



Défense nationale

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17 June 2019

Commodore Bernatchez, OMM, CD
Judge Advocate General
National Defence Headquarters
101 Colonel By Drive
Ottawa, Ontario K1A 0K2

Commodore Bernatchez,

Pursuant to article 101.11(4) of the Queen's Regulations and Orders for the Canadian Forces, enclosed please find the annual report of the Director of Defence Counsel Services. The report covers the period from 1 April 2018 through 31 March 2019.

Yours sincerely,

D.K. Fullerton
Colonel
Director of Defence Counsel Services



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ANNUAL REPORT ***2018- 2019***

Director
Defence
Counsel
Services



OVERVIEW

1. This report covers the period from 1 April 2018 to 31 March 2019. It is prepared in accordance with article 101.11(4) of the Queen's Regulations and Orders for the Canadian Armed Forces, which sets out the legal services prescribed to be performed by the Director of Defence Counsel Services and requires that he report annually to the Judge Advocate General on the provision of legal services and the performance of other duties undertaken in furtherance of the Defence Counsel Services mandate. The director during this period was Colonel Fullerton.

ROLE OF DEFENCE COUNSEL SERVICES

2. Under section 249.17 of the *National Defence Act (NDA)* individuals, whether civilian or military, who are "liable to be charged, dealt with and tried under the Code of Service Discipline" have the "right to be represented in the circumstances and in the manner prescribed in regulations." Defence Counsel Services is the organization that is responsible for assisting individuals exercise these rights.

3. The Director of Defence Counsel Services is, under section 249.18 of the *National Defence Act*, appointed by the Minister of National Defence. Section 249.2 provides that the director acts under the "general supervision of the Judge Advocate General" and makes provision for the JAG to exercise this role through "general instructions or guidelines in writing in respect of Defence Counsel Services." Subsection 249.2(3) places on the director the responsibility to ensure that general instructions or guidelines issued under this section are made available to the public.

4. On 25 March 2019, the Judge Advocate General published a document establishing a "FIVE (5) YEAR POSTING RULE". In this document, she "directed that legal officers will be posted to CMPS or DCS for a minimum of five years, subject only to the availability of a vacant position on the establishment at the appropriate rank and to the Director of Military Prosecutions' or the Director of Defence Counsel Services' assessment of their respective requirements". Pursuant to subsection 249.2(3) of the *National Defence Act*, a copy of the complete document is published as an annex to this report.

5. The director "provides, and supervises and directs" the provision of the legal services set out in Queen's Regulations and Orders. These services may be divided into the categories of "legal advice" where advice of a more summary nature is provided, often delivered as a result of calls to the duty counsel line, and "legal counsel" which typically involves a more sustained solicitor-client relationship with assigned counsel and representation of an accused before a Military Judge, a Court Martial, the Court Martial Appeal Court or the Supreme Court of Canada. Historically and occasionally, counsel have also appeared before provincial Mental Health Review Boards and the Federal Court.

6. Legal advice is provided in situations where:
- a) members are the subject of investigations under the Code of Service Discipline, summary investigations, or boards of inquiry, often at the time when they are being asked to make a statement or otherwise conscripted against themselves;
 - b) members are arrested or detained, especially in the 48 hour period within which the custody review officer must make a decision as to the individual's release from custody;
 - c) members are considering electing summary trial or waiving their right to court martial;
 - d) members are seeking advice of a general nature in preparation for a hearing by summary trial; and
 - e) members are considering an Application before a Commanding Officer to vary an intermittent sentence or the conditions imposed by a summary trial.
 - f) members are considering or preparing a Request for Review of the findings or punishment awarded to them at summary trial.
7. Legal representation by assigned counsel is provided in situations where:
- a) custody review officers decline to release arrested individuals, such that a pre-trial custody hearing before a military judge is required;
 - b) members request or require a judicial review of release conditions imposed by a custody review officer;
 - c) there are reasonable grounds to believe that an accused is unfit to stand trial;
 - d) applications to refer charges to a court martial have been made against individuals;
 - e) members apply to a Military Judge to vary an intermittent sentence or the conditions imposed by a court martial or to a judge of the Court Martial Appeal Court in the case of conditions imposed by that Court;
 - f) members are appealing to the Court Martial Appeal Court or to the Supreme Court of Canada, or have made an application for leave to appeal and the Appeal Committee, established in Queen's Regulations and Orders, has approved representation at public expense; and

- g) in appeals by the Minister of National Defence to the Court Martial Appeal Court or the Supreme Court of Canada, in cases where members wish to be represented by Defence Counsel Services.

