



National
Defence

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A review from 1 April 2003 to 31 March 2004

Annual Report

of the Judge Advocate General to
the **Minister of National Defence**
on the administration of military justice
in the Canadian Forces



Canada



Office of the
Judge Advocate General

Cabinet du
Juge-avocat général

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21 May 2004

The Honourable David Pratt
Minister of National Defence
National Defence Headquarters
101 Colonel By Drive
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Dear Minister,

It is my honour to present to you the fifth Annual Report of the Judge Advocate General on the Administration of Military Justice in the Canadian Forces, made pursuant to Section 9.3 of the *National Defence Act*.

Yours truly,

A handwritten signature in cursive script, appearing to read "Pitzul".

Jerry S.T. Pitzul, Q.C.
Major-General

Canada 



The maple leaves framing the badge of the Canadian Forces Legal Branch represent service to Canada, and the Crown, service to the Sovereign. The dark background of the central device signifies the blindfolded figure of justice, and symbolizes the impartiality of the justice system. Against the background the scales of justice are held aloft on a pointless curtana sword by a mailed right hand. The mailed hand represents military justice, while the pointless sword denotes the mercy that we trust prevails in judgment.

The motto "*FIAT JUSTITIA*" means, "*LET JUSTICE PREVAIL*".

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Judge Advocate General Communiqué



As Judge Advocate General of the Canadian Forces, I am privileged to submit this, my fifth Annual Report to the Minister of National Defence on the administration of military justice in the Canadian Forces. The 2003–2004 reporting period marked a significant milestone in the history of the Canadian military justice system, with the first independent review of the 1998 reforms that were enacted by the Bill C-25 amendments to the *National Defence Act*. Over the past year,

the Office of the JAG has been actively involved in this major undertaking.

While the work connected with the five year review of the military justice system proceeded, the daily functioning of the system continued apace, requiring the dedication of those entrusted with the conduct of service tribunals and appeals, and those who support them. This report canvasses those areas, including:

- an overview of service tribunal activity within the military justice system;
- the proceedings of the military justice committees;
- the results of the survey on the summary trial process;
- military justice training activities; and
- other JAG initiatives aimed at enhancing the operation of the military justice system.

Of particular note this year, I was pleased to introduce the topic of review authorities at the Senior Leadership Forum of the Canadian Forces that was held last autumn in Ottawa. This topic was chosen because of its special relevance to an audience of general and flag officers. As officers who may be called upon to review the disciplinary decisions of their subordinates, they carry a significant burden of responsibility. Through this program, they received a refresher on their role and what it entails.

Although it ordinarily functions without fanfare, the military justice system has a vital connection to two prominent Canadian institutions — the Canadian Forces and the Canadian criminal justice system. It is my task to ensure that a constructive dynamic exists between the military justice system and these important institutions of Canadian society. As the military justice system has been renewed over the past five years, efforts have been made to ensure that the renewal process has been communicated both within and beyond the Department of National Defence. While progress has been made, it remains the case that the military justice system is not always given its due in the planning of statutory reform initiatives. This results in either costly parallel amendments, or worse, lack of parity under the two systems. This is an area that I will revisit in order to ensure that the military justice system does not get left behind by developments in Canadian legislation.

The Right Honourable Antonio Lamer was appointed by the Minister of National Defence in March 2003 to act as the Independent Review Authority for the first independent review of the Bill C-25 amendments to the National Defence Act. After a series of consultations throughout the spring and summer, former Chief Justice Lamer tendered his report in the autumn of 2003, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of the Statutes of Canada 1998, c.35.*

As noted in the foreword to the Report of the First Independent Review “Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence”. However, as with any justice system, the military justice system benefits from continued improvement and reform. Accordingly, former Chief Justice Lamer included 56 recommendations related to military justice in his report. These recommendations deal with such matters as sentencing options, the structure of courts martial, arrest and detention procedures and further enhancements to the procedural fairness requirements at summary trial. The Office of the JAG is currently studying the report and is developing policies to implement the recommendations that have been accepted to date.

The five year review also served to confirm the value of two military justice initiatives that were taken to ensure an ongoing and broad-based dialogue on military justice issues: the military justice committee system, and the establishment of a military law section within the Canadian Bar Association. The military justice committees served as an important conduit of information for five year review issues, and discussed the review process, the Lamer Report, and specific recommendations found therein. These occasions proved very valuable as they generated constructive discussion among the assembled key decision makers in the department and the Canadian Forces. Likewise, the National Military Law Section of the Canadian Bar Association delivered a substantial submission to the Independent Review Authority. It has provided a fresh perspective on the issues of military justice reform.

The priority given to national security has changed profoundly since September 11, 2001. The continued high tempo of deployed operations by the Canadian Forces means that the maintenance of discipline continues to be acutely important. The Office of the JAG is a team of military and civilian personnel who are highly dedicated to the principle that the members of the Canadian Forces deserve a justice system that is second to none. As their leader and as the superintendent of the military justice system, I am proud of their unfailing commitment to service above self and to the ongoing revitalization of the Canadian military justice system.

A handwritten signature in black ink, reading "Pitzul". The signature is written in a cursive, flowing style with a large initial "P".

Jerry S.T. Pitzul, Q.C.

Major-General

Judge Advocate General



The Office of the Judge Advocate General

1.1 Duties and Powers of the JAG in Canadian Law

Under the *National Defence Act* (NDA), the Minister of National Defence (MND) presides over the Department of National Defence and, through the Chief of the Defence Staff, gives direction to the Canadian Forces (CF). It is fundamental to Canada's political system that the armed forces are under the control and direction of the civil authority. As a democratically elected member of Parliament and a member of the executive branch of government, the MND is the linchpin between the CF and the Government of Canada. With respect to the military justice system however, the requirements of constitutionality militate against any role for the Minister that would combine executive and judicial duties. Accordingly, the NDA makes provision to ensure that the military judiciary is insulated from the Minister, while also ensuring that the Minister receives the legal advice that he requires in order to remain properly informed about the administration of military justice. This allows the Minister to fulfill his role as the official who is accountable to Parliament for the Department of National Defence (DND) and the Canadian Forces.

To ensure transparent accountability to the Minister of National Defence, the NDA provides for the appointment of the Judge Advocate General (JAG) by the Governor in Council,¹ and sets out the duties, powers and functions of the JAG in Canadian law. In addition to being the legal adviser to the Governor General, the Minister of National Defence, DND and the CF in matters relating to military law,² the JAG is also charged with the superintendence of the administration of military justice in the CF.³

1.2 Statutory Responsibilities

The JAG is statutorily responsible to the Minister of National Defence and “accountable”⁴ for the legal advice given to the Chief of the Defence Staff, the military chain of command, and to the Deputy Minister. This accountability structure was designed to ensure the independence of the Office of the JAG from the chain of command in the provision of legal advice in all areas, including military justice.

This independent role is reinforced in *Queen’s Regulations and Orders* (QR&O) articles 4.081(1) and (4), which provide that all legal officers whose duty is the provision of legal services shall be posted to a position established within the Office of the JAG 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.

An organization chart illustrating the JAG’s position within both the CF and DND is contained at Annex C.

1.3 Organization of the Office of the JAG

The Office of the JAG comprises 119 regular force legal officer positions and 63 reserve force legal officer positions. The regular force legal officers are employed throughout the CF, in Canada and abroad, as follows:

-
- 1 *National Defence Act*, Revised Statutes of Canada, 1985, Chapter N-5, hereinafter referred to as NDA, section 9(1).
 - 2 NDA section 9.1.
 - 3 NDA section 9.2.
 - 4 For a detailed description of the concepts of responsibility, authority and accountability within the CF and DND, see the DND publication “Organization and Accountability”, 2nd edition, September 1999.

- National Defence Headquarters in Ottawa;
- The Office of the Department of National Defence/
Canadian Forces Legal Advisor;
- eight Assistant Judge Advocate General (AJAG) offices, including seven in Canada and one in Germany;
- eleven Deputy Judge Advocate (DJA) offices across Canada;
- four Regional Military Prosecutor (RMP) offices across Canada;
- Supreme Headquarters Allied Powers (Europe) in Belgium;
- CF Joint Operations Group Headquarters and the Royal Military College of Canada (RMC) in Kingston;
- Deputy Commander North American Aerospace Defence Command Headquarters in Colorado, USA;
- International Institute of Humanitarian Law in San Remo, Italy;
- with CF contingents deployed overseas — during 2003–2004, four locations in Bosnia-Herzegovina, Afghanistan, the Gulf of Oman, and at MacDill Air Force Base in Florida, USA; and
- in training with CF formations and units participating in major national and international exercises.

Like their regular force colleagues, reserve force legal officers are employed throughout the CF and on operations and exercises. They are also integrated into the defence and prosecution functions of the military justice system.

Organization charts for the regular and reserve components of the legal branch, and contact and location information for all JAG offices, are included at Annex B.

Strategic Use of Resources by the Office of the JAG

Requests from several principal clients for dedicated legal services and the demands, arising from Canada's international obligations, dictated the temporary reallocation of some JAG resources in 2002–2003. The cost of meeting these demands for resources was that longer-term projects did not progress as rapidly as anticipated.

During the reporting period, sustainable arrangements were put in place to respond to those new demands that constituted continuing requirements for legal services. These arrangements were implemented once new positions received final approval and, where applicable, organizational changes were completed.

These activities led to resource shifts in 2003. The new position of legal adviser to the CF Provost Marshal's office was created. The primary responsibility of this legal adviser is to provide legal advice to the Deputy Provost Marshal Professional Standards on the handling and investigation of complaints about the conduct of military police. In December of 2003, responsibility for the Canadian Forces Grievance Authority (CFGAs) was transferred from the JAG to the Vice Chief of the Defence Staff (VCDS). This change was made in order to dispel any perceived conflict of interest between the work of the CFGAs and the role of the JAG. While overall responsibility has shifted to the VCDS, the JAG continues to support the CFGAs with legal services. Accordingly, the complement of legal officers employed there as advisers will remain on the establishment of the Office of the JAG.

1.4 Areas of the Office of the JAG Involved in Military Justice

The Canadian Military Prosecution Service

The Director of Military Prosecutions (DMP) holds office upon appointment by the Minister, who is the sole authority with the power to appoint and remove the DMP.⁵ The DMP may only be removed from office by the Minister for cause, on the recommendation of an Inquiry Committee.⁶

Under the provisions of the NDA, the DMP is responsible for the preferring of all charges to be tried by court martial and the conduct of all prosecutions at courts martial. On 1 September 1999, the Minister instructed the DMP to act as counsel in respect of appeals.⁷ In addition to these statutory responsibilities, the DMP is also the legal adviser to the Canadian Forces National Investigation Service in the conduct of their investigations.

In exercising prosecutorial discretion in relation to the preferral of charges and the conduct of prosecutions, the DMP's independence is protected by both the institutional structures in the NDA and at common law.⁸ In this way, the DMP's situation is analogous to that of a director of public prosecutions in the civilian criminal justice system.

The NDA provides that the DMP is under the general supervision of the JAG, who may issue general instructions or guidelines in writing in respect of prosecutions or in respect of a particular prosecution.⁹ There were no general instructions or instructions with respect to particular prosecutions issued during the reporting period.

Annex J of this report contains an abridged version of the Annual Report of the DMP. Information that is presented in the main report has been excluded from the abridged version in order to minimize duplication.

Director of Defence Counsel Services

The Director of Defence Counsel Services (DDCS) is appointed by the Minister and holds office on good behaviour for a term not exceeding four years.¹⁰ The DDCS provides, supervises and directs the provision of legal services to accused persons, as defined in regulations.¹¹

5 NDA section 165.1. The DMP holds office for a term not exceeding four years. Captain (Navy) William Reed was appointed DMP on 16 January 2001.

6 NDA section 165.1(2) and QR&O 101.18. The Inquiry Committee was not required to sit during 2003–2004.

7 NDA section 165.11 provides for the DMP to act as counsel for the Minister in respect of appeals, when instructed to do so.

8 After the decision *Re Balderstone and R.* (1983), 8 C.C.C. (3d) 532 (Man.C.A.), leave to appeal to S.C.C. refused, [1983] 3 S.C.R. v., Canadian courts have placed significant legal restrictions on the review of the exercise of prosecutorial discretion. Courts will undertake such reviews only in the clearest case of abuse of process. See e.g. *Krieger v. Law Society of Alberta*, [2003] 3 S.C.R. 372, 2002 S.C.C. 65.

9 NDA section 165.17. The JAG must give a copy of every such instruction to the Minister. The DMP must ensure that such instructions are made available to the public, except in limited cases where the DMP decides that release to the public of an instruction or guideline would not be in the best interests of the administration of military justice.

10 NDA section 249.18. On 1 September 2003, Lieutenant-Colonel Jean-Marie Dugas was appointed DDCS.

11 QR&O article 101.20.

The DDCS is statutorily insulated from other CF and DND authorities to protect the DDCS from potentially inappropriate influence. DCS lawyers represent their clients and their clients' interests in accordance with DDCS and JAG policies as well as the codes of conduct of their respective law societies. These are designed to preserve and enhance the legal and ethical obligations that defence counsel owe to their clients. Communications with their clients are protected at law by solicitor-client privilege.

The DDCS acts under the general supervision of the JAG, who may issue general instructions or guidelines in writing in respect of defence counsel services.¹² However, the JAG may not instruct the DDCS in respect of a particular defence or court martial. There were no general instructions in respect of defence counsel services issued by the JAG during the reporting period.

Annex I of this report contains the Annual Report of the DDCS.

Deputy Judge Advocate General/Operations

The Deputy Judge Advocate General/Operations (DJAG/Ops) is responsible for providing DND officials and CF authorities with legal advice on international and operational law issues, and for providing the Military Police and CF formations and units with legal advice on some military justice issues. In addition to the above, DJAG/Ops oversees all legal officers deployed on operations, the AJAG offices and all of the subordinate field offices.

In response to changes in the scope and volume of work demanded from legal officers under DJAG/Ops, several changes in the DJAG/Ops organization will be made in the next reporting period. Most notably, responsibility for the supervision of the AJAG offices and subordinate field offices will be transferred to a new position of Deputy Judge Advocate General/Regional Services.

12 NDA section 249.2. The DDCS must make any general instructions or guidelines available to the public.

Deputy Judge Advocate General/Human Resources

The Deputy Judge Advocate General/Human Resources (DJAG/HR) is responsible for providing DND and CF authorities with legal advice on military personnel issues through the Directorate of Law/Human Resources. DJAG/HR is also responsible for the provision of military legal training for CF members, through the Office of Military Legal Education in Kingston, and oversees the Deputy Director of the International Institute of Humanitarian Law in San Remo, Italy. Through the Directorate of Law/Training, DJAG/HR is also responsible for developing and delivering military justice training, in particular the certification course for presiding officers.

During the next reporting period, the responsibilities of this position will be realigned and the position will be renamed Deputy Judge Advocate General/Military Justice and Administrative Law. The position will gain responsibility for the Directorate of Law/Military Justice Policy and Research and the new Directorate of Law/Administrative Law. Functions related to training and education will be reallocated to the Deputy Judge Advocate General/Chief of Staff.

Deputy Judge Advocate General/Chief of Staff

The Deputy Judge Advocate General/Chief of Staff (DJAG/COS) provides legal research and policy development advice through the Directorate of Law/Military Justice Policy and Research (DLAW/MJP&R). DLAW/MJP&R assists the JAG in carrying out his superintendence and review functions of the military justice system and supports the production of the JAG's Annual Report. DJAG/COS also oversees the provision of all support services to the Office of the JAG.

In the next reporting period, responsibilities will be reallocated between the Chief of Staff and the new position of Deputy Judge Advocate General/Military Justice and Administrative Law. Authority over DLAW/MJP&R will be transferred to the DJAG/Military Justice and Administrative Law, while the Chief of Staff will assume responsibility for the Office of Military Legal Education, the Deputy Director of the International Institute of Humanitarian Law, and the Directorate of Law/Training.

Judge Advocate General Chief Warrant Officer

The JAG Chief Warrant Officer (CWO) serves as an information contact between the JAG, the chain of command and non-commissioned members in respect of the administration of military discipline. This position, which has been filled by CWO Marius Dumont since its inception in 2001, ensures that the Office of the JAG has direct access to the disciplinary knowledge and experience of senior non-commissioned members of the CF. The JAG CWO is a key component of the network of chief warrant officers and chief petty officers first class in the regional AJAG offices and the DJA offices in Borden and Gagetown.

1.5 Department of National Defence/ Canadian Forces Legal Advisor

The JAG is responsible for supervising the administration of military justice in the CF and for providing the Governor General, the Minister of National Defence, DND and the CF with legal advice in all matters relating to military law.¹³ The Department of National Defence/ Canadian Forces Legal Advisor (DND/CF LA) is responsible to the Minister of Justice for providing DND and the CF with legal advice on matters falling outside the JAG's area of responsibility. The staff of DND/CF LA includes civilian lawyers from the Department of Justice as well as military lawyers provided by the JAG. DND/CF LA and the Office of the JAG cooperate to deliver seamless legal services to their DND and CF clients. The drafting and coordination of legislation and regulations relating to military justice is a collaborative effort between DND/CF LA and the Office of the JAG.

13 NDA section 9.1 and 9.2.



Superintendence and Review of the Canadian Military Justice System

2.1 The Two Tiers of the Military Justice System

The NDA creates a two-tier system of military justice. The first tier, where most disciplinary matters are dealt with, is the summary trial system. The second tier is the more formal court martial system. The term “service tribunal” means either a court martial or a person presiding at a summary trial.¹

2.2 Analysis of Summary Trial Statistics

Where a member is charged with a service offence, a summary trial permits the case to be dealt with quickly and, as a general rule, at the unit or formation level.² As in previous years, the summary trial remained the most commonly used form of service tribunal in the military justice system in 2003–2004.

During the reporting period, 1637 disciplinary proceedings were initiated of which 1610 were completed as summary trials.

1 NDA section 2.

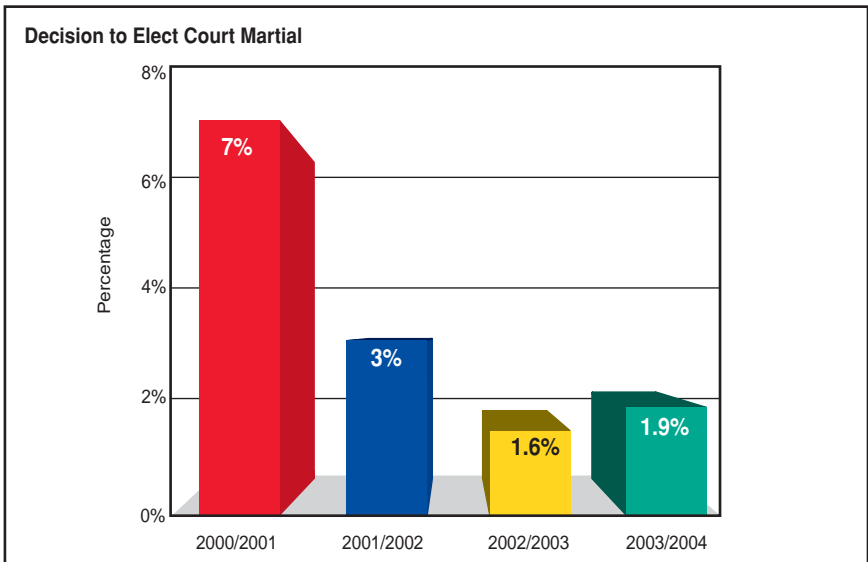
2 Summary trials are presided over by delegated officers, commanding officers or superior commanders. For a comprehensive overview of the military justice system, see the Précis in Annex A.

The percentage of service tribunals conducted as summary trials increased slightly from 97% in 2002–2003 to 98% in 2003–2004.

Summary Trials in 2003–2004

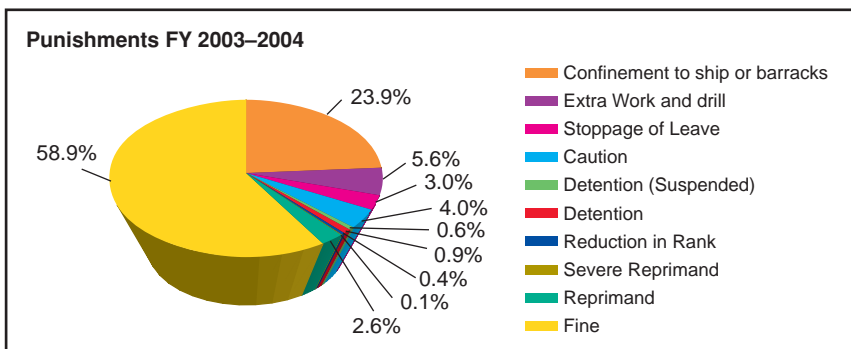
The number of summary trials conducted during the period (1610) represents a leveling-off after a 40 per cent increase in summary trials that was reported last year.

