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JUDGE ADVOCATE GENERAL

# JAG ANNUAL REPORT 2022-2023





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# COMMUNIQUÉ

I am pleased to deliver my first annual report to the Minister of National Defence on the administration of military justice since my appointment as Judge Advocate General of the Canadian Armed Forces on 28 June 2023. This report covers the period from 1 April 2022 to 31 March 2023, during which time I served as Acting Judge Advocate General.

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

The theme of last year's Annual Report focused on the journey of the military justice system to improve the discipline, efficiency, and morale of the Canadian Armed Forces. Last year's report traced the system's ongoing evolution as it adapted to changes in Canada's social and legal norms to better meet the Canadian Armed Forces' unique needs in a fundamentally just and equitable manner. This year's report will focus on one significant milestone on that journey: the implementation of provisions of Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*.<sup>2</sup> While much has been written about one aspect of this Act, *the Declaration of Victims' Rights*, this report will focus on the foundation of the military justice system, the Canadian Armed Forces' the new summary hearing system.

## The New Summary Hearing System

As of 20 June 2022, the new summary hearing system replaced the previous system of summary trials. The new system is designed to enhance the responsiveness of the military justice system at the unit level, providing a more streamlined, non-penal, disciplinary process to deal with misconduct by Canadian Armed Forces members. This new system allows commanding officers and their delegates to address minor breaches of military discipline swiftly and fairly, holding to account those responsible while still adhering to fundamental principles of fairness.

Implementing the new summary hearing system represented a comprehensive redesign of the military justice system at the unit level. A change of this magnitude required work and input from all Defence Team partners. For several years, the Office of the Judge Advocate General (Office of the JAG) has been part of a whole of government effort to bring this about, consulting with military justice stakeholders from across the Canadian Armed Forces and the Department of National Defence, preparing policy and training materials and working with the Department of Justice to draft legislative and regulatory amendments.

Like several recent changes to the military justice system, including the *Declaration of Victim's Rights*, the legal foundations of the summary hearing system were laid by Bill C-77. However, the breadth of the changes required more than just statutory amendments; it also required the most extensive amendments to the *Queen's Regulations and Orders for the Canadian Forces*<sup>3</sup> in over five decades before the new process could be effectively implemented. The amendments came into force on 20 June 2022, and the first summary hearing was held on 11 July 2022.

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

<sup>2</sup> Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, 1<sup>st</sup> Sess, 42nd Parl, 2019 (assented to 21 June 2019).

<sup>3</sup> Canada, Department of National Defence, *Queen's Regulations and Orders for the Canadian Forces* (Ottawa: DND, 20 June 22) [*Queen's Regulations and Orders for the Canadian Forces*].

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The previous summary trial system was a crucial piece of the Canadian military justice system since the coming into force of the *National Defence Act* in 1950. Designed to be held wherever a unit was located, whether in garrison, in an exercise area or deployed abroad, summary trials made up more than 80% of all service tribunals during a typical reporting period.<sup>4</sup> They were an invaluable tool for the chain of command, serving as an efficient criminal process to address relatively minor service offences while also providing the accused with robust procedural safeguards. The summary trial system was instrumental in maintaining discipline in the Canadian Armed Forces across the full spectrum of training and operations throughout the cold war era and on into the critical United Nations and NATO international peace and security missions that followed.

However, the military justice system must keep pace with evolving legal and social norms. To better align with contemporary Canadian values, a new, non-penal administrative tribunal was designed with a view to meeting the recognized needs of military justice stakeholders while offering the chain of command flexible and efficient options to deal with minor breaches of discipline. In the result, more serious misconduct continues to be addressed through the prosecution of service offences in courts martial, but less serious matters can be addressed swiftly in a manner that meets the distinct objectives of the military justice system outside of the penal system.

The change from criminal to administrative law underpinnings is reflected in many aspects of the new hearing process. To begin with, service offences have been removed from the jurisdiction of summary hearings and replaced exclusively with service infractions. Service infractions cover a variety of acts, omissions, or conduct that breach Canadian Armed Forces standards and adversely affect unit morale, efficiency, and discipline. These include such things as the unauthorized use of public property, failing to disclose a conflict of interest, handling a weapon in a dangerous manner, and being impaired while on duty.

The standard of proof has also been modified. Charges heard in the summary hearing system are determined on a balance of probabilities, typical of administrative disciplinary proceedings in other professions, rather than the criminal standard of beyond a reasonable doubt. Finally, a person found to have committed a service infraction will be subject to a sanction rather than a punishment, which can range from minor sanctions like extra work and drill to more serious sanctions like a reduction in rank for the most aggravated of infractions.

While the changes have been extensive, certain principles remain the same, including the centrality of the chain of command in the process. In most cases, it is commanding officers or delegated officers who conduct summary hearings. In addition, the new process maintains safeguards for those charged with service infractions, grounded in the principles of procedural fairness and natural justice. These include access to an assisting officer if desired, the right to make representations, and the right to be heard by an impartial decision-maker.

## The Superintendence Enhancement and Assessment Project

The establishment of the summary hearing process has been accompanied by ongoing work on the part of the Office of the JAG to enhance transparency and accountability in the military justice system by improving monitoring, statistical analysis, and the use of technology. This work will culminate at the unit level with the Justice Administration Information Management System under the Superintendence Enhancement and Assessment Project that will include and incorporate the Military Justice Performance Monitoring Framework and the Military Justice System Time Standards initiatives.

The aim of these efforts is to maintain an awareness of the efficiency and effectiveness of the military justice system with a view to allowing for improved statistical and evidence-based decision-making. In addition, these

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<sup>4</sup> For example, in the 2021-2022 JAG Annual Report, summary trials accounted for 81% of the reported service tribunals (Judge Advocate General, JAG Annual Report 2021-2022 (The Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2021 to 31 March 2022)) (Ottawa: Office of the Judge Advocate General, 2023) at annexes A and B.

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new initiatives will also improve the administration of military justice at the unit level by providing unit authorities with a complete picture of disciplinary proceedings within their unit, thereby better engaging them in the disciplinary process.

## *The Declaration of Victims' Rights*

The coming into force of Bill C-77 also transformed the military justice system by enacting the *Declaration of Victims' Rights* within the *National Defence Act*. Aligning the military justice system with its civilian counterpart, the *Declaration* statutorily enshrines support mechanisms for victims of crime and provides them with a number of legal rights, including enhanced rights to access information, the right to participate in decision making, the right to protection, and the right to restitution. The Office of the JAG was instrumental in supporting the development of this initiative and continues to support its implementation to ensure victims and survivors of service offences are able to effectively participate within the administration of military justice.

## Conclusion

The implementation of the summary hearing system marks an important milestone on the military justice system's journey. In their role superintending the administration of military justice, the Judge Advocate General remains committed to supporting the Government of Canada, the Department of National Defence, and the Canadian Armed Forces in the continuing evolution of the system, working to improve its fairness, efficiency, and responsiveness to the needs of military discipline. As they have in the past, the Judge Advocate General's efforts towards this end will be guided by the overlapping imperatives of the rule of law, the rights of all participants and the unique requirements of the Canadian Armed Forces.

*Fiat Justitia*

Rob Holman, CD  
Brigadier-General

# 1 THE OFFICE OF THE JUDGE ADVOCATE GENERAL

## The Judge Advocate General

In accordance with section 9 of the *National Defence Act*,<sup>5</sup> the Judge Advocate General is appointed by the Governor in Council for a term not exceeding four years and acts as legal advisor to the Governor General, the Minister of National Defence, the Department of National Defence, and the Canadian Armed Forces in matters relating to military law. Pursuant to section 10 of the *National Defence Act*,<sup>6</sup> the Minister of National Defence may authorize any other officer so qualified to act as the Judge Advocate General. 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*.<sup>7</sup> The Judge Advocate General is responsible to the Minister of National Defence in the performance of their duties and functions.



## Command of the Office of the Judge Advocate General

The Judge Advocate General has command over all officers and non-commissioned members posted to a position established within the Office of the JAG. The duties of a legal officer posted to such a position are determined by, or under the authority of, the Judge Advocate General and, in respect of the performance of those duties, a legal officer is not subject to the command of an officer who is not a legal officer.<sup>8</sup> This is to ensure that legal officers provide independent legal services. All qualified legal officers serving in the Office of the JAG are members in good standing at the bar of a province or territory in Canada.

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<sup>5</sup> *National Defence Act*, *supra* note 1.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 3, art 4.081(4).

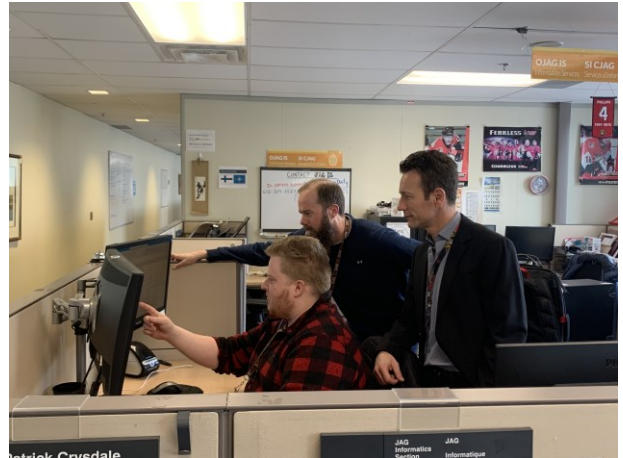
## Office of the Judge Advocate General

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

The Office of the JAG's mission is to deliver client focused, timely, options-oriented, and operationally-driven legal services in support of Government of Canada, Department of National Defence, and Canadian Armed Forces priorities and objectives.

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

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



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

a renewable term of four years, the Director of Military Prosecutions acts independently from Canadian Armed Forces and Department of National Defence authorities when exercising their prosecutorial powers, duties and functions.

The Director of Military Prosecutions and the Director of Defence Counsel Services submit annual reports to the Judge Advocate General. Their reports for the 2022/23 reporting period are available online here:

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



# 2 THE CANADIAN MILITARY JUSTICE SYSTEM

## The Structure of Canada's Military Justice System

Canada's military justice system operates in parallel with its civilian criminal justice counterpart and forms an integral part of the Canadian legal mosaic. It shares many of the same underlying principles as the civilian system and it is subject to the same constitutional framework, including the *Canadian Charter of Rights and Freedoms*.<sup>9</sup> On several occasions, the Supreme Court of Canada has affirmed the requirement for a separate, distinct military justice system to meet the specific needs of the Canadian Armed Forces<sup>10</sup> and has recognized the military justice system as a "full partner in administering justice alongside the civilian justice system."<sup>11</sup>



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.

## The Code of Service Discipline

The Code of Service Discipline, contained in Part III of the *National Defence Act*,<sup>12</sup> is "[t]he foundation of Canada's military justice system".<sup>13</sup> It is "an essential ingredient of service life"<sup>14</sup> that "defines the standard of conduct to which military personnel and certain civilians are subject and provides for a set of military tribunals to discipline breaches of that standard."<sup>15</sup> The *National Defence Act* describes the Code's purpose as the maintenance of the discipline, efficiency, and morale of the Canadian Armed Forces.<sup>16</sup> It has also been recognized as serving a public

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<sup>9</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>10</sup> *R v Généreux*, [1992] 1 SCR 259 [*Généreux*]; *MacKay v R*, [1980] 2 SCR 370 [*MacKay*]; *R v Moriarty*, 2015 SCC 55.

<sup>11</sup> *R v Stillman*, 2019 SCC 40 at para 20 [*Stillman*].

<sup>12</sup> *National Defence Act*, *supra* note 1.

<sup>13</sup> *Stillman*, *supra* note 11 at para 55.

<sup>14</sup> *MacKay*, *supra* note 10 at 398.

<sup>15</sup> *Généreux*, *supra* note 10 at 297.

<sup>16</sup> *National Defence Act*, *supra* note 1, s 55.

function “by punishing specific conduct which threatens public order and welfare.”<sup>17</sup> Additionally, the Code sets out the procedures and organization of service tribunals, the jurisdiction of various actors in the military justice system, the scale of punishment, and the post-trial review and appeal mechanisms.

The term “service offence” is defined in the *National Defence Act* as “an offence under this Act, the *Criminal Code*, or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline.”<sup>18</sup> Thus, service offences include many disciplinary offences that are unique to the profession of arms, such as disobedience of a lawful command,<sup>19</sup> absence without leave<sup>20</sup> and conduct to the prejudice of good order and discipline,<sup>21</sup> as well as the more conventional offences such as those found in the *Criminal Code*<sup>22</sup> and other Acts of Parliament. Members of the Regular Force of the Canadian Armed Forces are always subject to the Code of Service Discipline, whereas members of the Reserve Force are subject to the Code of Service Discipline only in the circumstances specified by section 60 of the *National Defence Act*.

