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, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, as required under section 96 of Statutes of Canada 1998, c.35

Submitted to the Minister of National Defence

September 3, 2003

FOREWORD

Those responsible for organizing and administrating Canada's military justice system have strived, and must continue to strive, to offer a better system than merely that which cannot be constitutionally denied.

This report arises out of the requirement that the Minister of National Defence arrange for an independent review of the provisions and operation of Bill C-25[1] every five years. Thankfully, unlike past reports, such as the Report of the Special Advisory Group on Military Justice and Military Police Investigation Services in March of 1997 and the Report of the Commission of Inquiry in respect of the Deployment of the Canadian Forces to Somalia of June 1997, this report has not been precipitated by serious incidents leading to a perception of deficiencies within Canada's military justice system.

While not entirely without room for improvement, it is my conclusion that the military justice system is generally working well. However, the grievance process, also a subject of Bill C-25, unfortunately is not. The large number of outstanding grievances - close to 800 at last count, some outstanding for ten or more years - is unacceptable. As a result, I have made many recommendations to ensure that grievances are dealt with much more quickly and in a fair and transparent manner.

I. A sound and fair military justice framework

While Bill C-25 dealt with a variety of issues, one of the main areas was the reform of the military justice system. I am pleased to report that as a result of the changes made by Bill C-25, Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence.

The changes to the military justice system made by Bill C-25 have not gone unnoticed in other countries. In a recent letter addressed to me from Eugene Fidell, the President of the National Military Institute for Justice in Washington, D.C., he wrote:

> As you know, military justice practitioners and scholars in the United States are taking an increasing interest in the developments in other countries' systems, and Canadian developments have been at the top of the list. Canada has much to be proud of in this area.[2]

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

[2] A copy of Mr. Fidell's letter is attached as Annex F.

Notwithstanding my belief that Bill C-25 created a much more fair military justice system, there remain areas that can be improved. I have, when considering changes to our military justice system (this expression being used in its widest sense), always kept in mind the need to have a system that will properly operate under those special conditions that our men and women are placed in, often abroad, under conditions from peacekeeping to peace-making, in what is often a hostile environment, and indeed sometimes outright war. My major recommendations are set out below.

Military Court

- An independent military judiciary is the hallmark of a fair military justice system.

- Bill C-25 enhanced the independence of military judges by including provisions outlining the appointment, terms and functions of military judges.

- To further ensure judicial independence, I am recommending the creation of a permanent trial level military court, with judges appointed until retirement.

Military Police

- Bill C-25 created the Military Police Complaints Commission, a very important oversight body responsible for ensuring that complaints as to military police conduct and interference with military police investigations are dealt with fairly and impartially.

- The predicated scale of the workload of the Military Police Complaints Commission post-Somalia seems to have been significantly overestimated, with only a small number of complaints being filed each year with the Commission.

- In order to ensure that taxpayer money is being used prudently, I recommend that an internal audit be conducted to reconsider the financial and personnel requirements of the Military Police Complaints Commission.

Code of Service Discipline

- Maintaining discipline by the chain of command is essential to a competent and reliable military organization.

- The changes made by Bill C-25 created a more fair and impartial system and introduced important safeguards to protect the rights of an accused.

- I have recommended certain relatively minor changes that reflect the ongoing need to balance the norms and values of the Canadian society with the unique needs of the military for discipline, efficiency, and portability.

Independence of Key Actors

- Bill C-25 clarified the roles and responsibilities of the Judge Advocate General and the Minister of National Defence. It also clearly separated the investigative, prosecution and defence functions by creating the new positions of Director of Defence Counsel Services and Director of Military Prosecutions and eliminating most of the quasi-judicial roles of the Minister.

- To further ensure the independence of all of these actors, I recommend that security of tenure for the Director of Defence Counsel Services be the same as that for the Director of Military Prosecutions.

II. Unsatisfactory grievance process

Bill C-25 created an independent and impartial grievance board and a streamlined grievance process. Although the grievance process that was created seems to be sound, the way that it has operated is not. Grievances still caught in the process after ten and even twelve years are not unheard of, and those of two or more years at the level of the Chief of Defence Staff seem to be the norm. Further, many grievors complained to me that they were not advised as to the reasons for delays or where their grievances were at in the grievance process.

In order to fix the process, I recommend new measures to end the unacceptable delays, reduce bureaucracy and increase transparency.

End Unacceptable delays

- The Chief of Defence Staff must be given the power to delegate to someone under his command and control decision-making in respect of all grievances, except those that may have significant implications for the Canadian Forces.

- A task force composed of senior members of the Canadian Forces should be created with the sole responsibility of resolving the backlog of grievances at the Chief of Defence Staff Level within a year of the tabling of this report in Parliament by the Minister of National Defence. Resolution of these older grievances should not affect the expedient review of more recent grievances.

- That, from now on, decisions respecting grievances be rendered within a time limit of twelve months.

- That additional resources be made available to the Canadian Forces Grievance Authority and the Canadian Forces Grievance Board to enable them to review grievances in a timely fashion.

Reduce bureaucracy

- In order to reduce the number of grievances that reach the Chief of Defence Staff level, those charged with reviewing grievances at the initial level (i.e., commanding officers) should be given the requisite training, authority and resources to resolve grievances.

Increase Transparency

- To increase transparency, the Chief of Defence Staff should be required to report annually on the Canadian Forces grievance process, including on the timeliness of the review of grievances. This report should be made public. Moreover, grievors should be entitled to find out the status of their grievances without delay.

III. Conclusion

I have approached the task of writing this report from the perspective of the women and men in the Canadian Forces. These soldiers who risk their lives for our country deserve a military justice system that protects their rights in accordance with our *Charter*, while maintaining the necessary discipline for achieving successful missions. Further, they deserve a grievance process that addresses their grievances in a fair, transparent and prompt manner. I believe that my recommendations will go far towards achieving these goals.

IV. In Appreciation

I would be remiss if I did not express my appreciation for the assistance of Stikeman Elliott LLP, a law firm with whom I am associated. In particular, I would like to thank Catherine McKenna, a lawyer at the firm, and Lynn Larson (both as articling student and as an associate), who assisted directly in the preparation of this report. I would also like to thank Diane Morris, my assistant, Patrizia Martino, a summer student, and David Brown, who assisted me on the administrative side. My thanks also go out to Holly McCormick, Andrew Cunningham and Lyle Halcro for their editing assistance.

While there are a large number of people who provided valuable assistance in the preparation of this report, particular mention must be made of General R.R. Henault, Chief of Defence Staff; Lieutenant-General G. Macdonald, Vice Chief of Defence Staff; Major-General J.S.T. Pitzul, Judge Advocate General; Lieutenant-

Colonel D. Couture; Lieutenant-Colonel M. Gibson, Director Military Justice Policy Research; Lieutenant-Colonel P. Gleeson, Special Assistant to the Judge Advocate General; Colonel P. Olson, Director Law Human Resources; Vice-Admiral G. Jarvis, Special Assistant to the Chief of Defence Staff; Colonel A.F. Fenske, Director General Canadian Forces Grievance Authority; Colonel Smith, Special Assistant to the Assistant Deputy Minister, (Policy & Communications); Dr. D. Lenarcic, Policy Officer - Directorate of Cabinet Liaison, Assistant Deputy Minister (Policy); the Chief Military Judge Colonel K. Carter; Military Judge Lieutenant-Colonel M. Dutil; Military Judge Commander J. Price (retired); Mr. P. Massé, previously Chairperson of the Grievance Board; Ms. D. Laurin, Acting Chairperson of the Canadian Forces Grievance Board; Ms. L. Cobetto, Chairperson of the Military Police Complaints Commission; Colonel D. Cooper, Provost Marshal; Mr. A. Marin, Canadian Forces Ombudsman; Mr. E. Fidell, President of the National Institute of Military Justice, Washington, D.C.; Mr. D. McNairn, Chair of the Military Law Section of the Canadian Bar Association; Dr. A. Nadeau, Doctor of Constitutional Law; Pierre Allard, Director, Service Bureau, Dominion Common, The Royal Canadian Legion and Major (retired) Bill Beswetherick, The Royal Canadian Legion.

I would also like to express my sincere thanks to the many other members of the Canadian Forces and the general public who provided input in relation to the substance of this report, including those that I had met with or who had contact with Ms. McKenna or Ms. Larson, as well as those who took the time to outline their views on Bill C-25 in a submission to me.

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I - INTRODUCTION

1. Overview of the Mandate

Pursuant to the authority of the Minister of National Defence ("Minister") under Section 4 of National Defence Act ("*NDA*") and section 96 Bill C-25, the Minister issued a Ministerial Direction on March 27, 2003, appointing me as the Bill C-25 five-year independent review authority (hereinafter "Independent Review Authority"), reporting directly to him.

Before discussing the terms of this mandate, I should emphasise that while I have attempted to limit the use of abbreviations, an index to abbreviations may be found at Annex A at the end of this report. Further, I note that the statistics and other data that I refer to in my report are current as of the date of the writing of this report or as may be otherwise indicated.

The terms of this mandate are as follows:

> The mandate of the Independent Review Authority is to conduct the first independent review of the provisions and operation of Bill C-25 as required under section 96 of Statutes of Canada 1998 c. 35.
>
> The review of provisions in the National Defence Act that were not amended by Bill C-25 is not within the mandate of the Independent Review Authority.
>
> The Independent Review Authority is authorized:
>
> a. to sit at such time and at such place in Canada as it may from time to time decide;
>
> b. to adopt such procedures and methods as it considers expedient for the proper discharge of its mandate;
>
> c. to have, subject to law, complete access to:
>
> (i) the employees of the Department of National Defence,
>
> (ii) the officers and non-commissioned members of the Canadian Forces,

(iii) the members and staff of the Canadian Forces Grievance Board,

(iv) the members and staff of the Military Police Complaints Commission, and

(v) the Ombudsman for the Department of National Defence and the Canadian Forces and staff,

and to any information relevant to their review; and

d. to be provided with or to engage the services of such staff and other advisors as it considers necessary to aid and assist in the review, at such rates of remuneration as may be approved by the Treasury Board.[3]

It should be emphasized at the outset that this is not a review similar in nature to that of the Special Advisory Group on Military Justice and Military Police Investigation Services in March of 1997, chaired by the late Right Honourable Brian Dickson ("First Dickson Report"). That review was essentially an overview of the entire military justice system. My mandate is quite different in that it is restricted to a review of the provisions and operation of Bill C-25. A more detailed discussion of my mandate may be found in the following chapter.

2. Bill C-25

Bill C-25 implemented most of the recommendations made by the First Dickson Report as well as some of the recommendations contained in the following reports:

- the Report to the Prime Minister on the Leadership and Management of the Canadian Forces by the Minister of National Defence, March 1997;
- the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia* Affair, June 1997 ("Somalia Report"); and

[3] A copy of the Ministerial Direction may be found at Annex B.

- 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 ("Second Dickson Report").

The major changes made by Bill C-25 include:

- clarification of the roles and responsibilities of the principal actors in the military justice system, including the Minister and the Judge Advocate General ("JAG"), and the establishment of clear standards of institutional separation between the investigative, prosecutorial, defence and judicial functions;

- establishment of a Director of Military Prosecutions ("DMP") who prefers all charges to be tried by court martial and has conduct of all prosecutions at court martial and a Director of Defence Counsel Services ("DDCS") who provides, supervises and directs the provision of legal services to people liable to be charged, dealt with and tried under the *Code of Service Discipline* contained in Part II of the *NDA ("Code of Service Discipline")*;

- establishment of a Canadian Forces Grievance Board ("Grievance Board") to make findings and provide recommendations to the Chief of the Defence Staff ("CDS") on grievances by members of the Canadian Forces;

- establishment of a Military Police Complaints Commission ("MPCC") to investigate complaints with respect to military police conduct and interference with military police investigations; and

- requirement that the Minister arrange for an independent review of the provisions and operation of Bill C-25 every five years.

3. The Process

The Minister directed that I be given complete access to the employees of the Department of National Defence, officers and non-commissioned members of the Canadian Forces ("CF members") of all ranks, members and staff of the Canadian Forces Grievance Board ("Grievance Board"), the MPCC, and the Canadian Forces Ombudsman ("Ombudsman"), as well as to any information relevant to this review. This direction has been scrupulously complied with; indeed I must say that my staff and I have received the utmost co-operation on the part of all.

My staff and I had contact on more than one occasion with the JAG, the DMP, the DDCS, the Ombudsman, the Chair of the MPCC, the Chair and Vice-Chair of the Grievance Board, the CDS and the Vice-Chief of Defence Staff, the Canadian Forces

Provost Marshal ("Provost Marshal"), the Director General of the Canadian Forces Grievance Authority ("CFGA"), and the Canadian Forces Military Judges, among others. We also had contact with representatives of The Royal Canadian Legion, the Chair of the National Military Law Section of the Canadian Bar Association ("CBA") and other people with expertise in matters falling under Bill C-25. These meetings usually took place at the boardroom of the Ottawa Stikeman Elliott LLP office, by telephone, or at the National Defence Headquarters ("NDHQ").

In order that CF members, veterans and others interested in the military justice system and other matters pertaining to Bill C-25, be made aware of my review, I issued a call for comments which was published in the Canadian Forces newspaper, The Maple Leaf (and, where possible, in Canadian Forces base newspapers) outlining the scope of my review and welcoming confidential submissions (see Annex C). At my request, the CDS also issued a Canadian Forces General Message (CANFORGEN) containing the call for submissions. My call for submissions was also posted on the Canadian Forces internal and external websites. As a result of these efforts, I received 121 submissions dealing with matters including the grievance process, the military police, summary trials and courts martial. A breakdown of the subject matter of these submissions may be found at Annex D.

In order to ensure that I met with CF members outside of NDHQ, my staff and I also visited several bases across Canada where we met with a variety of people, including the base commander, the commanding officers of units, delegated officers, officers authorized to lay charges, officers who had acted as assisting officers, and the military police (i.e., members of the National Investigation Service ("NIS") and base police) (see Annex E). Generally speaking, at the bases we had roundtables with members involved in the military justice system in the mornings, and had confidential meetings with people who requested to meet with me in the afternoon.

I also received submissions from interested parties, including from the CBA, the JAG Internal Review Team on the operation of the military justice provisions of Bill C-25 ("JAG Internal Review Team"), the Grievance Board, the MPCC, the Ombudsman, The Royal Canadian Legion, and the CDS.

While I have referred to many of these submissions, I have not attached them to this report.[4] As required by my mandate, I have deposited these submissions with the Minister.

[4] An exception was the CDS Submission on Pay and Allowances which is attached as Annex H.

4. Approach

My approach to addressing possible problems arising from the provisions or operation of Bill C-25 was one to share my concerns with the relevant persons, affording them an opportunity to institute corrective measures or explain to me why my concerns were unjustified. In proceeding in this way it is my sincere hope that when my report is tabled in the House of Commons, most of the problem areas that I have identified will have been addressed and thus many of my recommendations will be moot. This approach has already proved to be useful. It often resulted, when appropriate and possible, in immediate administrative action. Indeed, it demonstrated that reform need not be confrontational, nor reports sensational.

II – MANDATE

My mandate, as outlined in the Ministerial Direction from the Minister, is clearly limited to a review of Bill C-25. However, much confusion still exists as to the meaning of section 96 of Bill C-25, now contained in the "Related Provisions" section of the *NDA*. Questions arise as to whether this section implements the original intent of the recommendation for a review set out in the Second Dickson Report and whether Parliament wanted and enacted a requirement for a review of the entire *NDA*.

Section 96 of Bill C-25 states:

> (1) The Minister shall cause an independent review of the provisions and operation of this Act to be undertaken from time to time.
>
> (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 confusion that arises from this section surrounds whether the review of the provisions and operation of "this Act" refers only to those changes made to the *NDA* by Bill C-25 or to a review of the entire *NDA*.

1. Recommendation in the Second Dickson Report

Recommendation 17(b) of the Second Dickson Report was the basis for section 96 of Bill C-25. This recommendation reads as follows:

> 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 <u>following the enactment of the legislative changes required to implement the recommendations contained in this report and in our 1997 report</u> (emphasis added).

It is apparent that even at the drafting stage much confusion existed around how to draft a provision that captured the intent of the recommendation put forward by the Second Dickson Report.

Some people were of the opinion that the recommendation in the Second Dickson Report intended to limit the future review to the changes to the *NDA* made by Bill C-25. This would explain why the recommendation in the Second Dickson

Report did not end with the words, "every five years" but instead went on to refer to a review following the enactment of the changes based on the recommendations contained in the Second Dickson Report. When Bill C-25 was examined in the Hearings of the Standing Senate Committee on Legal and Constitutional Affairs, Senator Bryden stated:

> They are making a recommendation that affects a broad area in defence and one that, in this act, deals with the judicial system in the Department of National Defence. They are saying that we should be ensuring that there is an independent review every five years regarding as what we are considering here and what we are enacting, and no more.[5]

Other Senators took the position during the debate that the Second Dickson Report was recommending a broader review encompassing the entire *NDA*. In the Senate Committee Hearings, Senator Lorna Milne, the Chairperson of the Standing Senate Committee on Legal and Constitutional Affairs stated in a discussion with Colonel Fenske,[6] that "Chief Dickson's recommendation was that an independent review of the legislation that governs the Department of National Defence and the Canadian Forces be undertaken every five years following enactment, but it did not say to whom that review should be given." Colonel Fenske replied: "That is correct, or how it should be given."[7]

To some, it seemed clear that limiting a review to the changes made to the *NDA* made by Bill C-25 was nonsensical, as amendments made to the *NDA* after Bill C-25 would not be the subject of the review. Mr. David Gates, Research Officer of the Library of Parliament told the Senate Committee:

> After Royal Assent, when the phrase "this Act" is used in clause 96, it would refer to this act as amended by Bill C-25. In other words, it would be the current provisions of the National Defence Act as changed by Bill C-25. If you broadened that by saying the National Defence Act as amended by this Act alone, you could freeze the provisions that are being reviewed to just the ones from Bill C-25. Amendments made after this bill assented to might not be caught by the review.[8]

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[5] Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Senate Committee Hearings (18 November 1998) at 8.

[6] Then Deputy Advocate General, Advisory and Legislation, *National Defence Act* Amendment Team.

[7] Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Senate Committee Hearings (5 November 1998) at 8.

[8] Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Senate Committee

2. Section 96

After much discussion, Bill C-25 was adopted with section 96 which required "an independent review of the provisions and operation of this Act to be undertaken from time to time."[9]

In order to understand the meaning in law of the words "this Act" in Section 96 of Bill C-25, one must turn to section 42(3) of the federal *Interpretation Act*[10] which states that

> An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment it amends.

Therefore, based on this principle, a review of "this Act" should be interpreted to mean a review of the *NDA*. This explains why references to 'this Act' in the text of an amendment are taken to refer to the amended and not the amending Act."[11]

While it is pure conjecture at this point to assess what was intended by recommendation 17(b) of the Second Dickson Report, I will make a few comments. First, I agree with the argument that limiting a review to the changes made to the *NDA* by Bill C-25 defies logic, particularly as Bill C-25 becomes more and more dated. Currently, there are a number of bills before Parliament that would make changes to the *NDA*. For example, *Bill C-42: The Public Safety Act,* currently being debated, would establish a reserve military judges panel. Reviewing the *NDA* while ignoring new changes to the military justice system is of dubious use. More recently, certain changes and adjustments have been made to the military justice system and the grievance process in relation to matters relating to Bill C-25 and the related *Queen's Regulations and Orders* ("*QR&O*"), both in the lead up to my review and as a result of certain suggestions that I have made to improve the system (e.g., in relation to the grievance process). Further, I would imagine that as a result of my recommendations, additional changes will be made to the *NDA*. Quite clearly, a future review limited to Bill C-25 amendments would be untenable.

My second comment is that I assume that in making its recommendations, the Second Dickson Report was staying within its mandate, a mandate which did not cover a review of the whole *NDA*. Therefore, I find it a reasonable assumption that

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Hearings (18 November 1998) at 9.

[9] Notably, while the changes made by Bill C-25 are directly embodied in the main part of *NDA*, section 96 of Bill C-25 is not. Instead, it may be found in the section of the *NDA* entitled "Related Provisions" in reference to section 96 of Bill C-25.

[10] *Interpretation Act*, R.S.C. 1985, c I-21.

[11] R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (Toronto: Butterworths, 2002) at 540-541 states that section 42(3) of the *Interpretation Act* means that: "the text of the amendment is integrated into the text of the amended legislation and, except for its commencement date, the new provision is treated as if it had always been there."

the intention of recommendation 17(b) of the Second Dickson Report was that future reviews would cover those matters that were the subject of the First and Second Dickson Reports, namely, the military justice system (broadly speaking). Such a review might also include a review of the Office of the Ombudsman as this was also a subject that was addressed in the First Dickson Report. I note that the Ombudsman has made representations to me that the Office of the Ombudsman should be part of my review. However, as the Office of the Ombudsman was not created by Bill C-25, it is clearly not part of my review. Further, it is outside of the scope of my mandate to comment on whether the Ombudsman should be part of a future review or not.

Some have suggested that a review of the entire *NDA* should be undertaken every five years. This is the position put forward in the Submission of the National Military Law Section of the CBA ("CBA Submission"):

> Amending the *NDA* to include a provision similar to section 96 of Bill C-25 would be a tremendous engine for the review, reform and renewal of military law in Canada. At least once every five years, attention would be focused on the provisions and operation of Canadian military law and, perhaps more importantly, on where changes and improvements might be required.

Notwithstanding the position of the CBA, it is my view that a review should be more limited in scope but include the military justice system and the grievance process. In keeping with what I believe to be the spirit of recommendation 17(b) in the Second Dickson Report, and in order to ensure a productive review, the *NDA* should be amended to clearly state that a review of the military justice system and the grievance process should be carried out every five years. As Major-General Pitzul states in his communiqué to the JAG Annual Report, "reform of the military justice system is not a one-time event but rather an ongoing process."[12]

The requirement for a review of the military justice system every five years should be contained in the *NDA*, and not in the "related provisions" section of the *NDA* which only adds to the uncertainty regarding the nature of the review.

