



National  
Défence

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# ***ANNUAL REPORT 2020- 2021***

**Director  
Defence  
Counsel  
Services**



### OVERVIEW

1. This report covers the period from 1 April 2020 to 31 March 2021. 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.

2. During the pandemic, 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. No such directive was issued this year.

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, as this year, the Federal Court.

6. Legal advice is provided in situations where:

## *DEFENCE COUNSEL SERVICES*

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- 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 and 6 trial counsel at the rank of major/lieutenant-commander. In addition to these Regular Force officers, 7 Reserve Force legal officers at various locations in Canada assisted on matters part-time.

#### **Administrative Support**

11. 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. Many AS-1 positions within the Office of the Judge Advocate General have been reviewed. Our AS-1 position will be reclassified as a CR-5 position.

#### **Regular Force Resources**

12. 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 2 months.

#### **Reserve Counsel**

13. As indicated, at the commencement of the year there were a total of 7 Reserve Force defence counsel within the organization.

14. Our Reserve Force counsel are located throughout Canada; with one in Newfoundland & Labrador, one 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.

## **DEFENCE COUNSEL SERVICES**

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### **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 counsels were hired by the director to represent members in 2 files.

### **Funding**

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

<b>FUND</b>		<b>EXPENDITURE</b>
C125	Contracting (Counsel, Experts, and Services)	\$134,703.07
L101	Operating Expenditures	\$6,928.40
L111	Civilian Pay and Allowances	\$206,041.53
L127	Primary Res Pay, Allowance, Ops, Maintenance	\$419,987.84
<b>TOTAL</b>		<b>\$767,660.84</b>

17. This amount is less than our initial operating budget of \$792,115.00 and represents stable funding over the past few years. Expenditures related to the Primary Reserve have increased because: (1) 4 reservist captains have undergone their mandatory training to become qualified legal officer within the Office of the Judge-Advocate General; (2) regular attendance of our 7 reservists to weekly virtual meetings as a result of the pandemic; and (3), files were assigned to reservists geographically proximate to court martial hearings to minimize air travel of regular force defence counsel in the context of the pandemic.