Further, since the coming into force of Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*<sup>23</sup> on 20 June 2022, the Code of Service Discipline now incorporates the concept of “service infractions”. A more complete discussion of service infractions and the associated summary hearings can be found in the following sections.



## The Two Tiers of the Military Justice System

During the reporting period, the military justice system had a tiered structure comprised of two types of service tribunals. Prior to 20 June 2022, the two tiers were summary trials and courts martial. After that date, the two tiers became summary hearings and courts martial. The Code of Service Discipline and the *Queen’s Regulations and Orders for the Canadian Forces*<sup>24</sup> outline procedures for the disposal of a charge by each type of service tribunal.

The following sections describe each tier of the military justice system. With the coming into force of Bill C-77, the summary trial system was retired, and the new summary hearing system came into effect. The summary hearing system is a non-penal, non-criminal process designed to address minor breaches of military discipline at the unit level. With this reform, courts martial alone have jurisdiction to try service offences. A more detailed description of the summary hearing system can be found below.

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<sup>17</sup> *Stillman*, *supra* note 11 at para 55.

<sup>18</sup> *National Defence Act*, *supra* note 1, s 2.

<sup>19</sup> *Ibid*, s 83.

<sup>20</sup> *Ibid*, s 90.

<sup>21</sup> *Ibid*, s 129.

<sup>22</sup> *Criminal Code*, RSC 1985, c C-46.

<sup>23</sup> Bill C-77, *supra* note 2.

<sup>24</sup> *Queen’s Regulations and Orders for the Canadian Forces*, *supra* note 3.

## 1. Summary Trials

The summary trial was the most common form of service tribunal prior to 20 June 2022. It allowed for relatively minor breaches of discipline to be tried and disposed of quickly at the unit level. Summary trials were presided over by commanding officers or their delegates, who were trained and certified by the Judge Advocate General as qualified to perform their duties as presiding officers in the administration of the Code of Service Discipline.<sup>25</sup> All accused members were entitled to be assigned an assisting officer who aided the accused member in the preparation of their case, during the summary trial, and in the preparation of any post-trial request for review. As the Supreme Court of Canada observed about summary trials: “The procedures are straightforward and the powers of punishment limited in scope.”<sup>26</sup> This limitation reflected both the relatively minor nature of the offences involved, and the intent that the punishments be primarily corrective in nature.



The jurisdiction at summary trial was limited by factors such as the rank of the accused and the offence or offences charged. All service offences may be tried by court martial, and while some offences had to be tried by court martial, those listed in article 108.07 of the 2019 *Queen's Regulations and Orders for the Canadian Forces* could also be tried by summary trial. Military Judges<sup>27</sup> and other officers at or above the rank of colonel<sup>28</sup> could only be tried by courts martial.

For most offences that could be dealt with by way of a summary trial, the accused member had the right to elect a trial by court martial.<sup>29</sup> The election process was designed to provide the accused member with the opportunity to make an informed choice regarding the type of service tribunal that would try the matter.

Charges laid under the Code of Service Discipline must be dealt with as expeditiously as the circumstances permit.<sup>30</sup> Unless the accused member waived the limitation periods, they could not be tried by summary trial unless the charge was laid within six months after the day on which the service offence was alleged to have been committed, and the summary trial commenced within one year after that day.<sup>31</sup>

### 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 had the right to request that a review authority review the finding rendered, the punishment imposed, or both.<sup>32</sup> A review authority could

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<sup>25</sup> Canada, Department of National Defence, *Queen's Regulations and Orders for the Canadian Forces*, (Ottawa: DND, 28 June 2019) [*Queen's Regulations and Orders for the Canadian Forces* 2019], art 101.07.

<sup>26</sup> *Stillman*, *supra* note 11 at para 62.

<sup>27</sup> *National Defence Act*, *supra* note 1, s 164(1.3) (up to 19 June 2022). This provision was repealed upon the coming into force of Bill C-77.

<sup>28</sup> *Ibid*, s 164(1)(a) (up to 19 June 2022). This provision was repealed upon the coming into force of Bill C-77.

<sup>29</sup> An accused could not elect a trial by court martial in two instances. Firstly, in cases provided for by article 108.17(1) of the *Queen's Regulations and Orders for the Canadian Forces*, 2019, second where the charges are more serious in nature and require a direct referral to a court martial.

<sup>30</sup> *National Defence Act*, *supra* note 1, s 162.

<sup>31</sup> *Ibid*, ss 163(1.1), 164(1.1) (up to 19 June 2022). These provisions have been repealed upon the coming into force of Bill C-77.

<sup>32</sup> *Queen's Regulations and Orders for the Canadian Forces* 2019, *supra* note 25, art 108.45(1).

also, on their own initiative, undertake a review of the finding and/or punishment.<sup>33</sup> As provided for under articles 108.45 and 116.02 of the 2019 *Queen's Regulations and Orders for the Canadian Forces*, a review authority was typically a more senior officer in the chain of command of the officer who presided over the summary trial. A review authority could quash any findings of guilty made at summary trial, substitute any finding of guilty or punishment, or could mitigate, commute, or remit any punishment imposed at summary trial.<sup>34</sup> Before making any determination, a review authority had to obtain legal advice.<sup>35</sup>

## 2. Courts Martial

A court martial is a formal military court presided over by a military judge who possesses all the constitutional hallmarks of judicial independence. It is designed to deal with more serious offences and a military judge has powers of punishment up to and including imprisonment for life. Courts martial are conducted in accordance with rules and procedures similar to those of civilian criminal courts, while taking into account the unique requirements of the military justice system. Courts martial exercise the same rights, powers, and privileges as a superior court of criminal jurisdiction with respect to all “matters necessary or proper for the due exercise of [their] jurisdiction.”<sup>36</sup>



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

At court martial, the prosecution is conducted by a military prosecutor under the authority of the Director of Military Prosecutions. The accused is entitled to be represented by

defence counsel assigned by the Director of Defence Counsel Services at no cost or by civilian counsel at their own expense.<sup>37</sup>

## Appeal of a Court Martial Decision

Decisions made at court martial may be appealed to the Court Martial Appeal Court of Canada.<sup>38</sup> The Court Martial Appeal Court of Canada is composed of civilian judges who are appointed by the Governor in Council from the Federal Court of Appeal, the Federal Court, or from the superior courts and courts of appeal of the provinces and territories.<sup>39</sup> Court Martial Appeal Court of Canada decisions may be appealed to the Supreme Court of Canada

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<sup>33</sup> *Ibid*, art 116.02.

<sup>34</sup> *Ibid*, art 108.45 (Note B).

<sup>35</sup> *Ibid*, art 108.45(8).

<sup>36</sup> *National Defence Act*, *supra* note 1, s 179(1)(d).

<sup>37</sup> In some cases, civilian counsel can be provided at no cost by the Director of Defence Counsel Services.

<sup>38</sup> The Minister of National Defence has instructed the Director of Military Prosecutions to act on their behalf for appeals to the Court Martial Appeal Court of Canada and the Supreme Court of Canada pursuant to s. 165.11 of the *National Defence Act*.

<sup>39</sup> *National Defence Act*, *supra* note 1, s 234(2).

on any question of law on which a judge of the Court Martial Appeal Court of Canada dissents, or on any question of law when leave to appeal is granted by the Supreme Court of Canada.<sup>40</sup>

## The Retirement of the Summary Trial System and the Introduction of Summary Hearings

On 20 June 2022, Bill C-77 came into force, an event that had several significant implications for the military justice system. This section focuses on one of those implications: the retirement of the summary trial system and the introduction of the summary hearing system.

As a result of this change, all service offences that were committed following the date of coming into force of Bill C-77 must now be dealt with by a court martial.<sup>41</sup> Service offences that predate the coming into force are still subject to the previous regime if charges were laid prior to 20 June 2022. These proceedings are subject to the limitation periods discussed above and the member's election for court martial.<sup>42</sup>



When the summary hearing system was introduced, the second tier of the military justice system changed from a quasi-penal system to a non-penal system. The summary hearing system only deals with service infractions,<sup>43</sup> which are minor breaches of discipline. Correspondingly, the sanctions which may be imposed at a summary hearing are also less serious than those that were available at summary trial. Additionally, there are fewer limitations as to who may preside over a summary hearing compared to a summary trial.

It should also be noted that the coming into force of Bill C-77 has had implications for the military justice system beyond the introduction of a new type of summary proceeding. Crucially, it also represented an important step in responding to the recommendations of the report of the Third Independent Review Authority to the Minister of National Defence prepared by the Honourable Morris Fish.<sup>44</sup> The report made 107 recommendations to improve the military justice and grievance systems, all of which were accepted in principle by the Minister of National Defence. The coming into force of Bill C-77 has resulted in ten of those recommendations being either fully or partially implemented, including recommendations to strengthen the independence of key military justice system actors and provide victims and survivors of service offences with enhanced protections through the *Declaration of Victims Rights*.

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<sup>40</sup> *Ibid*, s 245.

<sup>41</sup> Summary hearings can only deal with service infractions as per ss. 162.4, 162.5 of the *National Defence Act*.

<sup>42</sup> Bill C-77, *supra* note 2, s 66.

<sup>43</sup> *National Defence Act*, *supra* note 1, s 162.4.

<sup>44</sup> Canada, *Report of the Third Independent Review Authority to the Minister of National Defence*, by Hon Morris J Fish (Ottawa, 2021).

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# The Summary Hearing System

## a. Purpose

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

## b. Infractions

Service infractions are breaches in military discipline defined in the *Queen's Regulations and Orders for the Canadian Forces*<sup>45</sup> that are generally less serious than the misconduct covered by service offences. There are currently three categories of service infractions.

The first category of infractions is related to property and information and covers acts or omissions such as unauthorised possession of public property and failure to disclose a conflict of interest.<sup>46</sup> The second category is composed of infractions related to military service. These cover breaches of discipline such as unauthorised discharge of a firearm and other behaviour that adversely affects the discipline, efficiency, or morale of the Canadian Armed Forces.<sup>47</sup> The final category is infractions related to drugs and alcohol. This category includes behaviour such as the possession of an intoxicant or use of a drug, such as cannabis, while on duty.<sup>48</sup>

## c. Hearings

Summary hearings can only be held to deal with service infractions<sup>49</sup> and may be held anywhere the Canadian Armed Forces operate.<sup>50</sup> They are conducted by an officer which must be at least one rank above the member charged with the infraction.<sup>51</sup> However, officers may be precluded from conducting a hearing in certain circumstances listed in the *National Defence Act*.<sup>52</sup>

The Officer Conducting the Summary Hearing (OCSH) may be a superior commander, a commanding officer, or a delegated officer. Where the hearing determines that the member has committed a service infraction, the status of the OCSH conducting the hearing will impact the sanctions that are available.<sup>53</sup>

Summary hearings are generally open for the public to attend. However, they may be closed in certain circumstances, including where classified information will form part of the evidence, or where information that may impact an individual's safety or security arises as part of the evidence.<sup>54</sup>

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<sup>45</sup> *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 3, arts 120.02–120.04.

<sup>46</sup> *Ibid*, art 120.02.

<sup>47</sup> *Ibid*, art 120.03.

<sup>48</sup> *Ibid*, art 120.04

<sup>49</sup> *National Defence Act*, *supra* note 1, s 162.4.

<sup>50</sup> *Ibid*, s 163.5.

<sup>51</sup> *Ibid*, s 163.

<sup>52</sup> *Ibid*.

<sup>53</sup> *National Defence Act*, *supra* note 1, s 163.1.

<sup>54</sup> *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 3, art 120.02.

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At the start of the hearing, the OCSH will take an oath or make a solemn affirmation<sup>55</sup> before asking the member charged with the infraction three preliminary questions: did the member have adequate time to prepare, does the member wish to challenge the capacity of the officer to hold the summary hearing, and does the member wish to admit to any of the details of the charge.<sup>56</sup> The OCSH must ensure that a member had adequate time to prepare and is required to adjourn the hearing if the first question is answered in the negative.<sup>57</sup>

Summary hearings are conducted in accordance with the principles of Canadian administrative law, particularly the principles of procedural fairness and natural justice.<sup>58</sup> As such, the member charged with the service infraction must be given the opportunity to request the presence of witnesses, present evidence, and make representations at all stages of the hearing.<sup>59</sup>

Unlike a court martial or summary trial, the standard of proof at a summary hearing is on a balance of probabilities.<sup>60</sup> A member will, therefore, be deemed to have committed a service infraction if “it is more likely than not that the alleged event occurred.”<sup>61</sup> However, it is insufficient for OCSH to simply state that it is more likely than not that the member committed the infraction. To be a valid determination, the decision of the OCSH must be “transparent, intelligible, and justified.”<sup>62</sup> As such, the OCSH must provide the reasons underpinning their determination.