This year's figures indicate that the number of summary trials held annually has stabilized at a level which is higher than that which was seen in 2002 and earlier years. This development is consistent with the conclusion that CF members who have been given disciplinary responsibilities are developing proficiency with the summary trial process and are becoming more confident in their ability to use it as a disciplinary tool. The widespread acceptance of the summary trial as the preferred means of dealing with the vast majority of disciplinary matters is evidenced by the continuing very low percentage of accused persons (less than 5% in each of the past three years) who choose court martial when offered an election between summary trial or court martial.



During the reporting period, there was significant interest in the military justice system’s response to misconduct involving drugs or alcohol. In most cases, charges arising from this type of misconduct involve offences that may be dealt with at summary trial. In 2003–2004, the proportion of drunkenness charges as a percentage of all charges laid rose from 5.5% to 8%, while the proportion of drug- or alcohol-related charges that were laid under section 129 (prejudice to good order and discipline) of the NDA rose from 4.2% to 5.5%. The number of charges under section 130 of the NDA that related to violations of the *Controlled Drugs and Substances Act* (CDSA) remained marginal, rising from 0.33% to 0.42% of the total number of charges laid. These figures indicate that there has been a modest but noticeable increase in the percentage of charges laid in the CF over the past year in connection with drug or alcohol-related misconduct. On deployed operations, the percentage of charges that related to these types of offences continued to be significantly higher than the overall average for the CF. In 2003–2004, 31% of charges laid during deployments were of this type as compared with 26% the previous year.

Minor punishments and fines accounted for the vast majority of the sentences awarded at summary trials. Detention was imposed in 0.9% of cases this year compared to 1.6% in 2002–2003. This is consistent with historical trends wherein detention accounts for only a very small percentage of punishments awarded. The punishment imposed most often at summary trial was a fine. Punishments such as fines and minor punishments permit the offender to serve their sentence while still remaining an effective member of their unit. The use of such punishments is consistent with the overall goals of the summary trial system.



The average time from the date of the laying of charges to final disposition by summary trial for both deployed and non-deployed units increased to 11 days from 7 and 9 days, respectively. While this was a relatively minor increase in delay, it is a development that bears monitoring, since part of the rationale for the summary trial is that it provides unit commanders with a tool to deal with minor service offences in a prompt manner.

Detailed statistics for summary trials conducted during the reporting period 1 April 2003 to 31 March 2004 are included at Annex D.

Applications for Review of Summary Trials in 2003–2004

All offenders convicted at summary trial have the right to apply to the presiding officer's next superior in the disciplinary chain of command for a review of the finding, the punishment imposed, or both.³ Review authorities acting under QR&O article 108.45 must obtain legal advice before making any determinations on requests for review.⁴ The findings and punishment imposed at summary trial may also be reviewed on the independent initiative of a review authority.⁵

During the reporting period, 26 convicted persons made requests for review, of which 1 related to the finding, 10 related to the sentence, and 15 related to both the finding and the sentence. Review authorities reversed or modified the finding, punishment imposed or both in 17 of the 26 cases.

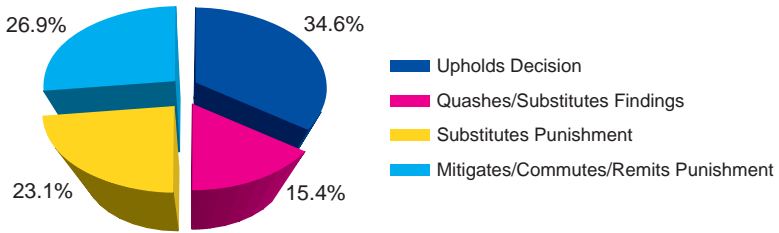
These figures indicate that the number of applications for review of a summary trial finding and/or punishment more than tripled over the previous reporting period. This is viewed as a positive outcome of the considerable efforts that have been made over the past year to increase CF members' awareness of the review process provided for in QR&O article 108.45. The following pie graph depicts the final disposition of applications for review made during the reporting period.

3 QR&O article 108.45.

4 QR&O article 108.45(8).

5 NDA section 249 and QR&O article 116.02.

Decisions of Review Authority following Requests for Review FY 2003–2004



Persons convicted at summary trial may also request judicial review from the Federal Court or from the Superior Court in any province.⁶ During 2003–2004, one application for judicial review of a summary trial was brought in the Federal Court of Canada. However, the application was discontinued before the Federal Court had considered the case on its merits.

2.3 Analysis of Court Martial Statistics

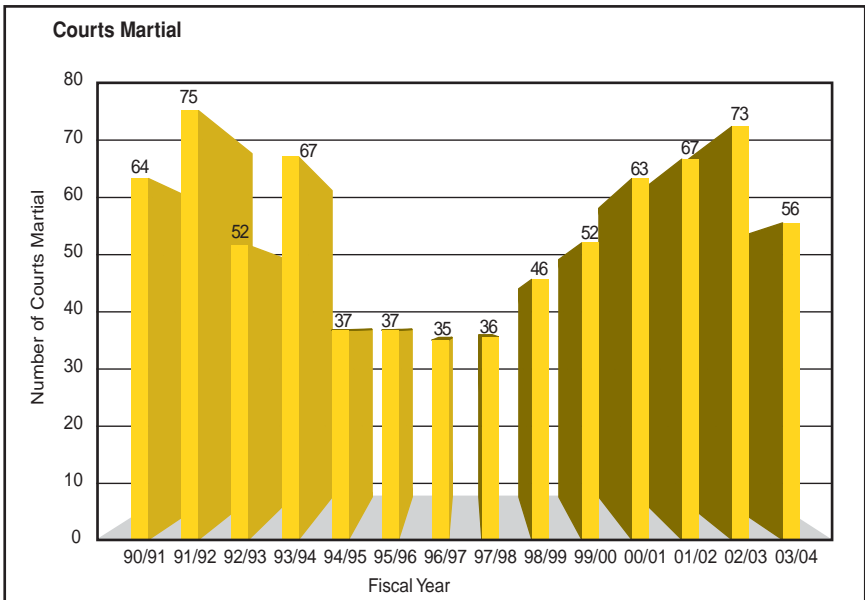
While the summary trial system is designed to provide unit commanders with the ability to deal with minor service offences in a prompt but fair manner, the court martial procedure is more formalized and is normally reserved for more serious cases. Each court martial is presided over by a military judge. The accused is entitled to be represented by defence counsel provided by the Director of Defence Counsel Services, or the accused can choose to be represented by civilian counsel at his or her own expense.

Courts Martial in 2003–2004

During 2003–2004, 56 courts martial were conducted across the CF. This represents a decrease from 73 in the previous period, and is the first year that the number of courts martial has declined since 1998–1999. While the overall number of courts martial fell, it is not anticipated that this is the

⁶ *Federal Courts Act*, R.S.C. 1985, c. F-7, sections 18 and 18.1.

beginning of a trend. Rather, the relatively high number of courts martial during the previous reporting period was the result of a number of cases during that period that arose from the same or similar incidents. In addition, the figures for the past several reporting periods have been higher as efforts were made to bring cases to trial in order to alleviate court martial delay. Given the relatively low numbers of courts martial as compared with summary trials, there will always be a tendency for small variations in the total number of courts martial to appear large in relative terms.



Information on courts martial is publicly available through the web sites of both the JAG and the Office of the Chief Military Judge.⁷ Detailed statistics for courts martial conducted during the reporting period 1 April 2003 to 31 March 2004 are included at Annex E.

7 The JAG web site is www.forces.gc.ca/jag/ and the web site of the Office of the Chief Military Judge is www.forces.gc.ca/cmj/.

2.4 Review and Reporting Framework

The JAG is tasked with the superintendence of the military justice system. This task requires the monitoring and assessment of the system using methods such as statistical analysis, independent professional analysis and standardized quantitative and qualitative reports from the system's key participants. The current review and reporting framework was designed in 1999–2000 with these objectives in mind. In addition, it has proven to be an effective means of identifying trends and issues in the military justice system that require closer analysis.

2.5 Military Justice Surveys

Surveys are an essential element of the military justice review and reporting framework discussed above. They assist in compiling a comprehensive overview of the state of the military justice system by complementing the information that is derived from periodic reports of key actors within the system and specialized reports such as compliance audits. Although they are useful, surveys tend to be costly. Consequently, the Office of the JAG uses surveys conservatively and when possible employs surveys for more than one purpose, such as the client satisfaction survey.

Interview Survey of Stakeholders

This survey involves individual interviews with various participants in the military justice system, including commanding officers, charge laying authorities and referral authorities. These interviews are conducted by an officer from the Directorate of Military Justice Policy and Research or by the JAG Chief Warrant Officer. The value of this particular survey is that individual interviews may result in the identification of important issues that are not apparent from statistical information. It was not used during this reporting period, as it was recognized that the consultations being conducted by the Independent Review Authority took priority, and an additional series of military justice interviews would likely overburden the chain of command. However, it will continue to be used periodically as it has proven to be a valuable information collection tool.

Client Satisfaction Survey

The second annual JAG Client Satisfaction Survey was completed during the reporting period. This survey is conducted by means of questionnaires that are e-mailed to principal clients of the Office of the JAG. While it does not focus primarily on military justice issues as such, this survey does collect responses from a target audience that includes persons who frequently utilize the military justice system. In the most recent client satisfaction survey, the overall results exceeded performance targets, indicating a high level of client satisfaction with legal services including those related to military justice. For details of this survey, see the JAG Annual Performance Report — Fiscal Year 2003.⁸

KPMG/BearingPoint Survey on the Summary Trial Process

This professionally run survey constituted the major military justice survey activity during 2003–2004. With the assistance of the Chief of Review Services, the Office of the JAG engaged the private sector consulting firm of KPMG and its affiliate BearingPoint, to conduct a CF-wide survey on the administration of summary trials. This survey was designed to:

- indicate how well CF members and units are complying with the regulations concerning the conduct of summary trials;
- contribute to the growing body of statistical information against which the performance of the military justice system can be monitored;
- contribute to the ongoing review of the NDA reforms; and
- determine the effect of enhanced military justice training over the past four and a half years.

The survey questionnaire targeted all commanding officers and persons who have been involved in the summary trial process since January 2003 as accused persons, assisting officers, presiding officers (delegated officers, commanding officers or superior commanders), review authorities or charging authorities.

⁸ Online: www.forces.gc.ca/jag/office/publications/performance_reports/PerformanceReport2003_e.pdf.

The questionnaire was hosted on the BearingPoint web site and was electronically accessible through the DND/CF Internet web site and the DND/CF intranet. Paper copies were also mailed out to selected units, based on their usage of the summary trial system over the previous year.

The survey drew a very good response from all levels of participants, although the total number of responses fell by more than 10% from the record high number received in 2003.

The number of responses from persons who had participated in the summary trial process as an accused fell 4%, while the number of responses from charging authorities rose by slightly less than 4%. The responses of each target group are important and new methods of publicizing the survey will continue to be explored. The responses are detailed as follows:

Data Source	Response on paper	Response by e-mail	Number of responses	Share of responses
Accused	17	76	93	11.7%
Assisting Officer	21	163	184	23.1%
Presiding Officer	16	139	155	19.5%
Commanding Officer	6	157	163	20.5%
Review Authority	0	7	7	0.9%
Charging Authority	6	188	194	24.3%
Total	66	730	796	100.0%

Survey Results

The format of the 2004 survey on the summary trial process was based upon versions of the survey questionnaire utilized in 2003 and earlier. Changes to the survey format have been limited to incremental modifications over the four years the survey has run, in order to compile responses that focus on the same or similar areas of inquiry and to create a historical record of service members' views on these issues.

The survey measures adherence to the three tenets of fairness in the summary trial system as detailed below:

Tenet 1: Compliance with regulatory requirements relating to the administration of military justice.

- a. Commanding officers are certified by the Office of the JAG to perform their duties in the administration of the Code of Service Discipline.
- b. Each unit maintains a Unit Registry of Disciplinary Proceedings.
- c. Records of Disciplinary Proceedings (RDPs) are completed correctly, including the final disposition of all charges, and submitted for review to the local AJAG or DJA and, ultimately, to the JAG.
- d. Legal advisers and review authorities give timely feedback.
- e. Requests from the public for access to the Unit Registry of Disciplinary Proceedings are handled appropriately.

This year's survey responses indicated that units are reporting a high degree of compliance with the regulatory requirements relating to the administration of summary trials. While this is a positive indicator, a further verification will be conducted in 2004 through a Chief of Review Services audit that will focus on the Unit Registry of Disciplinary Proceedings. A separate area of concern under this tenet continues to be the timeliness of feedback from unit legal advisers on disciplinary matters. As in previous surveys, there were some concerns about the timeliness of the provision of legal advice by unit legal advisers. This concern was reflected in satisfaction levels of 82% to 89% with the timeliness of feedback, and the comments expressed by some respondents. This satisfaction level may be expected to rise as the number of vacancies in the legal officer establishment is reduced and the cadre of recently-enrolled legal officers gain experience.

Tenet 2: Each accused receives fair treatment at summary trial.

- a. Trials are held in the official language chosen by the accused.
- b. Accused persons who are entitled to elect trial by court martial are given the opportunity and legal support to do so.
- c. Accused persons receive:
 - (1) all information identified in the regulations,
 - (2) access to the evidence that will be used to support the charge, and
 - (3) a list of witnesses who will testify to support the charge.
- d. Accused persons are given the opportunity to exercise their right to put their case to the presiding officer before a finding is made.
- e. Accused persons are given the opportunity to exercise their right to present evidence of mitigating considerations before sentence is passed.

This year's results again demonstrated substantial compliance in these areas. However, significant increases in compliance levels were not reported, despite the publication of new and revised pamphlets aimed at providing military justice information to members of the CF, and broader eligibility for enrolment in the Presiding Officer Certification Training. While an increase in positive feedback arising from these changes did not materialize, it was noted that higher levels of procedural fairness in the summary trial process tend to be reported by assisting officers, while accused persons tend to report less positive observations. Accordingly, it is important to analyze these results in conjunction with statistical returns and other data, in order to develop an accurate appreciation of how the military justice system is perceived by CF members.

Tenet 3: The system for reviewing the decisions made at summary trial is fair and responsive.

- a. All accused persons are informed of their right to seek review.
- b. The review process is efficient.

The survey responses on this issue indicated that awareness of the right to request review is not increasing among members of the CF who have been charged. Less than 50% of accused persons who responded to the survey indicated that they were aware that they could seek a review of the outcome of a summary trial. This figure is not consistent with the perceptions of commanding officers, 96% of whom reported that an accused member of their unit is made aware of his or her right to seek review, and most of whom identified the assisting officer as the person responsible to brief the accused about this right. The responses of assisting officers indicated that while the majority are aware of this obligation to inform the accused, more work needs to be done to ensure that the burden upon assisting officers for this important function is clearly understood and fully discharged.

The right to seek a review of a summary trial is an important element of the process and as such, it will continue to be a significant concern for the Office of the JAG to determine how best to increase service members' awareness of this right.

Analysis of Survey Results

The results of this survey indicate that efforts to educate participants in the military justice system must continue. Of greatest concern is the absence of an increase in the percentage of accused persons responding that they were aware of their right to request a review of their summary trial. The survey results indicate a growing gap between the perceptions of commanding officers and their personnel with respect to awareness of the right to seek review. However, these survey results must be considered while taking into account that, as is noted earlier in this chapter, the number of applications for review more than tripled during the reporting period. This suggests that awareness of the right to seek review is indeed on the increase among members of the CF.

As was reported last year, presiding officer certification training was made available to all junior officers and senior non-commissioned officers in response to expressions of interest in this training from assisting officers and charging authorities. This initiative seems to have been very well received, with a significant number of respondents from both groups endorsing the presiding officer certification training and indicating that the course and the course materials have proven valuable to them.

This survey on the administration of summary trials builds on the information obtained from the preceding three annual surveys. Given the nature of this survey, the information gathered serves only as a rough indicator of issues and potential problem areas. Further information must be gathered to confirm any problems or concerns identified by this survey. The Office of the JAG will continue to monitor the administration of military justice to ensure all members are treated fairly and in accordance with the law.

2.6 Five Year Review of the Bill C-25 Amendments to the *National Defence Act*

Introduction

As noted in last year's annual report, 2003 marked the commencement of the first independent review of the amendments made to the NDA in 1998 by Bill C-25. The Office of the JAG was involved in the review throughout the reporting period, preparing substantive submissions on military justice issues for consideration by the Independent Review Authority and, where requested, providing support to the process.

A Synopsis of the Five Year Review Process

Bill C-25 received Royal Assent in December 1998. It made extensive amendments to the NDA aimed at reform of the military justice system and modernization of the Code of Service Discipline. Bill C-25 also made a number of amendments to the NDA in non-military justice areas, including the grievance process and the military police complaints process. The Bill included a provision requiring that the Minister of National Defence cause

an independent review of the C-25 changes to be undertaken every five years, and that the Minister table a report on the review in Parliament. The scope of the independent review is limited to the changes that Bill C-25 made to the NDA.

In March 2003, the Minister of National Defence appointed the Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada as the Independent Review Authority to carry out the first five year review of Bill C-25. Once appointed, former Chief Justice Lamer issued a call for comments from CF members, DND employees and other interested parties. Subsequently, he conducted a series of meetings both at National Defence Headquarters and at several Canadian Forces Bases and Wings across Canada. He also received 121 written submissions, including a substantial submission from the Office of the JAG, which is discussed below. The Canadian Bar Association's National Military Law Section also provided a submission to the Independent Review Authority.

Office of the JAG Support to the Five Year Review

In order to present the Independent Review Authority with a considered submission in respect of the operation of the military justice provisions of Bill C-25, the JAG established a JAG internal review team. The team consulted broadly within DND/CF, undertook a review that looked at the institution's experience with the 1999 military justice reforms and finally provided recommendations for reform to the primary military justice stakeholders.

The military justice review and reporting framework instituted by the JAG in 1999–2000 ensured the availability and compilation of data reflecting the operation of the reformed military justice system since 1 September 1999. The consolidation of this information in the JAG's Annual Report to the Minister of National Defence, coupled with the continuously-updated information and statistics on the military justice topics found on the JAG website, provided both the JAG internal review team and the Independent Review Authority with ready access to this essential information.

The JAG internal review team prepared and delivered three separate reports addressing substantive military justice matters for consideration by the Independent Review Authority. These reports, delivered in May, June and July 2003, made 33 recommendations to the Independent Review Authority. Officers within the Office of the JAG were also made available, at the request of the Independent Review Authority, to provide required background information or to address specific questions relating to the military justice system.

The Lamer Report and the Response

The report of the Independent Review Authority, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35*,⁹ (the “Lamer Report”) was submitted to the Minister of National Defence on September 3, 2003. The Minister tabled the report in Parliament on November 5, 2003. In total, the Lamer Report contained 88 recommendations, of which 56 dealt with the military justice system. The remaining recommendations dealt with the military police complaints process and the grievance process.

The Independent Review Authority reported that, “as a result of the changes made by Bill C-25, Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence”. Having concluded that the military justice system is generally working well, the Independent Review Authority did note that there were some areas where there was still room for improvement and made a number of recommendations for further reform. Some of the more significant recommendations relate to the structure of military courts, sentencing options, arrest and detention procedures, and further enhancements to the procedural fairness protections at summary trials.

9 Online: www.forces.gc.ca/site/Reports/review/en/report_e.pdf.

As reflected in the Minister's statement made at the time of the tabling of the Lamer Report before Parliament in November 2003, the vast majority of the report's recommendations pertaining to military justice have been studied and accepted. A few of the recommendations involving more complex issues have been identified for further study, including those that former Chief Justice Lamer himself had identified as needing further consideration before implementation.