## **SERVICES, ACTIVITIES AND TRAINING**

### **Duty Counsel Services**

18. Legal advice is available twenty-four 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.

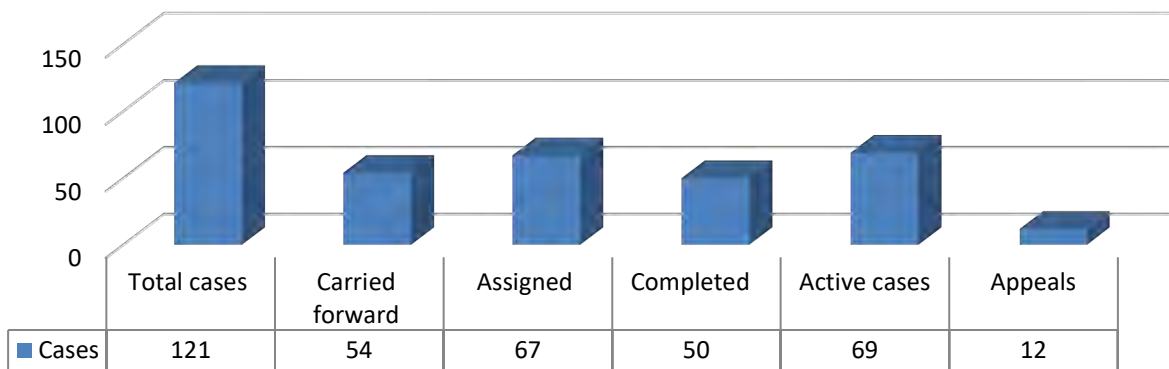
## *DEFENCE COUNSEL SERVICES*

### Court Martial Services

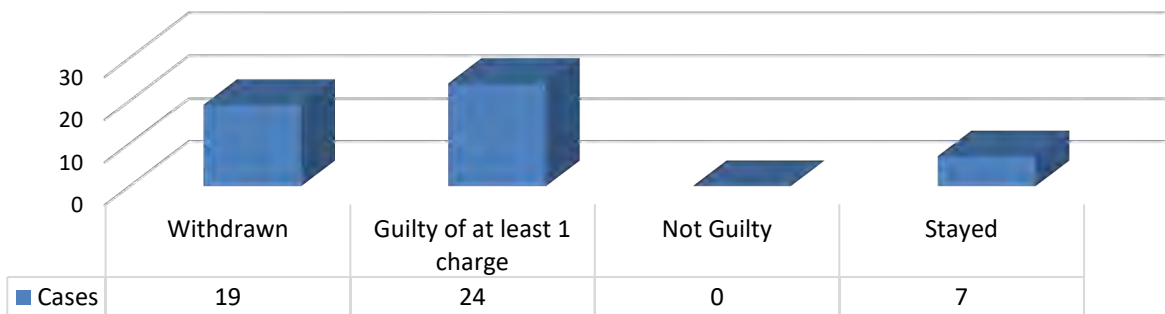
19. When facing court martial, accused persons have the right to be represented by lawyers from Defence Counsel Services at public expense, they may retain legal counsel at their own expense, or they may choose not to be represented by counsel.

20. Defence Counsel Services provided legal representation to accused persons in 121 cases referred for prosecution before a court martial. This number includes 54 cases carried over from the previous reporting year. It also includes 67 new cases assigned by the Director during this reporting period. Of these 121 cases, 50 were completed. Of these 50, 19 members had their charges withdrawn. Of the remaining 31 cases, 7 cases were stayed and in 24 cases the accused was either found guilty or pled guilty to at least one charge. Eleven cases are under appeal.

**DDCS Cases - 01 Apr 2020 to 31 March 2021**



**Results of Completed Cases - 01 Apr 2020 to 31 March 2021**



### Appellate Services

21. Ten 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. Seven appeals were filed by the Minister and 3 were filed on behalf of the accused.

22. 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 assesses 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*

23. On 29 January 2021, the Appeal Committee granted the request of Cpl McGregor for legal representation at public expense for the purpose of filing an application for leave to appeal to the Supreme Court of Canada (the “SCC”) from the judgment of the CMAC, *R. v. McGregor*, 2020 CMAC 8. The question raised is about the extraterritorial application of the *Canadian Charter of Rights and Freedoms*. The SCC judgment on leave is under reserve.

### *Court Martial Appeal Court*

24. In the cases of *R v Crepeau*, 2020 CM 3007, *R v Edwards*, 2020 CM 3006, *R v Fontaine*, 2020 CM 3008 and *R v Iredale*, 2020 CM 4011, the military judge found that the court martial was not an independent and impartial tribunal under s. 11d) of the *Charter* because sitting military judges can be charged under the Code of Service Discipline. Stays of proceedings were ordered. The Minister appealed these cases. Judgment is under reserve.

25. In the cases *R v Christmas*, 2020 CM 3009, *R v Proulx*, 2020 CM 4012 and in *R v Cloutier*, 2020 CM 4013, the military judge also found that the court martial was not independent. Again, stays of proceedings were ordered, and again, the Minister appealed these cases. Judgment is under reserve.

26. In the case of *R v Lévesque*, docket 201962, the appeal is about whether the military judge erred in law in ordering the member to be incarcerated in a military prison as opposed to a civilian prison. The hearing is expected in the next months.

27. In the case of *R v Pépin*, 2021 CM 3005, the member appeals his conviction before a General Court Martial for theft and conduct to the prejudice of good order and discipline. Several grounds of appeal are raised, some of which are related to the *WD* warning, voluntariness of statements to a person in authority and a *no prima facie* case application.

28. In *R v Thibault*, 2021 CM 5002, the member appeals his conviction of sexual assault in which a sentence of incarceration for 18 months was imposed. The grounds of appeal relate to

the required legal analysis to assess the credibility of the accused. (Of note, the Federal Court of Canada was seized of this matter after the military judge had stated that she would recuse herself, but later decided not to do so. The Federal Court dismissed the member's Application for an interim prohibition order.)

### **Professional Development**

29. Due to the COVID pandemic, professional development opportunities have been limited to *ad hoc* on-line individual legal training.

### **CONCLUSION**

30. This year again, legal officers within Defence Counsel Services 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. My priority remains to promote an environment where clients can trust that their defence counsel is not only professionally competent but also independent from government.

J-B. Cloutier  
Colonel  
Director of Defence Counsel Services

May 2021