

# **Annual Report of the Director of Defence Counsel Services**

## **INTRODUCTION**

1. This annual report covers the period from 1 April 2010 to 31 March 2011. The Director was Lieutenant-Colonel Jean-Marie Dugas until 10 August 2010 when I assumed the role. While it has subsequently changed, the rank associated with this position was, throughout the entirety of this period, that of lieutenant-colonel.
2. It has been interesting to have the opportunity, at this point in my career, to be appointed by the Minister as Director Defence Counsel Services (DDCS). It is a "shifting of gears". I have been away from the "court martial" component of the "military justice system" for some time, after spending much of the early part of my career doing both prosecutions and defense, and after ending an eight year period with the prosecution service in 2006.
3. Over the entirety of my military career, our system of courts martial has been a real source of pride. Nonetheless, there are aspects of our system that, from the vantage point of my current position, should be further addressed.
4. It has become apparent to me over the past months that even those who have spent many years working within the system do not have a common understanding of what that system does. For this reason, I feel some compulsion to share with you my own understanding of the system and its purpose within the military community.

## **PERSPECTIVE AND PURPOSE OF MILITARY JUSTICE SYSTEM**

### **Enforcement of Discipline (generally more quickly and sometimes more severely)**

5. The purpose of the Military Justice System is to address the unique needs of the Canadian Forces and to address its disciplinary concerns expeditiously and, sometimes, with more severe punishment. There is nothing surprising in this and it is most eloquently expressed by Mr. Justice Lamer in his oft quoted passage from *R. v. Généreux*, [1992] 1 S.C.R. 259

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 the 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.

6. It appears to me that our very concept of military discipline will have a direct effect on our decisions to exercise formal disciplinary jurisdiction in any given matter. It may sometimes be true that the strict application of a minor rule will have less overall benefit to the morale and efficiency of the Canadian Forces than the judicious balancing of mentoring, counselling, administrative consequences or even an “icy blast” by an experienced senior member under the proper leadership of a Commanding Officer. The overall goal needs to be a military that is confident, effective and able to carry out its missions rather than one that engages in a mechanical punishment of all known breaches no matter how technical or tenuous their effect on the military community.

#### **Benefit to Service Members**

7. The Military Justice System is and should be, while it seems odd to speak in this way, a benefit to members of the Canadian Forces who are deployed or performing duties outside of the country. Through Status of Forces Agreements, which allow us to retain disciplinary jurisdiction over our members and their families, the Canadian Forces is in a position to ensure that those who have agreed to live according to the vicissitudes and sacrifices required by service life will, nonetheless, have access to Canadian standards of justice should they or their family members commit, or be accused of committing, an offence while on foreign soil.

#### **Fills a Practical Gap in the Law**

8. The Military Justice System, in addition to being focused on the disciplinary needs of the Canadian Forces, does within the larger legal context fill some practical gaps within the criminal law. For example, members of the Canadian Forces who are on temporary duty at locations across Canada may well commit, or be accused of committing, criminal offences which are not sufficiently serious that the authorities within that jurisdiction would necessarily bring that individual, or the witnesses, back to the province for civilian prosecution. As a very practical matter, the Military Justice System is in a position to prosecute these offences and fills this gap. This is true even where the victim is not a member of the Canadian Forces.

#### **Benefit to the Canadian Forces**

9. Canadian Forces members need to have “Canadian standards of justice” which are delivered to them in a timely fashion and which are accessible to them for incidents arising both in Canada and abroad. They need to be confident that military justice will be administered in accordance with the rule of law. They need to know that, just as they are



required to conduct themselves in a disciplined fashion, those who administer discipline will display restraint, wisdom and “discipline” in carrying out this duty as well.

10. Where they are confident in all of these things then this knowledge itself promotes morale, discipline and efficiency within the Canadian Forces. A system that is structured to meet these needs inspires confidence in the Canadian Forces and confidence in its leadership. A system that is structured to meet these needs is, in my view, the foundation of a disciplined force. The Canadian Forces is responsible to deliver this system. Defence Counsel Services (DCS) is an integral part of meeting this responsibility.

## **ROLE OF DEFENCE COUNSEL SERVICES**

11. The Role of the director is to “provide”, “supervise” and “direct the provision of” legal services in the circumstances and manner provided within the regulations.