8. The statutory duties and functions of Defence Counsel Services are exercised in a manner consistent with our constitutional and professional responsibility to give precedence to the interests of clients. Where demands for legal services fall outside the Defence Counsel Services mandate the members are advised to seek civilian counsel at their own expense.

9. Defence Counsel Services does not normally have the mandate to represent accused at summary trial. The military justice system relies upon the unit legal advisor, generally a Deputy Judge Advocate, to provide advice to the chain of command on the propriety of charges and the conduct and legality of the summary trial process, all with a view to ensuring that the accused is treated in accordance with the rule of law.

THE ORGANIZATION, ADMINISTRATION AND PERSONNEL OF DEFENCE COUNSEL SERVICES

10. Throughout the reporting period, the organization has been situated in the Asticou Centre in Gatineau, Quebec. The office has consisted of the Director, the Deputy Director, an appellate counsel, and five regular force trial counsel at the rank of major/lieutenant-commander. Throughout this period there were six reserve force legal officers in practice at various locations in Canada who assisted on matters part-time.

Administrative Support

11. Administrative support was provided by two clerical personnel occupying positions classified at the levels of CR-3 and AS-1, as well as a paralegal at the level of EC-2 providing legal research services and administrative support for courts martial and appeals. Our CR-3 position has recently been reclassified to CR-4 and our EC-2 position is presently under review. These changes should result in greater alignment with similar positions in the Directorate of Military Prosecutions and more appropriately reflect the work performed.

Regular Force Resources

12. Defence Counsel Services are part of, and resourced through, the Office of the Judge Advocate General. In our recent business plan, we requested two additional positions, one at the rank of lieutenant-colonel/commander and the other at the rank of major/lieutenant-commander to assist in the demands of this office. It is our understanding that those positions will not be established at this time.

Reserve Counsel

13. As indicated, at the commencement of the year there were a total of six reserve force defence counsel within the organization. During the year we enrolled one trial counsel at the rank of captain.

14. Presently, our reserve force counsel are located throughout Canada; with two in Quebec, three in Ontario, and one in British Columbia. They are an important component of our organization. They have made, and continue to make, a significant contribution to the Defence Counsel Services mandate.

Civilian Counsel

15. Under the *National Defence Act*, the Director of Defence Counsel Services may hire civilian counsel to assist accused persons at public expense in cases where, having received a request for representation by Defence Counsel Services, no uniformed counsel are in a position to represent the particular individual. This occurs primarily as a result of a real or potential conflict of interest, often involving Defence Counsel Service's representation of a co-accused. It may occur for other reasons as well. During this reporting period, civilian counsel were hired by the director to represent members in three trial-level cases and in one appeal.

Funding

16. During this fiscal year the following funds were spent.

FUND		EXPENDITURE
C125	Contracting (Counsel, Experts, and Services)	\$156,384.20
L101	Operating Expenditures	\$161,097.99
L111	Civilian Pay and Allowances	\$173,424.81
L127	Primary Res Pay, Allowance, Ops, Maintenance	\$234,052.80
TOTAL		\$724,959.80

17. This amount is slightly less than our projected business plan of \$774,900.00 and represents stable funding over the past few years.

18. Within Defence Counsel Services there are three methods of service delivery; regular force counsel, reserve force counsel and, pursuant to subsections 249.21(2) and (3), of the *National Defence Act*, contracted counsel. Regular force counsel are the most cost effective means of service delivery and do not require the expenditure of budgeted funds. The use of reserve force counsel and contracted lawyers come at a cost.

