

ANNEX D



Annual Report 2006-2007 of the Director of Defence Counsel Services

Prepared by Lieutenant-Colonel Jean-Marie Dugas



Introduction

1. This is the eighth annual report of the Director of Defence Counsel Services (DDCS) presented to the Judge Advocate General (JAG) Brigadier-General K. W. Watkin, under whose general direction I perform my duties. The JAG has shown a marked interest in the military justice system and its efficiency. Some of the initiatives suggested by the JAG have been warmly welcomed, such as the in-depth review of the performance of DCS. These initiatives may lead to both short and long-term improvements in the efficiency of DCS.
2. The format of this document conforms to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 101.20. This report, my fourth as Director, covers the period from 1 April 2006 to 31 March 2007 and contains:
 - An overview of the DCS organization and changes made over the course of the year;
 - 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.
3. It is clear that this has been a year in which unequal, but increasing, monthly activities have taxed the resources of the defence. The year began with only two military judges available to hear cases. Two subsequent nominations filled the vacant judicial positions. The number of courts martial increased as a result in October and November, and the judicial tempo has not lessened since then. As there are as many judges as regular force military lawyers who regularly appear before courts martial, the DCS reserve budget was adjusted in order to be able to use the services of reserve counsel, which helped to reduce the caseload.

4. The year's activities were as follows:
 - a. 140 active court martial files;
 - b. 59 courts martial completed, including 8 in French;
 - c. 138 days in court;
 - d. 1501 instances of advice given to service members and persons subject to the Code of Service Discipline;
 - e. 10 cases before the Court Martial Appeal Court;
 - f. 3 cases of assistance given to members before appearing before a Board of Inquiry;
 - g. 6 interventions during summary investigations;

5. The delegated contractual authority of DCS has been increased, which has permitted speedier decision-making and action. Experts can be retained more rapidly, which promotes rapidity in the scheduling of courts martial. The JAG has given wholehearted support for the increased budgetary requirements of DCS as a result of increased judicial availability.

6. Several complex and essential issues have been submitted to military courts and they had to take sufficient time to consider those issues. Moreover, the renewal "at the last minute" of the mandates of two of the three sitting judges for courts martial, and the refusal to fill the vacant military judge position, has led Defence counsel to make arguments on judicial independence. The validity of renewable mandates for judges and the prerogative of the Crown to select the type of court martial are two of the principal arguments that have been pleaded at first instance and on appeal. Also, the verdict by majority of Disciplinary and General Courts Martial panels is among the issues that have been argued.

7. The process of convening courts martial has been improved, and communications have become easier, since the internal policy of the Court Martial Administrator (CMA) began to make allowance for the plans

of counsel and for consultation between prosecution and defence. The problems that the defence has frequently raised in the past continue to some degree, and consultation with the Court Martial Administrator's office is ongoing. Also, the external review of the different components of the military justice system may help to identify clearly the stages of the process that are causing problems. As the defence occasionally receives files in which courts were convened without notice to DCS, this may lead to a better appreciation of the requirements of the defence in preparing a case for trial.

8. The number of disciplinary files dealt with greatly exceeds the number of courts martial. For example, some cases that were ready for trial were withdrawn following the pre-trial conference, or in open court. Other cases have been suspended by the CMA as a result of lack of judicial availability or because it was no longer possible to find the member that had long retired.
9. A new factor has come into play during this reporting period. As a result of the decision of the Court Martial Appeal Court in *Nystrom*¹, Disciplinary Courts Martial have begun to be convened. This new policy of convening Disciplinary Courts was not solicited by the defence and, in our opinion, is inappropriate. The CMA's policy of convening these courts for blocks of two weeks complicates, and sometimes renders impossible, the participation of all military defence counsel. In fact, this policy has the perverse effect of excluding reserve defence counsel. Efforts will be made through the committees set up on the initiative of the JAG to resolve this problem.

