

Annual Report of the Director of Defence Counsel Services

INTRODUCTION

1. This annual report covers the period from 1 April 2012 to 31 March 2013. It is prepared in accordance with article 101.20 of the *Queens' Regulations and Orders for the Canadian Forces (QR&O)* which sets out the legal services which are prescribed to be performed by the Director of Defence Counsel Services (DDCS) and requires the DDCS to report annually to the Judge Advocate General (JAG) on the provision of these legal services and the performance of other duties undertaken in the furtherance of the DDCS mandate. The Director during this period was Colonel D.K. Fullerton.

ROLE OF DDCS AND THE ORGANIZATION AND PERSONNEL OF DCS

Role of the DDCS

2. The DDCS is appointed by the Minister of National Defence under section 249.18 of the *National Defence Act (NDA)*. Although he acts under the general supervision of the JAG, he exercises his duties and functions independently and in a manner which is consistent with his responsibility to look to the individual interests of those who seek advice and representation from or through Defence Counsel Services. The DDCS provides, supervises and directs the provision of the following legal services, as set out in *QR&O* article 101.20:

- legal advice to arrested or detained persons
- legal counsel to an accused person where there are reasonable grounds to believe the accused person is unfit to stand trial
- legal advice of a general nature to an assisting officer or an accused person on matters relating to summary trials
- legal advice with respect to the making of an election to be tried by court martial
- legal counsel for a hearing addressing pre-trial custody under subsection 159(1) of the *NDA*
- legal counsel to an accused person in respect of whom an application to refer charges to court martial has been made
- legal counsel to the respondent where the Minister appeals a finding or sentence or the severity of a sentence awarded by court martial
- legal counsel to an appellant with the approval of the Appeal Committee established under *QR&O* article 101.21

- legal advice to a person who is the subject of an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry.

Organization and Personnel of DCS

3. During this reporting period the Office of DCS consisted of the Director, the Assistant Director and six Regular Force legal officers working out of the Asticou Centre in Gatineau, Québec as well as four Reserve Force legal officers in practice at various locations in Canada. The Reserve Force counsel have been active participants in the provision of legal services and the performance of the Defence Counsel Services (DCS) mandate.

4. Administrative support is provided by two clerical personnel occupying positions classified at the level of CR3 and CR5 as well as a paralegal who provides legal research services and administrative support for courts martial and appeals.

5. Pursuant to section 249.2 of the *NDA* the Director of Defence Counsel Services acts under the general supervision of the JAG and the JAG may issue general instructions or guidelines in respect of Defence Counsel Services. However, during this reporting period no such general instructions or guidelines were issued.

SERVICES AND ACTIVITIES

Professional Development

6. The National Criminal Law Program is the primary source of training in criminal law for defence counsel with DCS. In July 2012 six Regular Force lawyers and two Reservists attended this program. Additionally, counsel attended a one-day DCS in-house training program which dealt with a variety of issues including developments in criminal law and decisions of the Court Martial Appeal Court (CMAC). In June 2012, members of this office participated in training sponsored by the CMAC.

Duty Counsel Services

7. Bilingual service is available 24/7 to CF members, as well as to others who are subject to the Code of Service Discipline while serving abroad. DCS counsel provide verbal and written communications through a toll-free number that is distributed throughout the CF as well as a CSN number and via email, the popularity of which is growing. Usage was generally as follows:

- 1-800 access line to ensure availability of legal advice upon arrest or detention with the number provided to military police and other CF authorities likely to be involved in investigations of a disciplinary or criminal nature as well as being available on our website.
- Standard direct telephone access, available to accused persons subject to the *Code of Service Discipline*, for advice in relation to an election between court martial

and summary trial, questions on other disciplinary matters, or all other matters authorized under the QR&O.

- Clients occasionally use email to initiate contact with DCS.

During the reporting period, DCS counsel recorded 1343 calls on the duty counsel line. The calls ranged in duration but, on average, were approximately 15 minutes.

Court Martial Services

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. Our records indicate that in sixty-one of the courts martial occurring during this reporting period the accused was represented by DCS officers. Pursuant to the authority granted under ss. 249.21(2) of the *NDA*, the DDCS may hire, at public expense, civilian counsel in cases where, having received a request for representation by DCS counsel, no member of the DCS office can represent the particular individual, for example because of a conflict of interest, or because no suitable DCS officer is available. During the reporting period, civilian counsel hired by DCS appeared at five courts martial. Four other cases involving contracted counsel were withdrawn.

