



National
Defence

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ANNUAL REPORT 2021- 2022

**Director
Defence
Counsel
Services**



OVERVIEW

1. This report covers the period from 1 April 2021 to 31 March 2022. 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 (the Director) and requires that he report annually to the Judge Advocate General (the JAG) on the provision of legal services and the performance of other duties undertaken in furtherance of the mandate of Defence Counsel Services (DCS).

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." DCS is the organization that is responsible for assisting individuals exercise these rights.

3. The Director 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. No such directive was issued this year.

4. The Director is statutorily mandated at 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 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 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:

- 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;

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- 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.
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 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.
7. The statutory duties and functions of DCS are exercised in a manner consistent with our constitutional and professional responsibility to give precedence to the interests of clients.

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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 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

9. Throughout the reporting period, the organization has been situated in the Asticou Centre in Gatineau, Quebec.

Military Defence Counsel

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

11. For the first time in the history of DCS, the Director this year requested 5 new Regular Force positions.

12. These new positions are 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. These new positions would ensure that military defence counsel have comparable caseloads and supervision to military prosecutors. In addition, these new positions will make possible work-life balance and prevent detrimental turnover within DCS. They will allow much needed retention of litigation expertise and adequate succession planning. Better supervised military defence counsel will contribute to the reduction of delay in the military justice system. Finally, a more even balancing of prosecution and defence resources will favour the appearance of justice.

Administrative Support

13. 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

15. Under the *NDA*, the Director may hire civilian counsel to assist accused persons at public expense in cases where, having received a request for representation by DCS, no uniformed

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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 DCS' 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 advise and/or represent members in 7 files.

Funding

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

FUND		EXPENDITURE
C125	Contracting (Counsel, Experts, and Services)	\$202,181.47
L101	Operating Expenditures	\$9,808.75
L111	Civilian Pay and Allowances	\$195,666.64
L127	Primary Res Pay, Allowance, Ops, Maintenance	\$430,300.27
TOTAL		\$837,957.13

17. This amount is less than our initial operating budget of \$859,350.00 and represents stable funding over the past few years.

SERVICES, ACTIVITIES AND TRAINING

Duty Counsel Services

18. Legal advice is available 24 hours a day, seven days a week, to members who are under investigation or in custody. Duty counsel receives 10 to 15 calls per day and sometimes more. 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

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

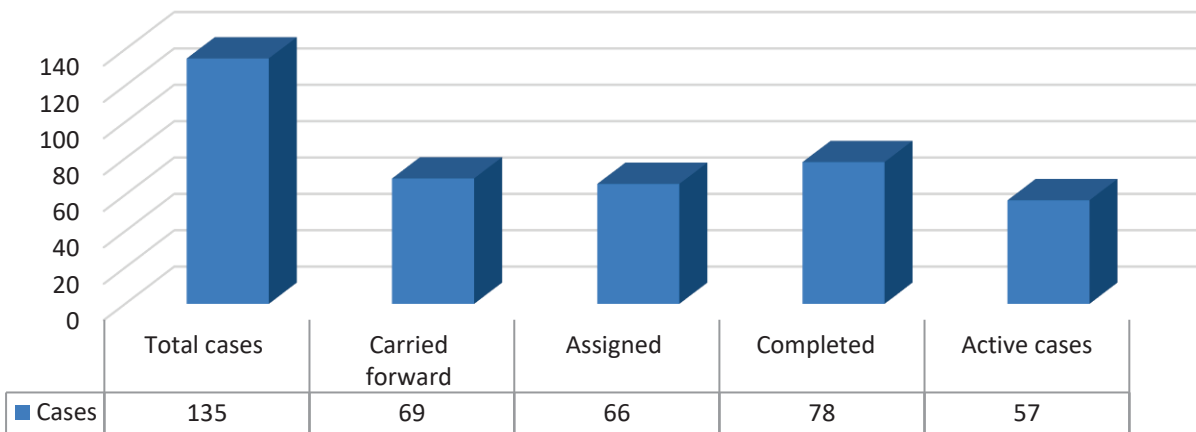
20. During this reporting period, 66 members requested legal counsel to the Director to be represented at court martial. When combined with the 69 cases carried over from the previous reporting period, the caseload for this reporting period was 135 cases.