¹ *Nystrom v. The Queen*, CMAC 483 (2005)

DCS Organization

10. The difficulties in recruiting bilingual civilian personnel in DCS remain present. The positions of paralegal and secretary have yet to be filled. The revised classification of certain positions within JAG may facilitate future recruitment.
11. Among the legal officers, a senior lawyer left for a posting as DJA. His position was filled later in the fall. Another lawyer took his release in February 2007. A reserve defence lawyer who has transferred to the Regular Force filled the vacant position. As a result, there is now a vacant reserve position in the western region. Procedures for the recruitment of a new reserve officer are underway.
12. The support of the JAG organization and the informatics team has greatly facilitated our operations. A second round of improvements to our informatics equipment has improved the efficiency of our personnel. The JAG organization has been made aware of the informatics needs of the reserve lawyers, who have very limited access to the National Defence system.

Duties and Responsibilities

13. Our duties and responsibilities under the NDA remain unchanged. The principal activities offered and provided are specified by *Queen's Regulations and Orders for the Canadian Forces* and are summarized as follows:

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 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 to an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry [QR&O 101.20 (2) (i)].

Relationship between DCS, DCS personnel, The Judge Advocate General and the Chain of Command

14. The openness of the JAG to the needs of the defence has created a much different dynamic this year. Regular meetings between the JAG and DCS promote positive developments in administrative and other matters relating to the military justice system. The intent is to insure that persons subject to the Code of Service Discipline *are* dealt with minimum *delay*.
15. Pursuant to his authority under ss. 249.2 of the NDA, the JAG has not issued guidelines of general application to DCS military lawyers during this reporting period.
16. Officers in the chain of command have intervened inappropriately in some cases. In one case, a General wrote directly the Chief Military Judge and enunciated his particular interest in proceeding rapidly in a particular case involving an officer. In another case, a superior officer sent an e-mail to the chain of command requesting an intervention against the decision of the Court Martial Administrator to request him as a member of a panel at an upcoming Disciplinary Court Martial.

Professional Development

17. DCS counsel received support for professional training at the national level with the participation of all Regular Force counsel and one reserve lawyer in the “Canadian Criminal Law Program.” DDCS, for his part, participated in training in international criminal law. Apart from

their membership in the Canadian Bar Association and their respective provincial bars, the DCS Regular Force lawyers are members of the International Criminal Defence Attorneys Association. The Deputy Minister's approval for membership of the five Regular Force counsel in the Criminal Lawyers Association has also been sought and approved.

18. DCS counsel participated in an advanced training course for counsel practicing in the military justice system. The participants appreciated this new opportunity for continuing legal education.

The Budget

19. The increased assignment of reserve counsel in order to address the problem of delay in courts martial has necessitated the reorganization of the defence budget. However, it remains within the initial allocation.
20. The financial authority of DCS has increased from \$5,000 to \$75,000. This allows DCS to avoid seeking external approval for medical expertise required at court martial. External approval is still required for contracts for the services of civilian lawyers in situations in which the defence must be undertaken by civilian counsel. The applicable regulation is contrary to the provisions of the NDA, which permits DCS to enter into contracts in this regard. Steps have been taken to correct this situation. The JAG has also accepted our request to put in place an independent functional structure for civilian defence counsel interested in practicing military law before courts martial.
21. 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.
22. The place of residence of accused who have become civilians or of service members posted to a region other than the one in which the court martial will be held is one of the elements that affect the

