in applying the doctrine of *stare decisis,* analyzed the cases of *R v Royes*, *R v Déry* and *R v Beaudry* and found the decision in *R v Royes* to be most persuasive. The Military Judge noted that "CMAC Beaudry imposes unnecessary limitations upon the administration of military justice, creating more problems than it solves as it subordinates other equality rights and principles of fairness." The Court found there is sufficient active oversight and accountability from military panels to maintain and rely upon them. The application to terminate the proceedings was denied but, in the interest of justice, the trial date was not to be fixed before a final decision by the Supreme Court of Canada, given the Director of Military Prosecutions motion to stay the decision of the Court Martial Appeal Court in *R v Beaudry*. At the end of this reporting period, the case was still awaiting trial.

R v Spriggs, 2019 CM 4002

Corporal Spriggs was charged with one count of sexual assault contrary to section 271 of the *Criminal Code* and punishable under paragraph 130(1)(a) of the *National Defence Act*. As a result of the *R v Beaudry* decision, the initial charge was withdrawn and replaced with a charge of disgraceful conduct, contrary to section 93 of the *National Defence Act*. The trial commenced on 28 January 2019.

The accused presented an application for stay of the proceedings under section 24(1) of the Charter as a remedy to what he alleged was an abuse of proceedings. The accused alleged that such substitution in the charges was used to circumvent the loss of jurisdiction arising from the *R v Beaudry* decision.

The Military Judge concluded that by withdrawing the very charge which made the accused triable by a judge and jury in a civilian court of criminal jurisdiction, and by replacing it by a purely military charge of disgraceful conduct triable only by court martial, the accused was effectively deprived of a right pursuant to the Charter. As a result, on 31 January 2019, the Military Judge terminated the proceedings.

Misconduct of a sexual nature

R v Duvall, 2018 CM 2027

Captain Duvall was charged with one count of disgraceful conduct contrary to section 93 of the *National Defence Act*, for sexually touching a service member, and a colleague without her consent. The accused pleaded guilty to the charge and was found guilty of disgraceful conduct. On 28 September 2018 the military judge sentenced him to a severe reprimand and a fine of $2,000.

R v Jonasson, 2019 CM 2003

Lieutenant-Colonel Jonasson was charged, contrary to section 95 of the *National Defence Act*, for allegedly ill-treating a person who was, by rank, subordinate to him. He was also charged, contrary to section 97 of the *National Defence Act*, for drunkenness. After an initial investigation yielded insufficient evidence, a further investigation was conducted by the Canadian Forces National Investigation Service. Owing to limited evidence on the drunkenness charge, the accused's application for *no prima face case* was granted. On the remaining charge, numerous witnesses were called, but none could provide evidence proving that the alleged acts occurred. Furthermore, the Military Judge concluded that the complainant was neither credible nor reliable and warned of potential offences for making false allegations. Lieutenant-Colonel Jonasson was found not guilty and acquitted of all charges on 8 February 2019.

Other significant cases

R v Abbott, 2018 CM 2032

Major Abbott was charged with of one count of behaving in a disgraceful manner, contrary to section 93 of the *National Defence Act*. A Victim Impact Statement was prepared and read by the victim where she expressed how the incident affected her and the self-doubt it created personally, as well as professionally. Through her Victim Impact Statement, the victim was able to communicate to the Court the direct consequences that the accused's behaviour had on her. The Military Judge considered the Victim Impact Statement as an aggravating factor, prior to sentencing. The accused entered a guilty plea and was sentenced on 5 November 2018 to a severe reprimand, as well as a $2,500 fine.

R v Stow, 2018 CM 3014

Leading Seaman Stow was charged and found guilty of trafficking in cocaine, contrary to section 5(1) of the *Controlled Drugs and Substances Act*. Five other charges were initially laid against the accused but were later withdrawn. Given the seriousness of involvement with drugs in a military environment, and pursuant to a joint submission made by the prosecutor and defence counsel, on 28 August 2018 the accused was sentenced to imprisonment for a period of ten months.

Conclusion

The 2018/19 reporting period was one that saw numerous and notable developments to the military justice system. The significant legislative developments outlined in this chapter will significantly enhance the support to victims along with improving the promptness, fairness and effectiveness of the military justice system. The reviews of the military justice system by the Office of the

Auditor General and the House of Commons Standing Committee on Public Accounts contribute significantly to the continued evolution of the military justice system. The next reporting period will include the decision of the Supreme Court of Canada in *R v Beaudry* that will undoubtedly serve as a landmark decision for the military justice system.

Given the myriad of legislative initiatives, judicial decisions and policy advancement during the reporting period, the military justice system continues to evolve in light of Canadian law and values while supporting the chain of command to ensure the discipline, efficiency and morale of members of the Canadian Armed Forces.

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CHAPTER FOUR
The Way Ahead

The Office of the Judge Advocate General (Office of the JAG) is committed to providing "*Excellence Through Service*" and will continue to deliver 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; and, to superintend the administration of military justice while respecting the independent roles of each statutory actor within the military justice system.

Canada's military justice system is a unique and necessary part of the Canadian legal mosaic developing separately and in parallel with the civilian criminal justice system. It contributes significantly to the ability of the Canadian Armed Forces to achieve its mission in Canada and around the world, by assisting military commanders in maintaining discipline, efficiency and morale. As a trusted partner in the Defence team, the Office of the JAG will continue to support the Government of Canada towards enhancements to the military justice system such as Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts* and responding to the recommendations of the Office of the Auditor General and the Standing Committee on Public Accounts. These legislative initiatives and external reviews serve to reinforce Canada's position as a global leader in the development of a fair and effective military justice system.

The Canadian Armed Forces is committed to ensuring that it has a workplace free from sexual assault, harassment and discrimination. The military justice system plays a pivotal role in supporting Operation HONOUR and provides a valuable mechanism for commanders towards the elimination of harmful and inappropriate sexual behaviour which seriously undermines discipline, efficiency and morale in the Canadian Armed Forces. The Office of the JAG remains

committed to supporting the Chief of the Defence Staff and the chain of command in the promotion of a culture of leadership, respect, and honour – which are the cornerstones of Canada's Defence Policy, *Strong, Secure, Engaged*.

The Office of the JAG awaits the release of the Supreme Court of Canada decision of *R v Beaudry* and *Stillman v R* in the next reporting period. This important decision will undoubtedly provide invaluable guidance regarding critical aspects of the military justice system.

With the valued expertise of the Assistant Deputy Minister (Information Management), the Office of the JAG will continue to support the development and implementation of the Superintendence Enhancement and Assessment Project, including the Justice Administration and Information Management System, the Military Justice System Performance Monitoring Framework and the Military Justice Stakeholder Engagement Project. It is anticipated that the Justice Administration and Information Management System will be rolled-out within the Canadian Armed Forces in the next reporting period. Each of these projects will significantly contribute to improving the ability of the Judge Advocate General to superintend the administration of military justice. In addition, these projects will result in the implementation of the recommendations stemming from the Office of the Auditor General's report on the Administration of Justice in the Canadian Armed Forces and the report of the House of Commons Standing Committee on Public Accounts presented to the House of Commons on 6 December 2018.

Finally, section 273.601 of the *National Defence Act* requires the Minister of National Defence to cause periodic independent reviews of the military justice system to be conducted. The results of the next independent review of the military justice system are scheduled for tabling before Parliament in June 2021. The military justice system is constantly evolving, and the independent review process is instrumental in providing guidance and direction in ensuring the system evolves in accordance with Canadian law while promoting the operational effectiveness of the Canadian Armed Forces by contributing to the maintenance of discipline, efficiency and morale. During the next reporting period, significant focus will be centered on planning for the next independent review. This will ensure the Office of the JAG is prepared to provide dedicated support for this important statutory requirement.

Conclusion

This reporting period called for dedicated work towards the improvement of the military justice system. Legal officers from the Office of the JAG were instrumental towards advancing a multitude of policy and legislative initiatives while also responding to a number of internal and external challenges. They have once again demonstrated excellence through service and proven themselves to be experts in military justice and have lived the motto of the legal branch – *Let Justice Prevail*.

The next reporting period will include opportunities to further improve the system such as the implementation of the Justice Administration and Information Management System, as well as other projects that will enhance the ability of the Judge Advocate General to fulfill her statutory role of superintending the administration of military justice in the Canadian Armed Forces. Support to legislative and regulatory initiatives, as well as the statutorily-mandated independent review, will be a priority in the next reporting period.

The Judge Advocate General, supported by the Office of the JAG, will ensure the military justice system continues to evolve to support the operational effectiveness of the Canadian Armed Forces and is responsive to the needs of operational commanders both domestically and abroad. As part of the larger Canadian legal mosaic, Canada's military justice system will continue to be one that represents Canadian values, complies with Canadian law, and is one in which Canadians can have confidence.

ANNEX A:

Summary of Charges Disposed of at Summary Trial

1 April 2018 — 31 March 2019

Current as of 17 May 2019

NDA Section	Description	2017-2018		2018-2019	
		#	%	#	%
83	Disobedience of lawful command	17	2.02	5	0.67
84	Striking or offering violence to a superior officer	3	0.36	1	0.14
85	Insubordinate behavior	43	5.10	29	3.91
86	Quarrels and disturbances	64	7.60	31	4.17
90	Absence without leave	312	37.05	274	36.93
91	False Statement in Respect of Leave	1	0.12	0	0.00
93	Cruel or Disgraceful Conduct	2	0.24	1	0.14
95	Abuse of subordinates	2	0.24	4	0.54
96	Making false accusations or statements suppressing facts	1	0.12	0	0.00
97	Drunkenness	114	13.54	104	14.01
98	Malingering, Aggravating Disease or Infirmity or Injuring Self or Another	0	0.00	2	0.27
101.1	Failure to comply with conditions	0	0.00	2	0.27
102	Hindering Arrest or Confinement or Withholding Assistance When Called On	0	0.00	1	0.14
107	Wrongful Acts in Relations to Aircraft or Aircraft Material	0	0.00	1	0.14
108	Signing Inaccurate Certificate	0	0.00	7	0.94
111	Improper driving of vehicles	3	0.36	1	0.14
112	Improper use of vehicles	7	0.83	3	0.40
113	Causing Fires	1	0.12	0	0.00
114	Stealing	5	0.59	2	0.27
116	Destruction, damage, loss or improper disposal	2	0.24	2	0.27
117	Miscellaneous offences	3	0.36	1	0.14
125	Wilfully made a false statement in a document	6	0.71	6	0.81
127	Injurious or destructive handling of dangerous substances	1	0.12	4	0.54
129	Conduct to the prejudice of good order and discipline – Negligent discharge	12	1.42	25	3.37
129	Conduct to the prejudice of good order and discipline – Sexual Harassment	24	2.85	35	4.71
129	Conduct to the prejudice of good order and discipline – Inappropriate relationships	7	0.83	3	0.40

ANNEX A:

Summary of Charges Disposed of at Summary Trial

Continuation

NDA Section	Description	2017-2018		2018-2019	
		#	%	#	%
129	Conduct to the prejudice of good order and discipline – Alcohol related	27	3.20	32	4.31
129	Conduct to the prejudice of good order and discipline – Drug related	19	2.25	19	2.56
129	Conduct to the prejudice of good order and discipline – Other	148	17.58	142	19.13
130(4(1) CDSA*)	Possession of a controlled substance	3	0.36	0	0.00
130(265 CC**)	Assault	1	0.12	1	0.14
130(266 CC)	Assault	9	1.07	2	0.27
130(267 CC)	Assault with a Weapon or Causing Bodily Harm	3	0.36	2	0.27
130(430 CC)	Mischief	1	0.12	0	0.00
130 (430(4) CC)	Mischief in Relation to Property	1	0.12	0	0.00
Total		**842**	**100**	**742**	**100**

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.
* *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.
** *Criminal Code*, R.S.C., 1985, c. C-46.

ANNEX B:
Summary of Charges Disposed of at Court Martial

1 April 2018 — 31 March 2019

NDA Section	Description	2017-2018		2018-2019	
		#	%	#	%
83	Disobedience of lawful command	3	1.47	1	0.89
84	Striking or offering violence to a superior officer	3	1.47	0	0.00
85	Insubordinate behavior	7	3.43	3	2.65
86	Quarrels and disturbances	7	3.43	1	0.89
87	Resisting or Escaping from Arrest or Custody	0	0.00	1	0.89
90	Absence without leave	10	4.90	6	5.30
91	False Statement in Respect of Leave	0	0.00	1	0.89
93	Cruel or Disgraceful Conduct	11	5.40	11	9.73
95	Abuse of subordinates	10	4.90	8	7.07
97	Drunkenness	10	4.90	8	7.07
101.1	Failure to comply with conditions	2	0.98	0	0.00
109	Low Flying	0	0.00	1	0.89
114	Stealing	4	1.96	2	1.77
116	Destruction, damage, loss or improper disposal	2	0.98	1	0.89
117 (f)	Miscellaneous offences	1	0.49	1	0.89
118.1	Failure to Appear or Attend	0	0.00	1	0.89
124	Negligent performance of a military duty	4	1.96	1	0.89
125 (a)	Wilfully made a false statement in a document	0	0.00	2	1.77
127	Injurious or destructive handling of dangerous substances	0	0.00	1	0.89
129	Conduct to the prejudice of good order and discipline	44	21.58	38	33.62
130 (4(1) CDSA*)	Possession of a controlled substance	1	0.49	3	2.65
130 (5(1) CDSA)	Trafficking in substance	2	0.98	2	1.77
130 (5(2) CDSA)	Possession for purpose of trafficking	2	0.98	1	0.89
130 (7 (1) CDSA)	Production of a substance	1	0.49	0	0.00
130 (86(1) CC**)	Negligent Handling of a Firearm	2	0.98	0	0.00
130 (86(2) CC)	Contravention of storage regulations	2	0.98	0	0.00
130 (87 CC)	Pointing a firearm	1	0.49	0	0.00
130 (88 CC)	Possession of a weapon for a dangerous purpose	1	0.49	0	0.00
130 (91(1) CC)	Unauthorized possession of a firearm	1	0.49	0	0.00
130 (122 CC)	Breach of trust by public officer	17	8.33	0	0.00
130 (129(a) CC)	Resisting a peace officer	0	0.00	1	0.89

ANNEX B:

Summary of Charges Disposed of at Court Martial

Continuation

NDA Section	Description	2017-2018		2018-2019	
		#	%	#	%
130 (151 CC)	Sexual Interference	1	0.49	0	0.00
130 (162(1)(a) CC)	Voyeurism	1	0.49	0	0.00
130 (162.1 CC)	Made available an intimate image without consent	1	0.49	0	0.00
130 (163.1(2) CC)	Making child pornography	1	0.49	0	0.00
130 (163.1(4) CC)	Possession of child pornography	2	0.98	0	0.00
130(264(1) CC)	Criminal Harassment	1	0.49	1	0.89
130 (264.1 CC)	Uttering threats	9	4.41	0	0.00
130 (266 CC)	Assault	11	5.45	7	6.19
130 (271 CC)	Sexual assault	9	4.41	6	5.30
130 (286.1(1) CC)	Obtaining sexual services for consideration	1	0.49	0	0.00
130 (334 CC)	Theft	1	0.49	0	0.00
130 (334(a) CC)	Theft - value stolen exceeds $5000	1	0.49	1	0.89
130 (337 CC)	Public servant refusing to deliver property	1	0.49	0	0.00
130 (348 CC)	Breaking and Entering	0	0.00	1	0.89
130 (351 (1) CC)	Possession of break-in instrument	0	0.00	1	0.89
130(355.2 CC)	Trafficking in property obtained by crime	3	1.47	0	0.00
130(366(1) CC)	Forgery	1	0.49	0	0.00
130 (368(1) CC)	Uttering a forged document	1	0.49	1	0.89
130 (380(1) CC)	Fraud	8	3.92	0	0.00
130 (430 CC)	Mischief	2	0.98	0	0.00
130 (463(b) CC)	Attempt to Defraud	1	0.49	0	0.00
Total		**204**	**100**	**113**	**100**

* *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.
** *Criminal Code*, R.S.C., 1985, c. C-46.

ANNEX C:

2018-2019 Director of Military Prosecutions Annual Report

National Defence | Défense nationale

DMP

Canadian Military Prosecution Service
Le Service canadien des poursuites militaires

Director of Military Prosecutions

Annual Report 2018 - 2019

Canada

National Defence | Défense nationale

Director of Military Prosecutions
National Defence Headquarters
Major-General George R. Pearkes Building
101 Colonel By Drive
Ottawa, ON K1A 0K2

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

19 June 2019

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

Commodore Bernatchez,

Pursuant to article 110.11 of the *Queen's Regulations and Orders for the Canadian Forces*, I am pleased to present you with the 2018-2019 Annual Report of the Director of Military Prosecutions. The report covers the period from 1 April 2018 through 31 March 2019.

Yours sincerely,

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

Canada

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Message from the Director of Military Prosecutions

I am pleased to present the Director of Military Prosecutions (DMP) Annual Report for the 2018/19 reporting period, my fifth since being appointed by the Minister of National Defence as DMP on 20 October 2014.

As a Commanding Officer, it gives me great pride to lead an organization such as the Canadian Military Prosecution Service (CMPS) and those talented individuals who work within it. Despite a number of challenges faced by the CMPS this year, we were able to successfully continue to support the Canadian Armed Forces (CAF) in the maintenance of the discipline, efficiency and morale of the men and women who serve their country with distinction.

In September of 2018, the Court Martial Appeal Court (CMAC) released its decision in the case of *R v Beaudry*. Despite two previous rulings to the contrary, the CMAC held that s. 130(1)(a) of the *National Defence Act* violates section 11(f) of the *Canadian Charter of Rights and Freedoms*. The immediate effect of that ruling was that the CMPS was no longer able to prosecute those cases where accused persons were charged with offences under that section and were subject to a punishment of imprisonment for five years or more. At the time of the decision, nearly half of our annual caseload was impacted.

Within 48 hours of the decision, our team responded by appealing the decision on behalf of the Minister of National Defence and by filing two motions with the Supreme Court of Canada (SCC) – one to request a stay of execution of the declaration of invalidity

and a second motion to join the matter with the case of *R v Stillman* which was already before the SCC on the very same issue.

On 14 January 2019, the SCC denied the request for a stay of execution. I immediately instructed all members of my team to examine those impacted cases on a principled basis to determine whether those matters could still proceed through the military justice system or if they had to be transferred to the civilian justice system. In all cases where there were victims, I required that they be consulted and informed prior to any decisions being taken.

It is an understatement to say that this presented a challenge to our organization and our ability to continue to prosecute cases through the military justice system. At all times, we continued to balance the need to hold those accused of offences to account for their actions along with the interests of victims and the rights of the accused to be tried within a reasonable time as indicated by the SCC in the recent case of *R v Jordan*. On 26 March 2019, the cases of *Beaudry* and *Stillman* were argued before the SCC and a decision is expected in the next reporting period.

In addition, this past reporting period the Auditor General of Canada, as a part of his 2018 Spring Report, reported on the administration of military justice. That report indicated a number of concerns related to delay, the documenting of key decisions in court martial files and the independence of the DMP. The Auditor General made a series of recommendations which were accepted and our prosecution team updated a number of our policies and procedures to ensure better efficiencies and that key decisions were properly documented.

In terms of independence, I continue to work with the Judge Advocate General and others to ensure that conflicts do not arise in the duty of my prosecutors to act in the public interest. Properly recognized by the Auditor General, prosecutorial independence that is free from any form of interference is one of the keys to a properly functioning criminal justice system.

This past reporting period there were a number of appeal decisions from the CMAC as well as the case of *R v Gagnon* which was also argued at the SCC. In that case, in a unanimous decision from the bench, the SCC affirmed the requirement, in cases of sexual assault, for an accused to take reasonable steps to ensure that the complainant is consenting to sexual activity. At the CMAC, aside from *Beaudry*, the court also rendered two other decisions in *R v Edmunds* and *R v Cadieux*. In addition, on behalf of the Minister, I appealed four court martial decisions to the CMAC on several questions of law in *R v Bannister*, *R v MacIntyre*, *R v Edwards* and *R v Spriggs*. All of these cases are discussed in greater detail in Chapter Three.

This past reporting period I also took considerable steps to engage in strategic outreach with members of the CAF as well as with civilian and military prosecutors both nationally and internationally through the Federal/Provincial/Territorial Heads of Prosecution Committee and the International Association of Prosecutors. These organizations are designed to promote good relations between prosecution agencies and facilitate the exchange and dissemination of information, expertise and experience in those areas that touch upon criminal law and practice management. Through these relationships not only do we improve the conduct of prosecutions within the CMPS through the sharing of best practices but we also continue to strengthen the legitimacy of Canada's military justice system.

