

# ANNEX I



## Annual Report 2005-2006 of the Director of Defence Counsel Services



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*Initial report Prepared by Lieutenant-Colonel Jean-Marie Dugas*

### INTRODUCTION

1. This edited version is the seventh annual report of the Director of Defence Counsel Services (DDCS) presented to the Judge Advocate General (JAG) under whose general direction I perform my duties. The format of this document conforms to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 101.20. This report, my third as Director, covers the period from 1 April 2005 to 31 March 2006 and contains:
  - An overview of the DCS organization;
  - A review of DCS duties and responsibilities;
  - A review of the relationships between the Director, the staff and counsel of DCS, the Judge Advocate General (JAG) and the chain of command;
  - An overview of the services provided during the reporting period; and
  - DDCS and DCS general activities.
2. This analysis of the activities of the past year provides a constructive opportunity to review the accomplishments of DCS. The control over allocated funds for DCS has been simplified because of the local initiatives that were introduced; however, the fact remains that these funds are drawn from the JAG allotment, similar to the Military Prosecution Service.

3. This year, once again, military members accessed the services of DCS counsel concerning a myriad of disciplinary and administrative sanctions. The number of cases heard at court martial does not reflect the significant duties and accomplishments of DCS lawyers. In certain cases, convening orders were retracted due to the lack of available judges. Also, a portion of those cases for which DCS counsel have prepared themselves and cases that have already received a fixed trial date are beyond this reporting period.

## **DCS ORGANIZATION**

4. Significant changes were noted within the civilian personnel due to job transfers. The incumbents in all three civilian positions changed, which was largely attributable to employment offers at a higher level within JAG as well as outside the organization. For the military lawyers, a senior lawyer was posted after four years of service. His departure took place during the summer posting season. For a second consecutive year, the establishment for military personnel has been filled.
5. The Reserves finally benefited by the addition of a position to DCS in Montreal. The long hiring process delayed his entry into service, but we are nevertheless proceeding with his admittance and training and he should be able to perform his duties in the next reporting period.
6. The support from the Informatics team provided appreciable results. The provision of new equipment assisted DCS personnel in becoming functional, efficient and much more productive, as much in garrison as when travelling. However, there must be increased emphasis on the mode of modern communications and improvements for the Reserve Force DCS lawyers who are otherwise cut-off from direct access to much of the basic information that is necessary for the good management of their files.

## DUTIES AND RESPONSIBILITIES

7. The principal services offered and provided to persons subject to the Code of Service Discipline during this reporting period were:

### **Legal Counsel Services:**

- ▶ To detained persons:
  - 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 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 of Canada 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 of Canada 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)] if there is no anticipation that disciplinary proceedings will follow.

## **RELATIONSHIP DCS/CHAIN OF COMMAND AND ACCUSED**

8. DDCS meets with JAG on a regular basis for administrative matters and from time to time on the legal activities of DCS. The “professional independence” of the DDCS and DCS staff presents an on-going challenge. Administrative concerns such as posting forecasts for lawyers and funding for expert witnesses or the approval of the services of civilian counsel factor into these challenges. These concerns will likely be the subject of future consultations between DDCS and the JAG.
9. The ability of defence counsel to fulfill, freely and effectively, the duties and responsibilities entrusted to them revolves around the notions of professional and institutional independence. Since the important changes during the reform of the NDA in 1999, DDCS has continued to stress that military defence counsel must be sheltered from any actual or potential influence from any and all internal sources. The current DCS organization represents the minimum level necessary to permit DCS counsel to fulfill their responsibilities towards their military and other clientele. They have courageously advanced the interests of their clients and, equally, the military justice system.
10. Communication between DCS counsel and clients, on one hand, and assisting officers on the other, is normally achieved regardless of the rank or status of the latter. The accused's place of residence and the geographical location of his or her unit are factors that may influence this professional relationship and reflect on the operational costs of Defence Counsel Services. The difficulty in contacting witnesses and local

resources are additional factors, which render the duty of representation particularly complex.

