



Défense nationale

National Defence

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15 June 2020

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

Read adminral 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 2019 through 31 March 2020.

Yours sincerely,

J.-B. Cloutier
Colonel
Director of Defence Counsel Services



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ANNUAL REPORT 2019- 2020

**Director
Defence
Counsel
Services**



OVERVIEW

1. This report covers the period from 1 April 2019 to 31 March 2020. It is prepared in accordance with article 101.11(4) of the *Queen's Regulations and Orders for the Canadian Armed Forces (Queen's Regulation and Orders)*, 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. Up until 6 March 2020, the director was Colonel D.K. Fullerton. Since then, Colonel J-B. Cloutier was appointed as the director.

2. During the pandemic which began at the end of this reporting period, the Director of Defence Counsel Services has continued to fulfill his legislated mandate to provide legal advice on the duty line and legal representation for custody review hearings, pre-trial conferences, preliminary motions, courts martial and appeals.

ROLE OF DEFENCE COUNSEL SERVICES

3. 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.

4. 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.

5. On 20 January 2019, the Chief of Staff Judge Advocate General (COS JAG) sent a document to legal officers within Defence Counsel Services (DCS) and the Canadian Military Prosecution Service (CMPS) who had reached five (or more) years within their respective service. In this document, COS JAG encouraged these experienced litigators to submit a request to be posted out of DCS and CMPS. This document is intended to be in accordance with the the Judge Advocate General "FIVE (5) YEAR POSTING RULE", published on 25 March 2019, in response to the Auditor General's 2018 report on the Administration of Justice in the Canadian Forces which identified a lack of litigation expertise within the military justice system. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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

11. 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, five trial counsel at the rank of major/lieutenant-commander and one at the rank of captain. In addition to these Regular Force officers, seven Reserve Force legal officers at various locations in Canada assisted on matters part-time.

Administrative Support

12. Administrative support was provided by two clerical personnel occupying positions classified at the levels of CR-4 and AS-1, as well as a paralegal whose position has been reclassified from EC-2 to EC-3. All AS-1 positions within the Office of the Judge Advocate General are currently under review. A preliminary draft of this reclassification review concludes that our AS-1 position should be reclassified as a CR-5 position.

DEFENCE COUNSEL SERVICES

Regular Force Resources

13. Defence Counsel Services are part of, and resourced through, the Office of the Judge Advocate General. During the reporting period, all Regular Force positions were filled. One Regular Force major was on parental leave for 6 months.

Reserve Counsel

14. As indicated, at the commencement of the year there were a total of seven Reserve Force defence counsel within the organization. One of them has reached compulsory retirement age on 16 March 2020.

15. Our Reserve Force counsel are located throughout Canada; with two in Quebec, four 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

16. 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 counsels were hired by the director to represent members in three trial-level cases and one appeal.

Funding

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

FUND		EXPENDITURE
C125	Contracting (Counsel, Experts, and Services)	\$309,239.64
L101	Operating Expenditures	\$19,250.22
L111	Civilian Pay and Allowances	\$206,064.41
L127	Primary Res Pay, Allowance, Ops, Maintenance	\$324,972.81
TOTAL		\$859,527.08

18. This amount is less than our operating budget numbers of \$877,472.00 and represents stable funding over the past few years.

19. 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

20. 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.

Court Martial Services

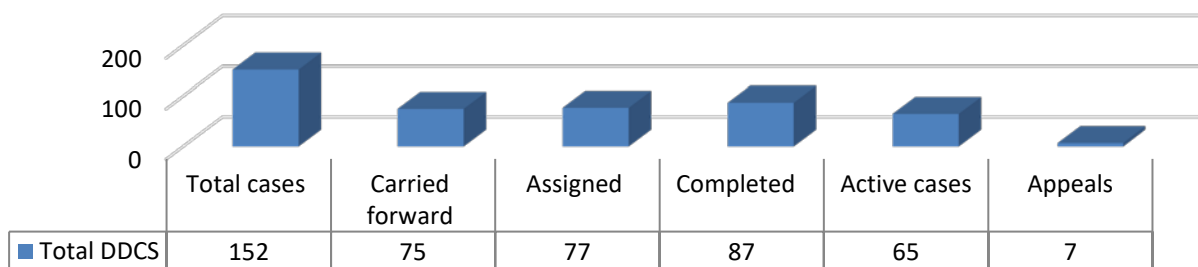
21. When facing court martial, accused persons have the right to be represented by lawyers from Defence Counsel Services at public expense, they may retain legal counsel at their own expense, or they may choose not to be represented by counsel.

22. During this reporting period, approximately 59% of those who requested representation by Defence Counsel Services were, as shown below, able to move forward without conviction.

