



National
Defence

Défense
nationale



ANNUAL REPORT ***2022- 2023***

Director
Defence
Counsel
Services

DEFENCE COUNSEL SERVICES

OVERVIEW

1. This report covers the period from 1 April 2022 to 31 March 2023. It is prepared in accordance with Article 101.11(4) of *Queen's Regulations and Orders for the Canadian Forces (QR&O)*, which sets out the legal services prescribed to be performed by the Director of Defence Counsel Services (Director) and requires that they report annually to the Judge Advocate General (JAG) on the provision of legal services and the performance of other duties undertaken in furtherance of the mandate of the of Defence Counsel Services (DCS).

ROLE OF DEFENCE COUNSEL SERVICES

2. Pursuant to 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 (CSD)” have the “right to be represented in the circumstances and in the manner prescribed in regulations.” DCS is the organization that is responsible for assisting individuals exercise these rights.

3. The Director is, pursuant to section 249.18 of the *NDA*, appointed by the Minister of National Defence (MND). On 12 September 2022, upon the retirement of Colonel Jean-Bruno Cloutier, the MND appointed Colonel Nooral Ahmed as the Director. 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) of the *NDA* places upon the Director the responsibility to ensure that general instructions or guidelines issued under this section are made available to the public. No such directive was issued this year.

4. The Director is statutorily mandated pursuant to s. 249.19 to “provid[e], and supervis[e] and direc[t]” the provision of defence counsel services. These services may be divided into the categories of “legal advice” where advice of a more summary nature is provided, often delivered through telephone 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 Court Martial, the Court Martial Appeal Court of Canada (CMAC) or the Supreme Court of Canada (SCC). Historically and occasionally, counsel have also appeared before provincial Mental Health Review Boards and the Federal Court.

5. Legal advice is provided in situations where members are:

- a) the subject of investigations under the CSD, summary investigations, or boards of inquiry, often at the time when they are being asked to provide a statement or otherwise act contrary to their interests and rights;

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- b) arrested or detained, in particular in the 48-hour period within which the custody review officer must make a decision as to the individual's release from custody;
 - c) seeking advice of a general nature in preparation for a Summary Hearing;
 - d) considering an application before a Commanding Officer to vary any conditions imposed upon them;
 - e) considering or preparing a Request for Review of the findings or sanction ordered at a Summary Hearing;
6. 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 (MJ) 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) charges against individuals have been preferred to court martial;
 - e) members apply to a MJ to vary an intermittent sentence or the conditions imposed by a court martial or to a judge of the CMAC in the case of conditions imposed by that Court;
 - f) members are appealing to the CMAC or to the SCC, or have made an application for leave to appeal and the Appeal Committee, established in *QR&O*, has approved representation at public expense; and
 - g) in appeals by the MND to the CMAC or the SCC, in cases where members wish to be represented by the DCS.
7. The statutory duties and functions of DCS are exercised in a manner consistent with the constitutional and professional responsibility to act solely in the best interests of the member as a client. Where demands for legal services fall outside the DCS mandate, members are advised to seek civilian counsel at their own expense.
8. DCS does not have the mandate to represent persons charged at summary hearing. 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 hearing process.

THE ORGANIZATION, ADMINISTRATION AND PERSONNEL OF DEFENCE COUNSEL SERVICES

9. Throughout the reporting period, the organization has been physically situated at the Asticou Centre in Gatineau, Quebec, although a remote and hybrid work posture has been adopted. Currently, there are discussions underway regarding a possible re-location of the DCS offices within the National Capital Region.

Military Defence Counsel

10. The office consisted of the Director, the Assistant Director, and 7 Regular Force legal officers. In addition, 6 Reserve Force legal officers at various locations in Canada assisted on matters part-time.

11. This year, the Director requested one additional LCol/Cdr position to be the Deputy of the DCS which was not approved. This new position is required to enable the Director to adequately fulfill his statutory mandate under s. 249.19 of the *NDA* to “*provid[e] and supervis[e]*” the provision of defence counsel services. The new position would ensure that DCS has a senior officer with the roles of personnel management, training, succession planning, and office administration including financial planning and file management. Additionally, the senior position would be responsible for responding to requests from the JAG for consultation on recommendations from external reviews of the military justice system. Indirectly, the position would facilitate work-life balance, add redundancy of litigation expertise, and permit succession planning.