11. Although the JAG has issued to military lawyers, pursuant to his authority under subs. 249(2) of the NDA, guidelines of general application regarding the protection of privileged documents, he has not issued those guidelines to DCS military lawyers because of their unique role in the military justice system.

## **PROFESSIONAL DEVELOPMENT**

12. Following a request for funding by DDCS, the JAG authorized four positions for the national professional development program in criminal law with the "Canadian Criminal Law Program" in Winnipeg. DDCS requested this funding in order to ensure that professional development continues for Regular Force DCS counsel. Two other professional development activities for DCS lawyers included the JAG annual conference in Ottawa and the professional development workshop for DCS lawyers in Gatineau. On an individual basis, two DCS lawyers participated in professional development activities of their respective Bar associations, and DDCS participated in a training seminar on cross-examination.

## **THE BUDGET**

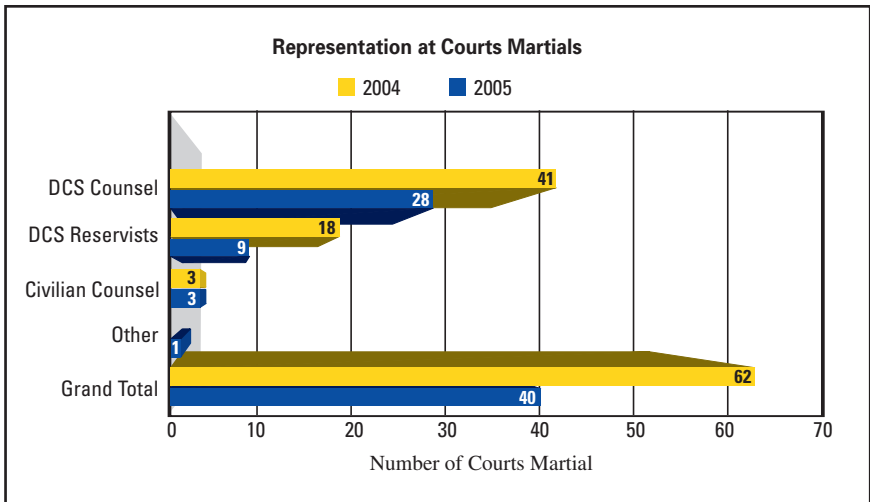
13. As previously mentioned, the DCS budget originates directly from the JAG. Budget management is difficult as the location, number and nature of cases is unpredictable. The defence has no control over its incoming business. Despite a notable increase in funds for Reserve lawyers, who were heavily relied upon this year, the room for manoeuvre within the budget is limited and certain activities have been deferred to the following fiscal year. The support of the JAG on this matter has been positive.
14. The defence now assumes supplementary charges for transcribing witnesses' statements, formerly assumed by Military Police and Prosecution at the time of disclosure. These costs are quite substantial and can no longer be ignored in the budgetary process.

## SERVICES PROVIDED

### *Counsel Services*

#### ► Courts martial

15. 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.
16. Relations with the Court Martial Administrator are cordial, but difficulties sometimes arise. On occasion, the Administrator has proceeded with convening courts martial without prior agreement from the defence. This has led to some reworking through judicial procedures to change the dates of hearing, a cumbersome and arduous procedure in the court martial system. Some courts were convened and dates set without waiting for the official designation of a lawyer for the proceedings, or without notice to counsel. Another example of difficulty is that some cases convened and formally set down for trial by the Administrator were recalled without prior formal notice.
17. During the reporting period, DCS was involved in 41 trials commenced before courts martial. One is ongoing and will be accounted for in the following year. Of the 40 accounted for in the following graph, three were conducted by civilian counsel, mandated by the DDCS in view of potential conflicts of interest between co-accused. The sources of representation in these courts martial were distributed as follows:



18. Pursuant to the authority granted under subsection 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 because of a conflict of interest. Reliance on civilian counsel poses two major difficulties: firstly, there are few who have suitable expertise (or a constant conflict with the standards for awarding contracts); secondly, where an inexperienced counsel demonstrates interest, the DDCS must indirectly assume the costs of their professional development in military law, not counting the time spent furnishing them with documents and the minimum of references, due to the time constraints of the file.
19. As demonstrated in the chart above, the involvement of Reserve lawyers has been heavily solicited as a direct result of the change in establishment and the need for experience in discipline matters. Experience is a highly valued and essential resource necessary for the effective functioning of DCS.
- Court Martial Appeal Court of Canada (CMAC)
20. Six cases made their way to the Office of the Clerk of the CMAC. Three requests for representation before the CMAC were presented to the Appeal Committee pursuant to article

