

Annual Report of the Director of Defence Counsel Services

INTRODUCTION

1. This annual report covers the period from 1 April 2011 to 31 March 2012. It is prepared in accordance with article 101.20 of the *Queens' Regulations and Orders for the Canadian Forces (QR&O)* which sets out the legal services which are prescribed to be performed by the Director of Defence Counsel Services (DDCS) and requires the DDCS to report annually to the Judge Advocate General (JAG) on the provision of these legal services and the performance of other duties undertaken in the furtherance of the DDCS mandate. The Director during this period was Colonel D.K. Fullerton.

ROLE OF DDCS AND THE ORGANIZATION AND PERSONNEL OF DCS

Role of the DDCS

2. The DDCS is appointed by the Minister of National Defence under section 249.18 of the *National Defence Act (NDA)*. Although he acts under the general supervision of the JAG, he exercises his duties and functions independently and in a manner which is consistent with his responsibility to look to the individual interests of those who seek advice and representation from or through Defence Counsel Services. The DDCS provides, supervises and directs the provision of the following legal services, as set out in *QR&O* article 101.20:

- legal advice to arrested or detained persons
- legal counsel to an accused person where there are reasonable grounds to believe the accused person is unfit to stand trial
- legal advice of a general nature to an assisting officer or an accused person on matters relating to summary trials
- legal advice with respect to the making of an election to be tried by court martial
- legal counsel for a hearing addressing pre-trial custody under subsection 159(1) of the *NDA*
- legal counsel to an accused person in respect of whom an application to refer charges to court martial has been made
- legal counsel to the respondent where the Minister appeals a finding or sentence or the severity of a sentence awarded by court martial
- legal counsel to an appellant with the approval of the Appeal Committee established under *QR&O* article 101.21

- legal advice to a person who is the subject of an investigation under the Code Service Discipline, a summary investigation or a board of inquiry.

Organization and Personnel of DCS

3. During this reporting period the Office of DCS consisted of the Director, five Regular Force legal officers and one Reserve force legal officer on class B service working out of the Asticou Centre in Gatineau, Québec as well as five Reserve Force legal officers in practice at various locations in Canada. The Reserve Force counsel have been active participants in the provision of legal services and the performance of the Defence Counsel Services (DCS) mandate.

4. Administrative support is provided by two clerical personnel occupying positions classified at the level of CR3 and CR5 as well as a paralegal who provides legal research services and administrative support for courts martial and appeals.

5. Pursuant to section 249.2 of the *NDA* the Director of Defence Counsel Services acts under the general supervision of the JAG and the JAG may issue general instructions or guidelines in respect of Defence Counsel Services. However, during this reporting period no such general instructions or guidelines were issued.

SERVICES AND ACTIVITIES

Professional Development

6. The National Criminal Law Program is the primary source of training in criminal law for defence counsel with DCS. In July 2011 four Regular Force lawyers and three Reservists attended this program. Additionally, counsel attended a one-day DCS in-house training program which dealt with a variety of issues including developments in criminal law and decisions of the Court Martial Appeal Court (CMAC).

Duty Counsel Services

7. Bilingual service is available 24/7 to CF members, as well as to others who are subject to the Code of Service Discipline while serving abroad. DCS counsel provide verbal and written communications through a toll-free number that is distributed throughout the CF as well as a CSN number and via email, the popularity of which is growing. Usage was generally as follows:

- 1-800 access line to ensure availability of legal advice upon arrest or detention with the number provided to military police and other CF authorities likely to be involved in investigations of a disciplinary or criminal nature as well as being available on our website.
- Standard direct telephone access, available to accused persons subject to the *Code of Service Discipline*, for advice in relation to an election between court martial

and summary trial, questions on other disciplinary matters, or all other matters authorized under the QR&O.

- Clients occasionally use email to initiate contact with DCS.

During the reporting period, DCS counsel recorded 772 calls on the duty counsel line. The calls ranged in duration but, on average, were approximately 20 minutes. This is less than in previous years and it appears that counsel have failed to log into PMDSS, our record system, a number of calls. It is believed that the number of calls were similar to previous years. This deficiency has been addressed and we are now recording in excess of 100 calls per months which is consistent with our expectations.

Court Martial Services

8. When facing a court martial, an accused person has the right to be represented by DCS counsel at public expense, may retain legal counsel at his or her own expense, or may choose not to be represented.