12. Our primary role is to provide two basic services to those subject to the Code of Service Discipline. Firstly, to provide “legal advice” to those who are:

- arrested or detained;
- assisting officers or accused persons seeking advice “of a general nature” relating to summary trials;
- faced with an election between summary trial or court martial; or
- the subject of an investigation under the Code of Service Discipline, a summary investigation or board of inquiry.

This advice is generally limited advice of a summary nature, often delivered over the telephone and based on the information provided by the requestor without access to the complete file containing the evidence or information in support of the charges.

13. Secondly, to provide “legal counsel” to those who desire DCS representation and are:

- in custody, where a Custody Review Officer has decided not to direct their release;
- accused, where their charges have been referred for court martial;
- accused, where there are reasonable grounds to believe that they are unfit to stand trial;
- accused, where they have been tried at court martial and the Minister appeals; or
- tried and convicted, and the Appeal Committee approves counsel at public expense.

14. DCS does not provide legal representation at summary trials. The Presiding Officer is responsible to provide a forum that is procedurally and substantively fair. In carrying out this function he has access to legal advice provided by his own unit’s legal advisor.

## **ORGANIZATION AND PERSONNEL OF DCS**

15. In carrying out his responsibilities the director is assisted by civilian staff as well as regular and reserve force legal officers and, where required, by contracted civilian counsel.

16. During this reporting period, the office consisted of the director and four other regular force legal officers as well as five reservists with criminal practices in various locations in Canada.

17. Administrative support is provided by two clerical staff and a paralegal who provides legal research services and administrative support for trials and appeals.

## **ACTIVITIES**

### **Legal Advice**

18. Bilingual service is available 24/7 through a toll-free number to persons subject to the Code of Service Discipline whether in Canada or abroad. This toll-free line is used upon arrest or detention at the investigation phase of a service offence and, sometimes, for advice related to elections and summary trials. During this period, DCS counsel received 1013 requests for advice on this line.

19. During the same period last year we recorded 1194 calls. This drop may reflect greater screening of calls by support staff this year so as to redirect those who do not fall within the DDCS mandate (such as impaired driving). It may also reflect that we relied more heavily on reservists to fulfill our duty counsel services but have faced challenges recording their input into our database. For details regarding the origin and language of these requests please see appendix A.

### **Legal Counsel**

20. Some members of the Canadian Forces were represented by DCS counsel with respect to their release from custody. It is common for defence counsel to be involved in issues surrounding conditions of release but relatively few cases actually went to a formal custody review hearing before a military judge. DCS was also involved in one pre-trial custody issue before the Court Martial Appeal Court (CMAC).

21. During this period DCS received 88 requests for representation by counsel at trial. In 21 of those cases the prosecution withdrew all charges prior to trial. There were 67 courts martial held during this reporting period. The accused was represented by DCS counsel in 65 of those cases. For a more detailed breakdown of these numbers see appendix B.

22. There were 17 appeal cases before the CMAC during this reporting period. In 14 of those cases it was the accused who appealed. The accused was represented by DCS



counsel in 16 of these appeals. For a more detailed breakdown of these appeals see appendix C.

## **Professional Development**

23. The National Criminal Law Program is an important source of training for DCS counsel. This year all but one regular force and one reserve force counsel attended. Members also attended programs sponsored by the Criminal Lawyers Association, the Legal Education Society of Alberta, a DCS program dealing with developments in military law and the JAG CLE. All counsel must meet the annual professional continuing legal education requirements of their respective law societies.

## **SYSTEMIC MILITARY JUSTICE ISSUES**

24. As a result of the mandate of DCS we are in a unique position to observe systemic issues affecting the military justice system. Here are some matters which I raise.

### **Organizational Structure and Resourcing**

25. The Judge Advocate General commands all officers within the JAG Branch including those of DCS. The DDCCS acts under the general supervision of the Judge Advocate General. The Judge Advocate General can issue general instructions or guidelines in respect of Defence Counsel Services provided he does so in writing. DCS is part of and administered through the JAG Branch. It is clear that the Director Defence Counsel Services, and those assigned to assist him in his mandate, must have sufficient independence in the performance of their duties. The level of independence possessed is undefined and unclear and needs to be further addressed within the organization.