To further improve the abilities of my prosecutors I also put a high priority on training and professional development opportunities. With such a junior cadre of military prosecutors within the CMPS, training becomes an essential component in the improvement of the core prosecutorial competencies of our personnel. To that end, my prosecutors were afforded a number of training opportunities including some who worked alongside our civilian counterparts through memorandums of understanding with provincial prosecution services to prosecute cases under the mentorship of civilian Crown

counsel. Given the busy workload and high tempo throughout the year, most of the CMPS leadership was involved in the two appeals to the SCC as well as providing assistance and guidance on the extraordinarily high number of cases argued at the CMAC this year. This made external training opportunities of vital importance to enhance the skill set of our personnel as internal training opportunities and day-to-day mentoring were greatly reduced.

Finally, this year saw significant development of and improvement to our electronic case management system. This system which tracks all court martial cases throughout the court martial process will improve transparency and efficiency by increasing accountability and reducing overall delays in the court martial system. In response to the recommendation by the Auditor General that a case management system be put in place to monitor and manage the progress and completion of military justice cases, the case management system was operationalized on 1 June 2018. The work done this year to enhance the case management system is discussed in greater detail in Chapter Eight.

In closing, it has been a very busy and challenging year for the CMPS and I would like to thank my entire team for their dedication, tenacity and professionalism in successfully meeting each and every one of these challenges as we continue to support the rule of law and support the maintenance of discipline, efficiency and morale in the Canadian Armed Forces.

ORDO PER JUSTITIA

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

CHAPTER ONE

The Canadian Military Prosecution Service

Duties and Functions of the Director of Military Prosecutions

The Director of Military Prosecutions (DMP) is the senior military prosecutor in the Canadian Armed Forces (CAF). He is appointed by the Minister of National Defence for a fixed term pursuant to subsection 165.1(1) of the *National Defence Act* (NDA). Under the NDA the DMP is responsible to prefer all charges to be tried by court martial and for the conduct of all prosecutions at courts martial. The DMP also acts as counsel, when instructed, in respect of appeals to the Court Martial Appeal Court (CMAC) and the Supreme Court of Canada (SCC). The DMP is also responsible to provide advice in support of investigations conducted by the Canadian Forces National Investigation Service (CFNIS), a military police service that reports to the Canadian Forces Provost Marshal. The DMP also represents the CAF at custody review hearings and provides legal advice and training to the CFNIS.

The DMP is under the general supervision of the Judge Advocate General (JAG) and, in this regard, the JAG may issue general instructions or guidelines in writing in respect of prosecutions, which the DMP must ensure are made available to the public. The JAG may also issue specific instructions or guidelines in writing in respect of a particular prosecution. The DMP must ensure that these instructions or guidelines are also available to the public, unless the DMP considers that doing so would not be in the best interest of the administration of military justice. To date, the JAG has never issued specific instructions or guidelines on a particular prosecution.

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

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

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

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

Mission and Vision

Mission

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

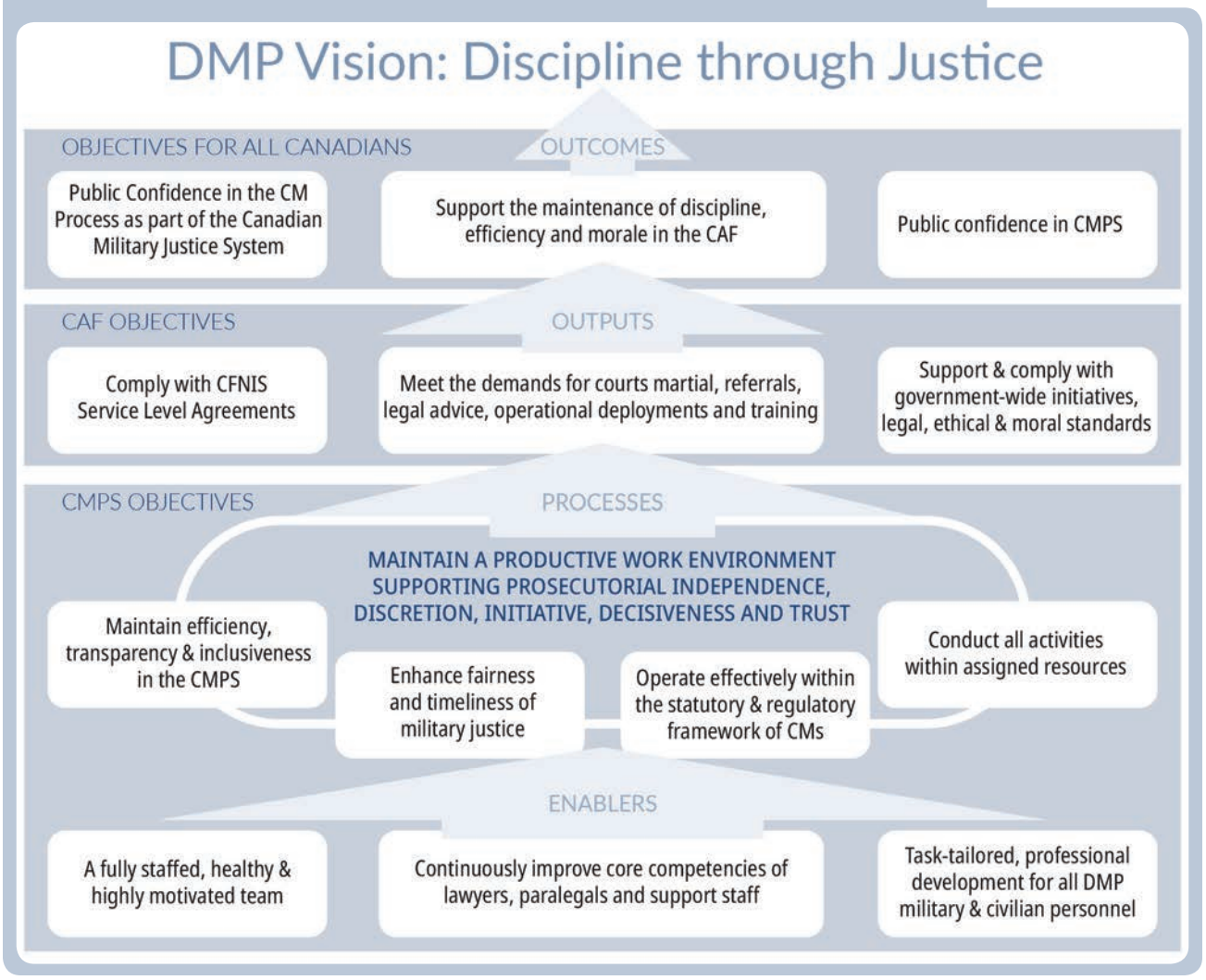
Vision

Ordo Per Justitia or *Discipline Through Justice*. The DMP is a key player in the Canadian military justice system helping to promote respect for the law, as well as discipline, good order, high morale, *esprit de corps*, group cohesion and operational efficiency and capability.

Canadian Military Prosecution Service

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

Figure 1-1: DMP Vision: Discipline Through Justice



CMPS Headquarters

Along with the DMP, at the CMPS Headquarters, there is the Assistant Director of Military Prosecutions (ADMP); two Deputy Directors of Military Prosecutions (DDMPs); Appellate Counsel; Policy Counsel and the Legal Advisor to the CFNIS.

ADMP

The ADMP is responsible to assist the DMP in the day-to-day management of the CMPS. In addition, the ADMP supervises the appellate counsel, the prosecutor responsible for policy, training and communications and the legal advisor to the CFNIS.

DDMPs

The DDMPs are responsible to supervise and mentor the RMPs. One DDMP supervises those RMPs located in the Atlantic, Eastern and Pacific regions and the second DDMP supervises those RMPs in the Central and Western regions.[1]

Appellate Counsel

The Appellate counsel is responsible to appear as counsel on behalf of the Minister of National Defence for all cases argued at the CMAC and the SCC.[2]

Prosecutor responsible for policy, training and communications

The prosecutor responsible for policy, training and communications provides advice to the DMP on all policy related matters and to update the DMP Policy Directives, as necessary. The policy counsel is also responsible to assist in the coordination of all training opportunities for members of the CMPS.

CFNIS Legal Advisor

The CFNIS Legal Advisor is a military prosecutor embedded with the CFNIS who provides legal advice to the CFNIS Headquaters. The CFNIS Legal Advisor also provides advice to investigators throughout all stages of an investigation as well as provides the CFNIS with updates on criminal law developments.

Regional Military Prosecution Offices

The RMP offices are located in Halifax, Valcartier, Ottawa, Edmonton and Esquimalt. With the exception of Esquimalt, which only has one RMP and one civilian administrative support staff, each RMP Office has two RMP positions and one civilian administrative support staff. All RMPs also represent the CAF at custody review hearings on behalf of the DMP and provide legal advice and training to the CFNIS.

Reserve Force Prosecutors

The CMPS also relies on five experienced civilian prosecutors who are members of the Reserve Force and prosecute cases with the CMPS. These five members consist of DDMP Reserve, a Lieutenant Colonel who is

1 The DDMP for the Central and Western regions also supervises those prosecutions which occur outside of Canada.
2 Depending on the caseload for appeal files it is common for other officers within the CMPS to also appear as counsel or co-counsel at the CMAC or the SCC.

responsible for the overall supervision and management of Reserve Force prosecutors, as well as four prosecutors who assist their Regular Force counterparts in the prosecution of cases at courts martial.

Sexual Misconduct Action Response Team

The position of the DDMP for the Sexual Misconduct Response Team (SMART) was created in the last reporting period and is primarily responsible for mentoring prosecutors in the performance of their duties related to serious sexual misconduct prosecutions.

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

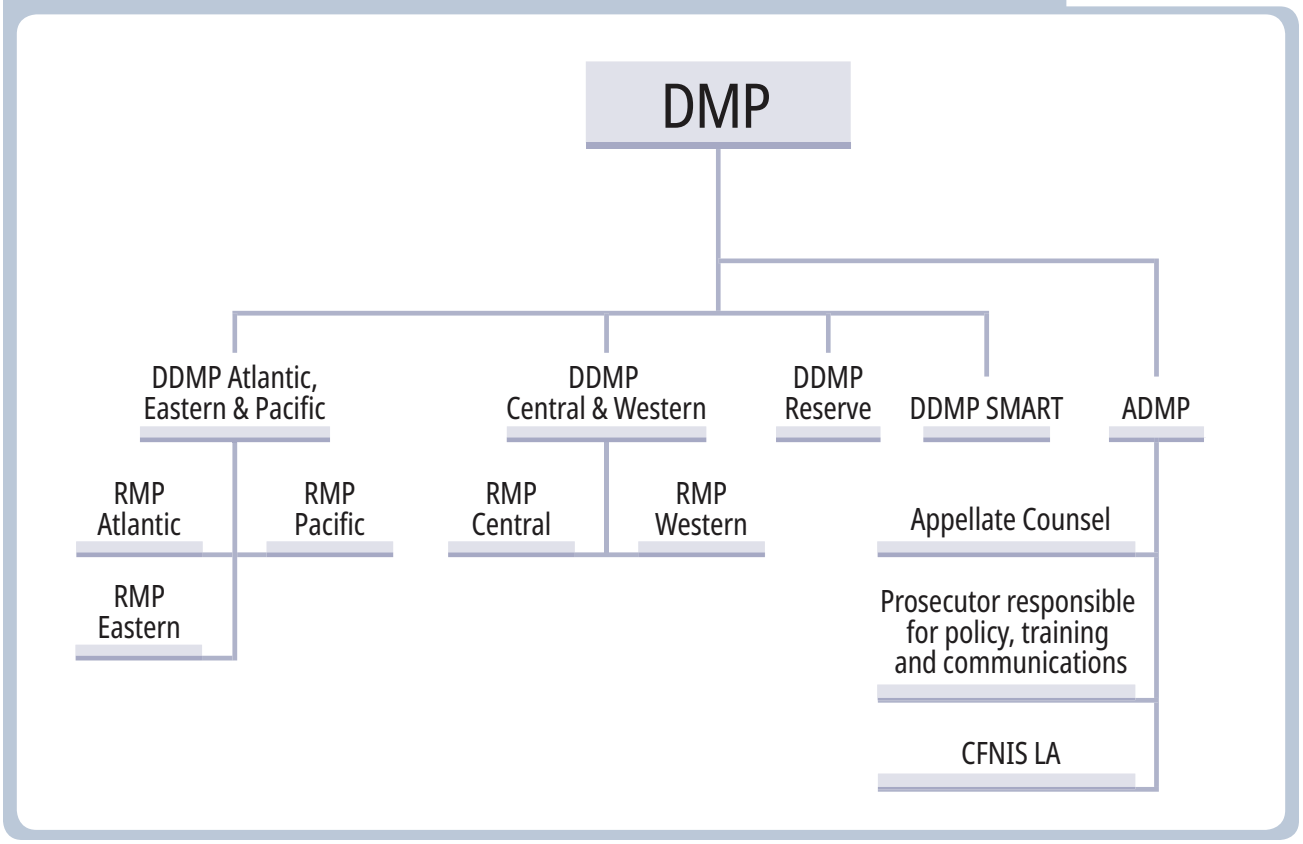
CMPS Personnel

Regular Force

On October 20, 2018, the DMP was re-appointed by the Minister to a second four year term as the DMP. Also during the reporting period there were a number of postings and changing of positions within the CMPS. The ADMP was posted out of CMPS after nearly ten years of military prosecution experience and was replaced by the DDMP for the Atlantic, Eastern and Pacific Regions. Filling the spot of the DDMP was the Appellate Counsel who was promoted to the rank of Lieutenant Colonel during the reporting period. Additionally, the senior RMP from the Halifax office was relocated to Ottawa and assumed the duties of Appellate Counsel.

There were also a number of internal postings within CMPS as prosecutors already with the CMPS were posted into RMP positions in

Figure 1-2: Organizational Chart for the Director of Military Prosecutions



the Halifax, Ottawa and Esquimalt regional offices. Also, the senior RMP from the Ottawa office was posted as the CFNIS legal advisor. There were four new prosecutors posted to the CMPS occupying positions in the Atlantic, Eastern and Western regions as well as the Prosecutor responsible for policy, training and communications located at CMPS Headquarters. Finally, two RMPs, one in the Pacific Region and one in the Atlantic Region, were on maternity leave during this reporting period.

Reserve Force

During this reporting period an offer of employment was made to an experienced civilian Crown counsel in Nova Scotia. That individual continues to progress through the enrollment process and is expected to join the CMPS as a Reserve Force prosecutor early in the next reporting period.

Civilian personnel

During the reporting period, the CMPS paralegal left the organization to pursue other opportunities within the federal public service. This position was filled on a short term basis with another civilian member from the Office of the JAG filling it for a four month period in an acting capacity. It is expected that the position will be filled on a permanent basis in the next reporting period.

In addition, the position of legal assistant in the Central Region was vacant at the beginning of the reporting period. It was filled, on an interim basis, between June and October 2018 and was permanently filled in December 2018.

Training and Continuing Legal Education

The need to continue to develop legal skills and keep abreast of key developments in the law is important for any lawyer but is critical for all prosecutors, including military prosecutors. The state of criminal law remains in constant evolution as a result of court rulings as well as through changes to the *Criminal Code of Canada* as well as the NDA.

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

Canadian Military Prosecution Service Continuing Legal Education Workshop

The CMPS held its annual Continuing Legal Education workshop on 11 and 12 February 2019 for its Regular Force and Reserve Force military prosecutors. The training touched upon several topics, including media training and an interactive demonstration dealing with a mock sexual assault scenario.

As prosecutors may be exposed to frequent interactions with journalists, prosecutors received a half-day of training from public affairs where practice interviews were held enabling prosecutors to enhance their skills in order to better interact with the media. This is consistent with the requirement that the military justice system be transparent and accessible to the public.

The mock sexual assault interactive demonstration was focused on those prosecutors with the least number of years of experience. The exercise allowed these junior prosecutors to develop their skills through scenario-based training through various stages of the court martial process including the analysis of whether there is a reasonable prospect of conviction, victim preparation, direct examination, cross examination and making submissions in court.

Finally, the CMPS also held a civilian training workshop on 12 February 2019 which focused on topics such as file management, finance and training on the functionality of the new case management system.

Resilience Training and Mental Health

In line with Canada's new Defence Policy, "Strong, Secure, Engaged" and the promotion of psychosocial well-being in the workplace, in 2016 the CMPS, in partnership with the CAF Health Service Group, explored different strategies to improve the mental resiliency of individual prosecutors. Based on the Road to Mental Readiness program, the training was tailored specifically for military prosecutors and focused on:

- understanding and recognizing the impact stress has on your physiology and cognitive processes;
- applying stress management strategies in order to optimize well-being and performance in a high-stress occupational environment;
- identifying changes in health and performance as well as signs of under-recovery and mental illness; and,
- knowing what mental health resources are available and how to access them.

During the reporting period, a full day of training was provided to those prosecutors who did not receive the training offered last year.

Partnership with the Attorney General for the Province of Ontario and the Public Prosecution Service of Canada

During the last reporting year, CMPS entered into a partnership with the Attorney General for the Province of Ontario and the Public Prosecution Service of Canada for the temporary employment of a CAF legal officer as a Crown prosecutor with these provincial and federal prosecution services.

During the reporting year, two military prosecutors from the Central region worked with the Ottawa Crown Attorney's Office. As such, these prosecutors acted as second chair during several Ontario Court of Justice trials and one Superior Court of Justice jury trial for cases such as aggravated assault, sexual assault and breach of conditions. These exchanges are invaluable in fostering relationships with other Canadian prosecution services, developing well-rounded advocates, and providing an opportunity to capture lessons learned that help further advance our practices and policies. Our prosecutors also received positive feedback from victims for the manner in which they treated the victims throughout the court process.

External organizations

During the reporting period, military prosecutors participated in continuing legal education programs organized by the Federation of Law Societies of Canada, the Public Prosecution Service of Canada, the Ontario Crown Attorneys' Association, *le Barreau du Québec*, Osgoode Professional Development, the Canadian Institute, the Advocates' Society and the Nova Scotia Public Prosecution Service. These programs benefited the CAF not only through the knowledge imparted and skills developed but also through the professional bonds developed by individual military prosecutors with their colleagues from the provincial and federal prosecution services.

For a complete breakdown of training opportunities provided by external organizations, please refer to Table 1-3.

Table 1-3: External Training Opportunities

HOST ORGANIZATION	NAME OF COURSE	NUMBER OF ATTENDEES
Federation of Law Societies of Canada	2018 National Criminal Law Program	6
Public Prosecution Service of Canada	PPSC School for Prosecutions - Prosecution Fundamentals (Level 1)	2
Ontario Crown Attorneys' Association	Nuts and Bolts	3
Ontario Crown Attorneys' Association	Experts	2
Ontario Crown Attorneys' Association	Sexual Violence	1
Ontario Crown Attorneys' Association	Trial Advocacy	2
Ontario Crown Attorneys' Association	Search and Seizure	1
Barreau du Québec	Techniques de plaidoirie	1
Osgoode Professional Development	Written Advocacy	1
The Canadian Institute	9th Annual Law of Policing Conference	1
Osgoode Professional Development	National Symposium on Sexual Assault Cases	3
The Advocates' Society	Leading Your Case	1
Nova Scotia Public Prosecution Service	Crown Conference	1

Training provided by CMPS

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

Also, legal officers serving outside the CMPS may, with the approval of their supervisor and the DMP, participate in courts martial as "second chair" prosecutors. The objective of this program is "to contribute to the professional development of unit legal advisors as well as to improve the quality of prosecutions through greater local situational awareness".[3]

Temporary Duty

The portability of the court martial system means that courts martial can occur anywhere in Canada or overseas. Unlike their civilian counterparts, military prosecutors are often called upon to travel away from their home for significant periods of time to conduct courts martial or appeals as well for various training opportunities. Travel away from home – referred to as temporary duty – has a significant impact on the well-being of CMPS personnel and their families. This year, members of the CMPS were on temporary duty for a total of 704 days. Table 1-4 shows the breakdown of temporary duty for all CMPS personnel for this reporting period.

Table 1-4: CMPS Temporary Duty

REGION	COURT MARTIAL RELATED TD	APPEAL RELATED TD	TRAINING RELATED TD	OTHER TD	TOTAL TD
CMPS HQ	47	18	87	49	201
Atlantic	78	0	28	0	106
Eastern	33	0	42	0	75
Central	72	0	30	0	102
Western	107	0	44	0	151
Pacific	38	0	18	13	69
TOTAL	**375**	**18**	**249**	**62**	**704**

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

CHAPTER TWO

The Military Justice System and the Court Martial System

Introduction

The nature of the operational missions entrusted to the CAF requires the maintenance of a high degree of discipline among CAF members. Parliament and the SCC have long recognized the importance of a separate military justice system to govern the conduct of individual soldiers, sailors and air force personnel, and to prescribe punishment for disciplinary breaches. In 1980 and 1992 the SCC in *MacKay v the Queen*[4] and *R v Généreux,*[5] unequivocally upheld the need for military tribunals to exercise their jurisdiction in order to contribute to the maintenance of discipline, and associated military values, as a matter of vital importance to the integrity of the CAF as a national institution.