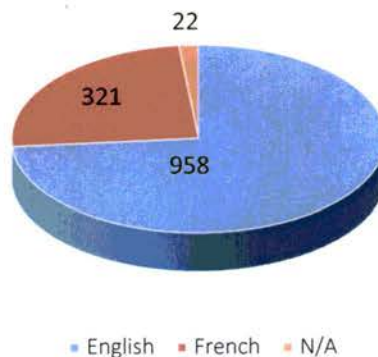
SERVICES, ACTIVITIES AND TRAINING

Duty Counsel Services

19. Legal advice is available twenty-four hours a day, seven days a week, to members who are under investigation or in custody. Legal advice is typically provided through our duty counsel line, a toll-free number which is distributed throughout the Canadian Armed Forces and is available on our website or through the military police and other authorities likely to be involved in investigations and detentions under the Code of Service Discipline.

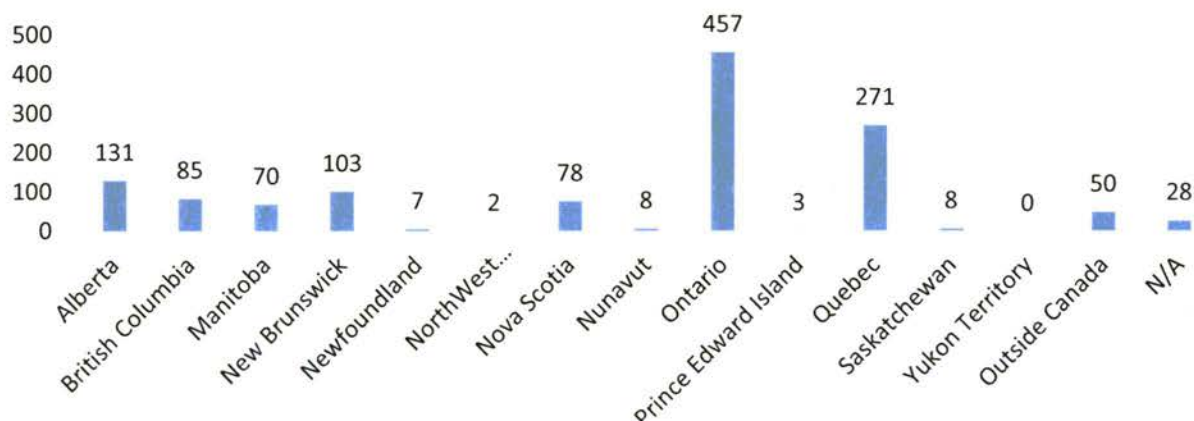
20. During the reporting period, Defence Counsel Services recorded 1,301 calls on the duty counsel line. Services were provided in both official languages. The language of service was divided generally between English for 958 calls and French for 321 calls as depicted in the chart below. In 22 cases, the language of call was not recorded.

Duty Service Calls - by Language



21. The calls ranged in duration but, on average, lasted for approximately 15 minutes. Calls originated from every Canadian province and territory, as well as various locations outside of Canada from members serving abroad. The number of calls by location is illustrated in the graph below.

Number of Calls By Location



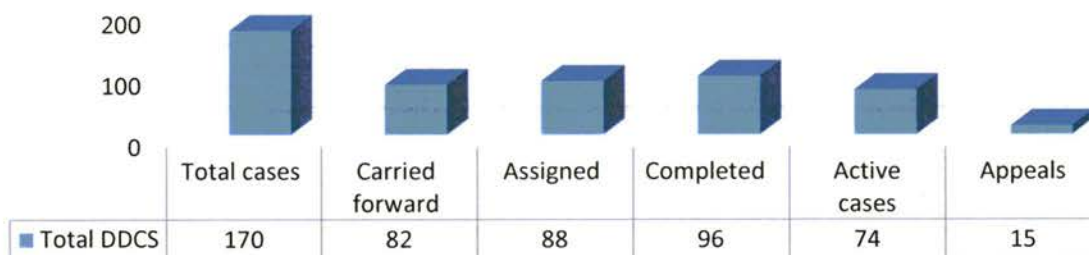
Court Martial Services

22. When facing court martial, accused persons have the right to be represented by lawyers from Defence Counsel Services at public expense, they may retain legal counsel at their own expense, or they may choose not to be represented by counsel.

