



National
Defence

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ANNUAL REPORT 2023- 2024

**Director
Defence
Counsel
Services**

OVERVIEW

1. This report covers the period from 1 April 2023 to 31 March 2024. It is prepared in accordance with Article 101.11(4) of *Queen's Regulations and Orders for the Canadian Armed 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). 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 (CM), 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;
- b) arrested or detained, in the 48-hour period within which the custody review officer must decide 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 resulting from a Summary Hearing;
6. Legal representation by assigned counsel is provided in situations where:
- a) custody review officers decline to release an arrested individual, 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 our 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 accused members 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.

9. Bill C-66, *An Act to amend the National Defence Act and other Acts, (Military Justice System Modernization Act)* received first reading on 21 March 2024. If the Bill is enacted by Parliament, Courts Martial will no longer have jurisdiction to try a person in relation to an offence under the *Criminal Code of Canada* that is alleged to have been committed in Canada and that is of a sexual nature or committed for a sexual purpose – this covers over 25 *Criminal Code* sexual offences (CCSO). It is anticipated the Bill may have an impact on the number of Courts Martial. However, more importantly, if the Bill passes, persons charged with a CCSO will no longer be entitled to representation by DCS counsel because the cases will be prosecuted in the civilian criminal justice system. Access to justice for our members will be negatively affected if there remains no policy to provide them with legal representation.

THE ORGANIZATION, ADMINISTRATION AND PERSONNEL OF DEFENCE COUNSEL SERVICES

10. Throughout the reporting period, the organization has been physically situated at the Asticou Centre in Gatineau, Quebec, although a remote and hybrid work posture is in place. Discussions regarding a re-location of the DCS offices within the National Capital Region continue.

Military Defence Counsel

11. The office consisted of the Director, the Acting Assistant Director, and 5 Regular Force legal officers. In addition, the team included 1 Reserve Force legal officer working full time and 6 Reserve Forces legal officers working part-time at various locations in Canada.

12. During the reporting year, one legal officer was posted from DCS to the Military Justice Modernization Division to support the implementation of recommendations from external reviews.

13. The JAG informed DDCS that 25 legal officers had provided DCS as one their posting preferences. Given posting cycles and movement of personnel, it is anticipated that the following reporting year will include some personnel changes.

14. This year again, 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

15. 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. The Business Plan 2024-2025 submitted by the DDCS requested these administrative positions be upgraded to more accurately the nature of the work.

Civilian Counsel

16. 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 is able to represent the individual. Contracting occurs for several reasons but primarily as a result of a conflict of interest, often involving DCS' representation of a co-accused. During this reporting period, the Director contracted civilian counsel to advise and/or represent members in 9 files.

Funding

17. During this fiscal year, the following funds were expended:

FUND		EXPENDITURE
C125	Courts Martial Costs (Counsel, Experts, Travel & Services)	\$464,535.79
L101	Operating Expenditures	\$32,560.65
L111	Civilian Pay and Allowances	\$230,254.20
C127 (Pay)	Primary Res Pay, Allowances	\$204,375.61
C127 (O&M)	Ops, Maintenance	\$7,518.71
TOTAL		\$939,244.96

18. This amount is slightly lower than the previous year due to the unpredictability of the number of cases and length and location of trials.

SERVICES, ACTIVITIES AND TRAINING**Duty Counsel Services**

19. 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, on average, 10 to 15 calls per day. Legal advice is typically provided through our 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.