These principles were unanimously reaffirmed by the SCC in 2015 in *Second Lieutenant Moriarity et al v R*[6]: "I conclude that Parliament's objective in creating the military justice system was to provide processes that would assure the maintenance of discipline, efficiency and

4 [1980] 2 S.C.R. 370 at paras 48 and 49.
5 [1992] 1 S.C.R. 259 at para 50.
6 [2015] 3 S.C.R. 485.

morale of the military."[7] In *Moriarity*, the SCC also reinforced that "... the behavior of members of the military relates to discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base."[8]

These views were directly in line with earlier comments by Chief Justice Lamer in *Généreux* that the *Code of Service Discipline* "does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare" and "recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. In other words, criminal or fraudulent conduct, even when committed in circumstances that are not directly related to military duties, may have an impact on the standard of discipline, efficiency and morale in the CAF. There is thus a need for separate tribunals to enforce special disciplinary standards in the military."[9]

Following *Moriarity*, the SCC delivered another unanimous decision related to the military justice system. In 2016, the SCC confirmed in the case of *R v Cawthorne* [10] that the authority conferred to the Minister of National Defence over appeals was in compliance with the *Canadian Charter of Rights and Freedoms.* This decision not only confirmed the organizational structure of the CMPS but also was important for all prosecution services across Canada as the court touched upon the concept of prosecutorial independence and abuse of process.[11] This clearly shows that the military justice system is a respected parallel justice system within the broader Canadian legal mosaic.

7 *Ibid* at para 46.
8 *Supra* note 6 at para 54.
9 *Supra* note 5 at 281 and 293.
10 2016 SCC 32.
11 The Attorney General of Canada, the Attorney General of Ontario, the Attorney General of Quebec, the Attorney General of British Columbia and the *Directeur des poursuites criminelles et pénales* of the province of Québec all intervened in this appeal to the SCC.

Courts Martial

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

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

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

Statutorily, courts martial have the same rights, powers and privileges as superior courts of criminal jurisdiction with respect to all "matters necessary or proper for the due exercise of its jurisdiction," including the attendance, swearing and examination of witnesses, the production and inspection of documents, and the enforcement of their orders.[12]

There are two types of courts martial provided for under the NDA: General Courts Martial and Standing Courts Martial. A General Court

12 *National Defence Act*, section 179.

Martial is comprised of a military judge and a panel of five CAF members. The panel is selected randomly by the Court Martial Administrator and is governed by rules that reinforce its military character. At a General Court Martial, the panel serves as the trier of fact while the military judge makes all legal rulings and imposes the sentence. Panels must reach unanimous decisions on any finding of guilt.

A Standing Court Martial is conducted by a military judge sitting alone who is responsible for the finding on the charges and imposing a sentence if the accused is found guilty.

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

What sets the military justice system apart are some of the public interest factors that must be taken into account. These include:

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

Information relating to these and other public interest factors comes, in part, from the accused's commanding officer when he or she sends the matter to his or her next superior officer in matters of discipline. That superior officer also comments on public interest factors when referring the matter to the DMP.

An accused person tried by court martial is entitled to legal representation by or under the supervision of the Director of Defence Counsel Services. This legal representation is provided to an accused person at no cost to the accused. An accused person may also choose to retain a lawyer at his or her own expense.

In most cases, the accused person has the right to choose between trial by General or Standing Court Martial. However, for the most serious offences a General Court Martial will generally be convened while a Standing Court Martial will be convened for less serious offences.[13]

Both an offender convicted by court martial and the Minister of National Defence have a right to appeal court martial decisions to the

13 Please refer to sections 165.191 and 165.192 of the *National Defence Act*.

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

CMAC decisions may be appealed to the SCC on any question of law on which a judge of the CMAC dissents, or on any question of law if leave to appeal is granted by the SCC.[14]

Table 2-1: Additional Facts about the Court Martial System

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

14 *National Defence Act*, section 245.

CHAPTER THREE

Military Justice Proceedings: Year in Review

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

Courts Martial

This section provides an overview and analysis of those cases heard at court martial during the reporting period. For a complete breakdown of all court martial data for the reporting period please refer to Annex A.

Number of Courts Martial

This past reporting period there were a total of 51 courts martial.[15] Of those, 45 were Standing Courts Martial and six were General Courts Martial. Although this is slightly below the average number of courts martial over the past five years (57), this is not unexpected in that there were only three of four sitting military judges over the course of the reporting period. In addition, 40 cases were affected by the CMAC decision in *R v Beaudry*[16] meaning those cases were prevented from being heard through the military justice system. A complete picture of the number of courts martial broken down by type of court martial since 2014/15 can be found at Figure 3-1.

15 In addition, there were three courts martial which were commenced during the reporting period but were not completed by the end of the reporting period. Two of these cases (*R v McGregor* and *R v August*) were adjourned as a result of the CMAC decision in *Beaudry* and a third case (*R v Banting*) was commenced just prior to the end of the reporting period.

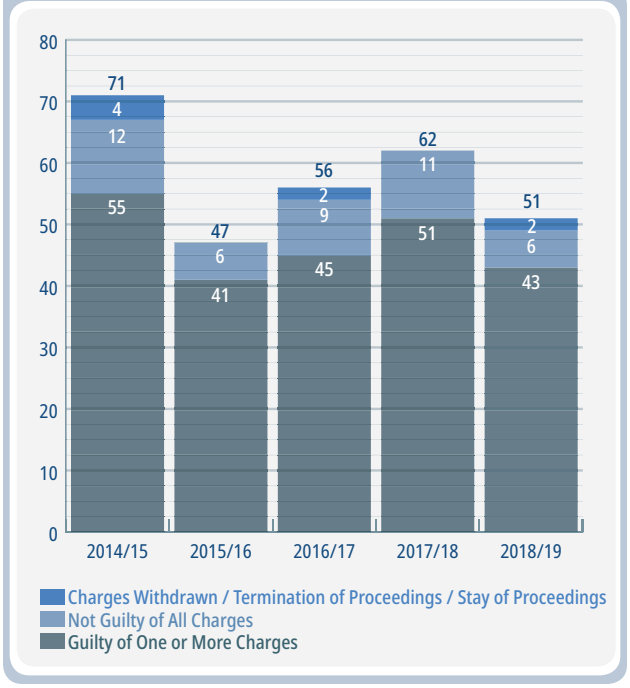
16 2018 CMAC 4.

Figure 3-1: Number of Courts Martial by Type

Court Martial Results

Of those 51 courts martial, accused persons were found guilty of one or more charges in 43 cases, found not guilty of all charges in six cases, had all charges withdrawn in one case and had a termination of proceedings in one case. Figure 3-2 shows a breakdown of all court martial results since 2014/15.

Figure 3-2: Courts Martial Results



Punishments at Court Martial

While only one sentence may be imposed at a court martial, more than one punishment may be given as a part of that sentence. In this reporting period a total of 43 sentences were handed down by courts martial involving a total of 57 punishments. The most common punishment awarded at courts martial was a fine with a total of 35 fines awarded, representing 61 percent of all punishments and awarded in 81 percent of all sentences. The next most common punishment awarded was a severe reprimand which was awarded in 10 cases and accounted for over 17 percent of all punishments.

A total of four custodial punishments were awarded representing nearly nine percent of all punishments. Of those custodial punishments, there was one punishment of detention handed down at court martial which was suspended by the military judge. A complete breakdown of all punishments imposed at courts martial from 2014/15 can be found in Table 3-3.

Table 3-3: Punishments at Court Martial

PUNISHMENT	2014/15	2015/16	2016/17	2017/18	2018/19
Dismissal	1	2	1	3	2
Imprisonment	6	3	4	7	3
Detention	4	4	4*	4**	1***
Reduction in Rank	1	3	9	9	2
Severe Reprimand	18	10	6	11	10
Reprimand	13	13	17	20	4
Fine	39	32	39	38	35
Minor Punishments	0	0	0	3	0
TOTAL	**82**	**67**	**80**	**95**	**57**

* One of these punishments was suspended by the Military Judge.
** Three of these punishments were suspended by the Military Judge.
*** This punishment was suspended by the Military Judge.

Court Martial Timelines

During this reporting period the average number of days from the time a file was referred to the DMP until a decision had been taken by a prosecutor was approximately 88 days. This is a decrease of seven percent from the previous reporting period. Figure 3-4 illustrates the average number of days from referral to a post-charge decision for the past five reporting periods.

In this reporting period, the average number of days from the preferral of charges until the commencement of the court martial was 244 days. This is an increase of 33 days in comparison to the previous reporting period and is 16 days above the five year average. Figure 3-5 shows the average number of days from the preferral of charges until the commencement of the court martial since 2014/15.

Figure 3-4: Average Number of Days from Referral to Post-Charge Decision

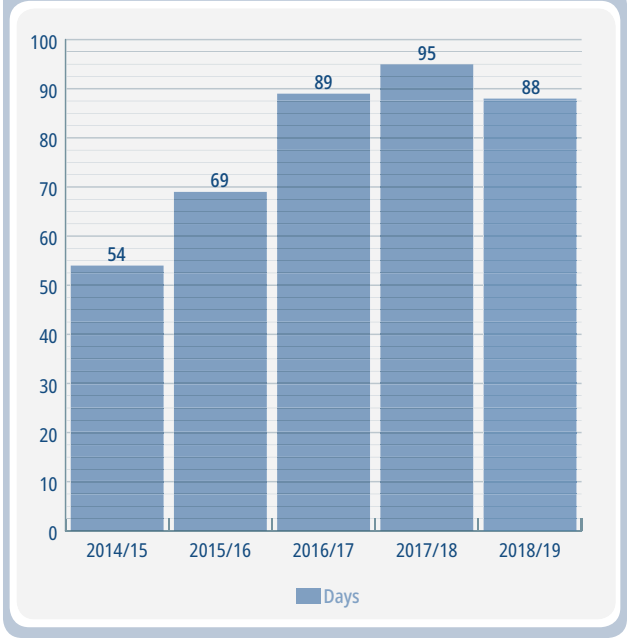


Figure 3-5: Average Number of Days from Preferral to Commencement of Court Martial

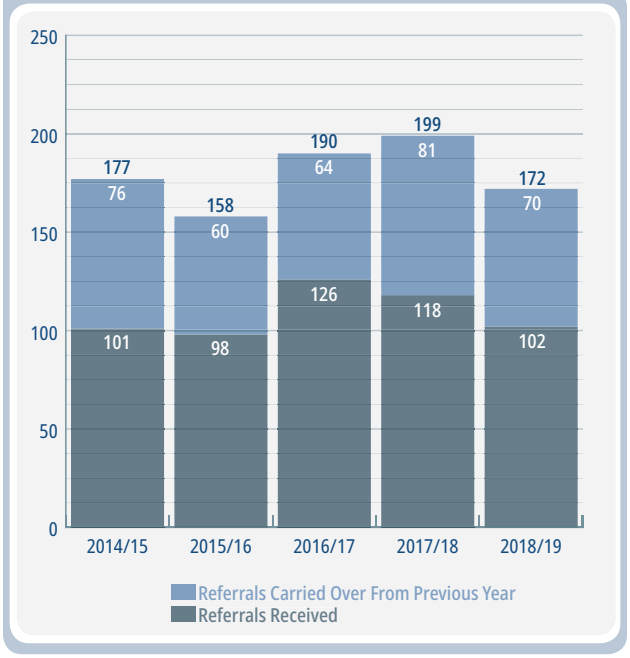
Case Management

Number of Referrals

During this reporting period there were 102 referrals received by the DMP. This is consistent with the average number of referrals received over the past five years which is approximately 109. When combined with the 70 referrals carried over from the previous reporting period, there were a total of 172 referrals processed during this reporting period. The 172 referrals processed during the current reporting period is the second lowest number of referrals processed over the past five years but is relatively consistent with the five year average of 179 referrals per year.

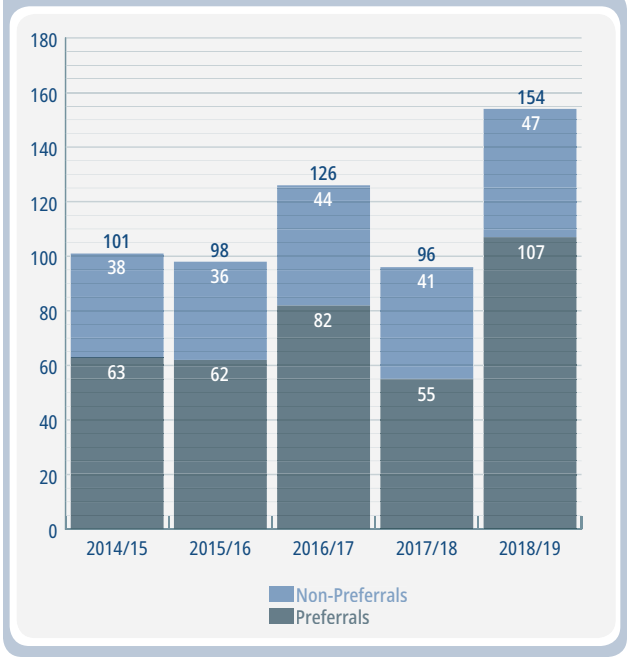
Of those 172 referrals processed, 154 cases were completed in that a decision on post-charge was taken by a prosecutor leaving 18 referrals carried over into the next reporting period. This number of files carried over is well below the average number of referrals carried over to the following year over the past five years which is approximately 58 files. Figure 3-6 shows the total number of referrals processed over the past five reporting periods.

Figure 3-6:
Total Number of Referrals Processed



This reporting period there were a total of 107 cases where charges were preferred and 47 cases where no charges were preferred giving an overall preferral rate of 69 percent. Although this is the highest preferral rate in the last five reporting periods it is only slightly higher than the average preferral rate of 63 percent over the past five reporting periods. However, as can be seen in Figure 3-8 the total number of prosecutorial decisions taken on post charge is significantly higher than it has been over the past five reporting periods. The reason for this is that although there were not as many referrals as there have been in previous years, there were far fewer files which are carried forward to the next reporting period meaning that the rate of files processed (90 percent) was much higher this reporting period. Figure 3-7 shows the total number of preferrals and non-preferrals for the five previous reporting periods.

Figure 3-7: Total Number of Preferrals and Non-Preferrals

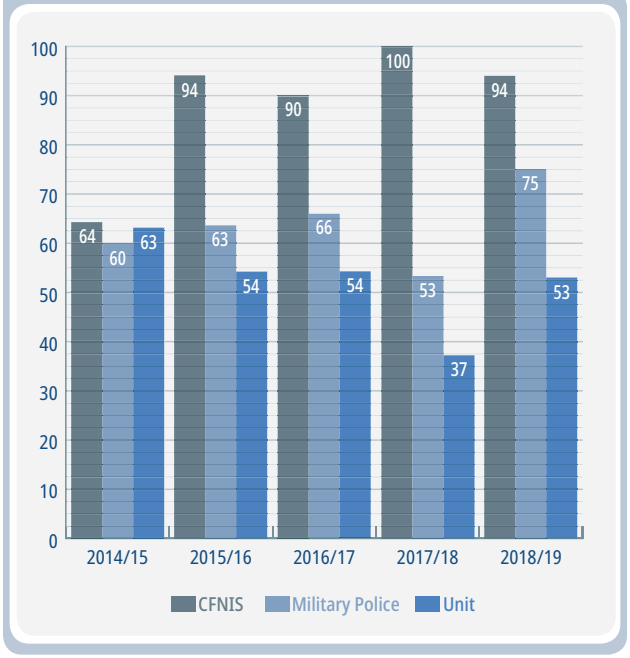


Preferral Rates by Investigative Agency

Although all files referred to the DMP are received through a referral authority, the incident giving rise to the charge may be investigated by one of three investigative agencies – the CFNIS, an investigator with the military police who is not a member of the CFNIS and a unit investigator. The rate of preferrals varies greatly as between the investigative agency. For example, during this reporting period the preferral rate for those files investigated by the CFNIS was 94 percent[17], this is a much higher preferral rate when compared to that of the regular military police and unit investigators which were 75 percent and 53 percent, respectively.

This divergence of preferral rates has been consistent over the past several years with those investigations conducted by the CFNIS being preferred at a much higher rate than regular military police and unit investigators. For a complete overview of preferral rates by investigative agency over the past five years, please refer to Figure 3-8.

Figure 3-8: Preferral Rates by Investigative Agency



17 This figure does not include those cases which were investigated by the CFNIS but were non-preferred as a result of the CMAC decision in *Beaudry*.

The DMP has identified this as an issue and has taken a number of courses of action to improve the preferral rates of all investigative agencies. For example, this reporting period he amended a number of his policy directives to require his prosecutors to provide feedback to the investigator both when there is a decision not to prefer a charge and also at the conclusion of the court martial with the aim of improving the quality of future investigations.

Pre-Charge Advice

Number of Requests for Pre-Charge Legal Advice

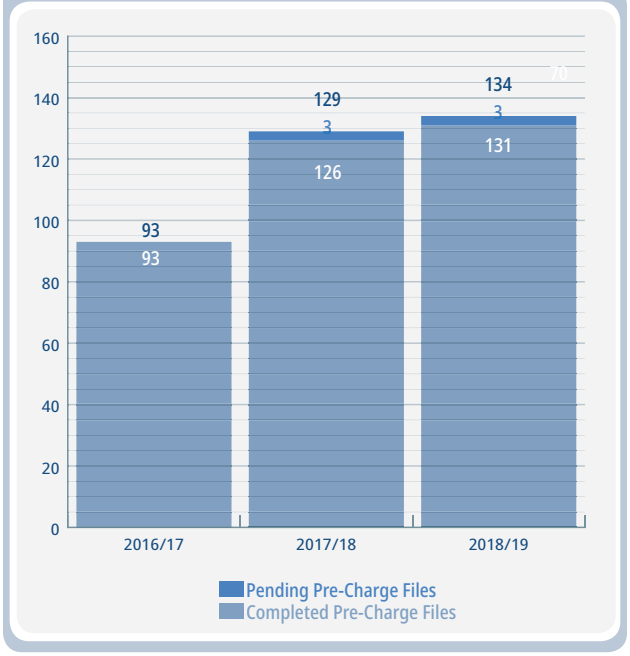
Prosecutors with the CMPS are responsible to provide pre-charge advice to both the CFNIS[18] and to unit legal advisors.[19] In this reporting period, there were a total of 118 cases sent to the CMPS for pre-charge legal advice. In addition, there were 16 pre-charge files carried over from the previous reporting period for a total of 134 pre-charge files processed during the reporting period. Of the 134 requests for pre-charge legal advice, three files were pending at the end of the reporting period.

The number of pre-charge files sent for review by a military prosecutor remained relatively consistent this reporting period when compared to the previous reporting period where there were 129 requests for pre-charge advice. Figure 3-9 shows the total number of pre-charge files processed for each of the previous three reporting periods.

18 DMP Policy Directive 002/00: Pre-Charge Screening - https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/pre-charge-screening.html.

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

Figure 3-9: Total Number of Pre-Charge Files Processed



Origin of Requests for Pre-Charge Legal Advice

As in previous reporting periods, the majority of requests for pre-charge legal advice come from the CFNIS. During this reporting period there were 91 requests for pre-charge legal advice from the CFNIS compared to only 43 requests from unit legal advisors. Figure 3-10 shows the number of requests for pre-charge legal advice broken down by requestor.

Outcome of Requests for Pre-Charge Legal Advice

During the reporting period charges were recommended in 62 cases and no charges were recommended in 67 cases.[20] Therefore, charges were recommended in approximately 48 percent of all requests for pre-charge legal advice. Figure 3-11 provides an overview of the number of cases where charges were and were not recommended for the past three reporting periods.

