

Annual Report of the Director of Defence Counsel Services

INTRODUCTION

1. This annual report covers the period from 1 April 2013 to 31 March 2014. It is prepared in accordance with article 101.11 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 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 101.11:

- 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 101.19; and

- legal advice to a person who is the subject of an investigation under the Code 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 five Reserve Force legal officers in practice at various locations in Canada, one of whom has left DDCS to join as a Regular Force officer posted to an other part of the Office of the JAG (OJAG).

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. Our CR5 position is presently under review for higher reclassification consistent with other divisions of the OJAG.

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

SERVICES AND ACTIVITIES

Professional Development

6. The National Criminal Law Program remains the primary source of training in criminal law for defence counsel with DCS. In July 2013 seven Regular Force lawyers and three Reservists attended this program. Additionally, counsel attended an annual 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). Certain specific other courses were attended to meet the professional needs of individual counsel.

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 advice through a toll-free number that is distributed throughout the CF. The services provided are 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 1586 calls on the duty counsel line. The calls ranged in duration but, on average, were just over 22 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 64 people were represented at their courts martial by DCS officers during this reporting period. Pursuant to the authority granted under ss. 249.21(2) of the *NDA*, the DDCS may hire civilian counsel at public expense in cases where, having received a request for representation by DCS counsel, no member of the DCS office can represent the particular accused. This may be because of a conflict of interest or because no suitable DCS officer is available. During this reporting period, two accused were represented at their courts martial by civilian counsel hired by DCS.

Appellate Services

10. Seventeen appeals were touched on by DCS at various points during this reporting period. Four of these appeals to the CMAC were generated by the prosecution. In thirteen cases, the appeal was filed by or on behalf of the member of the Canadian Forces. Two of these cases were joined together by the CMAC and an application was filed for leave to appeal to the Supreme Court of Canada. In two cases the accused were represented by civilian counsel at public expense on their appeals. In one case the accused hired civilian counsel at his own expense.
11. In those cases in which an appeal or a cross-appeal was entered by DMP, the accused was automatically entitled to representation by DCS counsel. During this period, the accused submitted to the Appeal Committee, pursuant to article QR&O 101.20(2)(h), twelve requests for representation by DCS. Of these twelve requests, ten were approved by the Appeal Committee, and two were denied.

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

ONGOING ISSUES AND CONCERNS

12. It has been traditional in the annual report to discuss events or concerns that have arisen during the reporting period and have had an impact on the operation of this office.

DCS personnel and administrative support

13. The administrative assistant (CR-5) position was submitted during the last reporting period for re-evaluation and potential upgrading to an AS-1 position. This was done to reflect the nature of the work performed and to ensure a level of parity between this position and those doing similar work within other parts of the OJAG and the Canadian Forces. We understand that this process can take up to two years for consideration. If successful this upgrade should support continuity of staffing within DCS and eliminate a barrier to retaining experienced personnel.

14. We currently have reserve counsel in British Columbia, Québec, and Ontario. The DCS reserve bar is an important resource which, during this reporting period, continued to make a significant contribution to the realization of our mandate.

15. During this reporting period, I was required to undergo, in stages, fourteen weeks of full-time second language training. This enhanced linguistic requirement was indicated to be a precondition to remaining in the Canadian Forces. During these periods of training the duties of director were largely performed on Sundays, by BlackBerry and by relying on a capable assistant director to act in my stead. While the linguistic requirement was successfully achieved, these events did have a substantial impact on the overall operation and resources of this office and highlight a strain that can exist between the statutory role and mandate of DDCS and the general obligations of military life.

CONCLUSION

16. Again this has been a challenging and interesting period for defence counsel within DCS. As I write this report, we stand at the door of the Supreme Court of Canada which has granted leave on some important issues that may delineate the parameters of our system of military justice. 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 a privilege to work for members and to assist them as they go through what is often an extremely difficult time in their careers and in their lives. Some go on to have full military careers and to be solid members of the military community. Others rejoin civilian life and, what we hope is, an opportunity to retake their place as productive members of Canadian civilian society.

D. K. Fullerton
Colonel
Director Defence Counsel Services
8 August 2014

Appendix: Synopsis of Appeals

- **Mr. Wehmeier** (CMAC-553) was charged under section 130 of the *NDA* with criminal acts allegedly committed while he was a civilian accompanying the Canadian Forces in Germany. At trial in Canada, the Military Judge terminated the proceedings for abuse of process. The prosecution appealed. The CMAC dismissed the appeal and found that the proceedings resulting from the prosecutorial decision to try Mr. Wehmeier by court martial in Canada were arbitrary, disproportionate and contrary to the *Charter*. Subsequent to this reporting period the Director of Military Prosecutions has made an application for leave to appeal the decision to the Supreme Court of Canada.
- **Cpl. Courneyea** (CMAC-554) was charged under section 130 of the *NDA* with assault with a weapon, pointing a firearm and uttering threats. The accused successfully raised a defence of not criminally responsible (NCR) on account of Post-Traumatic Stress Disorder. The appeal to overturn this decision was dismissed by the CMAC. This is the first appellate decision in Canada to uphold a defence of NCR based on a diagnosis of PTSD.
- **Cpl Cyr** (CMAC-555) was found guilty of stealing, wilfully making a false statement in a document required for official purposes, and improperly selling public property as well as possession of a prohibited device under s. 130 of the *NDA*. His request to the Appeal Committee for publicly funded appellate counsel was denied. His further application to the Chief Justice of the CMAC for appointment of publicly funded counsel under rule 20 was denied. The member abandoned his appeal.
- **SLt Thibeault** (CMAC-557) was found guilty of one count of sexual assault contrary to s. 130 of the *NDA*. He was sentenced to imprisonment for six months and a reduction in rank from captain to second lieutenant. The member appealed his conviction on the basis that he did not receive the effective assistance of counsel. His appeal was granted. His conviction was set aside and a new trial was ordered.
- **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(1)(a) of the *NDA* in relation to activities with cadets while he was 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 *NDA* for trafficking steroids. At trial, both appellants argued the overbreadth of section 130(1)(a) in violation of sections 7 and 11(f) of 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. The CMAC dismissed the appeal but "read down" s. 130(1)(a) such that military justice has jurisdiction only over matters that pertain directly to military discipline. Both members appealed to the CMAC where the court