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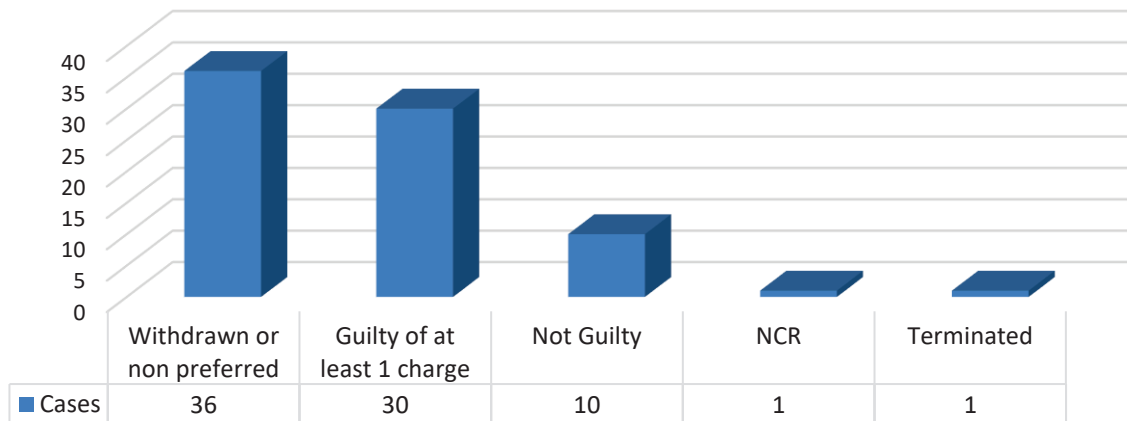
21. Of those 135, 78 cases were completed. And of those 78, 36 members represented by military defence counsel had their charges either withdrawn or not preferred before the convening of a court martial.

22. Military defence counsel represented the accused in 42 courts martial during this reporting period. In 10 cases, the accused was found not guilty of all charges. In 30 cases, the accused was either found guilty or pled guilty to at least one charge. In 1 case, the proceedings were terminated; and in 1 case, the accused was found not criminally responsible for cause of mental disorder (NCR).

DCS Court Martial Cases Fiscal Year 2021-2022



Results of Court Martial Cases Fiscal Year 2021-2022



Appeal Court Services

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

24. DCS worked on 1 appeal before the Supreme Court of Canada (SCC), for which leave was granted, and 17 appeals before the Court Martial Appeal Court of Canada (CMAC). 12 appeals were filed by the Minister and 6 were filed on behalf of the accused. DCS also filed applications for leave to appeal at the SCC in 8 cases.

Supreme Court of Canada

25. The SCC granted leave to appeal the judgment of the CMAC, *R. v. McGregor*, 2020 CMAC 8. The issue is about the extraterritorial application of the *Canadian Charter of Rights and Freedoms (Charter)*. The hearing of this case is scheduled on May 15, 2022, and will be discussed in the next annual report.

26. The Appeal Committee granted the request for legal representation at public expense of LS Edwards and seven other members (*Edwards et al.*) to file applications for leave to appeal to the SCC. The issue is the independence of the military judge under s. 11d) of the *Charter*. The SCC judgments on leave are under reserve.

Court Martial Appeal Court of Canada

27. In the 8 cases for which leave to appeal to the SCC was requested (*R v Edwards et al.*), the CMAC found that military judges are independent in accordance with s. 11d) of the *Charter*.

28. In *R v Lévesque*, the CMAC found that the military judge erred in law in ordering the member to be incarcerated in a military prison as opposed to a civilian prison.

29. In the case of *R v Pépin*, 2022 CMAC 4, the CMAC dismissed the appeal finding that the military judge correctly concluded that the accused *Charter* right to silence and right to counsel had not been breached. The CMAC further concluded that a WD instruction to the jury was not necessary in the circumstances.

30. In *R v Thibault*, 2022 CMAC 3, the CMAC dismissed the appeal. The military judge correctly applied the burden of proof and committed an error of little importance in failing to consider evidence of three witnesses that the complainant and the appellant were laughing together in

bed immediately following the sexual activity – despite the fact the complainant denied this evidence.

31. In *R v Euler*, the Minister appealed and contended that the military judge acquitted the accused because she required corroboration of the complainant’s testimony. Corporal Euler contended that the Military Judge did not require corroboration.

32. In *R v MacPherson*, the Minister appealed and argued that the military judge erred by finding it lacked jurisdiction over a sexual assault allegedly committed back in 1998. The appeal was heard and judgment is pending.

33. In *R v Vu*, the Minister is appealing on the basis that the military judge erred in concluding that there could be no reasonable doubt that the complainant was incapable to consent. The appeal has not yet been heard.

34. In *R v Stewart*, the member appealed for two reasons. First, the military judge erroneously dismissed the appellant’s application under s. 278.93 to introduce evidence of the complainant’s “other sexual activity”. Second, the military judge erroneously dismissed the appellant’s lost evidence application by ruling the complainant’s lost statement simply did not exist. The appeal has not yet been heard.

35. In *R v Turner*, the member is appealing on a number of grounds including the judicial independence issue presently before the SCC in the application for leave to appeal in *Edwards et al*. Factums have not been produced to date.

36. In *R v Bruyère*, the Minister is appealing the sentence. Factums have not been produced to date.

Professional Development

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

CONCLUSION

38. 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 courageously travelled throughout Canada to protect the rights of our members in the context of the pandemic. We owe them our greatest respect for their dedication.

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39. My priority has always been to promote an environment where clients can trust that their defence counsel is not only professionally competent but also independent from government.

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Mark Létourneau
Commander
Assistant Director of Defence Counsel Services

29 June 2022