

**Report of the Second Independent Review
Authority to The Honourable Peter G. MacKay
Minister of National Defence**

The Honourable Patrick J. LeSage, C.M., O.Ont., Q.C.

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Note

Bills C-15 and C-16 have recently received First Reading in the House of Commons. I have chosen not to comment on these bills as they are before Parliament at the present time.

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FOREWORD

Although there are some areas where the military justice system and the grievance system can benefit from improvements, overall the system is operating well. The structure of the Canadian Forces is aimed at ensuring individual members trust their leaders to execute successful missions while looking after those under their command. Improving policies and practices in the military justice and grievance system will only increase confidence in the Canadian Forces.

The men and women of the Canadian Forces have been most generous in providing valuable comments, recommendations and observations that have helped shape the content of this Report.

Colonel (Retired) Arthur H.C. Smith (Chief of Staff – Policy Group) provided the overall coordination of the Review and was always available to answer questions and provide guidance that comes only from long experience.

Colonel Patrick K. Gleeson (Deputy Judge Advocate General/Chief of Staff) and Colonel Michael Gibson (Deputy Judge Advocate General/Military Justice) along with numerous other members of JAG were ever helpful and patient, in briefing and facing the considerable challenge of educating me, regarding the military justice system.

Major Patrick Vermette (Directorate of Law/Military Justice – Strategic) who shepherded us through all the base visits was unwavering in his patience, courtesy, and providing me with invaluable information and guidance throughout this process.

Sarah Nath, Barry Stork, Tanya Rocca, and my counsel Lynn Mahoney, all of whom are employed at Gowling Lafleur Henderson LLP, worked tirelessly, wisely, and diligently in ensuring I had the assistance required to complete this Report.

TABLE OF ABBREVIATIONS

AWOL	Absence without leave
BGRS	Brookfield Global Relocation Services
Bill C-7	Bill C-7, <i>An Act to amend the National Defence Act</i> , 39 th Parl., 1 st Sess., 2006
Bill C-25	Bill C-25, <i>An Act to amend the National Defence Act and to make consequential amendments to other Acts</i> , 36 th Parl., 1 st Sess., 1998 (assented to 10 December 1998, S.C. 1998, c. 35)
Bill C-41	Bill C-41, <i>An Act to amend the National Defence Act and to make consequential amendments to other Acts</i> , 40 th Parl., 3 rd Sess., 2010
Bill C-45	Bill C-45, <i>An Act to amend the National Defence Act and to make consequential amendments to other Acts</i> , 39 th Parl., 2 nd Sess., 2008
Bill C-60	Bill C-60, <i>An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act</i> , 39 th Parl., 2 nd Sess., 2008 (assented to 18 June 2008, S.C. 2008, c. 29)
Bronson Defence Report	External Review of Defence Counsel Services (September 2009)
Bronson Prosecution Report	External Review of the Canadian Military Prosecution Service (March 2008)
CDS	Chief of the Defence Staff
CF	Canadian Forces
CFGS	Canadian Forces Grievance System
CFPM	Canadian Forces Provost Marshal

CMAC	Court Martial Appeal Court of Canada
CMP	Chief Military Personnel
CMPS	Canadian Military Prosecution Service
CO	Commanding Officer
<i>Code of Service Discipline</i>	<i>Code of Service Discipline</i> contained in Part III of the <i>National Defence Act</i>
CPIC	Canadian Police Information Centre
DCS	Directorate of Defence Counsel Services
DDCS	Director of Defence Counsel Services
DGCFGA	Director General Canadian Forces Grievance Authority
DMP	Director of Military Prosecutions
DPM PS	Deputy Provost Marshal Professional Standards
First Dickson Report	Report of Special Advisory Group on Military Justice and Military Police Investigation Services presented to the Minister of National Defence on March 14, 1997
Grievance Board	Canadian Forces Grievance Board
IA	Initial Authority
JAG	Judge Advocate General
Lamer Report	The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25 (September 2003)
MP	Military police
MPCC	Military Police Complaints Commission

NDA	<i>National Defence Act</i> , R.S.C. 1985, c. N-5
NDF	Negligent discharge of a firearm
PER	Performance Evaluation Report
PPSC	Public Prosecution Service of Canada
QR&O	<i>Queen's Regulations and Orders for the Canadian Forces</i>
RMP	Regional Military Prosecutor
Second Dickson Report	Special Advisory Group on Military Justice and Military Police Investigation Services, Report on the Quasi-Judicial Role of the Minister of National Defence (June 1997)
SIRA	Second Independent Review Authority
Somalia Commission of Inquiry	Commission of Inquiry into the Deployment of Canadian Forces to Somalia, <i>Dishonoured Legacy: The Lessons of the Somalia Affair</i> , June 1997
VCDS	Vice Chief of the Defence Staff

I. SECOND INDEPENDENT REVIEW AUTHORITY

A. Ministerial Direction

By Ministerial Direction issued on March 25, 2011,¹ the Honourable Peter G. MacKay, Minister of National Defence, established an external authority reporting directly to the Minister of National Defence to be known as the Bill C-25 Five-Year Independent Review Authority, and appointed the Honourable Patrick J. LeSage as the Second Independent Review Authority (“SIRA”).

The mandate of the SIRA is two-fold:

- (a) to conduct the Second Independent Review of the provisions and operation of the Statutes of Canada 1998, c. 35, (also referred to as Bill C-25)² under section 96 of that Act; and
- (b) to conduct an Independent Review of the provisions and operation of the Statutes of Canada 2008, c. 29 (also referred to as Bill C-60).³

The Ministerial Direction provides that the Second Independent Review Authority may:

- (a) sit at such time and at such place in Canada as it may from time to time decide; and
- (b) adopt such procedures and methods as it considers expedient for the proper discharge of its mandate.

The Second Independent Review Authority is granted, subject to law, complete access to:

- (a) the employees of the Department of National Defence;
- (b) the officers and non-commissioned members of the Canadian Forces;
- (c) the members and staff of the Canadian Forces Grievance Board;
- (d) the members and staff of the Military Police Complaints Commission;

¹ Attached as Annex A is a copy of the Ministerial Direction.

² Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 36th Parl., 1st Sess., 1998 (assented to 10 December 1998, S.C. 1998, c. 35).

³ Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*, 39th Parl., 2nd Sess., 2008 (assented to 18 June 2008, S.C. 2008, c. 29).

- (e) the Ombudsman for the Department of National Defence and the Canadian Forces and staff; and
- (f) any information held by the Department of National Defence and the Canadian Forces relevant to the review.

B. **The Process**

I have received numerous informative and helpful briefings from senior officers of the Judge Advocate General (“JAG”). I met with the Director of Military Prosecutions (“DMP”); the Director of Defence Counsel Services (“DDCS”); the Ombudsman; the CF Grievance Board; the Canadian Forces Provost Marshal (“CFPM”); the Director General Canadian Forces Grievance Authority (“DGCFGA”); the Canadian Forces Military Judges; the Military Police Complaints Commission (“MPCC”); the Environmental Chiefs of the Land, Air and Sea; the Vice Chief of the Defence Staff (“VCDS”); and with the Chief of the Defence Staff, General Walter Natynczyk. I also received written submissions and information from some of the above with respect to the operation of the military justice provisions of the *National Defence Act* (“NDA”),⁴ the grievance process, and the military police complaints process.

On or about May 5, 2011, a call for submissions was published in the CF newspaper, The Maple Leaf, and posted on CF internal and external websites. In it, I outlined the scope of the Review and asked for confidential submissions on the issues falling within my mandate.⁵ I have received 47 submissions dealing with a range of topics including the grievance process, the summary trial process, the military police (“MP”) and the military police complaints process, and the court martial system.

⁴ R.S.C. 1985, c. N-5.

⁵ Attached as Annex B is the published call for submissions.

Commencing May 29, 2011, I visited army, air force, and navy bases across Canada, meeting with a broad cross-section of CF members and a number of civilian members.⁶

I was given full access to all Canadian Forces (“CF”) members, all employees of the Department of National Defence, members and staff of the Canadian Forces Grievance Board, members and staff of the MPCC, the Ombudsman for the Department of National Defence and the Canadian Forces and his staff, as well as information relevant to this Review.

I thank all those who participated in the Review by attending meetings and providing written submissions. Everyone from Commanding Officers to new recruits provided thoughtful observations and recommendations for which I am very grateful. I hope this Report fairly captures many of the issues raised with me throughout the course of my consultations.

⁶ Attached as Annex C is a list of the military base and wing visits.

II. BACKGROUND AND MANDATE

To understand the scope of this Review, as provided in the Ministerial Direction, it is helpful to set out developments over the fifteen years leading up to this Review.

1. The Special Advisory Group on Military Justice and the Somalia Commission of Inquiry

The statutory basis for the Canadian system of military justice is set out in the *NDA*. It is known as the *Code of Service Discipline*.⁷ Two reviews of the system were released in 1997. The first, undertaken by the Special Advisory Group on Military Justice and Military Police Investigation Services, was chaired by the Right Honourable Brian Dickson, former Chief Justice of the Supreme Court of Canada. This Special Advisory Group was charged with examining the *Code of Service Discipline* (“First Dickson Report”) and examining the quasi-judicial role played by the Minister of National Defence under the *NDA* (“Second Dickson Report”).

For the second review, a Commission of Inquiry into the Deployment of Canadian Forces to Somalia (“Somalia Commission of Inquiry”) was assembled to investigate actions of certain CF members during their time in Somalia. The inquiry was chaired by Justice Gilles Létourneau of the Federal Court of Appeal and included Justice Robert C. Rutherford and Peter Desbarats. Both the Special Advisory Group’s reports and the Somalia Commission of Inquiry’s report recommended numerous changes to the *Code of Service Discipline*, the role of the Minister of National Defence under the *NDA*, and the leadership structure of the Canadian Forces.

⁷ *NDA*, Part III.

2. Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*

Following these two reviews, in 1998 the federal government introduced Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*.⁸ This Act received Royal Assent in December 1998. The principal changes introduced to the *NDA* by this Act included:

- abolishing the death penalty in the *NDA*;
- incorporating civilian parole ineligibility provisions;
- creating the Canadian Forces Grievance Board;
- establishing the Military Police Complaints Commission to provide independent oversight of complaints about the conduct of military police and allegations of interference of investigations conducted by the military police;
- creating the positions of Director of Military Prosecutions and Director of Defence Counsel Services;
- clarifying the functions of the Judge Advocate General, Minister of National Defence, and members of the chain of command; and
- strengthening the independence of Military Judges by amending the provisions relating to their appointment, power, and tenure.

Section 96 of Bill C-25 requires the Minister of National Defence to cause an independent review of the provisions and operation of this Act to be undertaken from time to time and “cause the report on a review conducted...to be laid before each House of Parliament within five years after the day on which this Act is assented to, and within every five year period following the tabling of a report...”.

⁸ S.C. 1998, c. 35.

3. The Lamer Report

The Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada, was appointed to conduct the first such independent review. His report, submitted in September 2003 (“Lamer Report”), made 88 recommendations, which included changes to arrest and pre-trial custody procedures, the charge-laying process, tribunal structure, sentencing, elections for mode of trial, and the requirement of unanimity for decisions of court martial panels. He also made recommendations regarding the independence of participants in the military justice system and improvements to the grievance and military police complaints process.

4. Legislative Response to the Lamer Report

Following the Lamer Report, the government made three separate attempts to amend the *NDA*. Bill C-7⁹ was introduced in the House of Commons on April 27, 2006 and subsequently died on the Order Paper when Parliament was prorogued on September 14, 2007. A successor bill, Bill C-45,¹⁰ was introduced in the House of Commons on March 3, 2008. It too died on the Order Paper when Parliament was dissolved on September 7, 2008 for a federal election.

Bill C-41¹¹ was introduced in the House of Commons on June 16, 2010. This Bill largely reproduced the provisions in the former Bill C-45. Bill C-41 also died on the Order Paper when Parliament was dissolved on March 26, 2011.

The majority of former Chief Justice Lamer’s recommendations have not yet been adopted in legislation. I will highlight some of those recommendations in the body of my Report. That I do

⁹ Bill C-7, *An Act to amend the National Defence Act*, 39th Parl., 1st Sess., 2006.

¹⁰ Bill C-45, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 39th Parl., 2nd Sess., 2008.

¹¹ Bill C-41, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 40th Parl., 3rd Sess., 2010.

not specifically refer to many of his recommendations should not be interpreted as lack of support for those recommendations.

5. Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*

On April 24, 2008, the Court Martial Appeal Court of Canada (“CMAC”) in *R. v. Trépanier*¹² found unconstitutional the provisions of the *NDA* authorizing the DMP to select the type of court martial to try an accused and requiring the Court Martial Administrator to convene the type of court martial selected. It determined these provisions violated the accused’s constitutional right to make full answer and defence and to control the conduct of that defence.

To address the *Trépanier* decision, Bill C-60 was quickly introduced. This Bill more closely aligned the mode of trial by court martial with the approach in the civilian criminal justice system. Bill C-60 also addressed four recommendations from the Lamer Report. It reduced the types of court martial from four to two (Standing Court Martial and General Court Martial), allowed Military Judges to deal with certain pre-trial matters at any time after a charge has been preferred, and required court martial panel verdicts to be unanimous. Bill C-60 received Royal Assent on June 18, 2008.

6. Mandate of the SIRA

The statutory authority for the SIRA is found in section 96 of S.C. 1998, c. 35 (also referred to as Bill C-25):

96. (1) The Minister shall cause an independent review of the provisions and operation of this Act to be undertaken from time to time.

¹² 2008 CMAC 3, [2008] C.M.A.J. No. 3 [hereinafter *Trépanier*].

- (2) *The Minister shall cause the report on a review conducted under subsection (1) to be laid before each House of Parliament within five years after the day on which this Act is assented to, and within every five year period following the tabling of a report under this subsection.*

The section flowed from Recommendation 17(b) of the Second Dickson Report:

We recommend that an independent review of the legislation that governs the Department of National Defence and the Canadian Forces be undertaken every five years following the enactment of the legislative changes required to implement the recommendations contained in this Report and in our March 1997 Report.

With respect to the scope of the review, the Lamer Report recommended the subject matter of the review include the military justice system and the Canadian Forces grievance process.¹³ An issue raised in the Lamer Report and was whether a review of the Office of the Ombudsman was included in his mandate Former Chief Justice Lamer concluded that since the Office of the Ombudsman was not created by Bill C-25 it was not part of his review.¹⁴ Because of the similar parameters of the mandate for this Review, I concur with this approach taken by former Chief Justice Lamer.

Responding to the Lamer Report recommendation regarding the timing and scope for these reviews,¹⁵ clause 101 of Bill C-41 would have added section 273.601 to the *NDA*. The proposed section 273.601 read as follows:

273.601 (1) The Minister shall cause an independent review of the following provisions, and their operation, to be undertaken:

(a) sections 18.3 to 18.6;

(a.1) sections 29 to 29.28;

¹³ Lamer Report, Recommendation 1.

¹⁴ Lamer Report at 9.

¹⁵ Lamer Report, Recommendation 1.

(b) Parts III and IV; and

(c) sections 251, 251.2, 256, 270, 272, 273, 273.1 to 273.5 and 302.

- (2) The Minister shall cause a report of a review to be laid before each House of Parliament within seven years after the day on which this section comes into force, and within every seven-year period after the tabling of a report under this subsection.*
- (3) However, if an Act of Parliament amends this Act based on an independent review, the next report shall be tabled within seven years after the day on which the amending Act is assented to.*

Bill C-41 would have increased the review period from five years to seven years and created a “reset” clause anytime legislation amended the Act based on an independent review.

I agree that such review should be statutorily entrenched in the *NDA*. My own experience in legislative enactments and in conducting this Review informs me that even seven years is an unnecessarily short period. Normally a significant period of experience with a statutory provision is required before one can wisely comment on its effect. I believe a ten year period would provide sufficient time for legislative changes and therefore remove the need for reset provisions. Also, a reset provision could result in too much time elapsing between reviews. Such a potentially long time lag was not envisaged by either former Chief Justice Dickson or former Chief Justice Lamer, who both felt that a regular review of the military justice and grievance processes was necessary.

Recommendation 1:

The military justice system and grievance system should be reviewed every ten years. The timing of the review period should be incorporated into the *NDA*.

III. MILITARY JUSTICE SYSTEM

A. Introduction

Unlike my predecessors, former Chief Justices Dickson and Lamer, I had little prior experience with the military or the military justice system. I accept without reservation the comments of Dickson J. when he described the uniqueness and importance of the military justice system:

...Canada is committed to keeping a viable regular and reserve military force, the ultimate purpose of which is the defence of the nation. Virtually everything that the military does must be subordinated to that objective including, in particular, the fundamental need to maintain discipline.

...

An essential quality, which ensures that members of the Canadian Forces will be capable of carrying out their assigned missions in these difficult missions is discipline. Without discipline, the Canadian Forces or, indeed, any military force cannot function effectively and can become a danger not only to themselves but to others.

It should not be surprising, therefore, that members of the CF are subject, not only to all the laws of the land like any other citizen, but as well to a Code of Service Discipline that sets out numerous "service offences" - such as absence without leave and insubordination - which attest to the unique needs of the military.

It is also essential to have a military justice system which deals expeditiously, decisively and yet fairly with breaches of the Code of Service Discipline. For the purpose of military justice is not only to ensure discipline but also - and this must be emphasized - to do so in a way which encourages reform of the individuals concerned so as to return them to the performance of their duties as soon as possible. The need for an efficient and expeditious justice system is thus greater in the military than in civilian society. Commanding Officers, especially in combat circumstances, cannot wait months or years before discipline is restored and justice done.

...

Such a disciplinary code would be less effective if the military did not have its own courts to enforce that code's terms.

*Notwithstanding the requirement for a separate Code of Service Discipline and for a special court system to deal with breaches of that code, it does not follow that the military justice system can be divorced completely from the rules of government and society as a whole. In particular, this system must be compatible with our Constitution, including the Canadian Charter of Rights and Freedoms.*¹⁶

A critical component of the military justice system is the strong and effective functioning of the chain of command. While former Chief Justice Dickson certainly accepted that the Commanding Officer in the chain of command was the “heart of the discipline system” whom the system entrusted to appropriately administer military justice, he felt that:

*...there are certain cases where this objective requires the introduction of checks and balances to ensure that the inherent conflicts that can occur between respect for the chain of command on the one hand, and impartial investigation and adjudication of service offences on the other, do not undermine the legitimacy of the whole military justice apparatus.*¹⁷

Regarding the importance and rationale of the summary trial, former Chief Justice Dickson wrote:

*The requirement for military efficiency and discipline entails the need for summary procedures. This suggests that investigation of offences and their disposition should be done quickly and at the unit level. The “cost” of doing this is that it is not possible to offer the accused member the full panoply of procedural rights which could otherwise be afforded in the context of ordinary criminal proceedings – such as an independent and impartial tribunal and the right to counsel. This suggests that routine investigations and summary proceedings should be reserved for minor offences directly involving unit discipline.*¹⁸

Having examined the system and listened to various participants (including a number who have been charged under the *Code of Service Discipline*), I share the view of former Chief Justice

¹⁶ First Dickson Report at 8-11.

¹⁷ First Dickson Report at 12.

¹⁸ First Dickson Report at 20.

Dickson. The summary trial system is vital to the maintenance of discipline at the unit level and therefore essential to the life and death work the military performs on a daily basis.

Michel Drapeau, a retired CF Colonel, has written extensively on the military justice system. In a submission to me he indicated that while not opposed *per se* to summary trials, he continues to be concerned about their structure, process, and perhaps even their constitutionality. One of M. Drapeau's primary concerns appears to be that a conviction at summary trial may result in a criminal record for the accused. This is a concern I share. However, regarding the constitutionality of the summary trial process, I am satisfied, as was former Chief Justice Dickson, that "the summary trial process is likely to survive a court challenge as to its constitutional validity".¹⁹

It is also significant to note the comment of former Chief Justice Lamer who stated, "Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence".²⁰ I proceed, as did former Chief Justices Dickson and Lamer, from the premise that the military justice system is sound, but some modifications will assist in ensuring its continued strength and viability.

B. **Code of Service Discipline**

The *Code of Service Discipline*, the foundation of the Canadian military justice system, sets out in considerable detail disciplinary jurisdiction, service offences, punishments, powers of arrest, and the organization and procedures for service tribunals, appeals, and post-trial review.

The *Code of Service Discipline* applies to regular CF members at all times, and to members of

¹⁹ First Dickson Report at 54.

²⁰ Lamer Report, Foreword.

the reserve force in specified circumstances, such as when on duty, in uniform, in a CF vehicle, etc.²¹ A civilian is subject to the *Code of Service Discipline* if they accompany a unit or other element of the CF on service or active service in any place, or if serving with the CF under an engagement with the Minister of Defence whereby the person agreed to be subject to the *Code of Service Discipline*.²²

When a person subject to the *Code of Service Discipline* commits an offence under the *Criminal Code*²³ or other federal law, they will normally be dealt with in the military justice system. Similarly, when an offence is committed contrary to foreign law by a person on deployment subject to the *Code of Service Discipline*, they will normally be tried in the military justice system.

However, not all offences can be charged and tried in the military justice system. The CF has no jurisdiction to try any person charged with having committed in Canada the offences of murder, manslaughter, or any offence under sections 280, 282, and 283 of the *Criminal Code* (offences of child abduction).

While I heard a variety of comments regarding the operation of the military justice system, specifically the summary trial and court martial processes, the system is generally working well. All the participants in this system take their job seriously and do their best to ensure the efficient and fair operation of the processes.

There are, however, some areas I believe could benefit from further review and revision.

²¹ *NDA*, s. 60.

²² *NDA*, ss. 60(f), (j), 61.

²³ R.S.C. 1985, c. C-46.

1. Investigations

When a service offence has been identified, an investigation may be conducted at the unit level by a designated CF member or by a military police officer (“MP”). MPs are CF members who are trained police officers and also perform military duties.

During the course of my Review I met with many MPs. Comments received from them and others were to the effect that their training and the training of all CF members who could be asked to conduct a unit investigation should be enhanced. My comments however will focus on training for MPs.

Many if not most investigations conducted by MPs are similar to investigations a provincial or municipal police force officer would conduct. Military bases are usually located in or adjacent to civilian municipalities. The police in those municipalities have frequent interaction with MPs. There is a significant degree of similarity of purpose with the two groups. MPs can and often do benefit from interactions with adjacent municipal, provincial, or RCMP force members. I encourage even greater MP liaison with these adjacent police services so each can benefit from sharing experiences, joint training sessions, and the expertise of the other. Such liaison, along with enhanced hands-on training, whether it be in a classroom or in the field, can only benefit MP skill and professionalism. It is interesting to note the First Dickson Report also recommended additional training.²⁴

Recommendation 2:

There should be greater liaison and, where practicable, joint training sessions between MPs and civilian municipal, provincial, or RCMP force members.

²⁴ First Dickson Report at 39.

A concern raised during base visits is delay in investigations. I was told this delay results in part because investigators are “over investigating”. While conducting thorough investigations is important, my concern is to ensure investigators are familiar with investigative techniques and processes that will help expedite their work. What must be kept in mind when the investigator is assessing the scope of the investigation required is that 98% of all charges laid proceed by summary trial. There need be a correlation between the offence alleged and the length and depth of the investigation required. An “External Review of the Canadian Military Prosecution Service”, released in March 2008 (“Bronson Prosecution Report”),²⁵ made the following observation:

The length of investigations is disproportionate to the seriousness and complexity of the cases.

...

It is difficult, in principle, to criticize the practice of conducting thorough investigations. However, in a system where speedy justice is a high priority, investigations need to be completed in a timely manner with an awareness of the impact that delay can have on the entire process. The time spent on investigations should also be proportionate to the seriousness of the matters involved.²⁶

The Bronson Prosecution Report recommended that, in straightforward cases, investigations conducted by units, MPs, and NIS, be completed within one month.²⁷ I agree with that recommendation and adopt it as my own.

Recommendation 3:

The target for completion of investigations in straightforward cases should be one month.

²⁵ Andrejs Berzins, Q.C., and Malcolm Lindsay, Q.C., *External Review of the Canadian Military Prosecution Service* (Ottawa: Bronson Consulting Group, 31 March 2008).

²⁶ Bronson Prosecution Report at 14 and at 27.

²⁷ Bronson Prosecution Report at 15.