joined the cases and rendered judgment which narrowed the jurisdiction of our military courts but upheld each conviction. Subsequent to this reporting period the Supreme Court of Canada has granted leave to appeal the issue of the overbreadth of section 130.

- **Pte Larouche** (CMAC 558) was found guilty under section 130 of the *NDA* of charges of voyeurism and child pornography. He was sentenced to 12 months imprisonment. The conviction was appealed to the CMAC where the member raised the unconstitutionality of s. 130(1)(a) of the *NDA* and challenged the constitutionality of the search of his computer. Subsequent to this reporting period, the search was found to be illegal and the conviction overturned.
- **Lt Watts** (CMAC 559) was found guilty of one count of unlawfully causing bodily harm contrary to s. 130 of the *NDA* as well as 2 counts of negligent performance of a military duty after an accident on a range in Afghanistan. He was sentenced to a reduction in rank and a severe reprimand. He appealed his conviction and sentence and the prosecution cross-appealed the sentence. The appeal was heard on 4 April 2014 and the CMAC has reserved its judgment.
- **Sgt Arsenault** (CMAC 561) was found guilty of one count of fraud contrary to section 130 of the *NDA* and of wilfully making a false declaration in a document required for official purposes. He was sentenced to a reduction in rank from WO to Sgt and to 30 days imprisonment. The member appealed, challenging the military judge's ruling that his children were not, within the context of his living arrangements, dependents within the definition of the Income Tax Act. He also raised the unconstitutionality of sections 130(1)(a) and 117(f) of the *NDA*. Subsequent to this reporting period the appeal was dismissed by the CMAC.
- **Capt Wright** (CMAC 562) was tried on two counts of obstructing justice contrary to s. 130 of the *NDA* and two counts alleging an act to the prejudice of good order and discipline. The Military Judge found that evidence had been obtained contrary to s. 8 of the *Charter* and it was excluded under s. 24. Capt Wright was found not guilty of all charges. The prosecution's appeal to the CMAC was dismissed.
- **Pte Vezina** (CMAC 564) was tried on two counts of trafficking cocaine contrary to s. 130 of the *NDA*. The Military Judge rejected her defence of entrapment, found her guilty, and sentenced her to six months imprisonment. The CMAC rejected her appeal of the constitutionality of s. 130(1)(a) of the *NDA*. Subsequent to this reporting period the Supreme Court of Canada has granted leave to appeal on this issue.
- **MCpl Laflamme** (CMAC 565) was tried and found guilty on two counts of obstructing a peace officer contrary to s. 130 of the *NDA*. He received a reprimand and a fine of six hundred dollars. The member hired private counsel and, subsequent to this reporting period, the CMAC granted his appeal and ordered a new trial.

- **Pte Dery** (CMAC 566) was tried on one count of sexual assault contrary to s. 130 of the *NDA*. He was found guilty and sentenced to 30 days imprisonment. On appeal to the CMAC Pte Dery challenged the constitutionality of the section 130(1)(a) of the *NDA*. This appeal has not yet been heard.
- **MCpl Stillman** (CMAC 567) was convicted under section 130(1)(a) on a variety of weapon offences including discharging a weapon with intent to wound, discharge of a restricted weapon in a manner reckless to life and safety, aggravated assault, using a firearm in the commission of an offence and possession of a loaded restricted firearm. He was sentenced to 6 years imprisonment and dismissal from Her Majesty's Service. The member appealed to the CMAC challenging the constitutionality of the section 130(1)(a) of the *NDA*. At the conclusion of this reporting period the appeal has not yet been heard.
- **MCpl Royes** (CMAC 568) was found guilty of one count of sexual assault contrary to s. 130 of the *NDA* and was sentenced to 36 months imprisonment. The member appealed challenging both the constitutionality of the section 130(1)(a) of the *NDA* and the Military Judge's assessment of his credibility. At the conclusion of this reporting period this appeal had not yet been heard.
- **MCpl Holloway** (CMAC 569) was tried under section 130(1)(a) of the *NDA* of one count of possession of child pornography and one count of accessing child pornography contrary to sections 163.1(4) and 163.1(4.1) of the *Criminal Code*. He was found not guilty on both counts. The Director of Military Prosecutions appealed the findings of the Court Martial but has subsequently abandoned his appeal.
- **Maj Wellwood** (CMAC 571) was found guilty of one count of obstructing a peace officer contrary to s. 130 of the *NDA* and one count of conduct to the prejudice of good order and discipline. She was sentenced to a reprimand. The member appealed to the CMAC challenging constitutionality of s. 130(1)(a) of the *NDA* and the legality of the Military Judge's instructions to the panel. This appeal has not yet been heard.