Figure 3-10: Origin of Requests for Pre-Charge Legal Advice

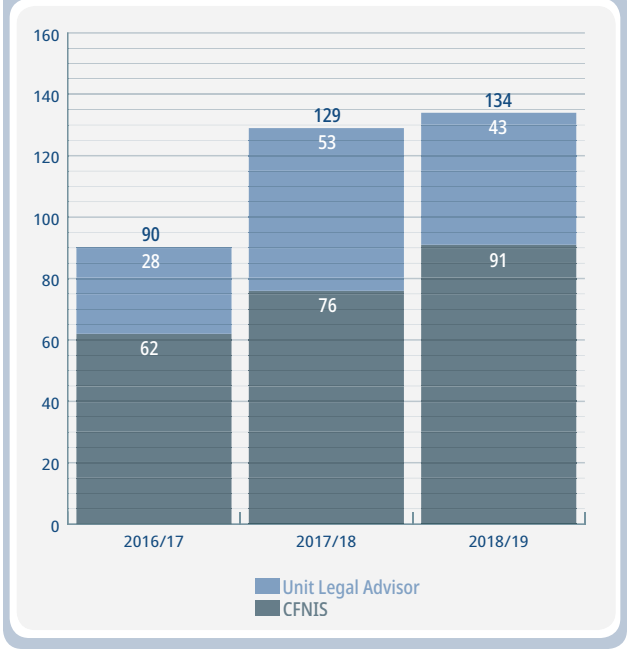
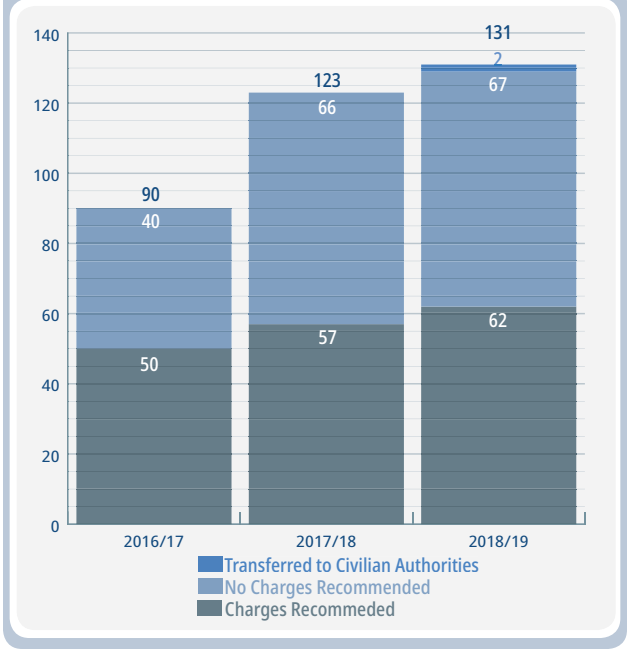


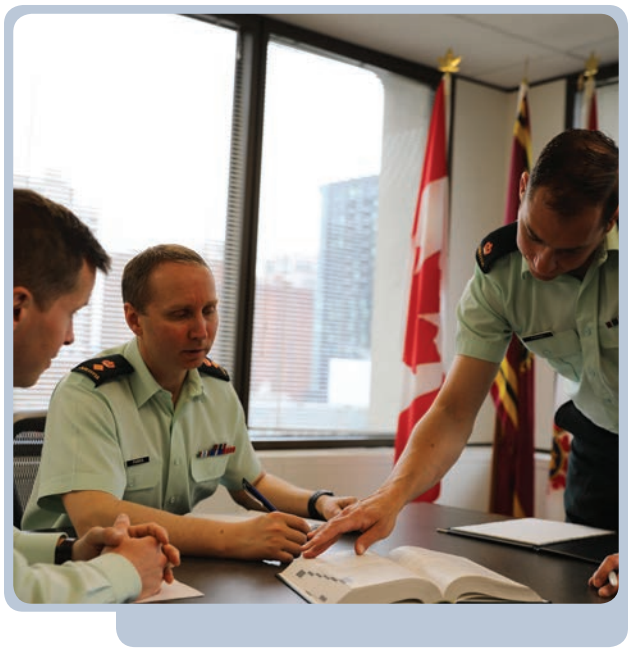
Figure 3-11: Outcome of Requests for Pre-Charge Legal Advice



20 In this reporting period there were two cases where there was a request for pre-charge legal advice and those files were transferred to civilian authorities as a result of the decision in *Beaudry*. Therefore, these files did not count as neither charges recommended nor charges not recommended.

Timelines

DMP Policy Directive 002/00 (Pre-Charge Screening) requires that prosecutors, when requested to provide pre-charge legal advice, must do so within within 14 days of receiving the file when all of the proposed charges, including electable offences, can be tried by summary trial and within 30 days in those instances where any charge would result in an automatic court martial for the accused. During this reporting period, the average number of days it took for prosecutors to provide pre-charge legal advice once the file was received was approximately 48 days.



Offence Categories

All files prosecuted by the DMP are categorized into one of four broad offence categories: sexual misconduct, drugs, conduct offences and fraud and other property related offences. The following sections provide an overview of the number of courts martial for each offence, the outcomes for each type of offence category as well as a summary of some notable cases during the reporting period.

Sexual Misconduct

Of the 51 courts martial during the reporting period, there were 20 cases that dealt with sexual misconduct. Of those 20 cases, the accused was found guilty of at least one charge in 14 cases.

R v Reyes, 2018 CM 4015

Master Warrant Officer Reyes, a reservist, pleaded guilty to a charge of disgraceful conduct for having surreptitiously made visual recordings of a female in a washroom at the Denison Armoury in Toronto. He was sentenced to imprisonment for a period of five months and a reduction in rank to the rank of Sergeant.

In considering the prosecution and defence counsel's joint submission pertaining to sentencing, the military judge emphasized the significant breach of trust given Master Warrant Officer Reyes' senior rank and the intrusive nature of the offence. In light of those facts, the legal precedents and the sentencing principles, the judge found the proposed sentence was reasonable.

R v Paul, 2018 CM 4013

Master Corporal Paul pleaded guilty to disgraceful conduct of a sexual nature. During the course of a holiday function at the junior ranks' mess, the accused touched the breast of the wife of a subordinate.

Counsel made a joint submission recommending a sentence of reduction in rank to Private. During sentencing, the military judge considered aggravating factors, notably that Master Corporal Paul had been formally briefed on Operation HONOUR only a few hours prior to the incident, the incident was highly intrusive, constituted a breach of trust of military families and demonstrated a failure in leadership. The judge also considered mitigating factors, such as Master Corporal Paul's voluntary release from the

CAF following the incident and ongoing rehabilitative efforts. In the balance, the judge found that a while a reduction in rank for a member who is releasing from the CAF is largely symbolic, it meets the objectives of deterrence and denunciation under 203.1(1) of the NDA without jeopardizing the accused's rehabilitative efforts.

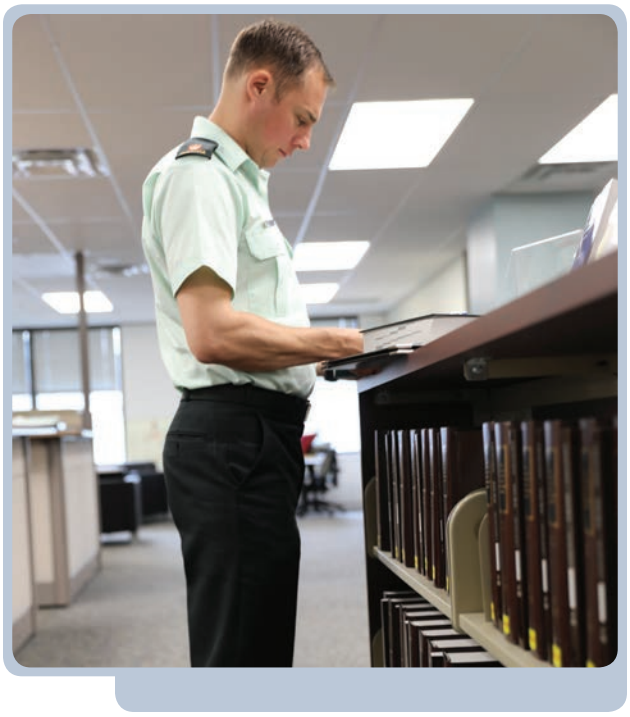
Conduct Offences

Of the 51 courts martial during the reporting period, there were 21 cases that dealt with conduct offences. Of those 21 cases, the accused was found guilty of at least one charge in 20 cases.

R v McEwan, 2018 CM 4012 & 2018 CM 4019

Corporal (retired) McEwan pleaded guilty to failing to appear before a service tribunal under s.118.1 of the NDA.

While undergoing voluntary release procedures, Corporal McEwan was charged by his unit with absence without leave. Corporal McEwan failed to appear at his summary trial on two occasions. He was then charged with failing to appear at his service tribunal and the case was referred to the DMP. Again, Corporal McEwan failed to appear at his Court Martial, which led to the military judge issuing a judicial warrant for his arrest.



Subsequent to his arrest, Corporal McEwan was tried by Court Martial despite his prior release from the Regular Force, because he committed the offence while he was still a member of the Regular Force and subject to the *Code of Service Discipline.* The military judge stated that, despite no longer being in the military, "administering justice in relation to Mr. McEwan does have an impact on those serving today." The judge added, "the NDA provides an obligation on members of the CAF to serve and perform duty until lawfully released. Refraining from enforcing this obligation on a person simply because he or she is on the way out of the CAF would send a message of impunity which may undermine good order and discipline of those serving within the CAF."

At the sentencing hearing, Corporal McEwan admitted having committed service offences similar in character to the offence charged at his court martial, but for which he was not formally charged. Under s. 194 of the NDA, the military judge agreed to take these alleged offences into consideration for the purposes of the sentence as if Corporal McEwan had been charged with, tried for and found guilty. The judge sentenced the accused to imprisonment for a period of five days.

R v Worthman, 2018 CM 2024

Corporal Worthman pleaded guilty to assault under s.130 of the NDA (s. 266 of the *Criminal Code*) and drunkenness under s. 97 of the NDA. She was given a suspended sentence of detention for a period of ten days.

Military Police (MP) found Corporal Worthman severely intoxicated and causing a disturbance. She refused to be escorted to her home, and subsequently resisted being brought to the MP detachment, striking and injuring a MP officer during the ensuing struggle.

In a joint submission, both counsel recommended ten days detention, but given the indirect consequences of the sentence, proposed that the sentence be suspended. The military judge found no basis that "the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest." The judge agreed to a suspended sentence to promote the accused's ongoing rehabilitative efforts.

R v Haire, 2018 CM 2015

Lieutenant-Colonel Haire, commanding officer of 1 Royal Canadian Horse Artillery pleaded guilty to neglect to the prejudice of good order and discipline under s.129 of the NDA for failing to ensure that the chamber was empty when performing the unload drill on the C7A2 rifle, resulting in the discharge of one blank round.

During the plea, the Court explained that the standard of care that Lieutenant-Colonel Haire's conduct is measured against is that of an infantry officer. He did not have to meet an elevated standard because he was the commanding officer of a unit.

Based on multiple mitigating factors, notably Lieutenant-Colonel Haire's acceptance of guilt at the earliest opportunity and exceptional leadership in dealing with the incident, the military judge accepted a joint submission to impose a $500 fine.

Drugs

Of the 51 courts martial during the reporting period, there were five cases that dealt with drugs. Of those five cases, the accused was found guilty of at least one charge in four cases.

R v Stow, 2018 CM 3014

Leading Seaman Stow pleaded guilty to trafficking under s. 5(1) of the *Controlled Drugs and Substances Act*, which constitutes an offence under s. 130 of the NDA.

The evidence before the Court demonstrated that Leading Seaman Stow trafficked in cocaine in the Halifax area, both on and off the Base, to both civilians and military members. Along with another member, Leading Seaman Stow trafficked approximately $10,000 in cocaine.

The military judge emphasized that "involvement with drugs in the military environment must be treated as a very serious matter." The judge relied upon a joint submission by counsel and sentenced the accused to ten months imprisonment in a civilian facility.

Fraud and other Property Offences

Of the 51 courts martial during the reporting period, there were five cases that dealt with fraud and other related property offences. Of those five cases, the accused was found guilty of at least one charge in all five cases.

R v MacDonald, 2018 CM 3011

Private MacDonald pleaded guilty to stealing under s. 114 of the NDA and wilfully damaging public property.

The accused forced his entry into locked sheds, causing significant damage. He then stole a snow blower (CAF property valued at $900). Upon learning that the MP had commenced an investigation, Private MacDonald disposed of the snow blower, which was never recovered.

In imposing the sentence, the military judge considered aggravating factors of breach of trust, premeditation, non-recovered stolen property and post-offence conduct. These factors were mitigated by the guilty plea, the absence of previous convictions and the fact that the accused had since released from the CAF. On the balance, the judge sentenced Private MacDonald to a severe reprimand and a $2000 fine.

Appeals

This section provides an overview of those cases which were appealed to the CMAC as well as to the SCC. For a quick overview of the disposition of those cases appealed to the CMAC, please refer to Annex B and for those cases appealed to the SCC, please refer to Annex C.

Court Martial Appeal Court

Decisions Rendered

R v Edmunds, 2018 CMAC 2

Master Corporal Edmunds ran a fraudulent scheme whereby he contracted on behalf of the CAF with himself as a sole proprietor. After pleading guilty to one count of fraud over $5000 involving two fraudulent transactions, he was charged with several additional counts of fraud which resulted in a second trial. He was sentenced to 30 days imprisonment at his first trial. At his second trial, Master Corporal Edmunds argued that the conduct of the investigators and prosecution was abusive, mainly alleging that the prosecution had improperly split its case. The issues on appeal arose from this second trial.

During a pre-trial disclosure and abuse of process application, the charge-layer testified that he did not know any information about the charges. He had been presented with a draft Record of Disciplinary Proceedings and had simply signed it. The military judge found that the charge-layer did not have an actual and reasonable belief that an offence had been committed, incorporating this finding into his decision on the abuse of process application.

In his decision on the abuse of process, the military judge found that the prosecution had not acted in bad faith or maliciously, but concluded that subjecting Master Corporal Edmunds to two trials was an abuse of process. The military judge concluded that the prejudice arising from this abuse was the possibility that Master Corporal Edmunds would be subjected to two separate periods of incarceration. He concluded that this prejudice could be remedied through mitigation of sentence.

Master Corporal Edmunds appealed the military judge's refusal to grant a stay of proceedings. After a review of the appeal record, the appellate counsel noted the error relating to the laying of the charges discussed above was fatal. It demonstrated that the charge-layer did not have the requisite reasonable belief to lay the charges. The court martial had therefore been without jurisdiction. This vitiated the proceedings and required the CMAC to quash the conviction. The CMAC agreed, declaring the court martial a nullity and overturning the conviction. The CMAC reiterated that the requirement that the charge-layer possess reasonable grounds to believe the accused has committed the offence charged constitutes a safeguard against the irresponsible laying of charges. A charge laid without such a belief is fatal and results in a loss of jurisdiction. Where this loss of jurisdiction arises, the subsequent referral of charges by the DMP does not cure the defect.

R v Cadieux, 2018 CMAC 3

At the end of EX Tropical Dagger in Jamaica, following festivities held on the evening of 27-28 November 2015 where the consumption of alcohol was authorized, Corporal Cadieux entered the female-only tent to find the complainant in order to invite her back to a party. He knelt beside the complainant's cot, where she was sleeping, and called her name quietly to awaken her. According to him, she then grabbed his head, pulled him toward her and began kissing him passionately. He reciprocated her kiss and touched the complainant's pelvic area. Corporal Cadieux testified the touch to the pelvic area was either accidental or to balance himself as he leaned over the complainant in his attempt to awaken her. The military judge accepted this explanation. As a result, the sexual nature of the touching, for the purposes of the CMAC analysis, is limited to the kissing. During the kissing, the complainant mumbled the name "Steve", to which Corporal Cadieux replied, "It's not Steve, its Simon". The complainant then pushed him off, telling him to "stop" or "stop it".

The following morning, Corporal Cadieux, still under the influence of alcohol, behaved in a disorderly manner in a number of ways. This included: (1) entering the all-female tent and refusing to leave when ordered by a superior, (2) sitting in the driver's seat of the Jamaican Defence Force-provided bus and honking the horn, (3) bringing alcohol on the bus without authorization and (4) attempting to operate a rental vehicle while not being in a condition to do so due to his previous alcohol consumption. Corporal Cadieux was charged with one count of sexual assault and one count of drunkenness.

At trial, the military judge concluded that Corporal Cadieux lacked the requisite *mens rea* to commit the offence of sexual assault. As a result, he decided it was unnecessary to consider the defence of honest but mistaken belief in consent raised by Corporal Cadieux. In relation to the charge of drunkenness, the military judge stated that it was unclear whether Corporal Cadieux's conduct on the morning of November 28th was due to the consumption of alcohol or because he was hungover. He further concluded that, although Corporal Cadieux demonstrated disturbing behaviour, there was no evidence the conduct was disorderly or that it harmed the reputation of Her Majesty's service. Corporal Cadieux was subsequently acquitted of sexual assault and drunkenness.

The DMP appealed the acquittal on the basis that the military judge erred (1) in his assessment of the *mens rea* and of the defence of honest but mistaken belief in consent, (2) in his assessment of witness credibility, and (3) in his interpretation of the offence of drunkenness under section 97 of the NDA. On 8 June 2017, the DMP filed a notice of appeal to the CMAC. The case was heard on 12 March 2018. In a unanimous decision rendered on 10 September 2018, the CMAC quashed the acquittals and ordered a new trial.

The Court found that the military judge erred in not applying the requisite legal test to analyze the defence of honest but mistaken belief in consent, since raising this defence "is essentially an assertion by an accused that he or she lacked the *mens rea* required to commit the alleged sexual assault". The Court reviewed the test in light of the facts and came to the conclusion that "the complainant had no reason to kiss Corporal Cadieux, he had no reason to believe she wanted to kiss him, and, importantly, immediately prior to the actual kissing, he had no reason to believe she wanted him to kiss her."

As to the charge of drunkenness, the Court found that being hungover is so inextricably linked to the state of being drunk that creating a distinction between the two states when analysing this offence is flawed.

R v Beaudry, CMAC 2018 4

Corporal Beaudry is alleged to have sexually assaulted a female soldier on a military base. He was convicted of one offence punishable under s. 130(1)(a) of the NDA, that being sexual assault causing bodily harm contrary to s. 272 of the *Criminal Code*. He was sentenced

to a term of imprisonment for 42 months and to dismissal from Her Majesty's service. He was also made subject to a number of ancillary orders. Corporal Beaudry appealed his conviction, alleging that s. 130(1)(a) of the NDA was unconstitutional.

On 19 September 2018, the CMAC delivered its judgment. In a split decision, the majority found that paragraph 130(1)(a) of the NDA violates the right to a jury trial pursuant to subsection 11(f) of the *Charter*. The majority allowed the appeal, set aside the guilty verdict, and declared that paragraph 130(1)(a) of the NDA, is of no force or effect in its application to any "civil offence" for which the maximum sentence is five years or more imprisonment. This decision was appealed to the SCC by the DMP on behalf of the Minister of National Defence. For further information on this case, please refer to Chapter Four.

Hearings

R v Bannister, CMAC-592

Captain Bannister was a Cadet Instructor Cadre (CIC) Officer and the Commanding Officer of the 148 Royal Canadian Army Cadet Corps in Charlottetown, PEI. He was acquitted of six charges (three counts of disgraceful conduct and three alternate counts of conduct to the prejudice of good order and discipline) at a Standing Court Martial on 27 February 2018. The DMP, on behalf of the Minister, appealed this case to the CMAC. Oral arguments were heard in Halifax on 21 November 2018.

The charges arose from a number of separate incidents involving comments made by Captain Bannister.[21] On two separate occasions, Captain Bannister made a number of inappropriate sexual comments to the victim, first while she was a cadet and then later when she was a subordinate officer with the CIC.

At the court martial, the military judge concluded that the behaviour of Captain Bannister was not disgraceful, as there was no evidence that his conduct presented a significant risk of harm to the victim in a way that undermined the respect for her dignity. He also concluded that there was no evidence that his behaviour tended to adversely affect good order and discipline. More specifically, he found that although the behaviour had an adverse impact on the victim, there was no evidence that the behaviour had an adverse impact on the unit or other unit members.

On behalf of the Minister, the DMP argued that (1) the military judge applied a test for disgraceful conduct that is too restrictive and does not properly reflect the purpose and objective of the offence, (2) that the military judge refused to apply his experience and general service knowledge to determine whether the conduct was prejudicial to good order and discipline and (3) that the military judge erred in concluding that there was no evidence that the conduct tended to adversely affect good order and discipline.

A decision on this case is expected to be issued by the CMAC during the next reporting period.

R v MacIntyre, CMAC-594

On 27 June 2018, Sergeant K.J. MacIntyre was found not guilty of one charge of sexual assault by a General Court Martial. The DMP, on behalf of the Minister, appealed the decision to the CMAC. The Court heard oral arguments on 27 March 2019.