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[12] See the 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 2002 to 31 March 2003) ("JAG Annual Report"). In note also that Eugene Fidell, President of the National Institute for Military Justice in the United States, stated in his letter to me (attached as Annex F):

> From this perspective, having a regular program of outside review of the operation of the Canadian system is highly significant, and something that other countries – including my own – would do well to emulate. I am aware that the scope of your review has been a subject of discussion – i.e., should it be confined to just Bill C-25 matters, or should it extend to overall administration of justice in the Canadian Forces? I would hope that the terms of reference for any periodic review would be broad, rather than narrow.

(1) I recommend that the requirement that there be an independent review by the Minister of National Defence be amended to specifically require a review of the military justice system and the Canadian Forces grievance process. This requirement for a review should be entrenched in the *National Defence Act.*

3. My Mandate

Notwithstanding the above discussion, my mandate does not include a review of changes to the *NDA* beyond those implemented by Bill C-25. I have limited my review to the changes introduced by Bill C-25, even though others have provided submissions to me on matters that fall outside my mandate. However, since Bill C-25 is like the helm of a ship in that it only operates through its motors and its motors are to be found in the *QR&O* and other instruments, I have therefore determined that while I am limited to Bill C-25, I inevitably cannot report in any significant way unless I look at the consequential changes that were made to the *QR&O*. Furthermore, in cases where Bill C-25 has had a ripple effect on other provisions of the *NDA* which were not specifically mentioned in Bill C-25, I have considered these provisions to also fall within the scope of my review.

III – ROLES OF THE MINISTER, THE JUDGE ADVOCATE GENERAL, DIRECTOR OF MILITARY PROSECUTIONS, AND DIRECTOR OF DEFENCE COUNSEL SERVICES

One of the overriding goals of Bill C-25 was to clarify the roles, responsibilities and duties of the key actors in the military justice system. This clarification included the introduction of new positions within the military justice system in order to enhance the independence of the judiciary, prosecution and defence from the chain of command. This section of my report will deal with changes made to the role of the Minister, the JAG, the DMP and the DDCS. Military judges and the Court Martial Administrator will be dealt with in the following chapter.

1. Minister of National Defence

Bill C-25 put into place many of the suggestions made by the Second Dickson Report to remove the Minister from the routine administration of the *Code of Service Discipline*. Some of the changes made by Bill C-25 include the elimination or transfer of the discretionary oversight duties of the Minister in the following areas:

- Petitions to the Minister for release from pre-trial custody have been abolished, and the duty transferred to military judges;

- The Minister no longer appoints superior commanders for summary trial purposes. This power has been transferred to the CDS;

- The power to appoint military judges has been transferred from the Minister to the Governor in Council;

- The Minister no longer has the power to order courts martial or to designate other persons who would have this power. This power has been transferred to the Court Martial Administrator;

- The requirement that the Minister approve certain sentences has been removed, as has the power to suspend punishments of imprisonment or detention or to appoint other officials to do so;

- The authority to review or alter convictions in the case of a summary trial has been transferred to the CDS and the authority to order a new trial because of irregularities has been abolished. The discretion to dispense with any retrial ordered by the Court Martial Appeal Court or the Supreme Court of Canada has been repealed; and

- The final authority in the grievance system has been transferred to the CDS.

I am of the view that the changes transferring or eliminating many of the quasi-judicial duties of the Minister have been positive ones, and have effectively achieved their goal.

2. Judge Advocate General (JAG)

Since 1911, the JAG has acted as legal advisor to the Governor General, the Minister, the Department of National Defence and the Canadian Forces. However, until Bill C-25 came into force there was uncertainty as to the qualifications, duties and responsibilities of the JAG. In addition to the duty to give specialized legal advice, the amendments put in place by Bill C-25 charge the JAG with the superintendence of the administration of military justice in the Canadian Forces. Specifically, the JAG must regularly review and report on the administration of military justice and is responsible for the preparation of an annual report on military justice to be given to the Minister who will ensure that the report is tabled in Parliament.

The role of JAG is found at s. 9.2(1) of the *NDA*, which reads as follows:

> The Judge Advocate General has the superintendence of the administration of military justice in the Canadian Forces.

The intention of this statement was to recognize and continue the exercise of responsibilities similar to those of the Attorney-General as historically performed by the JAG under English common law.[13]

3. Director of Military Prosecutions

Bill C-25 created the DMP in order to establish prosecutorial independence. Historically, the military prosecutor was the direct agent of the senior military authority who convened courts martial and had no independent authority to amend charges or decide whether or not to proceed to trial. The primary functions of the DMP as set forth in the *NDA* are the preferral of all charges to be tried by court martial and the conduct of all prosecutions at courts martial.[14] Because the DMP is outside of the chain of command, conflicts of interest in the convening of courts martial are avoided. The DMP is given the express authority to withdraw a charge that has been preferred, an authority not previously enjoyed by the prosecution.

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[13] It should be stressed that the Office of the Chief Military Judge is independent of the JAG.

[14] While this chapter of my report deals with independence and key actors in the military justice system, the chapter on Courts also makes suggestions pertaining to the role of the DMP.

The DMP will also act as counsel for the Minister in respect of appeals before the Court Martial Appeal Court if he has been so instructed. The DMP holds office upon appointment by the Minister for a period not to exceed four years, and may only be removed from office by the Minister for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council.[15]

Prosecutorial Independence

In order to provide greater assurance that prosecution decisions would be made free from external influences and to reduce the potential for conflict of interest, Bill C-25 enhanced the separation between the prosecution function and the chain of command. These changes were made pursuant to comments by the Supreme Court in *R v. Généreux*[16]which highlighted the lack of institutional independence that existed in the court martial process at the time:

> It is not acceptable, in my opinion, that the convening authority, i.e., the executive, who is responsible for appointing the prosecutor, also have the authority to appoint members of the court martial, who serve as the triers of fact. At a minimum, I consider that where the same representative of the executive, the "convening authority," appoints both the prosecutor and the triers of fact, the requirements of s. 11(d) will not be met.[17]

As I explain in the chapter of my report dealing with military judges, the essential conditions of independence are security of tenure, financial security and institutional independence. Bill C-25 went a long way to increase the independence of the DMP, and the changes must be commended. However, as time has passed and the role has become more established, I have identified some room for improvement in terms of the financial security and institutional independence currently enjoyed by the DMP which, if implemented, would further the goals of prosecutorial independence.

Financial Security

Bill C-25 was intended to create the necessary legislative buffers around the DMP to ensure that the proper exercise of prosecutorial discretion is not inadvertently interfered with by the military chain of command. In the third report of the JAG Internal Review Team, the issue of financial security for the positions of

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[15] See section 165.1(2) of the *NDA*.
[16] *R. v. Généreux*, [1992] 1 S.C.R. 259 [*Généreux*].
[17] *Ibid.* at 309.

the DMP (and the DDCS) was raised. The report points out that Bill C-25 does not expressly provide for the compensation of either position in the *NDA* or the *QR&O*. As I reiterate in the section of my report pertaining to military judges, leaving the door open to changes in financial security has the potential to undermine the perception of independence, if not independence itself, granted by Bill C-25. For example, an accused might be left with the impression that the decision whether or not to prefer a charge would be influenced in some way by its effect on how the DMP will be compensated, given that the method of compensation of the DMP is currently not clearly defined. I therefore agree with the suggestion made by the JAG Internal Review Team that the compensation to be granted to the DMP should be prescribed by regulation.

> **(2) I recommend that the *National Defence Act* be amended to require that the salary of the Director of Military Prosecutions be prescribed by regulation, and that the method of determining remuneration be clearly specified.**

Institutional Independence

Pursuant to the amendments made by Bill C-25, the JAG has the authority to issue both general and case-specific instructions to the DMP. In my opinion, this power is in keeping with the role of the JAG as superintendent of the administration of the military justice system and does not adversely affect prosecutorial independence. Indeed, part of the superintendence function of the JAG must be to recognize the legitimate concerns of the chain of command in the disciplinary process. Independence is protected by transparency and accountability requirements for JAG. The JAG must inform the Minister of any instructions or guidelines given to the DMP, and the DMP must ensure that such instructions are available to the public. In this way, the DMP has safeguards in place that adequately balance the requirements for prosecutorial independence and superintendence in the military justice system.

4. Director of Defence Counsel Services

Bill C-25 also created the position of the DDCS. Previously, the defence function was performed by the legal officers of the Office of the JAG. The primary function of the DDCS is to provide, supervise and direct the provision of legal services to persons who are liable to be charged, dealt with and tried under the *Code of Service Discipline*. The creation of the DDCS was a great step forward in affording members of the Canadian Forces the protection of legal advice and representation that is intended to be independent of the chain of command. While the establishment of the DDCS does indeed go a long way toward ensuring the independence of defence counsel, it must be noted that the hallmarks of

independence, security of tenure and financial security could benefit from even greater protection.

Security of Tenure

For example, there is a discrepancy in the security of tenure accorded the DMP and that accorded the DDCS. The security of tenure provisions are reproduced below for the sake of convenience:

Director of Defence Counsel Services	Director of Military Prosecutions
249.18 (1) The Minister may appoint an officer who is a barrister or advocate with at least ten years standing at the bar of a province to be the Director of Defence Counsel Services.	165.1 (1) The Minister may appoint an officer who is a barrister or advocate with at least ten years standing at the bar of a province to be the Director of Military Prosecutions.
(2) The Director of Defence Counsel Services holds office during good behaviour for a term not exceeding four years.	(2) The Director of Military Prosecutions holds office during good behaviour for a term not exceeding four years. <u>The Minister may remove the Director of Military Prosecutions from office for cause on the recommendation of an Inquiry Committee established under regulations made by the Governor in Council.</u> <u>(2.1) The Inquiry Committee is deemed to have the powers of a court martial.</u>
(3) The Director of Defence Counsel Services is eligible to be re-appointed on the expiration of a first or subsequent term of office.	(3) The Director of Military Prosecutions is eligible to be re-appointed on the expiry of a first or subsequent term of office.

As can be seen, the DDCS does not have the security of an Inquiry Committee in relation to removal, nor does the *NDA* require the Minister to have cause to remove the DDCS. This asymmetry invites scrutiny, for to my knowledge there is no reason for the difference. As stated in the Second JAG Report:

> Military defence counsel must defend their clients against the prosecutorial powers of the State in circumstances where their clients, the clients' actions and the defence counsel's arguments may be highly unpopular with senior members of the Canadian Forces. It is important to avoid any unnecessary or unintentional

> derogation from the actual and perceived independence of DDCS counsel.

I agree entirely with these concerns and that the security of tenure accorded to the DDCS should equal that granted to the DMPS in order to avoid any misperceptions.

> **(3) I recommend that the *National Defence Act* be amended to provide the Director of Defence Counsel Services with security of tenure equivalent to that granted the Director of Military Prosecutions, as set out in section 165.1 of the *National Defence Act*.**

Financial Security

As noted above, my comments pertaining to the financial security of the DMP, the compensation awarded to both the DMP and the DDCS is not expressly set out in the amendments made by Bill C-25. I agree with the JAG Internal Review Team that, in light of the fact that the other key institutional safeguards aimed at protecting the integrity of the DMP and the DDCS are found in the *NDA* & *QR&O*, it would be appropriate to include provisions relating to compensation in the regulations.

> **(4) I recommend that the *National Defence Act* be amended to require that the salary of the Director of Defence Counsel Services be prescribed by regulation, and that the method of determining remuneration be clearly specified.**

IV – MILITARY JUDGES AND COURT MARTIAL ADMINISTRATOR

1. Military Judges

Prior to the amendments made by Bill C-25, military trial judges officiated at Disciplinary Courts Martial and General Courts Martial. Special General Courts Martial were presided over by a judge alone, although this was not necessarily a military judge. Standing Courts Martial were presided over by an officer appointed by the Minister for either a fixed or renewable term.[18]

The reforms put in place by Bill C-25 were intended to recognize the unique history and tradition of the Canadian military justice system, and at the same time facilitate judicial independence. As will be seen, this has proven to be a difficult goal to achieve within the administrative framework of the Canadian Forces. While I make the majority of my comments pertaining to the roles and responsibilities of military judges in this section, please be aware that some issues will be dealt with in other sections of my Report.[19]

Some of the changes made by Bill C-25 to the role of military judges include:

- the transfer of power to appoint military judges from the Minister to the Governor in Council;
- the requirement that military judges have at least 10 years' standing at the bar of a province as a prerequisite for appointment;
- the creation of a Chief Military Judge designation; the stipulation of a five year term during good behaviour subject to removal by the Governor in Council for cause on the recommendation of an Inquiry Committee as established under the *QR&O*;
- the criteria governing re-appointment; clarification that a military judge ceases to hold office upon reaching the retirement age set out in the *QR&O*;
- remuneration as prescribed by the Treasury Board in the *QR&O* and not based on performance or rank; and
- the possibility that judges be appointed as a board of inquiry.

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[18] The officer was required to be a lawyer with at least three years' experience.
[19] See, for example, the section on the *Code of Service Discipline* dealing with the review of bail conditions.

The effect of Bill C-25 also brought the military justice system closer to its parallel civilian justice system by requiring military judges to preside at all courts martial, and to determine and impose any resulting sentence (in the previous system the President of the panel fulfilled these duties).

The First and Second Dickson Reports and the Somalia Report all addressed the fundamental importance of independence of the judiciary.[20] As the Supreme Court of Canada stated in *Reference re: Remuneration of Provincial Court Judges,*[21] the starting point for a discussion of judicial independence as guaranteed by section 11(d) of the *Charter*[22] is *R.* v. *Valente*.[23] *Valente* sets out the essential conditions of judicial independence (both individually and institutionally or collectively): security of tenure, financial security and institutional independence. In *Généreux,* the Court explained that the conditions of judicial independence need not be applied with a uniform institutional standard to military tribunals – some flexibility must be granted in the application. Despite this flexibility, the threshold that must be met remains whether the military tribunal, from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of judicial independence. It must also be remembered that while the content of judicial independence is to be determined with reference to our constitutional tradition and is framed as being independence from the "government", the concept of government refers not only to the executive or legislative branches but also to any person or body which can exert pressure on the judiciary through authority under the state. This includes any person within the judiciary who has been granted authority, however limited, over other judges.[24]

The establishment of a military judiciary has created unforeseen problems, one of which (and not the least problematic) is the fact that military judges are "judges" when sworn in to judge, but are stuck in a sort of temporal no man's land between each courts martial because they do not belong to a permanent court, nor are they considered to be members of their respective provincial bar associations. The fact that military judges are not members of a court intimately impacts on many aspects of their status. For example, this fact affects such matters as: tenure; Rules of Practice; the relationship between the military judges and the Chief Military Judge; and the respective roles of the Court Martial Administrator as convening authority and the Chief Military Judge, to name but a few.

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[20] See recommendations 27 and 28 in the First Dickson Report, recommendations 1, 4 and 5 in the Second Dickson Report and recommendations 40.1 and 40.35 in the Somalia Report.
[21] *Reference re: Remuneration of Provincial Court Judges*, [1997] 3 S.C.R. 3.
[22] *Canadian Charter of Rights and Freedoms*, s. 11(d), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [*Charter*].
[23] *R. v. Valente*, [1985] 2 S.C.R. 673 [*Valente*].
[24] *R. v. Lippé*,[1991] 2 S.C.R. 114 [*Lippé*].

Following is my analysis of how the system brought into place by Bill C-25 fares when one applies the requirements of security of tenure, financial security and institutional independence to the current framework of the Office of the Chief Military Judge. I must submit at the outset that while much has been achieved in fostering the independence of the military judges, the measures put into place by Bill C-25 to ensure the independence of the judiciary remain inadequate.

(a) Security of Tenure

Bill C-25 extended the term served by military judges to five years during good behaviour, subject to removal for cause by the Governor in Council on the recommendation of an Inquiry Committee. Military judges are currently eligible for reappointment on the expiry of the term on the recommendation of a Renewal Committee.

Renewable Terms

When setting up a court, renewable terms must be used with extreme caution. I shall not discuss here the difference between administrative tribunals and the courts as regards term appointments and renewable terms. The judicial decision-maker must be in the position to render a decision based solely on the merits of the case before him or her, according to law. More importantly, those appearing before a judicial decision-maker should, within reason, be satisfied that their case has been decided solely on its merits and according to law. Provisions governing renewal must be crafted with care to ensure that those subject to a judicial decision do not believe that a judge's desire to be renewed will influence his or her final decision. Legislative provisions must therefore be drafted with precision in order to prevent any possibility of interference by the executive, however remote such a possibility may be. When I considered the current provisions governing the renewal of term for military judges, I scrutinized the composition of the Renewal Committee, and the factors it must take into account when the term of a military judge comes up for renewal in order to ensure that those served by military judges would not be left with a perception of bias.

The composition of the Renewal Committee and the factors to be taken into consideration by the Renewal Committee are currently set out in *QR&O* article 101.15. The Renewal Committee is to be made up of a judge of the Court Martial Appeal Court, a civilian lawyer nominated by the Minister of Justice and a civilian nominated by the Minister of National Defence. The Renewal Committee is to take into account, among other things, the requirements of the Office of the Chief Military Judge, any compelling military requirement to employ the military judge after the completion of the current term of appointment in a non-judicial capacity elsewhere in the Canadian Forces, and the military judge's physical and medical fitness to perform military duties as an officer of the legal classification. The factors

to be taken into account by the Renewal Committee in determining a military judge's request for renewal leave the door open for the perception of potential interference, as well as highlight the difficulty in maintaining an appropriate segregation between legal officers and the judiciary.

The rationale behind the current renewable term for military judges appears to take into account the hardship of the job – the physical demands of constant travel, stress and the hardship of forgoing promotions while fulfilling the duties of a military judge. By instituting a renewable term, the military judge in question is thereby given the opportunity to rejoin the chain of command should the demands of the job become too great.[25] However, advancements in modern technology have worked to reduce the travel requirements for the position of a military judge. The voluntary *Rules of Practice* published by the Office of the Chief Military Judge make specific allowance for video conferencing and pre-trial telephone conferencing, thereby alleviating the necessity for travel in many circumstances.[26] In my opinion, the physical hardship of the job has been reduced such that it should no longer be a factor used to justify a renewable term. Also, the fact that a military judge forfeits any right to promotion for the length of his or her term is a reality that favours the default position of security of tenure until retirement from the Canadian Forces. This increased security of tenure effectively eliminates any perception of influence that the possibility of return to the chain of command may have on the decisions of a military judge.

It must be made clear that should a military judge decide to leave his or her position and return to the chain of command, the new position must be restricted to one that will not create an apprehension of bias. In *Lippé*, when the Supreme Court of Canada was faced with the question of the institutional impartiality of part-time judges, it was noted that the fact that a judge is part-time does not in and of itself raise a reasonable perception of bias. Rather it is the activities in which a judge engages during his or her time off coupled with the safeguards that are in place that

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[25] See, for example, the testimony of Colonel Bruno Champagne, Deputy JAG/Chief of Staff, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, *Senate Committee Hearings*, (28 October 1998) at 17: "…if military judges are appointed early in their careers, for instance, at approximately age 40, and if they are appointed until retirement age, they are barred from a full military career with the possibility of advancement, because they cannot be promoted without leaving the bench."

[26] It is also likely that, as the Office of the Chief Military Judge develops, more frequent recourse will be had to different and innovative remote conferencing options. See, for example, the example set by the Federal Court of Canada as evidenced by Rules 32 and 33 of the *Federal Court Rules, 1998* and Practice Direction and Circular No. 5/96 respecting telephone and video conferencing: Since its inception to address extraordinary situations almost ten years ago, the use of telephone conferences has grown to become a fairly routine part of the Court's practice. It is preferable to restrict it to procedural matters and the Court is careful in that regard, but with the enormous geographic responsibility of the Federal Court of Canada there are frequent disputes over trial or motion venue and they involve possible travel and expense for counsel far in excess of those experienced in the provincial Superior Courts. As the practice becomes more common in other jurisdictions and federally, there is an increased pressure to use it to resolve other kinds of disputes, particularly in emergency matters.

must be analyzed to determine if the prejudicial effects of a part-time judiciary are reduced. As will be discussed in greater detail, institutional safeguards are currently not in place to protect a military judge from a reasonable apprehension of bias should it be determined that the military judge's term not be renewed. For example, while military judges do swear a symbolic oath when appointed, the legislation does not require them to swear a binding oath upon appointment to the bench. Therefore, the military judges must swear an oath before each trial in accordance with section 251 of the *NDA*.[27] There is no judicial immunity other than that immunity offered to all CF members under the *NDA*, nor are military judges subject to a code of ethics. Additionally, a former military judge is currently not precluded from returning to either the Offices of the DMP or DDCS. This placement would be inappropriate and leave a military judge in a delicate situation, arguing before former colleagues and having been privy to the kinds of discussions that take place between colleagues on the bench. While I understand such placements occurred often in the past, I must stress that by the standards of today is inappropriate.

In *Généreux*, the Court stated that the Constitution did not necessarily require that military judges be accorded tenure equivalent to that enjoyed by judges of the regular criminal courts. However, constitutionality is a minimum standard. As I said at the outset, those responsible for organizing and administrating a military justice system must strive to offer a better system than merely that which cannot be constitutionally denied. For this reason I have come to the conclusion that military judges should be awarded tenure until retirement from the Canadian Forces.

> **(5) I recommend that military judges be awarded security of tenure until retirement from the Canadian Forces, subject only to removal for cause on the recommendation of an Inquiry Committee.**

The recommendation that military judges should be awarded security of tenure until retirement necessarily requires the dissolution of the Renewal Committee. If, however, my recommendation is not followed I must stress that the composition of the Renewal Committee and the factors that they are to take into account must be incorporated into the *NDA*, and not left to the *QR&O*.[28]

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[27] See, however, section 29.16 of the *NDA* which requires Members of the Canadian Forces Grievance Board to swear an oath of office, and section 250.1 of the *NDA* which requires members of the Military Police Complaints Commission swear an oath of office upon appointment.

[28] See, for example, comments by Honourable Lorna Milne, *Debates of the Senate (Hansard)*, 137 (25 November 1998) at 1439 (Hon. Gildas L. Molgat).