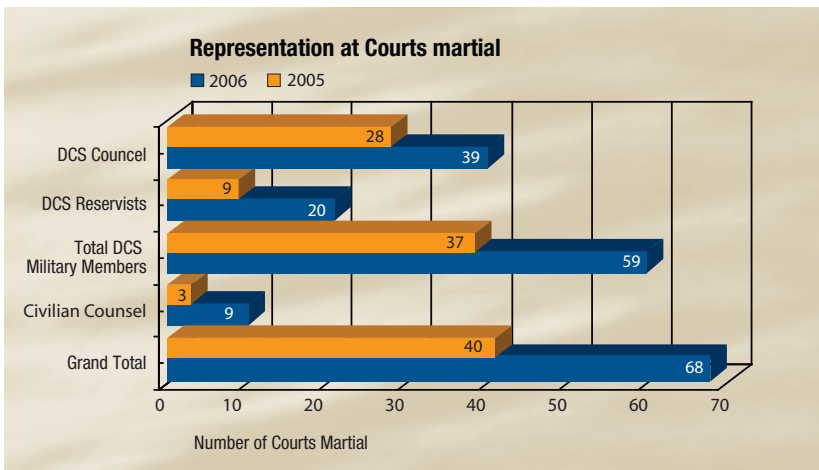
professional relationship between counsel and accused. This element has a large impact on the operational costs of DCS since it requires additional travel by the lawyers. Also, with the passage of time, difficulties in finding witnesses and local resources sometimes make the task of representing the accused particularly complex.

Services Provided

Counsel Services

Courts martial

- 23.** 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.
- 24.** 59 courts martial involving DCS commenced during the reporting period. One trial is underway and will be recorded in the next fiscal year. Of the 59 cases included in the following chart, a civilian counsel retained by DCS conducted one. The sources of representation at court martial are as follows:



- 25.** Pursuant to the authority granted under ss. 249.21(2) of the NDA, the Director of Defence Counsel Services may hire, at public expense, civilian counsel on a temporary basis to provide assistance. This authority is currently exercised only 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 (which leads to a continual 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. The Office of the JAG, in collaboration with DCS, is in the process of addressing this situation.
- 26.** As demonstrated in the chart above, the involvement of Reserve defence counsel is still very much sought after, as a direct result of the change in personnel and of the need for experience in disciplinary matters. This year, account must also be taken of the need to deal with the backlog in courts martial. DCS reserve counsel constitutes a precious and essential resource.

Court Martial Appeal Court of Canada (CMAC)

- 27.** Ten appeals involving DCS counsel came before the CMAC during the period 2006-2007. Three came from the previous fiscal year and the others entered during the current reporting period. One appellant abandoned his appeal one week before the hearing of his appeal.
- 28.** Appellants submitted requests for legal representation by DCS before the Court Martial Appeal Court of Canada to the Appeal Committee in accordance with article 101.20(2)(h) of QR&O. These files, except for one in which there was a cross-appeal by the prosecution, required the approval of the Committee. One request was rejected for “lack of professional merit” and the file is still at the court registry.

29. DCS counsel were involved in the following appeals during the reporting period:

- **Ballard** – The appellant appealed his conviction for drug trafficking. The court rejected the appeal on the ground that it was not convinced that a serious error permitting the court to intervene had been committed.
- **Griffith** – The member, represented by civilian counsel at the court martial, has requested the Appeal Court to quash his guilty plea and to order a new trial. The Appeal Committee granted his request for DCS representation. The member withdrew his appeal shortly before his appeal was to be heard.
- **Dunphy** – Appealed from the trial judge’s dismissal of his Charter motion challenging the independence of military judges. While the CMAC accepted the validity of the appellant’s constitutional arguments, no remedy was granted.
- **Parsons** – After the defence counsel had made his final address, and the trial judge had retired to consider his decision, the trial judge recalled the accused and cross-examined him. The appeal court granted the accused’s appeal and ordered a stay of proceedings.
- **Legresley** – Has entered an appeal of the court’s decision rejecting his motion for unreasonable delay, and also concerning the court’s finding of guilty on the charge of drug trafficking.
- **Kennedy** – Has entered an appeal of his conviction based on the linguistic difficulties of the trial judge, and on the ground that the evidence did not support the finding and also on the misapplication of the doctrine of reasonable doubt with respect to the accused’s testimony.
- **Grant** – Has entered an appeal with respect to the court’s rejection of his pre-trial motions under ss. 7 and 11(b) of the Charter, and also with respect to the finding of guilt on the grounds of misapprehension of the evidence and of failure to provide sufficient reasons for the finding.