2. Search Warrants

Section 273.3 of the *NDA* provides that only the Commanding Officer (“CO”) has the power to issue a search warrant. Subsection 163(2)(b) of the *NDA* states that a Commanding Officer may not preside at the summary trial of a person charged with an offence if the summary trial relates to an offence in respect of which a warrant was issued under section 273.3 by the Commanding Officer. The conundrum, if it be that, is that a CO will be disqualified from presiding at a trial based, even in part, on a search warrant issued by him or her. Since there is a fundamental rationale to having the CO of a unit preside at a summary trial, I suggest that whenever reasonably practicable, search warrants be sought not from the CO of the unit of the object of the investigation, but from another CO or from a civilian Justice of the Peace.

Recommendation 4:

When practicable, search warrants should be sought not from the CO of the unit of the object of the investigation, but from another CO or from a civilian Justice of the Peace.

3. Jurisdiction of Military Police

Many comments and submissions related to the jurisdiction of the military police. These issues are not straightforward and are multifaceted. Much of the difficulty relates to the interrelationship of various pieces of legislation including the *NDA*,²⁸ the *Queen’s Regulations and Orders for the Canadian Forces* (“*QR&O*”),²⁹ and the *Criminal Code*,³⁰ as well as other federal and provincial statutes. In some investigations these are like pieces of a puzzle that must be sorted out in order to establish MP jurisdiction.

²⁸ S.156: powers of military police; s. 2: definition of “defence establishment” and “material”; s. 18 of the *Federal Real Property and Federal Immovables Act*, S.C. 1991, c. 50 governs leased property by the DND which is a “defence establishment”.

²⁹ *QR&O* 22.01.

³⁰ S. 2(g): definition of “peace officer”.

There are no simple answers. I encourage the military authorities to establish close working relationships and mutual agreements or, where possible, memoranda of understanding with adjacent police agencies for a clearer delineation of services. Co-operative relationships with adjacent law enforcement agencies should be an ongoing goal.

Recommendation 5:

The military police should establish close working relationships with adjacent police agencies and, where possible, enter into memoranda of understanding. There should be ongoing dialogue with federal, provincial, and territorial ministers of justice regarding workable jurisdiction sharing.

Another jurisdictional issue is the authority of the MP to deal with provincial statutes. For example, mental health legislation in Ontario³¹ and British Columbia³² do not define MPs as “police officers”.³³ Thus, MPs who are called to deal with a person with mental health issues cannot place that person in custody to transport them to an appropriate medical facility for treatment by an appropriate medical practitioner.³⁴

The inability of the MP to provide appropriate assistance, in what may well be a volatile situation, needs to be rectified. Rectification will possibly require amendments to provincial legislation or regulation. This may well be difficult to accomplish, but with goodwill and commitment of federal, provincial, and territorial justice authorities, it can be achieved.

Mental health is a significant issue touching all members of society, including CF members. As well, it is an important issue at all levels of the justice system. It impacts families, the police, prosecutors, defence counsel, witnesses, judges, and jailors, not to mention the affected

³¹ *Mental Health Act*, R.S.O. 1990, c. M.7.

³² *Mental Health Act*, R.S.B.C. 1996, c. 288.

³³ See also *Police Act*, R.S.B.C. 1996, c. 367.

³⁴ *Ontario Mental Health Act*, s. 17.

individual, who often becomes the accused. Chief Justice Beverley McLachlin of the Supreme Court of Canada recently addressed the 2011 Annual Meeting of the Canadian Bar Association. In her comments she raised the issue of mental health as it relates to the justice system. She said more needs to be done to assist the mentally ill. They far too often fall to be dealt with in the justice system when the far better result for all concerned is that they be dealt with by our health system. Although it is a top priority for police, prosecutors, defence counsel, correctional authorities, and judges, there is much to be done.³⁵ I can do no better than to echo Chief Justice McLachlin's words and encourage the senior ranks of the Canadian military to do their utmost to ensure that those suffering from mental health issues get the needed help from our health system and are not being relegated to the justice system.

Recommendation 6:

The senior ranks of the Canadian military are encouraged to do their utmost to ensure that those suffering from mental health issues are not placed in the criminal justice system by default but receive the help they need from our health care system.

4. Offences

Section 129 of the *NDA* is an "offence" section about which numerous submissions were received. The section provides a general prohibition against "acts, conduct, disorder or neglect to the prejudice of good order and discipline". The importance of section 129 in the military justice system is also evident from the fact that it is the most commonly charged infraction in the *Code of Service Discipline*. The JAG Annual Report indicates in the last reporting year, section 129 accounted for 1,264 out the 2,376 charges at summary trial. Further, at court martial, section 129

³⁵ Melanie Patten, "Chief Justice says Canadians of all backgrounds deserve to have legal needs met" *Winnipeg Free Press* (13 August 2011), online: [winnipegfreepress.com <http://www.winnipegfreepress.com/canada/breakingnews/chief-justice-says-canadians-of-all-backgrounds-deserve-to-have-legal-needs-met.html>](http://www.winnipegfreepress.com/canada/breakingnews/chief-justice-says-canadians-of-all-backgrounds-deserve-to-have-legal-needs-met.html).

accounted for 35 out of the 187 charges.³⁶ Therefore, in the last reporting year, almost 51% of all charges laid were under section 129.

The CMAC in *R. v. Lunn*³⁷ dealt with a constitutional challenge to section 129 on the basis of vagueness. It held that section 129 is not unconstitutional on this basis if adequate particulars are provided. However, former Chief Justice Lamer noted in his report that there is confusion and uncertainty regarding the elements required to prove this offence.³⁸

A specific concern discussed with me at base visits related to the use of section 129 for the very frequently used charge of “negligent discharge of a firearm” (“NDF”). Given the number of NDF charges,³⁹ the very broad range of circumstances that gave rise to the NDF charge, the apparent legal complexity (depending on the factual background that gives rise to the charge), and the current practice of seeking legal advice from JAG before laying the NDF charges, I suggest a new approach be taken.

I recommend that NDF be made a separate and distinct offence. I further recommend that there not be a single offence of NDF but a series of at least two, if not three, separate offences of NDF. There ought to be a gradation in the severity of the offences. I will not attempt in this Report to describe how the offences might be differentiated; however, one may look at somewhat analogous provisions in other areas of the law. For example, driving offences include everything from speeding, to careless driving, to dangerous driving, to criminally negligent driving. One

³⁶ Office of the Judge Advocate General, *Annual Report of the Judge Advocate General to the Minister of National Defence on the administration of military justice in the Canadian Forces*. A review from 1 April 2008 to 31 March 2009, (Ottawa: JAG, 2009) at 130 and 136 to 137, online: The Department of National Defence and the Canadian Forces <<http://www.dnd.ca/jag/publications/office-cabinet/AnnRep-RappAnn2009-eng.pdf>>.

³⁷ [1993] C.M.A.J. No. 7.

³⁸ Lamer Report at 68.

³⁹ During the 2008-2009 reporting period, there were 408 summary trials conducted for negligent discharges. This represents 22% of the total number of summary trials held during the reporting period.

may also look for some guidance – and I stress, only some guidance – at some of the weapons offences in the *Criminal Code*. If such changes are made, I believe some of the problems of the “generic” charge under section 129 would be alleviated and the necessity of obtaining pre-charge legal advice and the attendant delays would be greatly reduced, if not eliminated. The range of charges could better reflect the accidental, careless, negligent, grossly negligent, or wilful nature of this infraction.

Recommendation 7:

There should be distinct, separate offences in the *NDA* for negligent discharge of a firearm based on the seriousness and circumstances of the discharge.

Recommendation 8:

Section 129 of the *NDA* ought to be clarified to ensure the salient elements of an offence are properly delineated.

5. Legal Advice Prior to Charges

Currently, *QR&O* 107.03 provides circumstances where legal advice must be obtained prior to laying a charge. *QR&O* 107.11 also sets out circumstances when a Delegated Officer, Commanding Officer, or Superior Commander to whom a charge has been referred must obtain advice from the unit legal advisor prior to making a decision under *QR&O* 107.09(2) or (3).

Former Chief Justice Lamer recommended that consideration be given to reducing instances in which charging authorities must obtain legal advice before laying a charge.⁴⁰ Some civilian criminal law provinces and territories require the obtaining of legal advice prior to laying a charge. Other jurisdictions provide the charging authority (usually the police) with the final

⁴⁰ Lamer Report, Recommendation 57.

discretion whether or not to lay a charge. In my view, the military charging authority should, with few exceptions, be given that decision-making power, absent being mandated to obtain legal advice, although they should feel free to, and often will, seek advice from JAG.

Recommendation 9:

The instances in which charging authorities must obtain legal advice before laying a charge should be reduced.

6. Limitation Period for Laying Charges

The length of time to charge an individual, and thereafter the time it takes to commence a summary trial, often contributes to delay in the summary trial process. The one year limitation period to commence a summary trial, as recommended by both former Chief Justices Dickson⁴¹ and Lamer,⁴² was accepted in Bill C-60 and is now contained in the *NDA*.⁴³

Clauses 35 and 36(2) of Bill C-41 were to replace *NDA* subsection 163(1.1) and subsection 164(1.1) and provide a six-month limitation period for the laying of charges from the date of the offence. Clause 36(2), similar to the language in clause 35, stated:

A superior commander may not try an accused person by summary trial unless the charge is laid within six months after the day on which the service offence is alleged to have been committed and the summary trial commences within one year after that day [emphasis added].

I believe the phrase “that day” could be confusing and should be clarified to specifically say “one year after the day on which the service offence is alleged to have been committed”.

⁴¹ First Dickson Report, Recommendation 32.

⁴² Lamer Report, Recommendation 43.

⁴³ *NDA*, s. 164 (1.1): “A superior commander may not try an accused person by summary trial unless the summary trial commences within one year after the day on which the service offence is alleged to have been committed”.

Recommendation 10:

If language similar to clauses 35 and 36(2) of Bill C-41 is used to amend the NDA in the future, the language should be clear that the summary trial commences within one year after the day on which the service offence is alleged to have been committed.

7. Assisting Officers

QR&O 108.14 describes persons eligible to be an assisting officer as an officer, or in exceptional circumstances, a non-commissioned member above the rank of sergeant. In a JAG publication produced by the Directorate of Law Training,⁴⁴ the role of the assisting officer is described in part:

- ensure that the accused, before making any election for summary trial or court martial, is aware of his or her rights and the procedures under the *Code of Service Discipline*;
- assist, to the extent desired by the accused, with the preparation, and presentation of the case when the matter will be tried by summary trial;
- assist in the pre-election, pre-trial, trial, and sentencing phases of the summary trial process;
- assist, to the extent that the accused desires, to:
 - prepare the accused's case
 - advise the accused regarding witnesses
 - advise the accused regarding evidence
 - advise the accused on all matters regarding the charges and the trial
 - assist and speak for the accused during the trial
 - ensure the accused is provided with all information relevant to the charge
 - assist the accused in the election process.

⁴⁴ The Department of National Defence and the Canadian Forces. *Military Justice at the Summary Trial Level V2.2*, 12 January 2011, online: The Department of National Defence and the Canadian Forces <http://www.forces.gc.ca/jag/publications/Training-formation/MilJustice_JustMilv2.2-eng.pdf> at chapter 9.

Concerns were expressed that some individuals assigned the role of assisting officer have not had the opportunity to be appropriately trained.

Assisting officers have a pivotal role in the military justice system. They must be capable of properly advising accused persons. Assisting officers who do not understand their role and the military justice system threaten the integrity of the summary trial. It is essential these officers be properly trained. It would be beneficial to include in-person instruction as part of the training process. Consideration should also be given to including a mock trial during training to allow future assisting officers to witness a summary trial from start to finish. Job shadowing with more experienced assisting officers would also be beneficial. These measures would provide a more interactive, experiential learning environment.

While assisting officers are not expected to be lawyers, it is clear from the description of their role they must be adequately versed in the military justice system to provide appropriate procedural advice and information to the CF member to permit that member to make informed decisions. In my view, an assisting officer should not be a CF member who has just completed basic training. The assisting officer should have at least the rank of Lieutenant.

I also recommend that there be a certification requirement for assisting officers similar to that of presiding officers.⁴⁵ Senior officers should be reminded of their ongoing and important role to mentor assisting officers.

⁴⁵ *QR&Os* 101.09 and 108.10 provide that all Superior Commanders, Commanding Officers, and Delegated Officers must be both trained in the administration of the *Code of Service Discipline*, and certified by the JAG as qualified to perform these particular duties.

Recommendation 11:

Assisting officers should hold a rank of Lieutenant or higher. There should be a certification requirement for assisting officers similar to that for presiding officers. The training process of assisting officers ought to include in-person instruction, mock trials, and job shadowing of more experienced assisting officers.

By making these comments and recommendations I am reiterating what has been said by my predecessors in their reports.⁴⁶ In his first report in 1997, former Chief Justice Dickson wrote, “it appears that many officers lack the proper training and expertise to provide the help needed by the accused”.⁴⁷ Between the time of the First Dickson Report in 1997 and the Lamer Report in 2003, there had not been great progress made in assisting officer training. Former Chief Justice Lamer had this to say in his report:

My belief that assisting officers could use additional training is bolstered by the findings from a survey conducted by KPMG for the Office of the JAG. The survey found that over 20% of accused did not find their assisting officer helpful throughout the summary trial process. More worrying is the fact that 54.3% of accused did not know that they could request a review of the presiding officer’s finding or sentence at a summary trial – a fact that should have been made clear by their assisting officer. Further, it is only the minority of cases that accused are obtaining advice from legal counsel – an accused contacted a lawyer about the choice to proceed by summary trial or court martial in only 32.6% of cases. Many assisting officers indicated in the survey that they are not adequately prepared for their role and desired formal training similar to the certification training provided for presiding officers.⁴⁸

Notwithstanding the assisting officers’ role with an accused, it must be remembered that CF members should always have access to the 1-800 Help Line. The toll free 1-800 Help Line phone number is and must be provided on all documentation given to an accused when charged with an offence. The 1-800 Help Line must be appropriately staffed by properly trained JAG personnel

⁴⁶ First Dickson Report, Recommendation 24; Lamer Report, Recommendations 44 and 45.

⁴⁷ First Dickson Report at 63.

⁴⁸ Lamer Report at 60.

who are able to provide appropriate legal advice to any accused who may call. The importance of such advice being available to the accused cannot be over-emphasized.

8. Presiding Officers

An issue is who has or should have the authority to preside at the trial of Second Lieutenants in training in DP1. This issue was of specific concern in Gagetown due to the large number of trainees on the base. Currently, Second Lieutenants are required to be tried by Superior Officers, not Commanding Officers.⁴⁹ This puts a strain on the Superior Officer's time, particularly at a training base like Gagetown. To relieve the Superior Officer of having to spend what can be substantial periods of time on these hearings, I recommend the *NDA* be amended to permit the Commanding Officer to try a Second Lieutenant in DP1 in their unit. In part, this can be justified on the basis that although the Second Lieutenant in DP1 is a commissioned officer, he or she is not fully trained in his or her profession. Thus, Commanding Officers should have authority to preside at their summary trials. The senior officers with whom I consulted were of the view that there would be considerable benefit if these summary trials were conducted by COs. However, there must be an appropriate separation of rank between the rank of the Commanding Officer and the Second Lieutenant.

Recommendation 12:

The *NDA* should be amended to permit a Commanding Officer to preside at a summary trial of a Second Lieutenant in DP1 in their unit. There must be an appropriate separation of rank between the rank of the Commanding Officer and the Second Lieutenant.

⁴⁹ *NDA*, s. 164.

9. Flexibility of Punishments

The Lamer Report recommended officer cadets be subject to a wider range of minor punishments⁵⁰ and there be a comprehensive review of the sentencing provisions of the *NDA* to provide for a more flexible range of punishments and sanctions.⁵¹ Bill C-41 addressed both of these recommendations.⁵² If the successor bill addresses these issues in a similar fashion, this would satisfy many concerns. Greater flexibility should be available to the presiding officers and Military Judges to allow imposition of a sentence that reflects both the severity of the offence and the circumstances of the offender.

Recommendation 13:

A comprehensive review of the sentencing provisions of the *NDA* should be undertaken to provide for a more flexible range of punishments and sanctions.

10. Administrative Action

Defence Administrative Order and Directive 5019-4 (Remedial Measures) provides as follows:

Administrative Actions Versus Disciplinary Actions

Administrative actions are not punishments under the Code of Service Discipline.

Both disciplinary actions under the Code of Service Discipline and administrative actions are meant to address a CF member's conduct or performance deficiency. They may operate independently or one may complement the other.

Disciplinary actions and administrative actions serve different purposes. Disciplinary actions possess a punitive aspect that administrative actions do not.

⁵⁰ Lamer Report, Recommendation 51.

⁵¹ Lamer Report, Recommendation 52.

⁵² Clauses 21, 24, 36 and 62.

*Disciplinary action is initiated only if there are sufficient grounds to justify the laying of a charge under the Code of Service Discipline against a CF member.*⁵³

Further clarification is provided in the Military Administration Law Manual:

Administrative and Disciplinary Action

8. *Administrative and disciplinary action must always be clearly distinguished. It is inappropriate for administrative action to be used as a substitute for disciplinary action, although disciplinary action is never precluded by any administrative action that has already been carried out [emphasis added].*⁵⁴

In spite of these clear directives, I was advised by a number of CF members, both commissioned and non-commissioned, that administrative action continues to be used in some units as a substitute for what some consider the more cumbersome summary trial process. As a result, I reiterate what the directives make clear: the CF should not use administrative action as a substitute for disciplinary action. I echo the comments of former Chief Justice Lamer when he wrote:

*I do have concerns that one result of the perception that summary trials and courts martial take significant periods of time is the temptation for commanding officers to turn to administrative sanctions as a quick means to restore discipline. Administrative measures should not be seen as substitutes for disciplinary action. The use of long-term administrative measures, such as recorded warnings and counselling and probation, in such a manner is particularly worrying as they remain permanently on the member's file.*⁵⁵

Recommendation 14:

The chain of command must reconfirm that administrative action may not be used as a substitute for disciplinary action.

⁵³ The Department of National Defence and the Canadian Forces. *DAOD 5019-4, Remedial Measures*, 12 July 2010, online: The Department of National Defence and the Canadian Forces <<http://www.admfincs.forces.gc.ca/dao-doa/5000/5019-4-eng.asp>>.

⁵⁴ The Department of National Defence and the Canadian Forces. *Military Administrative Law Manual A-LG-007-000/AF-010*, 1 October 2008, online: The Department of National Defence and the Canadian Forces <<http://www.forces.gc.ca/jag/publications/adminlaw-loiadmin/MilAdminlaw-DroitAdminMill-eng.pdf>>, Chapter 14 at 2.

⁵⁵ Lamer Report at 71.

11. Records of Charges and Convictions

The *Criminal Records Act*⁵⁶ provides that a person is ineligible to apply for a pardon for ten years for a service offence under the *NDA* for which the offender received a fine of more than \$2,000, detention for more than six months, dismissal from Her Majesty's Service, imprisonment for more than six months, or punishment greater than imprisonment for less than two years under subsection 139(1).⁵⁷ The *Criminal Records Act* also provides that a person is ineligible to apply for a pardon for three years for all other service offences within the meaning of the *NDA*.⁵⁸

When I spoke with CF members across the country I was surprised that many, including lawyers, were unaware of the very real potential to acquire what is the equivalent of a "criminal record" if convicted of minor service offences.

Clause 75 of Bill C-41 was to add a provision to the *NDA* that convictions for certain service offences would not constitute an offence under the *Criminal Records Act*. I am of the view that the language contained in Bill C-41 is too narrow and should be expanded. At the Committee stage of Bill C-41 there was considerable discussion about this issue. This issue is complex. It involves the interplay between of the *Criminal Records Act*, the Canadian Police Information Centre ("CPIC") system, and the *NDA*.

Suffice it to say I have very real concerns about obtaining a criminal record from a summary trial conviction. The issue of criminal records flowing from convictions at summary trial must be reviewed. The very damage that flows from a criminal record and the potential effect on a person's life is far too severe a consequence for most offences tried by summary trial. I am fully

⁵⁶ R.S.C. 1985, c. C-47.

⁵⁷ *Criminal Records Act*, s. 4(a).

⁵⁸ *Criminal Records Act*, s. 4(b).

supportive of the summary trial as an efficient and effective method of maintaining discipline. However, because the summary trial, although constitutional for its purposes, does not provide the panoply of safeguards of a civilian criminal trial, the unintended consequence of acquiring a “criminal record” at a summary trial should occur only in exceptional circumstances.

A related concern is information regarding charges and convictions entered into CPIC. The RCMP, who are the responsible authority, describe CPIC on their website as:

...a computerized system that provides tactical information about crimes and criminals...it is the only national information-sharing system that links criminal justice and law enforcement partners across Canada and internationally.

CPIC is responsible for the storage, retrieval and communication of shared operational police information to all accredited criminal justice and other agencies involved with the detection, investigation and prevention of crime.⁵⁹

It strikes me as unreasonable that a CF member charged, for example, with “absence without leave” (“AWOL”)⁶⁰ for being late for work and who has a summary trial, could have this charge and perhaps even a subsequent conviction entered on the CPIC database. Such information is often shared with the Canadian Border Services Agency, which I have been informed has resulted in some members being denied entry into the United States because of the charge and/or conviction.

I recommend that the processes and procedures for entering information into CPIC and the sections of the *NDA* dealing with this issue⁶¹ be reviewed and amended so as to avoid consequences that are totally disproportionate to the violation.

⁵⁹ Royal Canadian Mounted Police. *Canadian Police Information Centre*, 9 August 2006, online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/nps-snp/cpic-cipc-eng.htm>>.

⁶⁰ *NDA*, s. 90.

⁶¹ *NDA*, ss. 196.27 to 196.29.

Recommendation 15:

There ought to be a full review of the issue of criminal records flowing from convictions at summary trial. I also recommend a review of the processes and procedures for entering information into CPIC and of the relevant *NDA* sections to avoid consequences disproportionate to the violation.

12. Election

An accused CF member has the right to elect a trial by court martial when charged with the majority of offences under the *Code of Service Discipline*.⁶² The presiding officer must offer an election unless the accused is facing only a minor disciplinary charge or the offence is one that must be dealt with at court martial.⁶³

The following chart depicts the number of summary trials, the number of elections offered, and the number of elections to court martial in circumstances where the accused was offered an election.⁶⁴ Courts martial comprise between 1.5% to 3% of total trials and approximately 5% to 7% of those cases where the accused was offered an election as to mode of trial.

	FY 07/08	FY 08/09	FY 09/10	FY 10/11
Total Number of Summary Trials	2040	1933	1943	1725
Number of elections offered	604	543	576	638
Number of elections made by accused to be tried by court martial	41	29	27	48

In cases where the accused is provided an election, he or she may waive the right to trial by court martial.⁶⁵ The waiver must be clear and unequivocal and the person must make the waiver with

⁶² *NDA*, s. 162.1.

⁶³ *QR&O* 108.17.

⁶⁴ Information provided by JAG.

⁶⁵ *QR&O* 108.17 and 108.18.

full knowledge of the rights being given up.⁶⁶ In *Korponay v. Canada (Attorney General)*, the Supreme Court of Canada stated:

...the validity of such a waiver...is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process... The factors [the judge] will take into account in determining whether the accused has clearly and unequivocally made an informed decision to waive his rights will vary depending on the nature of the procedural requirement being waived and the importance of the right it was enacted to protect.⁶⁷

With respect to the true “voluntariness” of the waiver, I have received comments that, in some instances, CF members elect summary trial to avoid what they believe are potential adverse consequences of an election to court martial. For example, a member on deployment who elects court martial will frequently be immediately “repatting” back to Canada. They are not allowed to finish their deployment, which probably will have significant financial implications.

Although I recognize there may well be practical necessity to “repatting”, it is nevertheless important to ensure that it does not occur in situations where it will be, or appear to be, a punishment for the member having chosen to exercise their right to a trial by court martial. Accused who choose to be tried by court martial should not be disadvantaged by their choice.

I recommend the *NDA* clearly state that members who elect court martial will not be subjected to any administrative or other consequences or be disadvantaged because of their election.

Recommendation 16:

The *NDA* should provide that members who elect court martial will not be subjected to any administrative or other consequences, or be disadvantaged because of this election.

⁶⁶ Martin L. Friedland, *Controlling Misconduct in the Military* (Ottawa: Public Works and Government Services Canada – Publishing, 1997) at 98-100.

⁶⁷ [1982] 1 S.C.R. 41 at 49-50.