Inquiry Committee

The composition of the Inquiry Committee and the factors to be considered are set out in the *QR&O*. Such important matters should be spelled out clearly in primary legislation to avoid any real or perceived executive interference. The *NDA* should therefore be amended accordingly.

> **(6) I recommend that the *National Defence Act* be amended to include the composition of the Inquiry Committee that may make a recommendation that a military judge be removed for cause and the factors that the Inquiry Committee must take into consideration when making such a recommendation.**

Temporary Suspension

Another area of concern that affects both security of tenure and the need for institutional independence is found in *QR&O* article 19.75 – Relief From Performance of Military Duty. In this section, the CDS and an officer commanding a command are authorities who may relieve an officer or non-commissioned member from the performance of military duty. This regulation leaves open the possibility that the CDS could suspend a military judge, and the Chief Military Judge could also suspend a military judge as she is considered to be an officer commanding a command. The Supreme Court of Canada in *Lippé* recognized that for members of the Court, judicial independence includes the requirement to be free from pressure or influence from the Chief Justice.[29] This regulation should be changed in order to avoid the perception of interference with the independence of military judges.

> **(7) I recommend that article 19.75 of the *Queen's Regulations and Orders* be amended to exempt military judges from temporary suspension of judicial duties.**

(b) Financial Independence

Bill C-25 has brought in many laudable changes with regard to the financial security of military judges. For example, the rates and conditions of pay are now prescribed by the Treasury Board in regulations. This represents a change to the former system which based pay on the highest level of the military judge's particular rank as a legal officer with an additional premium added to reassure the military judge that there was no concern over the annual assessment which normally would fix their merit pay.[30] A Compensation Committee has also been

[29] See *Lippé* at 138.

[30] The system brought into place by Bill C-25 was also due to the 1998 decision in *Lauzon v. R.* (1998), 8 Admin. L. R. (3d) 33., which found that basing the military judges salary on military rank was unconstitutional.

established and given the task of undertaking an inquiry every four years into the adequacy of the remuneration awarded military judges. I have had the opportunity to review the first Report on the Compensation of Military Judges, which was submitted in August of 2000. The Report confirms my belief that the financial security of judges has been greatly improved by the provisions and operation of Bill C-25. The conclusions reached in the Report also afford the Minister the opportunity to enshrine in the *NDA* the yearly salaries of the military judges in a legislative scheme similar to that offered Federal Court judges.

It should also be noted that while the requirement for regular review of the remuneration of military judges is set out in the *NDA,* the constitution of and factors reviewed by the Compensation Committee are set forth in the *QR&O* and therefore subject to alteration without Parliamentary scrutiny. In the interests of judicial independence, the *NDA* should be amended to include these provisions in the primary legislation.

> **(8) I recommend that the yearly salary of military judges and the Chief Military Judge be set out in the *National Defence Act*, along with a formula for the periodic adjustment and revision of salaries.**
>
> **(9) I recommend that the *National Defence Act* be amended to define the composition of the Compensation Committee tasked with reviewing the remuneration of the military judges and the factors that the Compensation Committee must take into consideration in their quadrennial review.**

(c) Institutional Independence

Suspension Provisions

The authority to suspend a punishment of imprisonment or detention imposed by a service tribunal is set out in sections 216, 217 and 218 of the *NDA*. Suspending authorities are prescribed by the Governor in Council in regulations found in article 114.02 of the *QR&O*. In respect of punishments imposed at courts martial, the CDS and an officer commanding a command may act as suspending authorities. As I also point out in the section of this report dealing with the Court Martial Appeal Court, the military rationale behind the suspension provisions is to provide the chain of command with the flexibility to accommodate the imperatives of a possible military necessity. The goal is to ensure that if an individual who has been sentenced to imprisonment or detention has a particular skill required on an imminent deployment with his/her unit, then that person may still be able to fulfill the duties required by the operational mission should the requirements of the

operation outweigh the societal and disciplinary interest in having a custodial sentence served at the time.

The rationale behind the suspension provisions, while perhaps understandable when viewed within a historical perspective, does not reflect the reality of the modern Canadian military justice system. The Canadian military now has professional judges to hear and try cases. Advances in modern technology allow military judges to respond quickly in times of emergency or crisis. It is also my belief that there is not an adequate safeguard built into the suspension provisions to ensure that they are not subject to abuse. In my opinion, it is possible to meet the unique requirements of military service in a manner that will recognize the imperatives of battle with the need for judicial independence from the chain of command.

> **(10) I recommend that the *National Defence Act* be amended to provide that the authority to suspend a custodial sentence shall reside with a military judge or judge of the Court Martial Appeal Court in the first instance, subject only to situations of military exigency when the decision to suspend a sentence may be taken by the chain of command and approved at the earliest opportunity by a military judge.**

Grievances

Section 29 of the *NDA* allows any officer or non-commissioned member the right to grieve in certain circumstances. It would be contrary to the principles of judicial independence to allow a military judge to apply to the executive for redress of a grievance, as this would open the door to executive interference with the judiciary. Bill C-25 established the Grievance Board, which is fully independent from the Canadian Forces chain of command. It would therefore make sense that any redress of grievance submitted by a military judge be sent directly to the Grievance Board for final resolution. By allowing the Grievance Board jurisdiction to consider and render a final decision on grievances of military judges, the independence of the judiciary is maintained in a cost-effective manner. Any appeal would then be directly to the Federal Court.

> **(11) I recommend that the Canadian Forces Grievance Board be awarded jurisdiction to issue a final decision in any grievance submitted by a military judge to the Canadian Forces.**

Immunity

Military judges currently have the same immunity that is afforded any member of the Canadian armed forces – this immunity is found in section 270 of the *NDA*.[31] I submit that military judges should be granted judicial immunity equal to that of their civilian peers. Amending the *NDA* to include a statutory reflection of the common law would improve the operation of the *NDA* by increasing the independence afforded to military judges, and eliminating uncertainty as to the applicability of the common law doctrine of judicial immunity to military judges. The rationale behind the common law doctrine of judicial immunity as it pertains to judicial independence was summarized by Lord Denning in the oft-cited decision of *Sirros* v. *Moore*:[32]

> Every judge of the courts of this land – from the highest to the lowest – should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank.

Given the jurisdiction granted to military judges to deal with the most serious of cases and the requirement to apply the laws of Canada in foreign jurisdictions, I respectfully submit that the protection from civil liability afforded to military judges should be enshrined in the *NDA*.

> **(12) I recommend that the *National Defence Act* be amended to grant military judges statutory immunity from civil liability when acting in their capacity of military judge.**

Status of Tribunal

As the Supreme Court of Canada noted in *Généreux,* the independence of a tribunal is a matter of its status:

> The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government but also by any other

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[31] No action or other proceeding lies against any officer or non-commissioned member in respect of anything done or omitted by the officer or non-commissioned member in the execution of his duty under the *Code of Service Discipline*, unless the officer or non-commissioned member acted, or omitted to act, maliciously and without reasonable and probable cause (s. 270 of the *NDA*).

[32] *Sirros v. Moore* (1974), [1975] 1 Q.B. 118 (C.A.) (U.K.) at 136 and as adopted by the Supreme Court of Canada in *Morier et al. v. Rivard*, [1985] 2 S.C.R. 716 at 739.

> external force, such as business or corporate interests or other pressure groups.[33]

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.

Another example of the lack of independent tribunal status is found in the *Court Martial Rules of Practice*,[34] as published by the Office of the Chief Military Judge. The Rules are a voluntary agreement between the Office of the Chief Military Judge, the Canadian Military Prosecution Service and the Office of the DDCS. This practice leaves military judges in the uncomfortable position of having to negotiate their own *Rules* with the consent of those appearing before the bench. It must also be remembered that the Judge Advocate General has the authority to issue general guidelines to the DMPS and the DDCS thereby creating a reasonable apprehension of bias and interfering with one of the primary goals of Bill C-25, which was to set clear standards of institutional separation for the investigative and prosecutorial defence and judicial functions.[35]

The most efficient way of dealing with the myriad of difficulties faced by military judges as they try to contort the current system of ad hoc courts martial into an independent judicial institution would be to create a permanent "Military Court" of Canada pursuant to the authority granted to Parliament under s. 101 of the *Constitution Act, 1867*.[36] Creating a permanent Military Court would also be in keeping with section 179 of the *NDA*, which states that a court martial has the same powers, rights and privileges as are vested in a superior court of criminal

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[33] *Généreux* at 283-84.
[34] Online: Chief Military Judge <http://www.dnd.ca/cmj/docs_e.asp.>.
[35] *Edited Hansard (Official Version)*, 077 (19 March 1998) at 1320.
[36] Section 101 of the Constitution states: "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

jurisdiction with respect to all matters necessary or proper for the due exercise of its jurisdiction.

I have considered the question of whether or not the Parliament of Canada is able to validly create a permanent court that would overlap with the provincial criminal jurisdiction, given subsections 91(27) and 92(14) of the *Constitution Act, 1867*.[37] It is my respectful belief, and that held by other esteemed jurists and academics alike, that section 101 of the *Constitution Act, 1867* grants to Parliament the authority to create a court supplementary to provincial superior courts notwithstanding the jurisdiction of provinces over the creation of criminal law courts.[38] I would refer you also to the reasoned opinion I obtained from Dr. Alain-Robert Nadeau, Attorney and Doctor of Constitutional Law as found at Annex G in which my reasoning is confirmed. Dr. Nadeau states:

> Thus, like the Court Martial Appeal Court, the creation of a trial court martial, the jurisdiction of which would be confined to matters under the jurisdiction of Parliament for the purpose of deciding matters arising out of an offence committed under the National Defence Act and Canadian penal laws, would comply with these principles. In our opinion, the constitutionality of such court could not be questioned.

The Court Martial Appeal Court was created by Parliament in 1959 and is a superior court of record identical in function and status to the provincial superior courts having final appellate jurisdiction in criminal matters.[39] It is my belief, in agreement with that expressed above, that the creation of the Court Martial Appeal Court is further evidence that the Parliament of Canada would be validly working within the parameters established by the *Constitution Act*, *1867* should it choose to

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[37] Subsection 91(27) of the *Constitution Act* states: "91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, […] 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." When read in conjunction with subsection 92(14) of the *Constitution Act, 1867*: "92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, […] 14. The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

[38] See, for example, *Mackay v. R.*, [1980] 2 S.C.R. 370 and *R. v. Reddick*, [1996] C.M.A.J. No. 9. See also B. Laskin, *Canadian Constitutional Law*, 3rd ed., (Toronto: Carsewell, 1966) at 818.

[39] Strayer, B., General Memorandum issued by the Chief Justice's Chambers, Court Martial Appeal Court of Canada in January 1996.

create a permanent Military Court and thereby at once increasing the independence of the judiciary, and solving a multitude of difficulties currently plaguing the Office of the Chief Military Judge.

> **(13) I recommend that the *National Defence Act* be amended to establish a permanent military court of record pursuant to the authority given the Parliament of Canada under section 101 of the Constitution Act, 1867.**

The many questions that must be answered in order to properly establish a permanent Military Court is a significant undertaking, and one that my time-limited mandate could not fully accomplish. By way of example, it must be determined whether the permanent Military Court would be granted the powers of a superior court, in which case there would be questions as to the availability of prerogative writs, what consequential amendments must be made to other legislation, in addition to a full understanding of the impact a permanent Military Court would have on the military justice system. For this reason, I most gratefully endorse the recommendation made in the Second JAG Report that a working group be established to fully consider the issues surrounding the creation of a permanent Military Court, in consultation, of course with the military judges and the Court Martial Appeal Court.

The working group should have as its goal the creation of a permanent Military Court, and be given the task of identifying the most effective framework for the better administration of the laws of Canada. The deadline for the completion of this task must balance the urgency of this matter with the importance of the matter at hand. Ideally, the group would include an independent authority in addition to representatives from the Department of Justice, the Office of the Chief Military Judge, the Office of the JAG, the DMP and the DDCS.

> **(14) I recommend that a working group be established and tasked with identifying the most effective framework for the creation of a permanent Military Court of record and that a schedule for the implementation of the Court be designed accordingly.**

The creation of a permanent Military Court will likely take some time. In the meantime, interim measures should be adopted to allow the military judges to function as much like a permanent court as possible. A non-exhaustive list of required improvements includes amendments to the *QR&O* to allow a military judge to be sworn in only once, and thereby obviate with the swearing-in before each pre-trial and hearing. Accountability for the finances of the Office of the Chief Military Judge should be clarified, and it must be determined whether accountability lies with the Chief Military Judge or the Court Martial Administrator.

Procedures should be put in place to allow for preliminary proceedings after a charge is conferred and before a court martial is convened. As will also be noted below, written judgments should be filed on a form/certificate and stored in an accessible format. Some additional changes will also be discussed under the section dealing with the Court Martial Administrator.

> **(15) I recommend that interim measures be adopted that will allow military judges to function within a system that is administered as much like a permanent court as possible until the establishment of said permanent military court can be accomplished.**

There are additional ancillary benefits to the creation of a permanent military court of which I will make brief mention. Military judges will be granted official access to the Judicial Ethics Committee, the Canadian Judicial Council and courses offered by the National Judicial Institute whereas now their status as judges is not officially recognized. Nor are military judges currently considered to be lawyers by their respective provincial bar associations. Military judges are as much in need as other judges of the initial and permanent education offered by bodies such as the Canadian Judicial Council, the Canadian Institute for the Administration of Justice and others. Increasing judicial access to continuing education and training is a critical aspect of military justice that should not be overlooked, and is of benefit to all Canadians.

(d) Other Matters

There are some additional recommendations that I would like to make concerning the role and obligations of military judges. While I expect that many of these changes will fall into place as a result of the creation of a permanent military court, I wanted to ensure that the following changes in particular are specified.

I observed through my research that the findings, sentences and orders of military judges are not currently reduced to writing in the form of a judgment similar to those found in civil or criminal law reports. Instead, one must read through the entire transcript of a court martial which often totals hundreds of pages. I would imagine that, by virtue of the creation of a permanent court, the military judges would perforce reduce any judgments/findings/sentences to writing in the form of a typical civilian judgment or order. I must emphasize that this information is of the utmost import to those researching military case law. Nonetheless, I therefore take this opportunity to recommend that such a process be put in place as quickly as possible, thereby allowing members, the prosecution and the defence alike access to court martial decisions.

(16) I recommend that military judges be required to reduce their findings, sentences, and any orders made to writing on a form or certificate as soon as practicable after that finding, sentence or order is made or awarded.

Section 165.23(3) of the *NDA* was implemented by Bill C-25 to allow military judges, with the approval of the Chief Military Judge, to be appointed as a board of inquiry. I must caution the Chief Military Judge and the military judges to use this new authority with great caution. Judges must carefully consider the terms of reference, and the effects on judicial independence before agreeing to serve on a board of inquiry.

(17) I recommend that military judges approach service on a board of inquiry with caution, and adopt the position of the Canadian Judicial Council on the Appointment of Federally Appointed Judges to Commissions of Inquiry (March 1998).[40]

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[40] Position of the Canadian Judicial Council on the Appointment of Federally-Appointed Judges to Commissions of Inquiry:

1. Every request that a judge perform a task referred to in section 56 of the *Judges Act* should in the first instance be made to the chief justice, chief judge, senior judge or other judge having administrative responsibility for the court (hereinafter referred to as the "chief justice") to which the judge belongs.
2. Such request should be accompanied by a reference to the authority for such an appointment.
3. The request should be accompanied by the proposed terms of reference for the inquiry and an indication as to the time limit, if any, to be imposed on the work of the commission. It is expected that a government, in estimating a time limit, will not overlook the period necessary for organization of the work of the commission including arrangements for premises, staff, identification of those with standing, etc., all of which are required before the hearings or other business of the commission can begin.
4. A sufficient time should be allowed for the chief justice to discuss fully the request with the judge whose services are requested.
5. The chief justice, in consultation with the judge in question, should consider whether the absence of the judge for these purposes would significantly impair the work of the court. In this respect they should consider, in respect of the duration of the proposed commission of inquiry:
   a) If no reporting date is fixed for the inquiry, is the probable duration unreasonable having regard to the needs of the court?
   b) If a reporting date is proposed, is the date reasonable in relation to the terms of reference? An assessment should be made to the best of the ability of the chief justice and the judge as to whether such period is realistic. If it is not realistic the proposed appointment should not be accepted.

   If the appointment is accepted and a prolonged absence of the appointed judge is contemplated, the chief justice may consider requesting the creation of an addition position for the court.
6. Apart from the consideration referred to in 5, the chief justice and judge will wish to consider whether the acceptance of the appointment to the commission of inquiry could impair the future work of the judge as a member of the court. In this respect they may consider:
   a) Does the subject-matter of the inquiry either essentially require advice on public policy or involve issues of an essentially partisan nature?
   b) Does it essentially involve an investigation into the conduct of agencies of the appointing

I have a further comment to make. While my mandate is limited to consideration of the provisions and operation of Bill C-25, I would be remiss if I did not acknowledge Bill C-42: *The Public Safety Act* that is currently being debated. This Bill would amend the *NDA* to provide for a Reserve Military Judges Panel. It is my belief that once a permanent Military Court is established, the military judges will be afforded the safeguards required to perform what are essentially part-time judicial duties. Consideration should be given to the Supreme Court of Canada decision in *Lippé* when determining the framework for the reserve military judges.[41]

2. Court Martial Administrator

Prior to Bill C-25, courts martial could have been convened by the Minister, the CDS, an officer commanding a command upon receipt of an application from a commanding officer or another service authority appointed by the Minister. The convening authority was also responsible for determining the type of court and, with the concurrence of the JAG, the appointment of the prosecutor. This overlap of roles was found to undermine the institutional independence of General Courts Martial (and by inference, Disciplinary Courts Martial). In *Généreux*, the Supreme Court of Canada explained that it was not acceptable that the convening authority (i.e., the executive responsible for appointing the prosecutor) also have the authority to appoint members of the court martial, who serve as the triers of fact. The Court also pointed out that the appointment of the judge advocate by the JAG undermined the institutional independence of the General Court Martial and that in order to comply with the *Charter*, the appointment of a military judge to sit as judge advocate at a particular court martial should be in the hands of an independent and impartial judicial officer.

In order to assist with the requirement of institutional independence, Bill C-25 created the position of a Court Martial Administrator responsible for convening courts martial, appointing members of General Courts Martial and Disciplinary

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government?

c) Is the inquiry essentially an investigation of whether particular individuals have committed counsel and staff?
d) Who is to select commission counsel and staff?
e) Is the proposed judge through particular knowledge or experience specially required for this inquiry? Or would a retired judge or a supernumerary judge be as suitable?
f) If the inquiry requires a legally-trained commissioner, should the court feel obliged to provide a judge or could a senior lawyer perform this function equally well?

Endnote: *In the absence of extraordinary circumstances, it is the position of the Canadian Judicial Council that no federally-appointed judge should accept appointments as referred to in section 56 of the Judges Act until the chief justice and the judge in question have had sufficient opportunity to consider all these matters and are satisfied that such acceptance will not significantly impair either the work of the court or the future judicial work of the judge.*

[41] See also the *Report on the Compensation of Military Judges* (August 2000), which discussed the possibility of reserve military judges and made a suggestion with regard to the appropriate compensation scheme.

Courts Martial panels and performing other administrative functions associated with the convening of courts martial. Currently, the Court Martial Administrator is housed in the Office of the Chief Military Judge in facilities independent of the Office of the JAG, the DMP and the DDCS.[42]

While the legislation has left the role of the Court Martial Administrator somewhat ambiguous, this worked well at the outset by allowing the parties greater flexibility in designing and implementing administrative systems that work to the benefit of all parties involved in the court martial process. However, greater legislative clarification would assist in clearing up some outstanding issues and in ensuring the successful measures crafted to date are enshrined in the *NDA*.

An additional benefit of creating a permanent Court Martial Court would be the resolution of several administrative problems that exist under the current system. For example, there is currently some ambiguity as to when a charge is preferred which affects the timing of a court martial. The debate surrounds whether a charge is preferred the date it is signed by the DMP, the date it is placed in the mail, or the date it is received in the Court Martial Administrator's office. This flows into a related issue, which is that the convening order must state the date charges were preferred. These issues would be resolved through the court registry function required of a court of record.

> **(18) I recommend that, once a permanent Military Court of record is established, the Court Martial Administrator be required to develop and maintain a court registry system, which would include all court files in respect of proceedings (stamped with the date and time of filing in the order of filing), as well as a Book of Charges and a Book of Judgments.**

The role of the Court Martial Administrator will also achieve *de facto* greater clarification through the creation of a permanent Court Martial Court. Inspiration in this regard should be taken from the administration of the civilian courts. The framework of duties and responsibilities to be undertaken by the Court Martial Administrator should be defined in the *NDA*.

> **(19) I recommend that the role of the Court Martial Administrator be defined in the *National Defence Act* to include such non-judicial work as may be delegated by the Chief Military Judge in accordance with any instructions given by them, including the making of an**

[42] While this section will deal with most of the changes I suggest to the role of the Court Martial Administrator, please see also the chapter of my Report dealing with Courts Martial.

> **order fixing the time and place of a trial or hearing, compelling the attendance of an accused or adjourning a trial or hearing in addition to arranging for the distribution of judicial business.**

While clarification of the role of the Court Martial Administrator to include specific authority for compelling the attendance of an accused at trial will assist with the operation of the military justice system, this power must also reflect the unique situation faced by military tribunals when prosecuting an accused who has, either by choice or by order, left the Canadian Forces. The legislation must be amended to deal with the recurring situation of an accused who is charged with a service offence pursuant to the *NDA* and then fails to appear at trial. In the civilian criminal justice system, provision is made to deal with an absconding accused. I respectfully submit that a similar provision be included in the *NDA*.