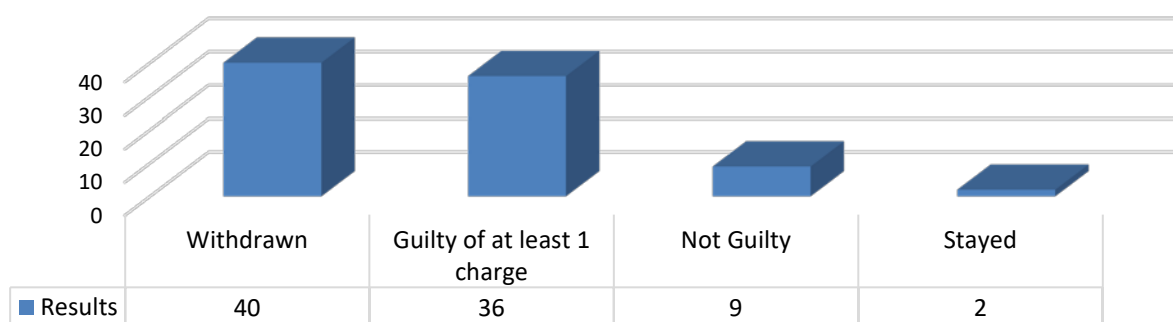
23. Defence Counsel Services provided legal representation to accused persons in 152 files referred for prosecution. This number includes 75 cases carried over from the previous reporting year. It also includes 77 new cases assigned to defence counsel during this reporting period. Of these 152 client files, 87 were completed. Of these 87, 40 members had their charges withdrawn after the assignment and involvement of counsel for the defence. Of the remaining 47 cases involving counsel appointed by the Director, in 9 cases the accused was found not guilty of all charges, two cases was stayed by a Military Judge, and in 36 cases the accused was either found guilty or pled guilty to at least one charge.

DEFENCE COUNSEL SERVICES

DDCS Casefiles 01 Apr 2019 to 31 March 2020



Results of Completed Cases F/Y 2019-2020



Appellate Services

24. Seven appeals at the Court Martial Appeal Court of Canada (the “CMAC”) and one application for leave at the Supreme Court of Canada occurred during this reporting period. Four appeals were filed by the Minister and three were filed on behalf of the accused. Of the three filed on behalf of the accused, two were subsequently abandoned before being heard by the Court. Of note, the Supreme Court of Canada rendered its decision in *R. v. Stillman*, 2019 SCC 40.

25. 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 may receive representation by Defence Counsel Services as a matter of right.

Supreme Court of Canada

26. On 26 July 2019, the Supreme Court of Canada rendered its decision in *R. v. Stillman*, 2019 SCC 40, which had been heard on 26 March 2019. The accused had asserted that section 130(1)(a) of the *National Defence Act (NDA)* violated their right to a trial by jury under section 11(f) of the *Charter*. The SCC, by a 5-2 majority, held that the phrase “an offence under military

law" in section 11(f) refers to an offence that is validly enacted pursuant to Parliament's power over the "Militia, Military and Naval Service, and Defence" under s. 91(7) of the *Constitution Act, 1867*; that section 130(1)(a) is such an offence; and therefore, the exception in section 11(f) of the *Charter* applies.

27. On 27 September 2019, the Director of Military Prosecutions, on behalf of Her Majesty the Queen, filed an application for leave to appeal to the Supreme Court of Canada from the judgment of the CMAC in the file of *R v MacIntyre* as noted below. The application for leave to appeal was dismissed on 09 January 2020.

Court Martial Appeal Court

28. The Director of Military Prosecution (the "DMP") appeal from acquittal *Canada v. Bannister* 2019 CMAC 2 was heard on 21 November 2018 and was allowed on 1 May 2019. Regarding the offence of disgraceful conduct under section 93 of the *NDA*, the CMAC unanimously held that expert evidence was not required to prove harm or risk of harm - the military judge can use their own military experience and general service knowledge. Regarding the offence of conduct to the prejudice of good order and discipline under section 129 of the *NDA*, the CMAC unanimously followed its earlier decision in *R. v Golzari* 2017 CMAC 3. A new trial was ordered.

29. The DMP appeal from acquittal *R. v. MacIntyre* 2019 CMAC 3 was heard on 27 March 2019 and was dismissed on 28 June 2019. The DMP challenged the military judge's instructions to the General Court Martial panel relating to knowledge of the complainant's lack of consent and inadequate police investigation. The DMP argued that once the military judge ruled that there was no air of reality to the defence of honest but mistaken belief in consent, the essential element of the offence that the accused knew that the complainant was not consenting no longer applied. In other words, the only *mens rea* element is whether the accused intentionally touched the complainant. The CMAC unanimously held that knowledge of the absence of consent is always an essential element of the offence of sexual assault. The DMP application for leave to appeal to the SCC was dismissed 9 January 2020.

