



Défense nationale

National Defence

Service d'avocats de la défense
Centre Asticou, Bloc 300
241 boulevard Cité des jeunes
GATINEAU (Québec) Canada J8Y 6L2
Tél : (819) 994-9151

Defence Counsel Services
Asticou Centre, Block 300
241 Cité des jeunes Blvd
GATINEAU (Québec) Canada J8Y 6L2
Fax : (819) 997-6322

Annex X
to CMCRT Draft Interim Report
dated 21 July 17

QGDN Ottawa, On. K1A 0K2

NDHQ Ottawa ON, K1A 0K2

3 November 2016

Distribution List

DEFENCE COUNSEL SERVICES AND THE COURT MARTIAL COMPREHENSIVE REVIEW

I am writing after reviewing some of the materials posted on-line in furtherance of the above-captioned study and also after reading some of the comments made within the media.

It has been roughly seventeen years since the present system for processing charges to courts martial was legislated and I support the above review. I strongly believe that it is time to look closely at what we are doing as legal officers within the Military Justice System and to assess whether our systems and activities are sufficiently focussed towards both supporting the greater mission and operational effectiveness of the Canadian Forces and towards minimizing unnecessary interference with the rights of CAF members to whom the system applies.

As the Director of Defence Counsel Services I am, pursuant to section 249.19 of the *National Defence Act*, mandated as the person who, "provides" and "supervises" and "directs the provision of" legal services to those charged and tried under the Code Of Service Discipline. The purpose of this letter is to assure each of you that members are being effectively represented and that the money spent reflects value for the resources allotted.

Defence Counsel Services effectively represents members at courts martial

With respect to the first issue, there is some discussion within the materials and the media that there were only 47 courts martial held during the fiscal year 2015-2016 and only 11 contested trials. As indicated in the Defence Counsel Services Annual Report for this period, 44 of these accused persons were represented by DCS counsel at their courts martial. However, these statistics present an incomplete picture of the effectiveness of DCS lawyers in representing their clients.

Between 1 April 2015 and 31 March 2016 our records indicate that 79 individuals turned to DCS lawyers to represent them at Courts Martial. Of these 79, 35 had their charges withdrawn without trial but after some level of intervention by lawyers from DCS. These interventions included motions and submissions based a number of issues including abuse of process, the unconstitutionality of NDA section 129(2), non-compliance with mandated Official Language requirements, violations of the right to counsel, violations of the right against arbitrary detention, and further information related to the public interest in proceeding, among other issues raised.

Of the remaining 44 accused who went to court martial represented by DCS counsel, roughly three quarters went to negotiated settlements on some but not all charges. Often the charge sheets were withdrawn and replaced with a charge sheet representing these negotiated conclusions. Of the 11 cases that simply went to trial on the issue of guilt or innocence, 6 were found not guilty of all charges and 5 were found not guilty of some of the charges they were facing.

These trends continue, and since 1 April 2016, Defence Counsel Services has assigned counsel for 140 accused whose charges have been referred to courts martial. Of these cases, 22 have had the charges withdrawn, 7 have been found not guilty of all charges, 5 have been found guilty of some charges and not guilty of others and 2 cases have been sent back to summary trial. Our records indicate that 9 individuals have been found guilty of the offences as alleged.

Defence Counsel Services represents value for the resources allotted

In addition to representing individuals at trial, the lawyers posted to Defence Counsel Services are engaged in other activities on behalf of clients and these activities are only inferentially presented to the public as part of the Court Martial Comprehensive Review. This is not surprising since, as the name indicates, this review focusses squarely on the litigation process at first instance within the forum of courts martial. This is, however, just one part of the mandate of the Defence Counsel Services office and the resources devoted to DCS are not narrowly focussed on this process.

Duty Counsel Line

In addition to representing members at courts martial, the 7 Regular Force and 4 class A Reserve Counsel who, in addition to myself, make up the office, are responsible to run a military Duty Counsel line which advises members who are under arrest, detained, under investigation and asked to make a statement, or otherwise being conscripted against themselves.

This line also assists members of the CAF facing summary trial by providing general advice in respect of that process, by providing advice surrounding elections for summary trial or court martial and by providing some assistance respecting requests for review of convictions.

The duty counsel line is manned on a rotating schedule 7 days per week, 24 hours per day and in the last complete fiscal year 1,656 members of the CAF were assisted through this means.

Appellate Advocacy

Further, the lawyers posted to this office have been required to run a vigorous and sometimes difficult appellate litigation schedule at the levels of both the Court Martial Appeal Court (CMAC) and the Supreme Court of Canada (SCC). During my 6 years as Director, the office has been required to respond to four appeals, or applications for leave to appeal, by the Director of Military Prosecutions to the Supreme Court of Canada: St-Onge, Wehmeier, Cawthorne and Gagnon et al. These cases have involved such fundamental issues as the extent to which former members of the CAF who are now civilians can be subject to various custodial sentences, the extent to which civilians in Canada can be tried by courts martial, and the extent to which the MND can constitutionally engage in prosecutorial functions within the military system of discipline.