The alleged sexual assault occurred on the first night of a deployment in Glasgow, Scotland, in 2015. The complainant and the accused were both part of a fleet logistics support team. Sergeant MacIntyre was the military police officer tasked with security liaisons in foreign ports. The complainant (navy sub-lieutenant at the time) was a logistics officer.

At trial, the complainant testified that after an overnight flight, a day of work and an evening drinking and dancing, she was helped to her

21 Although there were two victims in this case the issues on appeal only related to one of the two complainants covering four of the six charges.

hotel room by the accused and another fellow female navy officer. The complainant said she fell asleep and awoke during the night to find the accused in her bed naked. He then proceeded to sexually assault her despite her repeated refusals and attempts to resist.

Sergeant MacIntyre denied the allegations of sexual assault and testified that he had consensual sex with the complainant.

On behalf of the Minister, the DMP argued two grounds of appeal, both relating to the final instructions from the military judge to the General Court Martial panel. The first one relates to incorrect instructions on the *mens rea* and the second to an unjustified instruction titled "inadequate police investigation".

A decision on this case is expected to be issued by the CMAC during the next reporting period.

Appeals Initiated at the CMAC

R v Edwards, CMAC-595

On 16 November 2018, a Standing Court Martial held in Halifax, Nova Scotia, found Leading Seaman Edwards not guilty of one charge of prejudice to good order and discipline for the use of cocaine. The alleged offence occurred between 25 September 2015 and 23 July 2016, at or near Halifax, Nova Scotia, where it was alleged that the accused used cocaine, contrary to *Queen's Regulations and Orders* article 20.04.

In evidence was a voluntary statement provided by Leading Seaman Edwards to an investigator with the CFNIS, in which he admitted to purchasing and using cocaine.

The military judge acquitted the accused on the basis that the prosecution did not prove that the use occurred at or near Halifax, as particularized in the charge. The military judge also expressed concerns about the voluntary confession of the accused, and chose to disbelieve portions of it despite the fact that he had no basis in law to do so.

The DMP, on behalf of the Minister, has appealed this case to the CMAC. This case will be heard in the following reporting period.

R v Spriggs, CMAC-597

On 17 October 2017, the CFNIS laid one charge of sexual assault against Corporal Spriggs for an incident alleged to have occurred on 25 July 2016. On 4 April 2018, the prosecutor preferred one charge pursuant to s. 130(1)(a) of the NDA for sexual assault contrary to s. 271 of the *Criminal Code*.

On 27 November 2018, the prosecutor withdrew this charge sheet and replaced it with a charge pursuant to s. 93 for behaving in a disgraceful manner. The original charge of sexual assault was withdrawn by the prosecution due to the inability of the prosecution to try accused individuals charged under section 130(1)(a) of the NDA by court martial as a result of the decision in *Beaudry*.

At the commencement of the trial for Corporal Spriggs the defence presented an application claiming that Corporal Spriggs had been subjected to an abuse of process. The defence alleged that withdrawing the sexual assault charge and substituting the disgraceful conduct charge amounted to an abuse of process in that the accused was no longer able to benefit from a jury trial through the civilian criminal justice system. The defence sought a stay of the proceedings under subsection 24(1) of the *Charter* as a remedy for the alleged violation.

The military judge found that Corporal Spriggs had been subjected to an abuse of process because the substitution of charges deprived Corporal Spriggs of "his newly acquired *Charter* right to have the charge of sexual assault heard by a judge and jury in civilian courts of criminal jurisdiction". As a result, the military judge terminated the proceedings.

The DMP, on behalf of the Minister, appealed the *Spriggs* case to the CMAC. However, in preparation for the appeal, the appellate counsel conducted a detailed review of the case leading to a concern about whether there was a reasonable prospect of conviction in the event the CMAC ordered a new trial. It was determined that the matter would not be pursued at court martial even if a new trial was ordered. Therefore, on behalf of the Minister, the DMP abandoned the appeal, as it would be improper to continue forward with this appeal in the absence of a reasonable prospect of conviction.

For an overview of all appeals at the CMAC for the reporting period please refer to Annex B.

Supreme Court of Canada

Hearings Conducted

R v Gagnon, SCC 2018 41

The alleged sexual assault occurred on or about 15 December 2011 as Warrant Officer Gagnon and the complainant, a corporal, were both members of Régiment de la Chaudière, an Army reserve unit. After the annual Christmas luncheon Warrant Officer Gagnon and the complainant made their way to the armory. Warrant Officer Gagnon initiated sexual activity with the complainant progressing through four distinct sexual acts. Warrant Officer Gagnon confirmed during his testimony at trial that he took no steps to ascertain the complainant's consent before moving from one act to the next. The complainant testified that in addition to being passive, she communicated discomfort and physically resisted, at different times during the encounter. Warrant Officer Gagnon claimed that either the complainant consented or that he held an honest but mistaken belief that she consented, if the court found that she did not.

On 22 August 2014, a General Court Martial found Warrant Officer Gagnon not guilty of sexual assault after the military judge put the defence of honest but mistaken belief in consent to the panel for consideration. On 17 September 2014, the DMP on behalf of the Minister appealed this decision to the CMAC on the basis that the military judge should not have left the defence of honest but mistaken belief in consent with the panel for consideration.

A majority of the CMAC judges found that the military judge erred by submitting to the court martial panel a defence of honest but mistaken belief in consent without having considered whether the statutory preconditions in section 273.2 of the *Criminal Code* had been met. Section 273.2 required Warrant Officer Gagnon to take reasonable steps in the circumstances known to him at the time to confirm consent to the sexual

activities in question. Two of the three justices concluded that a judge applying the proper framework would likely consider that reasonable steps had not been taken, and would therefore have not put the defence of honest but mistaken belief in consent to the panel. On this basis, the CMAC overturned the acquittal and ordered a new trial.

The Chief Justice of the CMAC, in dissent, concluded that there was evidence of reasonable steps and an air of reality to the defence of honest but mistaken belief on the facts of the case sufficient to put the defence to the panel, and therefore there was no error at law committed by the military judge.

Warrant Officer Gagnon appealed the decision to the SCC and arguments were heard on 16 October 2018.

In a unanimous decision from the bench the SCC ruled that the defence of honest but mistaken belief in consent had no air of reality and that the trial judge committed a legal error when he instructed the panel of the General Court Martial to consider it. The SCC added that there was no evidence to show that Warrant Officer Gagnon took any steps to ascertain consent and that, as a result, the defence was barred pursuant to s. 273.2(b) of the *Criminal Code*. The SCC confirmed the CMAC majority decision and ordered a new trial.

R v Stillman/Beaudry, SCC 37701 and SCC 38308

These appeals to the SCC were joined together as they both deal with the constitutionality of s. 130(1)(a) of the NDA. Contextually, these appeals arose out of three separate decisions from the CMAC.

The CMAC first dealt with the central issue raised in this appeal in *R v Royes*[22]. In that case, a unanimous panel concluded that the acts or omissions referred to in s. 130(1)(a) are service offences and that service offences are offences under military law. As such, s. 130(1)(a) falls within the exception to the right to a

trial by jury in section 11(f) of the *Charter*. The CMAC further concluded that the effect of the SCC decision in *R v Moriarity*[23] was to correct the CMAC's prior reasoning respecting s. 130(1)(a) and military nexus. The CMAC found that its prior jurisprudence regarding military nexus was no longer valid, and therefore that s. 130(1)(a), without resort to a military nexus test, does not violate s. 11(f) of the Charter.

The CMAC ruled on the same constitutional issue for a second time in the case of *R v Déry*.[24] In *Déry*, the Chief Justice agreed with the analysis undertaken by the CMAC in *Royes*. The majority, however, found that "it is only by the reading in of a military nexus test that paragraph 130(1)(a) of the NDA can pass constitutional muster". Nevertheless, the CMAC unanimously concluded that it was bound by *Royes*, a decision it found to be "a fully reasoned treatment of the issue by a unanimous bench". The constitutional challenge was dismissed.

22 2016 CMAC 1.

23 2015 SCC 55.

24 2017 CMAC 2.

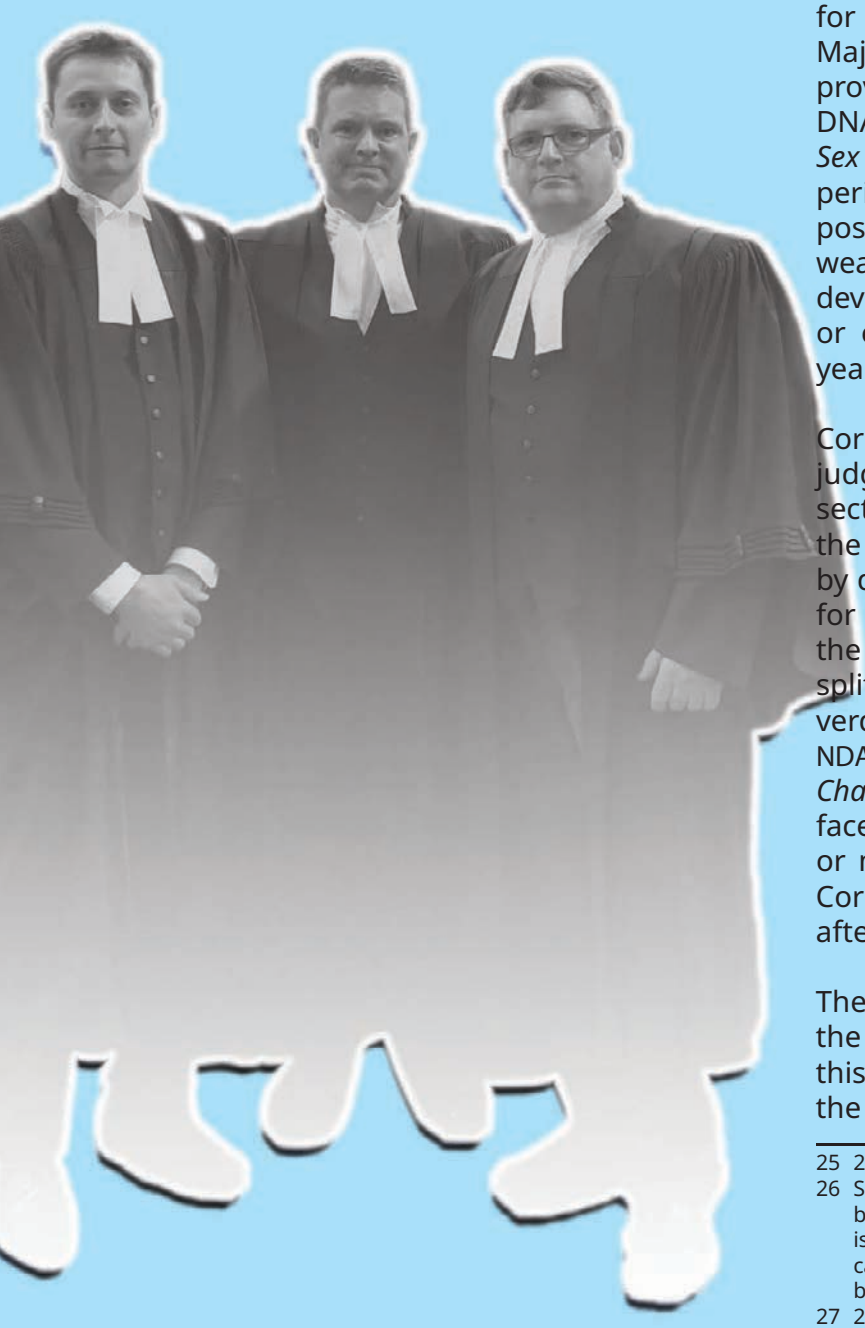
Following the CMAC decision in *Déry*, a number of the appellants were granted leave to appeal to the SCC under the name of Stillman which grouped seven appellants together into one matter. Following a motion to join, the SCC ordered that the appeal of *Beaudry* be heard concurrently to that of *Stillman*. These appeals were all heard on 26 March 2019. Further information regarding this appeal is contained in Chapter Four.

Custody Review Hearings

Military judges are, in certain circumstances, required to review orders made to retain a CAF member in service custody. The DMP represents the CAF at all such hearings. During the reporting period, military prosecutors appeared at four pre-trial custody review hearings. Of those four hearings, the accused individual was released with conditions on all four occasions. A complete summary of all custody review hearings can be found at Annex D.

CHAPTER FOUR

R v Beaudry



Following a Standing Court Martial held in July 2016, Corporal Beaudry was found guilty of having committed a sexual assault causing bodily harm, contrary to section 272 of the *Criminal Code,* under section 130 of the NDA.[25] He was sentenced to a term of imprisonment for 42 months and dismissal from Her Majesty's service and was also required to provide DNA for the purpose of forensic DNA analysis, ordered to comply with the *Sex Offender Information Registration Act* for a period of 20 years and was prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance for a period of ten years.

Corporal Beaudry appealed the military judge's decision to the CMAC arguing that section 130(1)(a) violates subsection 11(f) of the *Canadian Charter of Rights and Freedoms* by depriving him of his right to a trial by jury for a civil offence.[26] On 19 September 2018, the CMAC rendered its judgment and in a split decision, the majority set aside the guilty verdict and declared section 130(1)(a) of the NDA to be in violation of section 11(f) of the *Charter* for those offences where the accused faces punishment of five years imprisonment or more.[27] The conviction was quashed and Corporal Beaudry was released from prison after having served nearly 26 months.

The decision by the CMAC in *Beaudry* was not the first time that the court has considered this issue. In June 2016, in the case of *R v Royes* the CMAC unanimously ruled that s. 130(1)(a)

25 2016 CM 4010.

26 Section 11(f) of the *Charter* guarantees the right to a trial by jury where the maximum punishment for the offence is imprisonment for five years or a more except in those cases where the offence falls under military law tried before a military tribunal.

27 2018 CMAC 4.

did not violate s. 11(f) of the *Charter*. Later, in May 2017, a majority of the CMAC in the case of *R v Déry* disagreed with the conclusions in *Royes*, but found that they were nevertheless bound by *Royes* and ruled that s. 130(1)(a) did not violate s. 11(f) of the *Charter*. The *Déry* decision was appealed to the SCC under the name *R v Stillman*.

In its decision in *Beaudry*, not only did the CMAC overrule two of its recent previous decisions on this matter, the Court did not suspend the declaration of invalidity at the time of the ruling meaning that the declaration would take effect immediately and any accused individuals charged under section 130(1)(a) of the NDA could no longer be tried for any civil offence committed in Canada for which a maximum sentence is five years imprisonment or more through the military justice system.

At the time of the ruling, there were 40 cases within the military justice system where the accused had been charged for a civil offence under section 130(1)(a) of the NDA. This included 21 cases involving sexual related offences such as sexual assault, sexual exploitation and voyeurism. Therefore, with no ability to proceed with these cases through the military justice system, within 48 hours of the CMAC decision in *Beaudry*, the DMP, on behalf of the Minister of National Defence, appealed the decision to the SCC and filed a motion requesting the SCC to order a stay of execution of the CMAC declaration of unconstitutionality of paragraph 130(1)(a) of the NDA until the SCC has rendered a decision on the appeal. In addition, the DMP also filed a motion requesting to join the hearing of the appeal in *Beaudry* to the appeal in *Stillman* as they both relate to the same legal issue.

On 13 November 2018, the Chief Justice of the SCC directed that the cases of *Beaudry* and *Stillman* be heard together in a single hearing set for 26 March 2019. In addition, an oral hearing for the request for a stay of execution of the CMAC decision in *Beaudry* was set for 14 January 2019.

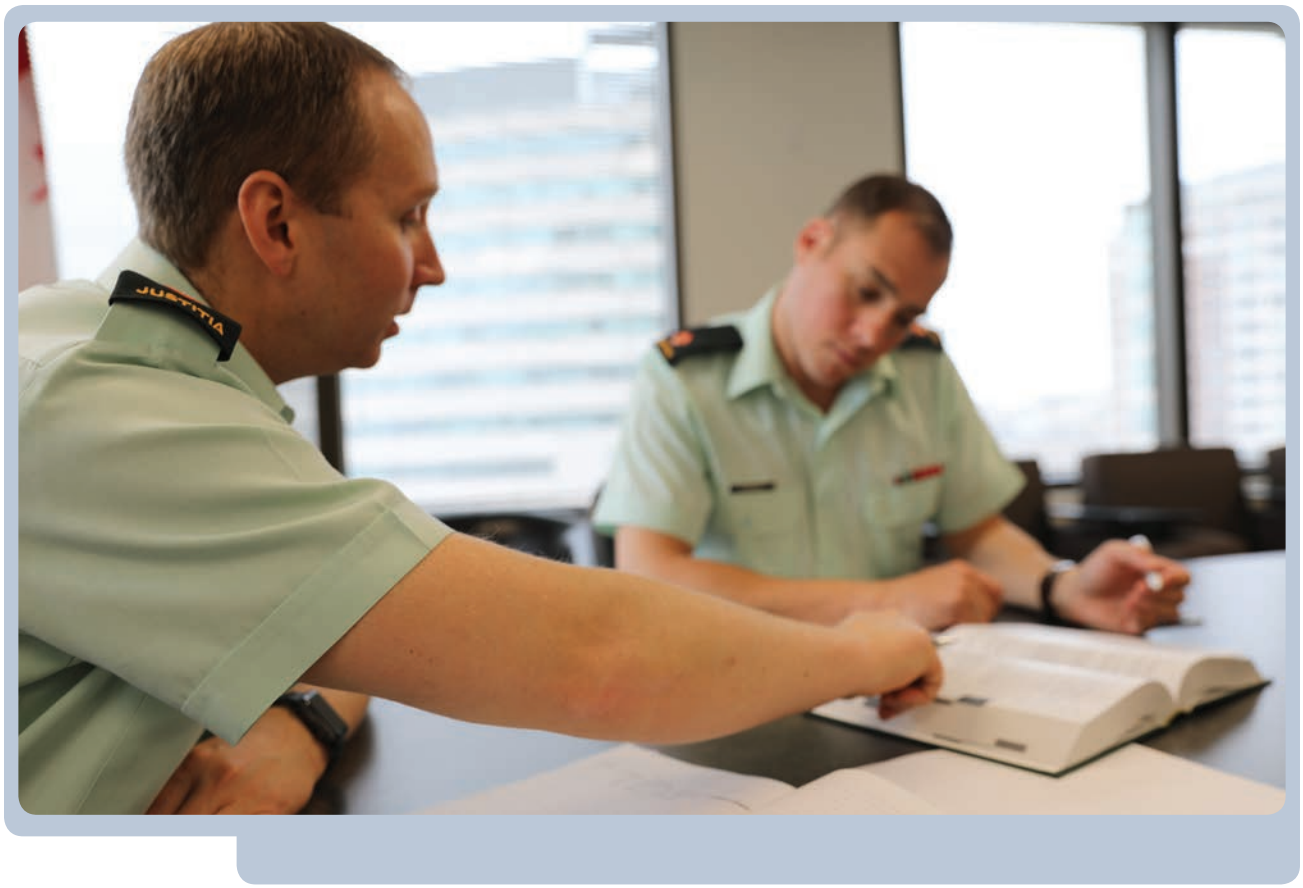
At the hearing for the request for a stay of execution, counsel with the CMPS argued that a stay of the CMAC decision in *Beaudry* was necessary to allow cases to continue to proceed through the military justice system as it was better placed to ensure the maintenance of the discipline, efficiency and morale of the CAF.

However, the SCC dismissed the request for a stay of execution. This meant that the finding of unconstitutionality of section 130(1)(a) of the NDA remained in place and any accused individuals charged under that section could not be tried through the military justice system at that time for civil offences committed in Canada for which a maximum sentence is five years imprisonment or more.

Immediately following the ruling on the request for a stay of execution, the DMP communicated the decision to the highest levels of the chain of command within the CAF and set out the way ahead as to his intentions on how to proceed with those cases which were impacted by *Beaudry*. The DMP directed his team to, where appropriate, determine whether cases could proceed under other NDA charges or whether those cases should proceed through the civilian justice system. The DMP expressly required his prosecutors to ensure that the appropriateness of any charge was to be considered on a principled basis and was not to be done simply to deny an accused his or her right to be tried by a jury through the civilian criminal justice system.

Over the course of the next several weeks, a number of steps were taken by military prosecutors in these cases to ensure that all impacted cases proceed in a fair and timely fashion and that the concerns of all victims were solicited, considered and addressed.

At the end of the reporting period, there were a total of 40 prosecution cases which were impacted by the CMAC decision in *Beaudry*. Of those cases, 18 affected cases remain in the military justice system; ten cases were referred to civilian prosecutors (an information was laid in eight cases and civilian prosecutors declined to proceed in two cases);



six cases remain in the military justice system and are proceeding by non-affected charges; military prosecutors declined to proceed with charges and did not refer the case to civilian authorities in one case; and five cases have already proceeded through the military justice system by non-affected charges resulting in a finding of guilty.