9. Our records indicate that in fifty-four of the courts martial occurring during this reporting period the accused was represented by DCS officers. Pursuant to the authority granted under ss. 249.21(2) of the *NDA*, the DDCS may hire, at public expense, civilian counsel in cases where, having received a request for representation by DCS counsel, no member of the DCS office can represent the particular individual, for example because of a conflict of interest, or because no suitable DCS officer is available. During the reporting period, civilian counsel hired by DCS appeared at five courts martial. Two other cases involving contracted counsel were withdrawn. Two accused were represented by civilian counsel at their own expense.

Appellate Services

10. Eleven appeals were before the CMAC at various points during the 2011-2012 reporting period. In all but three of those cases the appeal was filed by, or on behalf of, the member of the Canadian Forces. Two of the cases have been subsequently abandoned by the appellant given that the Appeal Committee denied their request for DDCS representation at public expense.

11. In the three cases in which an appeal or cross-appeal was entered by DMP, the respondent was automatically entitled to representation by DCS counsel. In one case the appellant commenced his proceedings with the assistance of civilian counsel and entirely without recourse to DCS. During this period, appellants submitted to the Appeal Committee, pursuant to article 101.20(2)(h) of QR&O, eight requests for representation by DCS. Of these eight requests, six were approved by the Appeal Committee, and two were denied.

Some sense of the issues and tenor of the appeals during this period is given in the cases delineated in the appendix.

ONGOING ISSUES AND CONCERNS

12. A number of areas of concern were noted during the reporting period.

DCS personnel and administrative support

13. An issue of some concern during this period was the adequacy of the facilities housing DCS at Asticou Centre. In this respect, the number of offices available to DCS in this location was inadequate and we were encroaching on the facilities of the Canadian Forces Language School to accommodate our appeals paralegal. Further, the site offered inadequate room for file storage. DDCS has since found new facilities within Asticou Centre to which they moved in the 2012-2013 period.

14. The administrative assistant (CR-5) position requires re-evaluation and potential upgrading to an AS position to reflect the nature of the work performed. This would ensure a level of parity between that position and positions doing similar work within other organizations within the Canadian Forces. This would also ensure continuity of staffing within the office and that DCS remains an attractive place for experienced staff to work.

15. At the conclusion of this reporting period two of our Reserve Force defence counsel positions remain unfilled. We currently have reserve counsel in British Columbia, New Brunswick, Québec, and Ontario. The DCS reserve bar is an important resource which has and continues to make a significant contribution to the realization of our mandate.

Systemic Military Justice Issues

17. As a result of their duties, DCS personnel are in a unique position to observe systemic issues affecting the military justice system. Following are issues which I bring to your attention in your capacity as superintendent of the military justice system.

18. Offences within the military justice system are dealt with either by summary trial or courts martial. Approximately 95% of cases are dealt with by summary trial. In many cases the members have the right to elect court martial. This election is the “safety valve” within the system and ensures that members, should they desire, have access to legal counsel and be tried by a decision maker with all the legal hallmarks of an independent and impartial tribunal.

19. Notwithstanding the importance of this right, which is fundamental to the legitimacy of the summary trial process, there are barriers to its practical exercise.

- a. DCS counsel frequently hear from members who are charged with offences for which they have the right to elect trial by court martial and who indicate that they are experiencing some pressures in exercising that right. Sometime when they elect court martial, they are sent back for a further period to reconsider and re-elect. Sometime they are told that this election will have a

significant impact on career courses, career opportunities or generally on their career. While court martial can create difficulties for accused it is important that artificial obstacles to the exercise of the right be avoided.

- b. QR&O 110.04 allows DMP to prefer charges sent to him or “any other charges that are founded on facts disclosed by evidence in addition to or in substitution for the charge”. This provision is often exercised months or sometimes years after the original charge has been laid and the election given. This creates challenges for both the accused and counsel to truly understand the case the accused has to meet. It creates issues surrounding the validity of the election and the right to make full answer and defence.
- c. Finally, many accused do not appear to be given an election where the language of QR&O 108.17(1)(a) would appear to convey that right.

CONCLUSION

20. This has been a busy and challenging period for defence counsel within DCS and, as in years past, our first priority has been to work with, and on behalf of, members of the Canadian Forces who are charged with service offences. Ours is the privilege of assisting them as they go through what can be a very difficult time in their career and in their lives. Many go on to have full military careers and to be solid members of the military community. For others, their charges represent a departure from service life and an opportunity to retake their place as productive members of Canadian civilian society.