13. The Referral and Preferral Processes

When a charge must proceed to court martial, either because the accused has so elected or because the nature of the offence so requires, the Commanding Officer or Superior Commander must forward an application to the Referral Authority for disposal.⁶⁸ The Referral Authority represents the interests of the Canadian Forces in prosecuting the charge. The Referral Authority's role is to ensure the views of the senior chain of command are taken into account in deciding whether to proceed with the charges. He or she has a broader perspective and a clearer picture of all issues in the units and formations to be considered when determining to continue with the prosecution.

After receiving an application for disposal, the Referral Authority forwards the application to the DMP along with any recommendations regarding the disposal of the charge.⁶⁹ The DMP is responsible for deciding whether a charge is suitable for court martial based on the sufficiency of the evidence and whether a prosecution is in the public interest and the interest of the Canadian Forces. If the DMP concludes that a court martial is warranted,⁷⁰ the charge is "preferred" by the DMP signing the charge sheet and referring it to the Court Martial Administrator,⁷¹ who is responsible for convening the court martial.⁷²

This entire process, as it presently exists, is very lengthy and contributes to delay. It currently takes approximately 82 days from the date the charge is laid to apply to a Referral Authority for

⁶⁸ *NDA*, s. 163.1 and *QR&O* 109.03.

⁶⁹ *QR&O* 109.05.

⁷⁰ If the DMP concludes a charge should not proceed by court martial, the DMP may refer it for disposal by an officer who has jurisdiction to try the accused person by summary trial.

⁷¹ *NDA*, s. 165(2) and *QR&O* 110.

⁷² *NDA*, s. 165.19.

disposal of a charge and a further 56 days for the charge to proceed from referral to preferral.⁷³ I see no good or necessary reason why, but for exceptional cases, more than 30 days are required to complete the application to the Referral Authority. The process should be condensed so that the Commanding Officer refers the charges to the Referral Authority and the DMP at the same time. The Referral Authority would have 30 days to provide input with respect to the charges to the DMP. The use of digital media would assist in streamlining and accelerating this process.

Recommendation 17:

Commanding Officers should be given 30 days to forward applications for disposal of charges to the Referral Authority and the DMP. Upon receipt of the application, if the Referral Authority wishes to make any comments with respect to proceeding with the charges, he or she should advise the DMP within a further 30 days. I recommend the CF optimize the use of digital media for streamlining the referral process.

I also see no good reason why the time period that the DMP has to prefer the charge to the Court Martial Administrator should be more than 60 days. The test the DMP has to consider when deciding whether to prefer the charge is whether there is a “reasonable prospect of conviction” and that it is in the “public interest” to proceed. It is not a standard of absolute certainty. The decision, but for the exceptional case, should be able to easily meet a 60 day timeframe. It is interesting to note the comments made in the Bronson Prosecution Report on this matter:

In our opinion, the post-charge reviews by RMP's⁷⁴ are conducted in excessive detail. The RMP's are very “risk-adverse” and are reluctant to leave any stone unturned...The depth of their post-charge reviews is disproportional to the seriousness of the cases, most of which are quite minor in nature. In order to keep the process moving and reduce delays, the in-depth preparation should be done after the charges have been preferred when the prosecutors get ready for trial.⁷⁵

⁷³ Information provided by JAG representing statistics from April 1, 2010 to March 31, 2011.

⁷⁴ “RMP” is Regional Military Prosecutor.

⁷⁵ Bronson Prosecution Report at 46.

Recommendation 18:

The time period for the DMP to prefer the charge and forward it to the Court Martial Administrator should be 60 days.

14. Disclosure and Production of Will Says

The accused's right to disclosure of all relevant and non-privileged information in the possession of the Crown is guaranteed by s. 7 of the Charter. Furthermore, failure to comply with this right is closely related to the risk of miscarriages of justice. For these reasons, the duty to make full disclosure is one of the most important obligations in the criminal justice system.⁷⁶

Disclosure should be handled no differently for a CF member charged in the military justice system than one charged in the civilian justice system. The principles of disclosure have been clearly articulated.⁷⁷ The accused must be given all potentially relevant information.

In the civilian justice system disclosure is often transmitted electronically. Many police officers' notes and documents are recorded in an electronic format and then disclosed electronically. I encourage MPs to utilize electronic means to record their notes, investigations, interviews etc. This will result in a more expeditious transfer to the prosecution. I also urge the prosecution to review the format of the disclosure and, wherever possible, make electronic disclosure to the accused.

The Bronson Prosecution Report stated:

The practice in the civilian system is to provide disclosure to the defence as soon as possible after charges are laid. Not only is this fair to the accused but also experience shows that timely disclosure results in earlier resolution of cases. In the military justice system, some basic disclosure is provided to the accused after he/she is charged and before he/she is required to make his/her election.

⁷⁶ The Honourable Patrick J. LeSage and Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (November 2008) at 20.

⁷⁷ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

*However, it appears that the accused is not given the entire investigation file at that stage.*⁷⁸

Lamer Recommendation 49 and Bronson Prosecution Report Recommendation 6.10 recommended complete disclosure be provided. The Lamer Report specifically recommended the *QR&O* be amended to require will say statements be provided to the defence “at or prior to the time when a charge is being preferred” rather than before the court martial commences.⁷⁹ Building on that recommendation, the Bronson Prosecution Report recommended that complete disclosure be provided to the accused as soon as possible after charges are laid and that “this should be done shortly after RMP has had the opportunity to vet the investigation file and should not be delayed until charges are preferred”.⁸⁰

I fully concur with these recommendations and adopt them as my own with emphasis being placed on “as soon as possible after charges are laid”, so that disclosure is not delayed until charges are preferred. *QR&O* 111.11 should therefore be amended to remove the language “before a trial by court martial commences” and replace it with “as soon as possible after charges are laid”.

Recommendation 19:

***QR&O* 111.11 should be amended to require complete disclosure be given as soon as possible after charges are laid.**

An issue raised by the military police was the requirement that an MP’s conduct record be disclosed to the prosecution. CF policy issued January 2011 provides that military police must disclose all relevant misconduct records of any MP involved in the conduct of an investigation to

⁷⁸ Bronson Prosecution Report at 53.

⁷⁹ Lamer Report, Recommendation 49.

⁸⁰ Bronson Prosecution Report, Recommendation 6.10.

an accused.⁸¹

In response to the Supreme Court of Canada decision of *R. v. McNeil*,⁸² the DMP Police Advisory 01/11 states as follows:

3. *It is understood that the McNeil ruling, as well as the contents of this policy, will likely cause significant privacy concerns among members of the MP Branch. MP can be reassured that prosecution services throughout the country are equally concerned and have developed procedures to ensure that only information directly relevant to the case at hand can be disclosed. The Public Prosecution Service of Canada (PSCC) [sic] issued ref C in Jul 09, which provided advice for police services to develop their own internal "McNeil" policies that will reflect the requirements of the this [sic] new case law while also ensuring the maximum protection to police against improper disclosure.*

All information must be disclosed to the DMP, who will then make the decision regarding relevance. The relevant information will be disclosed by the DMP to the accused.

15. Communication with Commanding Officer

If the DMP decides not to prefer a charge, *QR&O* 110.04(3) requires the DMP to provide written notice as soon as practicable to the Commanding Officer and others, including the officer who referred the charge. This had been the subject of a Lamer Report recommendation.⁸³

Consultation with the Commanding Officer and the chain of command is and should be part of the decision-making process:

*The input from the Chain of Command is most important on the issue of "public interest". Firstly, it is germane to the public interest in proceeding with the prosecution. Secondly, it is relevant to the sentence that should be imposed for the offence if the accused pleads guilty or is adjudged guilty after a Court Martial trial.*⁸⁴

⁸¹ Military Police Misconduct Disclosure Process Policy.

⁸² *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66.

⁸³ Lamer Report, Recommendation 39.

⁸⁴ Bronson Prosecution Report at 35.

The Bronson Prosecution Report recommended that Commanding Officers should communicate their views on sentencing to the prosecutor and the prosecutor, in turn, should take these views into consideration but not be bound by them.⁸⁵ Bronson also recommended the Regional Military Prosecutors regularly update Commanding Officers on the progress of every prosecution by court martial pertaining to their unit.⁸⁶ I have been advised that this recommendation was implemented in March 2009 through a policy directive, *Communications with Service Authorities*,⁸⁷ which directs communications throughout the court martial process.

When a prosecutor contemplates not proceeding with a charge or the prosecutor enters into a plea and/or penalty agreement, there should, in every case, be prior consultation with the Commanding Officer or his or her designate. I remind the DMP of the obligation pursuant to the *QR&O* and the policy directive mentioned above. Proper channels of communication between the DMP and the chain of command will ensure that the chain of command has faith in the integrity of the court martial process and the goal to instil discipline at the unit level is achieved.

Recommendation 20:

Commanding Officers should communicate their views on sentencing to the prosecutor, who would take them into consideration, but not be bound by them. I recommend military prosecutors regularly update Commanding Officers on the progress of prosecutions proceeding at court martial.

16. Powers of the Court Martial

The Lamer Report addressed difficulties of courts martial assuming jurisdiction given they are not permanent courts:

⁸⁵ Bronson Prosecution Report, Recommendation 5.4.

⁸⁶ Bronson Prosecution Report, Recommendation 5.5.

⁸⁷ The Department of National Defence and the Canadian Forces. *Director of Military Prosecutions Policy Directive #: 005/99*, 18 March 2009, online: The Department of National Defence and the Canadian Forces <<http://www.forces.gc.ca/jag/publications/CMPS-SCPM/policy-politiques-005-eng.pdf>>.

*Currently, military courts martial are not accorded any permanent identifiable status, per se. Courts martial more closely resemble a judicial event than that which they are in reality – a Canadian court with the power and jurisdiction to deal with the most serious of offences under the criminal law, including murder. For example, because military judges preside over a temporary “court” (in the sense that it comes into existence only once convened by the Court Martial Administrator and it ceases to exist once the trial is complete) preliminary proceedings are problematic. Until a court martial has been convened and a military judge is assigned to preside over a trial, the military judge has no jurisdiction over issues such as pre-trial release or further and better disclosure. Military judges currently feel obliged to take an oath before every hearing. These factors have the potential to lead to delay, inefficiency and create the potential for injustice.*⁸⁸

As a result of these and other concerns, former Chief Justice Lamer endorsed the JAG recommendation that “a working group be established to fully consider the issues surrounding the creation of a permanent Military Court...”.⁸⁹ JAG advised they were unable to share the work product of this working group with me.

While awaiting the outcome of the working group, former Chief Justice Lamer recommended some “interim measures” or procedures be put in place for preliminary proceedings after a charge is preferred and before a court martial is convened.⁹⁰ Subsection 179(1) of the *NDA* was to be amended by clause 49 of Bill C-41 as follows:

179. (1) A court martial has the same powers, rights and privileges — including the power to punish for contempt — as are vested in a superior court of criminal jurisdiction with respect to

- (a) the attendance, swearing and examination of witnesses;*
- (b) the production and inspection of documents;*
- (c) the enforcement of its orders; and*
- (d) all other matters necessary or proper for the due exercise of its jurisdiction.*

⁸⁸ Lamer Report at 26.

⁸⁹ Lamer Report at 28.

⁹⁰ Lamer Report at 28 to 29.

The only change made by clause 49 is to move the words “including the power to punish for contempt” from (d) and insert it in (1). The effect of this amendment I believe was to make it clear there was no limitation on “all other matters necessary” to exercise their jurisdiction. The intent was to confirm that Military Judges have all necessary authority to make pre-trial orders.

Currently, the Court Martial Administrator cannot convene the court martial until the parties have agreed on a trial date. I am told this can often delay the process for many months. It is only after the court martial has been convened that the Chief Military Judge assigns a judge to preside at the trial.

Military Judges need legislative authority to convene the court martial immediately after the charge is preferred. The judges may then deal with the case: hear preliminary motions, motions for disclosure, set a trial date, and any other matter that is better dealt with earlier rather than later. The authority should also permit any Military Judge, not just the trial judge, to hear and decide these matters. It is my recommendation that counsel appear (by video or in person) within 20 days of the preferral. The Military Judge may then, as part of case management, fix a schedule for motions, applications, pre-hearings, resolution conferences, and trial dates etc. Military Judges should have authority to deal with any and all relevant pre-trial matters prior to the convening order issuing, including of course the setting of a trial date.

In September 2009 an “External Review of Defence Counsel Services” (“Bronson Defence Report”) found it would be useful if the court martial required counsel to appear at a first appearance or “set date” as well as a judicial pre-trial.⁹¹ Many of the Bronson recommendations deal with case management practices and advocate that such practices, widely used in the

⁹¹ *External Review of Defence Counsel Services* (Ottawa: Bronson Consulting Group, 15 September 2009), Recommendation 54.

civilian criminal justice system, be adopted for use in the court martial system.⁹² The Bronson Prosecution Report found:

*...the military Court Martial system generally operates as if delay was not a problem. With some recent exceptions, it has not incorporated many of the modern case-management techniques and strategies now widely used in the civilian criminal justice systems in Canada and elsewhere.*⁹³

JAG advises that 78 courts martial were convened in 2007/2008, 67 in 2008/2009, 56 in 2009/2010, and 68 in 2010/2011.⁹⁴ These figures include those who elected to proceed by court martial and the approximately 20 to 40 who were mandated to be heard by court martial because of the serious nature of the offence or the seniority of the officer. On average, each of the four Military Judges deals with 15 to 20 cases annually, some of which are guilty pleas.

The Bronson Prosecution Report suggests that with good case management practices, a reasonable target would be to have most court martial hearings on simple, straightforward cases commence within three months of the date of the referral.⁹⁵

As discussed in the *Report of the Review of the Large and Complex Criminal Case Procedures*,⁹⁶ pre-trial stages of criminal proceedings have become ever more important and accordingly merit greater judicial attention and control.⁹⁷ I recommend that the Military Judges, the DMP, and the DDCS develop case management practices and rules. I am satisfied that the Military Judges have the authority to move forward with case management and that it should be a cooperative exercise between Military Judges, the DDCS, and the DMP.

⁹² Bronson Prosecution Report, Recommendations 7.1 to 7.18.

⁹³ Bronson Prosecution Report at 55.

⁹⁴ Information provided by JAG.

⁹⁵ Bronson Prosecution Report, Recommendation 7.8.

⁹⁶ The Honourable Patrick J. LeSage and Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (November 2008).

⁹⁷ The Honourable Patrick J. LeSage and Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures* (November 2008) at 56.

Recommendation 21:

Counsel should appear, by video or in person, within 20 days of the referral of a charge. At that time, the Military Judge, as part of the case management practice, will deal with as many preliminary matters as is practicable including a schedule for motions, applications, pre-hearings, resolution conferences, trial dates, and any other issues that promote efficient and effective management of the case.

Recommendation 22:

The current language of section 187 of the *NDA* should be amended to state: “At any time after a charge has been preferred, but before the commencement of the trial, any question, matter, or objection in respect of the charge may, on application, be heard and determined by a Military Judge”. I also recommend that Military Judges, the DDCS, and the DMP develop case management practices and rules.

17. Rank of Military Judges

The chain of command is a most important component of a military structure. With respect to the job performed by Military Judges however, the chain of command does not and cannot govern decisions. It is worthwhile to consider the appropriateness of Military Judges carrying a rank. I believe it would be preferable to have one distinct rank of “Military Judge”, which would apply to all Military Judges. Such a scenario would not preclude the appointment of the Chief Military Judge. The Chief Military Judge (as in the civilian system) would not be a higher rank, rather the title would be reflective only of his or her additional administrative responsibilities of assignment and scheduling of judges and other administrative matters.

Some have concern in providing Military Judges with a separate rank as it could be seen as “civilianizing” the military system. However, my recommendation has nothing to do with “civilianizing” the military system and everything to do with the optics of an independent judiciary within a military structure. A Military Judge, outside of the courtroom, should not be

required to demonstrate that they are of lesser rank to a more senior officer who is about to, or has previously appeared before them. I also recommend Military Judges be a branch of the Canadian Forces separate from the Legal Branch.

Recommendation 23:

There should be a distinct rank of “Military Judge”. The Chief Military Judge would also have that rank but with administrative duties added to his role. Military Judges should be a branch of the Canadian Forces separate from the Legal Branch.

18. Election by Accused as to Type of Court Martial

One of the first issues the Court Martial Administrator must deal with upon receipt of the preferral documents from the DMP is, if required, providing the accused an election between General and Standing Court Martial.⁹⁸ I am told that for some offences it is not always clear on the face of the charge sheet whether the accused is entitled to a right of election. This should not be difficult to rectify. The DMP must make it clear on the face of or elsewhere on the charge sheet whether the preferred charge is one that calls for an election. Failing clarity, I recommend legislation provide it be deemed an electable offence and the Court Martial Administrator must give the accused an election.

Recommendation 24:

The DMP should clearly indicate on the charge sheet whether the preferred charge is one that calls for an election. Where the DMP has failed to clarify the nature of the charge, I recommend legislation provide that the Court Martial Administrator give the accused an election.

Section 165.193 of the *NDA* requires the prosecutor’s consent to an accused’s re-election within

⁹⁸ *NDA*, s. 165.193.

30 days of a trial. I have been advised of instances where the DMP does not consent to a re-election. I reiterate the comments of former Chief Justice Lamer recognizing the importance of the accused's right to election:

I have been unable to find a military justification for disallowing an accused charged with a serious offence the opportunity to choose between a military judge alone and a military judge and panel, other than expediency. When it comes to a choice between expediency on the one hand and the safety of the verdict and fairness to the accused on the other, the factors favouring the accused must prevail. The only possible exception warranting a change to this default position might be during times of war, insurrection or civil strife.⁹⁹

Recommendation 25:

The DMP is strongly encouraged not to deny a request for re-election unless there are serious and significant reasons for not consenting.

19. Panel Selection

When an accused elects a General Court Martial, prior to issuing a convening order, the Court Martial Administrator proceeds to select a panel.¹⁰⁰ There have been court challenges to the Court Martial Administrator selecting the jury panel, particularly in relation to exercising the exclusions provisions. *QR&O* 111.03(4) permits the Court Martial Administrator to excuse someone from being on a panel if the administrator is satisfied that during the time of the court martial:

- the member will be required for duties sufficiently urgent and important to warrant the member not being appointed;
- the member is scheduled for a course that is important for their professional development or career progression;
- the member has served on a court martial panel within the preceding 24 months;

⁹⁹ Lamer Report at 40.

¹⁰⁰ *QR&O* 111.03(1).

- the member is unfit to serve on the court martial panel as a result of illness or injury;
- the member has compassionate reasons such as serious illness, injury, or death in the member's family for not being appointed; or
- the appointment to the panel may cause serious hardship or loss to the member or others.

The substance of the challenge to the Court Martial Administrator selecting a jury panel relates to the transparency of the process and, particularly, what the challengers refer to as judicial "discretion" being exercised by a non-judicial officer.

I suggest this issue could be resolved by implementing a system similar to that used in the civilian criminal justice system. A random list would be generated and a questionnaire sent to the individuals on the random list. The questionnaire would address the issue of exclusions. When the questionnaires are returned to the Court Martial Administrator, he or she can collate the information provided in the questionnaires and meet with a Military Judge. The Military Judge would then decide which jurors meet the exclusion categories. The Court Martial Administrator can then assemble the panel based on instructions from the Military Judge.

Recommendation 26:

A system should be implemented whereby the random list questionnaire responses are collated by the Court Martial Administrator and presented to the Military Judge to permit him or her to decide which members may appropriately be excluded.

Reservists form a significant part of the Canadian military and perform the services of a CF member. Reservists have traditionally been excluded from panel eligibility based on the thought that they may not be available or may not wish to participate. I have spoken with a number of individual reservists as well as representative reservists. All of them have expressed a willingness, even a desire, to be considered as part of the eligible pool of panel members. There

may be scheduling issues, but that is no different than for full time members or, for that matter, in the civilian justice system, which faces similar scheduling issues every day. I see no valid reason why reservists should be excluded from serving on court martial panels.

Recommendation 27:

Reservists ought to be eligible to serve on a court martial panel.

20. Rules of Evidence

In the court martial structure there have, for many years, been *Military Rules of Evidence*¹⁰¹ to guide and assist court martial procedure. These rules have not been regularly updated and have not kept pace with the common law evolution of the law of evidence. Today's Military Judges are well-trained and knowledgeable in law and procedure, as are counsel who appear before them. The *Military Rules of Evidence* are, in my view, no longer necessary for court martial proceedings. The common law rules of evidence as well as the *Canada Evidence Act*¹⁰² and, where appropriate, other provincial and federal evidence statutes, along with judicial decisions well known to Military Judges and counsel, should provide ample guidance for court martial proceedings. That is all the direction required.

Recommendation 28:

The Military Rules of Evidence should be superseded by the statutory and common law rules of evidence in the court martial system.

¹⁰¹ C.R.C., c. 1049.

¹⁰² R.S.C. 1985, c. C-5.

21. Punishment and Sentencing at Courts Martial

JAG has recommended Military Judges have a wider range of sentencing options to enhance the effectiveness of the sentencing process in the military justice system. They have recommended the creation of a probationary sentencing scheme in order to ensure the sentences of civilians, released CF members, and reservists continue to be imposed in the civilian world. There is a very good policy rationale for such a system. However, I question the practical wisdom of implementing a military probation system with all the attendant costs and structure for the small number of cases to which it might probably apply. The economics and the practical realities make it challenging to replicate the civilian probationary system. A fundamental of the civilian probation system is to give guidance and assistance to the probationer to help ensure they will “keep the peace and be of good behaviour”. The military system has that authority by the very nature of the chain of command, which oversees CF members and provides them with guidance and assistance. So, although probation may have benefits for civilians and released CF members, it is too substantial an undertaking to implement in the Canadian Forces for so few. I would, however, recommend that there be consultation with the civilian justice system to use existing resources to implement a workable system that might apply to released or civilian members.

Recommendation 29:

There should be consultation with the civilian justice system to use existing resources to implement a workable probation system that would, when required, apply to released or civilian CF members.

JAG also recommended the military justice system adopt prohibition orders similar to those found in sections 161 and 259 of the *Criminal Code* relating to sexual offences against children and impaired driving offences (restrictions on access to children and areas children frequent and

driving prohibitions, respectively). I agree with JAG that these prohibitions be incorporated in the *NDA*. Further, I recommend an agreement with the civilian authorities be sought so that such prohibitions will be recognized and enforceable under the civilian criminal justice system (and, of course, under the military justice system as well).

Recommendation 30:

The *NDA* should be amended to permit Military Judges and presiding officers to, as part of the sentencing process, issue prohibition orders similar to those found in sections 161 and 259 of the *Criminal Code* relating to sexual offences against children and impaired driving offences.

22. The Appeal Committee

An appeal committee currently consists of three persons, one appointed by the JAG, one appointed by the Chief of the Defence Staff (“CDS”), and another appointed by the DDCCS.¹⁰³ This committee exists to decide whether an accused will receive publicly funded legal representation for appeals to the CMAC or to the Supreme Court of Canada.

The Lamer Report recommended¹⁰⁴ that the appeal committee be composed of the DDCCS (or a person nominated by the DDCCS) as chair, a retired civilian judge, and a representative of the Office of the JAG.

A concern brought to my attention relates to the extent of work undertaken by the appeal committee to determine “professional merit” in the appeal. The review is often very extensive and it is believed by some that the time and effort expended frequently outweighs the decision to be made. The material sought to inform the committee on the professional merits of the appeal is

¹⁰³ *QR&O* 101.21(2).

¹⁰⁴ Lamer Report, Recommendation 26.

considerable and these inquiries have often significantly delayed the appeal process. The preference is that there be one decision-maker, the DDCS, who will determine “professional merit” and thus whether or not an appeal will be publicly funded.

While I agree the DDCS must be part of this decision making process, I believe another perspective would be helpful. I therefore recommend the appeal committee consist of the DDCS or his delegate, and one external person with criminal litigation experience such as a civilian or a reserve defence counsel, or a retired JAG officer or civilian judge. The determination of “professional merit” should be made by this two-person committee and should be required within 30 days. I believe this will be a more streamlined and effective decision-making body.

Recommendation 31:

The appeal committee should consist of two persons, the DDCS or his delegate, and an external person with litigation experience such as a civilian or reserve defence counsel, a retired JAG officer, or retired civilian judge.

23. DMP and DDCS

As previously mentioned, in 2008 and 2009 the Department of National Defence commissioned the Bronson Consulting Group to do two reports. One report was of the DMP and the other of the DDCS. These reports contain many excellent recommendations pertaining to both offices.¹⁰⁵

One of the Bronson Report recommendations commented on the variance of rank of the DMP and the rank of the DDCS. I am pleased to see the recent promotion of the DDCS to the rank of Colonel. I believe it important that the heads of both these important offices hold equal rank.