Should the member be found to have committed a service infraction, the OCSH must impose one, or a combination of, the authorised sanctions. Prior to doing so, they must allow the member to make representations regarding the sanction that will be imposed.<sup>63</sup>

Finally, after imposing a sanction, the OCSH must provide written reasons to the member and to their commanding officer no later than three days following the hearing.<sup>64</sup>

#### d. Sanctions

The *National Defence Act* enumerates the sanctions available when a member is found to have committed a service infraction. These are (from most severe to least severe): reduction in rank, severe reprimand, reprimand, deprivation of pay and deprivation of allowances for no more than 18 days, and minor sanctions.<sup>65</sup> These sanctions may be combined so that, for example, a member may be sanctioned to both a reprimand and a deprivation of pay.<sup>66</sup>

The minor sanctions are defined in the *Queen’s Regulations and Orders for the Canadian Forces* and include confinement to ship or barracks for no more than 14 days, extra work and drill for no more than 14 days, and the withholding of leave for no more than 30 days.<sup>67</sup>

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<sup>55</sup> *Ibid*, art 122.06.

<sup>56</sup> *Ibid*, art 122.07.

<sup>57</sup> *Ibid*, art 122.07(a).

<sup>58</sup> *Ibid*, art 122.08.

<sup>59</sup> *Ibid*.

<sup>60</sup> *National Defence Act*, *supra* note 1, s 163.1.

<sup>61</sup> *FH v McDougall*, 2008 SCC 53 at para 49.

<sup>62</sup> *Vavilov v Canada (Minister of Citizenship and Immigration)*, 2019 SCC 65 at para 15.

<sup>63</sup> *Queen’s Regulations and Orders for the Canadian Forces*, *supra* note 3, art 122.09.

<sup>64</sup> *Ibid*, art 122.09 (4).

<sup>65</sup> *National Defence Act*, *supra* note 1, s 162.7.

<sup>66</sup> *Queen’s Regulations and Orders for the Canadian Forces*, *supra* note 3, art 122.09(3).

<sup>67</sup> *Ibid*, art 123.02.

The status of the OCSH (i.e., whether the officer is a superior commander, commanding officer, or delegated officer) impacts which of these sanctions is available. A superior commander may impose any sanction,<sup>68</sup> whereas a commanding officer may not impose a sanction more severe than a reprimand.<sup>69</sup> A delegated officer may only impose a minor sanction and/or a sanction of deprivation of pay and allowances for no more than 7 days.<sup>70</sup>

## e. Reviews

A member who has been found to have committed a service infraction may request a review of the decision by applying in writing to a review authority within 14 days following receipt of the written reasons.<sup>71</sup> A review authority is normally the superior of the officer who conducted the hearing.<sup>72</sup> Alternatively, a review authority may undertake a review of the decision on their own initiative.<sup>73</sup> In both cases, a review authority must obtain legal advice from a legal officer of the Office of the JAG prior to conducting the review.<sup>74</sup>

Following the review, the review authority may leave the decision unchanged, quash the entirety or part of the decision,<sup>75</sup> substitute one or more findings,<sup>76</sup> substitute one or more sanctions,<sup>77</sup> or commute, mitigate, or remit the sanction(s).<sup>78</sup> A member who is unsatisfied with the outcome of the review can only seek further redress by filing an application for judicial review before the Federal Court of Canada.

## f. Policy and Training

The implementation of the summary hearing system has been accompanied by the introduction of additional policy guidance, in particular, the Military Justice at the Unit Level Policy. The new policy complements the legislative framework by providing units with clear, accessible direction on all aspects of how to apply the new procedure, including the investigatory and charge laying stages, as well as the conduct of the summary hearing itself. In addition, the Canadian Armed Forces have introduced new training to ensure that participants are familiar with the summary hearing system. The successful completion of the course is necessary to qualify to conduct a summary hearing.



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<sup>68</sup> *National Defence Act*, *supra* note 1, s 163.1(1).

<sup>69</sup> *Ibid*, s 163.1(2).

<sup>70</sup> *Ibid*, s 163.1(3).

<sup>71</sup> *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 3, art 124.03.

<sup>72</sup> *Ibid*, art 124.02(1).

<sup>73</sup> *National Defence Act*, *supra* note 1, s 163.6(2).

<sup>74</sup> *Queen's Regulations and Orders for the Canadian Forces*, *supra* note 3, art 124.02(2).

<sup>75</sup> *Ibid*, art 124.04.

<sup>76</sup> *Ibid*, art 124.05.

<sup>77</sup> *Ibid*, art 124.06.

<sup>78</sup> *Ibid*, art 124.07.



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# 3 MILITARY JUSTICE STATISTICS

During the 2022/23 reporting period, the Office of the JAG continued to collect the most accurate available quantitative data regarding the military justice system and took further steps to enhance transparency and accountability in the system by improving monitoring, statistical analysis, and the use of technology. Nevertheless, the statistics presented in this section should be considered in the context of several significant ongoing transitions in the military justice system and the Canadian Armed Forces during the reporting period. While there is no doubt that the statistics presented accurately reflect the military justice system during the reporting period, the transitional nature of this period complicates efforts to draw definitive conclusions or a coherent narrative from the available data.

The 2022/23 reporting period saw the Canadian Armed Forces' continuing transition away from the various precautionary measures that were put in place during the COVID 19 pandemic to protect the health and well-being of its members and prevent the spread of the virus. These measures limited the number of personnel in the workplace, restricted social gatherings and cut back on collective training. As noted in the 2021/22 Annual Report, the imposition of these measures likely had the effect of decreasing the overall use of both courts martial and summary proceedings. Conversely, their removal may well have the opposite effect, further complicating efforts to compare this reporting period's statistics with those of previous periods.

In addition, the transition from the summary trial system to the summary hearing system complicated collecting and interpreting military justice statistics. In the first quarter of the reporting period, summary trials were the only unit-level discipline option; however, summary trials that were scheduled prior to the transition to the new summary hearing system continued to be dealt with by summary trial and were not transitioned into the new system. Additionally, because summary hearings were only available for the last three quarters of the reporting period, year over year comparisons were not straightforward assessments. Moving forward, with only one unit-level disciplinary system in place, year-over-year comparisons will be much more straightforward and more meaningful data can be compiled and analyzed.

The statistics set out below should be considered in the context of the important changes that were ongoing throughout the reporting period. While the data provides an accurate snapshot of the military justice system at this time, it may not present a reliable narrative of longer-term developments in the system or point to meaningful and enduring trends.

## Summary Proceedings - Summary Trials and Summary Hearings

### Number of Summary Proceedings

During this reporting period, there were 41 courts martial, 93 summary trials, and 245 summary hearings conducted.

Summary proceedings (summary trials and summary hearings) continue to be the most widely used form of service tribunal (courts martial, summary trials, and summary hearings) in the Canadian Armed Forces. Summary

proceedings comprised approximately 89% of service tribunals, which represents a slight decline from the previous five-year average of approximately 91%. Summary hearings alone made up approximately 65% of all service tribunal proceedings and 72% of summary proceedings. This number is in keeping with expectations given the limited time that the new summary hearing system was in operation and the continued, though limited, use of summary trials during the reporting period. These numbers suggest that the introduction of summary hearings did not lead to a significant disruption in the use of summary proceedings, which are a vital means of maintaining discipline in the Canadian Armed Forces. Figure 3.1 shows the number of summary trials, summary hearings and courts martial held over the last two reporting periods as well as the corresponding percentage of cases tried by each type of service tribunal.

Fig 3.1: Distribution of Service Tribunals

	2021/22		2022/23	
	#	%	#	%
Number of Courts Martial	48	10.88	41	10.82
Number of Summary Trials	393	89.12	93	24.54
Number of Summary Hearings			245	64.64
<b>Total</b>	<b>441</b>	<b>100.00</b>	<b>379</b>	<b>100.00</b>

## Summary Proceedings by Organization

Figure 3.2 shows the total number of summary proceedings held over the last two reporting periods by organization.

Fig 3.2(a): Number of Summary Trials by Organization

	2021/22		2022/23	
	#	%	#	%
Canadian Army	201	51.15	40	43.01
Royal Canadian Navy	48	12.21	6	6.45
Military Personnel Command	42	10.69	23	24.73
Royal Canadian Air Force	56	14.25	13	13.98
Canadian Joint Operations Command	30	7.63	5	5.38
Canada Special Operations Forces Command	10	2.55	2	2.15
Vice Chief of Defence Staff	5	1.27	3	3.23
Assistant Deputy Minister (Information Management)	1	0.25	0	0.00
Canadian Forces Intelligence Command	0	0.00	1	1.07
<b>Total</b>	<b>393</b>	<b>100.00</b>	<b>93</b>	<b>100.00</b>

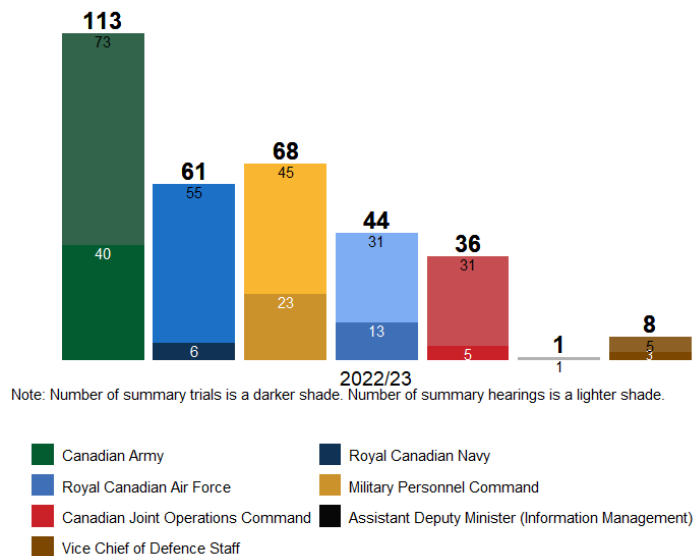
Fig 3.2(b): Number of Summary Hearings by Organization

	2022/23	
	#	%
Canadian Army	73	29.80
Royal Canadian Navy	55	22.45
Military Personnel Command	45	18.37
Royal Canadian Air Force	31	12.65
Canadian Joint Operations Command	31	12.65
Canada Special Operations Forces Command	4	1.63
Vice Chief of Defence Staff	5	2.04
Assistant Deputy Minister (Information Management)	1	0.41
Canadian Forces Intelligence Command	0	0
<b>Total</b>	<b>245</b>	<b>100.00</b>

Figure 3.3 illustrates the number of summary proceedings held since the 2021/22 reporting period within the following seven organizations: Canadian Army, Royal Canadian Navy, Military Personnel Command, Royal Canadian Air Force, Canadian Joint Operations Command, Vice Chief of Defence Staff, and Assistant Deputy Minister (Information Management).

Fig 3.3 Number of Summary Proceedings by Organization

Fig 3.3: Number of Summary Proceedings by Organization



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For the Canadian Army, there were a total of 40 summary trials and 73 summary hearings in this reporting period. The overall total of 113 summary proceedings represents a significant decrease of approximately 44% from the previous reporting period, when the Canadian Army held 201 summary trials. This is in keeping with a long-running trend. 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. However, the introduction of the summary hearing system appears to have coincided with a significant increase in its use of summary proceedings. While it only held 6 summary trials during the reporting period (representing less than 6.5% of the total summary trials), it held 55 summary hearings (approximately 22% of the total summary hearings).

The Royal Canadian Air Force's use of summary proceedings has declined slightly over the past two reporting periods. In the current reporting period, it held 13 summary trials, (13.98% of the total summary trials), and 31 summary hearings (12.7% of the total summary hearings). In the 2021/22 reporting period, the Royal Canadian Air Force accounted for 14.25% of summary trials. Prior to that, the Royal Canadian Air Force's use of summary proceedings as percentage of the total had seen a small but steady increase, accounting for under 9% of all summary trials in the 2014/15 reporting period rising to close to 15% in 2020/21.

In this reporting period, 68 summary proceedings were conducted within the Military Personnel Command: 23 summary trials and 45 summary hearings. This is generally in keeping with previous statistics for Military Personnel Command (listed as Chief of Military Personnel in previous reports), which accounted for between approximately 7% and 19 % of summary trials since the 2015/15 reporting period.

Finally, the Canadian Joint Operations Command held 5 summary trials and 31 summary hearings, for a total of 36 summary proceedings. This represents a 20% increase over the 30 summary trials the Canadian Joint Operations Command conducted during the previous reporting period. Since 2017/18, the number of summary proceedings held by the Canadian Joint Operations Command has varied slightly, displaying no significant pattern of increase or decrease. Between the 2014/15 and 2016/17 reporting periods, the Canadian Joint Operations Command accounted for approximately 1% and 2% percent of summary trials.