30. The DMP appeal from acquittal *R. v Edwards* 2019 CMAC 4 was heard on 13 June 2019 and was allowed on 31 October 2019. The accused had been acquitted of a charge under section 129 of the *NDA* for having used cocaine contrary to article 20.04 of the *Queen's Regulations and Orders*. The military judge had found that the DMP had proven neither the place, nor the time of the alleged usage. The accused conceded he was not prejudiced by the failure to prove the place of the offence. The CMAC unanimously held that the time of an offence only needs to be proven when it is an essential element of the offence, crucial to the defence, or the defence is misled by the particularized time.

31. The DMP appeal from acquittal in *R. v. Banting* 2019 CMAC 5 was dismissed from the bench on 28 October 2019, and judgment delivered 6 November 2019. The accused was not

represented by Defence Counsel Services. The CMAC simply upheld the military judge's decision that the DMP had not made a *prima facie* case. This case resulted in a \$10,000.00 cost award to the accused in *R. v. Banting* 2020 CMAC 2.

32. The DMP appeal of the sentence in *R. v. Darrigan* 2020 CMAC 1 was dismissed from the bench on 20 November 2019, and judgment delivered on 10 March 2020. The CMAC unanimously rejected the DMP submission that it should follow civilian sentencing jurisprudence. The CMAC held that the DMP submissions ignored the fundamental role of Canada's military and the *Code of Service Discipline*; and were contrary to the *NDA*, the CMAC sentencing jurisprudence, and civilian sentencing jurisprudence. The CMAC held that the jurisprudence does not establish categories of theft or fraud for which exceptional circumstances are required in order to justify a non-custodial sentence.

33. Notice of appeal was filed regarding the trial judgment in *R. v McGregor* 2018 CM 4023 on 4 October 2019 and was scheduled to be heard on 22 May 2020, but has been adjourned due to Covid-19.

34. A notice of appeal was filed by the member regarding the sentencing judgment in *R. v WO Malone* 2019 CM 5004 on 2 January 2019, but was abandoned.

35. A notice of appeal was filed by the member in *R. v MCpl Pett* 2020 CM 4002 on 10 February 2020 regarding an alleged violation of his right to be tried by an independent and impartial tribunal guaranteed under section 11(d) of the *Charter*, but was abandoned. The same constitutional question was raised in *R v Cpl D'Amico*, 2020 CM 2002, and will likely continue to be raised before courts martial in the coming year. In *Pett*, Military Judge Pelletier ruled that in order to obviate any concern about their independence or impartiality, military judges are not subject to prosecution under the Code of Service Discipline while they occupy judicial office. In *D'Amico*, Military Judge Sukstorff noted that this solution is best understood in the context of the recent unprecedented military prosecution against Chief Military Judge Colonel Mario Dutil: *R v Dutil*, 2019 CM 3003. In *DMP v Deputy Chief Military Judge*, 2020 FC 330, Justice Martineau provided a detailed exposé of the circumstances that gave rise to this prosecution. As a result, the Chief Military Judge was *de facto* removed from the bench up until the DMP withdrew the charges against him – approximately two years later when, among other things, the Chief Military Judge had reached his reached compulsory retirement age.

Professional Development

36. 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 2019, seven Regular Force legal officers and three Reserve Force legal officers attended the conference in Ottawa, Ontario. Our in-house and JAG-wide annual Continuing Legal Education program was cancelled due to the COVID pandemic.

CONCLUSION

37. This reporting period concludes with the retirement of Colonel Delano Fullerton, who has served tirelessly as Director of Defence Counsel Services for the past decade. Under his stewardship, legal officers within Defence Counsel Services have provided outstanding legal services to qualifying members of the military community who request our assistance. As the incoming director, my priority will be to honor his legacy by providing an environment where clients can trust that their defence counsel is not only professionally competent but also loyal and independent from government.



J-B. Cloutier
Colonel
Director of Defence Counsel Services

12 June 2020

ANNEX

Office of the
Judge Advocate General



Cabinet du
Juge-avocat général

National Defence
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101 Colonel By Drive
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0160-1-05600-01 (COS JAG)

0160-1-05600-01 (CÉM JAG)

20 January 2020

20 janvier 2020

Distribution List

Liste de distribution

FIVE-YEAR POSTING RULE

RÈGLE EN LIEN AVEC
LES AFFECTIIONS DE CINQ ANS

Reference: JAG's Letter 0160-1-06580-13-0001
25 March 2019 (enclosed)

Référence : Lettre du JAG 0160-1-06580-13-
0001 25 March 2019 (ci-joint)

1. In accordance with the JAG's letter to me at reference, I wish to advise you that in July 2020, you will have reached five (or more) years with your respective service.