Similarly, I am of the view that the Prosecution Service and the Defence Counsel Service should

¹⁰⁵ Attached as Annex D are copies of the recommendations from the Bronson Reports.

be comparably resourced. This does not mean they have equal numbers; rather, that the criteria for staff be comparable. The Bronson Defence Report found it would be useful if both offices, to the extent possible, shared resources and information. That report believed it desirable that all lawyers in the JAG branch, to the extent possible, work at some point for both DDCS and DMP.¹⁰⁶ Bronson also thought it important that lawyers be posted to the DMP or the DDCS for a minimum of five years. I agree with these recommendations.¹⁰⁷ I also encourage lawyers in both offices be given secondments to local legal aid offices and/or to local attorneys-general offices.

I recommend there be joint training of lawyers in both offices. I highly recommend attendance at the annual criminal law summer programme sponsored by the Federation of Law Societies. I commend the wisdom of so many of the recommendations of the Bronson Group, particularly with respect to training, mentoring, education, and secondments.¹⁰⁸ I have been informed that some steps have been taken to implement joint educational training programs.

I reiterate the importance of a high degree of co-operation between these two offices, starting at the highest levels. Bronson noted “a considerable amount of animus” between the two offices.¹⁰⁹ That is not acceptable. There is a fundamental need for collegiality and co-operation. This does not in any way derogate from the important and difficult roles these offices play in the military justice system. Co-operation and collegiality can only enhance the effectiveness of the system. In this regard, I fully adopt Recommendation 40 of the Bronson Defence Report that a “special effort be made by the leadership of the CMPS and DCS to place less emphasis on traditional

¹⁰⁶ Bronson Defence Report, Recommendation 39.

¹⁰⁷ Bronson Prosecution Report, Recommendation 8.3; Bronson Defence Report, Recommendation 20.

¹⁰⁸ Bronson Defence Report, Recommendations 2, 3, 24-29; Bronson Prosecution Report, Recommendations 5.6-5.8, 8.3-8.10.

¹⁰⁹ Bronson Defence Report at 3.

adversarialism and more emphasis on co-operative case management”.¹¹⁰ I understand efforts have been made to address the adversarialism perception and I continue to encourage them to take a co-operative approach.

Recommendation 32:

The Prosecution Service and the Defence Counsel Service ought to be comparably resourced. Co-operative case management between the DMP and DDCS should be implemented.

Recommendation 33:

DDCS and DMP lawyers should have joint training sessions. Secondments to local legal aid offices and/or to local Ministry of the Attorney General offices should be considered for lawyers working for both organizations.

24. Miscarriages of Justice

A miscarriage of justice is commonly known as the wrongful conviction and punishment of a person. Such events are not likely exclusive to the civilian justice system. They could also happen in the military justice system.

As we have learned in recent years, issues relating to a review of a potential miscarriage of justice are an exceedingly important aspect of any contemporary justice system. Notwithstanding the rarity of such matters, I recommend that a system be put in place to handle such eventuality in the military justice system.

Miscarriages of justice within the military justice system are, I am sure, exceedingly rare. So rare, that it would not justify setting up a separate military system to address them. The Canadian civilian criminal justice system that deals with these matters is section 696.1 of the *Criminal*

¹¹⁰ The Bronson Defence Report defines “CMPS” as Canadian Military Prosecution Service and “DCS” as Directorate of Defence Counsel Services.

Code. The current “section 696 structure” is staffed by highly skilled and specialized legal experts. They conduct reviews of primarily provincial and territorial prosecutions, (reviews of federal prosecutions are sent to an outside review agency).

I suggest the existing section 696 structure deal with any reviews that might flow from the military justice system. I realize this involves moving part of the process outside of the military justice system; however, the principles and concepts of examining these issues are matters that transcend all systems of justice.

Recommendation 34:

A process for identifying a potential miscarriage of justice should be adopted in the military justice system. The structure found in section 696.1 of the *Criminal Code*, which is connected to the DOJ, should be the vehicle for reviewing such cases.

25. Service Prison and Detention Barracks

The Rehabilitation Policy of the Canadian Forces Service Prison and Detention Barracks¹¹¹ states:

The punishment of detention seeks to re-instill in service detainees the habit of obedience in a structured, military setting, through a regime of training that emphasizes the institutional values and skills that distinguish the sailor, soldier, airman or airwoman from other members of society.

...

The CF is committed to providing suitable rehabilitative opportunities to enable service offenders to return as useful members to the military or civilian community.

JAG has submitted that a correctional regime should be developed that makes a clear distinction

¹¹¹ The Department of National Defence and the Canadian Forces. *Canadian Forces Service Prison and Detention Barracks Rehabilitation Policy*, 10 July 2000, online: The Department of National Defence and the Canadian Forces <<http://www.cmp-cpm.forces.gc.ca/pd/pi-ip/03-00-eng.asp>>.

between the punishments of detention and imprisonment and that the *Regulations for Service Prisons and Detention Barracks*¹¹² be amended to reflect this. JAG submits that a working group comprised of representatives from the Office of the JAG, the Canadian Forces Provost Marshal, the Canadian Forces Service Prison and Detention Barracks, the Chief of Military Personnel, and the Environmental Chiefs of Staff could be an effective group to develop such a regime. The proposal is to replace the punishment of detention with one of “corrective training”, which should better reflect its intended purpose: to re-instil discipline through refresher training of the service offender.

Recommendation 35:

A working group ought to be struck to consider the development of a correctional regime to distinguish between the punishments of detention and imprisonment.

The Commandant of the Detention Barracks also commented that in his view the legislative provisions concerning the transfer of service convicts and service prisoners to penitentiaries and civil prisons lack clarity and detail. The Provost Marshal also agreed that more guidance is needed as to who makes the transfer decision and how that process is facilitated.¹¹³ I agree with them to some extent and recommend there be more specific provisions concerning the transfer of service offenders to civil custody, including identifying who is responsible for initiating the transfer process.

Recommendation 36:

More specific provisions concerning the transfer of service offenders to custody in civilian prisons, including identifying who is responsible for initiating the transfer process are required.

¹¹² *QR&O* Appendix 1.4, chapter 6.

¹¹³ Sections 219 and 220 of the *NDA* provide some guidance as does *QR&O* 104.04 note B and chief military personnel instruction 03/00.

IV. GRIEVANCES

We expect a great deal from the men and women who join the Canadian Forces. They are required to perform unique tasks under unique and strenuous conditions. When a person enrolls in the Canadian Forces, he or she becomes subject to a broad liability to serve. Canadian Forces members are required to follow lawful orders, and can be required to serve, and potentially sacrifice their lives, in dangerous military operations.

Canadian Forces members are not like other government employees. They cannot form unions. Courts have confirmed that there is no legally enforceable employment contract between the Crown and Canadian Forces members. Courts have held that, due to the nature of their relationship, Canadian Forces members do not have the same range of legal remedies that are available to most Canadians in normal employment relationships. However, Canadian Forces members do have access to a mechanism to challenge decisions or actions that they feel are unfair, and that is the Canadian Forces grievance process.¹¹⁴

The CF grievance process was formally implemented by the 1998 amendments to the *NDA*, following the Dickson Reports. This process is defined in section 29 (redress of grievances) of the *NDA* and detailed in Chapter 7 of the *QR&O*. Officers and non-commissioned CF members who believe they have been aggrieved by a decision, act, or omission in the administration of the affairs of the CF for which no other process for redress is provided under the *NDA* and that is not specifically precluded in the *NDA* or the *QR&O*, have the right to submit a grievance.

As former Chief Justice Lamer stated, “it is essential to the morale of CF members that their grievances be addressed in a fair, transparent, and prompt manner”.¹¹⁵ A significant portion of his report involved a review of the grievance process. He found that “the Canadian Forces grievance process is not working properly”.¹¹⁶ His primary concern was the lengthy delay

¹¹⁴ Canada. National Defence and Canadian Forces Ombudsman report: *The Canadian Forces Grievance Process: Making It Right for Those Who Serve* by Pierre Daigle (May 2010), online: National Defence and Canadian Forces Ombudsman <<http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/gp-prg/doc/gp-prg-eng.pdf>> at 1.

¹¹⁵ Lamer Report at 86.

¹¹⁶ Lamer Report at 86.

between the initiation of a grievance and a decision by the Final Authority. He also noted that many grievors were not advised of the reasons for the delays or the status of their grievances.¹¹⁷

Unfortunately, many of the same concerns were raised by CF members at the bases I visited in the summer of 2011 and also in the submissions forwarded to me, now eight years after the Lamer Report.

However, I have been briefed on some significant recent changes made to the system, which will hopefully alleviate at least some of these concerns.

1. Armed Forces Council Recommended Changes

In April 2010, the VCDS directed a review of the grievance process. A working group reviewed the entire process, including the recommendations from the Lamer Report, and examined all relevant legislation and policies. A report from that process was forwarded to the VCDS in May 2010. Ten key recommendations were presented to the Armed Forces Council in October 2010.

The November 2010 approved recommendations of the Armed Forces Council included:

- implementing a mandatory “notice of intent” to grieve;
- training and educating of Analysts at the Initial Authority (“IA”) level and providing briefings across the Canadian Forces on the grievance process;¹¹⁸
- mandatory assignment and training of assisting officers;
- amending the timeline to submit a grievance from 6 months to 90 days;
- amending the time that the Initial Authority has to review and determine the file from 60 days¹¹⁹ to 120 days; and
- amending the timeline for submissions to the Final Authority by the grievor from 90 days¹²⁰ to 30 days.

¹¹⁷ Lamer Report at 86.

¹¹⁸ The Initial Authority is the person who can grant the remedy.

¹¹⁹ QR&O 7.07(1).

2. The Principled Approach

The Armed Forces Council also approved a six month trial of what they refer to as the “principled approach”, which includes a new step of review by the Grievance Board of all grievances not accepted by the Director General Canadian Forces Grievance Authority (“DGCFGA”). One of the objectives of the principled approach is to afford all grievors the opportunity to have their grievance reviewed by an external body, the Grievance Board.

In the current system, 40% of the files (based on subject) are sent directly to the Grievance Board for their review.¹²¹ The remaining 60% of the files are dealt with directly by the DGCFGA.

The new, principled approach requires that the DGCFGA produce a synopsis of all files. Those files where the DGCFGA would rule against the grievor are then sent to the Grievance Board. Once the Grievance Board’s findings and recommendations are returned, the DGCFGA will issue the decision if the recommendations of the Grievance Board and the DGCFGA are similar. However, if the positions are different, the file is sent to the CDS for final adjudication.

While this principled approach was intended to be conducted for a trial period only, I have been advised by the senior ranks of the CF that there is no compelling reason not to continue with the principled approach. The Grievance Board, I understand, is able to handle this increased caseload, so that would not likely be a reason not to continue this principled approach. It should become the standard for the future. Senior leadership is of the view that the Chief of the Defence Staff will get a more balanced input with the principled approach.

¹²⁰ QR&O 7.10(2).

¹²¹ QR&O 7.12.

Recommendation 37:

The “principled approach” should be permanently instituted. All files where the DGCFGA would rule against the grievor should be reviewed by the Grievance Board.

3. Notice of Intent

The “notice of intent” is a new and currently voluntary process designed to help both potential grievors and the chain of command. The purpose of the notice of intent is two-fold. First, to signal to the chain of command that a CF member has an issue for which he or she is considering submitting a grievance. Second, to allow the chain of command the opportunity to engage in discussions to identify and hopefully resolve a majority (or at least a significant number) of the issues at an early stage. If the parties are unable to resolve the matter at this early stage then the chain of command should provide assistance to the grievor in preparing, drafting, and submitting the grievance to the appropriate authority. The notice of intent step, although currently voluntary, is one I urge grievors to utilize and the chain of command to actively welcome and engage in as a practical tool in the early resolution of what could otherwise become a long and frustrating process.

4. Delays

In addition to the changes approved by the Armed Forces Council and implemented by the DGCFGA highlighted above, further consideration must be given to address the continuing delays in the system. While much progress has been made, I believe further steps must be taken. Additional resources and a streamlining of the process should permit achievement of the Lamer recommendation that grievances be resolved within a one year time limit recommended in the Lamer Report.¹²² The one year should be counted from the date the grievance is submitted to the

¹²² Lamer Report, Recommendation 74.

date of a decision by the CDS or his delegate. I believe that many grievances can and should be resolved in a much shorter period of time.

As detailed in the Ombudsman's report,¹²³ members of the CF do not have a union or even an employment contract. Their only recourse to address many employment related issues is the grievance system. Communication is vital in this process. Grievors must be kept advised of the status of their grievance. The grievance process is time consuming, often has financial implications for the grievor, and can be very stressful. The grievance system must provide grievors with an expeditious process.

Recommendation 38:

There should be a time limit of one year for a decision respecting a grievance from the date the grievance is submitted to the date of a decision by the CDS or his delegate. I also recommend the grievor be regularly advised of the status of their grievance.

I hope the recommendations accepted by the Armed Forces Council, along with the new principled approach and the notice of intent process, will substantially remedy delays in the system.

5. Training for Assisting Members

A member seeking to submit a grievance may request assistance in its preparation. In such cases, an assisting member is assigned to the grievor. However, the grievor does not have access to legal counsel.¹²⁴ It is therefore important that the assisting member have access to JAG legal advice, specifically a legal officer with expertise in administrative law. This would benefit the

¹²³ Canada, National Defence and Canadian Forces Ombudsman: *The Canadian Forces Grievance Process: Making It Right for Those Who Serve* by Pierre Daigle (May 2010), online: National Defence and Canadian Forces Ombudsman <<http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/gp-prg/doc/gp-prg-eng.pdf>>.

¹²⁴ *QR&O* 7.03.

assisting member in providing better advice to the grievor and ensuring the grieved issues are clearly identified and supporting materials are purged of irrelevant information. This can only help to expedite the grievance process.

Improved training and education for assisting members will help alleviate delays in the grievance system. This is another of the recommendations of the Armed Forces Council I strongly support.

Recommendation 39:

Better training and education of assisting members is required. Assisting members should have access to a JAG lawyer with expertise in administrative law.

6. Summaries of Decisions of Final Authorities

The Environmental Chiefs have considerable experience with the grievance process. They are sympathetic to those involved in the process, whether it be the grievor, staff, or the role played by the Initial Authority. One of the issues they observe is the difficulty members face in having a clear understanding of decisions made by the Final Authority. A suggestion made by the Chiefs, with which I agree, is that a summary and analysis of all decisions of the Final Authority be compiled, kept updated, and placed on the internet. That information will greatly assist all who are engaged, including the grievors, to better appreciate probabilities of a grievance succeeding or not succeeding. Such information would also be helpful to assisting members so they may better advise and counsel the grievor. The Initial Authority would also have ready access to the decisions, which will help in providing consistency throughout the CF.

I therefore recommend that steps be taken to distill, analyze, and publicize the decisions of the Final Authority so they may be readily accessible to all CF members.

Recommendation 40:

A summary and analysis of each decision made by the Final Authority should be compiled, kept updated, available via the internet, and accessible to all CF members.

7. Delegation by the CDS

Many issues contribute to delay in the grievance system. One such issue referenced in the Lamer Report is that the CDS is ultimately responsible for making many of the decisions relating to grievances.¹²⁵ As former Chief Justice Lamer aptly stated:

...having the top military officer personally decide grievances involving such matters as \$500 for moving expenses or the replacement of a \$60 pair of boots, in addition to his primary responsibility for the command, control and administration of the Canadian Forces, is unnecessary, and in any event, unworkable. The exception, of course, is when the grievance deals with a matter having far-reaching implications for the Canadian Forces.¹²⁶

I agree with former Chief Justice Lamer's recommendation that the CDS must be allowed to delegate his role as final adjudicator in all but those cases that have far-reaching implications for the Canadian Forces.¹²⁷

Recommendation 41:

The CDS should be permitted to delegate his role as final adjudicator in all but those cases that have far-reaching implications for the Canadian Forces.

Section 29.14 of the *NDA* provides the CDS can delegate his decision making power to "any officer" for grievances other than those which must be referred to the Grievance Board. There is a concern that if the delegate is a lower rank than the officer whose decision is being grieved, the

¹²⁵ Section 29.14 of the *NDA* provides that the CDS may not delegate his duty to act as final authority in respect of a grievance that must be referred to the Grievance Board.

¹²⁶ Lamer Report at 87.

¹²⁷ Lamer Report, Recommendation 72.

delegate may not be impartial in his decision making, which could raise a reasonable apprehension of bias. I would therefore recommend the statute be amended to provide that the officer to whom the powers, duties, and functions as Final Authority are delegated, be at least one rank above the rank of the officer whose decision is being grieved.

Recommendation 42:

Section 29.14 of the *NDA* should be amended to provide that the officer to whom the powers, duties, and functions as Final Authority are delegated be at least one rank above the rank of the officer whose decision is being grieved.

8. Role of the DGCFGA

The role played by the DGCFGA staff in the review and adjudication of grievances after they have been reviewed by the Grievance Board has been raised by several CF members.

The DGCFGA has three functions: he administers and is responsible for the overall grievance system process on behalf of the VCDS; he is the Final Authority's delegate for grievances that do not go to the Grievance Board; and he advises the CDS in those cases that do go to the Grievance Board.

These multiple roles assumed by one entity can have the potential to, and sometimes do, create an apprehension of bias and procedural unfairness to the grievors. I was advised of specific instances where the DGCFGA staff took the position the grievance should be denied. The Board disagreed. When the DGCFGA staff re-analyzed the issue, they relied on evidence not previously part of the file, following which they recommended the relief sought be denied. The same staff then prepared the file for the CDS' decision.

While the CDS clearly needs a team to help process and prepare files for adjudication, this should not be the same staff who administers the process, and not the same staff who reviewed the file prior to its submission to the Board. Where the DGCFGA disagrees with the recommendation of the Grievance Board to grant a grievance, the DGCFGA should not be involved in any further review and adjudication of the grievance. They should simply redirect the file to the Final Authority.

Principles of administrative law apply to the grievance process. It is not appropriate to conduct further investigation after the Board issues its Findings & Recommendations, even if, as the DGCFGA advises, the grievor is afforded the opportunity to respond. As stated in *Dunsmuir v. New Brunswick*, “procedural fairness is a cornerstone of modern Canadian administrative law”.¹²⁸

It is important that CF members are aware of all steps in the grievance process in advance and that the process is not changed on an *ad hoc* basis. The process must be transparent and fair. It bears repeating that the grievance process is the only channel the CF member has for addressing any issues they may have with their “employer” and, for that reason, the system must adhere to the highest standards of procedural fairness.

Recommendation 43:

Where the DGCFGA disagrees with the recommendation of the Grievance Board to grant the grievance, the DGCFGA should not be involved in any further review and adjudication of the grievance.

¹²⁸ 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 79.

9. CDS Authority to Grant Financial Compensation

In May 2010, the Military Ombudsman, Pierre Daigle, submitted a Special Report to the Minister of National Defence.¹²⁹ The report addressed the issue of unfairness to CF members resulting from the Chief of the Defence Staff's inability to deal with and remedy all issues arising in their grievances.

As the Ombudsman's report notes, the grievance system is not currently able to resolve all matters without recourse to the courts or other processes, such as *ex gratia* payments. This usually happens when the military member is seeking monetary compensation such as lost wages or reimbursement of an expense. The member may submit a claim against the Crown to the Director of Claims and Civil Litigation. A Department of Justice lawyer then determines if compensation should be provided. The Chief of the Defence Staff has no authority or say in whether compensation is awarded.¹³⁰

The Grievance Board raised this very issue with former Chief Justice Lamer during his review. Recommendation 81 in the Lamer Report responded to the concern by recommending the Chief of the Defence Staff be given the necessary financial authority to settle financial claims in grievances. The DGCFGA has recommended that steps be taken to implement the Lamer Recommendation. I endorse this recommendation. I understand this matter is under study. I hope it can be addressed in upcoming legislation.

¹²⁹ Canada. National Defence and Canadian Forces Ombudsman: *The Canadian Forces Grievance Process: Making It Right for Those Who Serve* by Pierre Daigle (May 2010), online: National Defence and Canadian Forces Ombudsman <<http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/gp-prg/doc/gp-prg-eng.pdf>>.

¹³⁰ Canada. National Defence and Canadian Forces Ombudsman: *The Canadian Forces Grievance Process: Making It Right for Those Who Serve* by Pierre Daigle (May 2010), online: National Defence and Canadian Forces Ombudsman <<http://www.ombudsman.forces.gc.ca/rep-rap/sr-rs/gp-prg/doc/gp-prg-eng.pdf>> at 2.

Recommendation 44:

The CDS should be given the authority to grant relief in a case where the grievor is seeking, as redress, financial compensation.

10. Grievances Regarding Moves and Housing

I received many comments during base visits and also in written submissions regarding issues flowing from housing and moves from one base to another. CF members often felt total frustration when seeking redress for problems in this area. Part of life in the CF involves relocating as postings require. This brings with it numerous emotional, logistical, and financial difficulties, which can impact the morale of the member and their family. Moves are a necessary part of the job. Care and consideration must be given to ensuring that these matters are handled expeditiously and sensitively.

CF relocations are currently administered by Brookfield Global Relocation Services (“BGRS”), the CF’s contracted service provider. BGRS is responsible to inform the member of his or her entitlements, assist the member during each step of the move, and process the relocation claim.

I am told the process to deal with these issues through BGRS is frustrating and cumbersome for CF members. I would suggest that the DGCFGA, as the administrator of the grievance system, examine how housing issues and relocations are being managed, with a view to improving this process. Issues need to be addressed and corrected so as to reduce the number of grievances filed and, more importantly, reduce the financial and emotional impact on the CF member.

Recommendation 45:

The management of the housing and relocation process must be examined with a view to reducing the number of grievances filed.

11. Grievances Regarding PERs

Addressing Performance Evaluation Reports (“PERs”) consumes much time and energy in the grievance process. Consideration should be given to creating significantly abbreviated time periods for dealing with grievances of PERs given the implications that time delays have on a CF member’s career.

Recommendation 46:

Consideration ought to be given to imposing a “fast track” process for dealing with grievances of PERs.

12. Implication of Filing Grievances

There is a belief among at least some CF members that filing a grievance can have career limiting implications. Some members have been intimidated when they filed a grievance. The CDS recognized this issue in his 2009 Annual Report on the grievance system:

The CO must also ensure that the grievor’s right not to suffer any form of reprisal is respected. Unfortunately, the results of the 2009 “Your Say” survey indicated that 52% of all the respondents felt that filing a grievance would have a negative impact on their relationships at work. It also showed that 44% felt that filing a grievance would have a negative impact on their career. Only 29% of the respondents felt that they were likely to obtain justice from the grievance process. Even if these are only perceptions, they are nonetheless important. While only a very small percentage of CF members do submit grievances, it is important that CF members have confidence that the CFGS is there to serve them. COs must take all possible measures to make sure the grievance process is as welcoming and grievor-friendly as possible. The CO, as the representative of the chain of command, should treat a grievance as an opportunity to assist a member rather than as an administrative burden [emphasis added].¹³¹

¹³¹ Canada. *Chief of the Defence Staff Annual Report on the Canadian Forces Grievance System (January – December 2009)*, online: Director General Canadian Forces Grievance Authority <<http://www.cfga-agfc.forces.gc.ca/ar-ra/docs/ar-ra-2009-eng.pdf>> at 4.

I remind Commanding Officers, and I remind all members of the CF, that subsection 29(4) of the *NDA* provides: “an officer or non-commissioned member may not be penalized for exercising the right to submit a grievance” [emphasis added].¹³² I suggest that this issue be stressed at all levels in the chain of command.

13. Pay and Allowances

The Chief Military Personnel (“CMP”) has proposed amendments to sections 12 and 35 of the *NDA* to deal with the authority to make regulations governing pay, allowances, reimbursement of expenses and other compensation and benefit matters for members of the CF.¹³³ These issues were raised with former Chief Justice Lamer at the time of his review in 2003. The changes would provide for the use of administrative instructions to cover compensation and benefits for members, other than just pay for Military Judges. Former Chief Justice Lamer in his report wrote: “any changes having the effect of creating a simplified and more efficient pay and allowance system in keeping with modern management practices are desirable”.¹³⁴ The only concern he had was he was not aware of the position of the Treasury Board.

I have been advised that Treasury Board has engaged in discussions with the CMP regarding these proposals and agrees these sections of the *NDA* warrant a further review.

Recommendation 47:

The submission provided by the Chief Military Personnel relating to proposed amendments to sections 12 and 35 of the *NDA*, as set out in Annex E, should be reviewed and implemented.