Since the delivery of the Lamer Report, the JAG internal review team has been developing policies that would implement the recommendations relating to military justice that have been accepted to date. With respect to those recommendations that have been accepted, most require statutory or regulatory amendments, a process that will be conducted in conjunction with the Department of Justice. The JAG team is also engaged in the further study of the more complex of the recommendations, particularly those involving the structure of military courts, and will be consulting with stakeholders and experts on these issues in the coming months. Most of the internal activity will be completed within the next reporting period.

2.7 Other Issues Related to Superintendence and Review

Implementation of Recommendations of CRS Audit of Court Martial Sentences

In July 2002, the Chief of Review Services (CRS) provided a report to the JAG concerning the implementation of punishments imposed at court martial between 1999 and 2001. The CRS reported that a significant proportion of sentences, particularly fines, were not being carried out. While there were a number of reasons behind this problem, the CRS found that the primary reason for non-implementation was the lack of a central monitoring authority. Accordingly, the JAG assumed the role of national monitoring authority for sentences in April 2003. This function was delegated to the Directorate of Military Justice Policy and Research.

The establishment of the national monitoring authority has required extensive cooperation with a number of other offices as most of the recommendations relate to better coordination of efforts and information sharing. By the end of the reporting period, the majority of the outstanding fines from 1999–2001 courts martial had been successfully collected, and a number of other changes had been made toward full implementation of the audit recommendations.

CRS Review of Unit Registry of Disciplinary Proceedings

The JAG asked the Chief of Review Services to conduct a review of CF units' compliance with the regulatory requirements concerning the Unit Registry of Disciplinary Proceedings.¹⁰ Pursuant to regulations, units must maintain a registry of disciplinary records and provide public access to certain records on request. The creation of these regulatory requirements was one of the outcomes of the reform of the military justice system that took place from 1997 to 1999. This review will assess compliance with those requirements. The CRS project team began its work in March 2004, and the results of the CRS review are expected during the next reporting period.

2.8 Committees on Military Justice

The Military Justice Stakeholders Committee

The Military Justice Stakeholders Committee is a forum for the discussion of a wide variety of long-term strategic issues related to military justice. It is chaired by the Chief Justice of the Court Martial Appeal Court, and includes the Minister of National Defence, the JAG, the Chief of the Defence Staff, the Vice Chief of the Defence Staff, the Chief Military Judge, the Director of Defence Counsel Services, the Director of Military Prosecutions, and the Canadian Forces Provost Marshal.

The Military Justice Stakeholders Committee met at Asticou, Quebec on 2 June 2003. The JAG provided the committee with an update on the JAG action plan for the review of the Bill C-25 amendments. The JAG's remarks

¹⁰ QR&O chapter 107, section 4.

focused on the work of the JAG internal review team, including its recommendation that certain regulatory changes also be made to enhance the efficacy of the military justice system. The committee was also briefed on a number of pending legislative changes, and provided with an update on several issues relating to the military judiciary. The meeting was followed by the investiture ceremony of Colonel Kim Carter as Chief Military Judge.

A subsequent meeting of the Military Justice Stakeholders Committee that was scheduled for November 2003 could not be held due to the unavailability of key members of the committee.

The CF Code of Service Discipline Committee

The CF Code of Service Discipline Committee is co-chaired by the Chief of the Defence Staff and the JAG. The committee members include the senior leadership of the CF (officers as well as chief warrant officers and chief petty officers first class) and other key players in the military justice system, such as the Director of Military Prosecutions, the Canadian Forces Provost Marshal and the JAG Chief Warrant Officer.

The Code of Service Discipline Committee met in June 2003. The committee was provided with updates on the recently issued Internet acceptable use policy, concurrent jurisdiction, and the military judiciary. The 2003 JAG Annual Report and the status of the five year review were the subjects of presentations by the JAG. The committee was also briefed on a specific service offence under section 129 of the NDA, negligent discharge of a weapon.

The committee met again on 16 December 2003. The JAG briefed the committee on the recent education seminar for judges of the Court Martial Appeal Court, and the Lamer Report. The committee held a discussion of the results of an informal survey of AJAGs concerning disciplinary proceedings involving reservists, a matter that the JAG deemed of particular concern and which he revisited in a follow-up letter to the members of the committee.

The JAG Advisory Panel on Military Justice

The mandate of the JAG Advisory Panel is to review new military justice initiatives and provide an external perspective before they are implemented. The structure of the panel ensures that the military justice system has the benefit of ideas and experience from the civilian criminal justice system. The panel is currently chaired by a sitting Superior Court Judge with broad experience in the military justice system. The members of the panel are all civilian lawyers with extensive experience.

The Advisory Panel members met at the Office of the JAG on November 14, 2003. The focus of the meeting was a number of the recommendations of the recently released Lamer Report.

The panel discussed alternative sentencing options, a permanent military court, a two-tier system of courts martial, the Appeal Committee, and NDA section 129. The round table discussion focused on pre-trial custody, and the allocation of charge-laying authority.

Military Justice Round Table

The Military Justice Round Table is an internal forum designed to integrate legal officers' views and recommendations into policy, regulation and legislation, as appropriate. It is comprised of senior legal officers from the Office of the JAG, the Director of Defence Counsel Services, the Director of Military Prosecutions, and the DND/CF Legal Advisor, as well as additional members as required when dealing with specific issues.

The Military Justice Round Table did not meet during the reporting period. It is expected that it will be convened during the upcoming reporting period, to assist the Office of the JAG in its follow up work concerning certain issues raised in the Lamer Report.



Judge Advocate General Initiatives

3.1 Introduction

Pursuant to the NDA, the JAG's responsibilities include the superintendence of the military justice system. In addition, the NDA requires that the JAG report annually to the Minister of National Defence on the administration of military justice. In fulfillment of those statutory duties, the JAG monitors the progress of the initiatives that he has undertaken to enhance the military justice system.

This chapter highlights the status of military justice initiatives in the following areas:

- court martial delay;
- statutory and regulatory changes related to military justice;
- policy guidance promulgated during the reporting period;
- military justice training and education; and
- other military justice superintendence and review initiatives undertaken during the 2003–2004 reporting period.

3.2 Court Martial Delay

The problem of unacceptable court martial delay was first noted as a concern in the 2001 JAG Annual Report. At that time it was observed that delay in bringing matters to trial was the result of a number of causes existing within the system, and that progress in reducing delay would take some time to achieve. Last year it was observed that significant progress was beginning to be made in reducing court martial delay, with a reduction of approximately 40 days in the average time required for a matter to be brought to trial after a decision to prefer charges by the Director of Military Prosecutions was made. In 2003–2004 further progress was made, with an overall reduction of 10 days in the average time it took for a matter to move from the charge-laying stage to the commencement of a court martial. In the past two years, the average time taken for a case to move from charge-laying to trial has fallen by nearly eighty days, a vindication of the analysis offered in earlier reports, which predicted an improvement over the medium term.

Among the factors that have contributed to the reduction of delay in bringing matters to trial are the rising levels of training and experience among military prosecutors, as well as the Court Martial Administrator's policy to encourage counsel to reach an agreement on a trial date within two weeks of the preferral of charges.

3.3 Statutory Amendments

Bill C-16 Sex Offender Information Registration Act

This Bill received Royal Assent on 1 April, 2004. It creates a national sex offender registry, designed to assist police in the protection of Canadians, particularly children, from future crimes of convicted sex offenders. The NDA is being examined with respect to changes that would be necessary to create a parallel scheme for military offenders convicted of designated offences.

Bill C-35 Remuneration of Military Judges

This Bill was intended to amend the NDA to allow for regulations to be made with retroactive effect to implement the recommendations of the Military Judges Compensation Committee concerning the rates of military judges' pay effective back to the date of the commencement of the period of the Committee's consideration, that is, 1 September 2003. It was introduced in Parliament in May 2003, but was not passed before the end of the session. It has not been reintroduced and consequently, it is intended that this issue will be dealt with in the package of legislative amendments arising from the Department's response to the report of the Independent Review Authority.

3.4 Changes in Regulations

Military Rules of Evidence

A project was commenced in 2001 to update the *Military Rules of Evidence* (MRE), which govern the admissibility of evidence at courts martial. It was expected that changes to the MRE would have come into force in 2003, however, competing priorities for drafting resources dictated that work on this project could not be completed within the reporting period. A team of JAG legal officers and DND/CF LA drafting specialists continue to work jointly on the drafting phase of the project. It is now anticipated that the revisions to the MRE will be completed in the autumn of 2004.

Victim Impact Statements

As reported in previous JAG Annual Reports, an initiative has been underway to create regulations for the use of victim impact statements at courts martial. These statements would ensure that the military justice process includes a mechanism for victims to describe how they have been affected by the commission of a service offence. Work continues on this proposal in order to resolve the remaining concerns that have been identified by stakeholders in the military justice system. It is anticipated that these regulations will be implemented within the next reporting period.

3.5 Judge Advocate General Policy Guidance

The JAG may issue general instructions in writing concerning prosecutions or defence counsel services, pursuant to subsections 165.17(2) and 249.2(2) of the NDA, respectively. During the 2003–2004 reporting period, no general instructions were issued to either DMP or DDCS.

3.6 Military Justice Education and Training

Ensuring that all CF members are knowledgeable with respect to the military justice system is a principal objective for those involved in military law training, particularly those members who have a specific role to play in the administration of military justice such as presiding officers. Legal officers from the Office of the JAG routinely provide instruction to CF members on the Code of Service Discipline and the military justice system. In 2003–2004, legal officers delivered the Presiding Officer Certification Training (POCT) course 51 times at 25 locations across and outside of Canada. Of these, seven POCT courses were delivered in French, reaching a total of 110 francophone CF officers.

Presiding Officer Certification Training (POCT)

Now in its sixth year, the POCT program ensures that presiding officers, including superior commanders, commanding officers and delegated officers are trained in the administration of the Code of Service Discipline and certified by the JAG to perform their roles in the administration of the military justice system at the summary trial level. Feedback from POCT trainees consistently indicates that officers feel much better prepared to deal with summary trial matters once they receive the training and are awarded the certification. Many officers also indicate that they would have benefited by having this training earlier in their military careers. As of 31 March 2004, over 5,000 CF officers have received the certification, which remains valid for a period of four years. Junior officers below the rank of Capt/Lt(N) and some non-commissioned members (NCMs) of the rank of Sgt/PO2 and above are invited to attend the POCT course for their own professional development. However, these trainees are not certified because they are

not eligible to preside at summary trials. In addition, the nine chief warrant officers and chief petty officers first class employed in Assistant Judge Advocate General and Deputy Judge Advocate offices across Canada also attend the POCT course to enhance their ability to fulfill their roles as liaison officers between CF units and JAG legal offices in disciplinary matters. These CWO/CPO1 also provide essential support to the Directorate of Law/Training by promoting POCT, ensuring attendance and monitoring military law.

Presiding Officer Re-Certification Test Program (PORT)

As reported in the 2002–2003 JAG Annual Report, a number of officers faced expiration of their certification as presiding officers starting in late 2003. The preferred option to assist them in maintaining their certified status was determined to be a computer-based re-certification test. This year, a new on-line, bilingual, testing program was launched, the Presiding Officer Re-Certification Test (PORT) program. In brief, as officers approach the four-year expiration point of their presiding officer certification, PORT allows them to re-certify on-line, anywhere, at anytime. Test results are immediately available upon completion of the on-line test. If an officer receives a failing grade, the officer is permitted a re-test using different but equally difficult questions. In the event of a second failure, officers must then re-attend the two-day POCT course in order to be re-certified.

The PORT program was made available on-line in October 2003 and by the end of the reporting period 95 officers had re-certified using the computer-based test. While the on-line PORT provides a very convenient way to re-certify, some officers nearing the expiration of their original POCT qualification have retaken the in-class POCT course as their preferred way to obtain their re-certification as presiding officers.

Other Military Justice Training

All members of the CF are subject to the Code of Service Discipline (CSD). Regular force members are liable to be dealt with for breaches of the CSD committed at any time during their military service, whether on duty or off

duty, both inside and outside of Canada. Reserve force members are also liable under the CSD but only during those times or in those situations specified in the *National Defence Act*. In order to ensure that CF members understand their rights, entitlements and obligations within the CF military justice system, instruction is provided at numerous points in a military member's career. Recruits attending the CF Leadership and Recruit School receive classroom instruction on the CSD as part of the curriculum of their recruit training. Military justice training is also imbedded in a variety of courses that CF members must complete to progress in their military occupations. Additional task-specific training is provided to those military personnel who are responsible for carrying out particular functions in the administration of the military justice system (e.g. CF members who investigate alleged offences, are authorized to lay charges, act as assisting officers or preside at summary trials).

In addition to providing training and lectures on military justice topics, the Office of the JAG also produces a number of publications and training aids related to military justice training. The main source of information on the summary trial process is the manual *Military Justice at the Summary Trial Level*. Military members charged with a service offence and their assisting officers may also refer to the publication *Guide for Accused and Assisting Officers* to inform themselves before making an election to have their charge dealt with before a court martial or by way of a summary trial. For the general information of all CF personnel, a question and answer format booklet entitled *The Code of Service Discipline and Me* is available. Finally, persons who investigate or lay charges under the CSD have access to the brochure entitled *Investigating and Charging*. These training aids and publications are distributed at CF bases as well as during military justice training. All of the above mentioned materials are also available on-line from the JAG web site.

Education

The Office of the JAG has, in cooperation with the Canadian Defence Academy, continued to improve the military justice component of the Officer Professional Military Education (OPME) program, a program that all new CF officers must undergo as part of their professional military development. OPME is designed to function primarily as an individual-based

program, however, both the navy and the air force have arranged for the Office of the JAG to offer group instruction in the legal component of OPME. To this end, in 2003–2004 legal officers delivered six on-site OPME Military Justice courses including five courses to naval officers at two venues — Halifax and Esquimalt, and one course for air force officers in St. Jean. In total, over 160 junior officers received this training. In addition to their printed student materials, each OPME student who attended an on-site course was provided with a bilingual CD-ROM containing key reference materials relating to military justice, including the *National Defence Act*, the *Queen's Regulations & Orders Volume 2 (Discipline)*, “The Code of Service Discipline and Me” information brochure and related Defence Administrative Orders and Directives. Because of the successes with the on-site OPME courses, and in consideration of their value as an efficient way for junior officers to complete this component of their professional military education, the air force is also now planning to deliver up to four on-site military justice OPME courses in the coming year.

Training and Education for Legal Officers

Given that lawyers rarely have an opportunity to study military law at law school or during their respective bar admission courses, the Office of the JAG has developed a robust, progressive program to ensure the professional development of new legal officers. In addition to various self-study packages and on-line tests, new JAG officers are required to undergo an on-the-job (OJT) training program that includes participating as junior counsel for either the prosecution or defence at a court martial. All legal officers are required to undergo presiding officer certification, and re-certification as necessary. Finally, as part of Legal Officer Intermediate Training, legal officers attend the week-long Military Justice course in order to broaden and deepen their understanding of the operation of the military justice system.

Additional training is provided to legal officers in the Canadian Military Prosecution Service and the Office of the Director of Defence Counsel Services, to enhance their knowledge of criminal law and their advocacy skills at the trial and appellate levels. Further education, including study in the field of criminal law, is available to selected legal officers at the postgraduate level.

Continuing Legal Education

As in past years, in the 2003–2004 reporting period the Office of the JAG played an active role in the Canadian Bar Association (CBA). More than two dozen legal officers attended the annual general meeting in Montreal in August 2003 at which the National Military Law Section (NMLS) sponsored a panel discussion of the five-year review of the Bill C-25 amendments. In October each year, the NMLS conducts its annual section meeting that is well attended by both military and civilian lawyers who share an interest in, and often practice, military law.

Each fall the JAG conducts a 2-1/2 day continuing legal education (CLE) workshop. While the themes of the workshops change from year to year, military justice issues are always included on the timetable of the workshop. For example, at the 2003 workshop the entire first day of the conference was reserved for military justice issues including a presentation on the work being done within the Office of the JAG relating to the five-year review of the Bill C-25 amendments.

Each year the training directorate of the Office of the JAG also supports continuing legal education for individual JAG officers by providing funds to attend courses, conferences, seminars and symposia dealing with legal issues, criminal law and advocacy training. For instance, in the 2003–2004 reporting period 86 JAG officers, regular and reserve, principally those whose tasks put them in direct contact with CF members involved with the military justice system, were sponsored to attend such CLE sessions.

Communications & External Links

The JAG website was upgraded and updated in the reporting period so that key military justice documents relevant to CF members and the public at large are now available for downloading, including the *National Defence Act* and the *Queen's Regulations and Orders*. Key links that the public may wish to access are also provided and include the website of the Chief Military

Judge (www.forces.gc.ca/cmj) which contains court martial schedules and other information. The main JAG link (www.forces.gc.ca/jag) has information on military justice, including the mandate of the JAG as superintendent of the administration of military justice in the CF, the annual reports of the Director of Defence Counsel Services and Director of Military Prosecutions, an Assisting Officer training brochure and several military justice training publications with information regarding the military justice system both at the summary trial and court martial levels. The Court Martial Appeal Court has its own website (www.cmac-cacm.ca). Former Chief Justice Lamer's report on the review of the provisions and operation of Bill C-25 is also available for viewing on-line (www.forces.gc.ca/site/Reports/review/en/report_e.pdf).

In 2003–2004 the Office of the JAG continued its liaison activities with other stakeholders in the military justice system. For example, throughout the reporting period military prosecutors held nine half-day training sessions with investigators from the National Investigation Service (NIS) and Military Police on a variety of topics relating to the investigation of *Criminal Code* and service offences. These lectures were delivered to members of NIS detachments at the Canadian Forces Military Police Academy at Canadian Forces Base (CFB) Borden. The lectures covered the taking of statements, search and seizure, evidence and the investigation of NDA section 129 offences, among other topics.

In addition, legal officers also met with representatives of foreign military justice systems. During October and November 2003 the Director of Military Prosecutions conducted an exchange with the British Army Legal Service that saw a Canadian military prosecutor spend a month in the United Kingdom while a British counterpart visited various JAG offices in Canada, as well as JAG headquarters in Ottawa. Military lawyers from Bulgaria and Ukraine also received briefings on the Canadian military justice system during their visit to CFB Borden.

3.7 Other Military Justice Initiatives

Paralegal Occupation

Due to the need for increased support, particularly with respect to paralegal activities within the military justice system, the Office of the JAG is proceeding with an initiative that would involve the creation of a paralegal occupation for non-commissioned members. The goal is to streamline the administration of military law by incorporating military paralegals into the process. Personnel for this occupation would be of the rank of sergeant/petty officer second class to master warrant officer/chief petty officer second class and could be selected from any military occupation. Candidates would attend paralegal training at a community college, and upon graduation, would be employed in all aspects of military law, including military justice. During the reporting period, the problem definition paper, business case, and terms of reference were drafted with the assistance of departmental occupational analysis staff. The proposal is now under review.

Senior Leadership Forum

This half-day forum for general and flag officers was held in Ottawa on 3 October 2003. It provided an occasion for the JAG to speak directly to the assembled senior ranks of the Canadian Forces and included briefings and discussions on the role of the Review Authority, details of the CF submissions to former Chief Justice Lamer on Bill C-25, and the perspectives of the CF Provost Marshal and the Director of Military Prosecutions on current issues relating to military justice. In his closing remarks, the JAG emphasized that the principles of fairness and transparency are particularly important at the review stage of the summary trial process, since the request for review process constitutes the final recourse when a member feels that he or she has suffered an injustice through the summary trial process.

Court Martial Appeal Court Seminar

In November 2003 a two-day education seminar was held for judges of the Court Martial Appeal Court in Aylmer, Quebec. This seminar was organized by the National Judicial Institute with the support of the Office of the JAG. The format included lectures, panel discussions, and a display that featured a deployable legal office. A panel comprising senior members of the Canadian Forces discussed their perspectives on issues of military justice, with a particular focus on sentencing. Among the topics covered at the seminar were a comparison of the military justice system and the civilian criminal justice system, the military factor in sentencing, and the maintenance of discipline in an operational setting. This was the first seminar of its type and was well attended with 22 members of the Court Martial Appeal Court participating. The feedback was very positive, suggesting that the audience found this seminar timely and useful.

International Commission of Jurists

The International Commission of Jurists is an organization based in Geneva, Switzerland, dedicated to the advancement of international law and the principles of human rights. It seeks to protect and promote human rights through the expansion of the rule of law. Its prestigious international reputation is a reflection of its membership, which includes sixty eminent jurists representing many of the different legal systems of the world. The Commission extended an invitation to the JAG to attend its seminar on human rights and the administration of justice through military tribunals in January 2004. The Director of Military Justice Policy and Research attended on behalf of the JAG and delivered a presentation to the Commission on the Canadian perspective on military tribunals, as well as responding to concerns raised by the members of the Commission.