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 at the level of EC-3.

Civilian Counsel

13. Under the *NDA*, the Director may contract civilian counsel to assist accused persons at public expense in cases where, having received a request for representation by DCS, no uniformed counsel are in a position to represent the particular individual. This occurs for various reasons but primarily as a result of a conflict of interest, often involving DCS’ representation of a co-accused. During this reporting period, civilian counsel were contracted by the Director to advise and/or represent members in 5 files.

DEFENCE COUNSEL SERVICES

Funding

14. During this fiscal year, the following funds were spent.

FUND		EXPENDITURE
C125	Courts Martial Costs (Counsel, Experts, Travel & Services)	\$486,116.22
L101	Operating Expenditures	\$48,073.75
L111	Civilian Pay and Allowances	\$197,650.79
C127 (Pay)	Primary Res Pay, Allowances	\$245,380.82
C127 (O&M)	Ops, Maintenance	\$9,669.35
TOTAL		\$985,827.03

15. The funds spent is slightly higher than last year primarily due to the requirement to contract civilian counsel more frequently than anticipated.

SERVICES, ACTIVITIES AND TRAINING

Duty Counsel Services

16. Legal advice is available 24 hours a day, seven days a week, to members who are under investigation or in custody or require military justice related advice. Duty counsel receives 10 to 15 calls per day and sometimes more. Legal advice is typically provided through the duty counsel telephone line, a toll-free number which is distributed throughout the CAF and is available on the DCS website or through the military police and other authorities likely to be involved in investigations and detentions under the CSD. Legal officers rotate being duty counsel on a weekly basis while continuing with their daily caseload.

Court Martial Services

17. When facing court martial, accused persons: have the right to be represented by counsel from DCS at public expense; may retain legal counsel at their own expense; or may choose not to be represented by counsel.

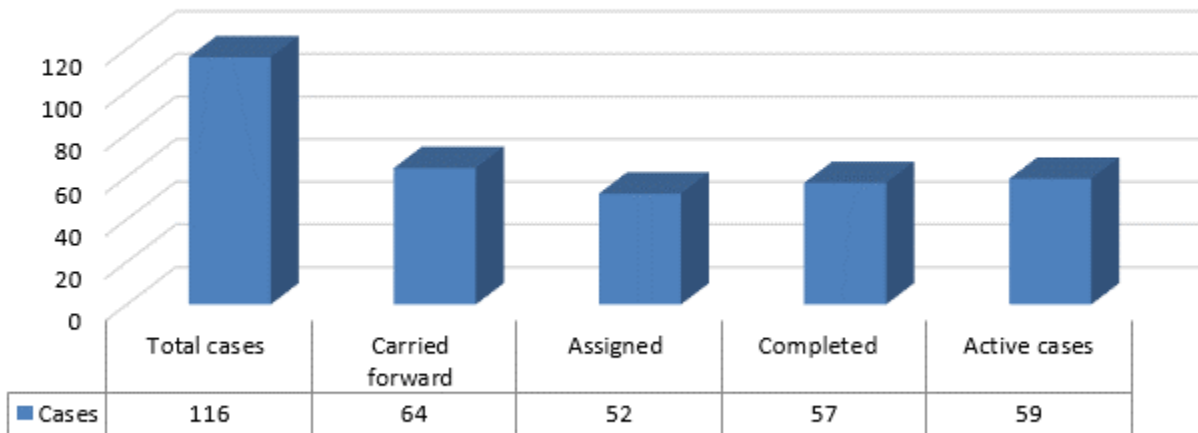
18. During this reporting period, 52 members requested legal counsel to the Director to be represented at court martial. When combined with the 64 cases carried over from the previous reporting period, the caseload for this reporting period was 116 cases.

19. Of those 116, 57 cases were completed. And of those 57, 17 members represented by military defence counsel had their charges either withdrawn or not preferred before the convening of a Court Martial.

