



**Annual Report of the
Director of Defence Counsel
Services for the period of
1 April 2003 to 31 March 2004**



Annual Report of the Director of Defence Counsel Services

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INTRODUCTION

1. This is the fifth report presented by the Director (DDCS) of Defence Counsel Services (DCS) pursuant to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 101.20. It is my first one as Director of the service. It covers the period from 1 April 2003 to 31 March 2004 and contains:
 - An overview of the DCS organization;
 - A review of DCS duties and responsibilities;
 - A review of the relationship between DCS counsel and the chain of command;
 - Services provided during the reporting period; and
 - DDCS and DCS general activities.

DCS ORGANIZATION

2. Changes in this part of the organization include a new director; the second in the history of the DCS organization. A new legal officer joined the office last summer and one was posted out in the fall. Also, the DCS reserve force establishment was changed by upgrading a position of major rank to one of the rank of lieutenant colonel. It was filled prior to the regular force position's vacancy, thus alleviating the effect

of the departure. One regular force position will have been vacant for almost two years but the situation will be corrected during the next annual posting season. The office must be allowed to function with its full establishment of personnel in order to offer an acceptable work environment for the legal officers.

3. The three civilian personnel positions in the office were subject to incumbent changes during the reporting period. It has not affected the quality of services offered by the organization. The situation is now stabilized.

DUTIES AND RESPONSIBILITIES

4. There were no changes in DCS 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 detained persons:
 - to persons held in custody, at hearings by a military judge under s.159(1) of the NDA to determine retention in custody [QR&O 101.20(2)(e)].
- 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].

- 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 DCS/CHAIN OF COMMAND

5. As discussed in previous reports, the status of the DDCS and DCS military 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 influence by the chain of command cannot be overstated. This is the basic function of DDCS under the law. It must be understood that an essential element at the heart of the mandate of DDCS and DCS counsel is to be able to perform their duties free from interference from the chain of command. DCS counsel have continued to perform their duties and advance the position of their clients free from such interference from the chain of command.
6. In the performance of their duties, DCS counsel have had direct dealings with their clients, including assisting officers, irrespective of rank, status or physical location. Those elements do influence the way a particular

mandate is delivered. Distances from clients, witnesses and sometimes from resources also, make representation difficult, but not impossible. 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.

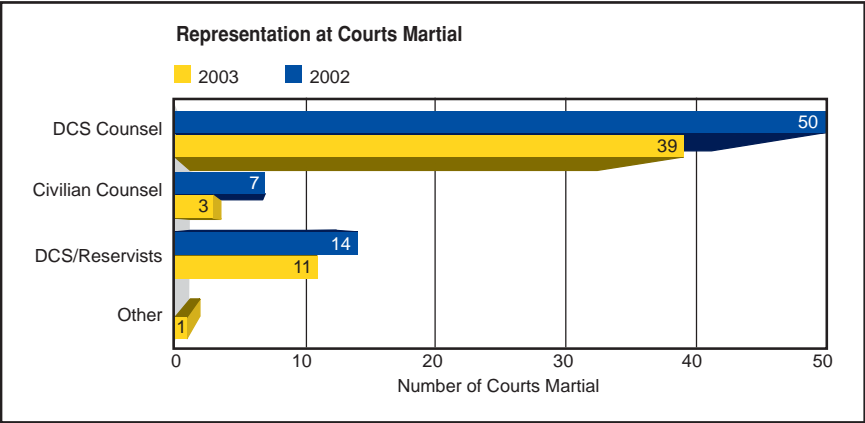
- 7. With respect to the JAG's general supervision of the military justice system and his authority to issue, pursuant to s.249(2) of the NDA, general instructions or guidelines to DDCS, no general instructions were issued to the DDCS by the JAG during the reporting period.

SERVICES PROVIDED

Counsel Services

➤ Courts martial

- 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. During the reporting period, DCS was involved in 54 of the courts martial completed. Sources of representation at courts martial have been as shown below.



10. Pursuant to the authority granted to him under s.249.21(2) of the NDA, the Director of Defence Counsel Services deemed it appropriate to hire, at public expense, civilian counsel in a number of cases where, having received a request for representation by DCS counsel, no member of the DCS office could represent the particular individual by reason of a conflict of interest. Civilian counsel were hired at public expense in two cases of co-accused.