Visits

The Office of the JAG hosted the visits of a number of legal professionals during the reporting year. A representative of the legal branch of the New Zealand Armed Forces, LCdr Chris Griggs, visited in October 2003. LCdr Griggs' visit was in connection with his work as coordinator of New Zealand's review of its military justice system. LCdr Griggs presented a briefing to legal officers on the state of New Zealand's military law review. In November 2003, Major General Dr. Menachem Finkelstein, Military Advocate General of the Israeli Defence Forces addressed the legal officers of the Office of the JAG during his visit to Ottawa. Mr. Eugene Meehan, a prominent Canadian lawyer and former President of the CBA, visited the Office of the JAG in February 2004 to deliver a lecture on the elements of successful oral and written advocacy.



The Office of the Chief Military Judge

4.1 Military Judges

The Governor in Council may appoint any CF officer who is a barrister or advocate of at least 10 years standing at the bar of a province to the military judiciary.¹ A process similar to that followed for other federal judicial appointments ensures that only competent, deserving officers are considered for military judicial appointments.

In making a recommendation to the Governor in Council, the Minister relies upon the report of the Military Judges Selection Committee. Members of the Military Judges Selection Committee are appointed by the Minister of National Defence to represent the bench, the civilian bar and the military community. The committee is composed of a lawyer or judge nominated by the JAG, a civilian lawyer nominated by the Canadian Bar Association, a civilian judge nominated by the Chief Military Judge, an officer holding the rank of major-general or higher, and a chief warrant officer or chief petty officer first class nominated by the Chief of the Defence Staff.

¹ NDA section 165.21(1).

4.2 Retirements and Appointments

Chief Military Judge

The NDA provides for the Governor in Council to designate a military judge to be the Chief Military Judge.² On 2 June 2003, Colonel Kim Carter's designation as Chief Military Judge was recognized in an investiture ceremony held at the military court room facility in the National Capital Region.

Military Judges

As noted above, appointments to the military judiciary are made by the Governor in Council. On 16 June 2003, Commander Peter Lamont was appointed a military judge, pursuant to the recommendation of the Minister of National Defence.

Commander James Price, who was appointed a military judge in 2001, retired in 2003.

Court Martial Administrator

The creation of the position of Court Martial Administrator (CMA) was a significant change made to the military justice system in 1999. The CMA is appointed pursuant to section 165.18 of the NDA. A civilian acting under the general supervision of the Chief Military Judge, the CMA convenes courts martial when a charge is preferred by the Director of Military Prosecutions, and appoints panel members as required.³

The position of Court Martial Administrator was held by three incumbents during the reporting period. In July 2003, Mr. Stan Blythe left the CMA position and was succeeded by Mr. Denis Gadoury, on an acting basis. In January 2004, Ms. Marie Cotter assumed the duties of CMA.

2 On 16 July 2002, the Governor in Council designated Colonel Carter as the Chief Military Judge of the Canadian Forces.

3 NDA section 165.19.

4.3 Military Judges Compensation

Regulations establish the Military Judges Compensation Committee (MJCC) and require that it conduct an inquiry into the remuneration of military judges every four years.⁴ On 1 September 2003 the members of the Military Judges Compensation Committee were appointed by the Governor in Council.⁵

The MJCC shall consider the following matters in the review of the adequacy of the compensation of military judges:

- the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
- the role of financial security in ensuring the judicial independence of military judges;
- the need to attract outstanding officers to the military judiciary; and
- any other objective criteria that the Committee considers relevant.

The MJCC consists of three part-time members, with one person nominated by the military judges, one person nominated by the Minister, and a chairperson nominated by the first two members. The members of the 2003 MJCC are:

- Chair — the Honourable Peter Cory, Q.C.
- Minister's nominee — Dr. Ian Clark
- Military Judges' nominee — the Honourable Claire L'Heureux-Dubé, Q.C.

The MJCC has nine months in which to conduct its inquiry and deliver its final report to the Minister of National Defence. The Minister must make the report public within thirty days and provide a response within six months of receiving it. The delivery of the MJCC's report is anticipated during the next reporting period.

4 QR&O articles 204.23 and 204.24.

5 NDA section 165.22(2) provides for the periodic review of remuneration of military judges by a Compensation Committee established by regulations.



Appeals from Courts Martial to the Court Martial Appeal Court of Canada and the Supreme Court of Canada

5.1 The CMAC Year in Review — 1 April 2003 to 31 March 2004

The Court Martial Appeal Court of Canada (CMAC) consists of not less than four civilian judges of the Federal Court of Canada and such additional judges of a superior court of criminal jurisdiction as are designated by the Governor in Council.¹

In 2003–2004, four appeals were argued before the CMAC. The Supreme Court of Canada did not hear any appeals from the CMAC during this period.

In all four cases argued before the CMAC, the appellant was a CF member convicted at court martial. In two of the four cases, both the legality of the guilty finding and sentence were appealed. In the third case, only the legality of the finding was appealed, and in the final case, only the sentence was appealed. More details of the CMAC appeals can be found at Annex F and in the report of the Director of Military Prosecutions at Annex J.

1 NDA section 234.

A convicted person initiating an appeal may apply to the Appeal Committee for representation by legal counsel at public expense. This committee consists of a person appointed by the JAG and a person appointed by the Chief of the Defence Staff. When both members of the Appeal Committee determine that the applicant's appeal has "professional merit", the committee shall approve the provision of legal counsel by the Director of Defence Counsel Services (DDCS).² A specific articulation in regulations of the meaning of the "professional merit standard" was one of the recommendations made by the Independent Review Authority in his report. During the 2003–2004 reporting period, the Appeal Committee received one application from an appellant. After assessing the application, the Committee did not find that there was professional merit in the appeal and accordingly it did not approve the provision of legal counsel by the DDCS.

5.2 CMAC Decisions

On 4 April 2003, the CMAC dismissed the appeal of Private Baril who had been convicted at court martial of offences including sexual assault and unlawful confinement.³ Private Baril appealed the conviction on the grounds that the military judge erred in his analysis of the evidence admitted at trial. The CMAC concluded that the trial judge had not erred in assessing the evidence, noting that the complainant's testimony had been reinforced by other witnesses, and that the trial judge had considered the evidence in its entirety. In the result, the CMAC declined to intervene and dismissed the appeal.

On 6 June 2003, the CMAC allowed the appeal of ex-Private Castillo, who had been convicted at court martial of fraud and theft and sentenced to 45 days imprisonment.⁴ The sentence was appealed on the grounds that it was outside of the appropriate range in all of the circumstances, a position

2 QR&O article 101.21(6).

3 *Baril v. R.*, [2003] CMAC-467.

4 *Castillo v. R.*, [2003] CMAC-468.

which the Crown conceded on appeal. The military trial judge had rejected a joint submission for a sentence of 30 days imprisonment (suspended), and a fine in the amount of \$4,500. The CMAC noted that the military judge had erred in two respects. Firstly, the appellant was treated as a repeat offender in circumstances in which it was not clear that his conduct constituted repetition of a previous offence. Secondly, in rejecting a suspended sentence on the basis that monitoring was not feasible, the military judge did not request counsel to make submissions concerning a proposed supervision plan. The CMAC substituted a fine in the amount of \$4,500. Dissenting reasons were given by Goodwin J.A.

On 28 August 2003, the CMAC allowed in part the appeal of Private Jackson, who had been convicted at court martial for pointing a firearm at a subordinate.⁵ He had been sentenced to a reduction in rank and a 3-year weapons prohibition. Both the conviction and the sentence were appealed. The CMAC rejected the appeal of the conviction, observing that the trial judge had properly applied the correct standard in assessing the appellant's credibility. With respect to the severity of the sentence, the CMAC accepted that in the circumstances of the case, the sentence imposed was unreasonable and too severe. The court noted that the reduction in rank would inflict a monetary penalty of thousands of dollars annually, as well as having implications for the member's pension. With respect to the weapons prohibition, the CMAC noted that the trial judge had erred in denying the appellant the opportunity to make representations concerning the application of the prohibition to his military duties. In the result, the sentence was varied to a severe reprimand and a fine of \$5,000, and the prohibition order limited so as not to apply to the appellant in his military duties.

5 *Jackson v. R.*, [2003] CMAC-470.

On 26 September 2003, the CMAC dismissed the appeal of Corporal Forsyth.⁶ Corporal Forsyth had been convicted at court martial of assault causing bodily harm, and sentenced to 8 months imprisonment. The appeal challenged the validity of the conviction on procedural grounds and sought, in the alternative, to vary the sentence. Corporal Forsyth had initially been charged by the RCMP for an assault on his spouse that took place in their home on a military base. The charge was later withdrawn and he was subsequently charged and tried in the military justice system. On appeal, the appellant argued that the court martial did not have jurisdiction to conduct the trial. The CMAC rejected the appellant's argument that military jurisdiction was lost when the RCMP and the provincial court dealt with the matter, noting that concurrent jurisdiction over the matter existed and was never lost. The appellant also argued that the plea of *autrefois acquit* could properly be made in the circumstances, an argument rejected by the CMAC which noted that the charge had been withdrawn before there had been a determination of the matter on its merits in provincial court. The third argument, that it was an abuse of process for the provincial Crown prosecutor to have withdrawn the charge in the circumstances, was rejected by the CMAC which noted that it was for defence counsel to fully appreciate the consequences of the withdrawal of a charge. The CMAC also considered the severity of the sentence, finding that it was not inappropriate in light of the range of sentences imposed in the relevant caselaw. In the result, both grounds of appeal were dismissed.

6 *Forsyth v. R.*, [2003] CMAC-469.



Conclusion

2003–2004 marked a significant year in the development of the Canadian military justice system. With the commencement of the first five year review of the Bill C-25 amendments to the NDA, the last year has seen the military justice system undergo a rigorous scrutiny of the changes enacted by Parliament in 1998. In large measure, the success or failure of the efforts to implement those changes has been the responsibility of the Judge Advocate General, as steward of the military justice system.

As this report has indicated, the structure and operation of the military justice system is unique in that its functioning is not, for the most part, in the hands of legal professionals. Rather, the mainstay of the system of service tribunals is the summary trial, a fact that dictates that most of the military justice system is administered through personnel who are not lawyers. In light of this feature of the system, one of the most important aspects of the mandate of the Office of the JAG is to ensure that all members of the CF who are involved in the administration of military justice are properly trained and provided with the necessary tools to fulfill their responsibilities. This is a mission that literally involves almost every legal officer, from those

teaching the presiding officers certification course to the Judge Advocate General lecturing assembled senior leaders of the Canadian Forces on the duties of review authorities. This continuing instruction is vital to ensure that CF personnel are properly prepared to fulfill their changing duties within the military justice system as they progress through their careers.

In September 2003, the five year review process arrived at a significant juncture with the delivery of the report of former Chief Justice Lamer to the Minister of National Defence. The delivery of the Lamer Report was a seminal occasion for two reasons. Firstly, the Lamer Report gave the military justice system an overall rating, and found it to be in good condition. The importance of that overall assessment cannot be overstated, particularly since the Independent Review Authority is a former Chief Justice of the Supreme Court of Canada. However, a second and arguably more significant implication of the Lamer Report was that its recommendations provided a framework for the work that lies ahead for improving the military justice system.

The Bill C-25 amendments to the NDA were introduced during a period in which the CF was developing a strategic long-term renewal plan, known as CF Strategy 2020. With the dictates of Strategy 2020 in mind, a management team struck by the JAG reported in 2000¹ on the harmonization of the strategic goals of the renewed military justice system with the 11 attributes of CF Strategy 2020. Based on the group's advice, the JAG decided that the first strategic goals to receive priority would be to restore the credibility of the military justice system, and to implement Bill C-25 and the consequential restructuring of legal services.

As has been reported in earlier annual reports, significant progress has been made in the restoration of public credibility concerning the Canadian military justice system.² The focus of activity during this reporting period has been the analysis of the degree to which the Bill C-25 amendments have been successfully incorporated into the fabric of both the military

1 *Paper on the JAG Review and Reporting Framework for the Administration of Military Justice*, 12 July 2000.

2 See chapter 6 of the Annual Report of the JAG to the Minister of National Defence, 2001–2002, and 2002–2003.

justice system and the culture of the Canadian Forces. As observed by the Independent Review Authority, much has been accomplished, with more to be done.

Within the CF, the growing level of awareness and the level of usage of the renewed military justice system is encouraging. Of particular note, the increased use of the summary trial as a disciplinary tool has become an established fact in the past two years. Moreover, the capacity of the system to respond to requests for change has been proven with the implementation of a more broadly-based presiding officer certification training. This broadened eligibility for military justice training has resulted in positive comments from assisting officers and charging authorities who have found the course extremely useful. Ultimately, this has led to greater self-confidence in using the military justice system, and increased confidence that it will produce fair results.

The success of the renewed military justice system has also been noticed by others who share an interest in the military justice system of the CF. The National Military Law Section of the Canadian Bar Association has significantly raised the profile of military law in the legal profession, a development which can only assist in ensuring that military justice remains a dynamic area of Canadian law. The active role now played by the CBA in military law is amply evidenced by the submissions of the National Military Law Section on the five year review of the Bill C-25 amendments. As well as achieving a heightened profile within Canada, the Canadian military justice system is also a matter of interest for Canada's allies as evidenced in the Lamer Report.

In summary, the reporting period saw the vindication of a number of strategies that had been carefully planned and carried out to ensure that the military justice system not only implemented the 1999 amendments to the NDA, but that it recorded, analyzed and was ready to report on the outcome of those changes. The way ahead will now be to give thorough study to those areas that the five year review has highlighted for additional attention and improvement.

Annex

A



A Précis of the Canadian Military Justice System



A Précis of the Canadian Military Justice System

A.1 The Purpose of a Separate Military Justice System

In 1982, the *Canadian Charter of Rights and Freedoms (Charter)* expressly recognized the existence of a separate yet parallel system of military justice within the Canadian legal system. Subsection 11(f) of the *Charter* states that any person charged with an offence has the right to trial by jury “except in the case of an offence under military law tried before a military tribunal”.

The Supreme Court of Canada has directly addressed the existence of a separate, distinct military justice system twice.¹ On both occasions, the court has upheld the requirement for a separate military justice system in the Canadian Forces (CF) (see sidebar).

1 *MacKay v. The Queen*, [1980] 2 S.C.R. 370, and *R. v. Généreux*, [1992] 1 S.C.R. 259.

2 *Constitution Act, 1867*, s. 91(7). Under the Canadian Constitution, the Parliament of Canada has exclusive authority to make laws relating to the “militia, military and naval service and defence”. Consequently, Canadian constitutional law accords to the federal Parliament the right to make laws and regulations relating to military justice.

A.2 The Constitutional and Legislative Framework of the Canadian Military Justice System

Using its constitutional authority,² the Parliament of Canada enacted the *National Defence Act* (NDA), which, among its provisions, sets out the organization of the Department of National Defence (DND), the CF and the Canadian military justice system (including the establishment of courts martial and the court martial appeal court), and authorizes the Chief of the Defence Staff (CDS) to issue orders and instructions to give effect to the decisions and the directions of the Government of Canada and the Minister of National Defence.³ The NDA authorizes the Governor in Council and the Minister of National Defence to make regulations for the organization, training, discipline, efficiency, administration and good government of the CF and, generally, for carrying the purposes and provisions of the NDA into effect. The NDA authorizes the creation of the *Queen's Regulations and Orders* (QR&O), Canadian Forces Administrative Orders (CFAO), and the Defence Administrative Orders and Directives (DAOD).

Volume II of QR&O, which covers disciplinary matters, prescribes in greater detail the jurisdiction, organization and procedures of the Canadian military justice system. Orders and

Why does the Canadian Forces have its own justice system?

In *R. v. Généreux*, [1992] 1 S.C.R. 259 at 293, the Supreme Court of Canada stated the rationale for keeping the military justice system distinct from the civilian criminal justice system:

The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.

³ NDA section 18(2).

instructions dealing with disciplinary matters may be issued at any level of the chain of command.⁴ All members of the CF have a duty to be familiar with the orders and instructions issued by their chain of command.⁵ Failure to comply with such orders and instructions can lead to charges under the Code of Service Discipline (contained in the NDA), which are disposed of in the military justice system.

Notwithstanding Parliament's authority to create and administer a military system of justice, the federal government is not immunized from complying with other constitutional laws, including the protections afforded by the *Charter*. As Canadian citizens, CF members are entitled to enjoy all the rights and freedoms guaranteed by the *Charter*.

A.3 The Military Justice System

Code of Service Discipline

Comprising approximately 50 percent of the NDA,⁶ the Code of Service Discipline is the foundation of the Canadian military justice system. It sets out disciplinary jurisdiction and describes service offences, punishments, powers of arrest, and the organization and procedures for service tribunals, appeals and post-trial review.

Jurisdiction

The Code of Service Discipline applies to all CF members and, in certain circumstances, to civilians who may become subject to Canadian military law, for example, when accompanying a CF unit on service or active service.⁷

4 QR&O articles 4.12 and 4.21.

5 QR&O articles 4.02 and 5.01.

6 Pursuant to section 2 of the NDA, the Code of Service Discipline consists of Part III of the NDA.

7 NDA section 60(1) and QR&O article 102.09. The complete list of persons subject to the Code of Service Discipline appears in sections 60–65 of the NDA and QR&O Chapter 102.

Not all offences can be charged and tried in the military justice system.⁸ The CF has no jurisdiction to try any person charged with having committed, in Canada, the offences of murder, manslaughter, or any offence under sections 280 to 283 of the *Criminal Code* of Canada.⁹

When a person subject to the Code of Service Discipline commits an offence under the *Criminal Code* or other federal law, the NDA extends jurisdiction to deal with the matter in the military justice system.¹⁰ Similarly, jurisdiction under the NDA may also be extended when an offence is committed contrary to foreign law.¹¹

Service Offence

A “service offence” is an offence under the NDA, the *Criminal Code* or any other act of Parliament committed by a person while subject to the Code of Service Discipline. The Code of Service Discipline also includes several service offences that are unique to the profession of arms,¹² such as: misconduct in the presence of the enemy, mutiny, disobedience of a lawful command, desertion, absence without leave, and conduct to the prejudice of good order and discipline.

Limitation Periods

Generally, a person who is subject to the Code of Service Discipline at the time of the alleged commission of an offence continues to be liable to be charged, dealt with and tried at any time under the Code of Service Discipline.¹³ This rule has two exceptions however. The first exception arises when the act or omission that constitutes the offence would have been subject to a limitation period had it been dealt with other than under the

8 NDA section 70.

9 Sections 280–283 of the *Criminal Code* relate to the abduction of children from a parent or guardian.

10 Under section 130 of the NDA, such offences may become service offences.

11 Under section 132 of the NDA, an offence committed by a person subject to the Code of Service Discipline under the law of a foreign country while outside Canada in that foreign country may also be dealt with as a service offence.

12 NDA sections 73–129.

13 NDA sections 60(2) and 69.

Code of Service Discipline; in such a case, that limitation period applies.¹⁴ For example, if the act or omission constituted an offence under the *Criminal Code* or other federal or foreign law, then in this circumstance, any limitation period applicable to the offence in the civilian justice system applies. The second exception relates to summary trials. A summary trial must begin before one year has elapsed after the day when the offence is alleged to have been committed.¹⁵

Process of Laying Charges

Where a complaint is made or where there are other reasons to believe that a service offence may have been committed, an investigation shall be conducted to determine whether there are sufficient grounds to lay a charge.¹⁶ A complaint can usually be directed to a commanding officer or to the Military Police.

Investigations

Investigations can be conducted by one of three groups. The type of disciplinary investigation, and the entity responsible for it, is determined by the nature of the offence alleged and the gravity or sensitivity of the matter.

Canadian Forces National Investigation Service (CFNIS) Investigation —

The CFNIS operates to provide independent criminal investigation services in support of the military justice system. It will investigate if an alleged offence is of a serious or sensitive nature. Any one of the following circumstances can bring a matter within the ambit of the “serious and sensitive” standard:

- when an offence is classified as indictable under the *Criminal Code* of Canada or other federal legislation;
- when a matter involves a senior officer (rank of major or above, or a civilian equivalent) or commanding officer as either the subject of investigation or victim; or
- when an offence arises out of a breached relationship of trust.