> **(20) I recommend that the *National Defence Act* be amended to mirror the provision in the *Criminal Code* allowing a court martial continued jurisdiction to try an accused who absconds during the course of his/her trial.**

Another area of ambiguity that will be resolved by the creation of a permanent court is the question of accountability to the executive for funding received. Currently the Court Martial Administrator has delegated financial spending authority, and must negotiate resources from the executive and approve most expenditures (with the exception of his own expenses and the expenses that judges incur for training). However, accountability for funds expended remains unclear. This ambiguity will be resolved through the creation of a permanent court and the Treasury Board designation of the Court Martial Administrator as deputy head under the *Financial Administration Act*.

> **(21) I recommend that the Court Martial Administrator be made deputy head of department pursuant to section 12 of the *Financial Administration Act*.**

The Court Martial Administrator is responsible for the service of documents on an accused. As such, the Regulations should provide guidance as to the service of documents on individuals suffering from a mental disorder.

> **(22) I recommend that the *Queen's Regulations and Orders* be amended to require service of documents by the Court Martial Administrator on legal counsel for an accused suffering from, or suspected to be suffering from, a mental disorder.**

V – COURT MARTIAL AND COURT MARTIAL APPEAL COURT

Several substantive changes were made to the courts martial process as a result of the Supreme Court of Canada's recommendations in *Généreux* and the amendments put into place by Bill C-25. For example, the authority that convened courts martial could formerly have been the Minister, the CDS, an officer commanding a command upon receipt of an application from a commanding officer or another service authority appointed by the Minister. Bill C-25 created the position of the Court Martial Administrator in order to take over the responsibility for convening a court martial, and to assist in the institutional separation of the system's prosecutorial, defence and judicial functions.[43] Members of General and Disciplinary Courts Martial were formerly limited to officers. Bill C-25 allows for the first time that if an accused person is a non-commissioned member, a General and a Disciplinary Courts Martial panel must include two non-commissioned members who are of the rank of warrant officer or above in order to more accurately reflect the spectrum of individuals responsible for the maintenance of discipline and morale in the military justice system. Under the system in place prior to Bill C-25, the panel determined both the finding and sentence to be imposed based on the vote of a majority of the members whereas the power to determine and impose the sentences now resides with the military judge.

1. Determining the Type of Court Martial

Bill C-25 states that the DMP is required to determine the type of court martial that should be convened. There are four types of court martial which differ based on their jurisdiction over an accused due to rank, differing powers of punishment and the composition of the court. This jurisdiction of each type of court martial necessarily limits the options available to the DMP in making his determination. For ease of reference, please find following a brief overview of the types of courts martial that currently exist in Canada. The types of court martial are as follows:

(i) **General Courts Martial** - may try *any person* who is liable to be charged, dealt with and tried on a charge of having committed a service offence. A General Court Martial is composed of a *military judge and a panel of five members*, and has the power to order a maximum punishment of imprisonment for life.

(ii) **Disciplinary Courts Martial** – may try *any officer of or below the rank of major or any non-commissioned member* who is liable to be

[43] Please see the chapter of my report that discusses the Court Martial Administrator for greater detail.

charged, dealt with and tried on a charge of having committed a service offence. A Disciplinary Court Martial is composed of a *military judge and a panel of three members* and may not pass a sentence that includes a punishment higher in the scale of punishments than dismissal with disgrace from Her Majesty's service.

(iii) **Standing Courts Martial** – may try *any officer or non-commissioned member* who is liable to be charged, dealt with and tried on a charge of having committed a service offence. A Standing Court Martial is composed of a *military judge alone*, and may not pass a sentence that includes a punishment higher in the scale of punishments than dismissal with disgrace from Her Majesty's Service.

(iv) **Special General Courts Martial** – may try *any person, other than an officer or non-commissioned member,* who is liable to be charged, dealt with and tried on a charge of having committed a service offence. A Special General Court Martial is composed of a *military judge*, and may only pass a sentence that includes a punishment of imprisonment or a fine.

When one scrutinizes the above-noted types of court martial, it becomes apparent that two individuals charged with the same offence have different rights under the current regime based on their respective ranks and the discretion of the DMP. For example, a higher-ranking officer such as a lieutenant-colonel charged with an offence that may be punished by a sentence including or lesser than dismissal from disgrace from Her Majesty's Service pursuant to the scale of punishments listed in the *Code of Service Discipline* is entitled to be tried by a military judge alone or a military judge and a panel of five members.[44] A non-commissioned

[44] Section 139 of the *NDA* sets out the scale of punishments as follows:
(1) The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:
(a) imprisonment for life;
(b) imprisonment for two years or more;
(c) dismissal with disgrace from Her Majesty's service;
(d) imprisonment for less than two years;
(e) dismissal from Her Majesty's service;
(d) detention;
(g) reduction in rank;
(h) forfeiture of seniority;
(i) severe reprimand;
(j) reprimand;
(k) fine; and
(l) minor punishments.
(2) Where a punishment for an offence is specified by the *Code of Service Discipline* and it is further provided in

member charged with the same offence is entitled to be tried either by military judge alone or military judge and a panel of three members. It is up to the DMP to determine the appropriate type of court martial. The fact that the majority of people charged and tried under the *Code of Service Discipline* are members of the junior ranks must be kept in mind when one considers how the current regime is operating.

To look at the rank of an accused as one of the factors governing the type of court martial to be convened is contrary to the modern-day spirit of equality before the law. There must be a military justification important enough to justify this different treatment. I have not been given any such justification. Any historical rationale for this difference must now be considered in light of the spirit of equality under the *Charter*, and the important changes made by Bill C-25 to the function of the panel at courts martial. Prior to Bill C-25 the panel determined both the finding and sentence to be imposed based on the vote of a majority of the members. The Canadian military now has professional judges to determine and impose sentence. As such, the role of the panel has been altered to one of trier of fact. The protection afforded to an accused through the deliberation of members of a court martial panel is of the utmost import, and any reduction in number of panel members necessarily reduces the scope for deliberation by the triers of fact. It is my respectful opinion that the protection afforded an accused under the *Code of Service Discipline* must be equal regardless of rank.[45]

The Canadian Forces would be best served by reorganizing military tribunals based on their jurisdiction to try and punish different offences, without regard to the rank of the accused. For example, a system could be put in place in which one type of court martial with limited powers of punishment could try less serious (and more frequent and therefore administratively burdensome) charges by military judge alone, and another type of court martial would have expanded powers of punishment and try more serious offences by military judge and panel. Jurisdiction to try civilians subject to the *Code of Service Discipline* would also have to be granted to each tribunal subject to limited powers of punishment.

The CBA Submission suggested that the disciplinary needs of the Canadian Forces would be met by retaining the Standing Court Martial and the General Court

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the alternative that on conviction the offender is liable to less punishment, the expression "less punishment" means any one or more of the punishments lower in the scale of punishments than the specified punishment.

[45] The move toward equality of protection for CF members, regardless of rank, is taking place throughout the military. See, for example, the recent changes to the *Injured Military Members Compensation Act*, which reflects the "moral obligation" that the Department of National Defence has to ensure that all ranks receive similar protection when injured in the line of duty and in service to Canada. It is my respectful belief that this moral obligation to accord all ranks equal protection is equally applicable to an accused charged under the *Code of Service Discipline*.

Martial. It explains that the Standing Court Martial would keep limited powers of punishment but would assume jurisdiction over civilians. For civilians the powers of punishment would be further limited to the non-military punishments in section 139 of the *NDA*. The General Court Martial would be retained to try more serious offences with expanded powers of punishment (subject to the maximum punishment provided for the offence with which the accused is charged). Although the General Court Martial would by default provide the accused with a trial by panel, I would suggest that the accused be allowed the option of trial by military judge alone, subject to approval by the DMP.

This streamlined system would grant equal protection to all ranks of the Canadian Forces, avoid redundancy and confusion, and also offer greater protection to an accused.

> **(23) I recommend that the working group convened to consider the creation of a permanent Military Court also be charged with modernizing the types and jurisdiction of courts martial provided for under the *National Defence Act*. The goal of the working group would be the creation of a two-tiered system whereby the General Court Martial would try serious offences and the Standing Court Martial would try minor offences, with no distinction made on the basis of rank. Necessary further consideration should be given to the offences listed in the *Code of Service Discipline*, and a scheme must be developed that will define what constitutes a serious offence as opposed to a minor offence.**

2. Majority Vote

Of the different types of courts martial held in the year 2000-2001, 98% were Standing Courts Martial and 2% were Disciplinary Courts Martial. In 2001-2002, 96% of courts martial were Standing Courts Martial, while the Disciplinary Courts Martial and General Courts Martial each accounted for 2%. In 2002-2003, Standing Courts Martial accounted for 100% of the trials.

These statistics led me to question why there was such a preponderance of Standing Courts Martial over the years. As noted earlier, when the choice is made between a Standing Court Martial and a Disciplinary or General Court Martial, the DMP is essentially choosing between a trial before a judge alone, or trial before a military judge and a panel (keeping in mind, of course, the limitations on jurisdiction and different powers to order certain punishments). The question then becomes why the DMP has been so adverse to order trial by panel in the past few

years. Some have suggested that the reason relates to a desire for expediency. It is faster and less costly to order a trial before a military judge alone. However, others have suggested that there is another explanation for the reluctance to order trial by panel, and that is section 192(2) of the *NDA*, which states that the decisions of the panel of a General Court Martial or a Disciplinary Court Martial are determined by the vote of a majority of its members. The punishment options available to both the above-noted courts martial are severe and to have such consequences based, for example, on a 3:2 split in the panel of a General Court Martial may indeed give the DMP cause to prefer the convening of a Standing Court Martial.

The historical rationale for the determination of verdict by majority vote is expediency. For example, the military may be conducting a court martial during times of war, civil strife or other hostilities where the on-going deliberations of a "hung" panel would not be feasible. However, there are serious problems associated with the majority verdict. The greatest problem lies with the diminished role of fact-finding during the deliberations of the panel. If a majority verdict is acceptable, the process of fact-finding may be reduced as the minority could be, in essence, ignored in deliberations. See, for example, Working Paper 27 published by the Law Commission of Canada entitled *The Jury In Criminal Trials*:

> Empirical research relating to the jury's deliberative process suggests: first, that minority views are more likely to be expressed and considered under the unanimity rule; and second, that the quality of discussion is superior. From these findings, the greater likelihood of an accurate decision under the unanimity rule can be inferred.[46]

The reduction in deliberation as it applies to a finding of guilt based on majority vote can therefore be seen to reduce the perceived accuracy of the verdict both in the eyes of the public and the accused. Once again, we should strive to offer a better system than merely that which cannot be constitutionally denied.

Indeed, efficiency must be balanced with the safety of the verdict and fairness to the accused. In the case of a verdict based on a majority vote, the safety of the verdict and fairness to the accused must take precedence. In the case of a panel that cannot reach a unanimous verdict, the *NDA* must grant the Court Martial Administrator the authority to convene a fresh panel upon direction of a military judge who is satisfied that the jury is unable to agree on its verdict.

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[46] Law Reform Commission of Canada, *Working Paper 27: The Jury in Criminal Trials*, (Ottawa: Minister of Supply and Services Canada, 1980) at 29.

(24) I recommend that the *National Defence Act* be amended to provide that a finding of guilty or not guilty by a court martial panel must be arrived at by unanimous vote. In the case of a panel that cannot reach a unanimous verdict, the *National Defence Act* must grant the Court Martial Administrator the authority to convene a fresh panel upon the direction of a military judge who is satisfied that the panel is unable to agree on its verdict.

3. Option for Trial By Panel for Serious Offences

As the Supreme Court of Canada stated in *Généreux*, section 11(f) of the *Charter* recognizes the existence of a system of military tribunals with jurisdiction over cases governed by military law.[47] Section 11(f) of the *Charter* specifically states that those subject to trial by courts martial are denied the right to a trial by jury and although the *NDA* could well grant that right if Parliament so chose, there are important military requirements that justify it not doing so. However, it must be remembered that a military panel convened to fact-find at a courts martial is not the equivalent of a civilian jury. As pointed out in *R.* v. *Lunn*,[48] while there are some similarities shared by a military panel and a civilian jury in that they are both the triers of fact, there are also many differences. A civilian jury is composed of 12 individuals that are chosen from a roster and subject to challenge by either the prosecution or defence. In the case of a military panel, the panel is composed of either three or five members and there is no right to challenge. Rather the Court Martial Administrator obtains a computer-generated list of all those who would qualify to sit on a panel and it is the Court Martial Administrator who excludes people based on either mandatory or discretionary exclusions. A civilian jury is intended to be representative of peers of the accused. In the case of a panel, the composition of the panel is dictated by the legislation (albeit with some flexibility). While I do not intend to catalogue an exhaustive list of differences between military panels and civilian juries, suffice it to say that a military panel is quite plainly not the equivalent of a civilian jury.

As explained earlier, one of the roles of the DMP is to determine the type of court martial that shall be convened. This determination is currently tantamount to a decision of whether a court martial shall be before a military judge alone, or a military judge and a panel except in those cases that must be tried by General Courts Martial due to the greater scope for punishment. As can be seen by the following statistics, the vast majority of cases are heard by military judge alone.

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[47] *Généreux* at 296.
[48] (1993), 19 C.R.R. (2d) 291 (C.M.A.C.).

Reporting Period	GCM Judge & Panel	DCM Judge & Panel	SCM Judge alone	SGCM Judge alone	Total CM
01 Sept 99 – 31 Mar 00	0	0	27	0	27
01 Apr 00 – 31 Mar 01	0	1	62	0	63
1 Apr 01 – 31 Mar 02	0	1	62	0	63
1 Apr 02 – 31 Mar 03	1	1	65	0	67
TOTAL	**1**	**3**	**216**	**0**	**220**

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.

It is my belief that an accused charged with a serious offence should be granted the option to choose between trial by military judge alone or military judge and panel prior to the convening of a court martial. The accused would be able to consult counsel with defence counsel for assistance in making this decision, and would then inform the Court Martial Administrator of his or her choice immediately, at which time the Court Martial Administrator will convene the appropriate service tribunal.

> **(25) I recommend that the *National Defence Act* be amended to give an accused facing trial by court martial the option of electing for a trial by military judge alone, or military judge and panel, subject to the right of the Judge Advocate General to require that the accused be tried by judge and panel in cases that would meet the conditions under section 568 of the *Criminal Code*.**

4. Appeal Committee

The *NDA* sets out when a person who is subject to the *Code of Service Discipline* has the right to appeal from a court martial to the Court Martial Appeal

Court or further to the Supreme Court of Canada. Prior to the enactment of Bill C-25, an appellant was not automatically provided the services of a military lawyer as counsel for the appeal unless the appeal was initiated by the prosecution. In order for a defendant to have pursued an appeal, the appellant would either have had to retain civilian counsel at his or her own expense, obtain funding through a provincial legal aid program, or pursue an application for the provision of appeal counsel under Rule 20 of the previous *Court Martial Appeal Court Rules*.[49]

Bill C-25 stipulates that when a person is liable to be charged, dealt with and tried under the *Code of Service Discipline*, reference shall be had to the Regulations, which set out the circumstances and manner in which representation by legal counsel will be granted.[50] An individual interested in appealing a decision from a court martial to the Court Martial Appeal Court or from the Court Martial Appeal Court to the Supreme Court of Canada must therefore turn to the *QR&O* to determine the process by which applications for representation will be granted.[51]

The *QR&O* state that once a person has delivered a Notice of Appeal under section 230 or section 245 of the *NDA*, that person may apply to the Appeal Committee for the provision of legal counsel by the DDCS for the appeal. The Appeal Committee considers applications for funded legal counsel in cases where individuals have been tried and ultimately convicted before a court martial. The application should be accompanied by a legal opinion provided by legal counsel who represented the accused at the court martial or the Court Martial Appeal Court indicating whether or not the appeal is considered to have professional merit. The DDCS may also make a recommendation to the Appeal Committee in respect of the disposal of any application.

Currently, the *QR&O* dictate that the military Appeal Committee is composed of a person appointed by the Judge Advocate General and a person

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[49]Rules of Appeal Practices and Procedures of the Court Martial Appeal Court of Canada, P.C. 1986-2080, 11 September 1986. Rule 20 is as follows:

> (1) A party who is not represented by counsel of record may apply to the Chief Justice for approval of the appointment by the Minister of Justice of counsel to represent him.
>
> (2) An application under subsection (1) shall be supported by the party's affidavit deposing to:
>
> (a) the pay, income, salary and allowances he was receiving
>
> (i) prior to his conviction, and
>
> (ii) at the date of the application;
>
> (b) his means other than those set out pursuant to paragraph (a);
>
> (c) his current and probable future assets and liabilities;
>
> (d) his marital status and number of dependants, if any; and
>
> (e) any further facts upon which the appellant relies as justification for such approval.
>
> (3) the Judge Advocate General shall file in the Registry a written reply to the appellant's application referred to in subsection (2), setting out his reason for opposing the application or stating that he has no objection to the granting of the application as the case may be.

[50] See section 249.17 of the NDA.

[51] See *QR&O* article 101.21.

appointed by the Chief of the Defence Staff. There is no requirement for the appointment of legally trained individuals, although the two persons currently serving on the Appeal Committee are both lawyers with over 20 years military service. The *QR&O* stipulate that when both members of the Committee agree that the appeal has professional merit, the Committee shall approve the provision of legal counsel by the DDCS.

The creation of the Appeal Committee was a great step forward. However, the CBA Submission was concerned with the current composition of the Appeal Committee, the lack of clear guidelines as to what determines professional merit, and a procedure that effectively grants a veto to either member of the Committee.

Appeal Committee & Unanimity Requirement

The current process for appointing the Appeal Committee is problematic. As noted earlier, there is one person appointed by the JAG and one person appointed by the CDS. It is argued in the CBA Submission that the Appeal Committee members are in a conflict of interest by virtue of their relationship (whether it be former or current) to the Office of the JAG, which provides legal advice to the Canadian Forces and therefore charged and prosecuted the applicant for representation on appeal. This obviously leaves an applicant who has been refused representation with the perception of bias, as the objective assessment of an appeal may be seen to be tainted by association with the Office of the JAG.[52] I respectfully submit that applicants would be better served by an Appeal Committee totalling three members, which offers the added advantages of deliberation and peer review.

> **(26) I recommend that the *Queen's Regulations and Orders* be amended to provide that the Appeal Committee responsible for determining whether or not to provide legal counsel for a person seeking representation by the Director of Defence Counsel Services for an appeal of a court martial to the Court Martial Appeal Court consist of: (i) as Chair, the Director of Defence Counsel Services or, in cases where the Director of Defence Counsel Services has represented the person applying for representation at trial, a person nominated by the Director of Defence Counsel Services; (ii) a retired civilian judge; and (iii) a**

[52] A suggestion put forth in the Third JAG Submission recommended that the Appeal Committee be composed of a single person, that person being a retired military or civilian judge. While this suggestion has merit, there is the possibility that an applicant might be left with the perception that his/her case was not granted funding because of a reluctance (however unlikely) by one judge to grant review of a colleague's decision. As a result, I respectfully submit the Appeal Committee be composed of three members.

representative from the Office of the Judge Advocate General.

The current requirement that both members of the Appeal Committee must agree that an appeal has "professional merit" effectively grants each member a veto and thus has the effect of requiring unanimity. This set up becomes even more troublesome when consideration is given to the composition of the Appeal Committee as discussed above. I therefore recommend that the Appeal Committee total three in number and that the decision be made based on majority vote.

(27) I recommend that the *Queen's Regulations and Orders* be amended to provide for the determination of the "professional merit" of an appeal based on majority vote.

Professional Merit

Another perceived problem is the requirement that an appeal have "professional merit" and the lack of additional guidance as to what may satisfy this criterion. As stated in the Third JAG Report:

> It is widely accepted that publicly funded resources should not be expended in cases in which an objective review of the merits of the prospective appeal suggests that there is little merit in the appeal.

During the fiscal year 2002-2003, the Appeal Committee assessed twelve applications from appellants, and found that there was professional merit in four of the twelve cases. The cases in which the Committee declined to approve the provision of counsel included a case in which the appellant had been sentenced to imprisonment (suspended).

The scheme of applying for funded legal counsel in appeals is not new, and represents a balancing between the expenditure of taxpayer's money and the rights of the individual appealing a decision. A procedure must therefore be crafted that considers whether the expenditure of funds is sensible in order to avoid wasting money based on frivolous or unmeritous appeals. For example, at Legal Aid Ontario an Area Committee reviews the opinion of legal counsel that provided services in the decision being appealed as well as the reasons for judgement and determines based on majority vote whether the appeal has "merit". Merit is usually considered to be a reasonable chance of success. Decisions as to whether or not to fund an appeal are then based on majority vote.

In the 2001-2002 JAG Annual Report, it is stated that the professional merit standard requires not only a reasonable chance of success on the particular legal

issues raised, but also a reasonable likelihood that should the court allow the appeal, the decision will alter the court martial finding or sentence.[53] However, this definition is not found in legislation, regulations or any other document produced by the Appeal Committee and/or agreed upon by the authorities responsible for the appointment of its members (as explained in the Third JAG Report). Indeed, certain individuals believe that the test should be limited to one of a reasonable chance of success despite the direction provided by the Office of the JAG. A clearer understanding of the requirement for professional merit would therefore assist: (i) the appellant in understanding the standard that must be met when attempting to prove that their appeal has professional merit; (ii) the Committee in making consistent decisions; (iii) trial counsel in writing opinion memos; and (iv) the Office of the JAG with the prudent expenditure of funds.

> **(28) I recommend that the *Queen's Regulations and Orders* be amended to set out the factors that will determine the standard of "professional merit", including as a factor, the reasonable chance of success of the appeal.**

Additional Recommendations

Currently, the *NDA* includes only a broad provision stating that a person who is liable to be charged, dealt with and tried under the *Code of Service Discipline* has the right to be represented in the circumstances and in the manner prescribed in regulations made by the Governor in Council.[54] There is no explicit reference to the Appeal Committee. In the interests of transparency and to better inform those who might seek representation on appeal, it would be helpful to refer to the Appeal Committee in the text of the *NDA* itself.

> **(29) I recommend that the *National Defence Act* be amended to include reference to the Appeal Committee responsible for determining whether or not to provide legal counsel for a person seeking representation by the Director of Defence Counsel Services for an appeal of a court martial to the Court Martial Appeal Court (currently set out in the *Queen's Regulations and Orders).***

Currently, the Appeal Committee provides no reasons for decisions made and reports only whether an application for representation is approved or denied.