101.20(2)(h) of QR&O. These files required the support of the Appeal Committee. One of the requests was refused on the grounds of “no professional merit”; yet the CMAC granted the appeal on sentence. Another refusal by the Committee became irrelevant by virtue of a cross-appeal by the Prosecution on one of the same legal points that had been raised by the Appellant and had been considered “without professional merit” by the Committee. The third application was accepted. The member was required to produce the facts supporting the request in an affidavit. It is hoped that this requirement will not be necessary in the future.

21. DCS counsel were involved in the following appeals during the reporting period:
- **Nystrom** - The accused was charged with sexual assault causing bodily harm, but was convicted of the lesser, included offence of sexual assault. The conviction turned on whether the impugned activities were consensual. The accused appealed both the legality of the finding as well as the constitutionality of the authority of the Military Prosecution Service to select the type of court martial. The CMAC granted the appeal and overturned the conviction, finding that the verdict was unreasonable and the trial judge misapprehended the law concerning credibility. The Court held that it did not need to answer the constitutional question, however, it did discuss this issue in *obiter*.
  - **Ballard** - The accused was convicted of possession of drugs and appealed both the finding and the sentence. Counsel are presently waiting for a hearing date following the filing of factums.
  - **Griffith** - The accused was represented by civilian counsel at the court martial and has requested that the CMAC strike his guilty plea and order a new trial. The Appeal Committee granted his request for DCS representation. The case is presently at the stage of filing the Defence factum.
  - **Constantin** - The accused was charged with use of a controlled drug, but was administratively released prior to the conduct of the trial. The accused pled guilty. The Prosecution appealed the sentence imposed by the court, but withdrew the appeal.

- **Doling** -The accused was a recruit at Canadian Forces Leadership and Recruit School, Canadian Forces Base St-Jean, and was acquitted at court martial. The Prosecution appealed the findings on some of the charges, but withdrew the appeal following service of the trial transcript.
- **Dunphy** -The accused appealed the decision of the trial judge relating to a pre-trial motion concerning the constitutionality of the re-appointment process for military judges. The Prosecution cross-appealed on findings concerning specific provisions relating to the re-appointment process.
- **Parsons** -This is a case concerning stealing and possession of stolen property. The accused appealed the substance of the trial judge's decision and the finding of guilt that followed. The accused also appealed the decision of the military judge, which differed from that of his colleague in other cases, but which had not been appealed. The Prosecution cross-appealed on this last decision of the judge

