



THE OBSERVATORY

The Newsletter of the
Canadian Observatory for Military Justice Reform

Editor: Major Tim Dunne, CD email: [tdunne\(at\)duncom\(dot\)ca](mailto:tdunne(at)duncom(dot)ca)
<https://military-justice.ca>

Summary Trials: “March the Guilty Bastard In”

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law . . . Canadian Charter of Rights and Freedoms — Section 15(1).

According to Canadian military doctrine, “summary trials are designed to deal with relatively minor service offences that are important for the maintenance of military discipline and efficiency at the unit level.” (see www.forces.gc.ca/assets/FORCES_Internet/docs/en/jag/military-justice-overview.pdf)

Canadian military personnel tried by summary trials are subjected to a modern version of medieval justice, denied the most basic and important rights the Canadian Charter of Rights and Freedoms guarantees to all Canadians.

A hold-over from England’s King William II’s Mutiny Act of 1689, *summary trials* provide for swift and peremptory treatment of minor infractions of military regulations and protocols. The summary trial is the principal method through which Canadian military personnel are tried.

It can deal with almost every infraction under the National Defence Act (NDA), other than the most serious offences, and can also address other Canadian statutes, such as the Criminal Code, the Environmental Act and the Controlled Drugs and Substances Act. Many of these infractions are not recognized as offenses under the Criminal Code and can be as simple as improperly laced shoes to negligent handling of a weapon.

The Presiding Officer is usually the accused’s commanding officer (CO) or an officer delegated as the CO’s representative, who sits as judge and jury to personally decide the accused’s guilt or innocence and imposes a sentence on the spot.

To qualify, presiding officers need only attend a two-day certification course. By contrast, Nova Scotia’s lawyers must attend law school for three years, article for an additional year and pass specific exams to be admitted to the bar. They can apply for admission to the bench after 10 years in the legal profession. On appointment, they have a two-week introductory course. There are also annual conferences and online resources to maintain their professional knowledge.

The Assisting Officer: The Judge Advocate General's 389-page manual for summary trials, *Military Justice at the Summary Trial Level* (<http://www.forces.gc.ca/en/about-reports-pubs-military-law-summary-trial-level/index.page>), prohibits legal representation for the accused. "[T]he accused will be assisted throughout the summary trial process by an assisting officer who is specifically appointed by the Commanding Officer for that purpose."

Normally, *assisting officers* are appointed under the authority of the presiding officer, but often lack legal training and experience with the summary trial process. There is no "solicitor-client privilege," as with a lawyer, which further exposes the accused to increased vulnerability before the military "justice" system.

Summary Trials make up more than 80 per cent of service disciplinary tribunals convened each year under the NDA, while courts martial are used to try the remaining disciplinary cases.

Since the beginning of the new millennium there have been more than 24,000 summary trials. That's an average of 1,340 annually. Only about five per cent of accused are acquitted.

- ❖ Presiding officers are not required to maintain an official transcript of the proceedings, so there is no appeal.
- ❖ The trial summary sheet records only the sentence and punishments. While an accused can request a review of a sentence, there is no provision for appeal.
- ❖ There is no requirement to apply the rules of evidence that apply in a civilian courtroom and that help an accused receive a fair trial.
- ❖ The accused can be compelled to testify against himself or herself; the constitutional right to protection against self-incrimination does not apply.
- ❖ Spousal privilege is disallowed; adverse inferences can be drawn from the silences of the accused and hearsay and opinion can be admitted as "evidence."
- ❖ The accused is granted some basic rights, such as the opportunity to question witnesses and present evidence. But statements obtained in written form, by phone or fax, limiting the accused's ability to challenge that "testimony."

The summary trial process allows for significant penalties to be imposed against those found guilty: reprimand, confinement, extra work, fines up to 60 per cent of monthly basic pay, reduction in rank and incarceration for up to 30 days with the possibility of a criminal record.

The presence of the Canadian military's medieval tribunal system in the 21st century is unwarranted, unnecessary, and unjust. It is time for the Code of Service Discipline to be re-examined to align it with contemporary Canadian values.

Bill C-77 addresses several glaringly problematic elements of the NDA, *summary trials* among them. This legislation has just passed third reading in the House of Commons and is on its way to the Senate for review. We need to see how the Act is rolled out following the Senate review

and Royal Assent before we celebrate this long overdue step in the modernization of military discipline.

The title of this article "March the guilty bastard in" is the historic and continuing meme within the Canadian military reflecting the belief that to be accused is deemed to be guilty.

The members of our Canadian Armed Forces should benefit from the same rights and freedoms which they are mandated to protect, even if doing so may cause their injury or death.

The Observatory

This newsletter is a free service intended to provide a perspective about the process and procedure which we know as "The Canadian military justice system." While I make every effort to confirm and validate all information in this newsletter, it is based on the belief that it is time for a public inquiry into Canada's military disciplinary processes, leading to a reform of the system, to provide our service personnel with the highest quality of legal support, and to introduce justice into the disciplinary system.

Questions and comments

If you have any questions or comments about the Canadian military's disciplinary tribunals and practices or this newsletter, please contact me. My phone, email and website URL are below.

Phone: (home office) (902) 461-1842 and (mobile) (902) 483-9097

Email: tdunne@duncom.ca

Web: [Canadian Observatory for Military Justice Reform \(https://military-justice.ca\)](https://military-justice.ca)

7 March 2019

2019/02