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[53] *Annual Report of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice in the Canadian Forces(*1 April 2001-31 March 2002) at 78.
[54] See section 249.17 of the *NDA*.

Further, an applicant has no avenue for redress should their application be denied. This situation gives me cause for concern.[55]

> **(30) I recommend that the *Queen's Regulations and Orders* be amended to require the Appeal Committee to provide a summary of the reasons for its decision, should it decline to approve provision of counsel by the Director of Defence Counsel Services in cases where the appellant has been sentenced to a custodial sentence at trial, and to allow the Appeal Committee or its members to issue reasons in other circumstances.**

5. Court Martial Appeal Court

Clause 60 of Bill C-25 amends sections 215 and 216 of the *NDA*, which set out the authority to suspend the carrying into effect of a sentence of imprisonment or detention imposed by a service tribunal. Under section 215, the service tribunal that imposes a sentence of imprisonment or detention (i.e. an officer presiding at a summary trial or a military judge presiding at a court martial) and designated may suspend the carrying into effect of the sentence. The military rationale for the suspension provisions is to provide the flexibility required to accommodate potential imperatives of military necessity. If a CF member is sentenced to a custodial sentence of either imprisonment or detention, but is required to participate in an imminent deployment with his/her unit, and the military needs are judged to be greater than the societal and disciplinary interest in having the member serve the custodial sentence at the time, then the suspending authority has the ability to direct that the sentence be suspended to be served at a later date.[56]

The Court Martial Appeal Court, while not currently included in the suspending authority provision of section 215, may consider an appeal with respect to the severity of sentence, and may substitute for the sentence imposed by the court martial a sentence that is warranted in law. There is a strong argument to be made that, in the appropriate circumstances, suspending the carrying into effect of a custodial sentence is, *de facto*, the substitution of a sentence warranted in law. For the sake of clarity, this power should be articulated in the suspension provisions of the *NDA*.

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[55] *QR&O* Article 101.21(7) specifically precludes a military member from submitting a grievance to review the decision.

[56] Note that the suspension provisions of the *NDA* must not be confused with "suspended sentences" under the *Criminal Code*. The *Criminal Code* provisions allow the Court to suspend the sentence of an accused and direct that the offender be released on conditions prescribed in a probation order. In contrast, the suspension provisions under the *NDA* only allow a service tribunal the power to suspend the carrying into effect of a custodial sentence – the sentence is actually imposed, but then put on hold without any form of probation. Note: see also my recommendation in the military judges section regarding suspension provisions.

(31) I recommend that the *National Defence Act* be amended to provide that the carrying into effect of a sentence of imprisonment or detention may be suspended by the Court Martial Appeal Court.

VI – CODE OF SERVICE DISCIPLINE

The statutory basis for Canada's military justice system is set out in the *Code of Service Discipline* contained within the *NDA* and the related *QR&O*. The *Code of Service Discipline* prescribes service offences, provides for summary trials and courts martial and establishes a process for the review of findings and sentence after trial.

Criticisms of Canada's military justice system, in particular in the Somalia Report in the First and Second Dickson Reports, highlighted deficiencies in the *Code of Service Discipline*. These deficiencies called into question the capacity of the *Code of Service Discipline* to promote discipline, efficiency, high morale and justice in the Canadian Forces.

Bill C-25 aligned the *Code of Service Discipline* more closely with Canadian values and legal standards, in particular in relation to the requirements of the *Charter*. However, it maintained those characteristics of the system necessary to meet the particular disciplinary needs of the military, and maintain a system workable in peace or conflict, in Canada or abroad.

The changes introduced by Bill C-25 made the military justice system more impartial, with the elimination of the power of a commanding officer to summarily dismiss charges under the *Code of Service Discipline* and the prohibition of commanding officers or superior commanders who lay a charge against an accused from presiding at the summary trial. Further, Bill C-25 brought the system more closely in line with the civilian criminal justice system. For example, charges for civilian criminal offences are subject to *Criminal Code* limitation periods; arrest and pre-trial custody provisions are more closely aligned with those under the *Criminal Code*; a scheme of parole ineligibility analogous to that found in the *Criminal Code* was introduced; and excessively harsh punishments were eliminated, including the death penalty.

Other important changes relating to the *Code of Service Discipline* that resulted from Bill C-25 include:

- The right of the accused to elect for trial by court martial was expanded to include all but the most minor of cases;

- In keeping with the purpose of the summary trial to deal with the more minor service offences, the maximum period of detention that may be awarded by a commanding officer at a summary trial was reduced from 90 to 30 days and the power to reduce an accused's rank was limited to one rank;

- Charges to be dealt with by way of summary trial under the *Code of Service Discipline* are now subject to a one-year limitation period; and

- Sexual assault is now part of the list of offences that may be tried by court martial.

The effect of these changes made by Bill C-25 to the *Code of Service Discipline* is laudable. Based on my review, including the many comments that I have received, there seems to be a near unanimous view among the Canadian Forces that these changes have created a much more fair military justice system.

The changes made by Bill C-25 have been complemented by several excellent training tools introduced by the Office of the JAG to further educate members of the Canadian Forces about the military justice system. In particular, the two day certification course for presiding officers is acknowledged as an outstanding course that has increased the fairness of summary trials. The Office of the JAG has also introduced many informative and useful publications, including a Guide for Accused and Assisting Officers, a booklet on the Investigation and Charging Process in the Military Justice System, a comprehensive Summary Trial Level manual, and a pamphlet on the *Code of Service Discipline*.

Notwithstanding the positive effect of the amendments made by Bill C-25, there remains a need to make amendments to the *Code of Service Discipline.* Thankfully, none of my recommendations is the result of serious disciplinary incidents that call into question the legitimacy of the military justice system. Rather my recommendations reflect the ongoing need to balance the norms and values of Canadian society, including the rights of the individual, with the unique needs of the military for discipline, efficiency and portability.

My recommendations to reform the *Code of Service Discipline*, reflect in part the extremely helpful submissions made to me by the JAG Internal Review Team[57] and by the CBA Submission. My recommendations in this section are also drawn from thoughtful comments and suggestions from members of the Canadian Forces that I met with on bases, submissions that I received from interested parties, and fruitful discussions with lawyers in the offices of the DMP and the DDCS, the latter mainly with Ms. McKenna and Ms. Larson.[58]

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[57] The JAG Internal Review Team submitted two reports relating to the *Code of Service Discipline*, one dated May 2003 (the "JAG Report") and one dated July 2003 (the "Second JAG Report"). Many of the matters discussed in these reports are based on issues that I raised in discussions with the Judge Advocate General.

[58] A small number of recommendations relating to the *Code of Service Discipline* may also be found in other chapters.

1. Arrest and Pre-Trial Custody

(a) Arrest without warrant

Sections 155 and 156 of the *NDA* allow for the arrest or detention without a warrant of a person who has committed, is found committing, or is believed on reasonable grounds to be about to commit or to have committed a service offence. The Court Martial Appeal Court in *R. v. Gauthier*[59] and the Federal Court of Appeal in *Delude v .The Queen*[60] both expressed the view that an arrest under section 156 of the *NDA* is unconstitutional on the grounds that it provides for no express limits on the arrest powers and therefore violates the *Charter* right to protection against arbitrary arrest and detention.

In both *Gauthier* and *Delude*, the court held that the requirements governing the exercise of the power of arrest found in Section 495 of the *Criminal Code* are minimum requirements for the valid exercise of the power of arrest. Subsection 495(2) of the *Criminal Code* prohibits a police officer from arresting a person for certain criminal offences if he or she believes on reasonable grounds that the public interest, having regard to all of the circumstances (i.e., the need to establish the identity of the person, secure or preserve evidence of or relating to the offence or prevent the continuation or repetition of the offence or the commission of another offence), may be satisfied without arresting the person and has no reasonable grounds to believe that the person will fail to attend court.[61]

The JAG Report suggests that both sections 155 and 156 of the *NDA* which deal with the authority to arrest without a warrant should be amended to make provision for an assessment of all of the circumstances when considering an arrest without a warrant for all offences that are not "serious offences" as defined in section 2 of the *NDA*.[62] I agree with this position.

> **(32) I recommend that sections 155 and 156 of the *National Defence Act*, in relation to offences that are not "serious offences" as defined in the *National Defence Act*, be amended to mirror section 495(2) of the Criminal Code which makes provision for an**

[59] [1998] C.M.A.J. No. 4, Court File No. CMAC 414 [*Gauthier*].
[60] (2000),192 D.L.R. (4th) 714 (FCA) [*Delude*].
[61] It was held in *R. v. Fosseneuve* (1995), 101 C.C.C. (3d) 61, that section 2(d) of section 495 of the *Criminal Code* is invalid to the extent that it permits an arrest without warrant for the offences mentioned therein, solely on the ground of the "public interest". However, it is valid to the extent that it permits the arrest in a public interest, limited to the needs to establish identity, secure evidence, and prevent the continuation or repetition of the offence or the commission of another offence.
[62] Section 2 of the *NDA* defines a "serious offence" means an offence under the *NDA* or an indictable offence under any other Act of Parliament, for which the maximum punishment is imprisonment for five years or more, or an offence that is prescribed by regulations under subsection 467.1(4) of the *Criminal Code*.

> **assessment of all of the circumstances (i.e., the need to establish the identity of the person, secure or preserve evidence of or relating to the offence or prevent the continuation or repetition of the offence or the commission of another offence) when considering an arrest without a warrant.**

(b) Laying of Charges

The *NDA* does not have a provision requiring that a person subject to the *Code of Service Discipline* who is retained in custody or released on restrictive conditions of bail be charged within a reasonable time.

The case of *R. v. Larocque,*[63] heard by the Court Martial Appeal Court, demonstrates that the failure to press charges as soon as possible after an arrest may raise *Charter* issues. In *Larocque,* the accused was arrested for criminal harassment and released the next day. As a consequence of the arrest of the accused, his accreditation as a police officer was suspended, he was subject to caution and observation measures and some restrictions on his freedom were imposed. Charges of harassment were not laid until over a year later. Justice Létourneau emphasized in his judgement that a person should not be arrested without the prosecution being in a position to charge the person:

> In our system of criminal law…the arrest does not constitute the commencement of the police investigation but rather the outcome of that investigation. It means that the prosecution is reasonably satisfied that an offence was committed, that its perpetrator is identified, that it has sufficient evidence of the facts and that it is necessary to proceed with his arrest. The prosecution is therefore able at that point to lay a charge and must do so with diligence if it decides to use the power of arrest, even if it necessarily means conducting some additional investigation while the proceedings are going ahead.[64]

Justice Létourneau concluded that the lengthy delay in filing charges following the arrest of the accused and his release on restrictive conditions of bail, infringed the section 7 *Charter* rights of the accused to liberty and security of the person.[65]

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[63] [2001] C.M.A.J. No. 2 (QL CMAC) [*Larocque*].
[64] *Ibid.* at para. 19.
[65] Justice Létourneau stated that in view of his conclusion that as section 7 of the *Charter* was breached, it was unnecessary for him to determine whether the accused was wronged under paragraph 11(b) of the *Charter* as a

Sections 497 and 498 of the *Criminal Code* set out that an arrested person shall be released as soon as possible by the person who arrested him or by the person in charge of the post, unless the public interest or the need to ensure his appearance in court justifies his detention. A release is accompanied by an appearance notice, a promise to appear or a recognizance to that effect. Section 505(b) of the *Criminal Code* requires that when a person has been released, an information relating to the offence alleged to have been committed by that person shall be laid before a justice as soon as practicable thereafter and, in any event, before the time stated in the appearance document. The *NDA* has no similar provision.

Section 503 of the *Criminal Code* provides that if a person has been detained in custody, that person must be taken before a justice within 24 hours of the arrest if a justice is available or, if a justice is not available within that time frame, as soon as possible. The *NDA* at sections 158 and 159 set out actions following arrest, including the review of custody by a custody review officer and a military judge. Within 24 hours after an arrest, a report of custody shall be delivered to a custody review officer, and if no charge is laid within 72 hours of the arrest, the custody review officer shall determine why a charge has not been laid and reconsider whether or not to retain the person in custody. If a person is not released by a custody review officer, that person shall be taken before a military judge for a release hearing. The *NDA* does not explicitly state when charges must be filed.

The CBA Submission recommends that the *NDA* be amended to include a requirement that a person who is retained in custody or released on bail must be charged within a reasonable time as provided for under the *Criminal Code* (and includes possible language to amend the *NDA* which is worthy of consideration). As I can find no military justification as to why the military justice system should differ from the civilian criminal justice system in this regard, I agree with this recommendation.

> **(33) I recommend that the *National Defence Act* be amended to provide that where a person is retained in custody or released on conditions of bail, that the person be charged with a service offence as soon as practicable.**

(c) Review of Directions to Release

Section 158.6(2) and (3) of the *NDA* provides that where a custody review officer directs the release of an arrested person from custody, this decision may be reviewed by an officer in the chain of command, with both a representative of the

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result of the pre-charge delay alone or in conjunction with the post-charge delay.

Canadian Forces and the released person being given an opportunity to be heard during the review.

I agree with the suggestion in the CBA Submission that sections 158.6(2) and (3) be amended to permit a military judge to review a direction for release made by a custody review officer. Once again, the CBA Submission includes language to amend these sections that should be considered. Currently, a military judge's role is limited to reviewing a decision by a custody review officer to keep a person in custody. I see no compelling military justification as to why a military judge may not also review and/or vary any conditions relating to the release of a person from custody.

The Second JAG Report has raised the issue as to whether *QR&O* 105.23 should be amended to identify who, under section 158.6(2) of the *NDA*, acts as a "representative of the Canadian Forces" in the context of a review of a direction by a custody review officer to release a person from custody. I agree with the Report's suggestion that this provision be clarified to state that a representative of the Canadian Forces will normally be counsel appointed by the DMP but in the absence of that counsel, the custody review officer may appoint another representative.

> **(34) I recommend that sections 158.6(2) and (3) of the *National Defence Act* be amended to permit a military judge to review a direction for release made by a custody review officer. I also recommend that article 105.23 of the *Queen's Regulations and Orders* be amended to clarify that a representative of the Canadian Forces (under section 158.6(2) of the *National Defence Act)* will normally be counsel appointed by the Director of Military Prosecutions but in the absence of such counsel, the custody review officer may appoint another representative.**

(d) Legal Advice for Custody Review Officers

The Second JAG Report recommends that custody review officers should be advised or required to seek legal advice in the course of their duties. Currently, under the *NDA* and the *QR&O*, custody review officers are neither required nor advised to seek legal advice in respect of their decisions to release arrested persons or to retain them in custody. I agree with the view expressed in the Second JAG Report that because of the importance of the decisions of custody review officers, they should be advised to seek legal advice.

> **(35) I recommend that *Queen's Regulations and Orders*, Chapter 105, be amended to advise custody**

review officers to seek legal advice in the course of their duties.

(e) Pre-Trial Custody Following Arrest

NDA section 159.2(c) provides that when a person retained in custody is taken before a military judge, the military judge may justify the retention of the person in custody on the basis that "any other just cause has been shown, having regard to the circumstances including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy imprisonment."

In the case of *R. v. Hall*,[66] the majority of the Supreme Court of Canada ruled that the opening words of section 515(10)(c) of the *Criminal Code*, which denied bail "on any other just cause being shown" were unconstitutional because they failed to set out narrow and precise circumstances upon which bail can be denied.[67] As a result, this phrase was severed from the rest of the provision. Notably, the majority did not find that the balance of section 515(10)(c), which permits detention where necessary to maintain confidence in the administration of justice, was overbroad.

Based on the decision in *Hall*, it is more than possible that the Supreme Court of Canada would view the words "on any other just cause being shown" in section 159.2(c) of the *NDA* as being overly vague and therefore unconstitutional as there seems to be no military justification for this overly broad provision. This provision should be amended to bring it into conformity with the *Charter* and the decision in *Hall.* The JAG Report and the CBA Submission support this view.

(36) I recommend that section 159.2(c) of the *National Defence Act* be amended to address the issue raised in the Supreme Court of Canada decision in *R. v. Hall* concerning the conditions necessary to retain a person in pre-trial custody.

(f) Termination of detention and conditions of bail

According to the CBA Submission, some confusion exists among military authorities as to when a direction releasing a person from custody on bail is terminated. The CBA Submission recommends that there be clear statutory direction indicating when a detention order and conditions of bail would be terminated. In particular, the CBA Submission suggests that a detention order be

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[66] (2002) D.L.R. 4th 536 [*Hall*].

[67] The majority also severed the phrase "without limiting the generality of the foregoing" from section 515(10)(c). This language is not contained in *NDA* section 159.2(c).

terminated and a person no longer subject to conditions of bail in the following situations:

- a charge has not been laid within fourteen days of the arrest of a person who is retained in custody or released on conditions;
- a commanding officer or superior commander decides not to proceed with a charge;
- the DMP gives notice in writing that a charge not be preferred;
- the DMP withdraws a charge; and
- the summary trial or court martial with respect to the charge is concluded.

I support the principle that clarity be given as to when a detention order be terminated and a person is no longer subject to conditions of bail.

> **(37) I recommend that the *National Defence Act* be amended to specify the circumstances in which a detention order and conditions of bail would be terminated.**

2. Non-Preferral of Charges

(a) Status of a charge where DMP decides not to proceed

NDA section 165.12 and article 110.04(1) of the *QR&O* establish that when a charge is referred to the DMP for trial by court martial, the DMP may decide not to prefer the charge. However, the *NDA* is silent as to whether in the event that the DMP decides not to proceed on a charge, the DMP may proceed on the charge at another time. Notably, the *NDA* does provide that withdrawing a charge that was preferred by the DMP does not preclude the DMP from proceeding with the charge at a later date.[68] The JAG Report recommends that the *NDA* be amended to provide that the DMP may decide not to proceed with a charge but such a decision would not preclude the DMP from proceeding with the charge at a subsequent time.

The JAG Report acknowledges that an accused person "should not be left to linger in an agony of uncertainty as to whether charges against him or her will proceed" and that in the military context, pending charges loom over every aspect of the accused's professional and social life. However, it states that the DMP would not want to be effectively estopped from proceeding on a charge, in particular a murder charge, if compelling evidence subsequently came to light.

[68] See subsection 165.12(3) of the *NDA*.

Under section 579 of the *Criminal Code*, the Attorney General or his counsel has the right to direct a stay after proceedings have been commenced (i.e., after an information has been laid or an indictment has been filed) and before a verdict has been rendered. In the case of an indictable offence, the proceedings can be recommenced within one year of the stay. For summary conviction matters, the Crown must act before the expiration of the limitation period. Where notice that the proceedings are to be recommenced, the proceedings continue on the original indictment or information. After the one year period elapses, the Crown, if it wishes to proceed on an indictable matter, must lay a new information or prefer a new indictment.

I agree with the suggestion in the JAG Report that the DMP should have the same right as the Attorney General to proceed with a charge that was previously withdrawn.

> **(38) I recommend that the *National Defence Act* be amended to provide that a decision by the Director of Military Prosecutions to withdraw or not proceed with a charge does not preclude the charge from being proceeded with at any subsequent time, subject to any applicable limitation periods.**

(b) Notice of a decision by DMP not to prefer a charge

There is currently no obligation under the *NDA* or the *QR&O* for the DMP to give written notice of a decision not to prefer a charge. The current practice of DMP is to provide a notice of non-preferral of charges to accused CF members and to their chain of command when DMP has assessed that there is insignificant evidence or that it is not in the public interest to proceed (although without providing an estoppel in the rare cases where new evidence comes to light).

I agree with the recommendation made in the CBA Submission that DMP be required to give notice to all relevant parties in writing of a decision not to prefer a charge.

> **(39) I recommend that the *Queen's Regulations and Orders* be amended to require that the Director of Military Prosecutions give notice in writing to the accused person or the accused person's counsel, the Director of Defence Counsel Services, the referral authority, and the accused's commanding officer of a decision not to prefer a charge that has been referred.**

3. Election

(a) Non-electable Offences

The Second JAG Report recommends that *QR&O* article 108.17, which sets out the offences for which an election for court martial is not mandatory, be expanded to include breaches of unit and other local orders under *NDA* section 129(2)(c). *NDA* section 129(2)(c) provides that a contravention by any person of any general, garrison, unit, station, standing, local or other orders, is an act, conduct, disorder or neglect to the prejudice of good order and discipline. If this suggestion were to be accepted, an accused below the rank of lieutenant-colonel who breached a unit or other local order would have no right to elect unless the officer exercising summary trial jurisdiction over the accused considered that the imposition of a punishment of detention, reduction in rank or a fine in excess of 25 per cent of monthly basic pay would not be warranted. The Second JAG Report justifies this position on the grounds that general, garrison, unit, station, local or other orders set out in *NDA* section 129(2)(c) often involve conduct of a relatively minor nature, such as parking prohibitions.

Setting aside the arguments that the meaning and application of section 129(2) is the source of a great deal of confusion (an issue to be discussed in more detail later in the section entitled "Section 129"), the suggestion in the Second JAG Report to expand the offences for which an election for court martial is not mandatory gives cause for concern.

A person given authority by the CDS to issue orders and instructions under *QR&O* 1.235 has the power to issue orders or instructions to give effect to the decisions and carry out the directions of the Government of Canada or the Minister. This is a very broad power. While a unit or local order may involve banal matters such as the prohibition of parking in certain areas, such an order may also involve a matter affecting the fundamental rights of CF members. For example, in the recent court martial of a lieutenant-colonel stationed abroad, the accused was charged with violating section 129(2) because he allegedly had an intimate relationship with a local employee, in violation of TFSO 103 on the Relations with Non-Canadian Personnel in Theatre. Section 103.6 of TFSO 103 states that: "Members of TFBH shall not enter into intimate relationships with civilian inhabitants of the AO, including employees of the Task Force." This very broad local order, falling under section 129(2)(c), is clearly not in the same category as a parking offence and involves an individual's freedom of association. While an infringement of such a freedom may be a reasonable and demonstrably justified limit in the context of a mission abroad, one would not want to deny the accused the right to be tried by court martial, with a more complete set of procedural and fundamental legal guarantees than with a summary trial, including the right to be represented by a lawyer.