¹³² Note A to *QR&O* 7.01 repeats this statement.

¹³³ Attached as Annex E is a copy of the CMP submission.

¹³⁴ Lamer Report at 110.

14. Grievance Board

I understand the current name of the CF Grievance Board is proposed to be changed to the “Military Grievances External Review Committee”. Such change would better reflect the important role of the Board/Committee. It would also indicate to CF members that this Board/Committee is external to and separate from the CF members of the DGCFGA. It will better reflect the role of the Board/Committee, which is to conduct reviews and make findings and recommendations, not final decisions. I am supportive of this change.

Recommendation 48:

The name of the CF Grievance Board should be changed to the “Military Grievances External Review Committee”.

As is the current practice, active CF members are not members of the Grievance Board. I believe that should be the policy and it should be made clear by legislation or regulation. I also recommend that the appointments made to the Board/Committee should reflect a variety of backgrounds, including persons who do not have a military background. There may be a steep learning curve for such persons but they could bring a different perspective to the Grievance Board’s deliberations. I believe it would be helpful to have civilians with no military background appointed to the Board.

Recommendation 49:

Legislation or regulation ought to provide that active CF members are not eligible to be members of the Grievance Board/Military Grievances External Review Committee. I also recommend civilians without military backgrounds be appointed to the Grievance Board/Military Grievances External Review Committee.

V. MILITARY POLICE COMPLAINTS COMMISSION

The MPCC was established pursuant to Bill C-25 in response to recommendations made in the First Dickson Report and the Somalia Commission of Inquiry's report. The First Dickson Report articulated the need for independent oversight as follows:

*Independent oversight is especially important for the military police and, in this regard, civilian oversight of police forces is particularly instructive. If an individual citizen complains to a civilian police force about improper conduct of its personnel, there is an expectation of and a right to a response. The situation should be no different in the military context.*¹³⁵

The MPCC is an independent civilian body that monitors and reviews complaints about the conduct of MPs in the performance of "policing duties and functions" (conduct complaints, which are initially handled by the Deputy Provost Marshal Professional Standards) and through its exclusive jurisdiction to investigate and report on complaints of improper interference in MP investigations (interference complaints). The MPCC Chairperson may also decide to launch an MPCC investigation of a complaint "at any time" when he deems it to be in the public interest to so do.

It is with this perspective in mind that I have examined the submissions of the MPCC and make the following comments and recommendations.

1. Notice of Complaints

Conduct complaints are initially the responsibility of the CF Provost Marshal ("CFPM"), and specifically, the Deputy Provost Marshal Professional Standards ("DPM PS"). The MPCC is notified of all conduct complaints and monitors their handling by the DPM PS.

¹³⁵ First Dickson Report at 82.

The MPCC, in its submissions to me, proposed that it receive “any communication received directly or indirectly...which expresses a concern about the conduct of a military police member...”. Pursuant to section 250.21 of the *NDA*, the MPCC receives conduct or interference complaints or notice of such complaints having been made to the Judge Advocate General or the Provost Marshal. I am not satisfied that this section should be expanded to require receipt of communications that are not complaints. The mandate of the MPCC is not to oversee all functions of the CFPM. The information the MPCC currently receives pursuant to section 250.21 of the *NDA* regarding conduct complaints is in my view sufficient.

2. Definition of “Policing Duties or Functions”

A question frequently arises as to whether the MP member is subject to a MPCC review. The conduct of a military police member is subject to review by the MPCC if the military police member was performing “policing duties or functions” as provided in subsection 250.18(1) of the *NDA*. The difficulty arises because “policing duties or functions” as prescribed in the *Complaints About the Conduct of Members of the Military Police Regulations*¹³⁶ is broadly defined.

While I agree that greater clarity would be helpful in describing “policing duties or functions”, the issue of the MPCC’s mandate is complex. It has been before Parliament more than once and may well be again. It has also been the subject of a number of judicial pronouncements.¹³⁷

¹³⁶ Military Police Complaints Commission. *Complaints About The Conduct Of Members Of The Military Police Regulations*, 12 May 2011, online: Military Police Complaints Commission <<http://www.mpcc-cppm.gc.ca/100/151-eng.aspx>>.

¹³⁷ See for example *Canada (Attorney General) v. Amnesty International Canada*, 2009 FC 918, [2009] F.C.J. No. 1096.

I reiterate and adopt the Lamer Report recommendation¹³⁸ that the CF Provost Marshal draft a framework setting out criteria to be applied by the CFPM to conduct complaints in order to determine whether the conduct triggers the jurisdiction of the MPCC.

Recommendation 50:

A framework should be drafted by the CFPM, after consultation with the MPCC, setting out criteria to be applied by the CFPM to conduct complaints in order to determine whether the conduct triggers the jurisdiction of the MPCC.

3. Who May Make an Interference Complaint

Subsection 250.19(1) of the *NDA* sets out the category of persons who may make a complaint about improper interference in an MP investigation. It is more restrictive than MP conduct complaints. Only those MP members conducting or supervising such an investigation may make an interference complaint. I agree with the submission of the MPCC that this category be expanded to include persons seconded to MP positions. This section should also be expanded to include improper interference with a policing duty or function of an MP.

Recommendation 51:

Subsection 250.19(1) of the *NDA* should be amended to include persons seconded to MP positions in the CF. Subsection 250.19(1) should also be amended to include improper interference with a policing duty or function.

4. Evidentiary Issues

The MPCC proposes that it be added to the Schedule of entities, referred to in section 38 of the *Canada Evidence Act*,¹³⁹ exempt from restrictions on receipt of “sensitive information” or

¹³⁸ Lamer Report, Recommendation 64.

¹³⁹ R.S.C. 1985, c. C-5.

“potentially injurious information”. This Schedule of the *Canada Evidence Act* lists “entities who can receive information injurious to international relations, national defence, or national security without having to provide notice to the Attorney General...”.¹⁴⁰ The Supreme Court of Canada has indirectly referred to a similar issue in the very recent past.¹⁴¹ I consider the issue to be complex, sensitive, and one on which I would be reluctant to proffer a recommendation without the benefit of full debate and submissions. For that reason, I am reluctant to recommend any changes.

The MPCC has proposed that provisions of the *NDA*¹⁴² placing evidentiary restrictions on the MPCC receiving or accepting answers given before boards of inquiries, summary investigations, and previous tribunal proceedings be repealed. I am not persuaded such a change is necessary to permit the MPCC to effectively carry out its responsibilities.

5. Access to Solicitor-Client Privileged Information

In addition, the MPCC has proposed that Part IV of the *NDA* be amended to provide the MPCC access to solicitor-client privileged information where legal advice is relied upon by the subject of the complaint to explain his or her actions or where legal advice is relied upon by the CFPM in its disposition of a complaint.

The jurisprudence on solicitor-client privilege is clear and established. I see no reason to recommend change. The comment from the Supreme Court of Canada in *Lavallee* is instructive:

...solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance....Such protection is ensured by labeling as unreasonable any

¹⁴⁰ *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, [2008] 3 F.C.R. 248 at para. 3.

¹⁴¹ *R. v. Ahmad*, 2011 SCC 6, [2011] S.C.J. No. 6.

¹⁴² *NDA* at paras. 250, 41(2)(b) and (d).

*legislative provision that interferes with solicitor-client privilege more than is absolutely necessary.*¹⁴³

6. Informal Resolution

The MPCC made various recommendations to me regarding the informal resolution process provided for in the *Complaints About the Conduct of Members of the Military Police Regulations*.¹⁴⁴ Section 3 of these Regulations precludes informal resolution for certain categories of conduct complaints such as “excessive use of force”, “the arrest of a person”, and “abuse of authority”. However, not all complaints caught by these categories (for example, the “arrest of a person” or “abuse of authority”) are so serious that the possibility of informal resolution must be precluded. Less serious complaints can and should, on consent of all parties, proceed to informal resolution conducted by an independent mediator. As such, there is merit to reducing categories of matters that are ineligible for informal resolution. The MPCC should be advised of the terms of the informal resolution.

Recommendation 52:

The categories of matters not eligible for informal resolution should be reduced. With respect to complaints informally resolved, I recommend the MPCC be advised of the terms of the informal resolution.

7. Time Limit for Requesting Review of Conduct Complaint

Pursuant to *NDA* section 250.2, there is a time limit of one year (after the events giving rise to the complaint) for a person to make a conduct or interference complaint. There is presently no time limit for requesting a review of a conduct complaint after it has been investigated by the

¹⁴³ *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 209 at para. 36. [hereinafter *Lavallee*].

¹⁴⁴ *QR&O* Appendix 7.2.

CFPM. I recommend the time limit to request such a review be 90 days. I see no reason why a longer time period would be required.

Recommendation 53:

There ought to be a time limit of 90 days for requesting a review of a conduct complaint after it has been investigated by the CFPM.

8. Legal Representation for MPs

Civilian police officers subject to similar regimes as the MPCC are almost always provided legal counsel when under investigation. Military police officers who are subject to investigation related to an MPCC conduct complaint should, if requested, be provided independent legal advice.

Recommendation 54:

MPs subject to an investigation related to a conduct complaint should have access to independent legal advice.

9. Extension of Term for Commission Members

The MPCC has pointed out the problems that arise when a Commission member's term expires before the review of a complaint is complete. This is of particular concern in public interest hearings and other complex complaint investigations that are at an advanced stage. If the member is removed, the effort expended by that member is wasted and a new member need begin the whole process anew.

I agree that Commission members' terms should be automatically extended in respect of complaint files assigned to them prior to being notified their term is not to be renewed. An

example of such a legislative provision can be found in subsection 8(3) of the *Canada Transportation Act*.¹⁴⁵

Recommendation 55:

The term of MPCC Members should be automatically extended in respect of complaint files assigned to them prior to their notification that their term is not to be renewed.

10. Relationship Between CFPM and VCDS

As of April 1, 2011, a new MP command and control structure came into effect that brought all MPs under the command of the CFPM with respect to their policing duties and functions. For military duties of a non-policing nature, MPs continue to fall under the command of operational commanders.

Command over the CFPM rests with the VCDS. The protocol that governs this reporting relationship is the 1998 VCDS-CFPM *Accountability Framework*.¹⁴⁶ The issue of defining the position and role of the CFPM was raised in the Lamer Report. Lamer Recommendation 58 recommended amendment of the *NDA* to define the roles and relationships of the CFPM. Following on this recommendation, Bill C-41 (and prior Bills C-7 and C-45) included provisions to legislatively enshrine the office of the CFPM and the definition of the CFPM's roles, duties, qualifications, and reporting relationships.¹⁴⁷ In addition, Bill C-41 included express authority for the VCDS to issue directions to the CFPM in respect of particular investigations.¹⁴⁸

¹⁴⁵ S.C. 1996, c. 10.

¹⁴⁶ *Accountability Framework*, Vice Chief of the Defence Staff and the Canadian Forces Provost Marshal, 2 March 1998.

¹⁴⁷ Clause 4, proposed new s. 18.3 and s. 18.4.

¹⁴⁸ Clause 4, proposed new s. 18.5(3).

I received many submissions with respect to this proposed relationship between the CFPM and the VCDS. I have read the transcripts of C-41 House Committee hearings where the issue was considered. This issue was discussed at length in Committee and the wording of Bill C-41 was not changed in this respect. I have nothing to add.

VI. CONCLUSION

It was an honour and a privilege to have the opportunity to meet and hear the concerns of the women and men of our Canadian Forces across Canada. Their dedication and commitment left a lasting impression. Their oral and written submissions provided the focus and the underpinnings of this Report.

I trust the recommendations made in this Report will contribute to and reflect a military justice and grievance system that provides support to the talented women and men who have chosen to serve our country as members of the Canadian Forces.

LIST OF RECOMMENDATIONS

Recommendation 1: The military justice system and grievance system should be reviewed every ten years. The timing of the review period should be incorporated into the NDA.

Recommendation 2: There should be greater liaison and, where practicable, joint training sessions between MPs and civilian municipal, provincial, or RCMP force members.

Recommendation 3: The target for completion of investigations in straightforward cases should be one month.

Recommendation 4: When practicable, search warrants should be sought not from the CO of the unit of the object of the investigation, but from another CO or from a civilian Justice of the Peace.

Recommendation 5: The military police should establish close working relationships with adjacent police agencies and, where possible, enter into memoranda of understanding. There should be ongoing dialogue with federal, provincial, and territorial ministers of justice regarding workable jurisdiction sharing.

Recommendation 6: The senior ranks of the Canadian military are encouraged to do their utmost to ensure that those suffering from mental health issues are not placed in the criminal justice system by default but receive the help they need from our health care system.

Recommendation 7: There should be distinct, separate offences in the NDA for negligent discharge of a firearm based on the seriousness and circumstances of the discharge.

Recommendation 8: Section 129 of the NDA ought to be clarified to ensure the salient elements of an offence are properly delineated.

Recommendation 9: The instances in which charging authorities must obtain legal advice before laying a charge should be reduced.

Recommendation 10: If language similar to clauses 35 and 36(2) of Bill C-41 is used to amend the NDA in the future, the language should be clear that the summary trial commences within one year after the day on which the service offence is alleged to have been committed.

Recommendation 11: Assisting officers should hold a rank of Lieutenant or higher. There should be a certification requirement for assisting officers similar to that for presiding officers. The training process of assisting officers ought to include in-person instruction, mock trials and job shadowing of more experienced assisting officers.

Recommendation 12: The NDA should be amended to permit a Commanding Officer to preside at a summary trial of a Second Lieutenant in DP1 in their unit. There must be an appropriate separation of rank between the rank of the Commanding Officer and the Second Lieutenant.

Recommendation 13: A comprehensive review of the sentencing provisions of the NDA should be undertaken to provide for a more flexible range of punishments and sanctions.

Recommendation 14: The chain of command must reconfirm that administrative action may not be used as a substitute for disciplinary action.

Recommendation 15: There ought to be a full review of the issue of criminal records flowing from convictions at summary trial. I also recommend a review of the processes and procedures for entering information into CPIC and of the relevant NDA sections to avoid consequences disproportionate to the violation.

Recommendation 16: The NDA should provide that members who elect court martial will not be subjected to any administrative or other consequences, or be disadvantaged because of this election.

Recommendation 17: Commanding Officers should be given 30 days to forward applications for disposal of charges to the Referral Authority and the DMP. Upon receipt of the application, if the Referral Authority wishes to make any comments with respect to proceeding with the charges, he or she should advise the DMP within a further 30 days. I recommend the CF optimize the use of digital media for streamlining the referral process.

Recommendation 18: The time period for the DMP to prefer the charge and forward it to the Court Martial Administrator should be 60 days.

Recommendation 19: QR&O 111.11 should be amended to require complete disclosure be given as soon as possible after charges are laid.

Recommendation 20: Commanding Officers should communicate their views on sentencing to the prosecutor, who would take them into consideration, but not be bound by them. I recommend military prosecutors regularly update Commanding Officers on the progress of prosecutions proceeding at court martial.

Recommendation 21: Counsel should appear, by video or in person, within 20 days of the referral of a charge. At that time, the Military Judge, as part of the case management practice, will deal with as many preliminary matters as is practicable including a schedule for motions, applications, pre-hearings, resolution conferences, trial dates, and any other issues that promote efficient and effective management of the case.

Recommendation 22: The current language of section 187 of the NDA should be amended to state: “At any time after a charge has been preferred, but before the commencement of the trial, any question, matter, or objection in respect of the charge may, on application, be heard and determined by a Military Judge”. I also recommend that Military Judges, the DDCS, and the DMP develop case management practices and rules.

Recommendation 23: There should be a distinct rank of “Military Judge”. The Chief Military Judge would also have that rank but with administrative duties added to his role. Military Judges should be a branch of the Canadian Forces separate from the Legal Branch.

Recommendation 24: The DMP should clearly indicate on the charge sheet whether the preferred charge is one that calls for an election. Where the DMP has failed to clarify the nature of the charge, I recommend legislation provide that the Court Martial Administrator give the accused an election.

Recommendation 25: The DMP is strongly encouraged not to deny a request for re-election unless there are serious and significant reasons for not consenting.

Recommendation 26: A system should be implemented whereby the random list questionnaire responses are collated by the Court Martial Administrator and presented to the Military Judge to permit him or her to decide which members may appropriately be excluded.

Recommendation 27: Reservists ought to be eligible to serve on a court martial panel.

Recommendation 28: The Military Rules of Evidence should be superseded by the statutory and common law rules of evidence in the court martial system.

Recommendation 29: There should be consultation with the civilian justice system to use existing resources to implement a workable probation system that would, when required, apply to released or civilian CF members.

Recommendation 30: The NDA should be amended to permit Military Judges and presiding officers to, as part of the sentencing process, issue prohibition orders similar to those found in sections 161 and 259 of the Criminal Code relating to sexual offences against children and impaired driving offences.

Recommendation 31: The appeal committee should consist of two persons, the DDCS or his delegate, and an external person with litigation experience such as a civilian or reserve defence counsel, a retired JAG officer, or retired civilian judge.

Recommendation 32: The Prosecution Service and the Defence Counsel Service ought to be comparably resourced. Co-operative case management between the DMP and DDCS should be implemented.

Recommendation 33: DDCS and DMP lawyers should have joint training sessions. Secondments to local legal aid offices and/or to local Ministry of the Attorney General offices should be considered for lawyers working for both organizations.

Recommendation 34: A process for identifying a potential miscarriage of justice should be adopted in the military justice system. The structure found in section 696.1 of the Criminal Code, which is connected to the DOJ, should be the vehicle for reviewing such cases.

Recommendation 35: A working group ought to be struck to consider the development of a correctional regime to distinguish between the punishments of detention and imprisonment.

Recommendation 36: More specific provisions concerning the transfer of service offenders to custody in civilian prisons, including identifying who is responsible for initiating the transfer process, are required.

Recommendation 37: The “principled approach” should be permanently instituted. All files where the DGCFGA would rule against the grievor should be reviewed by the Grievance Board.

Recommendation 38: There should be a time limit of one year for a decision respecting a grievance from the date the grievance is submitted to the date of a decision by the CDS or his delegate. I also recommend the grievor be regularly advised of the status of their grievance.

Recommendation 39: Better training and education of assisting members is required. Assisting members should have access to a JAG lawyer with expertise in administrative law.

Recommendation 40: A summary and analysis of each decision made by the Final Authority should be compiled, kept updated, available via the internet, and accessible to all CF members.

Recommendation 41: The CDS should be permitted to delegate his role as final adjudicator in all but those cases that have far-reaching implications for the Canadian Forces.

Recommendation 42: Section 29.14 of the NDA should be amended to provide that the officer to whom the powers, duties, and functions as Final Authority are delegated be at least one rank above the rank of the officer whose decision is being grieved.

Recommendation 43: Where the DGCFGA disagrees with the recommendation of the Grievance Board to grant a grievance, the DGCFGA should not be involved in any further review and adjudication of the grievance.

Recommendation 44: The CDS should be given the authority to grant relief in a case where the grievor is seeking, as redress, financial compensation.

Recommendation 45: The management of the housing and relocation process must be examined with a view to reducing the number of grievances filed.

Recommendation 46: Consideration ought to be given to imposing a “fast track” process for dealing with grievances of PERs.

Recommendation 47: The submission provided by the Chief Military Personnel relating to proposed amendments to sections 12 and 35 of the NDA, as set out in Annex E, should be reviewed and implemented.

Recommendation 48: The name of the CF Grievance Board should be changed to the “Military Grievances External Review Committee”.

Recommendation 49: Legislation or regulation ought to provide that active CF members are not eligible to be members of the Grievance Board/Military Grievances External Review Committee. I also recommend civilians without military backgrounds be appointed to the Grievance Board/Military Grievances External Review Committee.

Recommendation 50: A framework should be drafted by the CFPM, after consultation with the MPCC, setting out criteria to be applied by the CFPM to conduct complaints in order to determine whether the conduct triggers the jurisdiction of the MPCC.

Recommendation 51: Subsection 250.19(1) of the NDA should be amended to include persons seconded to MP positions in the CF. Subsection 250.19(1) should also be amended to include improper interference with a policing duty or function.

Recommendation 52: The categories of matters not eligible for informal resolution should be reduced. With respect to complaints informally resolved, I recommend the MPCC be advised of the terms of the informal resolution.

Recommendation 53: There ought to be a time limit of 90 days for requesting a review of a conduct complaint after it has been investigated by the CFPM.

Recommendation 54: MPs subject to an investigation related to a conduct complaint should have access to independent legal advice.

Recommendation 55: The term of MPCC Members should be automatically extended in respect of complaint files assigned to them prior to their notification that their term is not to be renewed.

Annex A

MINISTERIAL DIRECTION – SECOND INDEPENDENT REVIEW

Preamble

Section 96 of Statutes of Canada 1998, c.35, requires the Minister of National Defence to cause an independent review of the provisions and operation of that Act to be undertaken from time to time, and to cause the report of the review to be laid before each House of Parliament within five years after the day that Act was assented to, and within every five-year period following the tabling of a report.

The first independent review pursuant to this provision was conducted by the Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada, and the report of that review was tabled in Parliament by the Minister of National Defence on November 5, 2003. The Government of Canada's legislative response to the recommendations of the Lamer Report was introduced in Parliament in Bill C-7 on April 27, 2006, and subsequently in Bill C-45 on March 3, 2008. Neither of these legislative initiatives proceeded beyond First Reading in the House of Commons and both died on the Order Paper.

Some of the recommendations made in the Lamer Report have been implemented in statute by Bill C-60 (enacted as Statutes of Canada 2008, c. 29), by regulations and by changes in administrative policy and practices. However, given that Bills C-7 and C-45 did not become law, the majority of the recommendations in the Lamer Report requiring statutory implementation have not yet been implemented.

On June 16, 2010, Bill C-41, the *Strengthening Military Justice in the Defence of Canada Act*, was introduced and given First Reading in the House of Commons. This Bill constitutes the current legislative response to the recommendations of the Lamer Report.

An effective review of statutory and regulatory provisions, and administrative policies and practices, may best be accomplished in circumstances where they have already been implemented and there is some operational record upon which to ground a review. In order to maximize the utility of the second independent review, the review might most effectively be accomplished by focusing upon the Lamer Report recommendations which have already been implemented.

Appointment and scope of the review

1. Accordingly, pursuant to section 4 of the *National Defence Act* and section 96 of the Statutes of Canada 1998, c. 35, I hereby establish an external authority reporting directly to the Minister of National Defence to be known as the Bill C-25 Five-Year Independent Review Authority (hereinafter the "Second Independent Review Authority") and I appoint the Honourable Patrick J. LeSage, residing at Toronto, Ontario, as the Second Independent Review Authority.

2. The Second Independent Review Authority is to conduct the second independent review of the provisions and operation of the Statutes of Canada 1998, c. 35, under section 96 of that Act.

3. The Second Independent Review Authority is also to conduct an independent review of the provisions and operation of the Statutes of Canada 2008, c. 29.

Authority and obligations

4. The Second Independent Review Authority may:
- a. sit at such time and at such place in Canada as it may from time to time decide; and
 - b. adopt such procedures and methods as it considers expedient for the proper discharge of its mandate.
5. The Second Independent Review Authority is granted, subject to law, complete access to:
- a. the employees of the Department of National Defence;
 - b. the officers and non-commissioned members of the Canadian Forces;
 - c. the members and staff of the Canadian Forces Grievance Board;
 - d. the members and staff of the Military Police Complaints Commission;
 - e. the Ombudsman for the Department of National Defence and the Canadian Forces and staff; and
 - f. any information held by the Department of National Defence and the Canadian Forces relevant to the review.
6. The Second Independent Review Authority shall be provided with or may engage the services of such staff and other advisors as it considers necessary to aid and assist in the review.
7. The Second Independent Review Authority shall:
- a. provide a final report suitable for release to the public that does not disclose information properly subject to national defence, national security or privacy confidentiality, or solicitor-client privilege, in both official languages, to the Minister of National Defence by December 31, 2011; and
 - b. deposit its records and papers with the Office of the Minister of National Defence as soon as is reasonably possible after the final report is provided.

Signed at Ottawa, Ontario, this 25th day of March 2011.



The Honourable Peter G. MacKay
Minister of National Defence

DIRECTIVE MINISTÉRIELLE – SECOND EXAMEN INDÉPENDANT

Avant-propos

En vertu de l'article 96 du chapitre 35 des Lois du Canada (1998), le ministre de la Défense nationale fait procéder, à l'occasion, à un examen indépendant des dispositions et de l'application de la Loi; il fait déposer devant chacune des chambres du Parlement le rapport de cet examen au plus tard cinq ans après la date de la sanction de la Loi et, par la suite, au plus tard cinq ans après le dépôt du rapport précédent.