## Number of Charges Disposed of at Summary Proceedings<sup>79</sup>

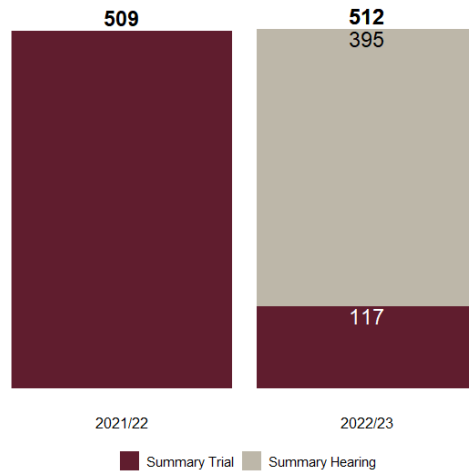
During this reporting period, 117 charges for service offences were disposed of at summary trial and 395 charges for service infractions were disposed of at summary hearing. Combined, these numbers represent a small increase over the 502 charges disposed of at summary trial during the previous reporting period. This is the second reporting period in a row that has seen an increase in the number of charges for offences/infractions disposed of at summary proceedings, following a trend of consistent decreases that began in 2017/18. Figure 3.4(a) shows the total number of charges for service offences disposed of at summary trial since 2021/22. Figure 3.4(b) shows the total number of service infractions disposed of at summary hearing.

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<sup>79</sup> See Annexes A and B, for a complete breakdown of all charges disposed of at summary hearing and summary trial respectively.

Fig 3.4 Number of Charges Disposed of at Summary Proceedings

Fig 3.4: Number of Charges disposed



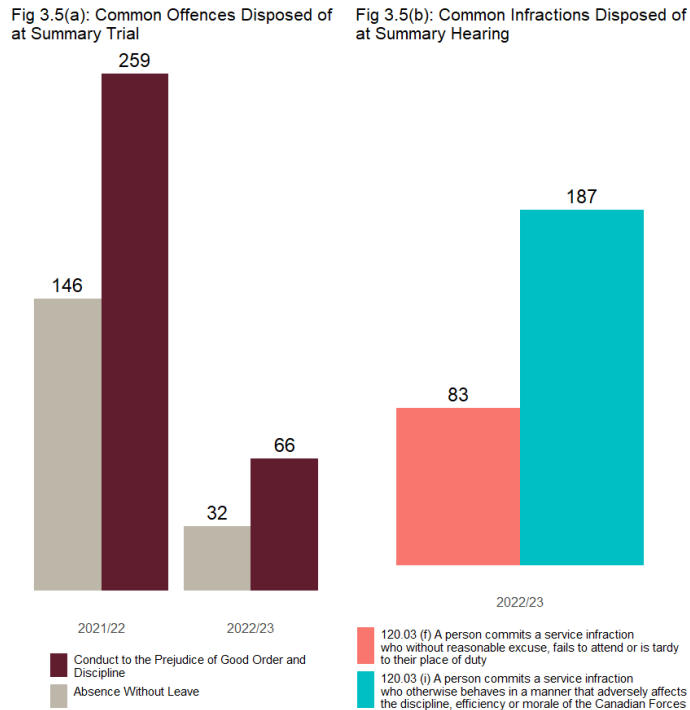
## Most Common Offences and Infractions Disposed of at Summary Proceedings

Historically, the most common services offences disposed of at summary trial were under section 90 of the *National Defence Act* (absence without leave) and under section 129 (conduct to the prejudice of good order and discipline).<sup>80</sup> During the 2021/22 report, for instance, these offences accounted for 81% of charges disposed of at summary trial. This pattern continued during the 2022/23 reporting period, where 66 charges for the offence of conduct to the prejudice of good order and discipline and 32 charges for the offence of absence without leave were disposed of at summary trial, accounting for approximately 84% of the total charges.

As a result of the introduction of the summary hearing system, disciplinary proceedings for service offences are no longer conducted by summary process. Instead, summary hearings deal with an entirely separate series of service infractions set out in the *Queen's Regulations and Orders for the Canadian Forces*. Although distinct from service offences, service infractions include two close equivalents to absence without leave and conduct to the prejudice of good order and discipline. Paragraph 120.03(f) stipulates that a person commits a service infraction who, without reasonable excuse, fails to attend or is tardy to their place of duty. Paragraph 120.03(i) establishes an infraction for behaving in a manner that adversely affects the discipline, efficiency, or morale of the Canadian Forces.

During this reporting period, summary hearings disposed of 187 infractions of behaving in a manner that adversely affects the discipline, efficiency, or morale under paragraph 120.03(i) and 83 infractions of failing to attend or being tardy to their place of duty under paragraph 120.03(f). Together, these numbers represent approximately 69% of infractions disposed of at summary hearings. This is generally consistent with the percentage of the equivalent service offences disposed of at summary trials in previous reporting periods. Figure 3.5(a) shows the number of charges for absence without leave and conduct to the prejudice of good order and discipline for the last two reporting periods, and Figure 3.5(b) shows the number of infractions of behaving in a manner that adversely affects the discipline, efficiency, or morale under paragraph 120.03(i) and the number of infractions of failing to attend or being tardy at place of duty under paragraph 120.03(f).

Fig 3.5 Common Offences and Infractions Disposed of Summary Proceedings



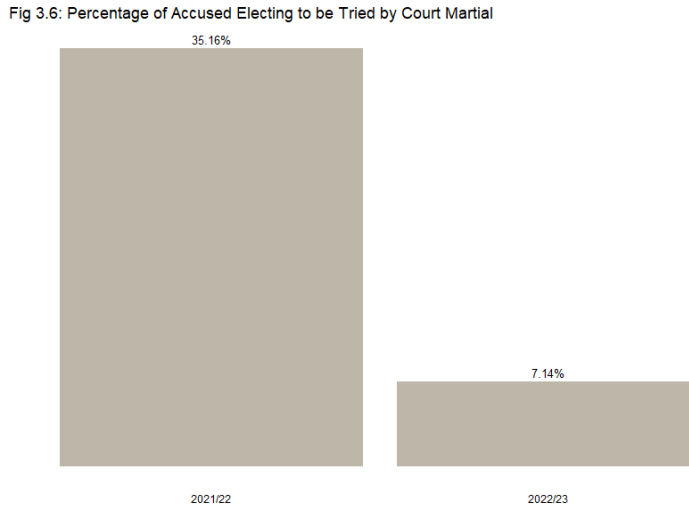
## Number of Elections to be Tried by Court Martial

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

- a. each offence with which the individual had been charged was one of the following: insubordination, drunkenness, absence without leave, quarrels, and disturbances, and conduct to the prejudice of good order and discipline (where the offence relates to military training, maintenance of personal equipment, quarters or workspace, or dress and deportment); and,
- b. the circumstances surrounding the commission of the offence were so minor in nature that the presiding officer concluded that a punishment of detention, reduction in rank, or a fine in excess of 25 percent of monthly basic pay would not be warranted if the accused person were found guilty of the offence.

During this reporting period, a total of 14 elections to be tried by court martial were offered to accused persons. Out of the 14 elections offered, 13 accused persons elected to be tried by summary trial, which represents 93% of the total elections offered. The remaining accused person elected to be tried by court martial, which represents 7% of the total elections offered.

Fig 3.6 Percentage of Elections to be Tried Court Martial



### Results by Charge at Summary Proceedings

The findings at summary trial, by charge, remained relatively consistent over the last five reporting periods. This reporting period saw a decrease in the percentage of guilty findings, from approximately 90% in the 2021/22 reporting period, to approximately 82% in this reporting period.

Findings of not guilty increased from approximately 8% in 2021/22 to approximately 14% in this reporting period. Moreover, the percentages of guilty and not guilty findings in this reporting period are within the range for past five reporting periods. A breakdown of the total number of findings by charge and the corresponding percentages for the last two reporting periods can be found at Figure 3.7(a).

The findings at summary hearing show results similar to those of summary trials. During the reporting period, there were 344 findings that the alleged service infraction was committed (the summary hearing equivalent of a guilty finding), representing 87% of summary hearing findings. There were 43 findings that the alleged service infraction was not committed (the equivalent of a not guilty finding), representing 11% of findings. There were 8 charges not proceeded with at summary hearing. Based on these early numbers, it appears that the move from summary trials to non-criminal and non-penal summary hearings, which included a move to the less onerous “balance of probabilities” standard of proof, has not had a significant impact on the outcome of summary proceedings. The statistics for findings at summary hearings is set out at figure 3.7(b).

Figure 3.7(a): Findings by Charge (Summary Trial)

	2021/22		2022/23	
	#	%	#	%
Guilty	458	89.98	96	82.05
Guilty with Special Finding	4	0.79	0	0.00
Not Guilty	40	7.86	16	13.68
Charge Stayed	2	0.39	1	0.85
Charge not Proceeded with	5	0.98	4	3.42

	2021/22		2022/23	
	#	%	#	%
<b>Total</b>	<b>509</b>	<b>100.00</b>	<b>117</b>	<b>100.00</b>

Figure 3.7(b): Findings by Charge (Summary Hearing)

	2022/23	
	#	%
Charge not Proceeded with	8	2.02
Found to have committed service infraction alleged	344	87.09
Not found to have committed service infraction alleged	43	10.89
<b>Total</b>	<b>395</b>	<b>100.00</b>

## Punishments, Absolute Discharges and Sanctions at Summary Proceedings

In this reporting period, there were a total of 111 punishments and absolute discharges imposed at summary trial.<sup>81</sup> Fines and extra work and drill continued to be the most commonly imposed punishments, accounting for 87% of all punishments. In this reporting period, the punishment of detention was not imposed. This is consistent with a decrease in the imposition of detention as a punishment over the past three reporting periods. During the 2020/21 period, detention was imposed twice and once in the 2021/22 reporting period. Figure 3.8(a) shows the number of absolute discharges and punishments by type that were imposed at summary trial for the last two reporting periods, as well as the corresponding percentages.

Compared to the sanctions that could be imposed by a summary trial, there are fewer sanctions available at a summary hearing. From most to least severe, the available sanctions are: reduction in rank, severe reprimand, reprimand, deprivation of pay and deprivation of allowances for no more than 18 days, and minor sanctions, which include confinement to ship or barracks for no more than 14 days, extra work and drill for no more than 14 days, and the withholding of leave for no more than 30 days. Reflecting the non-penal nature of the summary hearing system, an OCSH does not have authority to impose detention as a sanction. Nor can an OCSH impose a fine, though deprivation of pay and allowances may have a similar impact as a fine. Deprivation of pay was the most common sanction imposed at summary hearings during this reporting period, accounting for over 40% of sanctions. Confinement to ship or barracks and extra work and drill were both equally imposed sanctions, each accounting for approximately 20% of sanctions imposed. Figure 3.8(b) shows the number and percentages of sanctions, by type, that were imposed at summary hearing during the 2022/23 reporting period.

<sup>81</sup> More than one type of punishment may be imposed at a summary proceeding.



Figure 3.8(a): Punishments (Summary Trial)

	2021/22		2022/23	
	#	%	#	%
Detention	1	0.21	0	0.00
Reduction in Rank	1	0.21	0	0.00
Severe Reprimand	2	0.43	0	0.00
Reprimand	24	5.12	9	8.11
Fine	299	63.75	72	64.86
Confinement to Ship or Barracks	84	17.91	13	11.71
Extra Work and Drill	52	11.09	15	13.52
Stoppage of Leave	1	0.21	1	0.90
Absolute Discharge	5	1.07	1	0.90
<b>Total</b>	<b>469</b>	<b>100.00</b>	<b>111</b>	<b>100.00</b>

Figure 3.8(b): Sanctions (Summary Hearing)

	2022/23	
	#	%
Reduction in Rank	1	0.26
Reprimand	18	4.64
Confinement to Ship or Barracks	80	20.62
Extra Work and Drill	78	20.10
Stoppage of Leave	17	4.38
Deprivation of allowances	33	8.51
Deprivation of pay	161	41.49
<b>Total</b>	<b>388</b>	<b>100.00</b>

## Reviews of Summary Proceedings

Under the summary trial system, there were two means by which a guilty finding or a punishment imposed by a summary trial could be reviewed under the *Queen's Regulations and Orders for the Canadian Forces*: the member found guilty could request a review under former article 108.45 or a review authority could initiate the review on their own initiative under article 116.02.

During the 2022/23 reporting period, a total of 5 summary trials were reviewed, representing slightly more than 5% of the 93 summary trials conducted during the reporting period. This is a decrease from the 8% of summary trials that were reviewed in both the 2021/22 and 2020/21 reporting periods. Of the reviews, one was based on findings, 2 were based on sentencing, and 2 were based on both findings and sentencing. In relation to a review of a summary trial, a review authority could render one of the following decisions: to uphold the presiding officer's decision; to quash a guilty finding; or to substitute a finding or punishment imposed at a summary trial. In this reporting period, review authorities quashed the findings in 60% of summary trials for which a review was undertaken. Additionally, review authorities upheld 40% of the decisions of presiding officers. A complete breakdown of all decisions of summary trial review authorities for the past two reporting periods can be found at Figure 3.9(a).