Appellate Services

10. Fourteen appeals were touched on by DDCS at various points during the 2012-2013 reporting period. In all but two of those cases the appeal was filed by, or on behalf of, the member of the Canadian Forces. Two of the cases were subsequently abandoned by the appellant given that the Appeal Committee denied their request for DDCS representation at public expense. One appellant continued on his own and represented himself in front the CMAC.
11. In the two cases in which an appeal and one case in which a cross-appeal was entered by DMP, the respondent was automatically entitled to representation by DCS counsel. During this period, appellants submitted to the Appeal Committee, pursuant to article 101.20(2)(h) of QR&O, ten requests for representation by DCS. Of these ten requests, six were approved by the Appeal Committee, three were denied and one was pending at the conclusion of this period.

Some sense of the issues and tenor of the appeals during this period is given in the cases delineated in the appendix.

ONGOING ISSUES AND CONCERNS

12. A number of events or concerns are noteworthy during the reporting period.

DCS personnel and administrative support

13. During this reporting period DCS offices move from bloc 1900 to bloc 300 in the Asticou complex thus ameliorating a long standing difficulty with accommodations.

14. The administrative assistant (CR-5) position has been submitted for re-evaluation and potential upgrading to an AS-1 position to reflect the nature of the work performed and to ensure a level of parity between this position and positions doing similar work within other organizations within the Canadian Forces. If successful this should ensure continuity of staffing within the office and that DCS remains an attractive place for experienced staff to work.

15. We currently have reserve counsel in British Columbia, New Brunswick, Québec, and Ontario. The DCS reserve bar is an important resource which has and continues to make a significant contribution to the realization of our mandate.

Systemic Military Justice Issues

17. As a result of their duties, DCS personnel are in a unique position to observe systemic issues affecting the military justice system. Following are issues which I bring to your attention in your capacity as superintendent of the system.

18. Offences within the military justice system are dealt with either by summary trial or courts martial. Approximately 95% of cases are dealt with by summary trial. In many cases the members have the 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 to be tried by a decision maker with all the legal hallmarks of an independent and impartial tribunal.

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

- a. DCS counsel frequently hear from members who are charged with offences for which they have the right to elect trial by court martial and who indicate that they are experiencing some pressures in exercising that right. Sometimes when they elect court martial, they are sent back for a further period to reconsider and re-elect. Sometimes they are told that this election will have a significant impact on career courses, career opportunities or generally on their career. While court martial can create difficulties for accused it is important that artificial obstacles to the exercise of the right be avoided.

- b. *QR&O 110.04* allows DMP to prefer charges sent to him or “any other charges that are founded on facts disclosed by evidence in addition to or in substitution for the charge”. This provision is often exercised months or sometimes years after the original charge has been laid and the election given. This creates challenges for both the accused and counsel to truly understand the case the accused has to meet. It creates issues surrounding the validity of the election and the right to make full answer and defence.
- c. Finally, many accused do not appear to be given an election where the language of *QR&O 108.17(1)(a)* would appear to convey that right.

CONCLUSION

20. Again this year has been a busy and challenging period for members of Defence Counsel Services and, as in years past, our first priority has been to work with and on behalf of members of the Canadian Forces who are charged with service offences. It is our privilege to assist them as they go through what can be a very difficult time in their career and in their lives. The lawyers within this office are truly dedicated to raising the available issues and advocating the interests of their clients as they seek to defend themselves against the various allegations they may face.

Delano Fullerton
Colonel
Director Defence Counsel Services

3 June 2014

Appendix: Synopsis of Appeals

- **Capt Clark** (CMAC-545) was found guilty of disobedience of a lawful command under section 83 of the *National Defence Act (NDA)* and of two charges of committing an act to the prejudice of good order and discipline under s.129 of the *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. The Court Martial Appeal Court (CMAC) granted her appeal and ordered a new trial.
- **Cpl Rivas** (CMAC-548) was found guilty of sexual assault contrary to section 271 of the *Criminal Code of Canada (CCC)*, and of one count of drunkenness contrary to section 97 of the *NDA*. The main issue on appeal was identification. The CMAC granted his appeal and ordered a new trial.
- **Bdr Tomczyk** (CMAC-549) was found guilty of one count under s. 129 of the *NDA*, that is to say, failing to appear before a military doctor when ordered to do so. The CMAC granted his appeal.
- **Cpl Souka** (CMAC-550) was found guilty of the lesser and included offence of assault under section 266 of the *Criminal Code* and one count of drunkenness under s. 97 of the *NDA*. The appeal was confined exclusively to the issue of whether the judge erred in failing to grant the accused's motion that his rights to a trial within a reasonable time under section 11(b) of the *Charter* had been violated. The CMAC dismissed the appeal.
- **Capt Day** (CMAC-551) was found guilty of two counts of negligent performance of a military duty under s.124 of the *NDA* and, alternatively, with two counts of neglect to the prejudice of good order and discipline under s.129 of the *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. His request to the appeal committee for counsel at public expense was unsuccessful and the appellant abandoned his appeal.
- **Lt(N) Pearson** (CMAC-552) plead guilty to assault under section 130 *NDA* and harassment under section 129 *NDA* contrary to Defence Administrative Orders and Directives 5012-0 (Harassment Prevention and Resolution). Lt(N) Pearson was sentenced to a severe reprimand and a fine of \$8,000\$. His application to the appeal committee was denied. He applied under Rule 20 to the Chief Justice of the CMAC for legal assistance. His application was dismissed. He abandoned his appeal.
- **OS O'Toole** (CMAC-556) applied to the Chief Justice of the CMAC under section 159.9 of the *NDA* to review the direction of a Military Judge to retain the member in pre-trial custody. The application was dismissed.