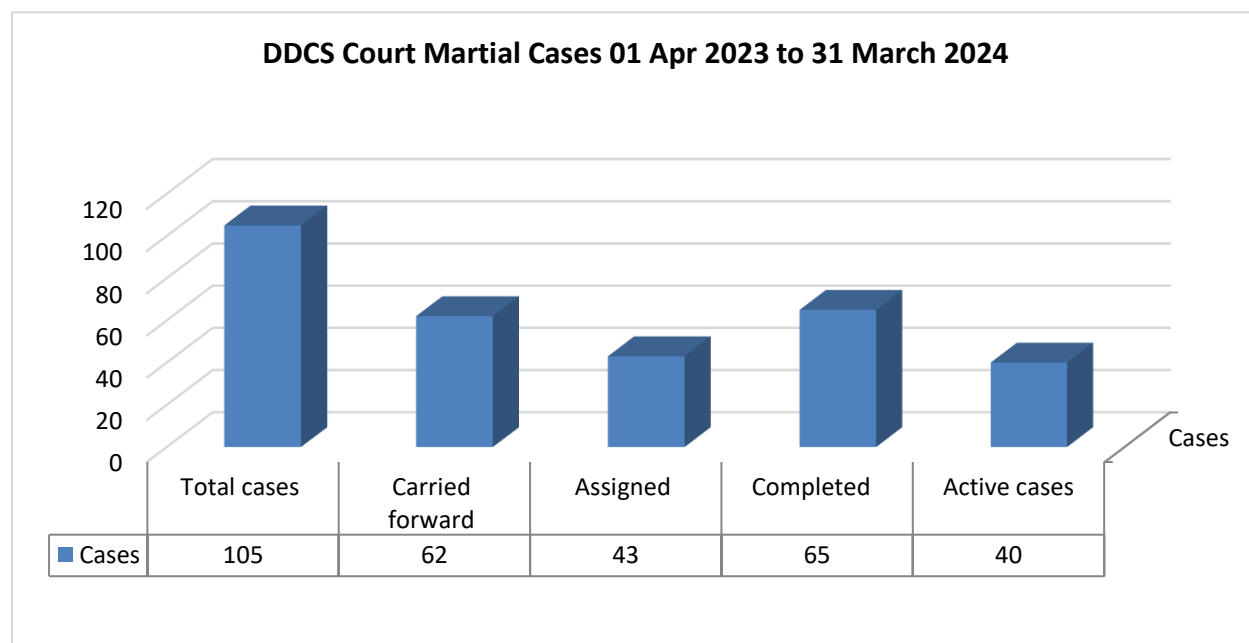
Court Martial Services

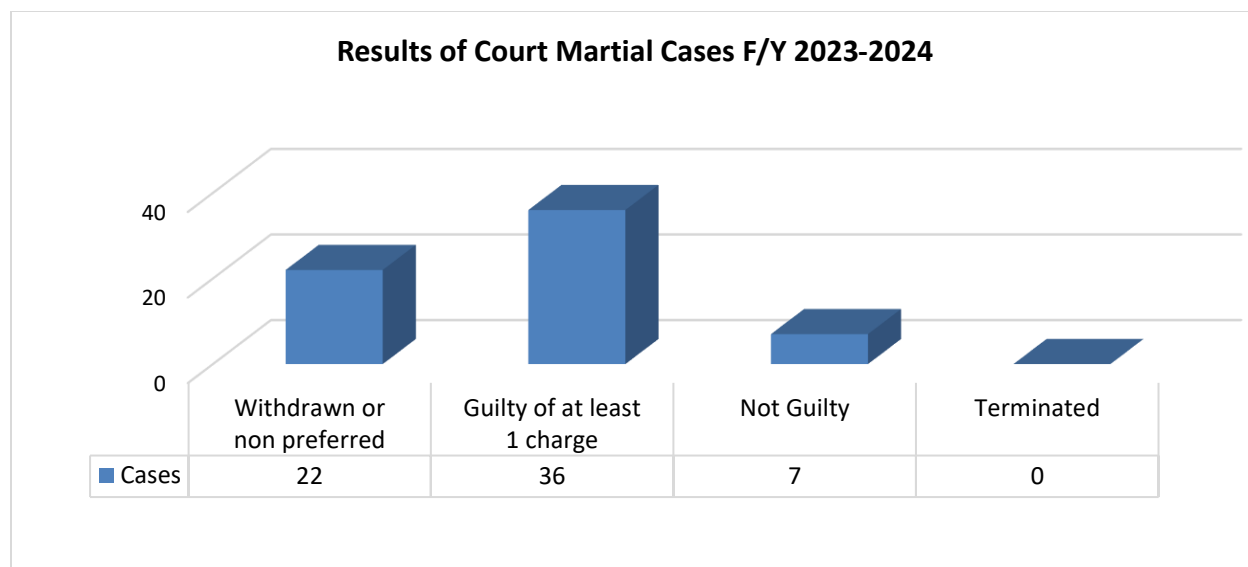
20. When facing court martial, accused persons: have the right to be represented by DCS counsel at public expense; may retain legal counsel at their own expense; or may choose not to be represented by counsel.

21. During this reporting period, 43 members requested legal counsel to the Director to be represented at court martial. When combined with the 62 cases carried over from the previous reporting period, the caseload for this reporting period was 105 cases.

22. Of those 105, 65 cases were completed. And of those 65, 22 members represented by military defence counsel had their charges either withdrawn or not preferred before the convening of a Court Martial.

23. Military defence counsel represented the accused in 43 courts martial during this reporting period. In 7 cases, the accused was found not guilty of all charges. In 36 cases, the accused was either found guilty or pled guilty to at least one charge.





24. Of note, is the Court Martial case of *R v MWO Dacey*, 2023 CM 4009. The MJ made the following comments in sentencing the member for ill-treatment of a subordinate:

[22] The delay in bringing this matter to trial is concerning to me..., this delay caused stress and anxiety to MWO Dacey resulting in him being unable to render the full services that the CAF may require of him. In addition, his effective suspension from military duty between September 2021 and January 2022, apparently without compliance with the applicable regulations, caused MWO Dacey significant distress given the isolation he suffered.