26. The 1997 report of the Defence Counsel Study Team, established to consider the feasibility of a military defence counsel service, identified the level of independence required in the following terms:

It is a system under which

- a. a defence counsel is free of inappropriate organizational influences that could create, or reasonably be seen to create, a conflict of interest between the defence of the individual client and the counsel's personal interests in maintaining a beneficial relationship with the organization or its hierarchy, and;
- b. defence counsel are protected from organizational relationships that could, or could reasonably be seen to, endanger solicitor/client confidences.

There is some value in going back to the work of the original Defence Counsel Study Team and considering their perspectives on these issues in the light of our 14 years experience with DCS as presently structured.

27. Over the past decade, this need for appropriate independence has relied heavily on the physical separation of DCS from the rest of the JAG organization and sometimes on a “generally adversarial” approach. These strategies appear to me to have, in the past, marginalized those posted here from their colleagues and negatively impacted on the staffing and resourcing of this office.

28. When I arrived at this office, the number of counsel within DCS had not grown since its inception almost a decade and a half ago. Conversely, the Military Prosecution Service had, over the same period, roughly doubled in size.

29. I have tried to engage in a more integrated way in the management of the JAG Branch in order to be in a better position to obtain the resources and organizational awareness necessary to carry out my duties in providing, supervising and directing the provision of legal services. Nonetheless, there are tensions between this approach and the independence, and certainly the perceived independence, of DCS.

30. Navigating these tensions is sometimes challenging. It requires goodwill, understanding, respect and commitment from all divisions of the JAG Branch, be they administrative law lawyers, prosecutors, the military justice policy folks or operational and regional counsel, all of which can be adverse in interests to lawyers from DCS who are defending at courts martial. We compete on case specific matters and for scarce resources within an organization that must not only accommodate but embrace these conflicting priorities.

### **Trial Counsel Rate for Reserve Force Lawyers**

31. DCS performs its legislative mandate using three methods of service delivery: regular force counsel, reserve force counsel and contracted counsel. Reserve Force counsel are criminal law practitioners who draw upon their civilian experience and are compensated within their reserve careers using a combination of daily pay and trial counsel allowance for time spent in court and its immediate preparation. These trial counsel fees have not been raised since their inception a decade ago. It is time to review these fees to ensure that they provide fair and sufficient remuneration for the sacrifices reserve force members make when taking time away from their civilian practice and making themselves available for courts martial.

### **Appeal Committee**

32. Throughout this reporting period the requirements of the Appeal Committee have caused some stress on the resources of this office. This committee, composed of three experienced lawyers located across the country, reviews applications for counsel at public expense to ensure that public resources are spent to good ends. They perform the



function of sober second thought and approval with respect to the merits of public funding of an appeal. During this period the requirements to make an application have changed. While this provides them with better oversight, it does make such an application more labour intensive. These requirements, combined with the lack of dedicated appellate counsel, pose an administrative challenge. This highlights the need for greater resources in the form of designated counsel to manage appeals.

### **Access to Courts Martial**

33. Offences within the Canadian Forces are dealt with either by summary trial or court martial. Approximately 95% of offences are dealt with by summary trial. In most cases the member has a right to elect court martial. This election is the “safety valve” within the system and ensures that members, should they desire, have access to legal counsel and Canadian standards of justice before a military judge.

34. Notwithstanding the importance of this right, which is fundamental to the legitimacy of the summary trial process, there are barriers to its practical exercise.

- a. DCS counsel frequently hear from deployed members who are charged with offences for which they have the right to elect trial by court martial and who have been told that, should they so elect, it will result in their immediate repatriation home with all of the consequent financial and career implications.
- b. The exercise of this right sometimes has significant career implications for the member if he is taken off career courses or removed from meaningful duties until final disposition of his charges. These consequences can be compounded by the inherent delay associated with a court martial.
- c. Finally, the interpretation by commanding officers of the meaning of the term “offences related to military training” found in *QR&O 108.17(1)(a)* is inconsistent and sometimes very broad. This results in the inconsistent granting or refusal of the right to elect court martial for members facing similar circumstances and charged under section 129 of the *NDA*.