Oral arguments were made to the SCC on 26 March 2019 in both the cases of *Stillman* and *Beaudry*. It is expected that the SCC will rule on the constitutionality of s. 130(1)(a) in the next reporting period.

CHAPTER FIVE

Report of the Auditor General of Canada on the Administration of Justice in the Canadian Armed Forces

Introduction

As a part of its 2018 Spring Reports, the Auditor General of Canada reported to Parliament on the Administration of Justice in the CAF.[28] The audit focused on whether the CAF administered the military justice system efficiently and in particular, it assessed the effectiveness of the CAF in processing military justice cases in a timely manner.

In regards to those areas that fell within the responsibility of the DMP, the Auditor General concluded that:

- It took too long to resolve many of its cases;
- The policy on disclosing relevant evidence to the accused did not establish time standards to provide evidence to the accused;
- There was no formal requirement to communicate with the military police about whether charges were laid or to provide feedback on the quality of the police investigations;
- The procedure for assigning cases and decision-making authorities to prosecutors was not clear and the assignment of cases to prosecutors was not always documented.

As a result, the Auditor General made a series of recommendations designed to address those concerns. Those recommendations that fell within the responsibility of the DMP included:

- The CAF should establish formal communication processes to ensure that the Military Police, the DMP, the JAG's legal officers, and the military units receive the information that they need to carry out their duties and functions in a timely manner.
- The CAF should define and communicate expectations for the timely disclosure of all relevant information to members charged with an offence.
- The CAF should put in place a case management system that contains the information needed to monitor and manage the progress and completion of military justice cases.
- The DMP should ensure that the policies and processes for assigning cases to prosecutors, and for documenting decisions made in military justice cases, are well defined, communicated, and fully implemented by the members of the CMPS.

Before the report was released, the DMP instituted a number of changes to address the concerns of the Auditor General. For example, the DMP directed his two DDMPs who supervise RMPs to request disclosure from the appropriate investigative agency before the file is assigned. In addition, before the report was released, the DMP had already made changes to the instruments for the appointment of prosecutors clarifying the limits for the exercise of their prosecutorial powers indicating that they were authorized to exercise the statutory powers given to the DMP on his behalf but subject to those limitations as indicated in his policy directives.

Policy Amendments

Following the release of the report, the DMP undertook a detailed policy review by 1 September 2018 to ensure that his policies properly reflect the concerns expressed by the Auditor General and that all key decisions taken on a file affecting the disposition of that file are properly documented and communicated. Those changes made in response to the concerns raised by the Auditor General are set out below.

28 Auditor General of Canada, "Administration of Justice in the Canadian Armed Forces", 29 May 2018.

DMP Policy Directive 001/00: Relationship with Canadian Forces National Investigation Service

Once a decision has been made to prefer charges for trial by court martial, prosecutors are required to actively follow-up with the investigator to ensure that they are aware of the decision and to discuss next steps as required. If the decision was not to prefer, the discussion with the investigator will essentially be to provide feedback to assist with improving future investigations.

Once a court martial has been completed the prosecutor must provide feedback to the investigator in order to address any concerns which may have arisen during the course of the court martial. The intent of the feedback is to identify and address areas of mutual concern with the aim of improving the quality of future investigations.

DMP Policy Directive 002/00: Pre-Charge Screening

If a prosecutor is unable to complete the pre-charge screening in the allotted timeframe, he or she shall contact the appropriate DDMP and seek approval to extend the timeline beyond the applicable time period. In those cases where the DDMP approves an extension beyond the applicable time period, he or she shall do so in writing and shall document the reasons as to why the extension was approved. The written authorization by the DDMP shall be placed in the case file.

Once an extension beyond the applicable time period has been approved the prosecutor shall contact the investigator and provide a reasonable estimate as to how much time will be required to provide the advice and a brief explanation as to why more time is required.

DMP Policy Directive 003/00: Post-Charge Review

File Assignment and Final Disposition

Upon receipt of a referral from a referral authority the appropriate DDMP shall conduct an initial review of the file to familiarize him or herself with the size and complexity of the file prior to assigning it to a prosecutor. At this stage, where the applicable DDMP concludes that a particular file will result in a non-preferral decision, in the interests of efficiency, he or she may complete the necessary documentation to dispose of the file without assigning it to a prosecutor.

Should the applicable DDMP not dispose of the file immediately, he or she shall request disclosure from the applicable investigative agency and assign a prosecutor to conduct the post-charge review.

Where a prosecutor does not have final disposition authority, he or she shall make their recommendation regarding disposition to the proper authority within the applicable timeframe. Once a decision is taken by the proper authority, that person must then ensure that they record their decision and place it in the prosecution case file.

Disclosure

Once a prosecutor has ensured that he or she has received complete disclosure he or she shall review the disclosure material in order to determine whether a charge or charges should be preferred. Where possible, the prosecutor shall prepare the disclosure package to be sent to defence counsel contemporaneously with the decision on whether or not to prefer charges. Where the prosecutor is unable to send the disclosure contemporaneously with the decision on whether or not to prefer charges, he or she shall notify the applicable DDMP informing him or her as to why disclosure will be delayed. In all cases, the necessary vetting of the disclosure materials shall commence immediately upon receipt in order to ensure that all relevant material is provided to the accused as soon as possible.

Reassignment of File

Where a file is to be reassigned from one prosecutor to another, the applicable DDMP shall assign a new prosecutor in writing. Once a new prosecutor has been assigned to the file, he or she shall review the file to determine whether there is a reasonable prospect of conviction should the matter proceed to trial by court martial and whether the public interest requires that a prosecution be pursued. In all cases, the new prosecutor shall document his or her decision and place it in the prosecution case file.

Timelines

The timeline to complete a post-charge review will be determined by the appropriate DDMP by considering the size and complexity of the file, the workload and experience of the prosecutor and any other relevant factors. Should the prosecutor require longer than the assigned time to complete the post-charge review he or she shall request approval from the appropriate DDMP and provide a reasonable estimate as to how much time will be required to complete the review and a brief explanation as to why more time is required.

Where the appropriate DDMP approves an extension of the deadline for the post-charge review, he or she must ensure that the approval is provided in writing and contains an explanation as to why the extension was provided. This approval shall be placed in the prosecution case file.

DMP Policy Directive 005/00: Communications with Service Authorities

This policy reiterates the requirement for prosecutors to speak with investigators after a court martial to provide feedback to assist in improving the quality of future investigations. However, it also makes it a requirement to do so in cases of military police and unit investigations.

DMP Policy Directive 011/00: Withdrawal of Charges

Once a decision to withdraw a charge has been made, the individual with final disposition authority must ensure that they record their decision and place it in the prosecution case file.

DMP Policy Directive 017/18: Court Martial Scheduling

This is a new policy that deals with the scheduling of courts martial and pre-trial applications. It holds that prosecutors shall take all best efforts to ensure that they schedule all courts martial, including pre-trial applications, in a timely manner. According to the policy, two timelines have been put in place to move cases more quickly:

- Once disclosure has been sent to defence counsel, prosecutors shall inform the accused of any witness who he or she proposes to call as soon as practicable and, except in exceptional circumstances, no later than 15 days after providing disclosure.

- Once disclosure and the list of witnesses have been sent to the accused, the prosecutor shall make best efforts to engage defence counsel within 30 days to discuss possible dates for court martial.

The policy also offers some guidance for the bringing of scheduling applications. In those cases where it may be appropriate to do so, the policy sets out a number of factors that should be taken into consideration such as:

- Whether the prosecutor has made reasonable efforts to schedule a court martial with defence counsel or an unrepresented accused;
- Whether the prosecutor is of the opinion that there is no valid reason to justify why a court martial should not be scheduled; and
- Whether the prosecutor is of the opinion that the only way for a court martial to be scheduled in a timely manner is to make a scheduling application.

Case Management System

In 2016, the DMP began work to create an electronic database to track cases throughout the court martial process with the aim of improving transparency and efficiency, increasing accountability and reducing over-all delays in the court martial system. In response to the recommendation by the Auditor General that the CAF put a case management system in place that monitors and manages the progress and completion of military justice cases, the DMP responded that he was prepared to employ a significantly improved electronic database / case management sys-tem by 1 June 2018.

Referred to as the Case Management System (CMS), this database was operationalized on 1 June 2018 and allows all prosecutors within the CMPS to monitor the progress of each file and to conduct specific actions on each file such as the assignment of files by the DDMPs. Since 1 June 2018, a number of upgrades have been made to CMS to further improve its functionality and enhance the way in which files are tracked through the court martial process. For a more detailed explanation of the CMS, please refer to Chapter Eight.

Canadian Forces Military Police Academy

In order to further enhance communications between prosecutors and military police, the DMP also undertook to examine how additional legal support could be provided to the Canadian Forces Military Police Academy (CFMPA). In addition to facilitating the provision of information between military prosecutors and military police, the intent is to assist in the improvement of the quality of future investigations through coordinated training and feedback. Since the release of the Report, the DMP has continued to offer assistance to locate an additional prosecutor at the CFMPA.

CHAPTER SIX

Policy Updates

The policy directives of the DMP serve a key role in the prosecution of cases at courts martial. Not only do they set out the authorities and limitations for prosecutors but they provide specific direction on a number of related issues such as communications with victims and with service authorities, media relations, the appeal process and the appointment of special prosecutors. They govern the prosecutions and other military justice proceedings conducted by prosecutors and ensure that all decisions taken by prosecutors are done on a principled basis and in accordance with the law.

In an effort to further enhance public confidence in the administration of military justice, the DMP, during this reporting period, promulgated the CMPS Complaints Policy which sets out the procedure for an individual to make a complaint on any matter within the purview of the CMPS and details the process for the timely resolution of all complaints.[29]

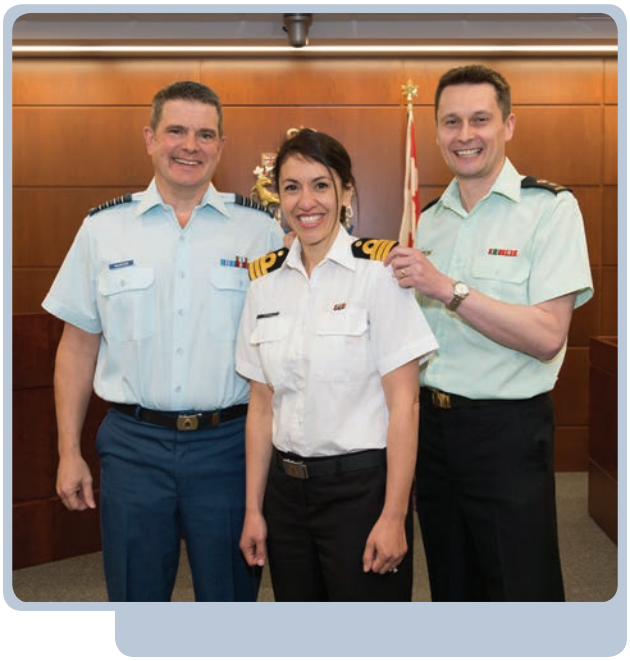
Although the CMPS is responsible to prosecute all service offences with diligence and in a manner that is fair, impartial and objective, on occasion a member of the CAF or a member of the Canadian public may feel as though they have been treated unfairly or that a prosecutor with the CMPS has not conducted him or herself in accordance with CMPS policies or directives. In such cases, that individual may wish to initiate a formal complaint for resolution.

29 The CMPS Complaints Policy Directive can be found at https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/cmps-complaints.html.

As independent actors within the military justice system, prosecutors with the CMPS are required to exercise their discretion in a variety of circumstances and on a regular basis. Therefore, the goal of this policy is to ensure the CAF and the Canadian public that the CMPS remains accountable to exercise their discretionary powers properly and in accordance with the direction provided by the DMP. In those instances where a complaint has been made, members of the CAF and the Canadian public can have the confidence that the leadership of the CMPS organization will take action as necessary when a matter has been brought to their attention.

In order to make a complaint, an individual must submit the complaint in writing, in either official language, and provide all relevant information in order to allow for a thorough review of the matter. Complaints may speak to the conduct of a particular prosecutor but may also be more general in nature addressing any procedure, practice or policy of the CMPS which results in the unfair treatment of any individual.

Where possible, the CMPS will provide the complainant with a written response within forty days of the complaint being received. If the CMPS is unable to do so, the complainant will be notified and will be provided with a written explanation for the delay. Additionally, in most cases, where a complainant is dissatisfied with the initial response he or she may request that the complaint be reviewed personally by the DMP for resolution.



Special Prosecutor

On 12 April 2017 The DMP issued a new policy directive for the appointment of special prosecutors whenever there is a risk of an actual or perceived conflict of interest in the conduct of military prosecution duties that may adversely impact public confidence in the administration of military justice.[30] Special prosecutors, are appointed by the DMP and must be members in good standing of the bar of a province or territory of Canada and must also be officers of the CAF but not a member of the Office of the JAG.

The DMP appointed a special prosecutor, Lieutenant-Colonel Mark Poland, a reserve infantry officer who is also the Crown Attorney of the Waterloo Region with the Ontario Ministry of the Attorney General on 19 February 2018 to conduct the post-charge review of charges laid by the CFNIS against the Chief Military Judge, Colonel Mario Dutil on 25 January 2018.

On 31 July 2018, the DMP appointed Second Lieutenant Cimon Senécal, a criminal and penal prosecuting attorney with the *Directeur des poursuites criminelles et pénales* of Québec, to assist Lieutenant-Colonel Poland. However, on 26 December 2018, Lieutenant-Colonel Poland was appointed by the Attorney General of Ontario as a justice in the Ontario Court of Justice. As a result, Second Lieutenant Senécal will now be the lead prosecutor in this matter.

30 The CMPS Policy Directive on the Appointment of Special Prosecutors can be found at https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/about-policies-standards-legal/dmp-policy-directive-016-17-appointment-of-special-prosecutors.pdf.

Additional Amendments

In addition to those policy amendments made as a result of the Report of the Auditor General on the Administration of Justice in the CAF a number of additional policy amendments were made to provide better clarity in areas where the policy was not as clear as it should have been. These amendments were made contemporaneously with those to respond to the concerns of the Auditor General and were promulgated on 1 September 2018.

DMP Policy Directive 002/00: Pre-Charge Screening[31]

The notion of further investigation at the pre-charge stage will no longer exist. That is, prosecutors will no longer return a file and request that additional investigation be undertaken thereby "stopping the clock" for how long it takes a prosecutor to conduct pre-charge screening. If a prosecutor receives a file and the evidence in the file does not satisfy the test to recommend that a charge be laid, the prosecutor will return the file with a recommendation that no charge be laid.

However, if the prosecutor believes that further investigation may assist he or she shall discuss this with the investigator and provide sufficient detail to assist the investigator in conducting any necessary further investigation. Should the investigator conduct further investigation and resubmit for pre-charge screening, the file will be re-opened and the prosecutor will provide his or her opinion based on the information contained in the updated file.

DMP Policy Directive 003/00: Post-Charge Review[32]

Changes made to this policy provide a bit more clarity to how serious sexual misconduct files are assigned and how final disposition authority is given to the DDMP SMART. Where a DDMP receives a file which contains an allegation of sexual misconduct, he or she will determine whether the allegation is one of serious sexual misconduct. Where required, the DDMP will consult with the DDMP SMART when making such a determination.

Where the file contains an allegation of serious sexual misconduct, the DDMP will assign the file to a prosecutor in consultation with DDMP SMART. In all cases involving an allegation of serious sexual misconduct, the DDMP will ensure that DDMP SMART is assigned final disposition authority. In all other cases of sexual misconduct, the DDMP will ensure that DDMP SMART is aware of the file.

31 The CMPS Policy Directive on Pre-Charge Screening can be found at https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/pre-charge-screening.html.

32 The CMPS Policy Directive on Post-Charge Review can be found at https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/post-charge-review.html.

DMP Policy Directive 009/00: Communications with Unit Legal Advisors[33]

This policy was amended to set out that prosecutors will only conduct pre-charge screening at the request of a Deputy Judge Advocate (DJA) after the DJA has thoroughly reviewed the file and has formed the opinion that charges triable only by court martial are warranted.

In addition, after providing pre-charge legal advice, the prosecutor will proactively follow up with the unit legal advisor and address any questions or concerns arising from that advice.

Victims

This reporting period, the DMP also created a new e-mail address, monitored daily, to provide victims of sexual misconduct with an online option to seek information from military prosecutors about the status of their case and the court martial process, or to get answers on questions they may have about their file.[34]

This initiative was introduced to ensure that victims remain informed and supported throughout the court martial process following recent amendments to a number of DMP policy directives requiring military prosecutors to consider the views of the victim in a variety of circumstances.

Information available to victims includes, but is not limited to:

- The decision of the prosecutor on whether to prefer a charge against the accused;
- Any release conditions placed on the accused prior to trial or any amendments thereto;
- Information regarding the court martial process;
- Publication bans or other available methods to protect victims' identities;
- Information regarding testifying at court martial;
- Any decision by the prosecutor to enter into plea negotiations with defence counsel;
- Any decision by the prosecutor to withdraw charges against the accused; and
- The ability of the victim to provide a victim impact statement at court martial.

33 The CMPS Policy Directive on Communications with Unit Legal Advisors can be found at https://www.canada.ca/en/department-national-defence/corporate/policies-standards/legal-policies-directives/communications-with-unit-legal-advisors.html.

34 The e-mail address for victims is CMPSVictimInformation-SCPMInformationVictime@forces.gc.ca.

CHAPTER SEVEN

Communication and Outreach

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

CAF Chain of Command

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

While protecting the prosecutorial independence of the CMPS, the DMP recognizes the importance of maintaining collaborative

relationships with the chain of command of the CAF. Collaborative relationships with the chain of command ensures that both entities work together to strengthen discipline and operational efficiency through a robust military justice system. During the reporting period, the DMP continued his practice of proactively meeting with senior members of the chain of command on different military bases across Canada.

During the reporting period, the DMP also participated as a guest speaker at the CAF Discipline Advisory Council held on January 14, 2019. On this occasion, the DMP had the opportunity to provide details on unit disciplinary investigations, victim support and an update on *Beaudry* to CWOs/CPO1s posted into various strategic positions within the CAF.

Canadian Forces National Investigation Service

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

This reporting period the DMP visited numerous CFNIS detachments across the country to discuss prosecution needs and strategic intent. In addition, the DMP, accompanied by the DDMP for the Atlantic, Eastern and Pacific regions, presented at the CFNIS Indoctrination Course on DMP's role and responsibilities, prosecutorial independence, and disclosure best practices. The presentation enhanced the incoming investigators' awareness of the legislative and regulatory framework surrounding the role of a prosecutor.

Federal, Provincial and Territorial Heads of Prosecutions Committee

The Federal, Provincial and Territorial Heads of Prosecutions (HoP) Committee is comprised of the DMP, the Director of Public Prosecutions as well as the equivalent heads of all provincial and territorial prosecution services. It is a national coordination and consultation forum that discusses common problems which touch upon criminal law and practice management. In order to promote inter-jurisdictional cooperation on operational issues and afford a unique opportunity to keep abreast of new developments in the area of criminal prosecutions, the HoP Committee holds two meetings throughout the year at various locations across Canada. These meetings provided an invaluable opportunity for participants to discuss matters of common concern in the domain of criminal prosecutions and find opportunities for collaboration.

This reporting period the HoP Committee held two general meetings, both of which were personally attended by the DMP. The 55th general meeting of the HoP Committee was held in St. Andrews, NB on May 16 and 17, 2018. The DMP was an active participant during the discussions ensuring that the interests of the military justice system remain at the forefront of criminal law in Canada.

The 56th general meeting of the HoP Committee was co-hosted by the DMP at the CFB Esquimalt Wardroom and Chief Petty Officer's & Petty Officer's Mess facilities on October 24 and 25, 2018. In his capacity as co-chair the DMP ensured the promotion of the military justice system throughout the broader Canadian legal community and also ensured that the military justice system remains aligned with broader Canadian values further contributing to the legitimacy of the military justice system.

International Association of Prosecutors

The International Association of Prosecutors (IAP) is the only world-wide association of prosecutors. It is non-governmental and non-political. It was established in 1995 and now has more than 183 organizational members from over 177 different countries, representing every continent. The IAP promotes the effective, fair, impartial, and efficient prosecution of criminal offences through high standards and principles, including procedures to prevent or address miscarriages of justice.

In addition, the IAP also promotes good relations between prosecution agencies and facilitates the exchange and dissemination of information, expertise and experience. Its annual conference is attended by prosecutors from a variety of nations, including other Canadian federal and provincial heads of prosecutions.