14 NDA section 69(a).

15 NDA section 69(b).

16 QR&O article 106.02.

Moreover, when the CFNIS conducts an investigation, its investigators have the authority to lay charges.

Military Police Investigation — Where an alleged offence does not meet the serious or sensitive standard, or where the CFNIS has waived their jurisdiction, the Military Police will normally assume investigative responsibilities. Matters investigated by the Military Police will be referred to the person’s unit for review and, where appropriate, the laying of charges.

Unit Investigation — Alleged offences typically involving only a minor breach of discipline can be dealt with by way of unit investigation.

Investigation Process

Regardless of the form of disciplinary investigation undertaken, an investigator shall, as a minimum, collect all reasonably available evidence bearing on the guilt or innocence of the person who is the subject of the investigation. Where appropriate, an investigation can involve:

- interviewing witnesses;
- taking statements;
- gathering physical evidence; and
- extending an opportunity to the subject of the investigation to make a statement.

The investigator may seek legal advice at any point during the investigation; but there is no obligation to do so.

Charging Process

A “charge” is a formal accusation that a person subject to the Code of Service Discipline has committed a service offence. A charge is laid when it is reduced to writing in a Charge Report (Part I of a Record of Disciplinary Proceedings (RDP) form) and signed by a person authorized to lay charges.¹⁷

17 QR&O article 107.015(2).

The following persons may lay charges under the Code of Service Discipline:

- a commanding officer;
- an officer or non-commissioned member authorized by a commanding officer to lay charges; and
- an officer or non-commissioned member of the Military Police assigned to investigative duties with the CFNIS.¹⁸

To lay a charge there must be an actual belief on the part of the person laying a charge that the accused has committed the alleged offence and that belief must be reasonable. A “reasonable belief” is a belief that would lead any ordinary prudent and cautious person to the conclusion that the accused probably committed the offence alleged.¹⁹

Legal Advice

Prior to laying a charge, the charge laying authority is required to obtain legal advice if:

- the charge cannot be tried summarily;
- the charge would give rise to a right to elect trial by court martial; or
- the offence is alleged to have been committed by an officer or non-commissioned member at or above the rank of warrant officer or petty officer first class.²⁰

Legal advice at this stage in the process assists the charge laying authority in the exercise of charge laying discretion and as such is generally focused on whether or not the basic legal elements exist to allow the charge layer to form a reasonable belief that an offence has been committed. Advice will usually pertain to:

18 QR&O article 107.02.

19 See Note to QR&O article 107.02.

20 QR&O article 107.03. Generally speaking, it is the rule rather than the exception to seek legal advice before laying charges. Effectively, legal advice must always be obtained, unless a person of or below the rank of sergeant or petty officer second class is to be charged with one of five minor offences listed in QR&O 108.17.

- the sufficiency of the evidence;
- whether or not the circumstances warrant a charge being laid; and
- the determination of an appropriate charge.

Where the CFNIS conducts an investigation, a prosecutor with the Canadian Military Prosecution Service (which is supervised by the Director of Military Prosecutions (DMP)) provides the necessary legal advice. In all other cases, the unit legal adviser provides legal advice.

Again, in all but the most minor of cases, legal advice must be sought from the unit legal adviser prior to making the decision of whether or not to proceed with a charge.²¹ The commanding officer shall only proceed with charges if, in addition to having a reasonable belief that the accused committed the alleged offence, he or she is satisfied that there is sufficient evidence to put the accused on trial.

The Decision to Proceed with a Charge

Once a charge has been laid, the charge laying authority must refer it to either:

- the accused person's commanding officer;
- the commanding officer of the base or unit in which the accused was present when the charge was laid; or
- another officer within the unit who has been authorized by the commanding officer to deal with charges under the Code of Service Discipline.²²

An officer, to whom a charge has been referred, must then decide whether to proceed with the charge or not. A commanding officer or superior commander who decides not to proceed with a charge laid by the CFNIS must communicate that decision with reasons to the CFNIS.²³ If, after reviewing the decision and reasons, the CFNIS considers that the charge should go

21 QR&O article 107.11.

22 QR&O article 107.09(1)(a).

23 QR&O article 107.12(1).

forward, the CFNIS may refer the charge directly to a referral authority for disposal, who must then refer the charge to the DMP.²⁴ When circumstances warrant, investigators of the Military Police and the CFNIS may also lay charges in the civilian courts.²⁵

Where a commanding officer, superior commander, or officer with delegated powers decides to proceed with a charge, the charge shall be dealt with in accordance with the procedures prescribed by regulations contained in Volume II of QR&O. Ultimately, the CO can decide not to proceed with the charge, arrange for the accused to be tried by summary trial or refer the charge, which begins a process whereby the accused may consequently be tried by court martial.

The Two Tiers of the Military Justice System

The military justice system has a two-tiered tribunal structure that includes the summary trial system (where most disciplinary matters are dealt with) and the more formal court martial system. The term “service tribunal”²⁶ means either a summary trial or a court martial.²⁷ The regulations outline procedures for the trial of a matter by summary trial, as well as procedures for referral of charges for trial by court martial.

A.4 Summary Trials

The summary trial remains the most commonly used form of service tribunal in the military justice system. The purposes of a summary trial are as follows:

- to provide prompt, fair justice in respect of minor service offences; and
- to contribute to the maintenance of military discipline and efficiency in Canada and abroad, in peacetime and during armed conflicts.²⁸

24 QR&O article 107.12(3).

25 Where concurrent jurisdiction does exist, charges may be laid by military authorities under the Code of Service Discipline or in the civilian courts.

26 NDA section 2.

27 For a detailed, comprehensive overview of the military justice system, see the JAG publication *Military Justice at the Summary Trial Level* (downloadable from www.forces.gc.ca/jag).

28 QR&O article 108.02.

Once jurisdiction exists to conduct a summary trial,²⁹ it may be held wherever the unit is located, whether it is in garrison, in an exercise area or deployed abroad. Generally, summary trials are conducted across Canada, at sea in Her Majesty's Canadian ships, and in various locations during operations abroad.

When a CF member is charged with an offence under the Code of Service Discipline, the summary trial process usually permits the case to be tried and disposed of in the unit, by members of the unit. Summary trials are presided over by commanding officers,³⁰ delegated officers³¹ or superior commanders.³² Before conducting a summary trial, however, the presiding officer must (in most circumstances) be trained and certified in the administration of the Code of Service Discipline in accordance with the curriculum established and taught by the Directorate of Law/Training on behalf of the JAG.³³

The procedures at a summary trial are straightforward and the powers of punishment are limited in scope. This restriction on the available punishments at summary trial reflects both the minor nature of the offences that may be tried at that level, and the intention that presiding officers impose punishments that are primarily corrective in nature.

29 Summary trial jurisdiction over an accused is not automatic; it depends on several statutory and regulatory factors including: fitness of the accused to be tried, the status and rank of the accused and of the presiding officer, the nature of the charges, the length of time elapsed between the laying of the charges and the first day of trial, the interests of justice and discipline, the nature of the punishment that may be imposed on the accused should a guilty finding be made and, if applicable, the election of the accused to be tried summarily. For a detailed consideration of jurisdiction, see NDA sections 60, 69, 70, 163 and 164; and QR&O articles 108.05, 108.06, 108.07, 108.09, 108.10, 108.12, 108.125, 108.16, 108.17 and 119.02.

30 NDA section 163(1)(a). Commanding officers may try accused persons who are either an officer cadet or below the rank of warrant officer.

31 NDA section 163(4) and QR&O 108.10. Delegated officers appointed by the commanding officer must be of the rank of captain or above. They may only try an accused below the rank of warrant officer, and may try only a limited number of minor offences.

32 NDA section 164(1)(a). Superior commanders may try officers below the rank of lieutenant-colonel or non-commissioned members above the rank of sergeant.

33 QR&O article 101.09; effective 1 April 2000-exceptions only for "urgent operational requirements."

During a summary trial, the accused is provided with an assisting officer from the unit. The primary functions of an assisting officer are to assist the accused in the preparation of his or her case and to assist the accused during the trial to the extent desired by the accused.

In addition, before the accused makes an election under article 108.17 (*Election To Be Tried by Court Martial*), the assisting officer shall ensure that the accused is aware of the nature and gravity of any offence with which the accused has been charged and the differences between trial by court martial and trial by summary trial.

Although the summary trial is still the overwhelmingly predominant form of service tribunal, not all service offences can be handled summarily. QR&O lists the offences that a commanding officer may try summarily.³⁴ The more serious offences, including most *Criminal Code* offences charged pursuant to section 130 of the NDA, must be tried by court martial.

Review of Summary Trials

All offenders convicted at summary trial have the right to apply to the presiding officer's next superior officer in the disciplinary chain of command for a review of the findings, the punishment imposed,³⁵ or both.³⁶ The findings and punishment imposed at summary trial may also be reviewed on the independent initiative of a review authority.³⁷ Review authorities acting under QR&O article 108.45 must obtain legal advice before making any determination on requests for review.³⁸

34 QR&O article 108.07. See QR&O article 108.125 for offence jurisdiction for summary trial by superior commander, and QR&O article 108.10 for offence jurisdiction for summary trial by delegated officer.

35 For a more detailed explanation of the powers of punishment in the summary trial system, see QR&O articles 108.24, 108.25 and 108.26.

36 QR&O article 108.45.

37 NDA section 249 and QR&O article 116.02.

38 QR&O article 108.45(8).

Offenders convicted at summary trial may also request judicial review from the Federal Court or from the Superior Court in any province or territory.³⁹

A.5 Right to be Tried by Court Martial

A significant aspect of the recent reforms was the expansion of the right of the accused to choose between summary trial and trial by court martial. Now, the accused has the right to elect trial by court martial in the vast majority of cases. In effect, the presiding officer must offer an election unless the accused is facing only a “minor disciplinary” charge.⁴⁰ The QR&O specify when an accused has the right to elect to be tried by court martial, and under what circumstances an accused is not provided the option to choose. Generally, there are two instances where the option to choose is unavailable:

- where the charge laid is “minor” and in the judgement of the officer who will conduct the summary trial, any of the following penalties would not be appropriate upon a finding of guilt:
 - detention,
 - reduction in rank,
 - a fine in excess of 25 percent of monthly basic pay;
- where the charge is for a serious offence under the Code of Service Discipline (e.g. negligent performance of duty, or some offences capable of being categorized as indictable under the *Criminal Code*) or the accused person is of the rank of lieutenant-colonel or higher, a trial by court martial is the only available option.

39 *Federal Courts Act*, R.S.C. 1985, c. F-7, sections 18 and 18.1.

40 “Minor disciplinary” charges resulting in a denial of the option to elect include the following sections of the NDA: 85 (insubordinate behaviour), 86 (quarrels and disturbances), 90 (absence without leave), 97 (drunkenness), or 129 (conduct to the prejudice of good order and discipline). When charges are laid under section 129, the right of election may be denied only when the offence relates to military training; maintenance of personal equipment, quarters or work space; or dress and deportment.

Where the accused has the right to be tried by court martial, the accused must be informed of that right. The accused must also be given a reasonable period of time to decide whether to elect to be tried by court martial, and to consult legal counsel with respect to the election.⁴¹

If a matter is to proceed by way of summary trial, in most circumstances the summary trial cannot be presided over by a commanding officer or superior commander who was also responsible for the investigation or laying of the charge for that particular accused.

Referral to Court Martial

When the type of charge requires trial by court martial, an accused has elected to be tried by court martial, or the commanding officer has determined that due to the nature of the offence the matter is most appropriately dealt with by court martial, the charge is referred to a referral authority. The term “referral authority” applies only to those specific officers who have been legally empowered to refer a charge to the DMP for the purposes of determining whether a matter warrants trial by court martial.

When making a referral to the DMP, a referral authority essentially represents the interests of the CF, which will be reflected in any recommendations accompanying a referred charge. Under the regulations, the following officers are referral authorities:

- the Chief of Defence Staff; and
- any officer having the powers of an officer commanding a command.

Upon receipt of an application to proceed with a charge, the referral authority must:

- forward the application to the DMP, adding any recommendations regarding the disposition of the charge that are deemed appropriate (including any recommendation to proceed or not proceed with a charge); or

41 QR&O articles 108.17 and 108.18. Legal officers of Defence Counsel Services are available to provide legal advice with respect to the making of the election. This service is provided at no expense to the accused, and is normally provided by telephone.

- direct a commanding officer or superior commander to try the accused by summary trial on the existing charges, but only in circumstances where the referring officer had referred the charge because he or she believed his or her powers of punishment were not adequate to try the accused by summary trial and the referral authority does not share this opinion.

Thus in most cases, when a charge has been referred to a referral authority, he or she must forward the charge to the DMP, with any recommendations that the officer considers appropriate.

Role of DMP in Court Martial Process

The DMP is responsible for:

- deciding whether a particular charge is suitable for trial by court martial; and
- conducting prosecutions at courts martial.

Upon receipt of a referral, the DMP initially undertakes a review of the charge. Two main issues are considered:

- the sufficiency of the evidence required to demonstrate a reasonable prospect of conviction in respect of the charges laid or yet to be laid; and
- where there is sufficient evidence, whether or not the public interest and the interests of the CF require the initiation of a prosecution.

Following a review of the charge, the DMP will determine whether or not a charge should be dealt with at court martial and will notify the referral authority, commanding officer, and the accused of this decision. Where it is decided not to proceed with the court martial, the DMP may refer the charge back to an officer having summary trial jurisdiction if:

- the offence is one which may be tried at summary trial; and
- the accused has not elected to be tried by court martial.

On the other hand, where the decision is made to pursue a charge, the DMP will prefer the charge by preparing and signing a charge sheet and refer the charge to the Court Martial Administrator, who will then convene a court martial. In addition, the DMP can modify charges or prefer any other charges supported by evidence.

A.6 Courts Martial

The court martial, a formal military court presided over by a military judge, is designed to deal with more serious offences, and is conducted in accordance with rules and procedures similar to those followed in civilian criminal courts. Like summary trials, courts martial may be held anywhere in the world. Statutorily, courts martial have the same rights, powers and privileges as a superior court of criminal jurisdiction with respect to all “matters necessary or proper for the due exercise of its jurisdiction,”⁴² including: the attendance, swearing and examination of witnesses; the production and inspection of documents; and the enforcement of its orders.

At a court martial, the prosecution is conducted by a legal officer from the Office of the Director of Military Prosecution (DMP). The accused is entitled to be represented free of charge by a legal officer from the Directorate of Defence Counsel Services (DDCS)⁴³ or, at his or her own expense, by a civilian lawyer. CF members who meet the qualifying criteria may also take advantage of provincial Legal Aid programs.

Types of Court Martial

The NDA provides for four types of court martial:

- General Court Martial;
- Disciplinary Court Martial;
- Standing Court Martial; and
- Special General Court Martial.

The General Court Martial and the Disciplinary Court Martial each comprise a military judge and a panel of CF members. The panel of CF members is roughly analogous to a jury in a civilian criminal court. In a General Court Martial, the panel is composed of five members and in a Disciplinary Court Martial, the panel is composed of three members.⁴⁴ When the accused is

42 NDA section 179.

43 QR&O article 101.20.

44 NDA sections 167(1) and 170(1).

an officer, the court martial panel consists entirely of officers. When the accused is a non-commissioned member, the panel at a General Court Martial must include two non-commissioned members at or above the rank of warrant officer or petty officer first class. The panel at the Disciplinary Court Martial of a non-commissioned accused must include one non-commissioned member at or above the rank of warrant officer or petty officer first class.⁴⁵ At both the General Court Martial and the Disciplinary Court Martial, the panel makes the finding on the charges (i.e. guilty or not guilty) and the military judge makes all legal rulings and imposes the sentence.

The Standing Court Martial and the Special General Court Martial differ in name and function, but not in composition; both are conducted by a military judge sitting alone,⁴⁶ who makes the finding on the charges and imposes a sentence if the accused is found guilty. The rank or status of the accused, the nature of the offence, and the powers of punishment available to the various types of court martial are all factors considered in determining which type of court martial is appropriate in a specific case.

Appeal of a Court Martial Decision

Generally speaking, decisions made at courts martial may be appealed to the Court Martial Appeal Court of Canada (CMAC), a civilian court composed of Federal Court and Superior Court judges.⁴⁷ The CMAC may sit and hear appeals at any place.

Under the NDA, both an accused tried by court martial and the Minister of National Defence may appeal to the CMAC.

CMAC decisions may be appealed to the Supreme Court of Canada. Such appeals may be made on any question of law on which a judge of the CMAC dissents, or on any question of law if leave to appeal is granted by the Supreme Court of Canada.⁴⁸

45 NDA sections 167(7) and 170(4).

46 NDA sections 174 and 177.

47 NDA sections 159.9, 234, 235, 238 to 243 and 248.2 to 248.9 of the NDA.

48 NDA section 245.

When a person has delivered a Notice of Appeal under section 230 or 245 of the NDA, he or she may apply to the Appeal Committee, established by the Governor in Council through regulation,⁴⁹ to be represented on the appeal, free of charge, by a lawyer appointed by the DDCS. When both members of the Appeal Committee determine that the applicant's appeal has professional merit, the committee shall approve the provision of legal counsel by the DDCS.⁵⁰

Before the establishment of the Appeal Committee, only accused persons who were respondents to appeals filed by the Crown were entitled to be represented by a legal officer at public expense.⁵¹ This regulatory provision now extends the same opportunity to persons initiating an appeal which is determined to have professional merit.

Ancillary Repercussions to a Member's Career

Apart from potential disciplinary action or penal sanctions under the Code of Service Discipline, administrative action may also be initiated by the chain of command.

When a CF member is faced with a charge under the Code of Service Discipline, a commanding officer must consider the consequences of leaving the accused in the workplace, or relieving him or her of the obligation to perform military duties. Whatever administrative course of action is contemplated, it must be appropriate, taking into account: the specific offence, the circumstances of the accused, the best interests of the unit, and the operational requirements of the CF as a whole. In essence, the rights of the individual involved must be weighed against the public interest.

49 QR&O article 101.21.

50 QR&O article 101.21(6).

51 QR&O article 101.20(2)(g).

When administrative measures are temporary in nature, a member's status will be re-evaluated once military justice proceedings are concluded. Depending upon the circumstances, however, long-term administrative measures may be imposed after a final disposition of the charges. Such measures can range from recorded warnings or counselling and probation, to the most serious measure, release from the CF.

A.7 Public Access to Charging Documents

The CF has a process similar to that used by civilian criminal courts to permit public access to the charging documents in the Unit Registry of Disciplinary Proceedings. Under the civilian court system, registries supply basic charging documents to requesters who give the registry staff sufficient information to identify the record sought.

Each CF unit is required to establish and maintain a Unit Registry of Disciplinary Proceedings.⁵² Anyone can request a copy of a specific Record of Disciplinary Proceedings (RDP) by sending the commanding officer of the originating unit a written request containing sufficient information to allow the RDP to be identified (e.g., a specific type of offence, or the name of an accused). Upon receipt of such a request, the commanding officer must send the requester a copy of the RDP held on the unit's Registry of Disciplinary Proceedings, unless release of the RDP is prohibited for one of the reasons set out in the regulation.⁵³

This streamlined process is designed to increase public access to the basic charging documents and key decisions in the military justice system. This material is also available through the *Access to Information Act* process, which must be used when the requester lacks sufficient identifying information or the commanding officer is prohibited from releasing the RDP for a reason set out in the regulation.