Given the importance of the rights at stake, additional regulatory guidance in the consistent application of these provisions would be warranted.

35. Custody review conditions imposed by a Custody Review Officer can have significant consequences for the freedom of individuals as they wait for the disposition of their charges by court martial. These conditions can remain in effect for many months, even after release from the CF. Similar conditions in the civilian criminal context are reviewable by a judge. This right does not presently exist in the Canadian Forces and this requires correction.

36. Canadian Forces doctrine recognizes the right of a member to have the results of their summary trial reviewed within their chain of command and through a process of civilian judicial review. There is no right to DCS counsel at summary trial or within this civilian process of review. This civilian process of review is difficult, expensive and impractical for members of the CF to access. Our Military Judges are well positioned to provide accessible, knowledgeable and portable appellate review of summary trials. This would increase the confidence of members in the summary trial process and have the incidental effect of providing beneficial harmonization of the two judicial forums which are the pillars of our system.

## CONCLUSION

37. I have been very pleased to have been appointed by the Minister to the position of Director Defence Counsel Services. I have found the initial months of my appointment to be both challenging and rewarding. I have appreciated the opportunity to work both with the dedicated professionals within the Military Justice System and to work with members of the Canadian Forces as they go through the disciplinary process.

38. Defence Counsel Services is only one part of the system. It is a part of the system that, of necessity, is most concerned with the individual rights of those who are accused. Nonetheless, I trust that my comments will be seen not as partisan or as the "whining of defence" but rather as a genuine attempt to bring to your attention my thoughts about how we might further enhance the system as a whole.

A handwritten signature in dark ink, consisting of a stylized, elongated oval shape with a vertical line through it, followed by a horizontal line extending to the right.