The DMP attended the IAP's 23nd Annual Conference and General Meeting held from 9 to 13 September 2018 in Johannesburg, South Africa. The main theme of the General Meeting was "Prosecutorial Independence – the Cornerstone of Justice to Society". The DMP presented on the enforcement of sexual misconduct in the CAF at the main plenary session as well as co-chaired two meetings of the Network for Military Prosecutors.

In addition, the DMP participated as moderator to the 5th IAP Regional Conference for North America and the Caribbean held in October 2018 in Toronto. Also at the Regional Conference, the DDMP for the Central and Western regions presented on mental health for prosecutors outlining those initiatives put in place within the CMPS in order to improve mental health and resiliency.

United Nations

The DMP was invited to speak at the United Nations in New York as a representative of the IAP about bringing terrorists to justice before national courts. The DMP spoke about the myriad of challenges faced by investigators and prosecutors in the collection and preservation of evidence in conflict areas and the difficulty in complying with national law to have this evidence admitted during criminal prosecutions.

Royal United Services Institute of Nova Scotia

During the reporting period, the DMP was invited by the Royal United Services Institute of Nova Scotia to speak to its members about the military justice system, the role of the DMP and current key issues facing the administration of military justice in the CAF. The DMP spoke to a number of issues outlining his role and responsibilities, prosecutorial independence and key cases moving through the military justice system.

Ukraine – Reforming Ukraine's Military Justice System

In May of 2018, the previous ADMP attended a conference in the Ukraine regarding military justice reform in the Ukraine. The ADMP presented an overview of the Canadian military justice system and the role and responsibilities of the DMP with a view to informing the discussion and providing a balanced voice as the Ukraine continues to take steps to advance its own national military justice system.

CHAPTER EIGHT

Information Management and Technology

Case Management System

In his report on the Administration of Justice in the CAF, the Auditor General recommended that the CAF put in place a case management system that contains the information needed to monitor and manage the progress and completion of military justice cases. Prior to making this recommendation, the DMP had already begun to develop an electronic case management system to track cases throughout the court martial process with the aim of improving transparency efficiency, increasing accountability and reducing overall delays in the court martial system. In response to the report, the DMP committed to making the CMS operational by 1 June 2018.

Launched on 1 June 2018, the CMS is a file management tool and database used to monitor the progress of all cases referred to the DMP through the court martial process. In addition, it allows for the tracking of all data in order to provide the DMP with the necessary statistics in real time about all cases in the court martial system.

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

The design of the CMS is user-friendly and is meant to provide each prosecutor with a quick overview of each of their cases. To that end, each prosecutor has access to a dashboard that shows the status of all relevant files and allows quick access to the data as necessary.

The CMS is intended to replace previous methods for the tracking of cases which has typically been done through a spreadsheet application. Currently, the DMP maintains both systems for tracking cases in order to ensure the quality control of all data. However, once the CMS undergoes a series of quality control tests in the upcoming reporting period, it is expected that the CMS will become the sole tracking system for all DMP cases in the court martial system.

Further, in the next reporting period, work will continue with the developers of the Justice Administration Information Management System (JAIMS) in order to determine whether the CMS is compatible with JAIMS allowing files from JAIMS to be electronically transferred into CMS once a case has been referred to the DMP.

CHAPTER NINE

Financial Information

Operating Budget

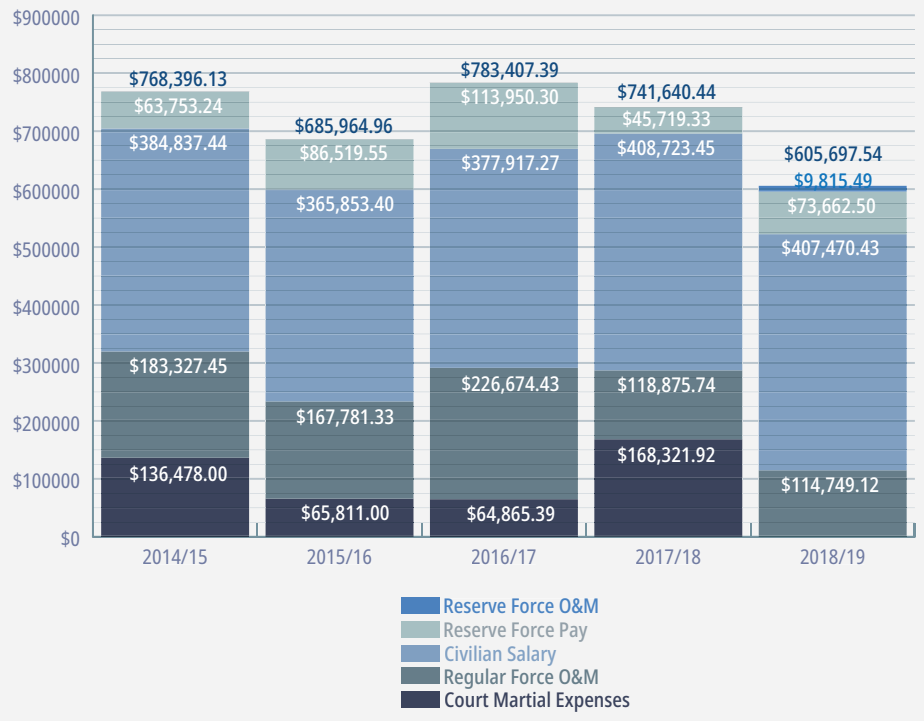
DMP's operating budget is allocated primarily to operations and is divided into four main categories: Regular Force Operations and Maintenance, Civilian Salary and Wages, Reserve Force Pay and Reserve Force Operations and Maintenance. Operations and Maintenance includes items such as travel, training costs, general office expenditures and other costs that support the personnel and maintain equipment. A complete overview of DMP's budget including initial allocation and expenditures can be found at Table 9-1. Figure 9-2 shows DMP's operating budget over a five year period.

In previous reporting periods court martial expenses was included as a part of DMP's operating budget. However, court martial expenses are no longer a part of the DMP's budget but instead are administered through a centralized fund. Due to various factors such as the number of courts, the duration of courts as well as any unpredictable expenses such as the requirement for expert witnesses, etc., court martial expenditures can be difficult to plan for and can vary greatly from one reporting period to the next. This year the total expenditures for courts martial was $248,873.90.

Table 9-1: Summary of DMP's Operating Budget

FUND	INITIAL ALLOCATION	EXPENDITURES	BALANCE
Regular Force Operations & Maintenance	$147,000.00	$114, 749.12	$32,250.88
Civilian Salary & Wages	$395,532.00	$407, 470.43	($11,938.42)
Reserve Force Pay	$100,000.00	$73,662.50	$26,337.50
Reserve Force Operation and Maintenance	$5,000.00	$9,815.49	$(4,815.49)
TOTALS	**$647,532.00**	**$605,697.54**	**$41,834.46**

Figure 9-2: DMP's Operating Budget – 2014/15 to 2018/19



ANNEX A

Court Martial Statistics

ACCUSED	TYPE	OFFENCE	DESCRIPTION	DISPOSITION	SENTENCE	LOCATION (CM)	DATE	LANGUAGE
Maj Abbott	SCM	93 *NDA*	Behaved in a disgraceful manner	Guilty	$2,500 Fine and a severe reprimand	Asticou, QC	5 November 2018	English
MS Baycroft	GCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$200 Fine	Esquimalt, BC	13 June 2018	English
Capt Belanger	SCM	125 *NDA*	Offences in relation to documents	Stay of proceedings	$750 Fine	Kingston, ON	17 December 2018	French
		117(f) *NDA*	Miscellaneous offences	Guilty				
		91 *NDA*	False statement in respect of leave	Guilty				
OCdt Bellefon-taine	SCM	90 *NDA*	Absence without leave	Guilty	$800 Fine	St-Jean, QC	17 July 2018	English
		85 *NDA*	Insubordinate behaviour	Withdrawn				
		85 *NDA*	Insubordinate behaviour	Withdrawn				
		97 *NDA*	Drunkenness	Withdrawn				
MCpl Camire	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$400 Fine	Valcartier, QC	5 February 2019	French
MCpl Cribbie	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$1,550 Fine	Borden, ON	18 June 2018	English
LS Derival	SCM	90 *NDA*	Absence without leave	Not guilty	Reprimand and a $1,800 fine	Esquimalt, BC	9 Apr – 8 May 2018	English
		90 *NDA*	Absence without leave	Not guilty				
		125(a) *NDA*	Offences in relation to documents	Not guilty				
		130 *NDA* (368(1) *CCC*)	Use, trafficking or possession of forged document	Guilty				
MCpl Desrosiers	SCM	93 *NDA*	Behaved in a disgraceful manner	Guilty	$3,000 Fine and a severe reprimand	St-Jean, Qc	23 May 2018	French
		97 *NDA*	Drunkenness	Guilty				
MWO Durnford	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	Reprimand and a $1,000 fine	Halifax, NS	4 December 2018	English
Capt Duvall	SCM	93 *NDA*	Behaved in a disgraceful manner	Guilty	Severe reprimand and a $2,000 fine	Esquimalt, BC	28 September 2018	English

ANNEX A

Court Martial Statistics
(continuation)

ACCUSED	TYPE	OFFENCE	DESCRIPTION	DISPOSITION	SENTENCE	LOCATION (CM)	DATE	LANGUAGE
LS Edwards	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Not guilty	N/A	Halifax, NS	5-16 November 2018	English
OS Florian-Rodriguez	SCM	130 *NDA* (271 *CCC*)	Sexual assault	Not guilty	Severe reprimand and a $2,000 fine	Halifax, NS	9 April 2018	English
		93 *NDA*	Behaved in a disgraceful manner	Guilty				
		130 *NDA* (266 *CCC*)	Assault	Withdrawn				
		129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty				
		129 *NDA*	Conduct to the prejudice of good order and discipline	Not guilty				
MCpl Guernon	SCM	114 *NDA*	Theft	Guilty	$500 Fine	Valcartier, QC	26 June 2018	French
		129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty				
Sgt Guillemette-Jerome	SCM	90 *NDA*	Absence without leave	Guilty	$200 Fine	Valcartier, QC	7 November 2018	French
LCol Haire	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$500 Fine	Shilo, MB	10 April 2018	English
Cpl Handfield	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	Reprimand and $700 fine	Edmonton, AB	26 July 2018	French
		95 *NDA*	Abuse of subordinates	Not guilty				
		95 *NDA*	Abuse of subordinates	Not guilty				
		95 *NDA*	Abuse of subordinates	Not guilty				
		95 *NDA*	Abuse of subordinates	Not guilty				
		95 *NDA*	Abuse of subordinates	Not guilty				
		95 *NDA*	Abuse of subordinates	Not guilty				

ANNEX A

Court Martial Statistics (continuation)

ACCUSED	TYPE	OFFENCE	DESCRIPTION	DISPOSITION	SENTENCE	LOCATION (CM)	DATE	LANGUAGE
Sgt Hansen	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	Reprimand and $1,000 fine	Gagetown, NB	16-18 April 2018	English
LS Harding	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$2,000 Fine	Halifax, NS	5 November 2018	English
LS Honeyman	GCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$250 Fine	Esquimalt, BC	10-12 December 2018	English
MBdr Hosford	SCM	129 *NDA*	Neglect to the prejudice of good order and discipline	Not guilty	$200 Fine	Gagetown, NB	23 July 2018	English
		129 *NDA*	Conduct to the prejudice of good order and discipline	Not guilty				
		87(d) *NDA*	Broke out of barracks	Stay of proceedings				
		90 *NDA*	Absence without leave	Guilty				
LCol Jonasson	SCM	95 *NDA*	Abuse of subordinates	Not guilty	N/A	Asticou, QC	4-8 February 2019	English
		97 *NDA*	Drunkenness	Not guilty				
Maj Krajaefski	SCM	93 *NDA*	Behaved in a disgraceful manner	Not Guilty	N/A	Asticou, QC	18-21 March 2019	English
		129 *NDA*	Conduct to the prejudice of good order and discipline	Not Guilty				
MCpl Lamontagne	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$200 Fine	Borden, ON	15 January 2019	French
		85 *NDA*	Insubordinate behaviour	Stay of proceedings				
Sgt Levangie	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$200 Fine	Halifax, NS	4 December 2018	English
MCpl Lewis	SCM	83(a) *NDA*	Insubordination	Not guilty	N/A	Winnipeg, MB	19-22 November 2018	English
		86(b) *NDA*	Quarrels and disturbances	Not guilty				
Cpl (ret'd) McEwan	SCM	90 *NDA*	Absence without leave	Withdrawn	Imprisonment for a period of five days	Petawawa, ON	16 July – 30 November 2018	English
		118.1 *NDA*	Failure to appear or attend	Guilty				

ANNEX A

Court Martial Statistics
(continuation)

ACCUSED	TYPE	OFFENCE	DESCRIPTION	DISPOSITION	SENTENCE	LOCATION (CM)	DATE	LANGUAGE
Pte MacDonald	SCM	130 *NDA* (348(1)(b) *CCC*)	Break and enter	Withdrawn	Severe reprimand and a $2,000 fine	Gagetown, NB	30 April – 1 August 2018	English
		130 *NDA* (334 *CCC*)	Theft	Withdrawn				
		114 *NDA*	Stealing	Guilty				
		116(a) *NDA*	Wilfully damaged public property	Guilty				
Sgt MacIntyre	GCM	130 *NDA* (271 *CCC*)	Sexual assault	Not guilty	N/A	Halifax, NS	18 – 27 June 2018	English
Capt Mileusnic	SCM	109 *NDA*	Low flying	Guilty	$2,000 Fine	Cold Lake, AB	21 January	English
		124 *NDA*	Negligent performance of duties	Not guilty				
		127 *NDA*	Injurious or destructive handling of dangerous substances	Not guilty				
LS Mitchell	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	Severe reprimand a $2,500 fine	Saint-John, NB	6 December 2018	English
		97 *NDA*	Drunkenness	Guilty				
Bdr Moulton	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Withdrawn	$1,200 Fine	Petawawa, ON	27 November 2018	English
		97 *NDA*	Drunkenness	Guilty				
LS Murphy	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$150 Fine	Esquimalt	3 October 2018	English
		130 *NDA* (351 *CCC*)	Possession of a break-in instrument	Withdrawn				
Capt Nordstrom	SCM	130 *NDA* (271 *CCC*)	Sexual assault	Not guilty	N/A	Edmonton, AB	4 June – 4 July 2018	English
		130 *NDA* (266 *CCC*)	Assault	Not guilty				
MCpl Paul	GCM	130 *NDA* (271 *CCC*)	Sexual Assault	Withdrawn	Reduction in rank to the rank of pte	Shilo, MB	24 July 2018	English
		93 *NDA*	Behaved in a disgraceful manner	Guilty				
		93 *NDA*	Behaved in a disgraceful manner	Withdrawn				

ANNEX A

Court Martial Statistics (continuation)

ACCUSED	TYPE	OFFENCE	DESCRIPTION	DISPOSITION	SENTENCE	LOCATION (CM)	DATE	LANGUAGE
LCol Popowych	SCM	130 *NDA* (271 *CCC*)	Sexual assault	Withdrawn	N/A	Asticou, QC	22 October 2018	English
MWO Reyes	SCM	93 *NDA*	Behaved in a disgraceful manner	Guilty	Imprisonment for a period of five months and a reduction in rank to the rank of Sgt	Toronto, ON	2-3 October 2018	English
LS Richard	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$3,500 Fine	Halifax, NS	19-22 February 2019	English
Sgt Roodzant	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$2,000 Fine	Petawawa, ON	27 November 2018	English
		129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty				
Avr Rutherford	SCM	93 *NDA*	Behaved in a disgraceful manner	Guilty	Dismissal from Her Majesty's service and a severe reprimand	St-Jean, QC	17 July 2018	English
		130 *NDA* (266 *CCC*)	Assault	Guilty				
		93 *NDA*	Behaved in a disgraceful manner	Guilty				
		130 *NDA* (266 *CCC*)	Assault	Guilty				
		130 *NDA* (266 *CCC*)	Assault	Guilty				
		130 *NDA* (266 *CCC*)	Assault	Guilty				
Lt(N) Ryan	SCM	130 *NDA* (271 *CCC*)	Sexual assault	Not guilty	Severe reprimand and $2,500 fine	Kingston, ON	8-16 May 2018	English
		130 *NDA* (264 *CCC*)	Criminal harassment	Guilty				

ANNEX A

Court Martial Statistics
(continuation)

ACCUSED	TYPE	OFFENCE	DESCRIPTION	DISPOSITION	SENTENCE	LOCATION (CM)	DATE	LAN GUA GE
Sgt Scott	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	Severe reprimand	Borden, ON	10 September – 21 November 2018	English
		129 *NDA*	Conduct to the prejudice of good order and discipline	Not guilty				
		129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty				
		129 *NDA*	Conduct to the prejudice of good order and discipline	Not guilty				
		129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty				
Cpl Sloan	SCM	130 *NDA* (4(1) CDSA)	Possession of substance	Not guilty	$200 Fine	Greenwood NS	29 May 2018	English
		129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty				
		129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty				
Cpl Spriggs	GCM	93 *NDA*	Behaved in a disgraceful manner	Proceedings terminated	N/A	Asticou, Cc	28-31 January 2019	English
Cpl St. James	SCM	97 *NDA*	Drunkenness	Guilty	$800 Fine	Montreal, QC	14 January 2019	English

ANNEX A

Court Martial Statistics (continuation)

ACCUSED	TYPE	OFFENCE	DESCRIPTION	DISPOSITION	SENTENCE	LOCATION (CM)	DATE	LANGUAGE
LS Stow	SCM	130 *NDA* (5(1) CDSA)	Trafficking	Guilty	Imprisonment for a period of 10 months	Halifax, NS	28 August 2018	English
		130 *NDA* (5(1) CDSA)	Trafficking	Withdrawn				
		130 *NDA* (5(2) CDSA)	Possession for the purpose of trafficking	Withdrawn				
		130 *NDA* (4(1) CDSA)	Possession of a substance	Withdrawn				
		130 *NDA* (129(a) *CCC*)	Resisting a peace officer	Withdrawn				
		130 *NDA* (4(1) CDSA)	Possession of a substance	Withdrawn				
Pte Taylor	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Not guilty	$2,000 Fine	St-Jean, QC	9-15 October 2018	English
		129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty				
		129 *NDA*	Conduct to the prejudice of good order and discipline	Not guilty				
		129 *NDA*	Conduct to the prejudice of good order and discipline	Not guilty				
Cpl Tremblay	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$3,500 Fine and a severe reprimand	Bagotville, QC	6 November 2018	French
LS Whelan	GCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	Dismissal from Her Majesty's Service	Esquimalt, QC	13 November – 20 December 2018	English
2Lt White	SCM	95 *NDA*	Abuse of subordinates	Withdrawn	$850 Fine	Petawawa, ON	19 December 2018	English
		97 *NDA*	Drunkenness	Guilty				
Cpl Worthman	SCM	130 *NDA* (266 *CCC*)	Assault	Guilty	10-day detention (suspended)	Trenton, ON	6 September 2018	English
		97 *NDA*	Drunkenness	Guilty				

ANNEX A

Court Martial Statistics
(continuation)

ACCUSED	TYPE	OFFENCE	DESCRIPTION	DISPOSITION	SENTENCE	LOCATION (CM)	DATE	LAN GUA GE
NCdt Yergeau	SCM	129 *NDA*	Conduct to the prejudice of good order and discipline	Guilty	$1,000 Fine	Esquimalt, BC	20 March 2019	French

ANNEX B

Appeals to the Court Martial Appeal Court of Canada

CMAC#	APPELLANT	RESPONDENT	TYPE OF APPEAL	RESULT
588	Cpl Beaudry	Her Majesty the Queen	Legality of Finding	Appeal allowed and conviction quashed
590	Ex-MCpl Edmunds	Her Majesty the Queen	Legality of Finding	Appeal allowed and convictions quashed
591	Her Majesty the Queen	Cpl Cadieux	Legality of Finding	The appeal is allowed, both aquittals are quashed and a new trial is ordered for each charge
592	Her Majesty the Queen	Capt Bannister	Legality of Finding	Waiting for Decision
594	Her Majesty the Queen	Sgt MacIntyre	Legality of Finding	Waiting for Decision
595	Her Majesty the Queen	LS Edwards	Legality of Finding	Waiting for Decision
596	MCpl Stillman	Her Majesty the Queen	Application for Release from Detention or Imprisonment Pending Appeal from Court Martial	Order for release rendered
597	Her Majesty the Queen	Cpl Spriggs	Legality of Finding	Abandoned by the appellant

ANNEX C

Appeals to the Supreme Court of Canada

SCC #	APPELANT	RESPONDENT	TYPE OF APPEAL	RESULT
37701	MCpl Stillman et al	Her Majesty the Queen	Legality of Finding (appeal by leave)	Judgment reserved
37972	WO Gagnon	Her Majesty the Queen	Legality of Finding (appeal as of right)	Appeal Dismissed
38308	Her Majesty the Queen	Cpl Beaudry	Legality of Finding (appeal as of right)	Judgment reserved

ANNEX D

Custody Review Hearings

ACCUSED	DATE	OFFENCE	DESCRIPTION	DECISION
Avr Cline	29-Aug-18	90 *NDA*	Absence without leave	Released on conditions
		90 *NDA*	Absence without leave	
		90 *NDA*	Absence without leave	
		90 *NDA*	Absence without leave	
		101.1 *NDA*	Failed to comply with conditions	
		101.1 *NDA*	Failed to comply with conditions	
LS Whelan #1	30-Oct-18	129 *NDA*	Conduct to the prejudice of good order and discipline	Released on conditions
		101.1 *NDA*	Failed to comply with conditions	
LS Whelan #2	13-Nov-18	101.1 *NDA*	Failed to comply with conditions	Released on conditions
Pte Truelove	26-Nov-18	90 *NDA*	Absence without leave	Released on conditions

ANNEX D:

Annual Report 2018-20189 Director of Defence Counsel Services

Défense nationale

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

National Defence

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

17 June 2019

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

Commodore Bernatchez,

Pursuant to article 101.11(4) of the Queen's Regulations and Orders for the Canadian Forces, enclosed please find the annual report of the Director of Defence Counsel Services. The report covers the period from 1 April 2018 through 31 March 2019.