D.K. Fullerton
Colonel
Director Defence Counsel Services

17 October 2013

Appendix

CMAC CASES 2011-2012

- **Ex-Pte St-Onge** (CMAC – 517) On 26 June 2008, Ex-Pte St-Onge appealed the results of his court martial in which he had pled guilty to charges of possessing cannabis, using cannabis and methamphetamine, unauthorized possession of CF ammunition, and verbally threatening a superior. The grounds of appeal were based on the jurisdiction of the court and that the sentence of thirty (30) days imprisonment was too severe. In August of 2010 the CMAC dismissed the appeal of jurisdiction but reduced the sentence to a fine of \$3,000. One judge dissented. The DMP, on behalf of the Minister of National Defence, appealed the decision to the Supreme Court of Canada. In April 2011 the Supreme Court granted the appeal and restored the sentence of the Military Judge.
- **Cpl T. Leblanc** (CMAC-538) was found guilty of sexual assault pursuant to section 271 of the Criminal Code and was sentenced to imprisonment for 20 months. During the course of the trial the military judge had refused to admit statements made by the victim which were relevant to the member's reasonable belief that the victim had consented to the sexual activities. The accused appealed his conviction. On 12 October 2011 the CMAC overturned the conviction and sent the matter back for a new trial. The member was subsequently acquitted at court martial in April 2012.
- **Cpl A. Leblanc** (CMAC-539) was found guilty of negligently performing a military duty and was sentenced to a \$500 fine. He made pre-trial motions under sections 7, 11(d) and 12 of the *Charter* challenging the constitutionality of the military scale of punishments as well as the independence of Military Judges. These were dismissed. In March 2010 the member filed a notice of appeal in relation to both the finding of guilt and the military judge's independence. On 2 June 2011, the CMAC upheld the finding of guilt. However, it found that the Military Judge, under the re-appointment provisions existing at the time, lacked the requisite independence. This has since been corrected by legislation.
- **Capt. Day** (CMAC-543) was charged with two counts of negligent performance of a military duty (s.124 *NDA*) and, alternatively, with two counts of neglect to the prejudice of good order and discipline (s.129 *NDA*) in relation to an incident in Afghanistan where a Canadian tank fired in the direction of Canadian soldiers. The military judge granted a motion that the prosecution had failed to present a *prima facie* case and found the member not guilty of all charges. The ruling was appealed and, in May 2011, a new trial ordered. The member was, on 20 November 2011, found guilty and was sentenced to a reprimand and a fine of \$5000.
- **Capt. Day** (CMAC-551) the member appealed the results of his second court martial. but abandoned his appeal on 26 August 2011 as the Appeal Committee had denied his request for DDOS representation at public expense.

- **Capt. Clark** (CMAC-545) was found guilty of disobedience of a lawful command (s. 83 *NDA*) and two charges of committing an act to the prejudice of good order and discipline (s.129 *NDA*). She was found to have inappropriately communicated performance evaluation report discussions to a subordinate contrary to a direction and to have lied in statements denying the misconduct. In February 2011 the member appealed the findings of guilt. The case was heard by the CMAC on 24 February 2012 and she was acquitted.
- **Capt. MacLellan** (CMAC-546) DCS was not counsel in this case. It involved an appeal of a decision of the Military Judge to allow the re-election as to mode of trial after the actual commencement of a General Court Martial. On 28 October 2011, the CMAC ordered a new trial.
- **Sgt Olive** (CMAC-547) was found guilty of conduct to the prejudice of good order and discipline under s. 129 of the *NDA* and sentenced to a reprimand and a fine of \$1,500. On 26 August 2011 the appellant abandoned his appeal after the Appeal Committee denied his request for DDCS representation at public expense.
- **Cpl Rivas** (CMAC-548) was found guilty of sexual assault contrary to section 271 of the *Criminal Code*, and an offence of drunkenness contrary to s. 97 of the *NDA* and sentenced to imprisonment for 9 months. The appeal committee denied his request for representation at public expense on the basis that the case did not have a reasonable chance of success. Upon the receipt of further material, the appeal committee reconsidered their decision and authorized counsel at public expense. The CMAC heard the parties on 23 March 2012 and ordered a new trial. He was never subsequently tried.
- **Bdr Tomczyk** (CMAC-549) was found guilty of one offence under s. 129 of the *NDA* for failing to follow medical direction. The matter was heard by the CMAC on 22 June 2012 and the member was acquitted.
- **Cpl Souka** (CMAC-550) was found guilty of the lesser and included offence of assault (s. 266 *CCC*) and the offence of drunkenness (s. 97 *NDA*). The appeal was confined exclusively to the issue of whether the trial had taken place within a reasonable time (18 months) under section 11(b) of the *Charter of Rights and Freedoms*. The CMAC ruled that his right had not been violated.