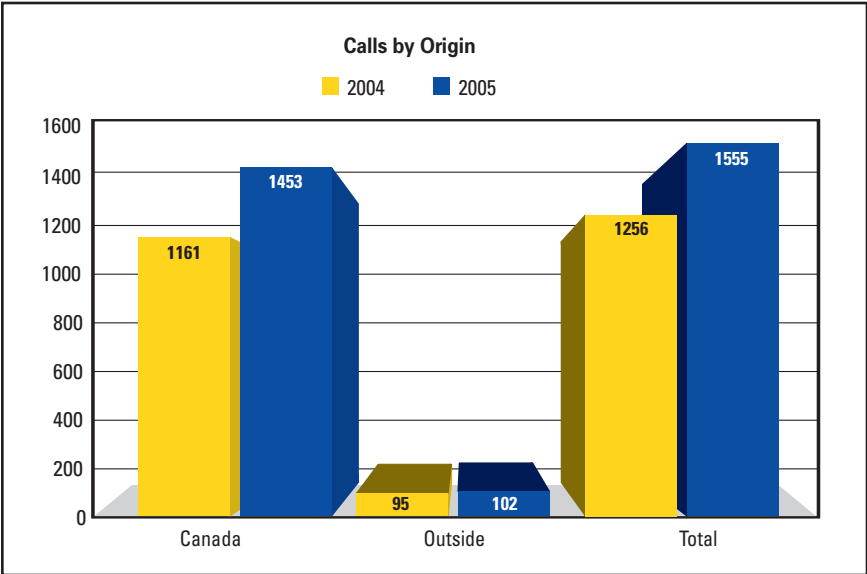
➤ Advisory Services

22. The advisory services provided by DCS counsel remain a dominant 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.
23. The communications arising from these advisory services highlights both the merit of the DCS contribution to the protection of and respect for these rights as well as the need to respond to practices that may infringe upon them. Rapid intervention by DCS lawyers with the legal advisors of the military authorities in question, or with other directorates of the JAG, have enabled us, at times, to contribute to correcting the situation.
24. Bilingual services are freely available to all CF members and persons subject to the Code of Service Discipline, whether they are posted in Canada or abroad, at all times and without interruption. Telephone and electronic communications are ensured by DCS lawyers through a toll-free number widely disseminated throughout the CF, a national access number and through email. This latter method of communication has become more and more frequent. The change towards a

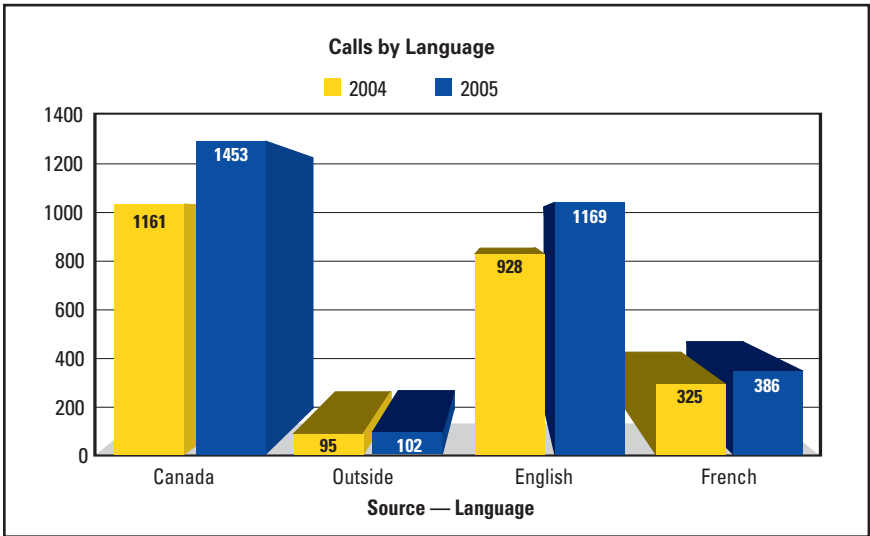
different telephone service provider has caused difficulty in accessing the Service outside the normal working hours. The situation has been reported and the Communications Service is working on rectifying this at time of writing this Report. Usage was distributed as follows:

- ▶ 1-800 access line to ensure access to legal advice upon arrest or detention; it is provided to military police and other CF authorities likely to be involved in investigations of a disciplinary or criminal nature.
- ▶ Standard direct telephone access, available to accused subject to the Code of Service Discipline, for advice in relation to an election between court martial and summary trial, or questions on other disciplinary matters, or all other matters authorized under the QR&O to all CF personnel.
- ▶ Email remains an avenue frequently used in initiating contact or obtaining information.