The rules with respect to reviews for the summary hearing system are set out in sections 163.6 to 163.9 of the *National Defence Act* and Chapter 124 of the *Queen's Regulations and Orders for the Canadian Forces*. As with summary trials, a review of a summary hearing can be initiated at the request of the member who was found to have committed a service infraction or on the initiative of a review authority. During the 2022/23 reporting period, there were 9 reviews of summary hearings, representing 3.7% of the 245 of the summary hearings.

Review authorities for summary hearings have similar powers to those of summary trial review authorities. They can uphold the finding that the member committed the service infraction, quash that finding, or substitute a finding or sanction imposed at a summary hearing. During this reporting period, review authorities upheld three findings, quashed one finding and substituted one finding. With respect to sanctions imposed at summary hearings, review authorities substituted three sanctions and remitted one. A breakdown of all decisions of summary hearing review authorities for the past two reporting periods can be found at Figure 3.9(b).

Fig 3.9(a): Decision of Review Authority

	2021/22		2022/23	
	#	%	#	%
Upholds decision	5	17.24	2	40
Quashes findings	22	75.86	3	60
Substitutes punishment	1	3.45	0	0
Mitigates punishment	0	0.00	0	0
Substitutes findings	1	3.45	0	0
Commutes punishment	0	0.00	0	0
Remits punishment	0	0.00	0	0
<b>Total</b>	<b>29</b>	<b>100.00</b>	<b>5</b>	<b>100</b>

Fig 3.9(b): Decision of Review Authority (Summary Hearings)

	2022/23	
<b>Review Decisions</b>	<b>#</b>	<b>%</b>
Quashes findings	1	11.11
Remits sanction	1	11.11
Substitutes findings	1	11.11
Substitutes sanction	3	33.33
Upholds decision	3	33.33
Mitigates sanction	0	0.00
Commutes sanction	0	0.00
<b>Total</b>	<b>9</b>	<b>100.00</b>

## Language of Summary Proceedings

Pursuant to former article 108.16 of the *Queen's Regulations and Orders for the Canadian Forces*, accused persons had the right to be tried by summary trial in the official language of their choice. Article 121.07 of the *Queen's Regulations and Orders for the Canadian Forces* performs a similar function for the conduct of summary hearings, requiring that the OCSH be able to understand the language in which the proceedings are to be conducted without the assistance of an interpreter.

In this reporting period, approximately 71% of summary trials and 86% of summary hearings were conducted in English. Approximately 29% of summary trials and 14% of summary hearings were conducted in French. These numbers are broadly consistent with the previous reporting period. Figures 3.10(a) and (b) show the total number of summary trials and hearings conducted in both English and French for the past two reporting periods.

Fig 3.10(a): Language at Summary Trial

	2021/22		2022/23	
	<b>#</b>	<b>%</b>	<b>#</b>	<b>%</b>
Number in English	287	73.03	66	70.97
Number in French	106	26.97	27	29.03
<b>Total</b>	<b>393</b>	<b>100.00</b>	<b>93</b>	<b>100.00</b>

Fig 3.10(b): Language at Summary Hearing

	2022/23	
	#	%
Number in English	212	86.53
Number in French	33	13.47
<b>Total</b>	<b>245</b>	<b>100.00</b>

## Timeline of Summary Proceedings

The purpose of both summary trials and summary hearings is to provide prompt and fair justice in respect of minor breaches of discipline. In order to achieve this, it is essential that the procedure allow for a minimal delay between the time the alleged offence or infraction occurred and the time the hearing or trial is completed.

The rules applicable to both types of summary proceedings imposed strict limitation periods. Summary trials were required to begin within one year of the date on which the offence was alleged to have occurred, unless this limitation period was waived by the accused person.<sup>82</sup> With the introduction of summary hearings, the limitation period was halved. A summary hearing may not be conducted unless it commences within six months after the day on which the service infraction is alleged to have been committed. This limitation period cannot be waived under the summary hearing procedure; if the limitation period has passed, there is no jurisdiction to hear the matter and the charge cannot proceed to hearing.

This reporting period saw 93 summary trials completed, and the average time from the alleged offence to the conclusion of the summary trial was approximately 48 days. Of these 93 summary trials, 41 concluded within 90 days of the alleged offence, representing approximately 44% of all summary trials for the reporting period. Further, approximately 76% of summary trials were concluded within 180 days of the alleged offence. Figure 3.11(a) shows a breakdown of the number of days from the alleged offence to the conclusion of the summary trial.

As may be expected given the shorter limitation period, the summary hearings conducted during this reporting period were completed in less time than the summary trials. For the 245 summary hearings completed, the average time from the alleged infraction to the conclusion of the hearing was 24 days. Approximately 60% of the summary hearings were completed within 90 days of the alleged infraction and all but two summary hearing were completed within 180 days. Figure 3.11(b) shows a breakdown of the number of days from the alleged infraction to the conclusion of the summary hearing.

Fig 3.11(a): Number of Days from Alleged Offence to Conclusion of Summary Trial

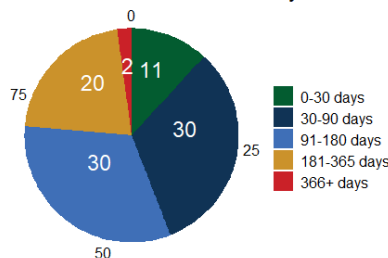
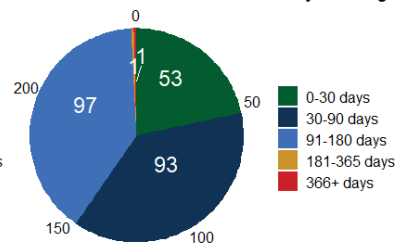


Fig 3.11(b): Number of Days from Alleged Infraction to Conclusion of Summary Hearing



<sup>82</sup> *Queen's Regulations and Orders for the Canadian Forces 2019*, *supra* note 25, art 108.171, repealed on 20 June 2022.

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## Statistics on the Use of Summary Hearings during the Reporting Period

While it is still too soon to draw any definitive conclusions about the efficiency and effectiveness of summary hearings, the statistics available from the 2022/23 reporting period point to encouraging signs that the new procedure has been readily adopted as a fast, fair, and easily accessible tool for maintaining discipline at the unit level.

The introduction of summary hearings did not result in a significant drop-off in the use of summary proceedings. Summary hearings alone made up approximately 65% of service tribunal proceedings and 72% of summary proceedings (see figure 3.1). Moreover, there was an overall increase, with some fluctuation, from month to month in the number of summary hearings conducted. In July 2022, the first full month in which the new procedure was in force, there were 7 summary hearings, while the number peaked in March 2023, the final month of the reporting period, with 46 summary hearings. These numbers suggest that Canadian Armed Forces units felt comfortable relying on the new procedure as a means of addressing minor breaches of discipline.

It also appears that the summary hearing system is proving to be portable. The Canadian Armed Forces deploys across the globe and to serve as an effective disciplinary tool, summary hearings must be able to be held wherever a unit is located when an alleged service infraction occurs. During the reporting period, summary hearings were used to address infractions that occurred on a range of deployments, exercises, and other Canadian Armed Forces activities outside of Canada. During the reporting period, summary hearings disposed of approximately 30 charges for infractions alleged to have been committed on board Royal Canadian Navy ships and appropriately 70 charges for infractions alleged to have been committed by Canadian Armed Forces members deployed abroad.

### Charges for Service Infractions Disposed of at Summary Hearings

OCSHs have jurisdiction to determine whether Canadian Armed Forces members committed service infractions. Service infractions are distinct from service offences over which courts martial have, and the former summary trial procedure had, jurisdiction. Chapter 120 of the *Queen's Regulations and Order for the Canadian Forces* sets out three categories of service infractions that cover a broad range of relatively minor disciplinary misconduct: infractions in relation to property and information, infractions in relation to military service, and infractions in relation to drugs and alcohol.

Each of these categories is further divided into individual service infractions. As noted previously, several of the infractions are similar to service offences (see figures 3.5(a) and 3.5(b)). However, many of the service infractions provide greater specificity as to the nature of the alleged misconduct than service offences. For instance, whereas previously such things as the unauthorized discharge of a weapon or the failure to disclose a conflict of interest may have resulted in charges for the service offence of conduct to the prejudice of good order and discipline (s.129 of the *National Defence Act*), under the summary hearing procedure, there are individual service infractions to specifically address both types of misconduct: paragraphs 120.03(b) (a person commits an infraction who discharges a firearm without authorization), and 120.02(d) (a person commits an infraction who fails to disclose actual, apparent or potential conflicts between their duties and private interests) of the *Queen's Regulations and Orders for the Canadian Forces*. The greater specificity of service infractions allows the Canadian Armed Forces to more closely monitor the particular disciplinary issues arising at the unit level.

Of the three categories of service infractions, the most charged is service infractions in relation to military service, under article 120.03 of the *Queen's Regulations and Orders for the Canadian Forces*. Charges under this article accounted for 363 of the 395 charges for service infractions during this reporting period, representing approximately 92% of the total. This may be because article 120.03 includes nine individual service infractions, the highest number of the three categories. It also includes the two most common charges disposed of at summary hearings: paragraph 120.03(f) (a person commits a service infraction who, without reasonable excuse, fails to attend or is tardy to their place of duty) and paragraph 120.03(i) (a person commits an infraction who behaves in

a manner that adversely affects the discipline, efficiency, or morale of the Canadian Forces). These two infractions account for approximately 21% and 47% of all charges disposed of, respectively. The other service infractions in relation to military service most commonly disposed of at summary hearing were paragraph 120.03(e) (a person commits a service infraction who, in relation to military service, furnishes false or misleading information or engages in deceitful conduct) accounting for approximately 7% of all charges, and 120(b) (A person commits a service infraction who discharges a firearm without authorization) accounting for approximately 6%.

There were 24 charges disposed of at summary hearing for service infractions in relation to drugs and alcohol under article 120.04 of the *Queen's Regulations and Orders for the Canadian Forces*, accounting for approximately 6% of the total. The most common charge disposed of under this article was paragraph 120.04(a) (a person commits an infraction who, while on duty, is impaired by a drug or alcohol) accounting for 3% of all charges. There were 8 charges disposed of for service infractions in relation to property and information under article 120.02, accounting for 2% of the total. Figure 3.12 provides the number and percentage of charges for each category service infraction disposed of at summary hearing during the 2022/23 reporting period. A more detailed list of each infraction disposed of at summary hearing is provided at Annex A.

Figure 3.12: Number of Infractions disposed of at summary hearing, arranged by provision

	2022/23	
	#	%
120.02 - INFRACTIONS IN RELATION TO PROPERTY AND INFORMATION	8	2.02
120.03 - INFRACTIONS IN RELATION TO MILITARY SERVICE	363	91.90
120.04 - INFRACTIONS IN RELATION TO DRUGS AND ALCOHOL	24	6.08
<b>Total</b>	<b>395</b>	<b>100.00</b>

## Summary Hearings by Rank

One of the innovations of the summary hearing procedure is the removal of the limit on the rank of the Canadian Armed Forces members who may be subject to a summary proceeding. Under the former procedure, officers holding the rank of Lieutenant-Colonel or higher could not be tried by way of summary trial and service offence charges against them could only be disposed of at court martial. That limitation has now been removed and members of the Canadian Armed Forces may now be charged with service infractions and subject to a summary hearing, regardless of their rank.

During the reporting period, there were a total of 176 summary hearings for junior non-commissioned members<sup>83</sup> and 24 for senior non-commissioned members.<sup>84</sup> For officers, there were 20 summary hearings for subordinate officers (officer cadets/naval cadets), 20 hearings for junior officers (between Second Lieutenant/Acting sub-Lieutenant and Captain/Lieutenant (Navy)), and 5 hearings for senior officers (Major/Lieutenant Commander and above). Of the last group, there was one summary hearing for a Lieutenant-Colonel and one for a Colonel, two officers who would not have been subject to summary proceedings under the summary trial procedure. Figure

<sup>83</sup> Junior non-commissioned members include the following ranks: private, sailor third class, aviator, trooper, sapper, corporal, sailor second class, bombardier, master corporal, sailor first class and master bombardier.

<sup>84</sup> Senior non-commissioned members include the following ranks: sergeant, warrant officer, master warrant officer, chief warrant officer, petty officer second class, petty officer first class, chief petty officer second class and chief petty officer first class.

3.13 sets out the number and percentage of summary hearings organized by the rank of the person alleged to have committed the service infraction.