1. Tel qu'indiqué dans la lettre en référence qui m'a été envoyée par le JAG, je vous informe qu'en juillet 2020, vous aurez complété cinq ans (ou plus) au sein de votre service respectif.

2. In light of this, I remind you of the opportunity to move elsewhere within the Office of the JAG, in order to broaden your legal experience through exposure to other areas of practice.

2. Suivant ceci, je vous rappelle que vous avez l'occasion d'être affecté au sein d'une autre division du Cabinet du JAG, afin d'élargir votre expérience juridique, en œuvrant dans d'autres sphères de pratique.

3. Doing so would enhance the capacity of the Office of the JAG to respond to a range of DND/CAF requirements, by increasing the number of legal officers who possess the leadership abilities, broad legal experience, and deep client knowledge necessary to successfully lead the Office and the Legal Branch in the years which lie ahead.

3. Ceci rehausserait la capacité du Cabinet du JAG à répondre à tout l'éventail d'exigences provenant des FAC/MDN, en augmentant le nombre d'avocats militaires possédant des aptitudes de leadership, une expérience juridique variée, ainsi qu'une connaissance pointue des clients, tous nécessaires pour mener le Cabinet et la Branche des Services juridiques sur la voie du futur.

4. I encourage you to submit to me posting preferences that will assist the Office of the JAG in responding to these requirements, by enabling

4. Je vous encourage donc à me soumettre vos choix d'affectations qui permettront au Cabinet du JAG de répondre à ces exigences, tout en promouvant votre développement et

you to further your development and experience in other areas of practice.

5. I am available, should you wish to discuss this with me; you can also reach out to Maj Dery, ACOS Personnel, at 613-943-4526.

votre expérience dans un autre champ de pratique.

5. Je demeure disponible, si vous désiriez en discuter davantage; vous pouvez aussi communiquer avec le Maj Dery, CÉMA Personnel, au 613-943-4526.

Le Chef d'état-major du Juge avocat général
Colonel



M.J. Dow
Colonel
Chief of Staff Judge Advocate General
613-996-6456

Distribution List

Action

LCol Dylan Kerr
LCol Dominic Martin
Cdr Mark Létourneau
Maj Chavi Walsh
LCdr Brent Walden
Maj Alexandre Gélinas-Proulx
Maj Benoit Tremblay

Information

Director of Military Prosecutions
Director of Defence Counsel Services

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Maj Chavi Walsh
Capc Brent Walden
Maj Alexandre Gélinas-Proulx
Maj Benoit Tremblay

Information

Directeur des Poursuites militaires
Directeur du Service des avocats de la défense

Judge Advocate General



Juge-avocat général

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0160-1-06580-13-0001

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

Canada

Judge Advocate General



Juge-avocat général

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0160-1-06580-13-0001

Le 25 mars 2019

Chef d'état-major – Juge-avocat général

RÈGLE À L'ÉGARD DES AFFECTATIONS DE CINQ ANS

Comme vous le savez, lors de la publication du rapport du vérificateur général sur l'administration de la justice dans les Forces armées canadiennes au printemps 2018, j'ai émis une directive à l'effet que la majorité des avocats militaires affectés au Service canadien des poursuites militaires (SCPM) et aux Services d'avocats de la défense (SAD) devraient demeurer dans leur poste pour l'année d'affectation 2018-2019.

Suivant cette mesure immédiate et avant la période des affectations 2019-2020, j'ai émis comme directive que les avocats militaires affectés au SCPM et au SAD demeureraient dans leur poste pour un minimum de cinq ans, sous réserve de la disponibilité d'un poste vacant dans l'organisation au grade approprié et de l'évaluation du directeur – Poursuites militaires ou du directeur – Services d'avocats de la défense de leurs besoins opérationnels respectifs.

Je vous confirme, dans votre capacité de chef d'état-major du Cabinet du JAG, que cette directive n'a pas changée.

Il se peut que cette directive change lorsque l'analyse du groupe professionnel avocat militaire sera terminée. J'espère que cette analyse va générer des données qui permettront d'identifier l'approche appropriée pour assurer l'expertise nécessaire en matière de litige, ce qui pourrait engendrer une approche différente quant aux affectations au sein du Cabinet du JAG.

// Copie originale signée //
Geneviève Bernatchez
Commodore
613-992-3019 / 613-995-3155

c.c. Juge-avocat général adjoint – Justice militaire
Directeur – Services d'avocats de la défense
Directeur – Poursuites militaires