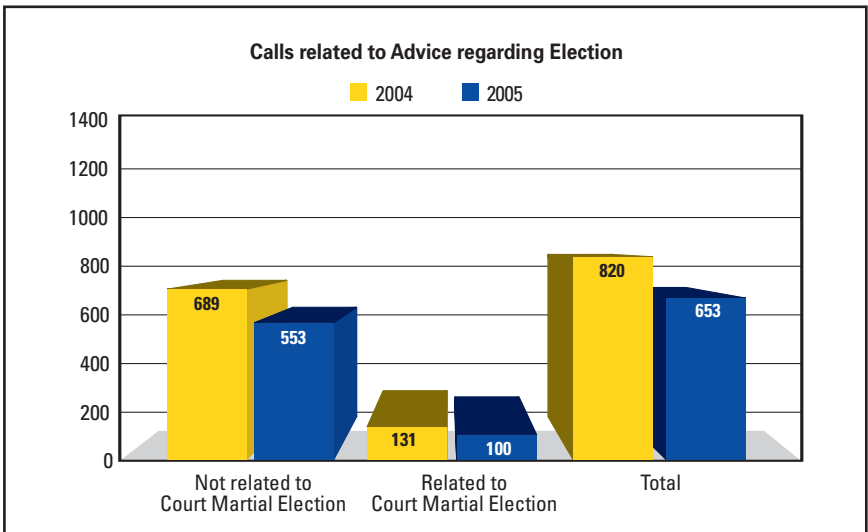
25. During the reporting period, DCS counsel handled a total of 1555 calls. The calls ranged in duration but, on average, were approximately 16 minutes. This undertaking totalled nearly 400 hours, similar to the previous year. The origin of the calls is illustrated in the following graph:



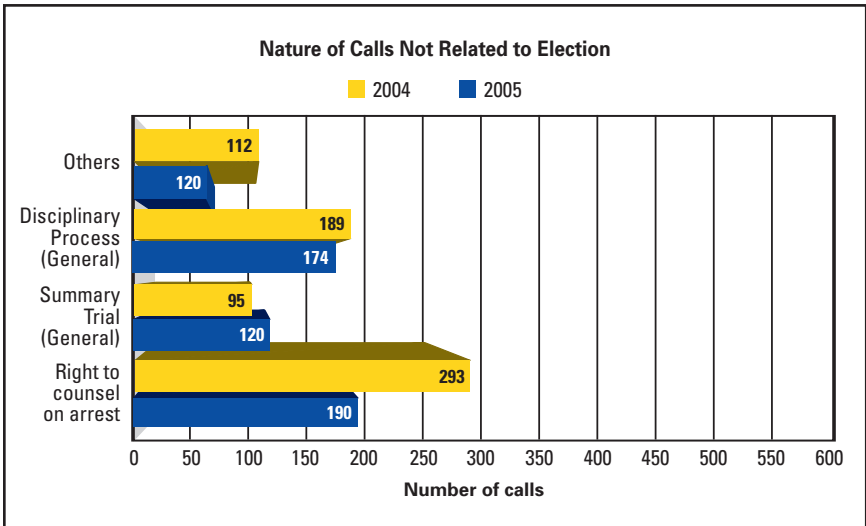
26. We have also tabulated the official language used by the accused, illustrated in the following graph:



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

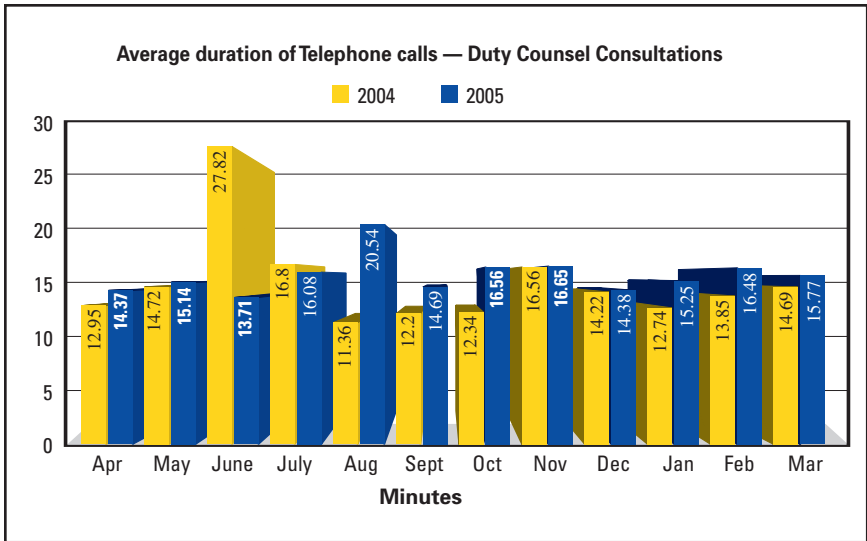


28. Similarly, this graph shows the nature of calls that were *not* related to the election of an accused between court martial or summary trial:



The *Others* portion of the above graph refers to subjects such as the 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.