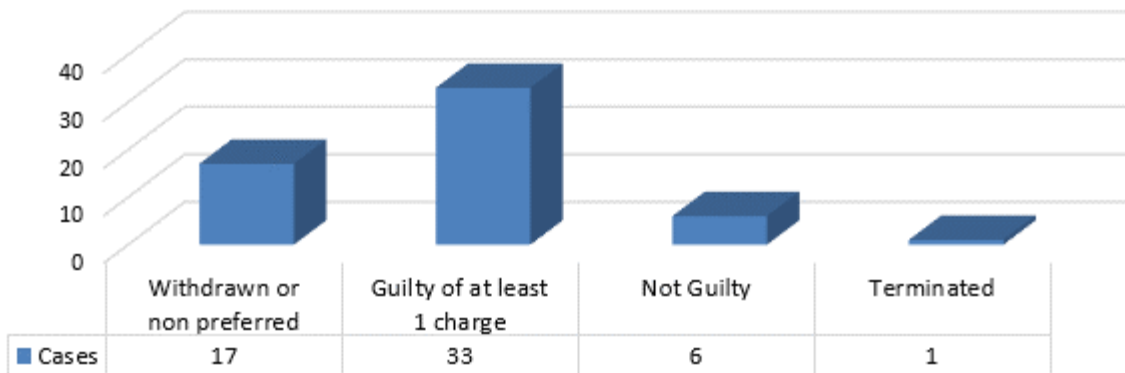
DEFENCE COUNSEL SERVICES

20. Military defence counsel represented the accused in 40 courts martial during this reporting period. In 6 cases, the accused was found not guilty of all charges. In 33 cases, the accused was either found guilty or pled guilty to at least one charge. In 1 case, the proceedings were terminated.

DCS Court Martial Cases Fiscal Year 2022-2023



Results of Court Martial Cases Fiscal Year 2021-2022



Legal Services at Appeal Courts

21. Where a member appeals their case and requests representation by DCS at public expense, they are required to make an application to the Appeal Committee, established under Art 101.19 of *QR&O*, which assesses the merit of the appeal. Members who are responding to appeals by the Minister may receive representation by DCS as a matter of right.

22. DCS worked on 1 appeal before the SCC, for which leave was granted, and 18 appeals before the CMAC (8 appeals were filed by the Minister and 10 were filed by the accused). DCS also filed applications for leave to appeal at the SCC in 8 cases which have been consolidated into one file.

Court Martial Appeal Court of Canada

Decided Cases

23. In *R v Thibault* (Sgt), 2022 CMAC 3, the CMAC dismissed the accused's appeal. The CMAC found that the MJ correctly applied the burden of proof and committed an error of little significance in failing to consider evidence favourable to the accused. The member has requested a stay of execution of the CMAC judgment pending the decision of the SCC in *R. v Edwards et al.* The motion was dismissed (*R v. Thibault*, 2022 CMAC 6).

24. In *R v Pépin* (Cpl), 2022 CMAC 4, the CMAC dismissed the accused's appeal and found that the MJ correctly concluded that the accused *Charter* right to silence and right to counsel had not been breached. The CMAC further concluded that the specific instruction to the panel, commonly known as the *W.(D.)* formula, was not required in the circumstances.

25. In *R v Euler* (Cpl), 2022 CMAC 5, the CMAC dismissed the Minister's appeal which contended that the MJ improperly acquitted the accused because they required corroboration of the complainant's testimony. The CMAC concluded that the MJ appropriately applied the third prong of the *W.(D.)* test and that they appropriately applied the standard of proof beyond a reasonable doubt by assessing the evidence globally rather than in a piecemeal fashion.

26. In *R v. Cogswell* (Bdr), 2022 CMAC 7, the member appealed the convictions and sentence imposed at Court Martial. The MJ found the member guilty of behaving in a disgraceful manner and of eight counts of administering a noxious substance (s. 130 *NDA* and s. 245(1)(b) *CCC*). They were sentenced to 30 days imprisonment, dismissal from Her Majesty's Service, and reduction to the rank of gunner. The Court dismissed the appeal from convictions and permitted their appeal of sentence. The appeal from sentence was ultimately dismissed.