D.K. Fullerton  
Colonel  
Director Defence Counsel Services

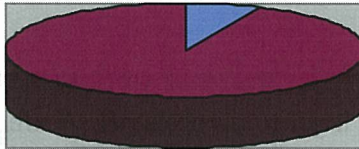
29 February 2012



## Appendix A: Breakdown of legal Advice

### CALLS BY ORIGIN

**Calls From  
Outside Canada  
67 (7%)**

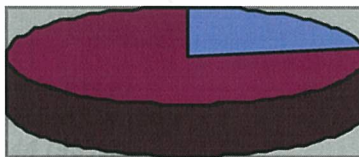


**Calls From  
Within Canada  
944 (93%)**

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### CALLS BY LANGUAGE

**French Calls  
222 (22%)**

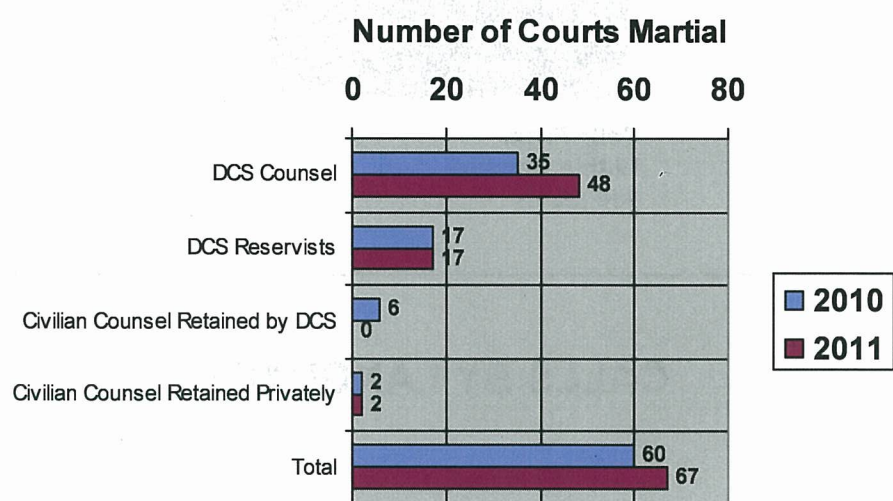


**English Calls  
782 (78%)**

## Appendix B

### BREAKDOWN OF REPRESENTATION AT COURT MARTIAL BY DCS COUNSEL

#### REPRESENTATION AT COURT MARTIAL





## Appendix C: Synopsis of Appeals

- **Ex-Pte St-Onge** (CMAC – 517) On 26 June 2008, Ex-Pte St-Onge appealed the results of his court martial in which he had pled guilty to a charges of possessing cannabis, using cannabis and methamphetamine, unauthorized possession of CF ammunition, and verbally threatening a superior. The grounds of appeal were based on the jurisdiction of the court and that the sentence of thirty (30) days imprisonment was too severe. In August of 2010 the CMAC dismissed the appeal of jurisdiction but reduced the sentence to a fine of \$3,000. One judge dissented. The DMP, on behalf of the Minister of National Defence, appealed the decision to the Supreme Court of Canada. In April 2011 the Supreme Court granted the appeal and restored the sentence of the Military Judge.
- **OS Lee** (CMAC- 523) OS Lee was found guilty of trafficking cocaine. He appealed the finding of guilt on the basis that the Military Judge had failed, within the specific facts of this case, to instruct the panel properly as to the *mens rea* of the offence. He also appealed the severity of his sentence of five months imprisonment. The appeal was heard on 19 March 2010. In April 2011 the appeal was dismissed.
- **Capt Savaria** (CMAC-525) was found guilty of having, in October of 2000, made false documents contrary to section 367 of the *Criminal Code*. The trial commenced in October 2008. He made a *Charter* motion under sections 8 and 24(2) alleging unreasonable search and seizure. The Military Judge dismissed the application, convicted the accused and imposed a severe reprimand and a fine of \$3000. The member appealed. In January 2010 the CMAC rejected the appeal. In May 2010 the Supreme Court of Canada denied his further request for appeal.
- **LS Reid, S.** (CMAC- 524) & **LS Sinclair, J** (CMAC-526), then PO2 Reid and PO1 Sinclair, had plead guilty to willfully damaging public property contrary to Section 116(a) of the *NDA*. The property in question was a database icon that they had been instrumental in creating for use within the National Defence Operations Center. Both members were sentenced to reductions to the rank of leading seaman and fines of \$3,000. They appealed their sentences. The CMAC dismissed their appeals in April 2010.
- **Ex-OS Ellis** (CMAC-528) had pled guilty to two charges of trafficking cocaine and two charges of conduct to the prejudice of good order and discipline for using cocaine. He was sentenced to 9 months imprisonment. At trial the accused had brought a motion under sections 7, 11(d) and 12 of the *Charter* challenging the constitutionality of our separate military scale of punishments. In April 2009 he

appealed the severity of his sentence and the Military Judge's rejection of his *Charter* motion. In April 2010 the Court Martial Appeal Court dismissed the appeal.

- **LCol Szczerbaniwicz** (CMAC-513) had been found guilty of common assault after his defence of property submissions were rejected. In April 2008 he appealed. In May 2009 the CMAC dismissed the appeal with one judge dissenting. The member appealed to the Supreme Court of Canada and the matter was heard in June 2009. In a 5-2 decision, rendered in May 2010, a majority of the Supreme Court dismissed the appeal.
- **Cpl Liwyj** (CMAC-530) was a vehicle technician who, in June 2009, was found guilty of three offences of disobedience of a lawful command in relation to the procedure that was to be followed in fixing a vehicle's brakes. He was sentenced to a reprimand and a fine of \$750. He appealed both the conviction and sentence. The CMAC heard the case in May of 2010. It upheld the conviction and the fine but removed the reprimand.
- **Cpl Wilcox** (CMAC-534) was found guilty of criminal negligence causing death contrary to section 220 of the *Criminal Code* and negligent performance of a military duty contrary to section 124 of the *National Defence Act* for the accidental shooting death of his friend and fellow soldier. He was sentenced to imprisonment for 48 months and dismissal from Her Majesty's service. In October 2009 he appealed on a number of grounds. In October 2010 the Minister reversed his position and joined the appellant in recommending a new trial be ordered as the military judge had erred in permitting the withdrawal of a panel member without replacement. The CMAC accepted this submission and ordered a new trial.
- **Ex-Pte Seifi** (CMAC-535) was charged with one count of sexual assault and an alternate charge of conduct to the prejudice of good order and discipline for touching the breast of the complainant. He was found not guilty of both these charges but guilty of the lesser and included offence of common assault. He was sentenced to a reprimand and fine of \$500.00. In October 2009 he appealed. The Director of Military Prosecutions, on behalf of the Minister, cross-appealed on the findings of not guilty of both sexual assault and conduct to the prejudice of good order and discipline. In April 2010 both appeal and cross-appeal were abandoned.
- **MS Boyle** (CMAC-537) was acquitted of behaving in a disgraceful manner (section 93 *NDA*) and of committing an act to the prejudice of good order and discipline (section 129 *NDA*) in relation to some apparent "horseplay" on board a ship. The Director of Military Prosecutions, on behalf of the Minister, filed a notice of appeal in December 2009. In November 2010 the CMAC ordered a new trial. The prosecution was subsequently abandoned.
- **Cpl T. Leblanc** (CMAC-538) was found guilty of sexual assault pursuant to section 271 of the *Criminal Code* and was sentenced to imprisonment for 20 months. During the course of the trial the military judge had refused to admit statements made by the