Le très honorable Antonio Lamer, ancien juge en chef de la Cour suprême du Canada, a effectué le premier examen indépendant en vertu de cette disposition, et le ministre de la Défense nationale a déposé le rapport de cet examen au Parlement le 5 novembre 2003. Le gouvernement du Canada a donné suite aux recommandations du rapport Lamer en déposant le projet de loi C-7 le 27 avril 2006 et par la suite, le projet de loi C-45 le 3 mars 2008. Ces projets de loi n'ont pas dépassé l'étape de la première lecture à la Chambre des communes et ils sont tous deux morts au feuillet.

Certaines recommandations du rapport Lamer ont été mises en œuvre dans la législation par le projet de loi C-60, édicté au chapitre 29 des Lois du Canada (2008), au moyen de règlements et de changements dans les politiques et pratiques administratives. Cependant, étant donné que les projets de loi C-7 et C-45 n'ont pas été sanctionnés, la majorité des recommandations du rapport Lamer devant être incorporée dans la législation ne l'a toujours pas été.

Le 16 juin 2010, le projet de loi C-41, intitulé *Loi visant à renforcer la justice militaire pour la défense du Canada*, a été déposé et a fait l'objet de la première lecture à la Chambre des communes. Ce projet de loi constitue la réponse législative du gouvernement aux recommandations du rapport Lamer.

Pour que l'examen des dispositions législatives et réglementaires ainsi que des politiques et pratiques administratives soit efficace, il est préférable qu'il soit effectué lorsque les dispositions, les politiques et les pratiques en question sont déjà mises en œuvre et lorsqu'il existe des antécédents opérationnels sur lesquels l'examen puisse se fonder. En effet, pour maximiser l'utilité du second examen indépendant, il faudrait qu'il soit axé sur les recommandations du rapport Lamer qui ont déjà été mises en œuvre.

Nomination et portée de l'examen

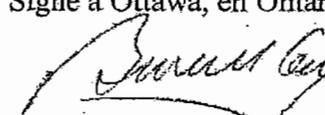
1. Par conséquent, conformément à l'article 4 de la *Loi sur la défense nationale* et à l'article 96 du chapitre 35 des Lois du Canada (1998), j'établis par la présente une autorité externe, appelée autorité de l'examen indépendant quinquennal du projet de loi C-25 (ci-après l'autorité du second examen indépendant), qui relèvera directement du ministre de la Défense nationale et je nomme l'honorable Patrick J. LeSage, résidant à Toronto (Ontario), à titre d'autorité du second examen indépendant.
2. Cette autorité doit effectuer le second examen indépendant des dispositions et de l'application du chapitre 35 des Lois du Canada (1998) conformément à l'article 96 de cette Loi.

3. Cette autorité doit également effectuer un examen indépendant des dispositions et de l'application du chapitre 29 des Lois du Canada (2008).

Autorité et obligations

4. L'autorité du second examen indépendant peut :
- a. exercer ses fonctions au moment et à l'endroit au Canada qu'elle juge opportuns;
 - b. adopter les procédures et méthodes qu'elle juge utiles à l'exercice de son mandat.
5. L'autorité peut consulter sans restriction, lorsque la loi le lui permet :
- a. les employés du ministère de la Défense nationale;
 - b. les officiers et militaires du rang des Forces canadiennes;
 - c. les membres et le personnel du Comité des griefs des Forces canadiennes;
 - d. les membres et le personnel de la Commission d'examen des plaintes concernant la police militaire;
 - e. l'Ombudsman du ministère de la Défense nationale et des Forces canadiennes et son personnel;
 - f. tout document pertinent à l'examen que détient le ministère de la Défense nationale et les Forces canadiennes.
6. L'autorité doit avoir à sa disposition, ou peut retenir les services du personnel et des conseillers dont elle aura besoin pour son examen.
7. L'autorité doit :
- a. présenter au ministre de la Défense nationale d'ici le 31 décembre 2011 un rapport final dans les deux langues officielles qui pourra être rendu public, ne contenant aucun renseignement confidentiel portant sur la défense et la sécurité nationales ainsi qu'aucun renseignement personnel ou protégé par le secret professionnel;
 - b. remettre les dossiers et documents de son examen au bureau du ministre de la Défense nationale dès qu'il sera raisonnablement possible de le faire après la présentation du rapport final.

Signé à Ottawa, en Ontario, ce 25 jour de mars 2011.

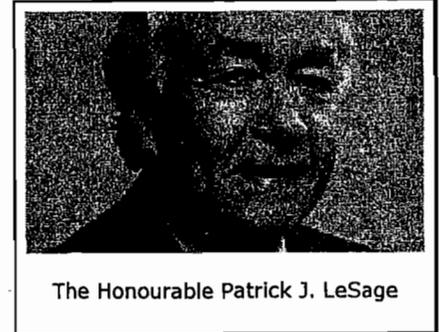

L'honorable Peter G. MacKay
Ministre de la Défense nationale

Annex B

National Defence and the Canadian Forces

Review Of The Military Justice System, Canadian Forces Grievance Process, And The Military Police Complaints Process: Call For Submissions

The Honourable Patrick J. LeSage, retired Chief Justice of the Ontario Superior Court of Justice, has been appointed by the Minister of National Defence to conduct the second independent review of Statutes of Canada 1998, c. 35 ("Bill C-25"), and an independent review of Statutes of Canada 2008, c.29 ("Bill C-60").



The Honourable Patrick J. LeSage

Bill C-25 requires the Minister of National Defence to conduct an independent review of the provisions and operation of the Bill every five years, and to table a report of the review in Parliament. The review will only deal with the changes Bill C-25 made to the *National Defence Act*, not the entire Act. Bill C-25 made important amendments to the Act concerning the military justice system, the Canadian Forces grievance process, and the military police complaints process.

As part of Defence's commitment to fairness and transparency, former Chief Justice LeSage (the "Second Independent Review Authority") will have complete access to Department of National Defence (DND) employees, Canadian Forces (CF) members, the members and staff of the Canadian Forces Grievance Board, the Military Police Complaints Commission and the Ombudsman for the DND and the CF, as well as to any information held by the DND or the CF relevant to the review.

The Second Independent Review Authority will be visiting selected CF bases across Canada to meet with individuals who have comments about the subjects under review, and to receive feedback on how the changes made by Bill C-25 and Bill C-60 are functioning.

Individuals who have an interest in the military justice system, the CF grievance process or the military police complaints process, and who would like to provide comments to the Second Independent Review Authority, are encouraged to contact him, preferably in writing, **by July 15th, 2011**. Persons making submissions should expect that their submissions will be made public, although the Second Independent Review Authority may, in his entire discretion, choose to receive certain submissions in confidence.

The Second Independent Review Authority may be contacted care of:

Lynn Mahoney Gowlings 1 First Canadian Place, suite 1600 Toronto, Ontario M5X 1G5 Tel: 416-862-4319

E-mail: lynn.mahoney@gowlings.com

A copy of the Ministerial Direction setting out the Terms of Reference for the Second Independent Review Authority may be obtained at the same address.

The Second Independent Review Authority may contact individuals directly.

National Defence and the Canadian Forces

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Articles

Have your say: Bill C-25 and Bill C-60

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As part of DND's commitment to fairness and transparency, former Chief Justice LeSage (the "Second Independent Review Authority") will have complete access to DND employees, CF personnel, the members and staff of the CF Grievance Board and the Military Police Complaints Commission, and the Ombudsman for DND and the CF, as well as to any information held by DND/CF relevant to the review.

Former Chief Justice LeSage will be visiting selected CF bases and wings throughout Canada to meet with individuals who have comments about the subjects under review and receive feedback on how the changes made by Bill C-25 and Bill C-60 are functioning.

Individuals who have an interest in the military justice system, the CF grievance process or the military police complaints process, and who would like to provide comments to the Second Independent Review Authority, are encouraged to contact him, preferably in writing, by July 4. Persons making submissions should expect that their submissions will be made public, although former Chief Justice LeSage may, in his entire discretion, choose to receive certain submissions in confidence.

Contact former Chief Justice LeSage through Lynn Mahoney at Gowlings, 1 First Canadian Place, suite 1600, Toronto ON, M5X 1G5; or at 416-862-4319; or at lynn.mahoney@gowlings.com.

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Articles

- [CSOR passes the half-decade mark](#)
- [Have your say: Bill C-25 and Bill C-60](#)
- [NATO allies attend memorial ceremony](#)
- [Putting it all together](#)
- [Canadian soldier dies in Afghanistan](#)
- [Rangers' skills tested on remote island](#)
- [Celebrating Asian Heritage Month](#)
- [Op MOBILE](#)
- [Air surveillance on the high seas](#)

- Honour, history, hockey

Date Modified: 2011-08-11

Have your say: Bill C-25 and Bill C-60

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A copy of the ministerial direction setting out the terms of reference for the Second Independent Review Authority may be obtained at the same address.

The Second Independent Review Authority may contact individuals directly.

Les projets de loi C-25 et C-60 : à vous la parole

Peter MacKay, ministre de la Défense nationale, a confié à Patrick J. LeSage, juge en chef à la retraite de la Cour supérieure de justice de l'Ontario, le deuxième examen indépendant du chapitre 35 des Lois du Canada 1998 (« projet de loi C-25 ») et un examen indépendant du chapitre 29 des Lois du Canada 2008 (« projet de loi C-60 »).

Conformément au projet de loi C-25, le ministre de la Défense nationale est tenu de procéder, tous les cinq ans, à un examen indépendant des dispositions et de l'application du projet de loi et de présenter un rapport à ce sujet au Parlement. L'examen ne portera que sur les modifications à la *Loi sur la défense nationale* découlant du projet de loi C-25 et non sur l'intégralité de cette dernière. Le projet de loi C-25 a entraîné des modifications en profondeur de la loi en

ce qui a trait à l'appareil judiciaire militaire, à la procédure de règlement des griefs des FC et au processus d'examen des plaintes concernant la police militaire.

Compte tenu de l'importance que le MDN accorde à l'équité et à la transparence, l'ancien juge en chef LeSage (« autorité indépendante chargée du deuxième examen ») pourra recourir sans restriction aux employés du MDN, aux membres du personnel des FC, aux membres et au personnel du Comité des griefs des FC et de la Commission d'examen des plaintes concernant la police militaire, ainsi qu'à l'ombudsman du MDN et des FC et à son personnel. Il pourra aussi consulter tout document pertinent à l'examen que détient le MDN et les FC.

L'ancien juge en chef LeSage se rendra dans des bases des FC choisies à l'échelle du Canada pour rencontrer les personnes

souhaitant présenter leurs observations sur les questions faisant l'objet de l'examen, ainsi que pour recueillir des commentaires sur l'application des modifications apportées par les projets de loi C-25 et C-60.

Toute personne qui s'intéresse à l'appareil judiciaire militaire, à la procédure de règlement des griefs des FC et au processus d'examen des plaintes concernant la police militaire, et qui aimerait présenter des observations à l'autorité indépendante chargée du deuxième examen, est priée de communiquer avec elle, de préférence par écrit, au plus tard le 4 juillet. Les gens qui présenteront des observations doivent toutefois s'attendre à ce que celles-ci soient rendues publiques, même si l'ancien juge en chef LeSage peut, à son entière discrétion, décider de recevoir certaines présentations en toute

confidentialité.

On peut communiquer avec l'ancien juge en chef LeSage par l'intermédiaire de Lynn Mahoney en lui téléphonant, au 416-862-4319, en lui envoyant un courriel à lynn.mahoney@gowlings.com, ou en lui écrivant à l'adresse :

Lynn Mahoney
Gowlings
1 First Canadian Place, bureau 1600
Toronto ON M5X 1G5.

Il est également possible d'obtenir à la même adresse un exemplaire de la directive ministérielle énonçant le mandat de l'autorité indépendante chargée du deuxième examen.

Si les circonstances l'exigent, l'autorité indépendante chargée du deuxième examen communiquera directement avec vous.

NATO allies attend memorial ceremony

By Capt Glen Parent

KABUL — More than 200 military, police and civilian members of the NATO Training Mission in Afghanistan gathered May 15 at the Law Enforcement Officer Memorial at Camp Phoenix in Kabul to honour fallen law enforcement personnel.

The 1st Annual Camp Phoenix Law Enforcement Officer Memorial Ceremony was held the same week as a similar

ceremony at the US National Law Enforcement Officer Memorial in Washington, D.C.

"We can never repay the debt of gratitude that we owe these faithful public servants," said US Brigadier General Mark Martins, commander of the Afghanistan Rule of Law Field Force.

Soldiers from Australia, Bulgaria, Canada, France and the US attended the ceremony, along with police officers from several nations. "I'm very proud to see

Canadian soldiers here along with our US and other allies," said Colonel Peter Dawe, the senior Canadian at the ceremony. "We are here to show solidarity with our Massachusetts Army National Guard partners at Camp Phoenix, many of whom serve as law enforcement officers back home. This ceremony was a reminder of the great sacrifices made by law enforcement officers in Canada, the US and worldwide."

One hundred CF personnel are in Kabul preparing for the arrival of additional personnel who will serve as advisors to Afghan National Security Forces at training camps and HQ in the Kabul area. The CF mission, Operation ATTENTION, is the Canadian contribution to the NATO Training Mission in Afghanistan. The majority of CF personnel deploying to the Kabul area for Op ATTENTION will be in place by the fall of 2011.

Honorer les agents de la force publique à Kaboul

Par le Capt Glen Parent

KABOUL — Plus de 200 militaires, policiers et civils participant à la mission d'instruction de l'OTAN en Afghanistan se sont réunis au Camp Phoenix, à Kaboul, le 15 mai, pour rendre hommage aux agents de la force publique ayant perdu la vie.

Le premier service commémoratif en l'honneur des agents de la force publique du Camp Phoenix a eu lieu la même semaine qu'une cérémonie semblable au monument

commémoratif national des agents de la force publique, à Washington D.C.

« Nous ne pourrions jamais leur témoigner notre gratitude ni honorer notre dette envers eux », a affirmé le Brigadier-général Mark Martins, des États-Unis, commandant de l'Afghanistan Rule of Law Field Force.

Des soldats des États-Unis, du Canada, de la France, de la Bulgarie et de l'Australie ont participé à la cérémonie, de même que des policiers de plusieurs pays. « Je suis très fier de voir des soldats

canadiens aux côtés de leurs homologues des États-Unis et d'autres pays alliés », a déclaré le Colonel Peter Dawe, officier supérieur canadien présent à la cérémonie. « Nous sommes ici pour témoigner notre solidarité à nos partenaires de la Massachusetts Army National Guard au Camp Phoenix. Beaucoup d'entre eux sont des agents de la force publique chez eux. La cérémonie nous a rappelé les grands sacrifices des agents de la force publique au Canada, aux États-Unis et partout dans le monde. »

Cent militaires canadiens se trouvent à Kaboul pour préparer l'arrivée d'autres militaires qui joueront le rôle de conseillers des Forces de sécurité nationales afghanes aux camps d'entraînement et au quartier général dans la région de Kaboul. La mission des FC, nommée opération ATTENTION, constitue la participation du Canada à la mission d'instruction de l'OTAN en Afghanistan. La plupart des déploiements dans le cadre de l'op ATTENTION à Kaboul auront lieu à l'automne 2011.

Annex

C

MILITARY BASE AND WING VISITS

Date	Location	Description of who attended the meeting
May 30, 2011	CFB Esquimalt	<p>Courtesy Call with Capt(N) C.A. Baines (Base Comd), and RAdm Greenwood (Comd MARPAC and JTFP).</p> <p>Roundtable 1. Invitees consist of CF/DND personnel and the general public.</p> <p>Roundtable 2. Invitees consist of the military police staff, JAG staff, and administrative staff working with grievances (subject-matter experts).</p> <p>Roundtable 3. Invitees consist of CF leadership representatives.</p>
June 1, 2011	4 Wing Cold Lake	<p>Courtesy Call with Col D.L.R. Wheeler (Wing Comd).</p> <p>Roundtable 1. Invitees consist of CF/DND personnel and the general public.</p> <p>Roundtable 2. Invitees consist of the military police staff, JAG staff, and administrative staff working with grievances (subject-matter experts).</p> <p>Roundtable 3. Invitees consist of CF leadership representatives.</p>

NOTE: The meetings were open, although specific people had been invited.

Date	Location	Description of who attended the meeting
June 2, 2011	CFB Edmonton	<p>Courtesy Call with Col S.G. Kennedy (1 ASG Comd), LCol T. Bradley (Base Comd) and LCol T.J. Cadieu (CO LdSH).</p> <p>Roundtable 1. Invitees consist of CF/DND personnel and the general public.</p> <p>Roundtable 2. Invitees consist of the military police staff, JAG staff, and administrative staff working with grievances (subject-matter experts).</p> <p>Roundtable 3. Invitees consist of CF leadership representatives.</p> <p>Visit of the Canadian Forces Service Prison and Detention Barracks and meeting with Maj. Ferguson (CO CFSPDB).</p>
June 6, 2011	CFB Petawawa	<p>Courtesy Call with LCol Rudderham (Base Comd).</p> <p>Roundtable 1. Invitees consist of CF/DND personnel and the general public.</p> <p>Roundtable 2. Invitees consist of the military police staff, JAG staff, and administrative staff working with grievances.</p> <p>Roundtable 3. Invitees consist of representatives of the CF leadership.</p>

NOTE: The meetings were open, although specific people had been invited.

Date	Location	Description of who attended the meeting
June 14, 2011	CFB Halifax	<p>Roundtable 1. Invitees consist of CF/DND personnel and the general public.</p> <p>Courtesy Call with Capt(N) <u>B.W.N. Santarpia</u> (Base Comd).</p> <p>Roundtable 2. Invitees consist of the military police staff, JAG staff, and administrative staff working with grievances.</p> <p>Roundtable 3. Invitees consist of representatives of the CF leadership.</p>
June 16, 2011	8 Wing Trenton	<p>Courtesy Call with LCol Fernandes (Acting Wing Commander).</p> <p>Roundtable 1. Invitees consist of CF/DND personnel and the general public.</p> <p>Roundtable 2. Invitees consist of the military police staff, JAG staff, and administrative staff working with grievances.</p> <p>Roundtable 3. Invitees consist of representatives of the CF leadership.</p>

NOTE: The meetings were open, although specific people had been invited.

Date	Location	Description of who attended the meeting
June 20, 2011	CFB Valcartier	<p>Courtesy Call with Col J.S. Sirois (5 ASG Comd).</p> <p>Roundtable 1. Invitees consist of CF/DND personnel and the general public.</p> <p>Roundtable 2. Invitees consist of the military police staff, JAG staff, and administrative staff working with grievances.</p> <p>Roundtable 3. Invitees consist of representatives of the CF leadership.</p>
August 9, 2011	Navy Reserves HQ	<p>Courtesy Call with Cmdre D.W. Craig (Comd, The Naval Reserve) and Capt(N) P.C. Dickinson (DComd, The Naval Reserve).</p> <p>Roundtable 1. Invitees consist of representatives of the CF leadership.</p> <p>Roundtable 2. Invitees consist of CF/DND personnel and the general public.</p>
August 9, 2011	CFB Valcartier	<p>Roundtable. Invitees consist of approx. 18 CF members (LFQA Army Reserve Unit members).</p>

NOTE: The meetings were open, although specific people had been invited.

Date	Location	Description of who attended the meeting
August 11, 2011	CFB Gagetown	<p>Courtesy Call with Col M.J. Pearson (3 ASG Comd).</p> <p>Roundtable 1. Invitees consist of representatives of the CF leadership.</p> <p>Roundtable 2. Invitees consist of CF/DND personnel and the general public.</p> <p>Roundtable 3. Invitees consist of members of the Military Police.</p> <p>Roundtable 4. Invitees consist of JAG staff and administrative staff working with grievances (subject-matter experts).</p>

NOTE: The meetings were open, although specific people had been invited.

Annex D

LE GROUPE CONSEIL

CONSULTING GROUP

EXTERNAL REVIEW
OF THE
CANADIAN MILITARY PROSECUTION SERVICE

Prepared by:

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FINAL REPORT

MARCH 31, 2008

10 LIST OF RECOMMENDATIONS

Chapter 4: The Investigation Stage

4.1 We recommend that, in order to better understand the reasons for delay and to know where to focus initiatives, more detailed statistics should be kept with respect to the time that has elapsed from the incident to the laying of charges. There should be a breakdown showing how long it took for the investigation reports to be approved by superiors, how long it took to obtain the required legal advice and to follow-up on that advice before charges were laid.

4.2 We recommend that a time standard or target of one month be established for the completion of investigations in straight-forward cases. This applies to investigations conducted by the Units, regular Military Police officers, and the NIS.

4.3 We recommend that the AJAG's, in consultation with the CMPS, take the lead in developing standard practices for Unit and Military Police investigations.

4.4 We recommend that Unit investigators and Military Police officers be provided with additional training concerning the evidence that is required if a case proceeds to Court Martial. This training should be done by Deputy Judge Advocates and, whenever possible, by RMP's. The use of checklists should be considered.

4.5 We recommend that, when an accused elects to proceed by Court Martial, the DJA's and investigators should give the case special attention. They should make sure that the investigation is complete and that all the essential elements of the offence can be established at a Court Martial. They should do this pro-actively without waiting for the RMP's to make the requests.

4.6 We recommend that, when RMP's make a request for additional information or investigation from Unit investigators, Military Police or NIS officers, they should provide a reasonable timeline by which the results are expected. A copy of the request and timeline should be sent to the investigators' superiors. The timelines should be enforced. It must be understood by investigators that RMP's will not wait indefinitely for outstanding matters to be completed and that they have the discretion not to proceed with cases that they believe have taken too long to bring to Court Martial.

4.7 We recommend that a new Service-level Agreement between the CMPS and the NIS, dealing with the issues between the two organizations, be negotiated and signed as soon as possible.

4.8 We recommend that the CMPS work with the Military Police (NIS) to develop a standard electronic brief format. The brief should include a list of the essential elements of the offence and the evidence available to prove those elements. We recommend that the standard brief include will-say statements of witnesses that are of sufficient quality to comply with the disclosure requirements in the Regulations.

4.9 We recommend that the CMPS and the Military Police, including the NIS, engage in discussions in order to arrive at an agreement dealing with the those situations in which it is necessary to videotape or audio-tape witness statements and when that is not essential. This should result in guidelines from the police superiors to their investigators.

4.10 We recommend that the CMPS be actively involved in training programs for Military Police officers.

4.11 We recommend that consideration be given to the appointment of staff in the Military Police, including the branches of the NIS, to act as "Court Liaison Officers" and to carry out similar duties as are performed by those personnel in the civilian police forces.

4.12 We recommend that, as soon as a decision is made by a Commanding Officer to send a case to a Referral Authority, the process of transmitting the complete investigation file to the RMP's in the Region should begin immediately. It should not be necessary for the RMP's to wait until after the case has worked its way through the chain of command to referral to get the file.

4.13 We recommend that someone should be assigned the specific responsibility for taking steps to ensure that the entire investigation file is forwarded to the RMP's. That person should take the initiative to have the file sent rather than waiting for an RMP to request it. Consideration should be given to making this the responsibility of either the Commanding Officer who decides to proceed with a charge or the DJA who has been providing advice on the case.

4.14 We recommend that, at the same time that the file is sent to the RMP's, they should be notified of the name of the individual who will be responsible for the case on behalf of the investigation. This will be the person who the RMP's should deal with during the post-charge review in order to answer any questions they may have and to arrange for such further investigation as may be required. The same person will also assist the RMP's through to the completion of the Court Martial. If that individual is deployed, transferred or becomes unavailable to work on the file for any other reason, a replacement must be appointed forthwith.

4.15 We recommend that the legal advice memoranda to the charging authorities and to the Commanding Officers prepared by the DJA's be made available to the RMP's who are conducting the post-charge reviews and they be forwarded to the RMP's at the same time as the case file.

4.16 We recommend that, absent special circumstances, the post-charge review should be completed within the Region where the charge is laid. A good practice would be for the RMP's in the Region to begin familiarizing themselves with the file once the Commanding Officer has decided to proceed, even before referral.

Chapter 5: Chain of Command and their Legal Advisers

5.1 We recommend that, in order to better understand the reasons for delay and to know where to focus initiatives, more detailed statistics should be kept with respect to the time from the laying of charges until referral to the DMP. There should be a breakdown showing how long it took for the Commanding Officers and the Referral Authorities to obtain legal advice and to act on it.