52 QR&O article 107.14.

53 QR&O article 107.16.








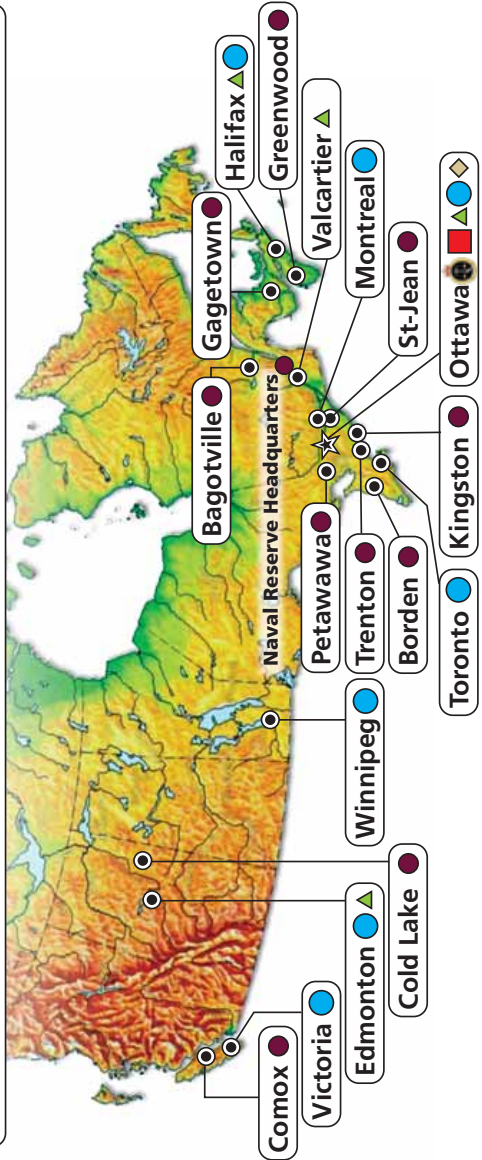
Organization Chart of the Office of the Judge Advocate General

Maps and Addresses/Phone Numbers of Judge Advocate General Offices

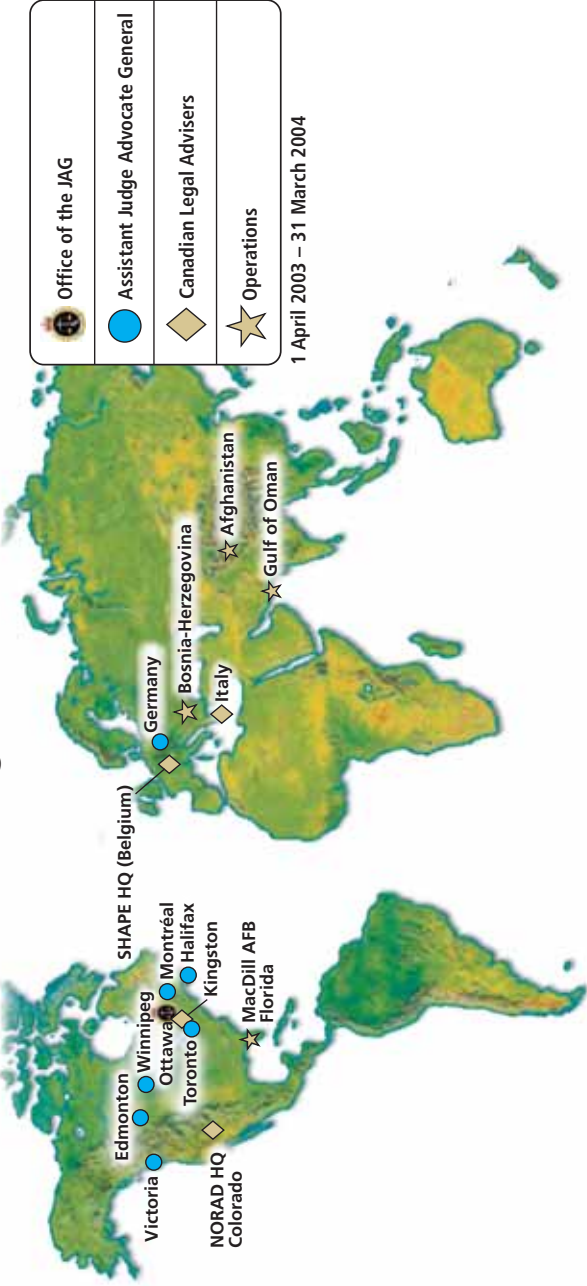


Canadian Offices of the Judge Advocate General

	Office of the JAG		Regional Military Prosecutors
	Assistant Judge Advocate General		Directorate of Defence Counsel Services
	Deputy Judge Advocate		Director Military Prosecutions



World Offices of the Judge Advocate General



Addresses/Phone Numbers of Judge Advocate General Offices

Mailing Address	Telephone/Fax Numbers
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Special Assistant Office of the Judge Advocate General MGen George R. Pearkes Building National Defence Headquarters 101 Colonel By Drive Ottawa ON K1A 0K2	TEL: (613) 996-8470 CSN: 846-8470 FAX: (613) 992-5678
Director of Military Prosecutions Constitution Building National Defence Headquarters 101 Colonel By Drive Ottawa ON K1A 0K2	TEL: (613) 996-5723 CSN: 846-5723 FAX: (613) 995-1840
Director of Defence Counsel Services Asticou Centre, Block 1900 National Defence Headquarters 101 Colonel By Drive Ottawa ON K1A 0K2	TEL: (819) 994-9151 CSN: 844-9151 FAX: (819) 997-6322
Deputy Judge Advocate General/Chief of Staff Constitution Building National Defence Headquarters 101 Colonel By Drive Ottawa ON K1A 0K2	TEL: (613) 992-8414 CSN: 842-8414 FAX: (613) 995-3155
Deputy Judge Advocate General/Operations Constitution Building National Defence Headquarters 101 Colonel By Drive Ottawa ON K1A 0K2	TEL: (613) 996-4812 CSN: 846-4812 FAX: (613) 995-5737

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Deputy Judge Advocate General/ Regional Services MGen George R. Pearkes Building National Defence Headquarters 101 Colonel By Drive Ottawa ON K1A 0K2	TEL: (613) 996-6456 CSN: 845-6456 FAX: (613) 992-5678
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Alberta

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--	--

Deputy Judge Advocate 4 Wing Cold Lake P.O. Box 6550 Stn Forces Cold Lake AB T9M 2C6	TEL: (780) 840-8000 EXT 7027 CSN: 690-7027 FAX: (780) 840-7328
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Deputy Judge Advocate 19 Wing Comox PO Box 1000, Stn Main Lazo BC V0R 2K0	TEL: (250) 339-8153 CSN: 252-8153 FAX: (250) 339-8015
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Manitoba

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Legal Adviser Canadian Forces Joint Operations Group Canadian Forces Base Kingston P.O. BOX 17000 Stn Forces Kingston ON K7K 7B4	TEL: (613) 541-5010 EXT 4360 CSN: 271-4360 FAX: (613) 540-8186
Deputy Judge Advocate Canadian Forces Base Petawawa Building S111 P.O. BOX 9999 Stn Main Petawawa ON K8H 2X3	TEL: (613) 687-5511 EXT 5665 CSN: 677-5665 FAX: (613) 588-6373
Deputy Judge Advocate Canadian Forces Base Trenton P.O. Box 1000 Stn Forces Astra ON K0K 3W0	TEL: (613) 965-7041 CSN: 827-7041 FAX: (613) 965-7094
Office of Military Legal Education P.O. Box 17000 Stn Forces Kingston ON K7K 7B4	TEL: (613) 541-6000 EXT 6988 CSN: 271-6988 FAX: (613) 541-6907

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Deputy Judge Advocate Naval Reserve Headquarters 112 Dalhousie Quebec QC G1K 4C1	TEL: (418) 694-5560 EXT 5300 CSN: unavailable FAX: (418) 694-5591
Deputy Judge Advocate Area Support Unit St-Jean P.O. Box 100 Stn Bureau-chef Richelain QC J0J 1R0	TEL: (450) 358-7099 EXT 6129 CSN: 661-6129 FAX: (450) 358-7009

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**Organization Chart
Displaying the Relationship
of the Judge Advocate General
to the Minister, the Chief of
the Defence Staff and the
Deputy Minister**





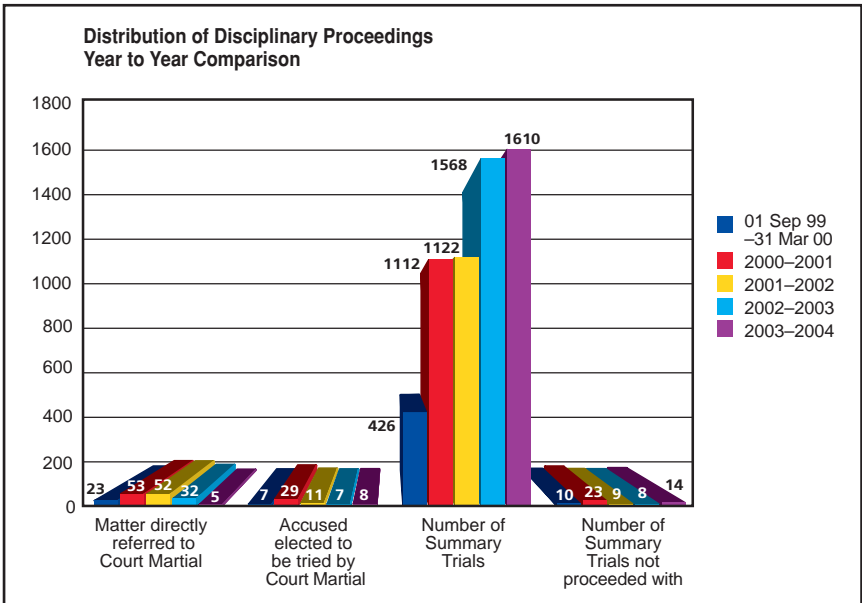
**Summary Trial Year
in Review — Statistics:
1 April 2003 to 31 March 2004**



Summary Trials Reporting Period 1 April 2003–31 March 2004

Distribution of Disciplinary Proceedings

	2002–2003		2003–2004	
	#	%	#	%
Matter directly referred to court martial	32	2%	5	0.3%
Accused elected to be tried by court martial	7	0.5%	8	0.5%
Number of summary trials	1568	97%	1610	98.3%
Number of summary trials not proceeded with	8	0.5%	14	0.9%
Total	1615	100%	1637	100%



Election to Court Martial

	2002–2003		2003–2004	
	#	%	#	%
Number of cases where member offered the right to be tried by court martial	432		433	
Percentage of persons electing court martial when offered		1.62%		1.85%

Language of Summary Trials

	2002–2003		2003–2004	
	#	%	#	%
Number in English	1280	82%	1254	77.9%
Number in French	288	18%	356	22.1%
Total	1568	100%	1610	100%

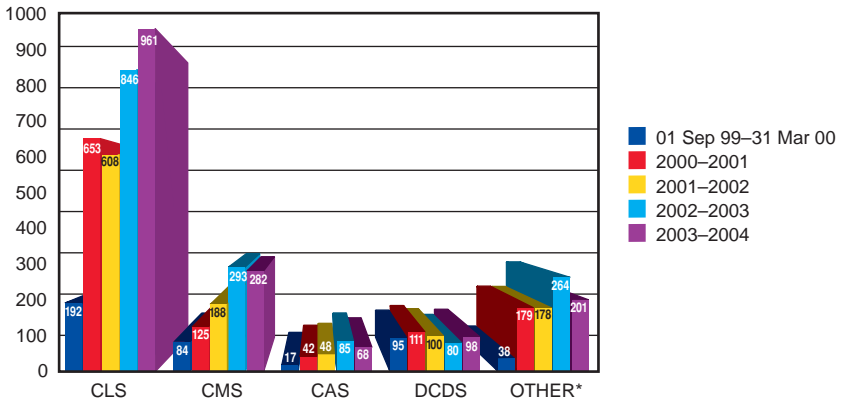
Command

	2002–2003		2003–2004	
	#	%	#	%
Vice Chief of the Defence Staff	0	0%	1	0.1%
Deputy Chief of the Defence Staff	80	5.1%	98	6.1%
Chief of the Maritime Staff	293	18.6%	282	17.5%
Chief of the Land Staff	846	54.0%	961	59.7%
Chief of the Air Staff	85	5.4%	68	4.2%
Associate Deputy Minister (Finance and Corporate Services)	1	0.1%	2	0.1%
Associate Deputy Minister (Human Resources-Military)	252	16.1%	187	11.6%
Associate Deputy Minister (Information Management)	11	0.7%	5	0.3%
Associate Deputy Minister (Materiel)	0	0%	6	0.4%
Total	1568	100%	1610	100%

Note: (1) For statistics relating to prior years, refer to previous JAG Annual Reports.

(2) The statistics in the annex are current as of 15 April 2004. For up to date statistics, see JAG website.

Command Year to Year Comparison



*Other includes — VCDS, ADM (Fin CS), ADM (HR Mil), ADM (IM) & ADM (Mat)

Rank of Accused

	2002–2003		2003–2004	
	#	%	#	%
Private and Corporal (includes Master Corporal*)	1434	91%	1428	88.7%
Sergeant to Chief Warrant Officer	56	4%	41	2.5%
Officer	78	5%	141	8.8%
Total	1568	100%	1610	100%

* Master Corporal is not a rank. It is an appointment pursuant to QR&O article 3.08.

Disposition by Case

	2002–2003		2003–2004	
	#	%	#	%
Guilty	1497	95%	1545	96.0%
Not guilty	71	5%	65	4.0%
Number of cases	1568	100%	1610	100%

Findings by Charge

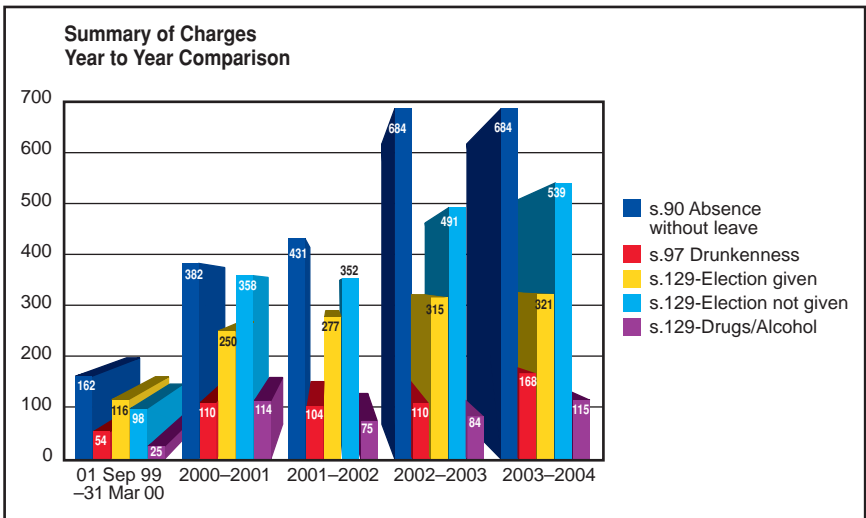
	2002–2003		2003–2004	
	#	%	#	%
Guilty	1777	89%	1877	89.5%
Guilty — special finding	1	0.5%	8	0.4%
Guilty of included offence	0	0%	2	0.1%
Not guilty	156	8%	151	7.1%
Charge stayed	47	2%	54	2.6%
Charge not proceeded with	1	0.5%	6	0.3%
Total Charges	1982	100%	2098	100%

Summary of Charges

NDA Article	Description	2002–2003		2003–2004	
		#	%	#	%
83	Disobedience of lawful command	53	2.6%	58	2.8%
84	Striking or offering violence to a superior	5	0.3%	5	0.2%
85	Insubordinate behaviour	64	3.2%	71	3.4%
86	Quarrels and disturbances	41	2.0%	27	1.3%
87	Resisting or escaping from arrest or custody	1	0.1%	0	0.0%
90	Absence without leave	684	34.5%	684	32.6%
93	Cruel or disgraceful conduct	3	0.2%	3	0.1%
95	Abuse of subordinates	4	0.2%	2	0.1%
97	Drunkenness	110	5.5%	168	8.0%
98	Malingering or maiming	6	0.3%	0	0.0%
101	Escape from custody	1	0.1%	0	0.0%
101.1	Failure to comply with conditions	1	0.1%	0	0.0%
111	Improper driving of vehicles	8	0.4%	6	0.3%
112	Improper use of vehicles	7	0.3%	8	0.4%
114	Stealing	14	0.7%	17	0.8%
115	Receiving	3	0.2%	0	0.0%
116	Destruction, damage, loss or improper disposal	12	0.6%	17	0.8%
117	Miscellaneous offences	18	0.9%	11	0.5%
124*	Negligent performance of a military duty	1	0.1%	0	0.0%

NDA Article	Description	2002–2003		2003–2004	
		#	%	#	%
127	Negligent handling of dangerous substances	2	0.1%	2	0.1%
129	Conduct to the prejudice of good order & discipline — Offences of sexual nature	5	0.3%	3	0.1%
129	Conduct to the prejudice of good order & discipline — Drugs/Alcohol	84	4.2%	115	5.5%
129	Conduct to the prejudice of good order & discipline — election to be tried by CM given (excl. cases reported in 129 — Offences of sexual nature & 129 — Drugs/Alcohol)	315	15.9%	321	15.3%
129	Conduct to the prejudice of good order & discipline — election to be tried by CM not given (excl. cases reported in 129 — Offences of sexual nature & 129 — Drugs/Alcohol)	491	24.7%	539	25.7%
130	Service trial of civil offences	49	2.5%	41	2.0%
Number of charges		1982	100%	2098	100%

* Pursuant to QR&O article 108.07(2), this offense cannot be tried by summary trial. Any findings of guilt under this offense has been or will be quashed.



Authority

	2002–2003		2003–2004	
	#	%	#	%
Delegated Officer	1220	78%	1157	71.9%
Commanding Officer	293	19%	390	24.2%
Superior Commander	55	3%	63	3.9%
Total	1568	100%	1610	100%

Punishments

	2002–2003		2003–2004	
	#	%	#	%
Detention (suspended)	10	0.5%	12	0.6%
Detention	31	1.6%	18	0.9%
Reduction in rank	1	0.1%	8	0.4%
Severe reprimand	2	0.1%	1	0.1%
Reprimand	48	2.5%	52	2.6%
Fine	1098	57.7%	1173	58.9%
Confinement to ship or barracks	506	26.6%	475	23.9%
Extra work and drill	96	5.0%	111	5.6%
Stoppage of leave	51	2.7%	61	3.0%
Caution	61	3.2%	81	4.0%
Total	1904	100%	1992	100%

Note: More than one type of punishment may be awarded in a sentence.