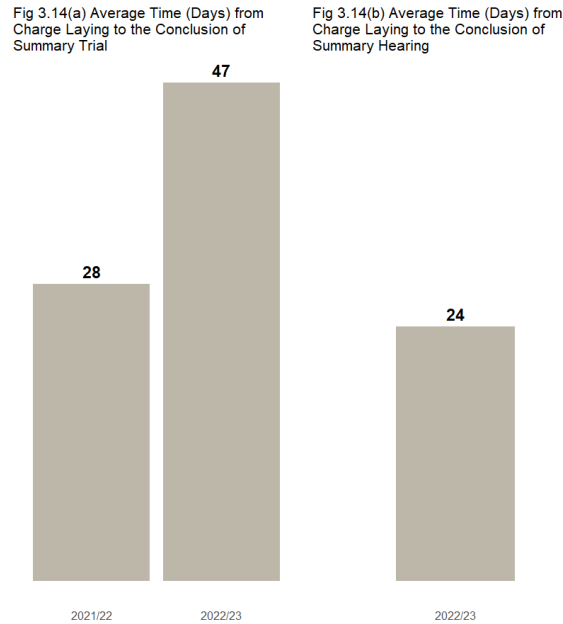
Figure 3.13: Number Summary Hearings by Rank of Accused

	2022/23	
	#	%
Corporal / Sailor 1st Class	78	31.84
Private / Aviator / Sailor 2nd Class	39	15.91
Private (Basic) / Sailor 3rd Class	35	14.29
Master Corporal / Master Sailor	23	9.39
Officer Cadet / Naval Cadet	20	8.16
Sergeant / Petty Officer 2nd Class	14	5.71
Captain / Lieutenant (Navy)	10	4.08
Warrant Officer / Petty Officer 1st Class	7	2.86
Second Lieutenant / Acting Sub-Lieutenant	6	2.46
Lieutenant / Sub-Lieutenant	5	2.04
Major / Lieutenant-Commander	3	1.22
Master Warrant Officer / Chief Petty Officer 2nd Class	3	1.22
Colonel / Captain (Navy)	1	0.41
Lieutenant-Colonel / Commander	1	0.41
<b>Total</b>	<b>245</b>	<b>100.00</b>

### Timeline for Steps in the Summary Hearing System

An essential feature of the summary hearing procedure is its ability to dispose of charges quickly. Summary proceedings are intended to allow Canadian Armed Forces units to address misconduct as promptly as possible while still maintaining a fair process. Delays in addressing disciplinary issues allow problems to persist and adversely impact a unit's morale and efficiency. The average number of days between an alleged infraction and

the conclusion of the summary hearing during the reporting period is 24 days shorter than the equivalent period under the summary trial procedure (see figures 3.11(a) and (b)). Moreover, the summary hearing procedure has accelerated each step in the process. For instance, the average number of days elapsing between charges being laid and the completion of the summary hearing during the reporting period was 24 days, compared to 47 days for summary trials. Likewise, the summary hearing process has proved quicker to commence following an alleged infractions and faster to complete a review following a hearing. Figure 3.14(a) and (b) show the average time from charge laying to completion of the summary trial and summary hearing for the past two reporting periods.

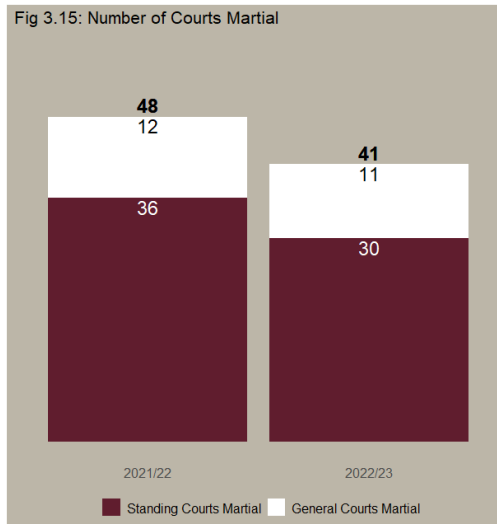


## Courts Martial

### Number of Courts Martial

During this reporting period, 41 courts martial were conducted, representing approximately 11% of all proceedings held by service tribunals. This is a slight decrease from the 48 courts martial held during the previous reporting period. Figure 3.15 sets out the number of courts martial for the past two reporting periods.





## Results by Case at Court Martial

Of the 41 courts martial held during this reporting period, 32 cases resulted in a finding of guilty on at least one charge; 9 cases resulted in a finding of not guilty on all charges or a stay of proceedings; in 0 cases the accused was found not criminally responsible on account of a mental disorder; 0 cases resulted in a termination of proceedings; and 0 cases resulted in all charges being withdrawn. Figure 3.16 shows the disposition by case over the past two reporting periods.

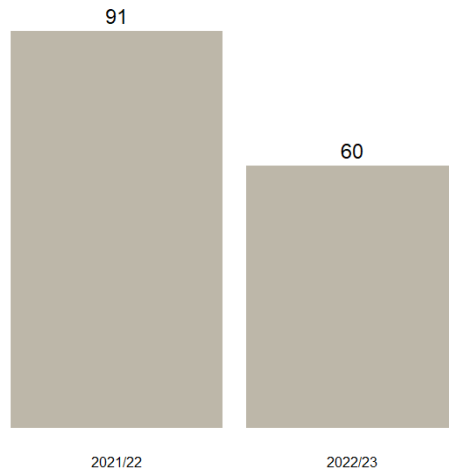
Fig 3.16: Disposition of Cases at Courts Martial

	2021/22		2022/23	
	#	%	#	%
Found Guilty of at Least One Charge	33	68.75	32	78.05
Not Guilty of All Charges or Stay of Proceedings	14	29.17	9	21.95
Not Criminally Responsible	1	2.08	0	0.00
Withdrawal of All Charges	0	0.00	0	0.00
Termination of Proceedings	0	0.00	0	0.00
<b>Total</b>	<b>48</b>	<b>100.00</b>	<b>41</b>	<b>100.00</b>

## Referrals Received by the Director of Military Prosecutions

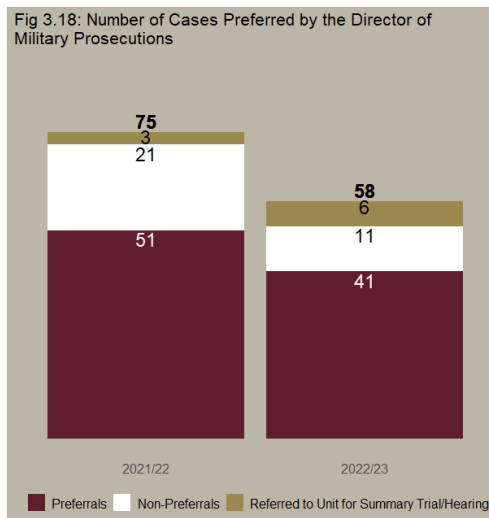
During this reporting period, the Director of Military Prosecutions received a total of 60 new referrals or requests for charges to proceed for trial by court martial, a decrease of 31 cases from the 2021/22 reporting period. This number does not include referrals that were carried over from the previous reporting period. Figure 3.17 shows the number of referrals received by the Director of Military Prosecutions over the last two reporting periods.

Fig 3.17: Number of Referrals Received by the Director of Military Prosecutions



## Preferrals and Non-Preferrals

During this reporting period, the Director of Military Prosecutions proceeded with charges or preferred charges in 41 cases for trial by courts martial. There were 11 cases where the Director of Military Prosecutions did not proceed with or prefer any charges and 6 files were referred back to a unit to try the accused person by summary proceeding. These numbers include 12 files that were received during the previous reporting period. Of the 60 referrals the Director of Military Prosecutions received during the reporting period, 14 files were still pending a decision on referral at the end of the reporting period. Figure 3.18 illustrates the number of cases preferred by the Director of Military Prosecutions and the number of files where no charges were preferred over the past two reporting periods.



## Punishments at Court Martial

Figure 3.19 breaks down the punishments imposed by courts martial over the past two reporting periods. The most common punishments imposed continue to be fines, followed by severe reprimands.

Fig 3.19 Punishments at Courts Martial

	2021/22	2022/23
Dismissal*	1	2
Imprisonment	6	5**
Detention	2	1
Reduction in Rank	4	3
Forfeiture of Seniority	0	0
Severe Reprimand	8	10
Reprimand	6	8
Fine	21	26
Confinement to ship or barracks	3	4
Stoppage of Leave	0	0
Absolute Discharge	0	1
<b>Total</b>	<b>51</b>	<b>60</b>

\*Includes dismissal with disgrace

\*\*One of these punishments was suspended by the Military Judge

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# 4 MJ JURISPRUDENCE: THE YEAR IN REVIEW

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

## Courts Martial

### Section 179 of the *National Defence Act*, Powers of Courts Martial

In two cases during the reporting period, military judges exercised their authority under section 179 of the *National Defence Act*, which provides courts martial with the power to control their own procedures and to address situations not accounted for in the Code of Service Discipline or the *Queen's Regulations and Orders for Canadian Forces*.

In *R v Levesque*,<sup>85</sup> the military judge was called upon to consider those powers in relation to a general court martial panel where a panel member who had already been sworn-in raised concerns about their own impartiality. The accused was charged with sexual assault and was facing trial by general court martial. After the court martial had commenced and the prosecution was in the course of presenting its case, one of the panel members sent a note to the military judge indicating that he recognized the complainant, having previously served with her and her spouse for several years.<sup>86</sup> There are no provisions in the *National Defence Act* or regulations managing the procedure for potential bias of a panel member after a panel has been sworn-in.<sup>87</sup>

Citing section 179 of the *National Defence Act*, the military judge relied on section 644 of the *Criminal Code*, which manages the impartiality of jurors during a criminal trial, and the Ontario Court of Appeal precedent in *R v Durant* to conduct an inquiry into the matter.<sup>88</sup> Although the military judge was inclined to characterize the panel member's responses during the inquiry as relatively neutral,<sup>89</sup> the judge nonetheless concluded that the panel member must be discharged on the grounds that a reasonably informed individual would perceive a reasonable apprehension of bias on the part of the panel member given the conditions surrounding a sexual assault trial.<sup>90</sup>

The second case, *R c Houde*,<sup>91</sup> involved the issue of whether bilingual court martial proceedings were permitted in the military justice system.<sup>92</sup> Finding that the *National Defence Act* was silent on the issue of bilingual courts

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<sup>85</sup> *R v Levesque*, 2022 CM 2012.

<sup>86</sup> *Ibid* at paras 1-3.

<sup>87</sup> *Ibid* at paras 9-10.

<sup>88</sup> *Ibid* at para 30 citing *R v Durant*, 2019 ONCA 74 at paras 146-151.

<sup>89</sup> *Ibid* at paras 36-41.

<sup>90</sup> *Ibid* at para 44.

<sup>91</sup> *R c Houde*, 2022 CM 3006.

<sup>92</sup> *Ibid* at paras 1-3.

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martial proceedings,<sup>93</sup> the military judge relied on section 179 of the *National Defence Act* to fill in an apparent gap in court martial procedure. In exercising this authority, the military judge considered the most relevant provision from the civilian system, section 530 of the *Criminal Code*, which states that civilian criminal proceedings may be bilingual when circumstances justify holding such a proceeding.<sup>94</sup> The judge also considered the Ontario Court of Appeal's decision in *R v Sarrazin* which lists several factors that would justify holding bilingual criminal trials.<sup>95</sup> Applying the *Sarrazin* analysis, the military judge determined there were sufficient reasons to justify holding a bilingual proceeding, including the fact that it would allow witnesses to testify in the official language of their choice without the filter of interpretation and that it would allow the accused to retain counsel who could use either language during the proceeding.<sup>96</sup>

## Court Martial Appeal Court of Canada

### Capacity to Consent to Sexual Activity

#### ***R v Vu*, 2023 CMAC 2**

In *R v Vu*<sup>97</sup>, the Court Martial Appeal Court of Canada considered whether the military judge erred in law by not considering the totality of the evidence on the question of a complainant's capacity to consent to sexual activity.

The accused, Pte Vu, was charged with sexual assault and voyeurism offences. Pte Vu had recorded his sexual acts with the complainant on his cellphone. In the video, he is heard asking the complainant several times if they consent to sexual activity, to which the complainant seems to acquiesce. However, at different times, the video also appears to show the complainant to be unconscious. On 5 November 2021, Pte Vu was acquitted of sexual assault by a standing court martial, where the presiding military judge determined that, based on the video, the complainant had consented to the acts in question.<sup>98</sup> The prosecution appealed the acquittal.