5.2 We recommend that, in most cases, there should only be one written legal opinion before referral. The opinion should be prepared by either the DJA's, for the members of the Units responsible for laying charges, or by the RMP's for the NIS. These opinions should deal with the sufficiency of evidence, applying the "reasonable prospect of conviction" standard, the charges to be laid, and the "public interest". In deciding whether to proceed, the Commanding Officers should not be required to seek another opinion and should normally act on those initial opinions. The Referral Authorities should do the same when considering their recommendations to the DMP.

5.3 We recommend that the standard time period for Commanding Officers to make their decisions whether to proceed with cases after charges have been laid should be two weeks. If they decide to proceed, they should send a request for prosecution directly to the DMP and forward copies of all documentation to the Referral Authorities. The Referral Authorities should have two weeks to forward their recommendations, if any, to the DMP. If the DMP does not hear from the Referral authorities within that timeframe, the DMP may assume they have nothing to add to the positions already taken by the Commanding Officers.

5.4 We recommend that, when referring cases to the DMP for prosecution, the Commanding Officers indicate their views on the appropriate sentence that should be imposed for the offence if the accused pleads

guilty or is adjudged guilty after a Court Martial trial. Those opinions should be taken into consideration by the RMP's, but would not be binding on them.

5.5 We recommend that the RMP's regularly update Commanding Officers on the progress through the Court Martial system of every charge pertaining to their Unit.

5.6 We recommend that the CMPS provide continuing education, on a regular basis, to DJA's with respect to the requirements of Courts Martial. Most importantly, the education should deal with the elements of offences and what is necessary to prove them. The Appeals Counsel (DMP-4), as part of his/her responsibilities, should ensure that the DJA's are kept up to date with current decisions relevant to Courts Martial and informed of problems encountered in court as the result of inadequate investigation or advice.

5.7 We recommend that DJA's be given the opportunity to participate as co-counsel (second chair) with RMP's at a few Courts Martial in order to give them a better appreciation of what is expected at those trials.

5.8 We recommend that DJA's be invited to attend the joint educational program conducted for RMP's and for the military defence counsel in order to keep them apprised of issues pertaining to Courts Martial.

Chapter 6: Practices and Policies of CMPS

6.1 We recommend that the CMPS examine ways to foster a work environment where Military Prosecutors feel free to fearlessly exercise discretion on a principled basis, without concern for personal or professional repercussions. We further recommend that the CMPS take measures to ensure strong institutional support for the exercise of such discretion.

6.2 We recommend that the general approach of the DMP and the DDMP should be to delegate responsibility for all aspects of decision-making to the RMP's with respect to the cases that are assigned to them. This delegation of authority should be subject to the following:

- The RMP's should be encouraged to freely consult with the DMP, the DDMP and other Regular Force and Reservist RMP's when they feel they could benefit from advice.
- When assigning specific cases to the RMP's, the DMP and the DDMP should indicate whether it will be a requirement of the RMP's assigned to consult with them before the RMP's make certain decisions on those cases.
- The RMP's should be required to initiate consultation with the DMP or DDMP before making a final decision on one of their assigned cases that has the potential to become controversial or precedent-setting and may have consequences that could affect the military justice system as a whole.

6.3 We recommend that the post-charge reviews of cases, to the extent they are maintained for some or all cases, be conducted by the RMP's more expeditiously and in less detail than at present. We see no need for the RMP's to interview many witnesses or view all videotapes of witnesses' statements in most cases.

6.4 We recommend that the practice of requiring RMP's to submit lengthy written analysis of the cases they review post-charge be discontinued. They should keep their own notes of their review in the file and a standard form should be developed that they could use as a guide for conducting the reviews.

6.5 We recommend that the tests described in the CMPS policies for pre-charge advice to the NIS, be changed to “reasonable prospect of conviction” and “in the public interest” for all offences.⁷⁵ Where the proposed charges are ones for which the accused will be given an election (following the laying of a charge), the prospect of conviction should be determined on the assumption that the rules of evidence applicable to Summary Trials will govern. Where the accused will have no election, the prospect of conviction should be determined based on the rules of evidence applicable at Courts Martial.

6.6 We recommend that the RMP's conduct the pre-charge reviews based on a court brief submitted to them by the NIS. They should not approve charges until they are satisfied that the investigation is complete and they have been provided with all of the documentation that will be required for trial.

6.7 We recommend that the general practice should be for RMP's not to interview witnesses during the pre-charge review stage. However, it may be appropriate to do so in the special circumstances set out in a list contained in the Federal Prosecutions Service Deskbook. A similar list should be made part of a new CMPS Policy Directive on pre-charge reviews. We recommend that, although the time required to conduct the pre-charge review will be dependent upon the nature and complexity of the case, the present goal of completing pre-charge reviews within 14 days should still apply.

6.8 We recommend that it should be left to the individual RMP to decide how detailed a memorandum the RMP will prepare to support the pre-charge review decision. Generally, it should not be necessary for them to complete a written analysis of all of the elements of each offence and the proof thereof. In most cases, a record in the RMP's file should suffice. Consideration should be given to the development of a standardized charge-screening and review form, such as those employed in Ontario and New Brunswick.

6.9 We recommend that Regulation 111.11(1)(b) be amended to remove the requirement for the CMPS to provide the defence with “will-say” statements of all of the witnesses it intends to call. A list of those witnesses along with their entire statements should be sufficient. In the alternative, or pending the amendment of the Regulation, the investigating authorities should provide “will-say” statements in the prosecution briefs that comply with the requirement of the Regulation.

6.10 We recommend that complete disclosure be provided to counsel for the accused as soon as possible after charges are laid. This should be done shortly after RMP has had the opportunity to vet the investigation file and should not be delayed until charges are preferred. If the accused does not have counsel, the disclosure “package” ought to be forwarded to the DDCS.

6.11 We recommend that Policy Directive 008/99, paragraph 4 that provides that “All resolution discussions must be initiated by defence counsel” be revoked.

6.12 We recommend that the CMPS adopt the practice of indicating the prosecutor's sentencing position on an early plea of guilty on a form that accompanies the disclosure package.

Chapter 7: The Court Martial

7.1 We recommend that modern case-management practices that are widely used in the civilian criminal justice system be adopted for use in the Court Martial system. The recent initiatives in this respect, that have been taken by the Chief Military Judge, should be encouraged and supported by all stakeholders.

7.2 We recommend that section 187 of Bill C-45 be amended to allow any military judge to deal with a case after a charge has been preferred up to the point when the Court Martial trial actually commences. Subject to that amendment, we hope that Parliament will give swift passage to the Bill.

7.3 We recommend that, if Bill C-45 is passed, Court Rules be developed and implemented by the Chief Military Judge pursuant to section 165.3. The Rules should deal with matters such as the amount of notice required for applications pursuant to the Charter of Rights and mandatory Judicial Pre-trial Conferences.

7.4 We recommend that the Chief Military Judge, with the assistance of the other Military Judges and the Court Martial Administrator, continue to assume an active leadership role in Case Management.

7.5 We recommend that a permanent Case Management Committee be established by the Chief Military Judge and that it meet on a regular basis. The Committee should be chaired by the Chief Military Judge and it should include the Court Martial Administrator, a "Trial Coordinator", the DMP, the DDMP, the DDCS, the Provost Marshall and others invited by them to attend. Its role should be to address case-management issues, including setting time standards, monitoring the flow of cases, identifying problems that contribute to delay and jointly devising solutions to those problems.

7.6 We recommend that, in carrying out their respective functions, special effort be made by the leadership of the CMPS and DCS to place less emphasis on traditional adversarialism and more emphasis on co-operative case management.

7.7 We recommend that the Military Justice Planning and Research Branch keep accurate statistics measuring delays in cases at every stage of the military justice process, from the time of the alleged offence until the completion of the Court Martial. A compilation of these statistics should be produced every month and they should identify areas where delays are increasing or decreasing. The data should be made available to the Case Management Committee for regular monitoring purposes.

7.8 We recommend that case-flow management standards and goals be established and monitored by the Case Management Committee. We believe that a reasonable target would be to have most Court Martial hearings on simple, straightforward cases commence within 3 months of the date of the referral.

7.9 We recommend that the position of "Trial Co-ordinator" be created within the office of the Chief Military Judge or attached to the Court Martial Administrator. The role of the Trial Co-ordinator would be to oversee the scheduling of trials, to communicate regularly with counsel and to monitor the trial list in order to ensure that judicial resources are used efficiently.

7.10 We recommend that the practice, recently started by the Chief Military Judge, of having the judge who travels to a location deal with more than one case should become the norm. Whenever a military judge travels to a given location to conduct one or more Courts Martial, he or she should also have all the pending cases in that location listed in court "to be spoken to".

7.11 We recommend that the practice of routinely scheduling one week for each Standing Court Martial and two weeks for Disciplinary Courts Martial be discontinued. The amount of time scheduled for trials should depend on the complexity of the cases, the issues identified by counsel and the time estimate given at Judicial Pre-trial Conferences.

7.12 We recommend that, if Bill C-45 is passed, Judicial Pre-trial Conferences should be mandatory and should be held before trial dates are set. The model for these conferences should be developed by the Chief Military Judge in consultation with the Case Management Committee. The "Best Practices" listed in the Report of the Criminal Justice Committee (Ontario, 1999) provide a good guide.

7.13 We recommend that, when a Court Martial is convened, a date should also be set for the matter "to be spoken to" one month in advance of the trial date for the purpose of holding a Confirmation Hearing by teleconference before a judge, preferably the judge assigned to conduct the Court Martial. The court should require counsel for both sides to confirm they are ready to proceed to trial and to confirm the time estimates previously given.

7.14 We recommend that procedures be put in place by the Chief Military Judge to facilitate the early resolution of cases by pleas of guilty and/or withdrawal of charges before trial dates are set. Consideration should be given to making greater use of the courtroom in Gatineau, Quebec for pleas of guilty in appropriate cases, with the proceedings broadcast by video to the accused's Unit in another part of Canada.

7.15 We recommend that, in the interests of greater efficiency, there should be, when appropriate, some deviation from the traditional practice of holding Courts Martial at the physical location of the Units. More Courts Martial should be held from the courtroom in Gatineau, Quebec, with the assistance of video technology. Prior to preferring a charge, an inquiry should be made of the Commanding Officer about the importance of holding the Court Martial at the location of the Unit.

7.16 We recommend that, in an effort to reduce overall delays, sentencing hearings in straightforward cases be made shorter and more efficient. Alternative ways of presenting the information that Military Judges consider necessary to arrive at a just sentence should be explored.

7.17 We recommend that, in order to promote consistency in sentencing for the same types of offences across the CAF, precedents from Summary Trials should be admitted and considered on sentencing by Military Judges at Courts Martial.

7.18 We recommend that a review be conducted of the Military Evidence Act (Military Rules of Evidence) with the view to simplifying the methods for proving certain elements of offences without unduly infringing on the fundamental rights of accused persons.

Chapter 8: Human Resources Management at CMPS

8.1 We recommend that the JAG should encourage and facilitate the development of an experienced cadre of criminal lawyers, both defence counsel and military prosecutors, and cross-postings should be encouraged. The present mind-set that the military lawyer practising in the criminal field ought to be a generalist should no longer be emphasized.

8.2 We recommend that, with regard to posting policies concerning JAG lawyers, it must be recognized that the position of a military prosecutor is a very specialized one that encompasses the acquiring of a considerable amount of knowledge and expertise with respect to advocacy skills, the rules of evidence, substantive criminal law and the Charter of Rights.

8.3 We recommend that the initial appointment to the position of RMP should be for a minimum of five years.

8.4 We recommend that the military prosecutors be encouraged to stay as long as possible in the RMP position. They should be permitted to spend their career as military prosecutors if they so wish.

8.5 We recommend that, whenever possible, the appointment of new military prosecutors to regional offices should occur when a more senior prosecutor is still posted to that office and is able to remain until the new appointment is able to become familiar with their position.

8.6 We recommend that a specific training programme, both for new appointees and for those more experienced military prosecutors, be developed and the job description of the Appeal counsel DMP-4 should include the responsibility for instituting and coordinating the training plan and programme. That person should also be responsible for distributing new case law to all military prosecutors on a regular basis. Furthermore, the position would be responsible for maintaining a data-base of Court Martial decisions. In all of these functions the incumbent would be aided by a paralegal.

8.7 We recommend that information about potential educational programmes should be disseminated by the Coordinator of Training to military prosecutors across Canada and that everyone be given an equal opportunity to attend these courses.

8.8 We recommend that the DMP provide an opportunity for every new prosecutor to work for a minimum of six to twelve months in a civilian prosecution service in order to gain experience in court. A similar opportunity should be repeated after several years of experience for military prosecutors to be seconded to a civilian prosecution office for a period of time that can be negotiated. An example would be that an experienced military prosecutor could have an opportunity to "junior" to a civilian prosecutor on a serious case, such as a homicide.

8.9 We recommend that new prosecutors should have the opportunity to conduct a number of Courts Martial as "juniors" to experienced military prosecutors, including Reservist prosecutors. This is especially relevant with regard to drug prosecutions which involve a degree of prosecutorial expertise and which compose a good percentage of the cases that the RMP's are facing.

8.10 We recommend that the DDMP, subject to his/her availability, should participate in some Courts Martial as a mentor with the assistance of junior military prosecutors. [This should occur frequently if our recommendation for three DDMP's is accepted]

8.11 We recommend that Joint Conferences/Training Sessions (the Advocacy Course), involving all defence counsel and all military prosecutors, be held at least once per year and should involve the military judges as panellists and presenters. The emphasis of these conferences/training sessions should be on advocacy skills.

Chapter 9: Organization of the CMPS

9.1 We recommend that the current regional structure of the CMPS be continued, with some modification.

9.2 We recommend that one of the RMP's in the West Region be posted at CFB Esquimalt.

9.3 We recommend that one of the RMP's in the Central Region be posted at CFB Borden. That position would also be responsible for training at the CF Military Police Academy.

9.4 We recommend that two new Lt. Colonel positions be created. These would be Senior Litigator positions, one for the West and one for the East/Atlantic Regions. They would replace existing RMP positions in those Regions rather than adding to the total complement. These positions would have the title "DDMP West" and "DDMP East/Atlantic" and would be at the same level as the existing DDMP position which would remain in the Central Region.

9.5 We recommend that the DMP-3 Policy Counsel position be filled immediately, or, alternatively, another member of the CMPS organization should take on the tasks of that position. A number of important issues that have not been addressed, pending the appointment of the Policy Counsel, should be dealt with immediately. For example, the comprehensive review of the Policy Manual and the drafting of the agreement with the NIS are matters of some urgency.

9.6 We recommend that consideration be given to the creation of the position of Administrator or Office Manager at the CMPS Headquarters. This position would be filled by a person who is not a lawyer and who has a strong administrative background and ability

LE GROUPE CONSEIL
BRONSON
CONSULTING GROUP

EXTERNAL REVIEW
OF
DEFENCE COUNSEL SERVICES

FINAL REPORT

Prepared for:

DEPARTMENT OF NATIONAL DEFENCE

Prepared by:

BRONSON CONSULTING GROUP
6 MONKLAND AVENUE
OTTAWA, CANADA, K1S 1Y9

September 15, 2009

SCHEDULE C
LIST OF RECOMMENDATIONS

- (1) It is our recommendation that the Director carry a caseload. In order to be an effective leader, the Director needs to be a role model for his staff. Part of the Director's responsibility is to develop his staff by mentoring them and instructing them in trial preparation and tactics. In our view, in order to do that, he must keep up his skills by taking a caseload. Doing so will make him a more central and integral part of the office. Our recommendation is that the Director participate in the rotation of duty phone from time to time. This would set a good example for the junior officers and it would lessen the burden of that task on them. It would also allow the Director to stay in touch with the practical realities faced by both his staff lawyers as well as the clients they serve.

- (2) We recommend that the Director implement a formal orientation and mentoring policy and program.

- (3) We recommend that the Director should play a significant mentoring role to his junior officers and provide them with guidance and advice on conducting their trials. In our experience, one of the keys to attracting and retaining staff counsel is to be a leader whom staff want to work for. A positive mentoring relationship with staff will contribute to their development and will engage them in both the work they do as well as in the office.

- (4) We recommend that the Director assign cases by meeting weekly with his staff lawyers and the reservists to discuss new files and how best to assign them. While we appreciate that the Director must try to assign a file to the lawyer of a client's choice, we are of the view that factors such as a lawyer's caseload and the possible impact on delay should be taken into consideration. The discussion at these weekly meetings should focus on the caseload and expertise of each lawyer as well as his/her ability to act on the file expeditiously.

- (5) We recommend that defence counsel be authorized to incur common disbursements on file without having to obtain formal authorization from the Director. A review of the Legal Aid

Ontario Tariff and Billing Handbook⁴² relating to disbursements may provide so assistance on the development of policies in this regard.

- (6) We recommend that when the Director is absent or otherwise unavailable, he delegate his authority to someone else in the office to act in his stead.
- (7) We recommend that the Director convene weekly meetings with his junior officers and support staff to discuss cases and their progress. This could be done at the same weekly meeting regarding the assignment of cases. We are cognizant of the fact that counsel have busy work schedules and responsibilities in court and suggest that such meetings be convened at a regular time and day first thing in the morning once per week. One meeting per month should include the reservists. Reservists and staff lawyers who are away from the office on the date of meetings, could participate by telephone conference or via a web-based conferencing tool.
- (8) We recommend that the Director be provided with support for his professional development as a lawyer manager. The Canadian School of Public Service has a number of professional development courses that focus on management and leadership which should be canvassed. A course called "Leadership, Reflections in Action" may be appropriate;
- (9) We further recommend that the Director have a 360 performance review every two years, which would include anonymous feedback from his staff, reservists and other colleagues. This practice is common in the public service and is an effective way to develop high functioning leaders.
- (10) We recommend that a well advertised, easily accessible and highly visible Frequently Asked Questions (FAQs) website for Canadian Forces members be developed to address the types of administrative questions being directed to the duty phone, to reduce the number and frequency of those types of calls. While some of the information regarding these types of questions is located in different sections of the JAG website, there does not appear to be a central and easily accessible location for FAQ's.

⁴² Online: http://www.legalaid.on.ca/en/info/pdf/Tariff_Manual.pdf, Chapters 5 and 6

- (11) We further recommend that the administrative assistant (CR 5) or the paralegal be trained to screen all calls that come to the duty phone and to respond to those inquiries that are of an administrative nature. All calls that come to the phone during working hours ought to be diverted from the lawyers unless they specifically require legal advice.
- (12) We also recommend that the military police be instructed to refer all impaired driving calls to the local civilian duty counsel hotline (Brydges hotline). In our view, this is the proper forum in which to obtain advice as the counsel responding to those lines are experienced with impaired driving.
- (13) We recommend that a bilingual after-hours answering service be retained and trained to screen calls to minimize the number of calls a lawyer has to take after work hours and through the night.
- (14) If the above-noted changes are implemented, we recommend that a comprehensive communication about the changes to the duty phone be sent out to all Canadian Forces members. That communication should also make clear to members that the phone is taken by a lawyer after work hours, on evenings, nights and weekends.
- (15) We recommend that the DCS be regionalized.
- (16) We recommend that secure technology be implemented to allow the DCS lawyers to meet via webcam with their clients and indeed, with one another if they need to consult. Such technology could also be used to communicate with family when a lawyer is on the road. Technology such as Skype could be explored for the purpose.
- (17) We recommend that when the next civilian employee leaves his/her employment at the DCS, that the position vacated be converted to a military position.
- (18) We recommend that the role of support in the office be clearly defined for everyone in the office and that all support staff at the DCS be trained and developed to assist all counsel in all aspects of the administration of client files including organizing disclosure, phone calls, correspondence, photocopies, document preparation, appointments, arranging for experts, travel etc.
- (19) We recommend that the support staff at DCS be sent to the Legal Aid Ontario Criminal Law Office in Brampton, Ontario to job shadow for a period of one week.

- (20) We recommend that the length of time lawyers are posted to the DCS be at least five (5) years with an “option to renew” at the end of a five (5) year term. This recommendation would be conditional on a regional structure which is discussed in detail in the section entitled “Regionalization” and on the restructuring of the DCS as recommended in the section entitled “Organizational Structure of the DCS”. We recommend that the Judge Advocate General create a litigation career path where lawyers could be posted to long term to positions in either the DCS or the CMPS. We recommend that a lawyer with little to no experience in criminal law either be seconded to a reservist or private defence lawyer’s office for a minimum of 1 year, or be posted to the CMPS for a period of at least three years before being posted to the DCS. Recommendations regarding secondment are detailed in the section entitled “Selection, Training and Mentoring of Staff Lawyers”.
- (21) We recommend that a lawyer being posted out of DCS continues to be assigned less serious files to work on until his/her departure. In our view, the client should be advised of the lawyer’s impending departure and should be reassured that his/her file will be transferred to a new lawyer if the matter cannot be completed before the original lawyer leaves. In the civilian system lawyers leave their place of employment from time to time. When that occurs, a client’s file is transferred to new counsel without interruption to the work.
- (22) We recommend that the DCS lawyers be permitted to deploy during their posting to DCS so long as the deployment is not for the purposes of advising the chain of command (as this could result in a conflict of interest);
- (23) In order to ensure that the office functions effectively in the absence of a lawyer on deployment, we suggest that two additional staff lawyer positions be created. We outline the benefits of additional resources in the section entitled “Organizational Structure of the DCS”.
- (24) It is our view that the DCS needs to be accountable for its time and expense and that guidelines should be developed to assist counsel to manage the time they spend on a file to ensure it is appropriate and reasonable. We would expect that such guidelines would take into consideration the seriousness of an offence and the nature of the consequences to the accused.

- (25) We recommend that the DCS develop a panel of mentors who are experienced in criminal defence work. The mentors could be staff lawyers, reservists or private defence counsel.
- (26) We recommend that the Director of DCS should develop and implement a formal orientation, training and mentoring program for in-coming counsel. As part of the training, the lawyers should be given a refresher course on the Rules of Evidence and should be taught basic principles of advocacy as well as basic criminal law and procedure.
- (27) We recommend that inexperienced lawyers be sent on secondments to work with either reservists, private counsel or criminal law staff legal aid offices, for a minimum of six months in order to learn how to properly conduct criminal defence work. The volume in those offices is high and would present a lawyer with a great learning opportunity. Upon his/her return to the office that lawyer should junior on at least one court martial before conducting one on his/her own.
- (28) We recommend that lawyers with some criminal law experience who may not require a secondment, be required to junior on at least four (4) courts martial before they conduct a court martial on their own. Once a lawyer is in a position to conduct a court martial on his/her own, a senior, more experienced counsel should supervise and attend at his/her first few courts martial.
- (29) We recommend that lawyers be required to have an ongoing relationship with mentors.
- (30) We recommend that the primary criterion for selecting a lawyer to work at the DCS be litigation and advocacy skills and experience as well as a desire to do litigation work. It is our opinion that with the recommendation to have the duty phone screened by other bilingual personnel, it is not necessary for every lawyer posted to DCS to be bilingual. In our submission a good balance between litigation experience and French language skills should be achieved. It would our recommendation that no more than three (3) staff lawyer positions be designated as bilingual.

- (31) We recommend that the DCS be governed by a Board of Directors.
- (32) We further recommend that the composition of the Board of Directors include military personnel that do not provide legal advice to the chain of command in any capacity.
- (33) We recommend that the function of the Board should be to oversee the operation of the DCS and to review its activities monthly. Further, the board should direct policies to be implemented in DCS and should be responsible for evaluating the performance of the Director on an annual basis. The Board meetings should be attended by both the Director and by a representative of the staff lawyers and reservists. Minutes should be taken at each meeting and should be made public.
- (34) In our view, the right to disclosure arises at the time that the accused is charged. We recommend that complete disclosure be provided as soon as possible after a charge is laid; it should not be delayed until after the charge is preferred. If the client does not have a private lawyer, the disclosure package should be sent to the DCS. The benefit of early disclosure would be to allow defence counsel to commence negotiations with the prosecution before charges are preferred and perhaps influencing either the nature of the charges to be preferred or the disposal of the matter;
- (35) We recommend that the Director have weekly meetings with staff lawyers and reservists to discuss cases including caseload and the allocation of new files. While the Director has to be mindful of section 101.22 of the QR & O's, the section only requires him to make an effort to assign a client his lawyer of choice. New files should be allocated in accordance with a lawyer's availability to conduct a trial within three (3) to four (4) months unless the file is such that a more experienced lawyer is required;
- (36) We recommend that the Director's practice of assigning cases to himself in order to delay the opening of a file until the next budget year be discontinued. As our mandate did not extend to considering whether the DCS budget was being properly managed, we are not in a position to comment in this respect. If the budget is insufficient to ensure that there is no delay in the defence of clients, the issue should be addressed by the Director of DCS to the JAG;
- (37) We recommend that the Director assign cases to lawyers despite the fact that they are to be posted. There is no reason that a lawyer cannot do the ground work to prepare a case for trial and have the trial conducted by someone else. In the United Kingdom, solicitors

prepare files for barristers as a matter of course. A well prepared trial file could easily be assumed by an experienced staff or reservist lawyer, even on short notice.