[23] ...there is something ironic in sentencing an offender for ill-treating his subordinates when the treatment received by MWO Dacey from his own superiors in the period before his trial caused him so much pain. It is difficult to understand why MWO Dacey needed to be isolated from the entire military community for four months before suitable arrangements could be found which would isolate him from complainants, especially in a large location such as Garrison Edmonton.

[24] ...That delay is surprising considering the obligation at *QR&O* article 107.09 and section 162 of the *NDA* to deal expeditiously with charges that are laid. It is also surprising given the applicable guidelines for time to perform these tasks...

DCS has experienced several cases wherein members' health has been negatively affected by protracted disciplinary proceedings or where the proceedings have negatively impacted their ability to serve the CAF. This aspect of the military justice system has been briefed to Armed Forces Council.

Legal Services at Appeal Courts

25. 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 MND may receive representation by DCS as a matter of right.

26. DCS worked on 14 appeals before the SCC, for which leave was granted in 9 cases (consolidated into 1) and a decision on leave to appeal is pending in 5 cases. DCS worked on 14 appeals before the CMAC (4 appeals were filed by the MND and 10 were filed by the accused).

Court Martial Appeal Court of Canada

Decided Cases

27. In *R v Turner (Sgt)*, 2023 CMAC 6, the CMAC dismissed the member's appeal. The member appealed on the grounds of errors of law in that the MJ erred in refusing to grant adjournments and restricting defence cross-examination of the complainant. The member also appealed on the issue of judicial independence as was raised before the SCC in the case of *R v Edwards et al.* The CMAC refused to interfere with the MJ's discretion related to the adjournment requests and affirmed the decision to limit the cross-examination of the complainant. The CMAC re-affirmed its position that there is no merit to the assertion the MJ lacked independence. An application for leave to appeal to the SCC was filed and will be decided along with *R v Edwards et al.*

28. In *R v El Zein (Cpl)*, 2023 CMAC 9, the CMAC dismissed the member's appeal. The member appealed on the grounds of an error in law in that the MJ provided insufficient and unreasonable reasons concerning the appellant's credibility. The appellant claimed the MJ rejected his version of the facts on illogical grounds which undermined the reasonableness of his verdict. The CMAC concluded it must show deference to the MJ and concluded there were no grounds to intervene. The member also requested leave to appeal on the severity of sentence because the MJ did not accept the joint submission seeking detention and sentenced him to imprisonment. The appeal of sentence was allowed, and the CMAC varied the MJ's sentence from 30 days imprisonment to 30 days detention. The member has filed, with the SCC, an application for leave to appeal.

29. In *R v Zapata-Valles (Cpl)*, 2023 CMAC 4, the CMAC dismissed the MND's appeal. The MND appealed the acquittal of the member claiming the MJ erred in finding the accused not guilty based on a determination that the accused had an honest but mistaken belief in consent despite there being no air of reality to that defence. The CMAC indicated it was satisfied that the facts as found by the MJ supported a finding that the Respondent had an honest but mistaken belief that the complainant consented. The Court refused to second guess the MJ in relation to findings of fact, especially where those findings were supported by the evidence.

30. In *R v Crouch (Cpl)*, 2023 CMAC 11, the CMAC dismissed the MND's appeal. The MND appealed the acquittals, of two counts of indecent acts, on the basis that the MJ allowed inferences of myths and stereotypes relating to the complainant to go before the panel and then failed to sufficiently instruct the panel to disregard those inferences when assessing the complainant's credibility. In dismissing the appeal, it was concluded that any error at trial had no material effect on the verdict.

31. In *R v Cookson (Cpl)*, 2023 CMAC 8, the CMAC dismissed the member's appeal that the MJ was not independent and impartial. The Court maintained its view from previous decisions. The member has filed, with the SCC, an application for leave to appeal.

32. In *R v Ellison (Maj)*, 2024 CMAC 3, the CMAC allowed the MND's appeal and ordered a new trial. The member was acquitted of four fraud-related charges. The MND appealed on the ground that the MJ erred in the application of the no *prima facie* case test.

Appeals filed but not decided

By the Accused

33. In *R v Houde (MCpl)*, 2023 CM 3011, (CMAC-631) the member was found guilty of two counts of sexual assault and sentenced to 42 months imprisonment. The member appealed the convictions and was granted an extension to file their memorandum of fact and law. Due to a conflict of interest the member's counsel was removed as counsel of record. On this basis, a second request for an extension to file their memorandum of fact and law was filed but not granted (*R v Houde*, 2023 CMAC 10). The Court is current seized of two applications. The first is by the MND who submits the appeal should be rejected for failure to file a memorandum of fact and law on time and the second by the appellant who submits the appeal should be re-started following an Order issued 24 October 2023. The Court concluded that the appeal on its merits may continue.

