

Annex I

Annual Report of the Director of Defence
Counsel Services for the period of
1 April 2001 to 31 March 2002

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Annual Report of the Director of Defence Counsel Services

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INTRODUCTION

1. This is the third report presented by the Director of Defence Counsel Services (DDCS) pursuant to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 101.20; it covers the period 1 April 2001 to 31 March 2002 and contains:
 - An overview of DDCS organization;
 - A review of DDCS duties and responsibilities;
 - A review of the relationship between DDCS counsel and the chain of command;
 - Services provided during the reporting period; and
 - DDCS general activities.

DDCS ORGANIZATION

2. There have been no changes to the DDCS establishment which has remained as described in earlier reports. While there were no changes in regular force personnel, three of four vacant reserve positions (out of a total of seven) are being filled and the new officers should commence their service with DDCS early in FY 2002/03.

DUTIES AND RESPONSIBILITIES

3. There were no changes in DDCS duties and responsibilities and most of the following principal services were provided to persons who are subject to the Code of Service Discipline during this reporting period:

Legal Counsel Services:

- ▶ To accused persons:
 - at courts martial [QR&O 101.20 (2) (f)];
 - where there are reasonable grounds to believe that the accused person is unfit to stand trial, at hearings to determine fitness to stand trial [QR&O 101.20 (2) (b)]; and
 - in cases where a finding of unfit to stand trial has been made, at hearings as to the sufficiency of admissible evidence to put the accused person on trial [QR&O 101.20 (3) (c)].
- ▶ To persons sentenced by court martial to detention or imprisonment, at hearings for:
 - release pending appeal [QR&O 101.20 (3) (b)];
 - review of undertakings for release pending appeal [QR&O 101.20 (3) (b) and 118.23];
 - cancellation of release pending appeal [QR&O 118.23]; and
 - to persons held in custody, at hearings by a military judge under ss. 159(1) of the NDA to determine retention in custody [QR&O 101.20 (2) (e)].
- ▶ To the Respondent (offender), at Court Martial Appeal Court or Supreme Court of Canada hearings where prosecution authorities appeal the legality of a finding or the severity of a sentence awarded by court martial [QR&O 101.20 (2) (g)].
- ▶ To a person on an appeal or an application for leave to appeal to the Court Martial Appeal Court or the Supreme Court of Canada, with the approval of the Appeal Committee [QR&O 101.20 (2) (h)].

Advisory Services:

- ▶ To persons arrested or detained in respect of a service offence pursuant to s. 10(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), on a 24/7 basis [QR&O 101.20 (2) (a)].
- ▶ To assisting officers and accused persons with respect to the making of an election to be tried by court martial pursuant to QR&O 108.17 and 108.18 [QR&O 101.20 (2) (d)].
- ▶ To assisting officers or accused persons on matters of a general nature relating to summary trials [QR&O 101.20 (2) (c)].
- ▶ To persons subject of an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry [QR&O 101.20 (2) (i)].

RELATIONSHIP DDCS/CHAIN OF COMMAND

4. As discussed in our first two reports, the status of DDCS lawyers as the “defence bar” of the CF and the importance of their ability to perform, and be perceived to perform, their duties free from influences by the chain of command cannot be overstated. DDCS counsel have continued to perform their duties and advance the position of their clients free from interference from the chain of command.
5. In the performance of their duties, DDCS counsel have had direct dealings with their clients, including assisting officers, irrespective of rank, status, unit or physical location. In particular, they dealt with their clients’ chain of command, military and civilian prosecution and enforcement authorities, and all other persons involved in disciplinary proceedings respecting their clients. They also had dealings with their provincial bars and other professional associations.
6. With respect to the JAG’s general supervision of the military justice system and his authority to issue, pursuant to s. 249(2) of the NDA, general instructions or guidelines to DDCS, the JAG