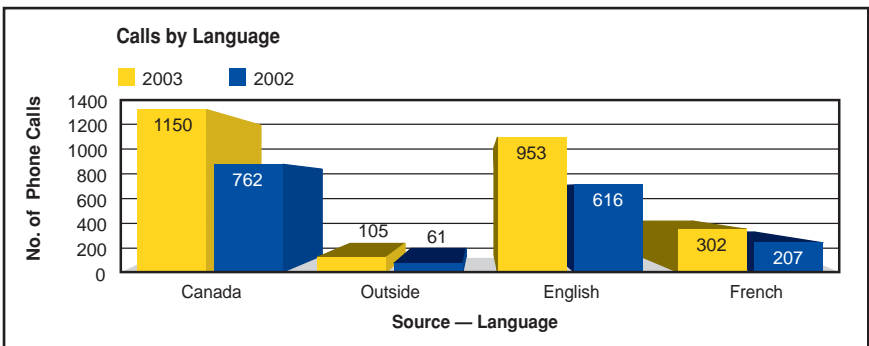
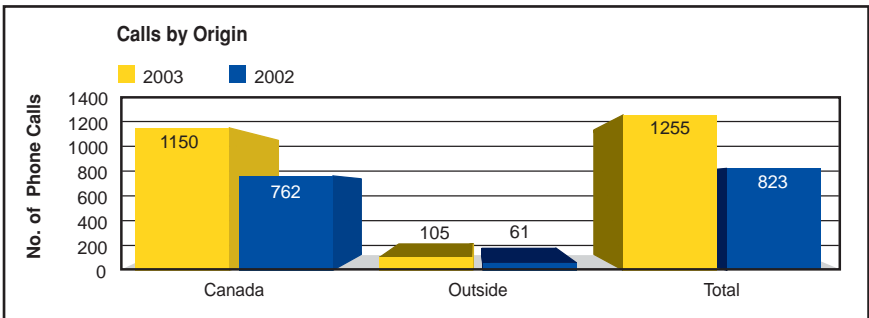
► Appeals

11. DCS counsel were involved in one hearing before the Court Martial Appeal Court (CMAC) in a case initiated in the previous reporting period. In one other case where the appellant was to represent himself, the Court Martial Appeal Court granted the prosecution's motion to dismiss the appeal. The member was incarcerated according to the order of the military judge.
12. The only request for representation by DCS before the Court Martial Appeal Court was rejected by the Appeal Committee. Except for one case where the Minister initiated the appeal, the approval of the Appeal Committee under QR&O 101.20(2)(h) was required as the request pertained to an appeal initiated by the member.
13. DDCS will therefore appear as respondent in one case. Military law being a specialized area of practice, it is of concern that military defence counsel are involved in such a small proportion of appeals. The proposed changes to the composition of the Appeal Committee should allow for a more equitable representation of the applicant.

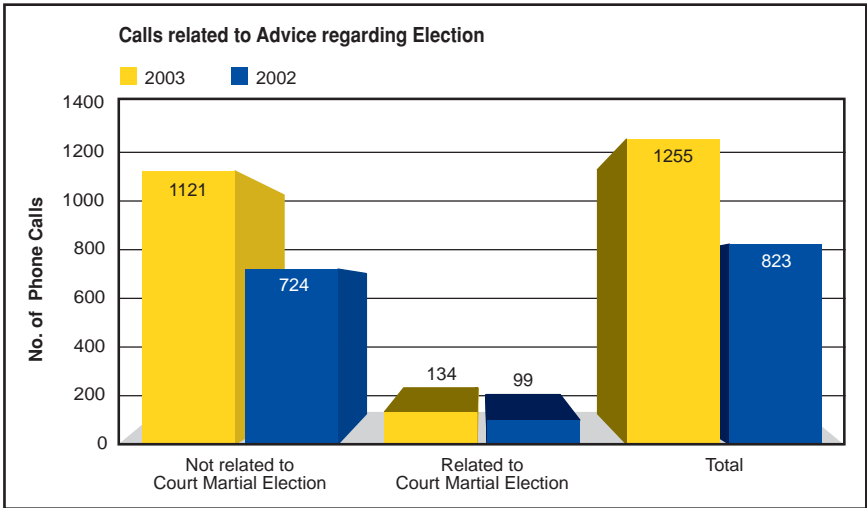
Advisory Services

14. The advisory services provided by DCS counsel remain an important aspect of the overall operation of DCS. Indeed, with an increase in deployments, 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.