34. In *R v W.C. Sutherland (MCpl)*, 2023 CM 2001, the member was found guilty of one count of sexual assault and sentenced to six weeks detention. The member appealed 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.

35. In *R v O'Dell (Cpl)*, 2023 CM 5004, the member was found guilty of one count of sexual assault and sentenced to detention for six weeks. The member appealed on the grounds that the MJ made multiple errors of law in declaring certain evidence as self-serving and improperly applying the current state of the *Sexual Offender Identification and Registry Act (SOIRA)*.

36. In *R v J.L. (Pte)*, 2023 CM 2010, the member was convicted of one count of sexual assault and one count of disgraceful conduct and granted an absolute discharge. The member

was 17 years old on the date of the offences – a young offender. The member appealed the convictions submitting that the *NDA* is inconsistent with the principle of fundamental justice entitling young persons to a presumption of diminished moral culpability as required by the *Youth Criminal Justice Act*.

37. In *R v Meeks (Sgt)*, 2022 CM 2016, the member was tried on one count of aggravated assault and one count of assault, they were found guilty of the lesser charge of assault causing bodily harm and sentenced to 30 days detention. The member appealed on the grounds that MJ are not independent and impartial and on the grounds that the administrative release from the CAF of the member renders the punishment of detention inoperative.

38. In *R v Kohlsmith (Sgt)*, decision unreported at the time of writing, the member was found guilty of one charge of sexual assault and sentenced to 36 months imprisonment. They appealed on the grounds that errors committed by the MJ related to the admission of bad character evidence, inadmissibility of evidence of prior sexual activity, and denial of applications for unreasonable delay, rendered the trial unfair.

39. In *R v Houde (MCpl)* (CMAC-644), decision unreported at the time of writing, the member was found guilty of two counts of sexual assault and sentenced to two years less a day imprisonment. They appealed based on multiple errors including: the right to an independent and impartial MJ; an error in finding the right to a trial within a reasonable time had not been violated; and an error in finding that there was an absence of a motive to fabricate by the complainant.

By the MND

40. In *R v Brosseau (MCpl)*, 2023 CM 4005, the member was charged with one count of sexual assault. The proceedings were terminated by the MJ. The MND appealed on the grounds of an error of law on the part of the MJ by allowing evidence of prior sexual conduct and finding an abuse of process.

Supreme Court of Canada

41. On January 16, 2024, the SCC heard the appeal of *His Majesty the King v Pte Vu*, 2024 SCC 1. The member was acquitted of sexual assault before the Court Martial. The MND appealed to the CMAC submitting that the MJ failed to consider all the evidence cumulatively and assessed the evidence on incorrect legal principles. The CMAC panel dismissed the appeal but, with one dissent, the MND appealed the decision, as of right, to the SCC. The SCC dismissed the appeal (6-1) for the reasons of the majority of the CMAC.

42. On October 16, 2023, the SCC heard the appeals of *Leading Seaman Edwards, et al v. His Majesty the King*. The principal issue was whether the *NDA* violated the right of accused persons

to be tried by an independent and impartial tribunal guaranteed under paragraph 11(d) of the *Charter* insofar as it prescribes MJIs be CAF officers. The decision was reserved.

43. Application for leave to appeal was filed with the SCC on 3 other cases with the decisions held in abeyance pending the decision *R v Edwards, et al*

Activities

44. The Director:
- a. participated in regular tri-lateral meetings with the Acting Chief MJ and the Director of Military Prosecutions where discussions focus on courts martial processes given the void of any formal rules of practice;
 - b. participated in the Military Justice Stakeholder meetings chaired by the JAG; and
 - c. briefed the Armed Forces Counsel on DCS activities in March 2024.

45. The Director responded to consultation requests regarding the implementation of recommendations from external reviews of the military justice system. Many of the recommendations have been reaffirmed and repeated by reviews over the past several years. The Director supports any change that enhances the rights of accused members and the independence of DCS.

Professional Development

46. Professional development opportunities have included *ad hoc* on-line individual legal training, the annual OJAG Continuing Legal Education Conference (with one day focussed on DCS-related topics), and the National Criminal Law Program held in Montreal, 10-14 July 2023.

CONCLUSION

47. Being my second report as Director, I convey that this year again, legal officers within DCS have provided outstanding legal services to members of the military community who request our assistance. I am particularly proud of our legal officers who provided 24/7 legal advice and travelled throughout Canada to protect the rights of our members who are being prosecuted under the NDA. All members of DCS are resilient individuals who ensure they maintain a healthy and balanced lifestyle so they may best serve their clients.

48. 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

7 August 2024