Another reason for concern with respect to the recommendation in the Second JAG Report is that unit and other local orders are not required to be notified and published in a consistent fashion. Regulations and orders are deemed to be notified to CF members as long as the commanding officer of the base takes the measures that seem practical to ensure that they are drawn to the attention of and made available to those they concern.[69] In the case of the lieutenant-colonel discussed above, the charges were dismissed because it could not be demonstrated that the accused had adequate notice of the order in question. Some might be concerned whether a similar case at summary trial, without formal rules of evidence and representation by a lawyer, would have been dismissed.

In conclusion, I do not believe that it is appropriate to further limit the offences where an accused may elect for court martial. In particular, because of the broad scope of potential orders, I am strongly against the recommendation that breaches of unit and other local orders be tried by summary trial without a mandatory election. I note that there is currently not a problem of an overwhelming number of accused electing for courts martial. According to statistics taken from the JAG Annual Report, of the 432 disciplinary proceedings where an accused was given an election, only 7 accused chose court martial over summary trial.[70]

> **(40) I recommend that the circumstances under which an election for a court martial is not available, under section 129 of the *National Defence Act* or any other section, not be expanded.**

(b) Availability of election by summary trial

The Second JAG Report recommended that *QR&O* article 108.07 should be amended to add to the list of offences which may, subject to an election by the accused to be tried by court martial, be tried by summary trial. In particular, the Report recommends adding to this list *NDA* section 122 (False Information on Enrolment), section 123 (Assisting Unlawful Enrolment) and section 125 (Offences in Relation to Documents). Currently these offences may only be tried by court martial, with no election for a summary trial available to an accused regardless of the circumstances. The Report notes that the maximum punishments for these offences are within the range of other offences that are currently tried by summary trial.

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[69] See *QR&O* 1.21.

[70] I also note that statistics in the JAG Annual Report indicate that the most frequently used charges involve offences for which there is no automatic election (i.e., insubordinate behaviour, quarrels and disturbances, absence without leave, drunkenness and section 129 offences where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment).

The Report also notes that of the cases that went to court martial involving charges under *NDA* section 125,[71] most involved sufficiently minor offences which appropriately could have been tried by summary trial had the option been available. The Report emphasised that in the event a charge under *NDA* sections 122, 123 or 125 involved serious circumstances, the matter could be directly referred to court martial by DMP. I agree with this recommendation.

> **(41) I recommend that article 108.07 of the *Queen's Regulations and Orders* be amended to permit offences under sections 122, 123 and 125 of the *National Defence Act* to be tried by summary trial.**

4. Summary Trials

(a) Availability of summary trials for lieutenant-colonels

The Second JAG Report looked at the issue as to whether officers of the rank of lieutenant-colonel be subject to trial by summary trial. Currently, only non-commissioned members and officers up to the rank of major are currently subject to summary trial. The *NDA* does provide at section 164(3) that a superior commander may try an accused of the rank of lieutenant-colonel by summary trial in the circumstances prescribed by Governor in Council regulations. No regulations under this provision have yet been enacted. Recently, the Armed Forces Council directed that regulations be developed to provide that lieutenant-colonels be subject to summary trial. The Second JAG Report supports the recommendation of the Council and I can see no reason why lieutenant-colonels should not be subject to summary trial.

However, I should emphasize that I concur with the position expressed in the Second JAG Report that an increase in jurisdiction of summary trials to include officers beyond the lieutenant-colonel level, "would necessitate a review of many other fundamental aspects of the summary trial, such as process, powers of punishment and review, which is considered neither necessary nor desirable."

> **(42) I recommend that the *Queen's Regulations and Orders* be amended to allow a superior commander to try an accused of the rank of lieutenant-colonel by summary trial.**

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[71] Since 1 September 1999, no charges under *Criminal Code* sections 122 and 124 have been tried at court martial; Section 125 is the fourth most frequently tried offence at court martial.

(b) One year limitation period for summary trials

Bill C-25 introduced a one year limitation for summary trials. Once the one year period is over, summary trial jurisdiction is lost, and, assuming the matter proceeds, it must proceed by way of court martial.

The suggestion has been made by some CF members that an accused should be able to waive the limitation period because the accused may still prefer to proceed by summary trial rather than by court martial even though the limitation period may have expired.

The JAG Report suggests that the one year limitation is necessary to reaffirm the requirement that discipline be enforced promptly and to ensure that only minor, non-complex offences be tried by summary trial. I agree with this argument and also believe that once an accused has been forced to wait a year for a trial, if the matter is to proceed at all, a court martial should be convened to ensure that the accused is given the attendant procedural and legal guarantees.

(43) I recommend that the current one year limitation period for summary trials be retained.

(c) Assisting Officer Training

An accused is entitled to have an assisting officer appointed to assist him or her as soon as possible after a charge has been laid. Under *QR&O* 108.14, an assisting officer is responsible for ensuring that an accused is aware of the nature and gravity of the offence with which he or she is charged and the differences between trial by court martial and summary trial. These differences include the powers of punishment of a court martial and a summary trial, the accused's right to representation at a court martial and assistance at a summary trial, the rules governing the reception of evidence at a court martial and a summary trial, and the accused's right to appeal the finding and sentence of a court martial and to make a request for review of a summary trial.

Ensuring that the accused understands the procedural safeguards that he or she is waiving by electing to be tried by summary trial rather than by court martial is critical. The Supreme Court of Canada has made it clear that when a person makes a waiver, to be effective the waiver must be clear and unequivocal and be done with the full knowledge of the rights that are being forsaken. At a summary trial, the accused is giving up fundamental and legal safeguards, including the right to a lawyer (who is subject to attorney-client privilege), the right to appeal the findings or sentence, and the right to make a motion to recuse any member of the court, including a military judge, for reasons set out in common law. Furthermore, a

court martial has formal rules of evidence (i.e., *Military Rules of Evidence*) and civilian witnesses may be compelled to attend.

Certain mechanisms are in place to confirm that the accused understands the effect of a waiver of a right to trial by court martial. On the Record of Disciplinary Proceedings, an accused is required to confirm that the nature and gravity of the offence and the differences between trial by court martial and trial by summary trial were discussed with the accused's assisting officer and that the accused had an opportunity to consult with legal counsel. Further, the Office of the JAG prepared an excellent guide for accused and assisting officers regarding the election to be tried by summary trial or court martial.

However, based on my discussions with CF members and submissions that I received, there seems to be a widespread belief that assisting officers still do not have proper training and expertise to assist the accused. In particular, concerns were raised that because of a lack of training, certain assisting officers were acting as lawyers, which is not their role, while others were providing little or no assistance to the accused at all.

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.

During my discussions with CF members, I suggested that assisting officer training might be provided early in a member's career, prior to the member being called upon to perform the functions of an assisting officer. However, valid objections were raised. Some members expressed the view that basic training is already overloaded, while others felt that such training would be forgotten by the time a member was called to act as an assisting officer. While I agree with these points, I am still of the view that it would be useful to provide assisting officer training at some point in a member's career when the member could soon expect to serve as an assisting officer. Such training should include a mock summary trial so that CF members would have the opportunity to act as an assisting officer.

However, more importantly, I am of the view that immediately after being asked to act as an assisting officer, the potential assisting officer would be given a package of material (e.g. on the role of the assisting officer, the difference between court martial and summary trial, ability to request a review, etc.) to study, after which he or she would be tested on the contents of the material. This test could be made available on a CD ROM as is the case for the presiding officer test. Only if the potential assisting officer passed the test, thus ensuring that the material was thoroughly understood, would that person be able to act as assisting officer.

I raised my concern about the lack of training for assisting officers with the JAG and I note that the Second JAG Report states that further training for assisting officers has recently been developed, with an emphasis on a training package that units could use to conduct their own assisting officer training. This package is now accessible on the JAG website.

> **(44) I recommend that immediately after being asked to act as an assisting officer, the Canadian Forces member be given a standardized package of material (e.g., on the role of the assisting officer, the difference between court martial and summary trial, right to request a review, etc.) and then be required to pass a test on the material before being entitled to act as assisting officer.**

I recommend the inclusion of two additional safeguards to ensure that a person at a summary trial is aware of his or her rights. First, a presiding officer should be required to confirm with the accused at the beginning of a summary trial that the accused has been advised by his or her assisting officer about the implications of electing summary trial rather than court martial. Second, a presiding officer should be required to inform an offender at the conclusion of a summary trial of his or her right to request a review. The Second JAG Report supports instituting these safeguards.

> **(45) I recommend that at the beginning of a summary trial, the presiding officer be required to confirm that the accused has discussed with his or her assisting officer the matters referred to in article 108.14 of the *Queen's Regulations and Orders* and at the conclusion of a summary trail that the presiding officer be required to inform an offender of his or her right to request a review of the presiding officer's finding or sentence.**

5. Evidentiary Matters

(a) Privilege and Compellability of Assisting Officers

Solicitor-client privilege exists between an accused and his or her legal counsel. As a result, legal counsel for an accused is prevented from disclosing information with respect to the case which has been provided by the accused, except with the accused's express consent. Currently, there is no similar privilege for communication between an assisting officer and an accused. While assisting officers do not provide legal advice, they do assist the accused in preparing and presenting the case to be tried by summary trial. As it stands, it is possible that an assisting officer could be compelled to disclose information communicated to the assisting officer and the accused, or testify against the accused in a subsequent proceeding on a matter in which the assisting officer assisted the accused.

Quite clearly, compelling an assisting officer to disclose the contents of discussions with the accused is problematic. As set out in the Office of the JAG publication entitled *Military Justice at Summary Trial Level:* "The integrity of an assisting officer's role and the effectiveness of the summary trial process could be adversely affected if an assisting officer is required to disclose communications with an accused."[72] The publication recommends that an assisting officer who is asked to reveal communications with the accused should consult with a legal advisor or the DDCS before disclosing such communications. It notes that privilege might be extended to the relationship between the accused and the assisting officer on a case by case basis.[73]

While introducing privilege similar to that between a solicitor and a client would not be appropriate, the confidentiality between assisting officer and accused should be protected. This goal can be achieved by introducing provisions that provide that the assisting officer has a duty not to disclose his or her communications with the accused person (except in limited circumstances required by public policy), and that the assisting officer is not normally compellable by the presiding officer to reveal confidential communications in other proceedings. This Second JAG Report supports this recommendation.

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[72] Canada, National Defence, *Military Justice at the Summary Trial* Level, Version: 2.0 (Office of the Judge Advocate General) at 9-8.

[73] The *Wigmore* test which governs circumstances under which privilege is extended to certain communications that are not traditionally recognized class privileges: (1) The communications must originate in a confidence that they will not be disclosed; (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

(46) I recommend that amendments to the *National Defence Act* and the *Queen's Regulations and Orders*, as necessary, be made to provide a greater measure of confidentiality between an assisting officer and an accused person. These amendments would address the issue of the compellability of the assisting officers in other proceedings under the *National Defence Act*, and would impose a duty of non-disclosure on the assisting officer in respect of his or her communications with the accused, except in the limited circumstances required by public policy.

(b) Privilege and Compellability of Military Spouses

The *Military Rules of Evidence* provide that, except in certain circumstances, the spouse of an accused may not be compelled to testify at a court martial either on behalf of the defence or the prosecution. However, these rules do not apply at a summary trial. As civilians are not compellable as witnesses at a summary trial, the issues of the compellability of spouses and spousal communication are an issue only in relation to a spouse, who is himself or herself a member of the Canadian Forces, of a member who is being tried summarily. While common law may provide for spousal privilege in such a case, it is my belief that spousal privilege should be made explicit either in the *NDA* or *QR&O*. The Second JAG Report supports this recommendation.

(47) I recommend that the *National Defence Act* or the *Queen's Regulations and Orders*, as necessary, be amended to parallel the rules applicable in respect of compellability of military spouses and the privilege of communications between spouses.

(c) Admissibility of prior convictions

During my discussions with individuals who had served as presiding officers, it became apparent that many officers were not clear whether references to prior convictions were permitted at a summary trial. Because there are no formal rules of evidence, presiding officers were using their own discretion. However, references to prior convictions are potentially prejudicial and therefore clear guidance should be given as to the limited circumstances when it should be allowed. The Second JAG Report agrees with this recommendation.

(48) I recommend that an additional Note be provided to article 108.21 of the *Queen's Regulations and Orders* indicating that evidence concerning prior convictions is rarely permissible during a summary

trial because of its potentially prejudicial nature. The Note should state that when such an issue arises during a summary trial, a presiding officer must consult with a legal officer before proceeding further.

(d) Willsay Statements

Under article 111.11 of the *QR&O*, military prosecutors may wait until the start of a court martial before notifying an accused of any witness that the prosecutor proposes to call and inform the accused of the purpose for which a witness will be called and of the nature of the proposed evidence of that witness. While in practice willsay statements are likely disclosed before this point, the possibility that the disclosure of the list of prosecution witnesses and their purpose could be delayed until the start of a trial hinders the ability of the defence to prepare for the trial. I agree with the suggestion made in the CBA Submission that willsay statements should be provided to the defence prior to or when a charge is preferred. By the time a charge is preferred, the military prosecutor should know the evidence and witnesses required to prove the Crown's case. In *R. v. Stinchcombe*,[74] the Supreme Court held that initial disclosure should occur before the accused is called upon to elect the mode of trial or plead. Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory. I have not been given any military justification as to why military personnel should not enjoy the same rights as other citizens.

(49) I recommend that article 111.11 of the *Queen's Regulations and Orders* be amended to require that willsay statements be provided to the defence at or prior to the time when a charge is preferred rather than simply before a court martial commences.

6. Officer Cadets

(a) Delegation of Commanding Officer's Powers

Under *NDA* sections 163 and 164, commanding officers and superior commanders may try officer cadets by summary trial. However, *QR&O* article 108.10 allows a commanding officer to delegate powers of trial and punishment only in respect of non-commissioned members below the rank of warrant officer. As a result, delegated officers cannot try officer cadets. The inability of a commanding officer to delegate his or her power in this respect is very burdensome, particularly at the Royal Military College.

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[74] [1991] 3 S.C.R. 326.

According to the Second JAG Report, at the Royal Military College there is only one commanding officer, one designated commanding officer and one superior commander to conduct the 40 to 50 summary trials of officer cadets that take place in an average year. This burden could be alleviated by allowing some summary trials to be conducted by senior delegated officers. This recommendation is supported by the Second JAG Report.

> **(50) I recommend that article 108.10 of the *Queen's Regulations and Orders* be amended to permit delegated officers to try officer cadets.**

(b) Wider range of minor punishments

Currently, the only punishments available for officer cadets for an offence at summary trial are that of severe reprimand, reprimand, fine and caution. The availability of additional minor punishments, such as confinement to barracks, extra work and drill and stoppage of leave, would be more effective disciplinary tools in training and educational environments. This recommendation is supported by the Second JAG Report.

> **(51) I recommend that officer cadets be subject to a wider range of minor punishments, such as confinement to barracks, extra work and drill and stoppage of leave.**

7. Sentencing

(a) More flexible range of punishments and sanctions

As was made clear in my discussions with various members of the Canadian Forces, including the court martial judges and presiding officers, and as highlighted in the CBA Submission and the JAG Report, the sentencing provisions under the *NDA* require extensive reform. The current powers of punishment are not adequate.

Because the military justice system has jurisdiction over members of the regular force, the reserve force and in certain cases, civilians, the range of punishments and sentences must be appropriate for all of these groups.

Some examples of the limited and inflexible sanctions currently available under the *NDA*:

- There is no provision in the *NDA* that provides for imprisonment and detention for default in paying a fine. As a result, the ability of the Crown to enforce payment of fines is limited;

- There is no provision for intermittent conditional sentences in the *NDA*. Therefore the unintended effect of a sentence of imprisonment or detention for a reservist may be the loss of the reservist's civilian employment; and

- For civilians, the only available or viable sentencing options are a fine or imprisonment.

It is clear that there is a need for more flexible sentencing powers in the military justice system, including some of the sentencing options that are available in the civilian criminal justice system.

> **(52) I recommend that the Department of National Defence undertake a comprehensive review of the sentencing provisions of the *National Defence Act* with a view to providing for a more flexible range of punishments and sanctions, as is available under the civilian criminal justice system.**

(b) Enforcement of fines imposed by service tribunals

While section 139(1)(k) of the *NDA* provides for a fine to be awarded by a service tribunal as a punishment in respect of a service offence, the *NDA* is silent as to how collect unpaid fines. While the amount of the fine is deducted from the pay of a regular force member, there is currently no mechanism by which to collect upon unpaid fines from a reservist who ceases to parade or a civilian subject to the *Code of Service Discipline*. I recommend that civil enforcement of fines awarded by service tribunals be introduced. The JAG Report supports this recommendation.

> **(53) I recommend that the *National Defence Act* be amended to allow for the civil enforcement of fines awarded by service tribunals.**

(c) Punishments of reprimand and severe reprimand

Many members raised the issue as to whether a real distinction exists between the punishments of reprimand and severe reprimand and whether these punishments should be retained. I agree with the opinion expressed in the JAG Report which suggests that there is a utility in maintaining an ability for superior commanders or military judges to express the degree of their disapprobation of the conduct which is the subject of the charges. However, I recommend that more guidance be given as to their use.

> **(54) I recommend that the punishments of reprimand and severe reprimand be retained but that additional guidance as to the circumstances in which it would be**

appropriate to impose one as opposed to the other be provided by way of regulation or Note thereto.

(d) Access to sentencing database for presiding officers

During my visits to Canadian Forces bases, some presiding officers suggested that they should have direct access to the summary trial database maintained by JAG. They expressed the view that having access to the database would assist them in passing appropriate sentences, therefore creating more consistency in the sentences imposed at summary trials. Currently presiding officers may only access such information through their legal officers.

The Second JAG Report expresses the view that "providing presiding officers access to the database without the benefit of legal advice creates the risk that they may overemphasize its importance and that the historical data will become the key factor in the summary trial sentencing process." I do not find this a compelling argument. Under *QR&O* article 108.20, presiding officers are required to take into account aggravating and mitigating factors when determining a sentence. Having access to a database would merely provide some guidance without being determinative. I see no cause for concern in relation to allowing presiding officers access to the summary trial database maintained within the Office of the JAG and therefore recommend that they have access to this database. Further, having access to the database would increase transparency and accessability.

(55) I recommend that presiding officers have access to the summary trial sentencing database that is collected and maintained within the Office of the Judge Advocate General.

8. Section 129

As mentioned briefly in the context of whether the number of offences where an election not be mandatory be expanded (see section entitled "Non-electable offences"), section 129 of the *NDA* is problematic. While some have suggested that section 129 might fall outside of my mandate, I am convinced that it falls squarely within it. The amendments to the *NDA* and related implementing regulations as a result of Bill C-25 extended the right for an accused to elect trial by court martial in all but the most minor cases. One of the implementing regulations that was amended, *QR&O* article 108.17, sets out one of the few instances for which an accused does not automatically have the right to an election; which is for offences under *NDA* section 129, but only where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and

deportment.[75] Therefore, it seems clear that section 129 is *intra vires* my mandate. This view is bolstered by the fact that the Second JAG Report includes in its review of Bill C-25, a recommendation that breaches of unit and other local orders under *NDA* section 129(2)(c) not give an accused an automatic right to elect trial by court martial.

Subsection 129(1) sets out a general prohibition against conduct to the prejudice to good order and discipline:

> 129(1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.

Subsection 129(2) is more specific, setting out that a breach of any provisions of the *NDA*, regulations, orders or instructions constitutes an act, conduct, disorder or neglect to the prejudice of good order and discipline. The *NDA* provides:

> 129(2) An act or omission constituting an offence under section 72 or a contravention by any person of
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> (a) any of the provisions of this Act,
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> (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or
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> (c) any general, garrison, unit, station, standing, local or other orders,
>
> is an act, 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 infraction most commonly used in the *Code of Service Discipline*. According to the JAG Annual Report, in the last reporting year, section 129 accounted for 895 out the 1982 charges at summary trial, of which an election to be tried by court martial was not given in at least 491 cases. Further, at court martial section 129 accounted for 62 out of the 217 charges. Therefore, in the last reporting year, almost 44% of all charges were made under section 129.

Notwithstanding the frequent use of section 129, important questions have been raised as to the elements required to prove that offence. This confusion was clearly evident in *R. v. Jones*, a case heard by the Court Martial Appeal Court.[76] The accused was charged under section 129 for making improper comments. Notably,

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[75] Article 108.17 of the *QR&O* was amended on 8 July 1999 and became effective 1 September 1999.
[76] [2002] C.M.A..J. No. 11 (QL CMAC) [*Jones*].

the charge did not allege a contravention to a regulation or an order that would have given effect to section 129(2). The trial judge found the accused guilty on the basis that his conduct may have or could have been to the prejudice of good order and discipline.

On appeal, the Court Martial Appeal Court noted because it was not a situation where the deeming provision of 129(2) applied, the prosecution was required to show beyond a reasonable doubt that the conduct of the accused was, in fact, prejudicial to good order and discipline. The court stated:

> [T]o convict the appellant on the basis that he may have or could have occasioned injury or prejudice is to convict him on the basis of a standard of proof that is less than a balance of probabilities and to engage in conjecture.[77]

The court also found that judicial notice should not have been taken that "failing to show proper respect to a superior in front of military members may prejudice good order and discipline." Rather, the court held that it was necessary to show that, in the circumstances of this particular case, the conduct of the accused was to the prejudice of good order and discipline, in that the remarks did tend to bring a superior into contempt.

The case of *Jones* demonstrates the complexity of section 129 offences and the confusion over which elements must be proven under sections 129(1) and 129(2), respectively.[78] Given the difficulty that lawyers and judges have in interpreting sections 129(1) and 129(2), it is quite likely that presiding officers, with little or no legal training find them even more perplexing.[79]

I am of the view that section 129 must be reviewed and clarified. A review is particularly important in light of the fact that Section 129 is the charge most often brought under the *Code of Service Discipline* and in many cases, is not accompanied by an automatic right on the part of the accused to elect a court martial.[80]

> **(56) I recommend that section 129 of the *National Defence Act* be amended to clarify the requisite elements of an offence under this provision.**

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[77] *Ibid.* at para. 10.