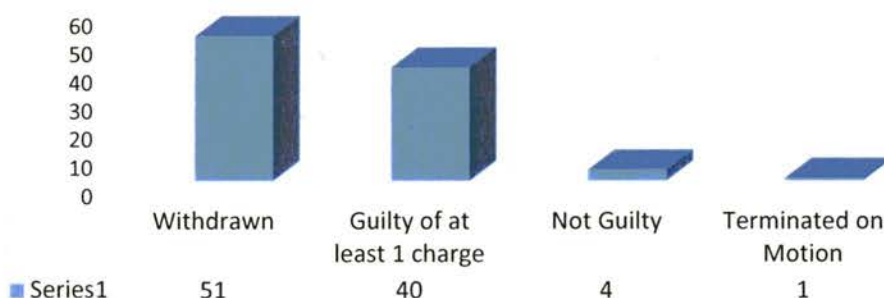
23. During this reporting period approximately 58% of those who requested representation by Defence Counsel Services were, as shown below, able to move forward without conviction.

24. Defence Counsel Services provided legal representation to accused persons in 170 files referred for prosecution. This number includes 82 cases carried over from the previous reporting year. It also includes 88 new cases assigned to defence counsel during this reporting period. Of these 170 client files, 96 were completed. Of these 96, 51 members had their charges withdrawn after the assignment and involvement of counsel for the defence. Of the remaining 45 cases involving counsel appointed by the Director, in four cases the accused was found not guilty of all charges, one case was terminated by a Military Judge, and in 40 cases the accused was either found guilty or plead guilty to at least one charge.

DDCS Casefiles 01 Apr 2018 to 31 March 2019



Results of Completed Cases F/Y 2018-2019



Appellate Services

25. Ten appeals involving 15 clients were touched on at various points during this reporting period, including three appeals to the Supreme Court of Canada. One appeal to the Supreme Court was filed by the Minister and two appeals were filed on behalf of the accused. Of the appeals to the Court Martial Appeal Court, five were filed by the Minister and two were filed on behalf of the accused.

26. Where a member is the appellant and is requesting representation at public expense by Defence Counsel Services, he or she is required to make an application to the Appeal Committee, established under *Queen's Regulations and Orders*, who assess whether the appeal has merit. Members who are responding to appeals by the Minister receive representation by Defence Counsel Services as a matter of right.

Supreme Court of Canada

27. On 19 September 2018, in the case of *R. v. Beaudry*, the Court Martial Appeal Court declared s. 130(1)(a) of the *National Defence Act* invalid for any civil offence committed in Canada and punishable by five years of imprisonment or more. The Court found that this provision violated members' constitutional right to Trial by Jury.

28. The Minister filed a motion with the Supreme Court of Canada to suspend this declaration of invalidity. On 14 January 2019, that motion was denied.

29. On 26 March 2019, the Supreme Court heard the *Beaudry* appeal, together with *Stillman et al.* addressing the same issue, and reserved judgment.

30. The SCC also heard the appeal of WO Gagnon, an appeal as of right, on the issue of whether the defence of honest but mistaken belief in consent should have been left with the panel. The SCC dismissed the appeal.

Court Martial Appeal Court

31. In *R. v. Edmunds*, the appellant had been found guilty of four counts of fraud. The member appealed on the basis that the convictions were void given that the charge-layer did not have reasonable grounds to believe the offences had been committed at the time that he signed the Record of Disciplinary Proceedings. The appeal was allowed and the convictions were quashed.

32. In *R. v. Cadieux*, the Minister appealed the member's acquittal on charges of sexual assault and drunkenness. The appeal was allowed and a new trial was ordered.