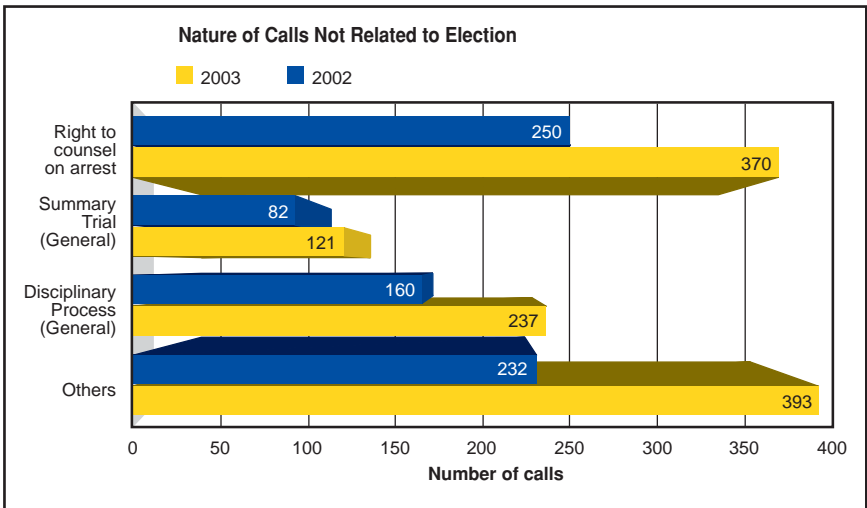
15. Advisory services are available on a 24/7 basis. In addition, the service is available in both official languages and accessible by all CF members whether they are posted in Canada or abroad. In order to facilitate the contact with DCS counsel, one toll-free number has been widely disseminated in the CF. This gives three ways to contact our services:
- 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.
 - Finally, the rapid evolution of the use of the Internet and Intranet is changing to some extent the way in which DCS counsel support and advise their clients. This trend is increasing and affects the DCS workload.
16. During the reporting period, DCS counsel handled a total of 1,255 calls. Origin and language of calls are as follows:



17. 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.



18. 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 DCS is not specifically 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, DCS counsel provide advice as to the mechanics of the process, but do not get involved in the merits of the matter.

GENERAL ACTIVITIES

19. In addition to representation of members at courts martial and before the Court Martial Appeal Court, DCS counsel were involved in two *show cause hearings* under s.159 of the NDA to determine whether the person was to be retained in custody. They also were involved in an attempt to obtain legal representation on appeal for one specific file where the Appeal Committee rejected the request for counsel.
20. 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, we are involved in the Permanent Military Court Working Group studying this specific matter. DDCS has not yet been involved in any proposal for regulations that will follow the Lamer Report.
21. We also are working on improving the process of scheduling of courts martial, as this is still an important and problematic issue.
22. In conjunction with other directorates in JAG and the DND/CF Legal Advisor, DDCS continues to work on the review of current regulations regarding the representation of CF members before civilian courts in foreign countries. We should be able to provide a comprehensive proposal during the next reporting period.
23. DDCS continues to administer the legal assistance funds allocated under the 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 original

request was granted and DDCS subsequently administered the agreed terms relating to the provision of legal services. The Crown successfully appealed the decision of the lower court to the Australian Court of Appeal. New counsel is required for the new trial and DDCS is assisting the accused member with that process.

24. The analysis of information provided through legal aid reveals that some military personnel are charged in criminal civilian court for military offences such as, driving a motor vehicle on a military base while impaired, family violence and some other offences. Such exercise of military police discretion to choose their forum varies from coast to coast and often negates access to DCS counsel for those members so affected.

CONCLUSION

25. In this reporting period, we have seen a slight decrease in the number of courts martial but an increase of disciplinary files. The numbers of long-released members still facing charges is of concern as it sometimes makes preparation of a defence more difficult and complicated. It also creates an additional burden on the former member who has reintegrated into the civilian work force, far from where they were serving and where they are being tried. It puts those former members at risk of losing their civilian position in order to secure their appearance in court martial, away from home.
26. However, many of the problems that have been identified previously were addressed.