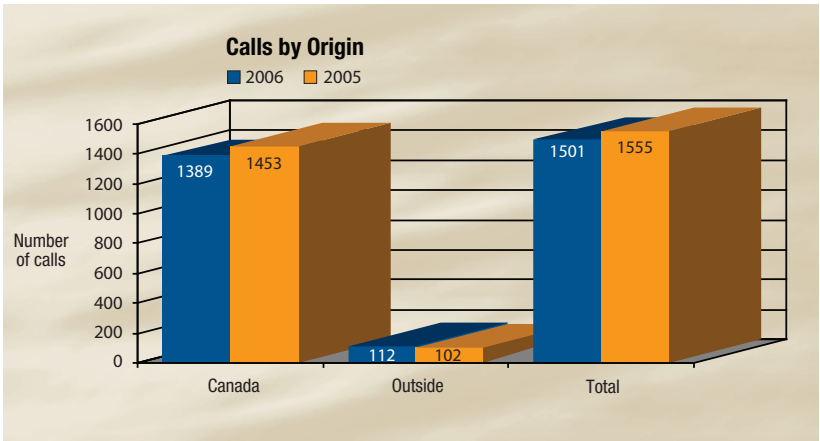
- **Trépanier** – Has entered an appeal of the court's decision rejecting his pre-trial application based on the decision of the CMAC in the *Nystrom* case, which dealt with the right of the accused to choose the type of court martial.
- **Taylor** – In his Notice of Appeal has requested the CMAC to rule on the notion of public interest to pursue charges in this matter and on the authority of the trial judge to reject a joint submission on sentence without advising counsel for the prosecution and defence.
- **McRae** – As in the Trépanier case, has requested the CMAC to rule on the question of the accused's choice of mode of trial. He has also appealed the legality of the verdict on the grounds of misapplication of the doctrine of reasonable doubt with respect to the evidence of the accused, and on the court's interpretation of the mens rea required.

Advisory Services

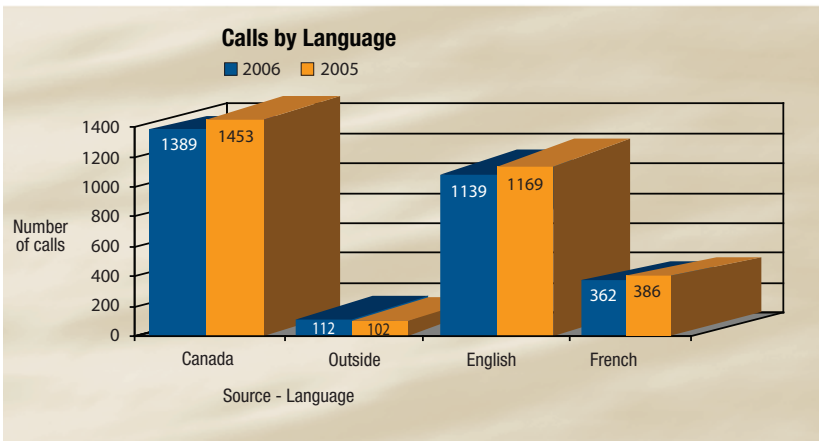
30. Bilingual service is available without cost, at any time and without interruption for all service members and others subject to the Code of Service Discipline serving anywhere in the world. DCS counsel provide verbal and written communications through a toll-free number that is distributed throughout the CF, a regular telephone number and via email, the popularity of which is growing. The problem was reported and has been resolved. 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 persons 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.
- Email remains an avenue frequently used in initiating contact or obtaining information.