- **Mr. Paul Wehmeier** (CMAC-553) was the first civilian to be tried by court martial sitting in Canada for offences allegedly committed while he was a civilian accompanying the Forces abroad. The counts included sexual assault under section 130 *NDA* and section 271 of the *Criminal Code*, uttering threats under s. 130 *NDA* and section 264.1 (1) (a) of the *Criminal Code* and assault under s. 130 *NDA* and section 266 of the *Criminal Code*. The court martial terminated the proceedings under section 24(1) of the *Charter* for abuse of process. The Court explained that military jurisdiction over civilians should only be exercised if it is necessary or in the interest of the civilians themselves. The Minister of National Defence appealed the decision. As of the end of this reporting period, the CMAC had rendered no decision.
- **Cpl. Courneyea** (CMAC-554) was found not criminally responsible (NCR) on account of mental disorder for charges of assault with a weapon, pointing a firearm and uttering threats contrary to s. 130 *NDA* and sections 267(a), 87, and 264.1 of the *Criminal Code*. This was the first court martial in which an accused successfully raised a defence of NCR on account of Post-Traumatic Stress Disorder. The Minister of National Defence appealed the decision. However, as of this reporting period, the CMAC has not rendered a decision.
- **Cpl Cyr** (CMAC-555) was found guilty of stealing, willfully making a false statement in a document required for official purposes, and improperly selling public property under sections 114, 125(a) and 116(a) of the *NDA* as well as possession of a prohibited device under s. 130 of the *NDA* and section 92(2) of the *Criminal Code*. The Appellant's application to the Appeal Committee was rejected. He applied to the Chief Justice of the CMAC under Rule 20 for the appointment of counsel by the Director of Defence Counsel Services. As of the end of this reporting period, the Chief Justice had not rendered a decision.
- **SLt Thibeault** (CMAC-557) was found guilty of one offence of sexual assault contrary to s. 130 *NDA* and section 271 of the *Criminal Code*. The Appellant was sentenced to imprisonment for six months and a reduction in rank from captain to second lieutenant. The appellant appealed his conviction on the basis that he did not receive the effective assistance of counsel. As of the end of this reporting period, the CMAC had rendered no decision.
- **2Lt Moriarity & Pte Hannah** (CMAC 560). 2Lt Moriarity was found guilty of sexual interference, sexual assault and invitation to sexual touching contrary to section 130 of the *National Defence Act* and sections 153, 271 and 152 of the *Criminal Code*. The charges related to his interactions with cadets while a Cadet Instructor. He was sentenced to 12 months imprisonment, dismissal from Her Majesty's service and reduction in rank. Pte Hannah was convicted under s. 130(1)(a) of the *National Defence Act* and provisions of the *Controlled Drugs and Substances Act* and the *Foods and Drugs Act* of trafficking steroids. At trial, both appellants argued the overbreadth of section 130(1)(a) of the *National Defence Act* in violation of sections 7 and 11(f) the *Charter*. The military judges in both cases rejected the

constitutional argument on the basis that the purpose of the military justice system was not restricted to matters pertaining directly to military discipline. As of this reporting period the CMAC has rendered no decision.

- **Pte Larouche** (CMAC 558) was found guilty of voyeurism and child pornography contrary to s. 130 of the *National Defence Act* and subsections 162(5) and 163.1(4) of the *Criminal Code*. He was sentenced to 12 months imprisonment. The Military Judge dismissed an application to exclude evidence under s. 24(2) of the *Charter*. Of note, the Military Judge asked whether the interests of justice and the public in this case would have been better served by trial before a civilian criminal court. The conviction was appealed to the CMAC. As of this reporting period the CMAC had rendered no decision.
- **Lt Watts** (CMAC 559) was found guilty of one count of unlawfully causing bodily harm contrary to s. 130 of the *National Defence Act* and section 269 of the *Criminal Code* as well as 2 counts of negligent performance of a military duty contrary to section 124 *NDA*. He was sentenced to a reduction in rank and a severe reprimand. Lt Watts appealed his conviction and sentence. As of the end of this reporting period, the CMAC had rendered no decision.