Requests for Review

	2002–2003		2003–2004	
	#	%	#	%
Requests for review based on finding	6	75%	1	3.8%
Requests for review based on sentence	1	12.5%	10	38.5%
Requests for review based on finding & sentence	1	12.5%	15	57.7%
Total	8	100%	26	100%

Decision of Review Authority

	2002–2003		2003–2004	
	#	%	#	%
Upholds decision	2	25%	9	34.6%
Quashes / substitutes findings	5	62%	4	15.4%
Substitutes punishment	0	0%	6	23.1%
Mitigates / commutes / remits punishment	1	13%	7	26.9%
Total	8	100%	26	100%



**Court Martial
Year In Review — Statistics:
1 April 2003 to 31 March 2004**



Court Martial Reporting Period 1 April 2003 — 31 March 2004

Number of Courts Martial

	2002–2003	2003–2004
	73	56

Courts Martial By Type

	2002–2003		2003–2004	
	#	%	#	%
Standing Court Martial	73	100%	56	100%
Disciplinary Court Martial	0	0%	0	0%
General Court Martial	0	0%	0	0%
Special General Court Martial	0	0%	0	0%
Total	73	100%	56	100%

Summary of Charges

Offences	Description	2002–2003 #	2003–2004 #
s.74 NDA	Offences by any person in presence of enemy	0	1
s.75 NDA	Offences related to security	0	1
s.83 NDA	Disobeying a lawful command	7	8
s.84 NDA	Striking a superior officer	1	1
s.85 NDA	Insubordinate behaviour	4	6
s.86 NDA	Quarrels and disturbances	1	0
s.90 NDA	Absent without leave	10	5

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

Offences	Description	2002–2003 #	2003–2004 #
s.93 NDA	Cruel or disgraceful conduct	6	2
s.95 NDA	Abuse of subordinates	0	2
s.97 NDA	Drunkenness	7	4
s.101 NDA	Escape from custody	1	0
s.101.1 NDA	Failure to comply with conditions	0	2
s.111 NDA	Improper driving of vehicles	1	0
s.113 NDA	Causing fires	0	1
s.114 NDA	Stealing	16	1
s.114 NDA	Stealing when entrusted	20	4
s.115 NDA	Receiving	1	1
s. 116 NDA	Destruction, Damage, Loss or improper disposal	0	1
s.117(f) NDA	An act of a fraudulent nature	14	12
s.118.1 NDA	Failing to appear before a court martial	0	1
s.122 NDA	False answers or false information	0	1
s.124 NDA	Negligent performance of a military duty	0	2
s.125(a) NDA	Willfully (or negligently) made a false entry	20	7
s.125(b) NDA	When signing a document, left material part blank	0	2
s.125(c) NDA	Suppressed or altered a military document with intent to deceive	0	2
s.129 NDA	An act to the prejudice	16	5
s.129 NDA	Conduct to the prejudice	45	28
s.129 NDA	Neglect to the prejudice	1	3
s.130 NDA (4(1) CDSA)	Possession of substances	5	0
s.130 NDA (5(1) CDSA)	Trafficking of substances	6	5
s.130 NDA (21 CCC)	Party to an offence	0	1
s.130 NDA (86(1) CCC)	Negligent handling of a firearm	0	1
s.130 NDA (87 CCC)	Pointing a firearm	2	2

Offences	Description	2002–2003 #	2003–2004 #
s.130 NDA (91(2) CCC)	Unauthorized possession of a prohibited firearm	0	1
s.130 NDA (163.1(4) CCC)	Possession of child pornography	0	1
s.130 NDA (173(1) CCC)	Committed an indecent act	0	1
s.130 NDA (249 CCC)	Dangerous operation of a motor vehicle causing bodily harm	1	0
s. 130 NDA (264(3) CCC)	Criminal Harassment	0	1
s.130 NDA (264.1(1) CCC)	Uttering threats	0	1
s.130 NDA (266 CCC)	Assault	5	7
s.130 NDA (267(a) CCC)	Assault with a weapon	0	3
s.130 NDA (267(b) CCC)	Assault causing bodily harm	4	2
s.130 NDA (271 CCC)	Sexual assault	7	12
s.130 NDA (279 CCC)	Kidnapping, forcible confinement, hostage taking	1	3
s.130 NDA (342 CCC)	Theft, forgery of a credit card	3	4
s. 130 NDA (348 CCC)	Breaking and entering with intent, committing offence or breaking out	0	1
s.130 NDA (367 CCC)	Forgery	4	0
s.130 NDA (368 CCC)	Uttering a forged document	5	5
s.130 NDA (380 CCC)	Fraud	3	0
s. 130 NDA (434 CCC)	Arson – own property	0	2
Total Offences		217	156

Disposition By Case

	2002–2003		2003–2004	
	#	%	#	%
Found/Plead Guilty	64	85%	48	86%
Not Guilty	7	9%	8	14%
Stay of Proceedings	1	2%	0	0%
Withdrawal	1	2%	0	0%
Other (NDA section 202.12)	1	2%	0	0%
Total	74	100%	56	100%

Sentences

Punishment Type	2002–2003	2003–2004
Dismissal	1	0
Imprisonment	9	9
Detention	5	6
Reduction in Rank	8	4
Severe Reprimand	10	10
Reprimand	13	11
Fine	51	36
Confined to Barracks	1	1
Extra Work and Drill	0	0
Caution	0	0
Total	98	77

Note: More than one type of punishment can be included in a sentence.

Language of Trial

	2002–2003		2003–2004	
	#	%	#	%
Trial in English	52	71%	47	84%
Trial in French	21	29%	9	16%
Total	73	100%	56	100%

Courts Martial By Command

	2002–2003		2003–2004	
	#	%	#	%
National Defence Headquarters (NDHQ)	2	2%	6	11%
Deputy Chief of the Defence Staff	7	10%	1	2%
Chief of the Maritime Staff	10	14%	12	20%
Chief of the Land Staff	40	55%	30	54%
Chief of the Air Staff	6	8%	5	9%
Canadian Defence Academy*	8	11%	2	4%
Total	73	100%	56	100%

* Training responsibilities are now shared between CF Support Training Group, the Canadian Defence Academy, and environmental commands. For court martial statistics, the Canadian Defence Academy is treated as a distinct entity.

Courts Martial By Rank

	2002–2003	2003–2004
Private and Corporal (includes Master Corporal*)	54	39
Sergeant to Chief Warrant Officer	11	11
Officer	8	6
Other	0	0
Total	73	56

* Master Corporal is not a rank. It is an appointment pursuant to QR&O article 3.08.



**Court Martial Appeal Court
Year In Review — Statistics:
1 April 2003 to 31 March 2004**



Court Martial Appeal Court Reporting Period 1 April 2003–31 March 2004

Appeals

Court	2002–2003	2003–2004
CMAC	9	4
Supreme Court of Canada	0	0
Total	9	4

Appeals by Party

Status of Appellant	2002–2003	2003–2004
Appeals by Crown	0	0
Appeals by Offender	9	4
Total	9	4

Nature of Appeal

Grounds	2002–2003	2003–2004
Finding	5	1
Sentence (Severity and/or Legality)	2	1
Finding and Sentence	2	2
Total	9	4

Disposition

	2002–2003	2003–2004
Upheld Trial Decision	5	2
Overtaken Trial Decision in whole or part	4	2
Total	9	4

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



**Certification & Re-Certification Training
Year In Review — Statistics:
1 April 2003 to 31 March 2004**



Certification & Re-Certification Training Reporting Period 1 April 2003–31 March 2004

Total Number of Officers Certified

	2002–2003	2003–2004
	617	619

Officers Re-Certified Through Presiding Officer Re-certification Test (PORT)

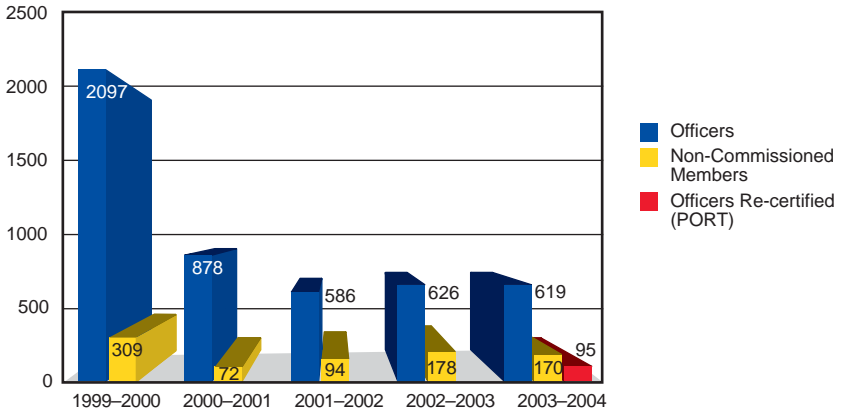
	2002–2003	2003–2004
	PORT not yet launched	95

Number of Members Trained

	2002–2003		2003–2004	
	#	%	#	%
Officers	626*	78%	619	78%
Non-Commissioned Members	178	22%	170	22%
Total	804	100%	789	100%

* Includes 9 officers below the rank of captain/lieutenant (navy) who were trained, but not certified.

**Certification Training
Year to Year Comparison**



Annex

H



Judge Advocate General Directives



Judge Advocate General Directives



The following JAG directives on military justice have been published in previous JAG Annual Reports. The text of each JAG directive can be found in the volume of the JAG Annual Report under which it is listed.

Published in the JAG Annual Report of 2002–2003

Directive: 028/03	Original Date: 21 March 2003	Updates:
Subject: General Instructions With Respect to Reserve Force Court Allowance (RFCA)		
Cross reference: <i>Compensation and Benefit Instructions for the Canadian Forces – 205.505.</i> Subsections 165.17(2) & 249.2(2) of the NDA		

Published in the JAG Annual Report of 2001–2002

Directive: 017/02	Original Date: 10 January 2002	Updates:
Subject: General Instruction – Payment Of Witness Expenses At Court Martial		
Cross reference: s.251.2 NDA; QR&O Article 111.10; CFAO 210-1; <i>Federal Court Rules</i> , Tariff A		

Published in the JAG Annual Report of 2000–2001

Directive: 013/01	Original Date: 30 March 2001	Updates:
Subject: General Instructions In Respect Of Delay In The Court Martial Process		
Cross reference: Sections 165.17(2) and 249.2(2) of the NDA		

Directive: 010/00	Original Date: 10 July 00	Updates:
Subject: Charge Screening Policy		
Cross reference: JAG Policy Directive 006/00 Professional Standards Review		

Directive: 006/00	Original Date: 1 August 2000	Updates: 22 November 2001
Subject: Professional Standards Review		
Cross reference: Policy Directive 010/00 – Charge Screening Policy		

Directive: 002/00	Original Date:	Updates:
Subject: Ethics Plan*		
Cross reference:		

* This directive was in its planning phase only during the reporting period of 2000–2001. It has since been replaced by the following:

Directive: 023/02	Original Date: 6 October 2000	Updates: 31 Jan 02 22 Apr 02 24 May 02 30 Dec 03
Subject: Ethics Directive		
Cross reference: JAG Policy Directive 006/00 – Professional Standards Review		

Published in the JAG Annual Report of 1999–2000

Directive: 008/00	Original Date: 23 March 2000	Updates:
Subject: General Instructions In Respect Of Prosecutions		
Cross reference: Section 165.17(2) of NDA		

Directive: 009/00	Original Date: 23 March 2000	Updates:
Subject: General Instructions In Respect Of Defence Counsel Services		
Cross reference: Section 249.2(2) of NDA		



**Annual Report of the
Director of Defence Counsel
Services for the period of
1 April 2003 to 31 March 2004**



Annual Report of the Director of Defence Counsel Services

Prepared by Lieutenant-Colonel Jean-Marie Dugas

INTRODUCTION

1. This is the fifth report presented by the Director (DDCS) of Defence Counsel Services (DCS) pursuant to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 101.20. It is my first one as Director of the service. It covers the period from 1 April 2003 to 31 March 2004 and contains:
 - An overview of the DCS organization;
 - A review of DCS duties and responsibilities;
 - A review of the relationship between DCS counsel and the chain of command;
 - Services provided during the reporting period; and
 - DDCS and DCS general activities.

DCS ORGANIZATION

2. Changes in this part of the organization include a new director; the second in the history of the DCS organization. A new legal officer joined the office last summer and one was posted out in the fall. Also, the DCS reserve force establishment was changed by upgrading a position of major rank to one of the rank of lieutenant colonel. It was filled prior to the regular force position's vacancy, thus alleviating the effect

of the departure. One regular force position will have been vacant for almost two years but the situation will be corrected during the next annual posting season. The office must be allowed to function with its full establishment of personnel in order to offer an acceptable work environment for the legal officers.

3. The three civilian personnel positions in the office were subject to incumbent changes during the reporting period. It has not affected the quality of services offered by the organization. The situation is now stabilized.

DUTIES AND RESPONSIBILITIES

4. There were no changes in DCS duties and responsibilities and most of the following principal services were provided to persons who are subject to the Code of Service Discipline during this reporting period:

Legal Counsel Services:

- To detained persons:
 - to persons held in custody, at hearings by a military judge under s.159(1) of the NDA to determine retention in custody [QR&O 101.20(2)(e)].
- To accused persons:
 - at courts martial [QR&O 101.20(2)(f)];
 - where there are reasonable grounds to believe that the accused person is unfit to stand trial, at hearings to determine fitness to stand trial [QR&O 101.20(2)(b)]; and
 - in cases where a finding of unfit to stand trial has been made, at hearings as to the sufficiency of admissible evidence to put the accused person on trial [QR&O 101.20(3)(c)].
- To persons sentenced by court martial to detention or imprisonment, at hearings for:
 - release pending appeal [QR&O 101.20(3)(b)];
 - review of undertakings for release pending appeal [QR&O 101.20(3)(b) and 118.23];
 - cancellation of release pending appeal [QR&O 118.23].

- To the respondent (offender), at Court Martial Appeal Court or Supreme Court of Canada hearings where prosecution authorities appeal the legality of a finding or the severity of a sentence awarded by court martial [QR&O 101.20(2)(g)].
- To a person on an appeal or an application for leave to appeal to the Court Martial Appeal Court or the Supreme Court of Canada, with the approval of the Appeal Committee [QR&O 101.20(2)(h)].

Advisory Services:

- To persons arrested or detained in respect of a service offence pursuant to s.10(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), on a 24/7 basis [QR&O 101.20(2)(a)].
- To assisting officers and accused persons with respect to the making of an election to be tried by court martial pursuant to QR&O 108.17 and 108.18 [QR&O 101.20(2)(d)].
- To assisting officers or accused persons on matters of a general nature relating to summary trials [QR&O 101.20(2)(c)].
- To persons subject of an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry [QR&O 101.20(2)(i)].

RELATIONSHIP DCS/CHAIN OF COMMAND

5. As discussed in previous reports, the status of the DDCS and DCS military lawyers as the “defence bar” of the CF and the importance of their ability to perform, and be perceived to perform, their duties free from influence by the chain of command cannot be overstated. This is the basic function of DDCS under the law. It must be understood that an essential element at the heart of the mandate of DDCS and DCS counsel is to be able to perform their duties free from interference from the chain of command. DCS counsel have continued to perform their duties and advance the position of their clients free from such interference from the chain of command.
6. In the performance of their duties, DCS counsel have had direct dealings with their clients, including assisting officers, irrespective of rank, status or physical location. Those elements do influence the way a particular

mandate is delivered. Distances from clients, witnesses and sometimes from resources also, make representation difficult, but not impossible. In particular, they dealt with their clients' chain of command, military and civilian prosecution and enforcement authorities, and all other persons involved in disciplinary proceedings respecting their clients. They also had dealings with their provincial bars and other professional associations.

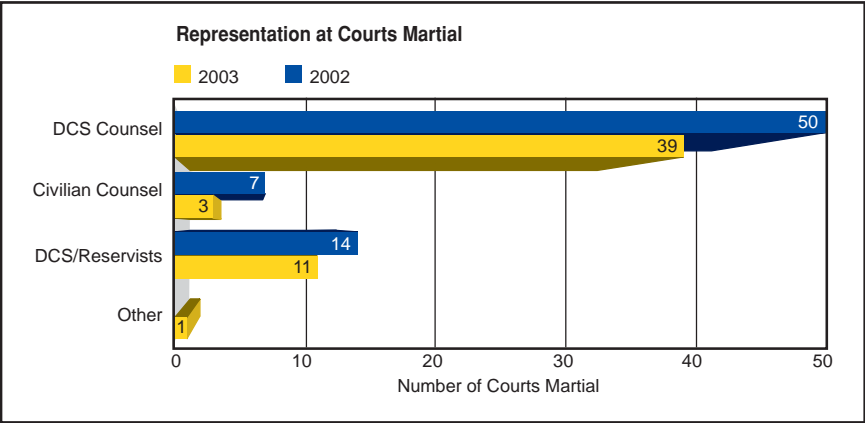
- 7. With respect to the JAG's general supervision of the military justice system and his authority to issue, pursuant to s.249(2) of the NDA, general instructions or guidelines to DDCS, no general instructions were issued to the DDCS by the JAG during the reporting period.

SERVICES PROVIDED

Counsel Services

➤ Courts martial

- 8. When facing a court martial, an accused person has the right to be represented by DCS counsel at public expense, may retain legal counsel at his or her own expense or may choose not to be represented.
- 9. During the reporting period, DCS was involved in 54 of the courts martial completed. Sources of representation at courts martial have been as shown below.



10. Pursuant to the authority granted to him under s.249.21(2) of the NDA, the Director of Defence Counsel Services deemed it appropriate to hire, at public expense, civilian counsel in a number of cases where, having received a request for representation by DCS counsel, no member of the DCS office could represent the particular individual by reason of a conflict of interest. Civilian counsel were hired at public expense in two cases of co-accused.

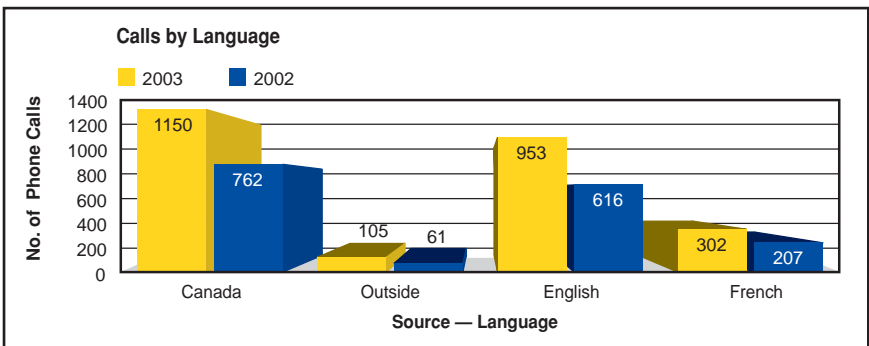
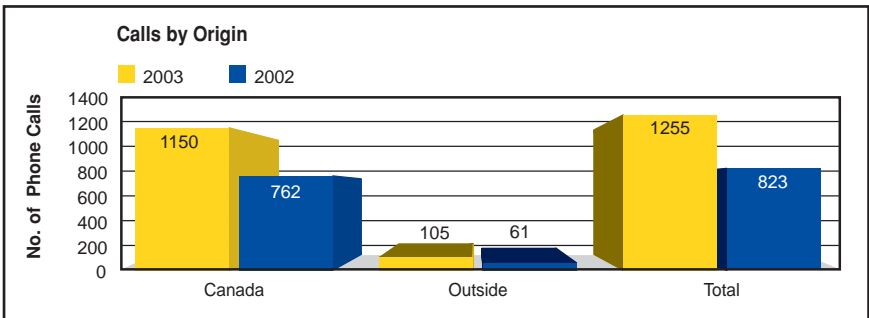
► Appeals

11. DCS counsel were involved in one hearing before the Court Martial Appeal Court (CMAC) in a case initiated in the previous reporting period. In one other case where the appellant was to represent himself, the Court Martial Appeal Court granted the prosecution's motion to dismiss the appeal. The member was incarcerated according to the order of the military judge.
12. The only request for representation by DCS before the Court Martial Appeal Court was rejected by the Appeal Committee. Except for one case where the Minister initiated the appeal, the approval of the Appeal Committee under QR&O 101.20(2)(h) was required as the request pertained to an appeal initiated by the member.
13. DDCS will therefore appear as respondent in one case. Military law being a specialized area of practice, it is of concern that military defence counsel are involved in such a small proportion of appeals. The proposed changes to the composition of the Appeal Committee should allow for a more equitable representation of the applicant.

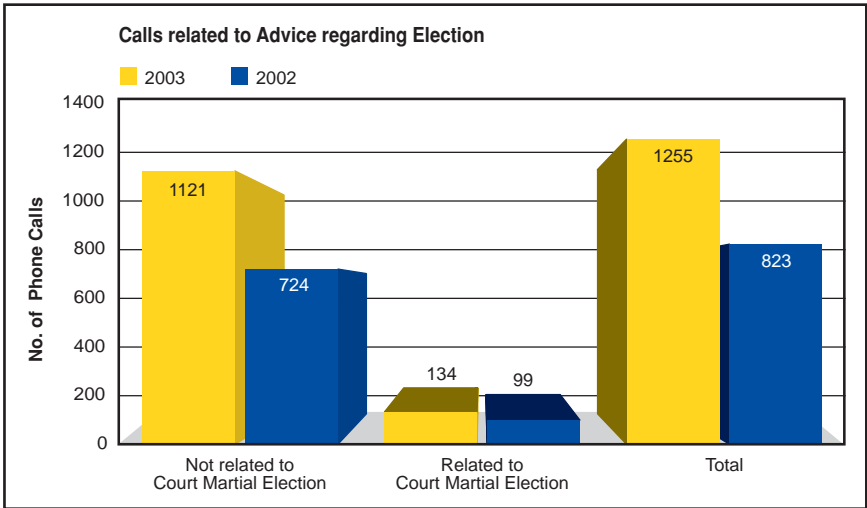
Advisory Services

14. The advisory services provided by DCS counsel remain an important aspect of the overall operation of DCS. Indeed, with an increase in deployments, the situations giving rise to the need for legal advice are numerous and occur on a daily basis. Furthermore, this service contributes largely to the protection of CF members' fundamental rights under the *Charter* from the moment they get involved with the justice system.