Yours sincerely,

D.K. Fullerton
Colonel
Director of Defence Counsel Services

Canada

National Defence Défense nationale

ANNUAL REPORT 2018- 2019

Director
Defence
Counsel
Services

OVERVIEW

1. This report covers the period from 1 April 2018 to 31 March 2019. It is prepared in accordance with article 101.11(4) of the Queen's Regulations and Orders for the Canadian Armed Forces, which sets out the legal services prescribed to be performed by the Director of Defence Counsel Services and requires that he report annually to the Judge Advocate General on the provision of legal services and the performance of other duties undertaken in furtherance of the Defence Counsel Services mandate. The director during this period was Colonel Fullerton.

ROLE OF DEFENCE COUNSEL SERVICES

2. Under section 249.17 of the *National Defence Act (NDA)* individuals, whether civilian or military, who are "liable to be charged, dealt with and tried under the Code of Service Discipline" have the "right to be represented in the circumstances and in the manner prescribed in regulations." Defence Counsel Services is the organization that is responsible for assisting individuals exercise these rights.

3. The Director of Defence Counsel Services is, under section 249.18 of the *National Defence Act*, appointed by the Minister of National Defence. Section 249.2 provides that the director acts under the "general supervision of the Judge Advocate General" and makes provision for the JAG to exercise this role through "general instructions or guidelines in writing in respect of Defence Counsel Services." Subsection 249.2(3) places on the director the responsibility to ensure that general instructions or guidelines issued under this section are made available to the public.

4. On 25 March 2019, the Judge Advocate General published a document establishing a "FIVE (5) YEAR POSTING RULE". In this document, she "directed that legal officers will be posted to CMPS or DCS for a minimum of five years, subject only to the availability of a vacant position on the establishment at the appropriate rank and to the Director of Military Prosecutions' or the Director of Defence Counsel Services' assessment of their respective requirements". Pursuant to subsection 249.2(3) of the *National Defence Act*, a copy of the complete document is published as an annex to this report.

5. The director "provides, and supervises and directs" the provision of the legal services set out in Queen's Regulations and Orders. These services may be divided into the categories of "legal advice" where advice of a more summary nature is provided, often delivered as a result of calls to the duty counsel line, and "legal counsel" which typically involves a more sustained solicitor-client relationship with assigned counsel and representation of an accused before a Military Judge, a Court Martial, the Court Martial Appeal Court or the Supreme Court of Canada. Historically and occasionally, counsel have also appeared before provincial Mental Health Review Boards and the Federal Court.

6. Legal advice is provided in situations where:

   a) members are the subject of investigations under the Code of Service Discipline, summary investigations, or boards of inquiry, often at the time when they are being asked to make a statement or otherwise conscripted against themselves;

   b) members are arrested or detained, especially in the 48 hour period within which the custody review officer must make a decision as to the individual's release from custody;

   c) members are considering electing summary trial or waiving their right to court martial;

   d) members are seeking advice of a general nature in preparation for a hearing by summary trial; and

   e) members are considering an Application before a Commanding Officer to vary an intermittent sentence or the conditions imposed by a summary trial.

   f) members are considering or preparing a Request for Review of the findings or punishment awarded to them at summary trial.

7. Legal representation by assigned counsel is provided in situations where:

   a) custody review officers decline to release arrested individuals, such that a pre-trial custody hearing before a military judge is required;

   b) members request or require a judicial review of release conditions imposed by a custody review officer;

   c) there are reasonable grounds to believe that an accused is unfit to stand trial;

   d) applications to refer charges to a court martial have been made against individuals;

   e) members apply to a Military Judge to vary an intermittent sentence or the conditions imposed by a court martial or to a judge of the Court Martial Appeal Court in the case of conditions imposed by that Court;

   f) members are appealing to the Court Martial Appeal Court or to the Supreme Court of Canada, or have made an application for leave to appeal and the Appeal Committee, established in Queen's Regulations and Orders, has approved representation at public expense; and

g) in appeals by the Minister of National Defence to the Court Martial Appeal Court or the Supreme Court of Canada, in cases where members wish to be represented by Defence Counsel Services.

8. The statutory duties and functions of Defence Counsel Services are exercised in a manner consistent with our constitutional and professional responsibility to give precedence to the interests of clients. Where demands for legal services fall outside the Defence Counsel Services mandate the members are advised to seek civilian counsel at their own expense.

9. Defence Counsel Services does not normally have the mandate to represent accused at summary trial. The military justice system relies upon the unit legal advisor, generally a Deputy Judge Advocate, to provide advice to the chain of command on the propriety of charges and the conduct and legality of the summary trial process, all with a view to ensuring that the accused is treated in accordance with the rule of law.

THE ORGANIZATION, ADMINISTRATION AND PERSONNEL OF DEFENCE COUNSEL SERVICES

10. Throughout the reporting period, the organization has been situated in the Asticou Centre in Gatineau, Quebec. The office has consisted of the Director, the Deputy Director, an appellate counsel, and five regular force trial counsel at the rank of major/lieutenant-commander. Throughout this period there were six reserve force legal officers in practice at various locations in Canada who assisted on matters part-time.

Administrative Support

11. Administrative support was provided by two clerical personnel occupying positions classified at the levels of CR-3 and AS-1, as well as a paralegal at the level of EC-2 providing legal research services and administrative support for courts martial and appeals. Our CR-3 position has recently been reclassified to CR-4 and our EC-2 position is presently under review. These changes should result in greater alignment with similar positions in the Directorate of Military Prosecutions and more appropriately reflect the work performed.

Regular Force Resources

12. Defence Counsel Services are part of, and resourced through, the Office of the Judge Advocate General. In our recent business plan, we requested two additional positions, one at the rank of lieutenant-colonel/commander and the other at the rank of major/lieutenant-commander to assist in the demands of this office. It is our understanding that those positions will not be established at this time.

Reserve Counsel

13. As indicated, at the commencement of the year there were a total of six reserve force defence counsel within the organization. During the year we enrolled one trial counsel at the rank of captain.

14. Presently, our reserve force counsel are located throughout Canada; with two in Quebec, three in Ontario, and one in British Columbia. They are an important component of our organization. They have made, and continue to make, a significant contribution to the Defence Counsel Services mandate.

Civilian Counsel

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

Funding

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

FUND		EXPENDITURE
C125	Contracting (Counsel, Experts, and Services)	$156,384.20
L101	Operating Expenditures	$161,097.99
L111	Civilian Pay and Allowances	$173,424.81
L127	Primary Res Pay, Allowance, Ops, Maintenance	$234,052.80
TOTAL		**$724,959.80**

17. This amount is slightly less than our projected business plan of $774,900.00 and represents stable funding over the past few years.

18. Within Defence Counsel Services there are three methods of service delivery; regular force counsel, reserve force counsel and, pursuant to subsections 249.21(2) and (3), of the *National Defence Act*, contracted counsel. Regular force counsel are the most cost effective means of service delivery and do not require the expenditure of budgeted funds. The use of reserve force counsel and contracted lawyers come at a cost.

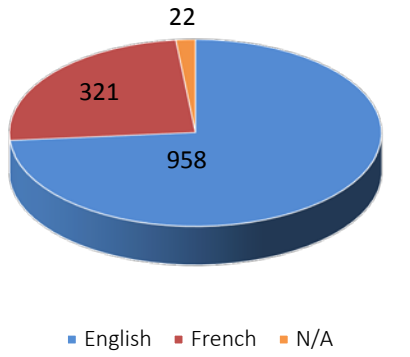
SERVICES, ACTIVITIES AND TRAINING

Duty Counsel Services

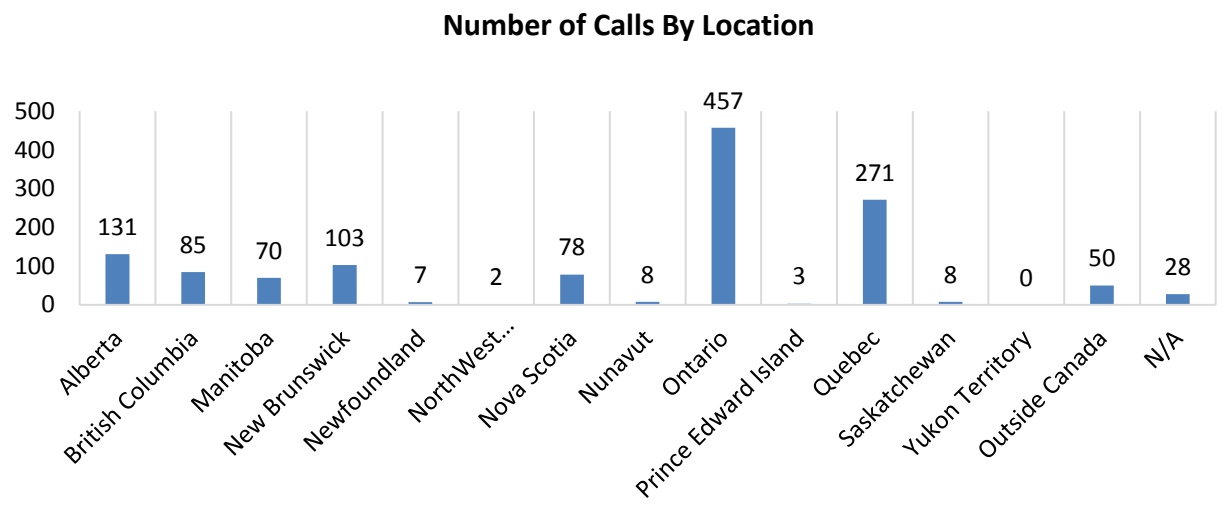
19. Legal advice is available twenty-four hours a day, seven days a week, to members who are under investigation or in custody. Legal advice is typically provided through our duty counsel line, a toll-free number which is distributed throughout the Canadian Armed Forces and is available on our website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

20. During the reporting period, Defence Counsel Services recorded 1,301 calls on the duty counsel line. Services were provided in both official languages. The language of service was divided generally between English for 958 calls and French for 321 calls as depicted in the chart below. In 22 cases, the language of call was not recorded.

Duty Service Calls - by Language



21. The calls ranged in duration but, on average, lasted for approximately 15 minutes. Calls originated from every Canadian province and territory, as well as various locations outside of Canada from members serving abroad. The number of calls by location is illustrated in the graph below.

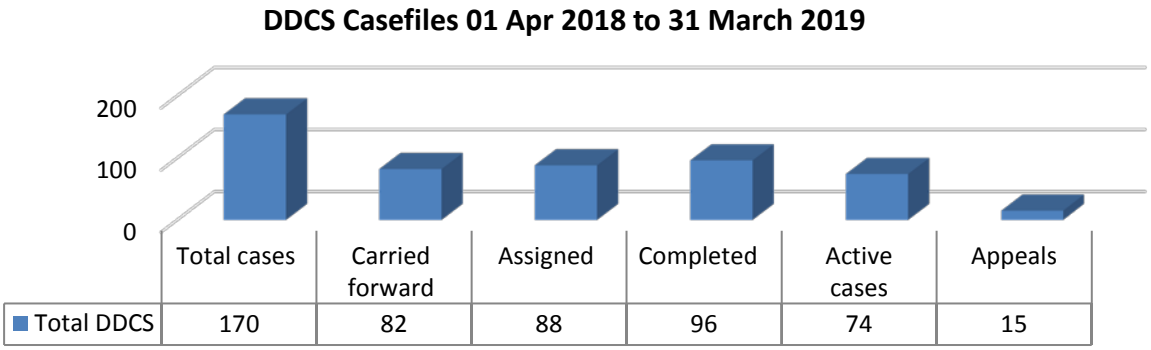


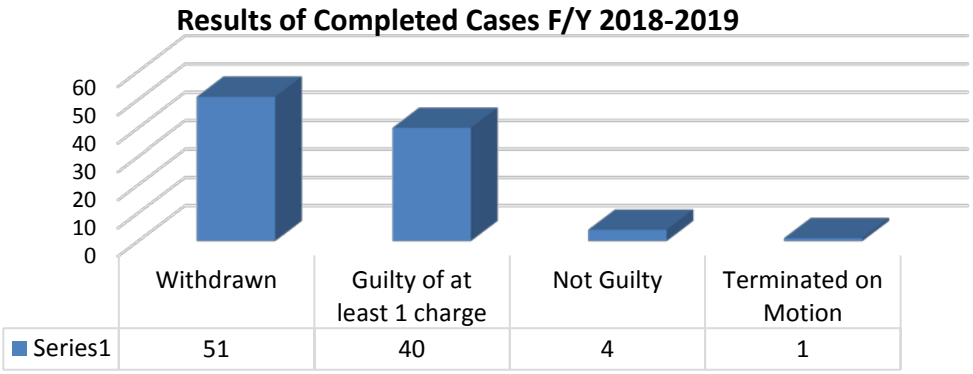
Court Martial Services

22. When facing court martial, accused persons have the right to be represented by lawyers from Defence Counsel Services at public expense, they may retain legal counsel at their own expense, or they may choose not to be represented by counsel.

23. During this reporting period approximately 58% of those who requested representation by Defence Counsel Services were, as shown below, able to move forward without conviction.

24. Defence Counsel Services provided legal representation to accused persons in 170 files referred for prosecution. This number includes 82 cases carried over from the previous reporting year. It also includes 88 new cases assigned to defence counsel during this reporting period. Of these 170 client files, 96 were completed. Of these 96, 51 members had their charges withdrawn after the assignment and involvement of counsel for the defence. Of the remaining 45 cases involving counsel appointed by the Director, in four cases the accused was found not guilty of all charges, one case was terminated by a Military Judge, and in 40 cases the accused was either found guilty or plead guilty to at least one charge.





Appellate Services

25. Ten appeals involving 15 clients were touched on at various points during this reporting period, including three appeals to the Supreme Court of Canada. One appeal to the Supreme Court was filed by the Minister and two appeals were filed on behalf of the accused. Of the appeals to the Court Martial Appeal Court, five were filed by the Minister and two were filed on behalf of the accused.

26. Where a member is the appellant and is requesting representation at public expense by Defence Counsel Services, he or she is required to make an application to the Appeal Committee, established under *Queen's Regulations and Orders*, who assess whether the appeal has merit. Members who are responding to appeals by the Minister receive representation by Defence Counsel Services as a matter of right.

Supreme Court of Canada

27. On 19 September 2018, in the case of *R. v. Beaudry*, the Court Martial Appeal Court declared s. 130(1)(a) of the *National Defence Act* invalid for any civil offence committed in Canada and punishable by five years of imprisonment or more. The Court found that this provision violated members' constitutional right to Trial by Jury.

28. The Minister filed a motion with the Supreme Court of Canada to suspend this declaration of invalidity. On 14 January 2019, that motion was denied.

29. On 26 March 2019, the Supreme Court heard the *Beaudry* appeal, together with *Stillman et al.* addressing the same issue, and reserved judgment.

30. The SCC also heard the appeal of WO Gagnon, an appeal as of right, on the issue of whether the defence of honest but mistaken belief in consent should have been left with the panel. The SCC dismissed the appeal.

Court Martial Appeal Court

31. In *R. v. Edmunds*, the appellant had been found guilty of four counts of fraud. The member appealed on the basis that the convictions were void given that the charge-layer did not have reasonable grounds to believe the offences had been committed at the time that he signed the Record of Disciplinary Proceedings. The appeal was allowed and the convictions were quashed.

32. In *R. v. Cadieux*, the Minister appealed the member's acquittal on charges of sexual assault and drunkenness. The appeal was allowed and a new trial was ordered.

33. In *R. v. Bannister*, the Minister appealed the member's acquittal on charges of disgraceful conduct and conduct to the prejudice of good order and discipline in relation to sexualized comments. The Minister contended there were errors in law relating to the interpretation of the elements of both offences. A decision was pending at the end of the reporting period.

34. In *R. v. Edwards*, the Minister appealed the member's acquittal on the charge of conduct to the prejudice of good order and discipline relating to drug use. The Minister took the position that there was no strict requirement to prove the elements of time and place of the commission of the offence. At the end of the reporting period, the appeal was awaiting hearing.

35. In *R. v. MacIntyre*, the Minister appealed the member's acquittal on charges of sexual assault. The appeal has been heard and judgment is under reserve.

36. In *R. v. Spriggs* the Minister appealed the Military Judge's decision to terminate the proceedings on the ground of an abuse of process. The appeal was subsequently withdrawn.

Professional Development

37. The Federation of Law Societies' National Criminal Law Program remains the primary source of training in criminal law for counsel with Defence Counsel Services. In July 2018, eight regular force counsel and three reserve force counsel attended this program, which was held in St-John's, Newfoundland. Additionally, in February 2019, most regular and reserve force counsel attended our annual one-day office continuing legal education program in Gatineau, Quebec, which dealt with a variety of issues relevant to our mandate. Certain other courses sponsored by the Office of the JAG and the Canadian Bar Association were attended by individual counsel in order to meet their specific professional needs.

38. DDCS appellate counsel, Cdr Mark Létourneau, coordinated the development and teaching of a military law course at the University of Ottawa Law School (common law section).

This intensive three-week course in Military Criminal Law was offered in collaboration with other divisions of the Office of the Judge-Advocate General. As a highlight of this course, Commodore Geneviève Bernatchez, Judge-Advocate General, as well as Chief Justice Richard Bell of the Court Martial Appeal Court and Colonel Richard Garon, Commander 35th Canadian Brigade Group, met with students and shared their insights on the Canadian Military Justice System.

CONCLUSION

39. It has been a particularly challenging year for those within Defence Counsel Services as multiple long-standing cases before the Supreme Court of Canada came to hearing and the lawyers and clients at the trial level navigated the effects of this litigation. As always, the priority has been the provision of outstanding legal services to qualifying members of the military community who request our assistance. It is a privilege to assist these members. They are often facing a very difficult period within their lives and careers. Many continue with their careers and their contribution as dedicated and reliable members of the military community. For others, their charges are part of their transition from service to civilian life.

D.K. Fullerton
Colonel
Director of Defence Counsel Services

17 June 2019

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25 March 2019

Chief of Staff – Judge Advocate General

FIVE (5) YEAR POSTING RULE

As you know, on release of the Auditor General's report on the Administration of Justice in the Canadian Armed Forces in Spring 2018, I directed that most legal officers assigned to the Canadian Military Prosecution Service (CMPS) and Defence Counsel Services (DCS) were to remain in their positions for the 2018/2019 posting year.

Following that immediate response, and in advance of the 2019/2020 posting season, I directed that legal officers will be posted to CMPS or DCS for a minimum of five years, subject only to the availability of a vacant position on the establishment at the appropriate rank and to the Director of Military Prosecutions' or the Director of Defence Counsel Services' assessment of their respective operational requirements.

I confirm that this continues to be my direction to you, as the Chief of Staff for the Office of the JAG.

It is possible that this direction will change once the analysis of the Legal Officer occupation is completed. It is my hope that this analysis will provide the data to identify the appropriate approach to ensure the necessary litigation expertise, which could result in a different approach to postings within the Office of the JAG.

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c.c. Deputy Judge Advocate General – Military Justice
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