In a split decision rendered on 27 February 2023, the Court Martial Appeal Court dismissed the appeal. The majority of the Court concluded that the military judge had not committed an error in law and had correctly determined the issue of consent,<sup>99</sup> though they did find that he had improperly engaged in speculation about the complainant's conduct.<sup>100</sup> The dissenting judge held that the military judge presiding at the court martial had failed to consider the whole of the evidence surrounding the question of consent,<sup>101</sup> pointing to the voluntary statement given by the accused to the Military Police which, in her view, showed that Pte Vu was aware that the complainant was unconscious at times during the act in question.<sup>102</sup> The prosecution appealed as of right to the Supreme Court of Canada who dismissed the appeal during the 2023/24 reporting period.

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<sup>93</sup> *Ibid* at para 12.

<sup>94</sup> *Ibid*.

<sup>95</sup> *Ibid* at para 21 citing *R v Sarrazin*, 2010 ONCA 577 at para 53.

<sup>96</sup> *Ibid* at paras 23-24.

<sup>97</sup> *R v Vu*, 2023 CMAC 2 [*Vu* CMAC].

<sup>98</sup> *R v Vu*, 2021 CM 4012 at paras 97-101.

<sup>99</sup> *Vu* CMAC, *supra* note 97 at paras 31-32.

<sup>100</sup> *Ibid* at paras 34-37.

<sup>101</sup> *Ibid* at paras 69-84.

<sup>102</sup> *Ibid* at paras 85-90.

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## Stay of Sentence Pending Appeal

### ***R v Thibault*, 2022 CMAC 6**

*R v Thibault* is part of the *R v Edwards* series of cases in which CAF members have appealed their convictions for service offences on the grounds that the military status of their court martial judges violated their rights under section 11(d) of the *Canadian Charter of Rights and Freedoms*<sup>103</sup> (the *Charter*) to be tried by an independent and impartial tribunal. The Court Martial Appeal Court of Canada dismissed all the appeals in the series of cases, but the Supreme Court of Canada has subsequently granted leave to appeal.

After unsuccessfully appealing his conviction for sexual assault on the same grounds as *Edwards*,<sup>104</sup> Sgt Thibault filed a motion with the Court Martial Appeal Court requesting a stay of his sentence pending resolution of the *Edwards* Supreme Court appeal. In its decision denying the request,<sup>105</sup> which was rendered prior to the Supreme Court granting leave to appeal, the Court Martial Appeal Court found that the criteria for granting a stay of sentence had not been met because the public interest criterion, which includes maintaining public confidence in the administration of justice, had not been satisfied.<sup>106</sup>

The Court Martial Appeal Court reviewed the circumstances of the case,<sup>107</sup> which included the following facts: the offence occurred more than a decade previously, only the military justice system took the offence seriously despite it being reported to civilian authorities, and the same question had been dealt with on numerous occasions in the *Edwards* cases.<sup>108</sup> In these circumstances, the Court concluded that a reasonable member of the public would expect the judgement to be executed in a timely manner.<sup>109</sup> The Court also noted numerous similarities to the appeal decision in *R v Royes* in which a member of the CAF had been convicted of a serious offence, was a minimal risk to the public, and was appealing only on a constitutional question.

## Court Martial Jurisdiction Over Historical Sexual Assault Cases

### ***R v MacPherson*, 2022 CMAC 8**

In this appeal, the Court Martial Appeal Court of Canada confirmed the limits of the military justice system's jurisdiction over historical sexual assault cases.

In 1998, Parliament passed *An Act to amend the National Defence Act and to make consequential amendments to other Acts*<sup>110</sup> (Bill C-25). Bill C-25 granted the military justice system jurisdiction over a variety of offences, including sexual assault committed in Canada, by removing the prohibition against trying sexual assault offences by way of court martial that had been present in the *National Defence Act* at the time.<sup>111</sup> This section came into force on 1 September 1999.<sup>112</sup>

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<sup>103</sup> *Charter*, *supra* note 9.

<sup>104</sup> *R v Thibault*, 2022 CMAC 3.

<sup>105</sup> *R v Thibault*, 2022 CMAC 6 [*Thibault* motion].

<sup>106</sup> *Ibid* at para 11.

<sup>107</sup> *Ibid* at paras 2 and 11.

<sup>108</sup> See e.g. *R v Edwards*, 2021 CMAC 2; *R v Christmas*, 2022 CMAC 1; *R v Brown*, 2022 CMAC 2.

<sup>109</sup> *Thibault* motion, *supra* note 105 at para 11.

<sup>110</sup> Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1<sup>st</sup> Sess, 46<sup>th</sup>-47<sup>th</sup> Parl, 1997-98, (assented to 10 December 1998), SC 1998, c 35.

<sup>111</sup> *Ibid*, s 22. See also *R v MacPherson*, 2022 CMAC 8 at para 3 [*MacPherson* CMAC].

<sup>112</sup> *MacPherson* CMAC, *supra* note 112 at para 2.

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On 10 December 2019, MWO MacPherson was charged with sexual assault offences that had allegedly occurred between 1 August 1998 and 31 October 1998. On 8 September 2021, during pre-trial procedures leading to a general court martial, the presiding military judge terminated proceedings for lack of jurisdiction on her own motion. She concluded that the *National Defence Act*, as it was at the time of the alleged offences, precluded courts martial from trying sexual assault charges alleged to have been committed in Canada, and that she could not preside over a general court martial for this offence.<sup>113</sup>

The Court unanimously dismissed the prosecution's appeal of the military judge's decision. Based on its interpretation of the provisions of Bill C-25, the Court concluded that Parliament did not intend to grant retroactive jurisdiction to courts martial for sexual assault offences when it enacted Bill C-25. As a result, sexual assault offences that allegedly occurred in Canada prior to 1 September 1999 cannot be tried by court martial.<sup>114</sup>

## Assessing Witnesses' Credibility and Reliability

### *R v Euler*, 2022 CMAC 5

The Court Martial Appeal Court of Canada provided a clarification in *R v Euler*<sup>115</sup> on the meaning of the term "credibility", and, in particular, whether assessing a witness's credibility requires consideration of both their credibility and the reliability of their testimony. This decision stems from the acquittal of Cpl Euler on charges of disgraceful conduct and ill-treatment of a subordinate by a standing court martial.<sup>116</sup> The prosecution appealed the acquittal on the grounds that the military judge made an error in law by requiring corroboration of the complainant's evidence.<sup>117</sup>

On 9 May 2022, the Court unanimously dismissed the appeal, finding that the military judge did not make an error in law by requiring corroboration despite the fact that she found the complainant's testimony to be credible. The Court concluded that the military judge had correctly applied the legal test for assessing a witness's credibility as elaborated by the Supreme Court of Canada in the *W(D)* decision.<sup>118</sup> Although the Supreme Court has previously stated that the term credibility is often used to encompass both credibility and reliability,<sup>119</sup> the Court Martial Appeal Court noted that this is not always the case and a distinction can be made between the reliability and the credibility of evidence.<sup>120</sup>

Accordingly, the military judge did not err in finding that the complainant was a credible witness, in the sense that she was not trying to mislead the court, but also that her testimony was unreliable in the absence of further contextual evidence. As the Court pointed out, "evidence can be credible without being sufficiently reliable to meet the standard of proof beyond a reasonable doubt."<sup>121</sup> Finally, the Court noted that the military judge's approach was consistent with the Supreme Court of Canada's approach in *Gerrard*<sup>122</sup> and thus it cannot be said that the judge made an error in law.<sup>123</sup>

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<sup>113</sup> *R v MacPherson*, 2021 CM 2014.

<sup>114</sup> *MacPherson* CMAC, *supra* note 112 at paras 20–21, 26–27, 43.

<sup>115</sup> *R v Euler*, 2022 CMAC 5 [*Euler* CMAC].

<sup>116</sup> *R v Euler*, 2021 CM 5019.

<sup>117</sup> *Euler* CMAC *supra* note 116 at para 10.

<sup>118</sup> *Ibid* at paras 5 and 19 citing *R v W(D)*, [1991] 1 SCR 742.

<sup>119</sup> See *R v GF*, 2021 SCC 20 at para 82.

<sup>120</sup> *Euler* CMAC, *supra* note 116 at para 8.

<sup>121</sup> *Ibid* at para 13.

<sup>122</sup> *Ibid* at para 18 citing *R v Gerrard*, 2022 SCC 13.

<sup>123</sup> *Ibid* at paras 18-19.

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## Applicable Sentencing Principles

### ***R v Bruyère*, 2023 CMAC 1**

In this appeal, the Court Martial Appeal Court of Canada clarified that military judges can consider both civilian and military cases when considering the parity of an individual sentence.

The respondent, Pte Bruyere, pleaded guilty at court martial to common assault and was sentenced to a \$3000 fine and a severe reprimand.<sup>124</sup> The prosecution appealed the sentence on the grounds that the presiding judge imposed an inappropriate sentence and failed to consider civilian sentencing principles. The prosecution argued that the range of sentences considered by the presiding judge was incorrect and that imprisonment was the minimum sentence required.<sup>125</sup>

In a unanimous decision, the Court dismissed the appeal,<sup>126</sup> finding that the prosecution's approach to sentencing ranges was too rigid to effectively serve as a guideline in identifying an appropriate, individualized sentence.<sup>127</sup> Moreover, the Court found that the presiding judge had, in fact, considered both civilian and military justice system cases in her sentencing analysis,<sup>128</sup> including the *Rumbolt*<sup>129</sup> and *Simms*<sup>130</sup> cases where a sentence of imprisonment had not been imposed following a conviction on assault charges.<sup>131</sup>

In making its decision, the Court elaborated that “[t]he principles of parity and uniformity in sentencing were adhered to in every way as part of a detailed and full review of the evidence, the legislation and the relevant military and civilian case law.”<sup>132</sup>

## Supreme Court of Canada

### Extraterritorial Application of the *Charter* and the Proper Role of Interveners

#### ***R v McGregor*, 2023 SCC 4**

In this appeal before the Supreme Court of Canada, the Court in a judgment issued on 17 February 2023, reconfirmed the legal framework with respect to the extraterritorial application of the *Charter* and also clarified the proper role of intervening parties in appeals.

Cpl (retired) McGregor was convicted at court martial for a number of offences, including sexual assault and voyeurism, on the basis of evidence obtained through searches conducted in Alexandria, Virginia, that had been authorized by a warrant issued under Virginia law. Cpl McGregor unsuccessfully challenged the introduction of this evidence before his court martial and subsequently on appeal with the Court Martial Appeal Court of Canada as a violation of his right against unreasonable search and seizure under section 8 of the *Charter*.<sup>133</sup>

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<sup>124</sup> *R c Bruyère*, 2022 CM 5004.

<sup>125</sup> *R v Bruyère*, 2023 CMAC 1 at para 15 [*Bruyère* CMAC].

<sup>126</sup> *Ibid* at para 36.

<sup>127</sup> *Ibid* at para 17.

<sup>128</sup> *Ibid* at para 26.

<sup>129</sup> *R v Rumbolt*, 2019 CM 2028.

<sup>130</sup> *R v Simms*, 2016 CM 4001.

<sup>131</sup> *Bruyère* CMAC, *supra* note 126 at para 22.

<sup>132</sup> *Ibid* at para 28.

<sup>133</sup> *R v McGregor*, 2018 CM 4023; *R v McGregor*, 2019 CM 4015.



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Speaking for the majority of the Court, Justice Côté explained that even if the Court were to accept Cpl McGregor's contention that the *Charter* applied to the actions of Canadian authorities who participated in the search of his United States residence, this search was reasonable and conformed to the requirements of section 8 of the *Charter*.<sup>134</sup> The Court's conclusion was in line with its 2007 decision on the extraterritorial application of the *Charter* in *R v Hape*,<sup>135</sup> where it held that the *Charter* does not apply outside Canada unless either local authorities consent to the application of Canadian law on their territory or the Canadian government's actions violate its international obligations.<sup>136</sup> The Court reconfirmed and clarified a legal framework oriented toward respect for sovereignty and comity in law enforcement operations. As LeBel J. noted in *Hape*, "it is in practice impossible to apply the full force of the *Charter* to searches and seizures in foreign territory [...] it would be unrealistic, in a co-operative investigation, to require the various officers involved to follow different procedural and legal requirements."<sup>137</sup>

Although the *Hape* framework remains the current state of the law, it has been criticized in academic circles<sup>138</sup> and during the hearing multiple interveners requested that the Court overturn it.<sup>139</sup> The Court rejected the interveners' requests, explaining that it was not necessary to consider overturning *Hape* in order to decide McGregor's appeal. Further, neither Cpl McGregor nor the prosecution had made such an argument; both parties had simply debated the appropriate interpretation of the *Hape* legal framework in the current case.<sup>140</sup>

The Court further reminded all interveners about their proper role in the context of a hearing before the Court, reviewing the rationale underpinning the limits of an interveners' role. Specifically, the Court explained that to allow interveners to raise issues that had not been raised by the parties was inappropriate and presented risks to the integrity of the judicial process. Such activity could prejudice the parties to litigation and impact other potential interveners who may not have expected these new arguments to be raised.<sup>141</sup>

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<sup>134</sup> *R v McGregor*, 2023 SCC 4 at para 23 [*McGregor SCC*].