[78] See also *R. v. Latouche*, [2002] C.M.A.J. No. 3 (QL CMAC), which highlights the confusion regarding the *mens rea* requisite for a section 129 offence.

[79] A more detailed discussion of the problems surrounding section 129, with suggested solutions, may be found in a paper by Major Jean-Bruno Cloutier, Regional Military Prosecutor for Central Region, entitled « L'Utilisation de l'Article 129 de la Loi sur la Défense Nationale dans le Système de Justice Militaire Canadien». The paper was written in the completion of his Master of Laws (LL.M.) Degree. The original document is available at the Brian Dickson Law Library at the University of Ottawa and at the National Libary of Canada.

[80] There is no automatic election where the offence relates to military training, maintenance of personal equipments, quarters of work space, or dress and deportment.

9. Delays for summary trials/courts martial

Despite much progress in reducing delays for summary trials and courts martial, many CF members continue to be concerned that disciplinary proceedings are taking too much time and as a result, discipline is not being restored as quickly or effectively as it should be. As one of the overarching goals of Bill C-25 was to protect the rights of an accused while promoting discipline, a goal which is negatively affected by delays in the military justice system, I consider this topic to fall within my mandate.

The JAG Annual Report states that the average time from the date of laying of charges to final disposition by summary trial has decreased from 11 to 9 days, with summary trials by deployed units conducted in 7 days, on average. The conclusion drawn in the JAG Annual Report is that the summary trial system is an effective tool for unit commanders to deal with minor service offences. However, our discussions with commanding officers have revealed that there are often delays of many months between the start of an investigation and the laying of charges. Such delays evidently defeat the purpose of the summary trial.

According to the Office of the JAG, the average number of days from the laying of charges to their disposition at court martial has shown an impressive overall decrease of 57 days from the previous year. Between April 1, 2002 and March 31, 2003, the average interval between the laying of charges and their disposition at court martial was 258 days. The total number of days the previous year was 314.

The overall decrease can be attributed in large part to a decrease of 40 days from the preferral to the commencement of a court martial over the previous year. This reflects the Court Martial Administrator's new policy of giving prosecution and defence counsel two weeks after the preferral of charges to agree on a date for the court martial (if they fail to do so, the Court Martial Administrator will set a date and convene the trial within 60 days).[81] However, once again, notwithstanding the fact that the time between laying of charges and disposition at court martial has decreased, many commanding officers complained of long delays before the laying of charges.

Determining whether the time from the commission of an alleged offence to its disposition at summary trial or court martial can be reduced requires an assessment of whether the length of time that is currently involved is simply what is necessary to ensure a fair military justice system. I do believe that the need for fairness may be part of the explanation. Bill C-25 created a system that was

[81] "Scheduling Courts Martial", 5203-1(CMA) dated 4 May 01.

procedurally more fair by introducing additional checks and balances relating to laying charges, access to counsel, and the conduct of the summary trial and court martial. As CF members become more familiar with the system, I believe that the time that it takes from the start of an investigation to the laying of charges and their disposition at a service tribunal will decrease. It goes without saying that a system can be made much faster by taking shortcuts in this process. However, one cannot sacrifice fairness for the sake of efficiency.

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.[82] 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.[83]

I believe that one way to reduce the time between the start of an investigation and the laying of a charge, is to reduce the number of consultations that are required to be made with lawyers, either from a unit legal adviser or a lawyer with the Canadian Military Prosecution Service, before a charge is laid. I do not think that it is necessary for there to be both pre-charge and post-charge screening in almost all cases.

In order to reduce delays, the circumstances in which the NIS investigators may lay charges without first having to obtain pre-trial screening could be amended. Currently, when the NIS is considering laying charges, it must consult a prosecutor with the Canadian Military Prosecution Service, even though the decision to lay a charge is completely within the duty and discretion of the NIS.[84] Once a charge has been laid, and assuming the charge is to be dealt with by court martial, the prosecutor conducts post-charge screening. This screening is much more comprehensive in nature, with the prosecutor considering whether the evidence demonstrates a reasonable prospect of conviction and whether or not the public interest and the interests of the Canadian Forces require the initiation of a prosecution.[85] Therefore, as a charge to be dealt with by court martial will undergo a full post-charge evaluation by a prosecutor, I do not believe that it is necessary,

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[82] CFAO 26-17 states that recorded warnings and counselling and probation are not substitutes for disciplinary action, nor do they preclude it.

[83] Although a member has the right to submit a redress of grievance in respect of the administrative action.

[84] See DMP Policy Directive #002/99 (March 1, 2000) "Pre-Charge Screening" and *QR&O* article 107.03(2), which provides that a Prosecutor will evaluate "the sufficiency of the evidence, whether or not in the circumstances a charge should be laid and, where a charge should be laid, the appropriate charge."

[85] See DMP Policy Directive #003/00 (March 1, 2000) "Post-Charge Screening'. See also the Note following *QR&O* article 107.02.

that the NIS consult with the prosecutor prior to laying a charge, although it should be permissible for it to do so.

Another change that would reduce delays between an investigation and the laying of a charge is to narrow the range of circumstances in which a charging authority other than the NIS is required to obtain legal advice.[86] Currently, a charging authority is required to obtain legal advice, except where the offence is alleged to have been committed by a CF member below the rank of warrant officer and the charge would not give rise a right to elect trial by court martial. Once a charge has been laid, the charging authority must refer the charge to the accused person's commanding officer, who, in all but the most minor of cases, must in turn seek legal advice from the unit legal adviser prior to making the decision of whether or not to proceed with a charge (and if appropriate, whether to forward a charge to a referral authority if the matter should be dealt with by court martial). Upon receipt of a referral, the DMP then reviews the charge to determine whether or not the charge warrants trial by court martial. Therefore, lawyers are potentially involved in reviewing charges at three stages in the process.

Reducing the number of stages at which consultation with a lawyer is required would likely reduce the time involved in the charging process. In particular, I can see no military justification for the requirement that a charging authority obtain legal advice where the offence involves a member of the rank of warrant officer or above but not if it involves a member of the rank of warrant officer and below (unless the charge would give rise to an election for trial by court martial). The distinction between ranks should be eliminated: charging authorities should be required to seek legal advice only when the charge gives rise to an election. As discussed above, once a charge has been laid, the accused person's commanding officer must seek legal advice in all but the most minor of cases as to whether or not to proceed with the charge. This check would appear to be sufficient protection against frivolous charges.

However, because of the current confusion surrounding the interpretation of section 129(1) and 129(2), I do not think that it is appropriate at this point to reduce the number of consultations with legal advisers that are required in the charging process. As the case of *Jones* demonstrated, section 129 is extremely complex and until such time as this section is clarified,[87] I am not convinced that charging authorities have the requisite experience to make correct assessments about potential s. 129 charges.

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[86] A charging authority is a commanding officer, an officer or non-commissioned member authorized by a commanding officer to lay charges or an officer or non-commissioned member of the Military Police assigned to investigative duties with the NIS.

[87] I recommended in my previous recommendation that this section be clarified.

(57) I recommend that consideration be given to reducing the instances in which charging authorities must obtain legal advice before laying a charge, provided first that the elements of an offence under section 129 of the *National Defence Act* are clarified.

VII - MILITARY POLICE AND THE MILITARY POLICE COMPLAINTS COMMISSION

1. Military Police

Members of the military police include all non-commissioned members and security officers appointed under section 156 of the *NDA*. Changes that have been made to the framework governing the military police over the past five years reflect in large part recommendations made by the First Dickson Report. For example, the Canadian Forces Provost Marshal ("Provost Marshal"), is now the Commanding Officer of the Canadian Forces National Investigation Service ("NIS"); the NIS have an expanded ability to lay charges as a consequence of investigations into serious or sensitive service offences; and a *Military Police Professional Code of Conduct*[88] has been established. Many of the changes were made pursuant to the Vice Chief of the Defence Staff/Canadian Forces Provost Marshal Accountability Framework ("*Accountability Framework*"), departmental policies or changes to *QR&O* made prior to Bill C-25 and therefore arguably fall outside my mandate. However, as noted earlier, I would not be able to adequately fulfill my mandate if I chose a restrictive reading of the provisions and operation of Bill C-25, as many of the changes to the military police that were made outside the four corners of Bill C-25 have a ripple effect on the workings of Bill C-25 itself.

2. Canadian Forces Provost Marshal

(a) Role

The current structure of the relationship between the Provost Marshal, the Military Police and the Military Police Complaints Commission ("MPCC") is relevant to the intertwined goals of Bill C-25 of accountability, independence and transparency. It is therefore somewhat surprising that the position of the Provost Marshal is not defined in the *NDA*. The role of the Provost Marshal is largely governed by the *Accountability Framework* that was developed in 1998 to ensure both the independence of the Provost Marshal as well as a professional and effective military police service, and is subject to annual review. This legislative omission is in contrast to the provisions in the *NDA* setting out the respective roles of the JAG, the Military Judges, the DMP, the DDCS, and the Court Martial Administrator. Not only is this legislative void contrary to Bill C-25's goal of ensuring independence of key actors in the military justice system from influence or interference, it also makes analysis of the current role of the Provost Marshal somewhat difficult. While recourse may be had to the *Accountability Framework*, it does not set out clearly

[88] *Military Police Professional Code of Conduct* SOR/2000-14 16 December 1999 pursuant to s. 13.1 of the *NDA*.

Parliament's intent in creating the role of the Provost Marshal. This leads to practical difficulties when interpreting laws and regulations regarding the Provost Marshal.

I note that in my visits to bases, some military police raised the issue of whether all military police should be under the command and control of the Provost Marshal. While this is an issue worthy of consideration, it falls outside of my mandate.

> **(58) I recommend that the *National Defence Act* be amended to define the role of the Canadian Forces Provost Marshal and set out the legislative framework governing the relationship between the Canadian Forces Provost Marshal and the military police, including the National Investigation Service.**

(b) Annual Report

Although the *Accountability Framework* provides that the Provost Marshal will issue an annual report, including statistics, trend analysis and analysis of law enforcement patters to the VCDS, I note that the last annual report publicly available at the time of the writing of my report was for the year 2000. Much of this information would have been helpful to me in my Review, and might have increased the communication between the Provost Marshal, the MPCC and the Canadian public. In keeping with the goal of increased transparency, I believe the Provost Marshal should be legislatively required to make an annual report publicly available within three months after each year end.

> **(59) I recommend that the *National Defence Act* be amended to require that the Canadian Forces Provost Marshal produce an annual report within three months after the end of each year, to be submitted to the Minister of National Defence.**

(c) Policing duties or functions

Bill C-25 gave the Governor in Council the authority to make regulations, known as the *Military Police Professional Code of Conduct* ("Code of Conduct"). The Code of Conduct is one of the means by which the Provost Marshal can exercise her governance over the conduct of Military Police Personnel. Her governance of the conduct of Military Police personnel through this means is sometimes referred to as a "technical" chain of command. Oversight, audit and review of Military Police functions are the responsibility of the Military Police Technical Chain, which includes the Provost Marshal and staff. Breaches of the Code of Conduct are investigated by the Provost Marshal delegate, known as the Deputy Provost Marshal

Professional Standards, and, if warranted, breaches will be referred to the Military Police Credentials Review Board ("MPCRB") for review. The Provost Marshal may suspend, revoke, or issue conditions on Military Police credentials upon recommendation of the MPCRB. The Military Police Technical Chain is required because of the dual role played by Military Police given that they are soldiers first, peace officers second and subject to the regular chain of command when not performing police duties or functions.

In order to determine whether the conduct of a Military Police member is subject to sanction by the technical chain of command or if an investigation is subject to review by the MPCC requires a review of the *Military Police Professional Code of Conduct* and a determination of whether the officer was performing "policing duties or functions".[89] Policing duties or functions are prescribed in the *Complaints About the Conduct of Members of the Military Police Regulations*.[90] The definition of policing duties or functions as prescribed by the regulations is overly broad and therefore a problem. While some leeway will obviously be required to determine each case on its facts, clarification would be helpful. For example, the question has arisen as to whether the Provost Marshal is performing a policing duty or function when conducting an investigation into a conduct complaint. One cannot look to Bill C-25 or the *NDA* to determine Parliament's intent by reviewing the provisions that govern the position of Provost Marshal, as the Provost Marshal was not created by Bill C-25 or the *NDA*. Recourse to the *QR&O* leaves the question unanswered. While I am inclined to believe that the Provost Marshal is indeed performing a policing duty or function when conducting a conduct complaint investigation, a final pronouncement on this question would be unwise until the role of the Provost Marshal is set out in the *NDA*.[91] Military Police members are also entitled to a

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[89] Subsection 250.18(1) of the *NDA*.

[90] Complaints About the Conduct of Members of the Military Police Regulations P.C. 1999-2065 18 November 1999. Subsection 2(1) states that the following, if performed by a member of the military police, are policing duties or functions: the conduct of an investigation, the rendering of assistance to the public, the execution of a warrant or another judicial process, the handling of evidence, the laying of a charge, the attendance at a judicial proceeding, enforcement of laws, responding to a complaint and the arrest or custody of a person. For greater certainty, it is stated that a duty or function performed by a member of the military police that relates to administration, training or military operations that result from established military custom or practice, is not a policing duty or function.

[91] In *Canada (Commissioner of the Royal Canadian Mounted Police) (Re)*, [1994] 3 F.C.J. No. 953, the Federal Court of Appeal concluded that the Commissioner of the RCMP was a "member" whose conduct could be investigated by the Commission and the total independence of the Commission vis-à-vis the Force and vis-à-vis the Commissioner ensured that the decision of the Commislsion to file a complaint against and/or to investigate the conduct of the RCMP Commissioner, the investigation of such complaint by the Commission and the findings and recommendations of the Commission with respect to such complaint, can be made, conducted and arrived at without any interference from the Force or from the Commissioner and without interfering with the Commissioner's ultimate authority over the control and management of the Force.

greater measure of certainty as to when their actions will be subject to the technical chain of command or public oversight.[92]

> **(60) I recommend that the definition of "policing duties or functions", both in relation to the military police and the Canadian Forces Provost Marshal when he or she is investigating a conduct complaint, be clarified.**

3. Military Police Complaints Commission

The MPCC was established pursuant to Bill C-25 in response to recommendations of the First Dickson Report and the Somalia Report. Both reports highlighted the perceived conflict of interest to which military police are subject given that they are soldiers first, peace officers second. Due to this dual role, both reports noted the existence of a potential vulnerability to the influence of the chain of command that military police may feel when fulfilling policing duties in their unit. As explained in the Somalia Report:

> Military Police are part of the chain of command. They take orders from their commanding officers about which incidents to investigate, and their chances for promotion are affected by their commanding officer's assessment of them. This makes it difficult for MP to treat their superiors as ordinary witnesses or suspects.[93]

Support has been given to the military police through the creation of the MPCC, a quasi-judicial civilian oversight body and operating independently of the Department of National Defence and the Canadian Forces. The MPCC was established to make the handling of complaints involving the military police more transparent and accessible, to discourage interference with military police investigations, and to ensure that both complainants and members of the military police are dealt with impartially and fairly.

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[92] See also the MPCC Chairperson's Final Report following a Public Interest Investigation With Respect to the Complaints of Lieutenant-Colonel Tony Battista and Major G. Wright at page 30: Lieutenant-Colonel Battista took issue with the current wording, interpretation and application of the *Military Police Professional Code of Conduct*. Although a strong proponent of a professional code for the Military Police as it pertains to clearly defined policing functions and duties, Lieutenant-Colonel Battista suggested that the current *Military Police Professional Code of Conduct* was being interpreted by the deputy Provost Marshal, Professional Standards, as applying to events not related to policing duties and functions.

[93] Somalia Report at 1271.

The 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.[94]

I cannot emphasize enough the importance of independent oversight of the military police. Oversight is essential to promote confidence in the investigative process and to ensure that both complainants and members of the military police are dealt with impartially and fairly. That being said, it must be remembered that the MPCC was born in the shadow of the Somalia affair. The Canadian Forces, which had been legislatively disregarded for many years, were suddenly the focus of the most substantial series of amendments to the *NDA* in 50 years. Predicting the future workload of the MPCC would have been a difficult task, due to its unique jurisdiction to deal with interference complaints and the fact that there had been no military police professional code of conduct before the amendments made by Bill C-25. Prior to the *Military Police Professional Code of Conduct* and the professional standards review process, "conduct" complaints were dealt with by the chain of command and statistics were therefore difficult to obtain for the purposes of creating a "business plan" for the MPCC. Now, some three years later, it is time to review the legislative framework governing the oversight body as well as to look at the type and number of complaints received in order to make recommendations to correct any deficiencies that may have come to light, if any, as the theory of an independent oversight has been put into practice.

(a) Administrative Framework

Caseload

The MPCC currently employs 1 full-time Member, 3 part-time Members, 23 full-time employees, and 1 part-time employee. Statistics provided by the MPCC show that the average time for completion of a conduct complaint review file is 15 months, an interference complaint review file is 11 months, and hearings/investigations conducted in the public interest take on average 10 months to complete. The MPCC has a duty to work expeditiously as stipulated in the *NDA*.

[94] First Dickson Report at 5.

Statistics for the MPCC[95]

YEAR	2000	2001	2002	TOTAL
Number of Employees	12 F/T 1 P/T	19 F/T 2 P/T	25 F/T 2 P/T	
Conduct Complaints	55	64	65	**184**
Requests for Review	2	13	6	**21**
Investigation in the Public Interest	1	2	0	**3**
Interference Complaint	1	1	2	**4**
Request to Withdraw Complaint	2	1	0	**3**
Total Complaints Actioned	61	81	73	**215**
Budget	3.66M	4.1M	4.34M	**12.1M**

As can be seen from the above chart, the MPCC has investigated very few complaints over the past three years. It has investigated a total of only four interference complaints and 184 conduct complaints. It should be noted that with respect to conduct complaints, the Provost Marshal has the primary role in investigation of the complaint. The role of the MPCC is limited to requests for review of the handling of a conduct complaint by the Provost Marshal, although the MPCC may conduct investigations in the public interest (for both conduct and interference complaints). As the chart demonstrates, there have been only 21 requests for review and 3 investigations in the public interest. Subject to an exhaustive internal audit, which might well support different conclusions, it appears that there is a need to reconsider the financial and personnel resources earmarked for the MPCC considering its caseload over the past three years. I must emphasize once again the important oversight function fulfilled by the MPCC, and underscore my conviction that any efficiencies that may be realized from an audit of the organization must not work to the detriment of the role Parliament intended for the MPCC.

(61) I recommend that an audit of the Military Police Complaints Commission be conducted and a business

[95] Employee statistics were provided by the MPCC Human Resources department. All other statistics are based on the MPCC Annual Reports.

plan produced detailing the requisite number of employees and financial commitment required to ensure the Military Police Complaints Commission caseload can be more effectively managed.

(b) Legislative Framework

Effective Independent Oversight

The relationship between the Provost Marshal and the MPCC is necessarily one of tension. The key to the success of the independent oversight provisions, however, is ensuring that the tension between the two bodies remains a positive one. The two bodies must be able to work together to create an effective independent oversight organization that will lend protection to both complainants and military police alike. During my Review, I have been concerned that the focus of the two organizations may have shifted somewhat to one of protectionism as opposed to cooperation. It is my belief that this is in part a function of the growing pains to be expected when any new organization is created and in part an attempt at understanding whether the legislation itself provides a broad enough protection to complainants and military police to be effective. See, for example, the statistics noted above. Are they a realistic reflection of the total number of complaints that might be made, or are the numbers on the lower end due to faults in the provisions and operation of the legislative framework?

The suggestion has been made that the MPCC Chairperson should be given the power to initiate conduct and interference complaints independently. In considering this suggestion, I must refer again to the above-noted comments on the requirement for cooperation between the Provost Marshal and the MPCC. It is in keeping with the goal of independent oversight that the MPCC Chairperson have the authority to initiate an independent conduct complaint, but I must caution that this authority must be used judiciously. The Chairperson must be satisfied that there are reasonable and probable grounds to justify requesting the Provost Marshal to conduct a conduct investigation. This conclusion has been based in part on the broad wording of the provision as it stands now – "any person" may make a conduct complaint, whether or not the complainant is personally affected by the subject-matter of the complaint.[96] Note also that the RCMP Public Complaints Commission Chairman may initiate a complaint, therefore this authority is in keeping with other public oversight bodies. However, I believe that only military police who conduct or supervise a military police investigation should be able to request that the MPCC conduct an interference investigation.

[96] Indeed, this provision as it stands may grant the MPCC Chairperson the right to initiate a complaint without an amendment to the legislation however, since there has been some confusion, clarification may be in order.

(62) I recommend that the *National Defence Act* be amended to allow the Chairperson of the Military Police Complaints Commission to submit a conduct complaint for investigation by the Canadian Forces Provost Marshal where the Military Police Complaints Commission Chairperson is satisfied that there are reasonable and probable grounds for such an investigation.

Protection of Canadian Forces members

It has been suggested that the operation of the oversight provisions of Part IV of the *NDA* would be strengthened by adding a provision that no officer or non-commissioned member of the Canadian Forces will be penalized or suffer recrimination for bringing such a complaint. While there is a similar provision currently in the *Military Police Professional Code of Conduct*, it is felt that the provision belongs more appropriately in the legislation. Such provision would be similar to the provision found in section 29(4) of the *NDA* pertaining to grievances.

(63) I recommend that the *National Defence Act* be amended to explicitly state that an officer or non-commissioned member of the Canadian Forces who brings a complaint in good faith to the Military Police Complaints Commission will not be penalized for bringing such complaint.