victim which were relevant to the central issue of trial; the member's reasonable belief that there was consent to the sexual activities he engaged in. The accused appealed his conviction. After the conclusion of this reporting period, the CMAC has overturned the conviction and sent the matter back for a new trial.

- **Cpl A. Leblanc** (CMAC-539) was found guilty of negligently performing a military duty and was sentenced to a \$500 fine. He made pre-trial motions under sections 7, 11d) and 12 of the *Charter* challenging the constitutionality of the military scale of punishments as well as the independence of Military Judges. These were dismissed. In March 2010 the member filed a notice of appeal in relation to both the finding of guilt and the military judge's independence. The CMAC heard the matter outside of this reporting period. They upheld the finding of guilt. However, they found that the Military Judge, under the extant re-appointment provisions, lacked the requisite independence. This has been corrected by legislation.
- **Capt. Winters** (CMAC-540) plead guilty at trial to a charge of conduct to the prejudice of good order and discipline for violating Land Forces Quebec Area "Information Systems Security Regulations". The Military Judge refused to accept the guilty plea because the provision contravened did not have the legal attributes of a regulation. The member was found not guilty and the Director of Military Prosecutions appealed the decision. In January 2010, after discussing the requirements and consequences of a guilty plea, the CMAC granted the appeal and returned the matter to the Standing Court Martial for sentencing.
- **Bdr Gray** (CMAC-542) was found guilty of stealing (section 114 *NDA*). He was sentenced to a fine of \$2001. The additional dollar had consequences on the ability of the member to seek a pardon in a timely fashion. In June 2010 the member appealed the severity of sentence. In October 2010 the Appeal Committee refused his application for counsel at public expense. In March 2011 the CMAC dismissed the appeal because of the inaction of the appellant.
- **Capt. Day** (CMAC-543) was charged with two counts of negligent performance of a military duty (s.124 *NDA*) and, alternatively, with two counts of neglect to the prejudice of good order and discipline (s.129 *NDA*). The charges related to an incident in Afghanistan where, as a result in a breakdown in communications, a Canadian tank fired in the direction of Canadian soldiers. At the close of the prosecution's case, the military judge granted a motion that the prosecution had failed to present a *prima facie* case and found the member not guilty of all charges. The ruling was appealed and, in May 2011, a new trial ordered.
- **Capt. Clark** (CMAC-545) was found guilty of disobedience of a lawful command of a superior officer (s. 83 *NDA*) and two charges of committing an act to the prejudice of good order and discipline (s.129 *NDA*). She was found to have inappropriately communicated performance evaluation report discussions to a subordinate contrary to a direction not to do so and to have lied in statements denying misconduct. In

February 2011 the member appealed the findings of guilt. At the end of this reporting period the appellant was awaiting the decision of the Appeal Committee.

- **Cpl Lough** (CMAC -544) was charged in relation to allegations of sexual assault at CFB Cold Lake. On 10 August 2010 a military judge ordered that he be retained in pre-trial custody pursuant to subsection 159.2(b) of the *NDA*. On 17 September 2010 DCS counsel filed a motion with the CMAC for his release. The CMAC denied the motion but granted leave to return the matter to a hearing before the same military judge who, on 21 September 2010, released the member on conditions.