33. In *R. v. Bannister*, the Minister appealed the member's acquittal on charges of disgraceful conduct and conduct to the prejudice of good order and discipline in relation to sexualized comments. The Minister contended there were errors in law relating to the interpretation of the elements of both offences. A decision was pending at the end of the reporting period.

34. In *R. v. Edwards*, the Minister appealed the member's acquittal on the charge of conduct to the prejudice of good order and discipline relating to drug use. The Minister took the position that there was no strict requirement to prove the elements of time and place of the commission of the offence. At the end of the reporting period, the appeal was awaiting hearing.

35. In *R. v. MacIntyre*, the Minister appealed the member's acquittal on charges of sexual assault. The appeal has been heard and judgment is under reserve.

36. In *R. v. Spriggs* the Minister appealed the Military Judge's decision to terminate the proceedings on the ground of an abuse of process. The appeal was subsequently withdrawn.

Professional Development

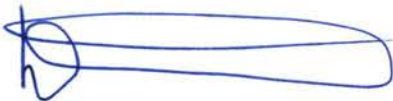
37. The Federation of Law Societies' National Criminal Law Program remains the primary source of training in criminal law for counsel with Defence Counsel Services. In July 2018, eight regular force counsel and three reserve force counsel attended this program, which was held in St-John's, Newfoundland. Additionally, in February 2019, most regular and reserve force counsel attended our annual one-day office continuing legal education program in Gatineau, Quebec, which dealt with a variety of issues relevant to our mandate. Certain other courses sponsored by the Office of the JAG and the Canadian Bar Association were attended by individual counsel in order to meet their specific professional needs.

38. DDCS appellate counsel, Cdr Mark Létourneau, coordinated the development and teaching of a military law course at the University of Ottawa Law School (common law section).

This intensive three-week course in Military Criminal Law was offered in collaboration with other divisions of the Office of the Judge-Advocate General. As a highlight of this course, Commodore Geneviève Bernatchez, Judge-Advocate General, as well as Chief Justice Richard Bell of the Court Martial Appeal Court and Colonel Richard Garon, Commander 35th Canadian Brigade Group, met with students and shared their insights on the Canadian Military Justice System.

CONCLUSION

39. It has been a particularly challenging year for those within Defence Counsel Services as multiple long-standing cases before the Supreme Court of Canada came to hearing and the lawyers and clients at the trial level navigated the effects of this litigation. As always, the priority has been the provision of outstanding legal services to qualifying members of the military community who request our assistance. It is a privilege to assist these members. They are often facing a very difficult period within their lives and careers. Many continue with their careers and their contribution as dedicated and reliable members of the military community. For others, their charges are part of their transition from service to civilian life.



D.K. Fullerton
Colonel
Director of Defence Counsel Services

17 June 2019

Judge Advocate General



Juge-avocat général

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25 March 2019

Chief of Staff – Judge Advocate General

FIVE (5) YEAR POSTING RULE

As you know, on release of the Auditor General's report on the Administration of Justice in the Canadian Armed Forces in Spring 2018, I directed that most legal officers assigned to the Canadian Military Prosecution Service (CMPS) and Defence Counsel Services (DCS) were to remain in their positions for the 2018/2019 posting year.

Following that immediate response, and in advance of the 2019/2020 posting season, I directed that legal officers will be posted to CMPS or DCS for a minimum of five years, subject only to the availability of a vacant position on the establishment at the appropriate rank and to the Director of Military Prosecutions' or the Director of Defence Counsel Services' assessment of their respective operational requirements.

I confirm that this continues to be my direction to you, as the Chief of Staff for the Office of the JAG.

It is possible that this direction will change once the analysis of the Legal Officer occupation is completed. It is my hope that this analysis will provide the data to identify the appropriate approach to ensure the necessary litigation expertise, which could result in a different approach to postings within the Office of the JAG.

Geneviève Bernatchez
Commodore
613-992-3019 / 613-995-3155

c.c. Deputy Judge Advocate General – Military Justice
Director of Defence Counsel Services
Director of Military Prosecutions