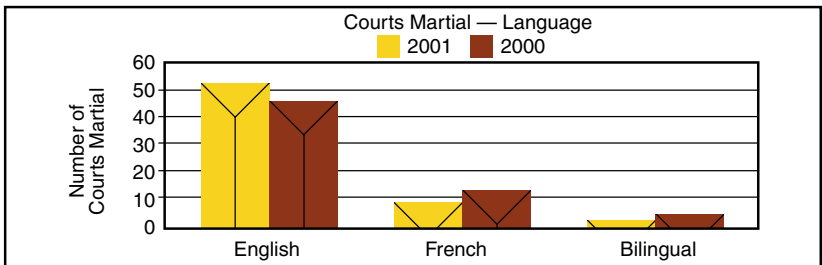
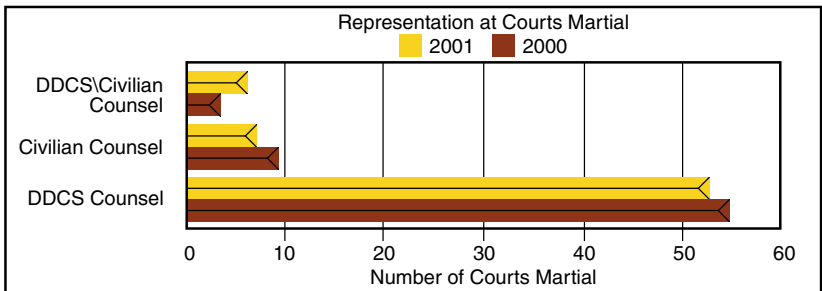
has issued on 10 January 2002 a general instruction on the matter of the payment of witness expenses at court martial. That instruction which is also addressed to the Director of Military Prosecutions is attached at Annex H to the JAG's report.

SERVICES PROVIDED

Counsel Services

► Courts martial

7. When facing a court martial, an accused person has the right to be represented by a DDCS counsel at public expense, may retain legal counsel at his or her own expense or choose not to be represented.
8. During the reporting period, a total of 67 courts martial were completed. Representation at courts martial and language of trial have been as shown below.



9. Pursuant to the authority granted to him under s. 249.21 (2) NDA, the Director deemed it appropriate to hire, at public expense, civilian counsel in a number of cases where, having received a request for representation by DDCS counsel, no member of DDCS office could represent the particular individual by reason of a conflict of interest. *DDCS/Civilian counsel* on the above chart refers to those cases. Civilian counsel were hired in two other cases, but as charges were ultimately withdrawn before trial, these cases do not appear in the above graph.

► Appeals

10. Twelve requests for representation before the Court Martial Appeal Court were received. In all cases, the approval of the Appeal Committee under QR&O 101.20(2)(h) was required as the requests pertained to appeals initiated by the member. The Appeal Committee granted the requests in six of the twelve cases. There was also one request related to representation regarding an application for leave to appeal before the Supreme Court of Canada, which was granted by the Appeal Committee. The application for leave was prepared and submitted by DDCS counsel; the matter is currently before the Court.
11. DDCS counsel were involved in five hearings before the Court Martial Appeal Court. Four of the appeals heard had been initiated in the previous reporting period.

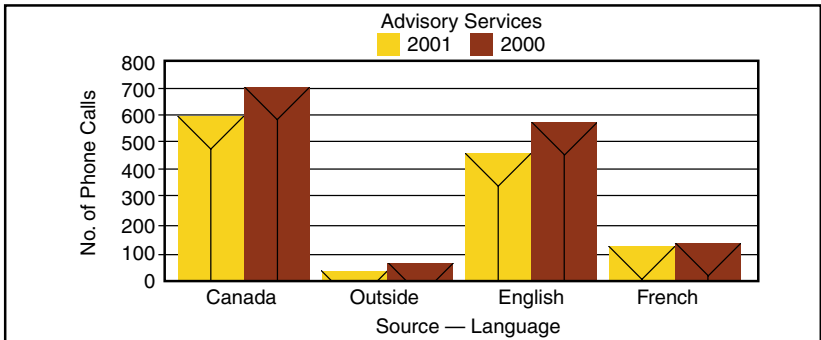
Advisory Services

12. The advisory services provided by DDCS counsel remain an important aspect of the overall operation of DDCS. Indeed, the situations giving rise to the need for legal advice are numerous and occur on a daily basis. Furthermore, this service contributes largely to the protection of CF members' fundamental rights under the *Charter* from the moment they get involved with the justice system.