29. Newly collected data added to the information compiled during the year has allowed us to track the regularity and variations of telephone services provides to DCS's clients:



## GENERAL ACTIVITIES

30. Our services were required on three occasions for possible hearings to determine whether accused members should be retained in custody. These hearings are held before a military judge pursuant to section 159 of the NDA, to hear evidence and determine whether the accused will be released, with or without conditions. Except for one case in which the member was detained for two days before being released by his unit, the military members were released by their units following preliminary exchanges between defence counsel, the Deputy Judge Advocate and the Regional Military Prosecutor, negating the need for a hearing in those cases.
31. A hearing was held pursuant to QR&O 101.20 (3)(c) in order to determine whether there was sufficient admissible evidence to order the accused to stand trial. They were related to events in Somalia and the former member was originally declared unfit to stand trial. The situation of this former member will soon be submitted to a test. The changes to the NDA, necessitated by a decision of the Supreme Court of Canada on this issue, are expected.
32. DDCS was consulted after having obtained comments on proposed legislative changes relating to the Appeal Committee.

33. DDCS requested an independent legal opinion on the possibility of obtaining intervener status following a motion in the Federal Court concerning an issue between the Director of Military Prosecutions and the Chief Military Judge and the Court Martial Administrator. The motion involved the case of a military member represented by DCS counsel.
34. The establishment of a judicial calendar that is realistic and adaptive to actual needs is still lacking. No significant progress been made on this matter.
35. The final drafting of regulations governing legal representation of CF members who are accused of criminal offences before foreign courts continues, but has been considerably delayed. A formula is required to obtain an amount, based on the actual cost and the member's pay, to be reimbursed to the Crown by the CF member. Initial problems with informatics and logistics contributed to the delays. The initial formula for calculation based on using an Excel spread sheet did not provide constant results. It required extensive review by other agencies, which finally resulted in a viable model. We have incorporated the new mathematical formula, which now provides constant and reliable results. However, we will have to rethink the proposition of a fixed percentage. With the experience acquired in this matter, it is evident that using a single percentage in all cases can result in a very large financial contribution by the offender, sometimes imposing a severe financial burden. A more equitable proposition will be submitted to the JAG during the next reporting period.
36. DDCS continues to administer the legal assistance funds allocated to military members accused abroad, but no activity has been required. The administration of this file is in accordance with Canadian Forces Administrative Order 111-2 - Employment of Civilian Defence Counsel in Foreign Criminal Court.
37. We note also that many accused members are released long before the conclusion of disciplinary proceedings. The medical condition of many accused once again required special attention from DCS counsel as well as follow-up medicals from experts in some cases. Also, the release from the CF of accused

members, sometimes without regard for the procedure or outcome of the military justice system, can severely impede the ability of DCS counsel to communicate with them. More than ever, accused persons restructure their activities to adjust to civilian life following their release and their contact information is frequently unknown. Release from the CF before the end of disciplinary proceedings occasionally jeopardizes the reintegration of the accused, and his or her family, into civilian life. This is often even more difficult for members subject to medical release.

38. As has been identified in previous annual reports, the Performance Evaluations process of DCS lawyers has been the subject of discussion. Unlike other legal officers in the Office of the JAG, DCS counsel do not have their performance reviewed by a Colonel/Captain (Navy). Although exact rank parity is not necessarily a requirement, this factor may be the subject of future discussions.

## **CONCLUSION**

39. The length and volume of courts martial reveal a need to ensure broad financial latitude and flexibility. The JAG understands the unpredictability attached to this task and does not hesitate to support these additional needs. I note that several files are handled and resolved following the Record of Disciplinary Proceedings but prior to the charge being preferred for court martial. The human resources and finances expended in such cases are nonetheless demanding of a significant amount of time and money, especially when medical expertise is required. The comments received from military members, allow me to believe that, in general, the objectives and mission of DCS are being achieved.