27. In *R v MacPherson* (MWO), 2022 CMAC 8, the CMAC dismissed the Minister's appeal which contended that the MJ erred by finding it lacked jurisdiction over a sexual assault allegedly committed in 1998. The CMAC concluded that the amendment to s. 70 of the *NDA* does not apply

retrospectively and accordingly, service tribunals do not have jurisdiction to try sexual assault offences alleged to have occurred in Canada prior to September 1, 1999.

28. In *R v Stewart* (S3), 2022 CMAC 9, the member appealed on the basis that the MJ erroneously dismissed the member's application pursuant s. 278.93 CCC to introduce evidence of the complainant's "other sexual activity" and erroneously dismissed the member's lost evidence application by ruling the complainant's lost statement simply did not exist. The CMAC decided the MJ's erred in concluding that the proposed evidence of the complainant's "other sexual activity" was irrelevant, and that the Appellant proposed to rely on statutorily prohibited inferences required a new trial. The appeal was allowed, and the matter was remitted to Court Martial for a new trial.

29. In *R v Bruyère* (Pte), 2023 CMAC 1, the Minister appealed on the basis that the sentence of the MJ was demonstrably unfit. In dismissing the Minister's appeal, the CMAC concluded that the MJ correctly applied the principles of sentencing indicating "this appeal goes to the very heart of the trial judge's discretion and does not point to any error that could justify this Court's intervention".

30. In *R v Vu* (Pte), 2023 CMAC 2, the Minister appealed on the basis that the MJ erred in finding that the prosecution had failed to prove lack of consent or capacity to consent. In dismissing the Minister's appeal, the CMAC, with one dissent, concluded the MJ did not make a legal error in the analysis which led to the acquittal.

31. In *R v Remington* (NCdt), 2023 CMAC 3, the CMAC dismissed the member's appeal of a conviction for sexual assault pursuant to s. 271 of the CCC. They appealed based on some of the issues raised in *Edwards et al, Proulx/Cloutier, Brown, Christmas and Thibault* (i.e. s 11(d) of the *Charter*). The member has filed an application for leave to appeal to the SCC, which is anticipated to be addressed upon the decision of the *R. v. Edwards et al*.

32. In *R. Zapata-Valles A. A.* (Cpl), 2023 CMAC 4, the Minister appealed claiming that MJ erred in finding the accused not guilty as there was no air of reality to the defence of honest but mistaken belief of consent. In dismissing the Minister's appeal, the CMAC concluded that the facts as found by the MJ correctly supported a finding of honest but mistaken belief of consent.

Appeals filed but not decided

By the Accused

33. In *R v El Zein* (Cpl), 2021 CM 3012, the member was found guilty of one count of sexual assault and sentenced to: 30 days imprisonment; reduction to the rank of private; and a \$5000 fine. The member appealed based on insufficient grounds with respect to the credibility of witnesses; an error of law by imposing a sentence higher than that requested by the parties

without allowing for additional arguments; and lack of judicial independence of the military tribunal under section 11(d) of the *Charter*. The judgment has not been delivered during the reporting period.

34. In the case of *R v Houde* (MCpl), 2022 CM 3006, the member was charged with: sexual assault causing bodily harm; two counts of sexual assault; and one count of distribution of an intimate image without consent, all pursuant to 130 of the *NDA*. He was found guilty of two counts of sexual assault and sentenced to 2 years imprisonment less a day. The member has filed a notice of appeal with grounds for the appeal to follow. The matter will be heard outside the reporting period.

35. In *R v W.C. Sutherland* (MCpl), 2023-02-28, the member was found guilty of one count of sexual assault and sentenced to six weeks detention. The member has filed a notice of appeal on the grounds that the MJ made multiple errors of law in their consideration and interpretation of the evidence and made a finding not supported by that evidence. The matter will be heard outside the reporting period.

36. In *R v Cookson* (Cpl retired), 2023 CM 2022, the member was found guilty of an offence pursuant to s 129 *NDA* for harassment by showing images of genitalia and sentenced to a fine of \$2,000.00. The member appealed based on an infringement of s 11(d) of the *Charter* in that MJs are not independent. The reasons for the appeal are identical to the case of *R. v Edwards et al*, currently before the SCC.