Additionally, appellate counsel from Defence Counsel Services have received leave from the Supreme Court of Canada on the issue of whether section 130(1)(a) of the *NDA*, which allows for the prosecution, within the geographic confines of Canada, of purely civilian offences normally handled by the civilian courts, was overbroad under section 7 of the Charter of Rights and Freedoms (*Moriarity, Hannah, Vezina and Arsenault*). In *Moriarity*, the Supreme Court left open the question of whether this would be better addressed under section 11(f) of the Charter and we presently await the judgement of the CMAC on this issue in cases involving 11 members of the CAF (*Wellwood et al*). We are also presently awaiting a decision of the SCC as to whether we will be granted leave to appeal on this issue in the case of MCpl Royes.

Members of the CAF have a right to be represented on appeal by lawyers from Defence Counsel Services in cases in which the member has won the issue and the Minister is attempting to change the result on appeal. In cases in which the member is appealing, he or she has the right to be represented at public expense, but only in those cases in which the Appeal Committee (composed of members nominated by the JAG, CDS and DDCS) have determined that the appeal has merit. Over the past six years, there have been a significant number of meritorious issues arising within our system, which is probably explained by the system's relative youth and the fact that we have, right now, some expertise within Defence Counsel Services such that many issues are being litigated for the first time. Some 20 appellate cases were addressed in the last fiscal year and we presently have 13 cases on which DCS counsel represent members either before the CMAC or the SCC.

Fiscal Responsibility

In Defence Counsel Services we have worked hard to carry out our duties and functions in a manner that is fiscally responsible. Throughout most of my 6 years as Director, there has normally been 16 regular force positions allotted to our prosecution colleagues and 8 regular force positions allotted to Defence Counsel Services. We have routinely defended 96% of the courts martial. We have consistently ensured that our budget for everything (including civilian support staff, reserve force legal officers, contracted counsel, temporary duty, experts, office equipment, appeals and miscellaneous costs) were well within the wage costs of just 6 majors on their larger establishment. We have routinely filed with the Supreme Court of Canada for well under \$5,000.00.

Of the 4 primary offices supporting the court martial system (CMJ, DMP, DJAG MJ and DDCS) we are the smallest. Our budget for the last fiscal year, divided by the 99 persons that we represented facing court martial or appeal, amounts to a very respectable cost per case of \$7,142.41 plus uniformed salaries. The work related to running the duty counsel line or to otherwise assisting members at summary trial is included in this number. This is a reasonable price to pay for quality specialized and deployable advice, representation and litigation on behalf of our members. Our numbers for the last fiscal year were as follows:

FUND		EXPENDITURE
C125	Contracting (Counsel, Experts, and Services)	\$107,867.11
L101	Operating Expenditures	\$61,105.55
L111	Civilian Pay and Allowances	\$179,133.49
L112	Primary Reserve Pay and Allowances	\$308,173.53
L115	Primary Reserve Operations and Maintenance	\$50,819.01
TOTAL		\$707,098.69

Court Martial Comprehensive Review and Ongoing Litigation

The Court Martial Comprehensive Review is important. It is important to review the purpose, efficacy, efficiency and legitimacy of the system. However, in doing so we must remain sensitive to the rights of members whose cases are on-going at trial and to the litigation presently before the Court Martial Appeal Court and Supreme Court of Canada with respect to section 11(f) and the scope of the exception for CAF members to the right to a jury trial. The judges of these courts are being called to examine the legitimacy of the system in the context of Charter section 11(f) and their decision will have an impact on the very issues currently under review. It is important to keep an open mind until this litigation concludes. Once the litigation is complete there will be a better understanding of the constitutional constraints of the system.

Conclusion

I am pleased that the system is being reviewed. I am proud of the work that members of this office have been doing in defending those charged within the Military Community. I am convinced that the work of those within my office, in articulating the issues before our courts, has already incidentally contributed to the present review. I have encouraged them, within the limits of their retainers and their schedules, to continue their dialogue and support for this review. I am concerned that some media reports highlighting the present slowdown of the system, and the resources allocated to it, may have inadvertently reflected negatively on both the system and the work of the lawyers within it. I remain convinced that a strong system of justice requires vigorous, competent, knowledgeable and adequately resourced deployable military defence counsel who are trained and experienced in the specialized practice of military law. This is critical to the functionality of the system and the ability of service members to have appropriate access to justice wherever they may be found. This, in turn, supports the operational effectiveness of the Canadian Armed Forces and the well-being of its members.



D.K. Fullerton
Colonel
Director Defence Counsel Services

Distribution List:

Action

Court Martial Comprehensive Review Team
Office of the Judge Advocate General
7th Floor – South Tower
101 Col By Drive
NDHQ

Information

The Hon. Harjit S. Sajjan, PC, OMM, MSM, CD, MP
Minister of National Defence
13th Floor – North Tower
101 Col By Drive
NDHQ

Gen J.H.Vance, CMM, MSC, CD
Chief of the Defence Staff
13th Floor – South Tower
101 Col By Drive
NDHQ

Mr. J. Forster, BSc, MBA
Deputy Minister of National Defence
13th Floor – South Tower
101 Col By Drive
NDHQ

VADM M.A.G. Norman, CMM, CD
Vice Chief of the Defence Staff
13th Floor- South Tower
101 Col By Drive
NDHQ

MGen B.B. Cathcart, OMM, CD, QC
Judge Advocate General,
JAG Suite
7th floor – South Tower
101 Col By Drive
NDHQ