<sup>135</sup> *R v Hape*, 2007 SCC 26 [*Hape*].

<sup>136</sup> *McGregor SCC*, *supra* note 135 at para 18.

<sup>137</sup> *Hape*, *supra* note 136 at para 89.

<sup>138</sup> *McGregor SCC*, *supra* note 135 at para 21 (Footnote 2). Here the Court lists several scholarly articles that criticize the *Hape* framework.

<sup>139</sup> *Hape*, *supra* note 136.

<sup>140</sup> *McGregor SCC*, *supra* note 135 at para 23.

<sup>141</sup> *Ibid* at paras 103–115.

# CONCLUSION

The introduction of the summary hearing system has inaugurated a new stage in the ongoing evolution of Canada's military justice system. The chain of command now has a non-penal disciplinary tool available to manage misconduct by members of the Canadian Armed Forces at the unit level. As Chapter 2 of this report highlights, under the new summary hearing procedure, service infractions are being used to hold to account members who engage in misconduct while still adhering to the principles of fairness and transparency for members. During this reporting period, 93 summary trials were held. After the retirement of that penal system, 245 summary hearings were held. This marked shift from the summary trial system to the new summary hearing system points to a promising trend that the new administrative regime is working to maintain the discipline, efficiency, and morale of the Canadian Armed Forces.



The retirement of the summary trial system provides an opportunity to reflect on the full spectrum of environments in which the former procedure supported the maintenance of good order and discipline in the Canadian Armed Forces. Whether onboard a ship, aircraft or in the field, summary trials were available to efficiently dispose of service offences for less serious misconduct. The advent of the *Canadian Charter of Rights and Freedoms* highlighted the strength and adaptability of the summary trial system, as it evolved to protect the rights and freedoms of members while still maintaining operational effectiveness. The importance of the summary trial system over the

course of 72 years is shown by the frequency of its use. The summary trial was the overwhelmingly predominant form of disciplinary proceeding.

However, over those 72 years, Canadian social and legal norms have changed significantly, and the military justice system must keep pace. With the introduction of the new summary hearing process, the military justice system took a leap forward away from a penal model of justice at the unit level to one rooted in administrative law that will support future missions, training, and challenges.

The new summary hearing system is specifically designed to build on the strengths of the old system but also to enable the system to evolve out of a strictly penal model of justice. The new process will provide more flexibility for the chain of command to respond to less serious forms of misconduct yet still be fair to members in a non-penal context. For serious forms of misconduct requiring punishment, the court martial system and its independent actors remain available. Notably, the court martial system was also recently improved upon to avoid delays and support victims. As discussed in previous reports, the court martial system was reformed to enshrine victims' rights with the *Declaration of Victims Rights*; extend charge laying to all members of the Military Police; and send referrals for service offences directly to the Director of Military Prosecutions.

As described in Chapter 4, during this reporting period, there were several impactful courts martial and appellate decisions. The Supreme Court of Canada's decision in *R v McGregor*<sup>142</sup>, affirmed the legal framework found in *R v Hape*<sup>143</sup> concerning the extra-territorial application of the *Charter*. It also provided insightful guidance on the

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<sup>142</sup> *McGregor SCC*, supra note 135.

<sup>143</sup> *Hape*, supra note 136.

proper role of intervenors in both the military and civilian systems of justice. In *R v Vu*<sup>144</sup>, the Court Martial Appeal Court of Canada canvassed complex topics of consent in the context of sexual assault. During the 2023/24 reporting period, we expect the Supreme Court of Canada to hand down its decision in the *R v. Edwards* series of cases,<sup>145</sup> which includes in *R v Thibault*,<sup>146</sup> addressing the issue of the judicial independence of military judges.

The Office of the JAG will use these changes as inspiration to continue to move forward with new tools, projects, and standards. The Superintendence Enhancement and Assessment Project will seek to enhance monitoring, analysis, and the use of technology to support the administration of justice in the Canadian Armed Forces. The Justice Administration Information Management System, the Military Justice Performance Monitoring Framework, and the Military Justice System Time Standards initiative will complement the new summary hearing system to make a system of justice that will support the operational readiness and effectiveness of the Canadian Armed Forces in years to come.

## Conclusion

The administration of military justice supports the standards of conduct and discipline that are expected of the Canadian Armed Forces. As society changes, the Canadian Armed Forces must keep pace to ensure that Canada has an armed force ready to deploy to support the objectives of our democratic government, both domestically and abroad. The changes to the military justice system and the corresponding projects, tools, and initiatives to support the administration of military justice outlined in this report are designed to do just that. The new summary hearing system and changes to the court martial system will support the maintenance of good order and discipline and firmly establish the democratic legal values and norms of Canadians within the very fabric of Canada's military.



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<sup>144</sup> *Vu* CMAC, *supra* note 97.

<sup>145</sup> See e.g., *R v Edwards*, 2021 CMAC 2; *R v Christmas*, 2022 CMAC 1; *R v Brown*, 2022 CMAC 2.

<sup>146</sup> *R v Thibault*, 2022 CMAC 3.

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

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

QR&O Section	Description	2022/23	
		#	%
120.02 (a)	Takes or uses, for other than authorized purposes, non-public property, public property, materiel or government-issued property or damages that property or materiel	7	1.77%
120.02 (b)	Without permission or legal justification, takes property that belongs to another person	0	0%
120.02 (c)	Accesses, possesses, uses or communicates information for a purpose unrelated to the performance of their duties	1	0.25%
120.02 (d)	Fails to disclose actual, apparent or potential conflicts between their duties and private interests	0	0%
120.03 (a)	Handles a weapon, explosive substance or ammunition in a dangerous manner	6	1.52%
120.03 (b)	Discharges a firearm without authorization	24	6.07%
120.03 (c)	Behaves in a manner that could reasonably undermine the authority of a superior officer	10	2.53%
120.03 (d)	Fails or while on duty is unfit to effectively perform their duties or carry out responsibilities	12	3.04%
120.03 (e)	In relation to military service, furnishes false or misleading information or engages in deceitful conduct	27	6.84%
120.03 (f)	Without reasonable excuse, fails to attend or is tardy to their place of duty	83	21.01%
120.03 (g)	Dresses in a manner or adopts an appearance or demeanor that is inconsistent with Canadian Forces requirements	10	2.53%
120.03 (h)	Fails to maintain personal equipment or assigned quarters in accordance with Canadian Forces requirements	4	1.01%
120.03 (i)	Otherwise behaves in a manner that adversely affects the discipline, efficiency or morale of the Canadian Forces	187	47.34%
120.04 (a)	While on duty, is impaired by a drug or alcohol	13	3.29%
120.04 (b)	Uses a drug contrary to article 20.04 (Prohibition)	5	1.27%
120.04 (c)	Introduces, possesses or consumes an intoxicant contrary to article 19.04 (Intoxicants)	6	1.52%
<b>Total</b>		<b>395</b>	<b>100%</b>

## Annex B: Summary of Charges Disposed of at Summary Trial

### Annex B: Summary of Charges Disposed of at Summary Trial

NDA Section	Description	2021/22		2022/23	
		#	%	#	%
83	Disobedience of Lawful Command	3	0.59%	0	0%
85	Insubordinate Behaviour	20	3.92%	5	4.27%
86	Quarrels and Disturbances	19	3.73%	3	2.56%
90	Absence Without Leave	146	28.68%	32	27.35%
97	Drunkenness	37	7.27%	11	9.41%
112	Improper Use of Vehicles	4	0.79%	0	0%
114	Stealing	3	0.59%	0	0%
116	Destruction, Damage, Loss or Improper Disposal	4	0.79%	0	0%
117	Miscellaneous Offences	5	0.98%	0	0%
125	Wilfully made a false statement in a document	2	0.39%	0	0%
127	Negligent Handling of Dangerous Substances	1	0.2%	0	0%
129	Conduct to the prejudice of good order and discipline - Alcohol Related	38	7.47%	5	4.27%
129	Conduct to the prejudice of good order and discipline - Drug Related	7	1.38%	2	1.71%
129	Conduct to the prejudice of good order and discipline - Sexual Misconduct - Personal Relationship	6	1.18%	0	0%
129	Conduct to the prejudice of good order and discipline - Sexual Misconduct - Sexual Harassment	32	6.29%	7	5.98%
129	Conduct to the prejudice of good order and discipline - Unauthorized Discharge	30	5.89%	6	5.13%
129	Conduct to the prejudice of good order and discipline - Other	146	28.68%	46	39.32%
130 (4(1) CC)	Possession of Controlled Substance	2	0.39%	0	0%
130 (265 CC)	Assault	1	0.2%	0	0%
130 (266 CC*)	Assault	3	0.59%	0	0%
<b>Total</b>		<b>509</b>	<b>100%</b>	<b>117</b>	<b>100%</b>

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

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

## Annex C: Summary of Charges Disposed of at Court Martial

### Annex C: Summary of Charges Disposed of at Court Martial

NDA Section	Description	2021/22		2022/23	
		#	%	#	%
77(f)	Offence against the property or person of any inhabitant or resident of a country in which he is serving	0	0%	0	0%
81	Offences related to mutiny	0	0%	1	1.31%
83	Disobedience of lawful command	4	3.15%	3	3.95%
84	Struck a superior officer	1	0.79%	0	0%
85	Insubordinate behaviour	2	1.57%	0	0%
86	Quarrels and disturbances	0	0%	4	5.26%
86 (a)	Fought with a person subject to the code of service discipline	1	0.79%	0	0%
90	Absence without leave	1	0.79%	1	1.31%
92	Scandalous conduct by officers	0	0%	1	1.31%
93	Cruel or disgraceful conduct	11	8.66%	3	3.95%
95	Abuse of subordinates	5	3.94%	2	2.63%
97	Drunkenness	2	1.57%	4	5.26%
101.1	Failure to comply with conditions	1	0.79%	0	0%
109	Low flying	1	0.79%	0	0%
112 (b)	Unauthorized use of vehicles	2	1.57%	1	1.31%
114	Stealing	4	3.15%	4	5.26%
117 (f)	Miscellaneous offences	2	1.57%	1	1.31%
124	Negligent performance of a military duty	1	0.79%	0	0%
125	Offences in relation to documents	0	0%	2	2.63%
129	Conduct to the prejudice of good order and discipline	35	27.56%	19	25%
130 (5(1) CDSA*)	Trafficking in substance	1	0.79%	0	0%
130 (8(1)(b) Cannabis Act)	Possessing cannabis that they knew to be illicit	1	0.79%	0	0%
130 (10 (1) Cannabis Act)	Selling cannabis without authorization	1	0.79%	0	0%

NDA Section	Description	2021/22		2022/23	
		#	%	#	%
130 (10 (2) Cannabis Act)	Possessing cannabis for the purpose of selling	1	0.79%	0	0%
130 (17(1) Cannabis Act)	Promotion of cannabis	1	0.79%	0	0%
130 (122 CC**)	Fraud by public officer	0	0%	2	2.63%
130 (152 CC)	Invitation to sexual touching	1	0.79%	0	0%
130 (162 (1) CC)	Voyeurism	1	0.79%	0	0%
130 (162.1 CC)	Transmission of an intimate image without consent	1	0.79%	0	0%
130 (162 (4) CC)	Publication of voyeuristic recordings	1	0.79%	0	0%
130 (172.1 (1)(b) CC)	Luring a child	1	0.79%	0	0%
130 (173 CC)	Indecent acts	0	0%	2	2.63%
130 (245(1)(b) CC)	Administering noxious thing	8	6.3%	0	0%
130 (264(1) CC)	Uttering threats	0	0%	1	1.31%
130 (266 CC)	Assault	4	3.15%	8	10.53%
130 (267b CC)	Assault causing bodily harm	1	0.79%	0	0%
130 (271 CC)	Sexual assault	26	20.47%	11	14.48%
130 (272(2)(b) CC)	Sexual assault causing bodily harm	1	0.79%	0	0%
130 (279(2) CC)	Forcible confinement	2	1.57%	0	0%
130 (334(a) CC)	Theft (value stolen exceeds \$5000)	0	0%	1	1.31%
130 (342.1 CC)	Unauthorized use of a computer	0	0%	1	1.31%
130 (366(1) CC)	Forgery	0	0%	1	1.31%
130 (372(3) CC)	Harassing communication	1	0.79%	0	0%
130 (380(1) CC)	Fraud	0	0%	3	3.95%
130 (430 CC)	Mischief	1	0.79%	0	0%
<b>Total</b>		<b>127</b>	<b>100%</b>	<b>76</b>	<b>100%</b>

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.