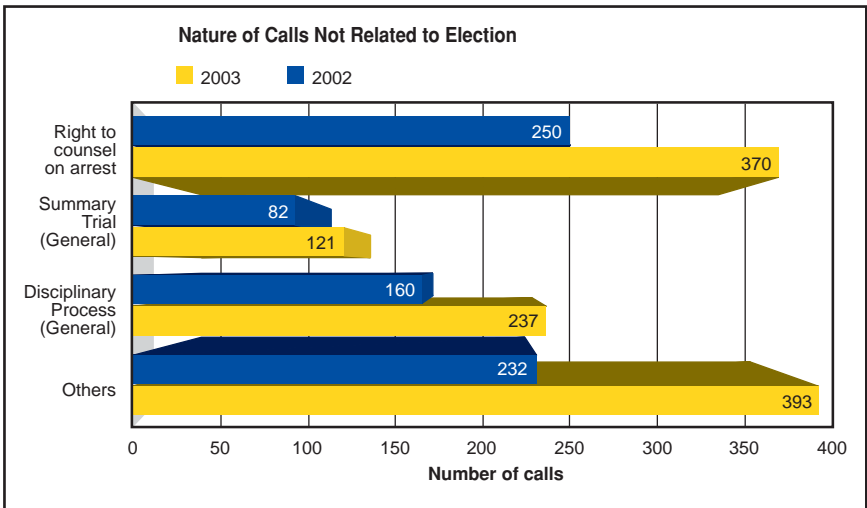
15. Advisory services are available on a 24/7 basis. In addition, the service is available in both official languages and accessible by all CF members whether they are posted in Canada or abroad. In order to facilitate the contact with DCS counsel, one toll-free number has been widely disseminated in the CF. This gives three ways to contact our services:
- One, relating to the right to seek legal advice upon arrest or detention, to military police and other CF authorities likely to be involved in investigations of a disciplinary or criminal nature.
 - The other, relating to election between court martial and summary trial and advice on other disciplinary matters, to all CF personnel.
 - Finally, the rapid evolution of the use of the Internet and Intranet is changing to some extent the way in which DCS counsel support and advise their clients. This trend is increasing and affects the DCS workload.
16. During the reporting period, DCS counsel handled a total of 1,255 calls. Origin and language of calls are as follows:



17. The graph below shows the proportion of calls related to advice regarding the election of an accused between court martial or summary trial to calls that were not related to this subject.



18. This graph shows the nature of calls that were *not* related to the election of an accused between court martial or summary trial.



The others portion of the above graph refers to subjects such as court martial process in general, redress of grievance and release from the CF. While DCS is not specifically mandated to advise on administrative matters, the duty counsel numbers which are widely distributed are also used for seeking advice on those subjects. In such situations, DCS counsel provide advice as to the mechanics of the process, but do not get involved in the merits of the matter.

GENERAL ACTIVITIES

19. In addition to representation of members at courts martial and before the Court Martial Appeal Court, DCS counsel were involved in two *show cause hearings* under s.159 of the NDA to determine whether the person was to be retained in custody. They also were involved in an attempt to obtain legal representation on appeal for one specific file where the Appeal Committee rejected the request for counsel.
20. DDCS has been involved with other military justice stakeholders in the review and update of policies and regulations aimed at improving the administration of military justice. Among others, we are involved in the Permanent Military Court Working Group studying this specific matter. DDCS has not yet been involved in any proposal for regulations that will follow the Lamer Report.
21. We also are working on improving the process of scheduling of courts martial, as this is still an important and problematic issue.
22. In conjunction with other directorates in JAG and the DND/CF Legal Advisor, DDCS continues to work on the review of current regulations regarding the representation of CF members before civilian courts in foreign countries. We should be able to provide a comprehensive proposal during the next reporting period.
23. DDCS continues to administer the legal assistance funds allocated under the Canadian Forces Administrative Order 111-2 — Employment of Civilian Defence Counsel in Foreign Criminal Court — in relation to a CF member charged with a criminal offence in Australia. The original

request was granted and DDCS subsequently administered the agreed terms relating to the provision of legal services. The Crown successfully appealed the decision of the lower court to the Australian Court of Appeal. New counsel is required for the new trial and DDCS is assisting the accused member with that process.

24. The analysis of information provided through legal aid reveals that some military personnel are charged in criminal civilian court for military offences such as, driving a motor vehicle on a military base while impaired, family violence and some other offences. Such exercise of military police discretion to choose their forum varies from coast to coast and often negates access to DCS counsel for those members so affected.

CONCLUSION

25. In this reporting period, we have seen a slight decrease in the number of courts martial but an increase of disciplinary files. The numbers of long-released members still facing charges is of concern as it sometimes makes preparation of a defence more difficult and complicated. It also creates an additional burden on the former member who has reintegrated into the civilian work force, far from where they were serving and where they are being tried. It puts those former members at risk of losing their civilian position in order to secure their appearance in court martial, away from home.
26. However, many of the problems that have been identified previously were addressed.



**The JAG Abridgement of the
Annual Report of the Director of
Military Prosecutions for the period of
1 April 2003 to 31 March 2004**





The JAG Abridgement of The Annual Report of the Director of Military Prosecutions

SECTION 1 — INTRODUCTION

This report is the JAG abridgement of the fifth annual Director of Military Prosecutions (DMP) report, completed in fulfillment of the requirement prescribed by Governor in Council and contained in *Queen's Regulations and Orders for the Canadian Forces* (QR&O).¹ The full text versions of all DMP Annual Reports are readily available on the CMPS portion of the JAG web site.² This report covers the period 1 April 2003 to 31 March 2004 and contains the following:

- The DMP/Canadian Military Prosecution Service (CMPS) Organization, Structure, Role and Personnel
- Training and Communications
- Military Justice and Courts Martial — applications, trials and appeals

1 QR&O article 110.11. The regulation provides: *The Director of Military Prosecutions shall report annually to the Judge Advocate General on the execution of his or her duties and functions.*

2 The URL of the JAG website is www.forces.gc.ca/jag.

SECTION 2 — DMP/CMPS ORGANIZATION, STRUCTURE, ROLE AND PERSONNEL

The CMPS collectively identifies the DMP and his team of military prosecutors and civilian staff. Organizationally, it has not changed from the last report,³ although new reserve prosecutors have been recruited in the reporting year. They will fill positions in RMP Atlantic and RMP Central regions. In addition, three regular force prosecutors were deployed on CF operations (Afghanistan and Bosnia-Herzegovina) in support of the larger JAG mandate. As well, the CMPS appellate counsel was promoted and posted out of his position to become AJAG Halifax in January 2004. The vacant appellate position is expected to be filled in the summer of 2004.

The primary duties of the DMP and CMPS are legislatively mandated⁴ and generally include the preferral and prosecution of all courts martial and acting as appellate counsel for the Minister of National Defence. CMPS prosecutors also act as advisers to the Canadian Forces National Investigation Service (CFNIS) and fulfill a training role.

SECTION 3 — TRAINING AND COMMUNICATIONS

In order to effectively fulfill the role of a military prosecutor, CMPS lawyers must be skilled, knowledgeable and demonstrate maturity, judgment and common sense. With this in mind, improving and increasing the knowledge base as well as the professional abilities and capabilities through training with our colleagues in the civilian prosecution services continues to be a major goal of the CMPS. In this reporting year the military prosecutors attended continuing legal education courses and seminars offered by various Canadian prosecution services (federal and provincial), the different provincial bar associations, the Canadian Bar Association and the Federation of Law Societies of Canada. A list of courses taken by military prosecutors from 1 April 2003 to 31 March 2004 is found at Appendix 1.

3 The Regular Force component of the CMPS is organized regionally within Canada with Regional Military Prosecutors (RMPs) located in Halifax (Atlantic), Valcartier (Eastern), Ottawa (Central) and Edmonton (Western) and a head office with the Director, Deputy Director and military prosecutors located at National Defence Headquarters in Ottawa. The Reserve Force component is organized regionally to support the RMPs and the military prosecutors working at the head office.

4 NDA section 165.11.

In addition to these courses, the annual CMPS Workshop was held on 20–21 October 2003, attended by both regular and reserve force prosecutors and the office paralegals. The objectives of the workshop were: to discuss recent developments in criminal and military law and their impact on CMPS functions; to discuss the roles and duties of the prosecutor in the military justice system; and to conduct Continuing Legal Education (CLE) on selected subjects. The workshop was conducted as a series of guided discussions and brief presentations by participants including a presentation from three commanding officers from the navy, army and air force regarding the issue of sentencing from a commander's viewpoint. The CMPS Workshop 2003 was a significant success, achieving all of its objectives and provided an excellent forum for discussions on a number of issues among military prosecutors. The interactive nature of the program was ideal, given that all CMPS participants had at least one year of experience in their respective positions.

Given that CMPS prosecutors are legal officers in the CF, they must retain their military skills so that CMPS can meet the deployment capability set out in its Mission Statement. Military prosecutors participate in military training activities, such as qualification on the pistol and rifle at ranges, as well as in-house Law of Armed Conflict and Operational Law courses. Not only do military prosecutors receive training, they also provide training in military justice, disciplinary and criminal law matters, both formally and informally, to police authorities, the supporting staff and court reporters of the Office of the Chief Military Judge, and other CF legal officers. For example, the CMPS was an integral part of the preparation and presentation of a two-day military justice seminar to the Court Martial Appeal Court Justices in November 2003. This seminar highlighted the military component to military justice. This information is also reflected in the above noted Appendix 1.

While the training of military legal officers is important, so too is that of the civilian staff. CMPS civilian staff participated in a variety of training courses throughout the reporting period, enhancing their efficiency and professionalism. It is recognized that the hardworking and highly motivated civilian component of CMPS is an integral part of the team and provides a most important service in the carrying out of the prosecutorial function.

This reporting period was also significant in terms of the Military Justice Outreach Program of both the JAG and the DMP. In January 2004, the DMP co-chaired the Federal, Provincial and Territorial Heads of Prosecution Committee meeting in Ottawa. This committee is the only national advisory forum on prosecutions issues in Canada: as such, it provides a venue where stakeholders can consult and seek views of the Canadian prosecution community; as a national table it promotes inter-jurisdictional assistance and co-operation on legal-operational issues; and it is a vibrant, constructive and highly effective forum for the discussion of prosecution and prosecution-related issues as well as for the exchange of information and best practices on prosecution related substantive procedural and managerial issues.

Since September 1999, CMPS has maintained an Internet web site as part of its communications strategy and to facilitate openness, transparency, and inclusiveness in the military justice system.⁵ The CMPS web site provides DMP with a mechanism to make available to the public court martial and appeal results. As well, JAG General Guidelines and Instructions to the DMP, JAG Case Specific Instructions to DMP, and DMP Policy Directives are set out on the web site. While the JAG has never issued any Case Specific Instructions, he has issued five general policy directives to the DMP, all of a housekeeping nature, which are set out on the CMPS website.

For five weeks in the fall of 2003, the CMPS participated in a visit/exchange between the Office of the JAG and the United Kingdom Director of Army Legal Services (DALs). The objectives of the visit/exchange were to foster better relations and understanding between the legal services branches of both countries and to provide an opportunity for a Canadian military prosecutor to work in the British Army prosecution environment while having a legal officer from DALs work within the office of the JAG. The objectives were met and it is anticipated that this visit will foster further exchanges of longer duration in the future. The DMP also met with the military prosecution authorities of New Zealand and Israel during the reporting period. In addition, various CMPS prosecutors met with The Right Honourable

5 The URL of the website address is www.forces.gc.ca/jag/military_justice/cmeps/default_e.asp.

Antonio Lamer P.C., C.C., C.D. to discuss matters of military justice prior to the submission of *The First Independent Review of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts*, as required under section 96 of Statutes of Canada 1998, c.35.

SECTION 4 — MILITARY JUSTICE AND COURTS MARTIAL

During the reporting period, the CMPS received 112 applications for disposal of a charge from different referral authorities. In 39 of the applications, charges were preferred by a prosecutor and completed at court martial. The decision not to prefer any charges was made in 22 cases.⁶ In all 22 cases, the decision not to prefer charges was made on the basis of a lack of reasonable prospect of conviction (86%) or the public interest factor for proceeding with a prosecution at court martial was not present (14%). After preferal, in three cases the charges were withdrawn before the court martial commenced. In one of these cases different charges were preferred and proceeded to trial.

All courts martial held during this period were Standing Courts Martial. A Standing Court Martial is a court composed of a military judge only. There were no Disciplinary Courts Martial nor General Courts Martial convened during this period.

CMPS reserve force prosecutors were again involved in the prosecution of a number of courts martial. Their assistance and counsel to DMP and the CMPS are invaluable. With the recent amendments to the NDA, military judges must review custody orders made by the chain of command. DMP represented the CF in one custody review hearing during the reporting period.⁷

6 In two additional cases, charges referred to the DMP during the previous reporting period were not preferred.

7 NDA section 159.

Annex J Appendix 1 Professional Development of Military Prosecutors

Training Received by Military Prosecutors

HOST ORGANIZATION	NAME OF COURSE	NUMBER OF ATTENDEES
Barreau du Québec	Congrès du Barreau (Mont Tremblant)	2
Barreau du Québec	Informatique et Internet pour criminalistes	2
Canadian Bar Association	Workshop on Search and Seizure Law	2
Canadian Bar Association	Charter Jurisdiction	2
Canadian Bar Association	Annual Conference	1
Canadian Forces	5 th Canadian Conference on Ethical Leadership	1
Canadian Forces Staff College	Law of Armed Conflict Course — Toronto	1
Canadian Military Prosecution Service	DMP Annual Workshop	13
Canadian Military Prosecution Service	Ethics self-study package	1
Continuing Legal Education Society of British Columbia	Dynamic Courtroom Performance	1
Department of National Defence	First-Aid	1
Department of National Defence	Management Seminar	1
Department of National Defence	C-7 rifle firing	1
Department of National Defence	9mm pistol firing	2
Department of National Defence	Course in Human Resources	1
Department of National Defence	Grenade range	1
Department of National Defence	Nuclear, biological and chemical defence	1
Department of National Defence	Defensive driving	1
Federal Department of Justice	Federal Prosecutor's School Ottawa	1
Federal Department of Justice	Communication in the Courtroom and Beyond	2
Federal Department of Justice	Working Smarter Not Harder	1
Federal Department of Justice	Section 1 of the Charter	1
Federal Government	Peacekeeping Operations	1
Federal/Provincial/Territorial Heads of Prosecution	Various Criminal Prosecution topics	3
Federation of Law Societies	National Criminal Law Program	6
Office of the Judge Advocate General	JAG Workshop	12
Office of the Judge Advocate General	Legal Officer Intermediate Training — Military Justice and Administrative Law	5

Annex J Appendix 1

Professional Development of Military Prosecutors

Training Received by Military Prosecutors

HOST ORGANIZATION	NAME OF COURSE	NUMBER OF ATTENDEES
Office of the Judge Advocate General	Legal Officer Intermediate Training — Operational Law	4
Office of the Judge Advocate General	International Law CLE Conference	2
Office of the Judge Advocate General	Australian Military Law Training	1
Office of the Judge Advocate General	Exercise Maple Leaf	1
Office of the Judge Advocate General	On the Job Training — NORAD Exercise Vigilant Overview	1
Ontario Bar Association	CLE Criminal Law	1
Ontario Bar Association	Human Rights in the Workplace	1
Ontario Crown Attorney Summer School	Appellate Advocacy	1
Ontario Crown Attorney Summer School	Search and Seizure	2
Ontario Crown Attorney Association	Experts	2
Ontario Crown Attorney Association	Sex Crimes	2
Ontario Crown Attorney Association	Trial Advocacy	1
Personal Development	English language training	1
Royal Military College	Officer Professional Military Education — Leadership and Ethics	3
The Advocates' Society	Plea Bargaining	1
The Advocates' Society	Opening Statements & Closing Arguments	1
The Advocates' Society	The Jury Trial	1
The Advocates' Society	Criminal Litigation	1
United Kingdom Army Legal Services visit/exchange	United Kingdom – Canada exchange of military prosecutors	1

CMAC #	APPELLANT	RESPONDENT	TYPE OF APPEAL	STATUS
467	Private Baril	Her Majesty the Queen	Legality of Finding	COMPLETED Appeal heard on 4 Apr 03 and dismissed.
468	Ex-Private Castillo	Her Majesty the Queen	Severity of Sentence	COMPLETED Appeal heard on 28 Apr 03. Allowed on 6 Jun 03, a Fine of \$4500 was substituted.
469	Corporal Forsyth	Her Majesty the Queen	Legality of Finding Severity of Sentence	COMPLETED Appeal heard on 25–26 Sep 03 and dismissed.
470	Private Jackson	Her Majesty the Queen	Legality of Finding Severity of Sentence	COMPLETED Appeal heard on 24 Jul 03. The appeal as to finding was dismissed. The appeal as to the severity of sentence was allowed. A Severe Reprimand and a Fine of \$5,000 were substituted.
472	Private Busch	Her Majesty the Queen	Legality of Finding Severity of Sentence	COMPLETED Appeal dismissed on 10 Nov 03 given the appellant's failure to file his factum within the time allocated in the CMAC Rules.
473	Corporal Manier	Her Majesty the Queen	Legality of Finding Severity of Sentence	COMPLETED Appeal dismissed on 21 Nov 03 given the appellant's failure to file his factum within the time allocated in the CMAC Rules.
474	Private Preece	Her Majesty the Queen	Legality of Finding	COMPLETED Appeal dismissed on 13 Jan 04, the appellant having failed to confirm her intent to abandon her appeal according to the CMAC Rules.
475	Her Majesty the Queen	WO Brady	Legality of Finding	ONGOING
476	Lieutenant(N) Scott	Her Majesty the Queen	Legality of Finding Severity of Sentence	ONGOING

Annex J *Appendix 2*
Appeals Completed/Initiated
1 April 2003 to 31 March 2004

CMAC #	APPELLANT	RESPONDENT	TYPE OF APPEAL	STATUS
477	Private Dixon	Her Majesty the Queen	Legality of Finding Severity of Sentence	ONGOING
478	Her Majesty the Queen	LS Walker	Legality of Finding	ONGOING
479	Cpl Rose	Her Majesty the Queen	Legality of Finding Legality of Sentence Severity of Sentence	ONGOING



Glossary of Terms and Abbreviations

AB	Able Seaman
AJAG	Assistant Judge Advocate General
Capt	Captain
CBA	Canadian Bar Association
CCC	Criminal Code of Canada
CDS	Chief of the Defence Staff
C.D.S.A.	Controlled Drugs and Substances Act
CF	Canadian Forces
CFB	Canadian Forces Base
CFGA	Canadian Forces Grievance Authority
CFNIS	Canadian Forces National Investigation Service
CLE	Continuing Legal Education
CM	Court Martial
CMA	Court Martial Administrator
CMAC	Court Martial Appeal Court of Canada
CMJ	Chief Military Judge
CMPS	Canadian Military Prosecution Service
CO	Commanding Officer
COS	Chief of Staff
Cpl	Corporal
CPO1	Chief Petty Officer 1 st Class
CRS	Chief of Review Services
CSD	Code of Service Discipline
CWO	Chief Warrant Officer
DALS	Director of Army Legal Services (United Kingdom)
DAOD	Defence Administrative Orders and Directives

DCS	Defence Counsel Services
DDCS	Director of Defence Counsel Services
DJA	Deputy Judge Advocate
DJAG/COS	Deputy Judge Advocate General/Chief of Staff
DJAG/HR	Deputy Judge Advocate General/Human Resources
DJAG/Ops	Deputy Judge Advocate General/Operations
DLAW/MJP&R	Directorate of Law/Military Justice Policy and Research
DMP	Director of Military Prosecutions
DND	Department of National Defence
DND/CF LA	Department of National Defence/ Canadian Forces Legal Advisor
FA	Fisheries Act
JAG	Judge Advocate General
LCol	Lieutenant-Colonel
LS	Leading Seaman
Lt(N)	Lieutenant Navy
MCpl	Master Corporal
MJCC	Military Judges Compensation Committee
MND	Minister of National Defence
MP	Military Police
MRE	Military Rules of Evidence
MWO	Master Warrant Officer
NCM	Non-commissioned member
NDA	National Defence Act
NIS	National Investigative Service
OCdt	Officer Cadet
OJT	On-the-job-training
OPME	Officer Professional Military Education
OS	Ordinary Seaman
POCT	Presiding Officer Certification Training
PORT	Presiding Officer Re-certification Test
PO2	Petty Officer 2 nd Class
Pte	Private
Q.C.	Queen's Counsel (Conseil de la reine)
QR&O	Queen's Regulations and Orders for the Canadian Forces
RCMP	Royal Canadian Mounted Police
RDP	Record of Disciplinary Proceedings
RMC	Royal Military College
RMP	Regional Military Prosecutor
SFOR	Stabilisation Force
Sgt	Sergeant
Stn	Station
VCDS	Vice Chief of the Defence Staff
WO	Warrant Officer
2Lt	Second Lieutenant