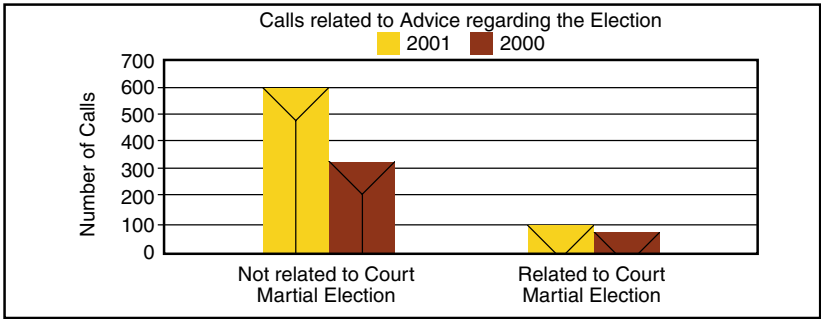
13. Advisory services are available on a 24/7 basis. In addition, the service is available in both official languages and accessible by all CF members whether they are posted in Canada or abroad. In order to facilitate the contact with DDCS counsel, two toll-free numbers have been widely disseminated:

- ▶ One, relating to the right to seek legal advice upon arrest or detention, to military police and other CF authorities likely to be involved in investigations of a disciplinary or criminal nature.
- ▶ The other, relating to election between court martial and summary trial and advice on other disciplinary matters, to all CF personnel.

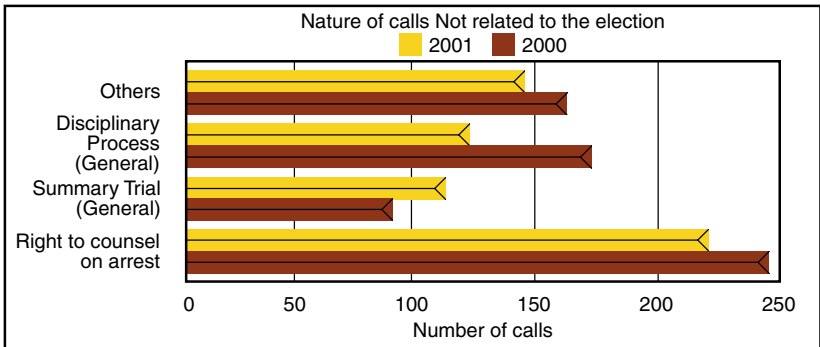
14. During the reporting period, DDCS counsel handled a total of 703 calls. Origin and language of calls are as follows:



15. The graph below shows the proportion of calls related to advice regarding the election of an accused between court martial or summary trial to calls that were not related to this subject.



16. This graph shows the nature of calls that *were not related* to the election of an accused between court martial or summary trial.



The *Others* portion of the above graph refers to subjects such as court martial process in general, redress of grievance and release from the CF. While DDCS is not mandated to advise on administrative matters, the duty counsel numbers which are widely distributed are also used for seeking advice on those subjects. In such situations, DDCS counsel provide advice as to the mechanics of the process, but does not get involved in the merits of the matter.

GENERAL ACTIVITIES

17. In addition to representation of members at courts martial and before the Court Martial Appeal Court, DDCS counsel were involved in three *show cause hearings* under s. 159 of the NDA to determine whether the person was to be retained in custody.
18. DDCS has been involved with other military justice stakeholders in the review and update of policies and regulations aimed at improving the administration of military justice. Among others, court scheduling has been the focus of attention so that the individual's right to a trial within a reasonable time is not denied or infringed.
19. In conjunction with other directorates in JAG and the DND/CF Legal Advisor, DDCS has undertaken a comprehensive review of current regulations regarding the representation of CF members before civilian courts in foreign countries. This review will be conducted in the next several months and be referred to competent authorities with recommendations on the deemed appropriate course of action.
20. Finally, DDCS took part in the staffing of an application for assistance under Canadian Forces Administrative Order 111-2 — Employment of Civilian Defence Counsel in Foreign Criminal Court — in relation to a CF member charged with a criminal offence in Australia. The request was granted and DDCS subsequently administered the agreed terms relating to the provision of legal services. This matter is now concluded subject to the Crown's right of appeal.

CONCLUSION

21. In this reporting period, we have seen a slight increase in the number of courts martial and delay in the administration of courts martial has continued to be a preoccupation. However, it is fair to say that we are at the point where, with the benefit of experience, most problems have been identified and we are now engaged in the fine tuning of the system.