- (38) We recommend that the DCS as well as the CMPS be showcased as an important and integral part of a fair and just military justice system. Their efforts should be recognized by the JAG Branch in some of the ceremonies that take place where honours are bestowed upon members who conduct their work with distinction. In our observation there is no reason not to hand out at least one commendation to a deserving member of the CMPS and the DCS at the annual Christmas party each year.
- (39) We recommend that all lawyers who wish to work in litigation in the JAG branch should be required to work in both DCS and the CMPS.
- (40) We recommend that the measures regarding co-operation set out in the External Review of the CMPS⁴³ be implemented immediately. Those measures bear repeating in this report, We therefore reiterate that, in carrying out their respective functions, special effort be made by the leadership of the CMPS and DCS to place less emphasis on traditional adversarialism and more emphasis on co-operative case management.
- (41) We recommend that the two Directors meet together with the staff at both the DCS and the CMPS as well as the Court Martial Administrator and the staff in the Military Judge's Office to set the tone for future more cooperative relationships.
- (42) We recommend that although the current rank of the Director of DCS is that of Lieutenant Colonel, there must be some opportunity for an individual who has demonstrated a very high level of competence in litigation, to remain in the position and attain the rank of Colonel.
- (43) We recommend that two new staff lawyer positions be created for the DCS. Those positions should be for senior and experienced counsel, one of whom would be a Deputy Director who could, if he/she demonstrated a very high level of competence, attain the rank of Lieutenant Colonel. The Deputy Director should be delegated similar authority to the Director so that he/she could ensure the office operates smoothly in the Director's absence.
- (44) We recommend that the no more than three (3) of the remaining positions be staffed by junior lawyers.

⁴³ Andrejs Berzins and Malcolm Lindsay, Bronson Consulting, "External Review of the Canadian Military Prosecution Service (2008)" p. 60

- (45) It is recommended that the DCS be regionalized. These writers are of the view that two additional positions be added to the DCS and that a review of the volume of courts martial in various locations be conducted done in order to determine the location of offices as well as the number of lawyers required to best serve the needs of Canadian Forces members. In such a review it would be important to take into consideration the location of the CMPS regional offices. In any event, we recommend that a Deputy Director be posted to Western Canada together with a junior and we suggest that the Director and one lawyer be assigned to the Ottawa area.
- (46) We recommend that the support staff be centralized and made available to all lawyers using technology. Communication can be by phone or by intranet and documents can be easily prepared and transferred from one office to the other.
- (47) It is suggested that in order to address the issues of isolation and support, the regional offices be collocated in a cost-sharing arrangement with reservists where possible, or private defence counsel.
- (48) It is recommended that all motions and applications be conducted centrally by the Director and the staff lawyer in Asticou. In our view there appears to be no need for those matters to be done "in the field". This recommendation would reduce the travel requirements for the Judges.
- (49) It is recommended that the staff counsel meet weekly be teleconference call and that they meet in person twice per year for a retreat.
- (50) We recommend that reservists be considered to be a more integral part of the team than they are at present.
- (51) We recommend that the reservists participate in regular staff meetings (perhaps once per month) with the staff lawyers and they be sent on training with them. There is much to be gained from regular contact. It would allow for both the staff and the reservists to get to know and share one another's skills and expertise as well as their recent experiences in courts martial.
- (52) We recommend that the reservists who are willing to do so, be part of a formal mentoring program for the junior and less experienced lawyers at the DCS.

- (53) We recommend that the reservists who are willing to do so, work with a seconded officer for a minimum of 6 months to 1 year in order to teach the officer the basics of a criminal defence practice.
- (54) We recommend that bill C-45 be re-tabled in order to allow court martial judges to make rules. If the legislation is passed, it is our suggestion that the court require counsel to appear at a first appearance or “set date” court as well as a judicial pre-trial.
- (55) It is our suggestion that in the meantime the Chief Military Judge convene a meeting with the Director of DCS and the Director of CMPS to try to implement “practices” that will be followed by counsel. Such practices may include attendance at a set date court that is convened every two weeks at the same time of day. Attendances should be able to be by telephone for out of town counsel. In the event that counsel or reservists are not available on that day, one of the staff lawyers from the DCS office should attend with instructions from counsel. Another “practice” that could be implemented would be the convening of judicial pre-trials. Such pre-trials should be conducted by a judge, other than the trial judge, and should focus on the narrowing of issues or resolution.
- (56) It is our recommendation that the Chief Military Judge, the Director of DCS and the Director of CMPS meet formally, once per month as a Bench and Bar Committee, to discuss systemic issues and other matters of mutual concern.
- (57) We recommend that clients be provided with an information sheet about the motions associated with their case and further, that the information sheet address the issue of delay in relation to the said motions.
- (58) We recommend that the challenges to the system that arise out of the aforementioned motions ought to be expedited to the Court Martial Appeals Court for consideration.
- (59) We recommend that the systemic issues set out above should be reviewed and discussed with the Judge Advocate General by all parties including the DCS with a view to considering recommendations for legislative amendments.

Annex E

SECOND INDEPENDENT REVIEW OF BILL C-25

COMPENSATION & BENEFIT ISSUES

GENERAL

1. The Canadian Forces recommends that sections 12 and 35 of the *National Defence Act* be amended.
2. Bill C-25 amended section 12 to provide in part that:
 - (3) The Treasury Board may make regulations
 - (a) prescribing the rates and conditions of issue of pay of military judges;
 - (b) prescribing the forfeitures and deductions to which the pay and allowances of officers and non-commissioned members are subject; and
 - (c) providing for any matter concerning the pay, allowances and reimbursement of expenses of officers and non-commissioned members for which the Treasury Board considers regulations are necessary or desirable to carry out the purposes or provisions of this Act.
3. Bill C-25 also amended section 35 of the *National Defence Act* to provide that:
 35. (1) The rates and conditions of issue of pay of officers and non-commissioned members, other than military judges, shall be established by the Treasury Board.
 - (2) The payments that may be made to officers and non-commissioned members by way of reimbursement for travel or other expenses and by way of allowances in respect of expenses and conditions arising out of their service shall be determined and regulated by the Treasury Board.
4. After a decade of experience with these two provisions, the Canadian Forces now recommends that four amendments be made to provide authority for:
 - a. payments under sections 12(3) and 35(2) to persons other than officers and non-commissioned members;
 - b. the Treasury Board to retroactively exercise its section 12(3) and 35 powers;
 - c. advances in payments under section 35; and
 - d. the Treasury Board to delegate, with conditions, to the Chief of the Defence Staff, its authority under section 35(2).
5. (The Canadian Forces had considered the impact of the limited class rule upon section 35(2) and had considered amending section 35(2) in light of it. That idea has been discarded.)

6. The aims of the amendments are to improve the interpretation of Parliament's intentions to improve the administration of the government's defence services program. The single, common theme of the recommended amendments is increased codification—within the *National Defence Act*—of service-related compensation and benefits authorities.

7. The recommended amendments are described in further detail below.

AMENDMENT #1—OTHER PERSONS

ISSUE

8. Amending sections 12(3) and 35(2) to authorize payments to persons other than officers and non-commissioned members.

BACKGROUND

9. The Treasury Board lacks authority under the *National Defence Act* to determine and regulate payments to persons other than officers and non-commissioned members.

10. Many other persons who are not public employees have a nexus to the Canadian Forces and defence services program. These persons include: a) the families of officers and non-commissioned members; b) civilians wishing to enrol in the Canadian Forces; c) former officers and non-commissioned members; d) honorary appointees who are not officers but who reinforce military values; and e) among others, various volunteers for and speakers at defence activities and conferences.

11. There are many foreseeable circumstances in which other persons may travel or otherwise incur expenses for service-related reasons. These circumstances include: a) travel generally, i.e. to units, conferences, and meetings; b) travel specifically, to hospitals, funerals, and internments; c) relocation, i.e. moving from one place to another; and d) education.

12. Each other person in each foreseeable circumstance has a tangible nexus to an officer, a non-commissioned member, or the Canadian Forces itself.

DISCUSSION

13. The object of amending sections 12(3) and 35(2) is uncontroversial. The government continues to express support for military families and for the reinforcement of military values. Canadian military legislation has long provided authority for "other persons" in some particular circumstances to be paid for some expenses they incur.

14. It is the means to achieve that object that requires amendment. Currently, only section 12(1) provides any enabling authority to authorize payments to other persons. The requirement to obtain a Governor in Council regulation is administratively laborious and relatively time-consuming.

15. It might be said that the *Financial Administration Act* provides sufficient authority for a Treasury Board policy to allow payments to "other persons". The reply is that the clerical administration of the Canadian Forces has not been efficiently served by a frequent need to refer to other legislation and documents issued other than under the *National Defence Act*.

16. Another option considered, but rejected, was that of making indirect payments, e.g. an officer may be reimbursed for their spouse's education expenses (Compensation Benefit Instruction 211.06). This option operates adequately in limited circumstances but:

a) strictly speaking, cannot operate when the officer or non-commissioned member is dead; and b) accomplishes indirectly what ideally should be done directly.

RECOMMENDATION—SECTION 12(3)

17. It is recommended that this section be amended to provide as follows:

(3) The Treasury Board may make regulations

(a) prescribing the rates and conditions of issue of pay of military judges;

(b) prescribing the forfeitures and deductions to which the pay and allowances of officers and non-commissioned members are subject; and

(c) providing for any matter concerning the pay, allowances and reimbursement of expenses of officers and non-commissioned members and concerning the payment by way of reimbursement of expenses of other persons, for which the Treasury Board considers regulations are necessary or desirable to carry out the purposes or provisions of this Act.

RECOMMENDATION—SECTION 35(2)

18. It is recommended that this section be amended to provide as follows:

(2) The payments that may be made,

(a) to officers and, non-commissioned members, and other persons by way of reimbursement for travel or other expenses, and

(b) to officers and non-commissioned members by way of allowances in respect of expenses and conditions arising out of their service,

shall be determined and regulated by the Treasury Board.

AMENDMENT #2—RETROACTIVITY

ISSUE

19. Amending sections 12(3) and 35 to provide explicit authority to retroactively exercise the powers in those sections.¹

BACKGROUND

20. The drafting of regulations and Treasury Board instructions takes time. First, a present need to increase payments or to create a new entitlement is recognized. Second, regulations or instructions are drafted or amended. Third, they are submitted and the Treasury Board considers them. Eventually, the Treasury Board may approve them.

21. Unless they are retroactive, the officers or non-commissioned members whose need instigated the compensation and benefit regulation or instruction are unlikely to benefit from them.

22. For decades, the retroactive creation of new entitlements and the retroactive increase of existing entitlements has occurred in the Canadian Forces compensation and benefits scheme.

23. Some of these retroactive payments were made under the authority of the *Retroactive Remuneration Regulations* (TB 806934, 26 November 1987). However, the scope, meaning, and continued effectiveness of that regulation has become controversial. Two factors complicate that controversy:

- a. whether section 35 is *in pari materia* to provisions under the *Financial Administration Act*, and should be interpreted accordingly;
- b. the effect of the *Regulations Repealing the Retroactive Remuneration Regulations (Miscellaneous Program)*, SOR/2000-116 23 March, 2000, whose Regulatory Impact Statement provides that “members ...of the Canadian Forces are entitled to retroactive payments in accordance with directives approved by Treasury Board”; and

24. In short, the Canadian Forces cannot “presume from mere silence that the legislature intended retroactive as well as prospective benefits.”²

DISCUSSION

25. The Canadian Forces is of the view the controversy is best eliminated by explicit, legislated authority to act retroactively.

¹ In this paper, “retroactive” means changing the law as it was in the past.

² Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 707.

26. The Canadian Forces accepts that it is a fundamental principle of public law that all governmental action must be supported by a grant of legal authority.³ The more explicit the authority, the better the interpretation of that authority. This overarching principle applies to the temporal operation of regulations and instruments issued under sections 12(3) and 35.

27. The temporal operation of legislation is a complex subject. This complexity is compounded when relying upon presumptions in statutory interpretation.⁴

28. Explicit, legislated language overcomes the presumptions.

29. The section 12(3) authority to issue regulations can be amended to permit making retroactive regulations.⁵ Insofar as Treasury Board instruments issued under section 35 are "executive legislation" *per* Keyes, section 35 can be amended to permit the Treasury Board to make retroactive instructions.

30. The Canadian Forces considered the option of continuing to conduct a "necessary implication" analysis to determine whether retroactive regulations and instruments could be made. It was concluded that the status quo is highly inefficient and subject to different interpretive approaches.

31. The Canadian Forces also considered an amendment relying upon the verb "to vary". It has been judicially interpreted to include an authority to act retroactively. There is a constant risk that a judicial interpretation may change. The risk is avoided if explicit, legislated language is used.

32. Accordingly, the Canadian Forces recommends amending sections 12(3) and 35 to create an explicit, legislated authority to make retroactive regulations and instructions.

RECOMMENDATION—SECTION 12(4)—NEW

33. It is recommended that section 12 be amended to include a new subsection (4) to provide as follows:

(4) A regulation made under subsection (3) may, if it so provides, be retroactive and have effect in respect of a period before it is made.⁶

RECOMMENDATION—SECTION 35(3)—NEW

34. It is recommended that section 35 be amended to include a new subsection (3) to provide as follows:

³ Brown and Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Canvasback, loose-leaf) at §13:1000 (Grant of Authority)

⁴ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis Canada Inc., 2008) at 639 and 677-681.

⁵ John Mark Keyes, *Executive Legislation*, 2nd ed. (Toronto: LexisNexis Canada Inc., 2010) at 498.

⁶ See Keyes at 498.

(3) A rate established under subsection (1) and a payment determined and regulated under subsection (2) may, if the Treasury Board so provides, be retroactive and have effect in respect of a period before it is established, determined, or regulated, as the case may be.

AMENDMENT #3—ADVANCES

ISSUE

35. Amending section 35 to provide explicit authority to make advance payments.

BACKGROUND

36. During the past decade, the Treasury Board has created or substantively amended more than 40 instructions for payments to officers or non-commissioned members.

37. The increasing complexity of personal financial circumstances, the incidents of service, and the possible high cost of certain expenses incurred by officers and non-commissioned members makes it difficult to anticipate every contemporary situation in which an advance payment may be reasonable.

38. There are many different circumstances in which it may be reasonable to make an advance payment. Consider two examples.

- a. a member who will travel abroad may not be able to access their pay abroad because of a lack of banking resources abroad; and
- b. a catastrophically wounded non-commissioned member may be entitled to a Home Modifications Benefit, reimbursing the member for home renovations commensurate to the injury (Compensation Benefit Instruction 211.01). Many renovations are relatively expensive. Without an advance in the benefit, the member may not be able to finance the renovation. Thus, although the Treasury Board created a benefit, a member may not be able to access it.

DISCUSSION

39. At the present time, there is little legislation that permits advance payments. Existing legislation is issued under the authority of section 38 of the *Financial Administration Act* and includes:

- a. *Accountable Education and Travel Advance Regulations (Dependants of Members of the Canadian Forces)*, CRC, c 669
- b. *Accountable Travel and Moving Advance Regulations (Canadian Forces)*, CRC, c 670
- c. *Accountable Travel and Moving Advance Regulations (Dependants of Members of the Canadian Forces)*, CRC, c 671

d. *Accountable Advances Regulations*, SOR/86-438.

40. There are weaknesses to this legislative framework. First, each regulation is of limited scope. Second, to amend the framework, a new or amending regulation is required (for the shortcomings of this requirement, see paragraph 20 above). The result is a degree of inflexibility that fails to respond to modern needs.

41. The Canadian Forces considered the option of interpreting section 35's "payments" to include advance payments. This option was rejected because section 35 can be read *in pari materia* to sections 11.1(1)(c) and (d) of the *Financial Administration Act*, in respect of which only regulations are used to authorize advance payments.

42. The Canadian Forces considered the option of using section 12(3)'s "any matter" to authorize advance payments. This option was rejected because: a) of the existence of section 38 of the *Financial Administration Act*; and b) it required significant legislative development (see paragraph 20 above).

43. In short, the Canadian Forces concluded that it would be more efficient and straightforward to consolidate in one provision the Treasury Board's authority to issue instructions about payments and to authorize, under those same instructions, accountable advances.

44. Ideally, each particular instruction would state whether an advance is permitted in respect of a payment under the instruction, the regulations would become redundant and be repealed, and clerical use of the compensation and benefits scheme would be more efficient (because there would be no need to locate and review a separate authority to make an accountable advance).

RECOMMENDATION

45. It is recommended that section 35 be amended to include a new subsection (4) to provide as follows:

(4) Despite paragraph 38(1)(a) of the *Financial Administration Act*, the Treasury Board may, under subsections (1) and (2), authorize the making of an accountable advance to an officer, non-commissioned member, or other person in respect of pay, allowances, and other financial benefits.

AMENDMENT #4—DELEGATION

ISSUE

46. Amending section 35(2) to allow the Treasury Board to delegate to the Chief of the Defence Staff its authority under section 35(2)

BACKGROUND

47. The background to this recommendation has two dimensions: 1) the government's approach to government compensation and benefits; and 2) administrative efficiency.

48. First, it has been the Treasury Board's central premise to benchmark the Canadian Forces compensation and benefits scheme to the public service scheme.⁷ Benchmarking of payments under section 35(2) to the public service is commonly exercised in one of two ways:

- a. incorporation by reference: see e.g. Compensation Benefit Instruction paragraph 209.335(8) (Family Care Assistance); and
- b. mirroring: the Treasury Board creates a benefit for the public service and subsequently creates a highly similar one for the Canadian Forces.

49. An example of mirroring is found in the *Canadian Forces Integrated Relocation Program* (CFIRP) and the Treasury Board authorized *National Joint Council Relocation Directive* (NJCRD). Mirroring sees the rates, amounts, figures, etc in CFIRP being the same as those in the NJCRD.⁸ In the footnoted example, the figures 80% and \$12,000 are common. It can be inferred that the Treasury Board wanted one scheme to mirror the other.

50. Second, there are several instances where mirroring ceases to work: a) one scheme's rates, figures, amounts, etc change; b) there were errors in drafting mirroring provisions; and c) a new benefit is created for, say, the public service, but not for the Canadian Forces.

51. When mirroring ceases to work but there is no intention to cease benchmarking, it becomes necessary to amend an existing instruction or to draft a new instruction. A Treasury Board submission is required in both cases and is time-consuming (see paragraph 20 above). Both the Canadian Forces and Treasury Board staff see inefficiency in the status quo.

⁷ Treasury Board, *Expenditure Review of Federal Public Sector - Volume Two - Compensation Snapshot and Historical Perspective, 1990 to 2003*, online at <http://www.tbs-sct.gc.ca/report/orp/2007/ler-ed/vol2/vol210-eng.asp>.

⁸ Example. NJCRD: "Employees who elect not to sell their homes at their former place of duty may transfer 80% of the real estate commission fees that would have been payable had the home been sold (taxes excluded) to the Personalized Fund." Compare CFIRP: "CF members who elect to keep their principal residence receive an incentive equal to 80% of the pre-negotiated corporate real estate commission rate based on the appraised value of the principal residence, not to exceed \$12,000."

DISCUSSION

52. Section 35(2) does not permit anyone other than the Treasury Board to determine and regulate by way of instruction.

53. Section 6(4) of the *Financial Administration Act* permits the Treasury Board to subdelegate its section 35(2) authority to a specific persons, including deputy heads. The Chief of the Defence is not a deputy head, but is considered within government as being analogous to one.⁹

54. A subdelegate can exercise section 35(2) authority only if the Canadian Forces' drafts a formal Treasury Board submission to amend an instruction or to create a new, mirror instruction.

55. Despite subdelegation, the submission requirement is constant. The most minor, unobjectionable amendment requires a Treasury Board submission. When the Treasury wants a new military benefit to mirror a new public service benefit, a Treasury Board submission is required. The result is significant administrative inefficiency upon the Canadian Forces.

56. The Canadian Forces considered the option of incorporation by reference as much as possible. Although this could mitigate the inefficiency, it cannot eliminate it. Furthermore, it is impossible to incorporate by reference a new public service benefit if no military instruction refers to it.

57. The Canadian Forces considered the option of Parliament's authorizing the Minister of National Defence to determine and regulate payments under section 35(2). This option was rejected because it divided responsibility between two Ministers and risked significant inconsistency across government compensation schemes.

58. The Canadian Forces considered the option of a discretionary subdelegation of the Treasury Board's section 35(2) legislative power to the Chief of the Defence Staff. An appropriate legislated subdelegation authority could:

- a. eliminate the need for preparation of a Treasury Board submission;
- b. allow a swifter response to changing rates, figures, amounts, etc, and swifter mirroring of new benefits; and
- c. respect Parliament's intention to limit subdelegation under the *Financial Administration Act* to deputy heads.

59. The Canadian Forces accepts that the subdelegated authority should be conditional.

⁹ Recall that the Department of National Defence and the Canadian Forces are two distinct legal entities.

RECOMMENDATION

60. It is recommended that section 35 be amended to include a new subsection (5) to provide as follows:

(5) Despite subsection 6(4) of the *Financial Administration Act*, the Treasury Board may delegate to the Chief of the Defence Staff any of its powers under subsection (2). It may make the delegation subject to any terms and conditions it considers appropriate.

SUMMARY OF RECOMMENDATIONS

SECTION 12

CURRENT	RECOMMENDED
<p>(3) The Treasury Board may make regulations</p> <p>(a) prescribing the rates and conditions of issue of pay of military judges;</p> <p>(b) prescribing the forfeitures and deductions to which the pay and allowances of officers and non-commissioned members are subject; and</p> <p>(c) providing for any matter concerning the pay, allowances and reimbursement of expenses of officers and non-commissioned members for which the Treasury Board considers regulations are necessary or desirable to carry out the purposes or provisions of this Act.</p>	<p>(3) The Treasury Board may make regulations</p> <p>(a) prescribing the rates and conditions of issue of pay of military judges;</p> <p>(b) prescribing the forfeitures and deductions to which the pay and allowances of officers and non-commissioned members are subject; and</p> <p>(c) providing for any matter concerning the pay, allowances and reimbursement of expenses of officers and non-commissioned members <u>and concerning the payment by way of reimbursement of expenses of other persons,</u> for which the Treasury Board considers regulations are necessary or desirable to carry out the purposes or provisions of this Act.</p>
	<p><u>(4) A regulation made under subsection (3) may, if it so provides, be retroactive and have effect in respect of a period before it is made.</u></p>

SECTION 35

CURRENT	RECOMMENDED
<p>35. (1) The rates and conditions of issue of pay of officers and non-commissioned members, other than military judges, shall be established by the Treasury Board.</p>	<p>35. (1) The rates and conditions of issue of pay of officers and non-commissioned members, other than military judges, shall be established by the Treasury Board.</p>
<p>(2) The payments that may be made to officers and non-commissioned members by way of reimbursement for travel or other expenses and by way of allowances in respect of expenses and conditions arising out of their service shall be determined and regulated by the Treasury Board.</p>	<p>(2) The payments that may be made,</p> <p><u>(a) to officers and non-commissioned members, and other persons by way of reimbursement for travel or other expenses, and</u></p> <p><u>(b) to officers and non-commissioned members by way of allowances in respect of expenses and conditions arising out of their service,</u></p> <p>shall be determined and regulated by the Treasury Board.</p>
	<p><u>(3) A rate established under subsection (1) and a payment determined and regulated under subsection (2) may, if the Treasury Board so provides, be retroactive and have effect in respect of a period before it is established, determined, or regulated, as the case may be.</u></p>

	<p><u>(4) Despite paragraph 38(1)(a) of the <i>Financial Administration Act</i>, the Treasury Board may, under subsections (1) and (2), authorize the making of an accountable advance to an officer, non-commissioned member, or other person in respect of pay, allowances, and other financial benefits.</u></p>
	<p><u>(5) Despite subsection 6(4) of the <i>Financial Administration Act</i>, the Treasury Board may delegate to the Chief of the Defence Staff any of its powers under subsection (2). It may make the delegation subject to any terms and conditions it considers appropriate.</u></p>