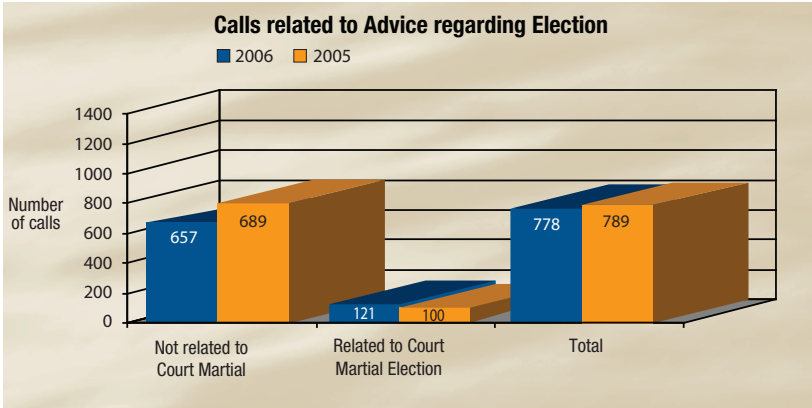
31. During the reporting period, DCS counsel handled a total of 1,501 calls. The calls ranged in duration but, on average, were approximately 15 minutes. This undertaking totalled nearly 375 hours, similar to the previous year. The origin of the calls is illustrated in the following graph:



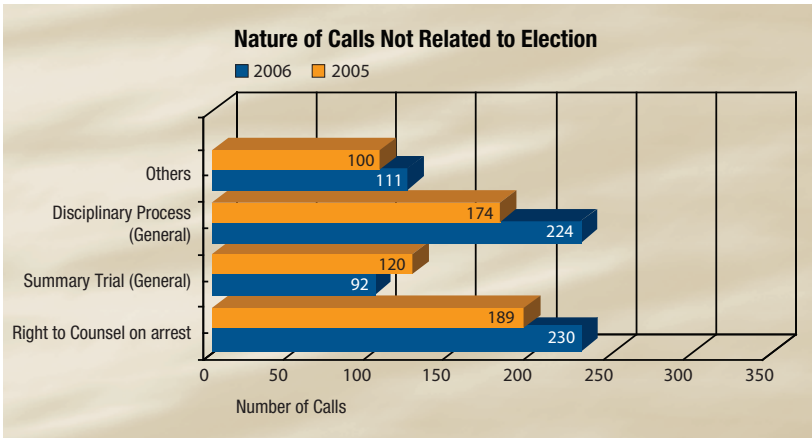
32. We have also tabulated the official language used by the accused, illustrated in the following graph:



33. 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:



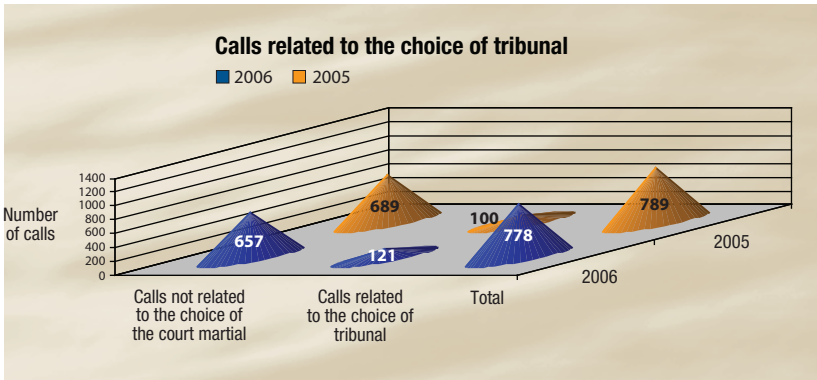
34. Similarly, this graph shows the nature of calls that were not related to the election of an accused between court martial or summary trial:



