

# The Court Martial Case\*

By Phyllis Nadeau\*\*

## 1 - Investigation

An investigation is conducted by the unit, the local military police or where required, by the National Investigation Service when a complaint has been made or there are reasons to believe a service offence has been committed. The seriousness or complexity of the alleged offence or the rank of the alleged offender determines the investigating body. An investigation must be conducted as soon as is practical to determine whether there are sufficient grounds to lay a charge.

## 2 - Requirement to Obtain Legal Advice

Prior to a charge being laid, the investigating body would normally obtain advice from a legal officer. A legal officer will review the results of the investigation to determine first if there is sufficient evidence to support the laying of a charge and second the appropriate charge to be laid.

## 3 - Laying a Charge

The authority to lay a charge rests with a commanding officer, a Canadian Forces member authorized by a commanding officer or a member of the National Investigation Service. A charge is laid when it is reduced in writing in the form of a "Record of Disciplinary Proceedings". All charges must set out a statement of the offence along with sufficient particulars to enable the accused to be reasonably informed of the offence alleged.

## 4 - Representation of an Accused Person

When a person is accused of having committed an offence and the matter is being processed for trial by court martial, that person has the right to elect trial in either French or English. The person is also given an election regarding the right to be represented at the court martial: first; by counsel from the Directorate of Defence Counsel Services, at no cost; second, by civilian counsel for which the accused person must pay; or,

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\* This is not intended to be an exhaustive treatise on the court martial process but, rather, a short guide setting out some of the most important matters.

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finally, by the accused person himself/herself without either military or civilian counsel.

## 5 – Referral and Pre-trial Disposal of a Charge

When a charge has been laid, the charge must then be referred to the commanding officer of the accused, for disposal. The commanding officer, upon receipt of charges, will either decide not to proceed with the charge (and if laid by the NIS send it back to them) or send it on to the referral authority for onward transmission to the Director of Military Prosecutions.

## 6 - Post Charge Review – Deciding Whether to Prosecute

A Military Prosecutor is responsible for deciding whether to go forward with a prosecution. This decision is based on whether there is a reasonable prospect of conviction and whether it is in the public interest to proceed. If either one of these criteria are not met then the military prosecutor will decide not to proceed with the charge. If both of these criteria exist the military prosecutor will prefer a charge for court martial to the Court Martial Administrator from the office of the Chief Military Judge.

## 7 - The Court Martial

Military members may be tried by one of three types of court martial. A Standing Court Martial, the most frequently convened court, is a court composed of a military judge only. A Disciplinary Court Martial is composed of a panel of three members and a military judge. A General Court Martial is composed of a military judge and a panel of five members. At a court martial, the accused may plead either guilty or not guilty to any or all of the charges. If the accused pleads not guilty a trial will normally follow. At court martial, the military judge will determine whether the evidence proves beyond a reasonable doubt that the accused is guilty of any or all charges brought against him/her. This is done by the prosecution presenting evidence consisting of documents, materials and calling witnesses. The prosecutor will present witness evidence by asking questions of each witness as to what they said, saw, heard and did. This is called examination-in-chief. Defence will then have an opportunity to question the prosecution's witnesses to dispute the prosecution's evidence and bring out evidence favorable to the accused. This is called cross-examination.

After the defence has finished questioning the prosecution's witnesses, the prosecutor will have another opportunity to question the witness to clarify any questions that may have come up in the defence cross-examination. This is called a re-examination.

When the prosecutor has finished questioning their witnesses and closed its case, the defence will then have the opportunity to introduce defence witnesses to support their case. This is done in the same manner as the prosecution witnesses but the defence will do the examination-in-chief and re-examination and the prosecution will do the cross-examination. The defence does not have to call witnesses but this option is available to them. When all evidence is submitted both prosecution and defence will have the opportunity to address the military judge on the evidence heard and the applicable law.

## 8- Standard of Proof

The standard of proof required in a court martial is proof beyond a reasonable doubt. The prosecution must prove the guilt of the accused beyond a reasonable doubt on each charge before a finding of guilt can be made. The accused does not have to prove his innocence.

## 9 - The Judge's Finding

In a Standing Court Martial, the Military Judge, after he/she has heard the submissions and had an opportunity to consider all of the evidence, will then deliver a finding of either guilty or not guilty in respect of each charge; and give reasons for the finding. In Disciplinary and General Courts Martial, after being addressed by the military judge the panel will determine the finding but will not be required to give reasons. If the accused is found not guilty then he/she is free to go and cannot be retried on the same charges unless the prosecution successfully appeals.

If the accused is found guilty, both prosecution and defence will have an opportunity to present evidence and to make submissions to the judge on the sentence they feel is appropriate.

## 10 - Sentencing

The Military Judge decides the sentence. He/She considers the recommendations made by the prosecution and defence and passes the sentence deemed to be appropriate. This is followed by the Judge's reasons based on his/her consideration of the evidence presented. In a court martial, only one sentence may be passed but that sentence may be composed of one or more punishments.

## 11 - Appealing to the Court Martial Appeal Court (CMAC)

Every person subject to the Code of Service Discipline has the right to appeal to the CMAC from a conviction at court martial. The three most common grounds of appeal are:

- Severity of sentence (with leave of the CMAC)
- Legality of finding of guilt
- Legality of sentence

The Prosecution, while acting as counsel for the Minister of National Defence, can appeal to the CMAC on the same grounds. In those cases where the Prosecution appeals (and in some cases where the military member appeals), the convicted military member is entitled to Military Defence Counsel appointed by the Director of Defence Counsel Services, free of charge.

An appeal must be commenced within thirty days after the termination of court martial proceedings by way of a Notice of Appeal, which sets out the particulars of the grounds upon which the appeal is based. Upon receipt of the Appeal Book (which includes a full transcript of the trial), the Appellant (the person who initiates the appeal) has 30 days to submit a factum to the CMAC, which sets out the Appellant's reasons why the Court Martial decision was wrong. The Respondent then has 30 days to reply to the Appellant's factum. The CMAC then sets a date to hear the arguments in person before a panel of three civilian judges who are members of the CMAC.

Any appeals of the decisions of the CMAC are made to the Supreme Court of Canada (SCC). The CMAC and SCC are an integral part of the civilian oversight of the military justice system.