37. In *R v Turner* (MWO), 2022 CM 4002, the member was found guilty of sexual assault pursuant to s 271 of the CCC and sentenced to 9 months imprisonment and reduction in rank to Sgt. The member is appealing on a number of grounds including the judicial independence issue presently before the SCC in *Edwards et al*. The matter will be decided outside the reporting period.

By the Minister

38. In *R v Crouch* (Cpl), 2022-10-24, the member was found not guilty of two charges of indecent acts pursuant to section 130 of the *NDA* (s.173 CCC). The Minister has appealed the acquittal submitting that the MJ: allowed inadmissible evidence to be adduced at trial; failed to properly instruct the panel on appropriate evidentiary use of that evidence; and failed to correct improper remarks made by defence counsel in their closing address. The matter will be heard outside the reporting period.

39. In *R v Brousseau* (MCpl), unreported by the Court Martial during the reporting period, the member was charged with one count of sexual assault contrary to section 130 of the *NDA* (s. 271 CCC). The proceedings were terminated by the MJ. The Minister has appealed on the grounds of an error of law on the part of the MJ by allowing evidence of prior sexual conduct

and a finding of abuse of process on the part of prosecution. The matter will be heard outside the reporting period.

Appeal Abandoned

40. In *R. v Levesque J.R.* (PO1), 2023 CM 2001, the member was found guilty by a General Court Martial (GCM) of: sexual assault; assault; and uttering threats. They were sentenced to a severe reprimand and a \$7,000 fine. The Minister appealed on the basis that the MJ erred in their characterization of the seriousness of the offence and, accordingly, the sentence imposed was unfit. The member has filed a cross appeal on the basis that the GCM was influenced by exposure to inadmissible evidence which was not remedied by the instructions to the panel. The Minister abandoned their appeal and PO1 Levesque abandoned the cross-appeal.

Supreme Court of Canada

41. On 17 February 2023, the SCC issued its decision in the case of *R v. Corporal McGregor* 2023 SCC 4. The issue before the Court was the extraterritorial applicability of the *Canadian Charter of Rights and Freedoms (Charter)*. In dismissing the accused's appeal, the SCC determined that accused's rights under section 8 of the *Charter* were not infringed and, accordingly concluded that there was no need to consider the extraterritorial applicability of the *Charter*.

42. On 2 February 2023, the SCC granted the eight defendants leave to appeal in the case of *Leading Seaman Edwards, et al v. His Majesty the King*. The issue is whether the *NDA* violates the right of accused persons to be tried by an independent and impartial tribunal guaranteed under paragraph 11(d) of the *Charter* insofar as they prescribe military judges be CF officers. It is anticipated that oral submissions will be made to the SCC in the fall of 2023.

Activities

43. The Director participates in regular tri-lateral meetings with the Acting Chief MJ and the Director of Military Prosecutions where discussions are focussed on courts martial processes given the void of any formal rules of practice. Additionally, DCS takes part in the Military Justice Stakeholder meetings which are chaired by the JAG.

44. The Director responds, as appropriate, to consultation requests with respect to the implementation of recommendations of the various external reviews of the military justice system. Many of the recommendations have been reaffirmed by reviews over the past several years. The Director supports any change that enhances the rights of accused members and the independence of the DCS.

Professional Development

45. Due to the COVID pandemic, professional development opportunities have been limited to *ad hoc* on-line individual legal training, the National Criminal Law Program and the virtual JAG Continuing Legal Education week.

CONCLUSION

46. As my first report as Director, I convey that this year again, legal officers within DCS have provided outstanding legal services to qualifying members of the military community who request our assistance. I am particularly proud of our legal officers who responded to the call of duty and travelled throughout Canada to protect the rights of our members in the context of the pandemic. We owe them great respect for their fearless representation of our members.

47. The Director's priority is to promote an inclusive environment where clients can establish a trusting solicitor-client relationship while ensuring that their defence counsel is professionally competent and independent from government.

N. Ahmed
Colonel
Director of Defence Counsel Services

15 Aug 2023