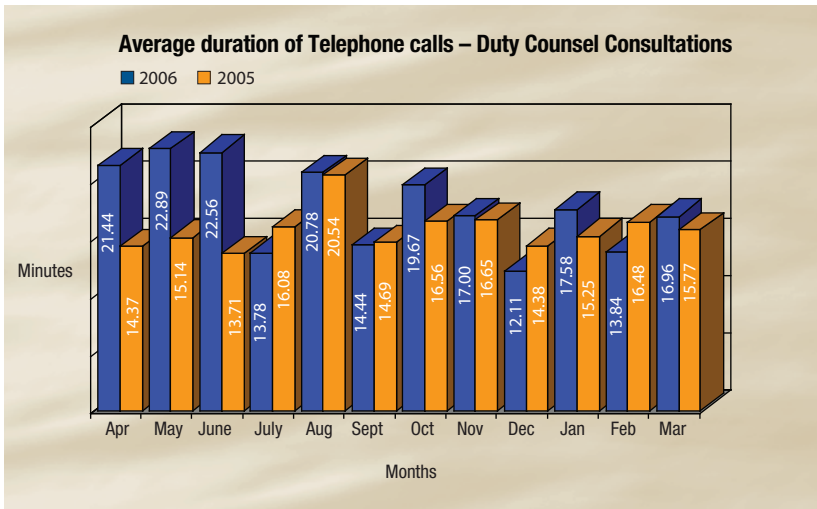
The *others* portion of the above graph refers to subjects such as the court martial process in general, redress of grievance and release from the CF. While DCS is not specifically mandated to advise on administrative matters, the duty counsel numbers which are widely distributed are also used for

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.

- 35.** The following data demonstrate the proportion of phone calls made in order to obtain advice on the choice between CM and summary trial to calls that were not directly related to the choice of military tribunal:



- 36.** Data compiled during the year allow us to track the regularity and variations of telephone services provides to DCS' clients:



- 37.** As the collected data indicate, the advisory services of DCS remain the dominant aspect of our work. Operational deployments and their related activities lead every day to numerous demands, of increasing complexity, for legal assistance. The participation of large numbers of reservists adds to this complexity. This essential service contributes to the protection of the fundamental rights of service members and others subject to the Code of Service Discipline.
- 38.** The 24-hour duty counsel line indicates an ignorance of rights and obligations, as well as a fear (founded or not) of reprisals. DCS is studying the possibility of offering more information on our website, which is under reconstruction. The intervention of DCS counsel has sometimes prevented the worsening of certain disciplinary situations.

General Activities & Comments

- 39.** As I observed in my last report, if the levying of fines before the end of proceedings in the Court of Appeal is administratively convenient, it is nonetheless often a heavy burden for the offender that must provide right away. This situation seems unjustified and the procedure should be modified to delay the entry into force of such a sentence.
- 40.** Our services were required on occasion with respect to Boards of Inquiry (BOI) and summary investigations (SI). However, considering the numbers of BOI and SI that are held every year, we receive relatively few requests for advice. We will insure that our services in that domain are better known.
- 41.** 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. The hearing was related to events in Somalia, and the former member was originally declared unfit to stand trial. The status of this ex-military member has been extended for another six months in order to finalize the measures required for a final

evaluation. A hearing is expected in July 2007. Changes to the NDA, necessitated by a decision of the Supreme Court of Canada on this issue, are expected.

42. Regulations concerning the legal representation of service members accused of criminal offences before foreign courts have reached the stage of legislative drafting.
43. 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.

Conclusion

44. The first objective of the lawyers of Defence Counsel Services is to allow their clients to obtain justice with the minimum of delay. The human and financial resources provided during this year and the flexibility of the JAG financial services have greatly facilitated our efforts. Although several members had already left the CF by the time of trial, it must be admitted that there has been a real improvement in this regard. We have also noted a general desire to deal promptly with disciplinary matters.
45. Over the coming year DCS will concentrate its efforts on pre-trial procedures. The introduction of rigid standards, policies and administrative directions in this area, such as the requirement of two weeks for every Disciplinary Court Martial, detracts from the principles of transparency and judicial impartiality. If the departure from these principles is too marked, it could affect procedural fairness and hence the right to make full answer and defence. Discussions on the flexible application of such policies are underway.

- 46.** As I announced in my last annual report, I have requested a second mandate as Director of Defence Counsel Services. The present four-year mandate expires in the month of August 2007. I have made this choice based on the achievements of Defence Counsel Services during this mandate.