Framework for Determining Public Oversight

Communication between the Provost Marshal and the MPCC is essential for the effective implementation of the Bill C-25 oversight provisions. Consider the legislated reporting relationship between the Provost Marshal and the MPCC as regards conduct complaints. A conduct complaint may be made, either orally or in writing, to the Chairperson of the MPCC, the JAG, or the Provost Marshal. A conduct complaint may also be made to any member of the military police. Once a complaint is received, the person who receives it shall ensure that notice of the complaint is sent as soon as practicable to the Chairperson and the Provost Marshal. Records obtained from the office of the Provost Marshal indicate differing numbers of conduct complaints received in the past three years than those recorded in the annual reports of the MPCC. This difference in numbers could be traced back to one of two causes: both offices might not report receipt of the same complaint in the same calendar year or there may be confusion as to whether the conduct in question falls within the oversight of the MPCC or remains solely with the office of the Provost Marshal. Either way, as noted earlier it would be helpful for the legislation to require that the Provost Marshal produce an annual report including numbers

detailing the number of complaints received, their classification and ultimate disposition.

Many breaches of administrative policy are deemed to be offences under the *Code of Service Discipline* by virtue of section 129 of the *NDA* and therefore a strict division between complaints that trigger independent oversight and those that do not would be impossible. Therefore, I feel that a framework for designation could be drafted by the Provost Marshal which would articulate those complaints that are most definitely breaches of an administrative nature, and allow for the establishment of criteria to be applied to conduct complaints which would assist in the designation of a complaint as one being subject to independent oversight.[97]

> **(64) I recommend that the Canadian Forces Provost Marshal draft a framework that would set out the criteria to be applied by the Canadian Forces Provost Marshal to conduct complaints in order to determine whether or not the conduct complained of triggers the jurisdiction of the Military Police Complaints Commission.**

Confidential Minutes of Settlement

Legislative guidance is required to clarify the obligation to conduct investigations with transparency and according to legislated reporting requirements. For example, it has been suggested that the Provost Marshal is obliged to provide the MPCC with the minutes of settlement agreed to by parties to the informal resolution process. Disclosure of the minutes of settlement to an informal resolution risks the success of the informal resolution process. Indeed, this is why subsection 250.27(3) of the *NDA* provides that no answer given or statement made by the complainant or the person who is the subject of the complaint in the course of attempting to resolve a complaint informally may be used in any disciplinary, criminal, civil or administrative proceeding.[98] If parties to a settlement agree to the settlement in confidence, the details need not be released to the oversight body. There is a review process provided for in the legislation should a party to an informal resolution desire one. It is a very real possibility that parties to an informal resolution would be reluctant to engage in the process wholeheartedly if they felt their agreement may be subject to scrutiny by a third party. This would also deny

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[97] See, for example, the case of Lieutenant-Colonel Battista and Finding #16 made by the MPCC Chairperson requesting greater clarification of the difference between breaches of administrative policy and statutory or criminal offences.

[98] Other than a hearing or proceeding in respect of an allegation that, with intent to mislead, the complainant or the person who is the subject of the complaint gave an answer or made a statement knowing it to be false.

participants a true sense of empowerment with respect to the process, which is one of the main goals of any informal resolution process.

> **(65) I recommend that the *National Defence Act* be amended to clarify that the obligation of the Canadian Forces Provost Marshal to notify the Chairperson of the Military Police Complaints Commission of the informal resolution of a conduct complaint does not require the disclosure of confidential minutes of settlement.**

Limitation periods

For complainants and military police alike, a sense of closure is important to maintain the effectiveness and integrity of the complaints system. As such, the Provost Marshal should be required to resolve a conduct complaint within a year. Once a conduct complaint has been successfully resolved by the Provost Marshal, any request for review by the complainant or the member of the military police whose conduct was the subject of the complaint should be made within a limited period. I would suggest that 60 days is reasonable, except in cases where there is a compelling case for review in the public interest. If a review is not requested within the 60 day period, the case should be deemed close.

> **(66) I recommend that the *National Defence Act* be amended to require the Canadian Forces Provost Marshal to resolve a conduct complaint within a year. Once a conduct complaint has been resolved by the Canadian Forces Provost Marshal, the complainant or the member of the military police whose conduct was the subject of the complaint would have 60 days within which to request a review, except in cases where there is a compelling case for a review in the public interest. If a review is not requested within the 60 day period, the case would be deemed closed.**

Definition of "Record"

The provision of Bill C-25 requiring the Provost Marshal to establish and maintain a record of all conduct complaints received and to make available to the MPCC information contained in that record should also be clarified in order to ensure the confidentiality of files and respect for the jurisdiction granted to the Provost Marshal to handle conduct complaints in the first instance. The record of complaints need not include the entire investigation file. It is meant only to include a record of the manner in which a complaint was handled, all letters required under

the statute and a summary of the findings, recommendations and/or corrective or remedial action to be undertaken as a result of the investigation.

> **(67) I recommend that the *Queen's Regulations and Orders* be amended to clarify the definition of "record" as it is referred to in section 250.25 of the *National Defence Act*, to include only a record of the manner in which a complaint was handled, all letters required under the statute and a summary of the findings, recommendations and/or corrective or remedial action to be undertaken as a result of the investigation.**

Conduct Complaints Against the Provost Marshal

Legislative direction would also assist in settling a separate but related problem. As noted earlier, the Provost Marshal is responsible for dealing with conduct complaints in the first instance. However, the CBA Submission pointed out that the provision as written is problematic. The provision provides that when the complaint is about the Provost Marshal, the CDS is responsible for dealing with the complaint, however the situation in which a complaint is not directly about the Provost Marshal's conduct, but the Provost Marshal is implicated or involved in the matter is not provided for. This may happen, for example, where the Provost Marshal issued orders which led to the conduct complained of. In addition to a clarification of "policing duties or functions", the legislation should provide that where the Provost Marshal is implicated or directly involved in the matter, the CDS should deal with the complaint.

> **(68) I recommend that the *National Defence Act* be amended to provide that the Chief of Defence Staff is responsible for dealing with a conduct complaint where the Canadian Forces Provost Marshal is implicated or involved in the impugned conduct.**

(c) Additional Recommendations

Please find following a list of additional recommendations that require no explanation, and are designed to clean up some of the apparent legislative deficiencies that have surfaced during the course of my review.

> **(69) I recommend that Part IV of the *National Defence Act* ("Complaints by or about the Military Police") be reviewed to correct inconsistencies between the French and the English language versions of the text.**

(70) I recommend that the *National Defence Act* be amended to provide authority to members of the Military Police Complaints Commission whose terms have expired to complete their caseloads.

(71) I recommend that the *National Defence Act* be amended to provide that persons seconded to or working for the military police are deemed to be military police for the purposes of Part IV of the *National Defence Act*.

VIII – CANADIAN FORCES GRIEVANCE PROCESS

1. Overview

During the course of my review of the operation of Bill C-25, it became increasingly clear to me that the Canadian Forces grievance process is not working properly. This conclusion is the result of an examination of the grievance process and its performance triggered by many complaints made to me by CF members at the bases that I visited and in the submissions made to me. While the introduction of the Grievance Board has increased the perception of an impartial grievance process, the lengthy period between the initiation of a grievance and a decision by the final authority, the CDS, gives cause for serious concern. Grievances still caught in the grievance process after ten and even twelve years are not unheard of, and those of two or more years at the level of the CDS seem to be the norm. Further, many grievors complained to me that they were not advised as to the reasons for delays or where their grievances were at in the grievance process.[99] As a result of these problems, many members of the Canadian Forces have lost confidence in the grievance process.

Soldiers are not second class citizens. They are entitled to be treated with respect, and in the case of the grievance process, in a procedurally fair manner. This is a fundamental principle that must not be lost in a bureaucratic process, even a military one. Grievances involve matters such as benefits, personnel evaluation reports, postings, release from the Canadian Forces, medical issues and harassment – all matters affecting the rights, privileges and other interests of CF members. From the grievor's point of view, pursuing a grievance takes time, often costs money, and in many cases is very stressful. Further, unlike in other organizations, grievors do not have unions or employee associations through which to pursue their grievances, nor do grievors generally have recourse to the Federal Court or to the Ombudsman while a redress of grievance is within the grievance process. It is essential to the morale of CF members that their grievances be addressed in a fair, transparent, and prompt manner.

Although a new grievance process was introduced by Bill C-25, the redress of grievances is not part of Canada's military justice system. While grievances must be treated fairly and with administrative justice, grievances should be seen as a human resource issue as they involve matters that affect the morale, well-being and quality of life of Canadian Forces members. Unlike military justice, which is by its very

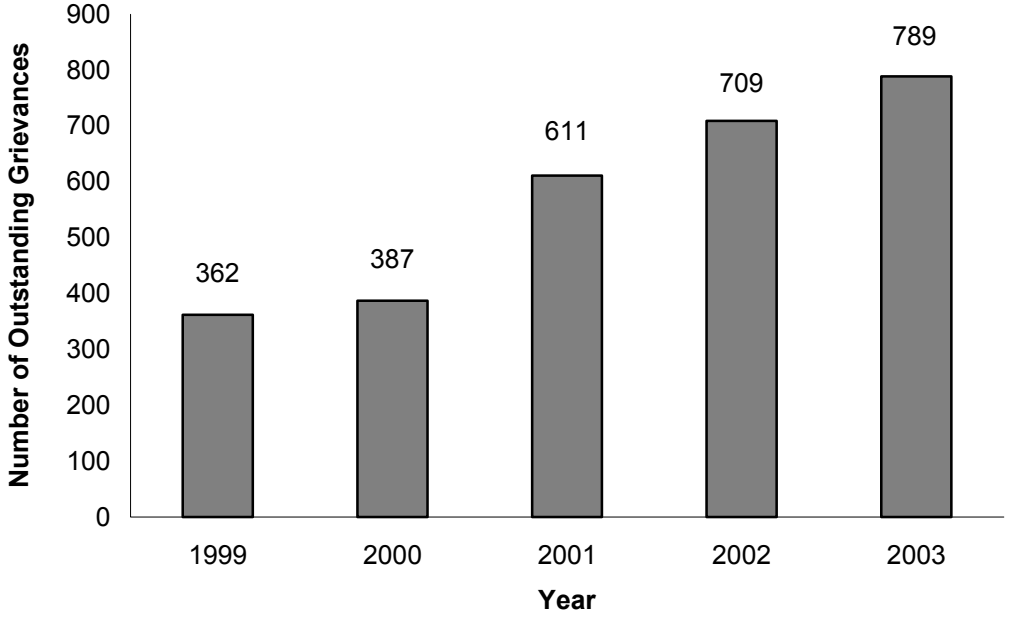
[99] I have been advised that recently a toll-free number was recently set up to allow grievors to find out the status of their grievance at the CDS level by calling 1-866-GRIEVOR. Grievors may find out the status of a grievance with the Grievance Board by calling 1-877-276-4193.

nature adversarial, the grievance process should be approached by the grievor, the Canadian Forces, including the CDS and the Canadian Forces Grievance Authority ("CFGA"), as well as the Grievance Board in a cooperative manner. Effectively responding to grievances is critical to maintaining a high morale among Canadian Forces members.

One of the main problems in the grievance process, and one that will likely surprise most Canadians, is that the person saddled with the huge responsibility for the running of our armed forces is required by law to *personally* decide approximately half of the grievances that arrive at the second and final level in the grievance process. The CDS himself must decide all grievances that are required to be first evaluated by the Grievance Board. As will be discussed, 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.

It should be made clear at the outset that my comments do not reflect on the performance of those currently involved in the grievance process. All those involved in the grievance process in place after Bill C-25 inherited a large backlog of grievances. These grievances are in addition to the new grievances that the CDS, the CFGA and the Grievance Board receive daily. Because they have been unable to finish reviewing grievances from the former system, and continue to receive new grievances, the number of unresolved grievances in the system is growing exponentially. As can be seen in Chart 1, in 1999 there were 362 unresolved grievances at the CDS level. This number has grown every year, resulting in a backlog of 789 grievances as of July 14, 2003.

Chart 1
Grievance Backlog Growth Acceleration (estimated)



Reducing delays relating to the redress of grievances was one of the major reasons behind the new grievance process established by Bill C-25. The other main reasons were to create a more impartial process by removing the Minister from the process, to introduce an independent grievance board, and to increase overall transparency in the review of grievances.

Prior to the reforms made by Bill C-25, a CF member making an application for redress of a grievance could have his/her application reviewed by multiple levels of authority within the chain of command, each of whom could alter the finding, before the application reached the Minister of National Defence.[100]

The Honourable Douglas Young, in his March 1997 report to the Prime Minister on the Leadership and Management of the Canadian Forces, indicated that he did not feel that having the Minister of National Defence as final arbiter in the grievance process was appropriate.[101] He also felt that the process was too slow and lacking in transparency. As a result, he recommended the establishment of an

[100] The different levels included the commanding officer, the formation commander, the officer commanding the command and the CDS.

[101] The Somalia Report at recommendation 40.34 stated that it was not appropriate or necessary for the Minister to perform the quasi-judicial function of final arbiter of grievances. The Second Dickson Report at recommendation 15 recommended repealing the role of the Minister to adjudicate on grievances arising from summary trial findings.

independent review board to be the final arbiter in the grievance process and the introduction of streamlined grievance procedures.

Bill C-25, including the regulations relating to the grievance process, implemented many of the suggestions made in the Report by Minister Young.[102] It removed the Minister as the final authority in respect of grievances, introduced an independent grievance board, and established a new streamlined grievance process. Bill C-25 also clarified the circumstances when the grievance process is available.[103]

The new grievance process provides for two levels of authority. The first level is the initial authority, with the grievor's commanding officer acting as the initial authority if he/she can grant the redress sought. Otherwise it is the commanding officer's next superior officer or the officer holding the appointment of Director General or above at National Defence Headquarters.[104] If the grievor is dissatisfied with the decision by the initial authority or if the grievance is not resolved within 60 days and the grievor refuses to grant the initial authority an extension, the grievance may be referred to the second and final level, that of the CDS.

Once a grievance reaches the CDS level, the CFGA makes a determination as to whether the grievance must first be referred to the Grievance Board for findings and recommendations before it is adjudicated by the CDS.

The CDS must refer to the Grievance Board any grievance relating to:

i. administrative action resulting in the forfeiture of, or deductions from, pay and allowances, reversion to a lower rank or release from the Canadian Forces;

ii. the application or interpretation of Canadian Forces policies relating to expression of personal opinions, political activities and candidature for office, civil employment, conflict of interest and post-employment compliance measures, harassment or racist conduct;

iii. pay, allowances and other financial benefits; and

iv. the entitlement to medical care or dental treatment.[105]

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[102] See Chapter 7 of the *QR&O*.
[103] There is no right to grieve in respect of a decision of a court martial or the Court Martial Appeal Court; a decision of a board, commission, court or tribunal established other than under this Act; a matter or case prescribed in regulations by the Governor in Council; or a decision made under the *Code of Service Discipline*.
[104] Officers may not act as initial authority if they rendered a decision being grieved or if they are in any other way the subject of a grievance. Where such a conflict exists, the grievance is referred to the next superior officer in the chain of command.
[105] See *QR&O*, Article 7.12(1).

Additionally, the CDS must refer every grievance concerning a decision or an act of the CDS in respect of a particular officer or non-commissioned member.[106]

The Grievance Board conducts a review of the grievances that were referred to it and provides findings and recommendations in writing to the CDS and the grievor, after which, the role of the Grievance Board ends. The CDS must then personally decide whether to deny or uphold the findings and recommendations made in respect of a grievance that the CDS was required to refer to the Grievance Board.[107] While the CDS is not bound by any finding or recommendation of the Grievance Board, if he does not act on a finding or recommendation of the Grievance Board, he must provide his reasons for not having done so.

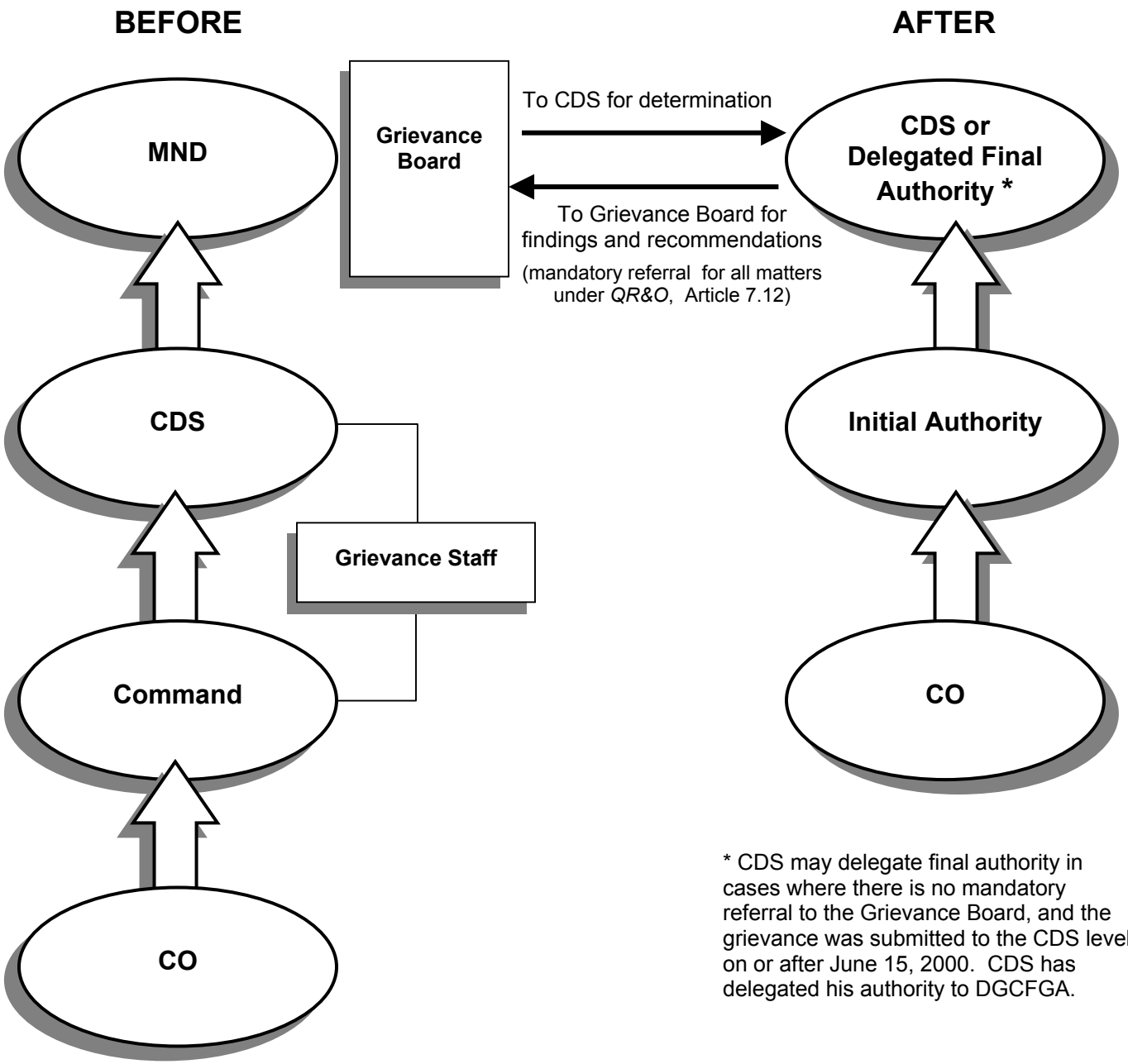
For all other grievances that reach the CDS level and which the CDS is not required to send to the Grievance Board, the CDS may delegate his power to decide the grievance. The CDS has delegated this role to the Director General of the CFGA (hereinafter the "DGCFGA"). The exception to the ability of the CDS to delegate is that the CDS must personally determine grievances that were submitted to the CDS prior to June 15, 2000 but which were not determined as of that date.[108] There were 18 such grievances remaining as of July 14, 2003.

Chart 2 shows the Canadian Forces grievance process before Bill C-25 and the current grievance process.

[106] See *QR&O*, Article 7.12(2).
[107] 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. Therefore, for cases that the CDS chooses to refer a grievance to the Grievance Board, although not required to, he may delegate his duty to act as final authority.
[108] See *QR&O*, Article 7.18(3).

Chart 2

Canadian Forces Grievance Process before and after Bill C-25



2. Positive Developments

The removal of the Minister and the establishment of an independent grievance board staffed by civilians has been a positive development as it has increased the perception of impartiality in the review of grievances.[109] The Grievance Board is to be commended for establishing in a relatively short time frame a grievance review process that is recognized as providing well-reasoned and thorough findings and recommendations. The fact that the CDS has thus far agreed with the Grievance Board in the great majority of grievances that the CDS has adjudicated appears to refute the argument put forward by some in the House of Commons debate on Bill C-25 that new bodies such as the Grievance Board would "have no teeth" because the CDS can ignore their recommendations.[110] As of January 1, 2003, the CDS had agreed with the Grievance Board's findings and recommendations in all but one of the 90 cases that he has reviewed.[111] However, because the CDS has yet to adjudicate close to 200 grievances for which findings and recommendations were provided to him by the Grievance Board, it remains to be seen whether this trend will continue.

Furthermore, the recent changes to the grievance process, including the establishment of the CFGA on January 1, 2003, are positive developments which demonstrate that the Canadian Forces recognises that the grievance process must be improved.[112] While it is far too early to evaluate whether the CFGA's new "national" approach to grievances will be more effective than the previous system, some of the proposals, including establishing a database that registers and tracks grievances, introducing alternative dispute resolution, and focussing on the early resolution of grievances, seem to be sensible reforms.

Finally, the resolution by the Minister by January 2003 of all but one grievance from the former grievance system that remained the responsibility of the Minister to adjudicate is a positive step towards eliminating the backlog of grievances dating from prior to Bill C-25.

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[109] Although I note that some parties hold the view that in extraordinary cases, the Minister should be involved. The Report of the Subcommittee on Veteran Affairs of the Standing Senate Committee on National Security and Defence, "Fixing the Canadian Forces' Method of Dealing with Death and Dismemberment" (April 2003) stated at page 22: "A few cases, including that of Major Henwood, can most appropriately be settled at the ministerial level. This fact should be reflected in the reasons given for the recommendations and the CDS should lay the grievance before the Minister without further delay."

[110] See comments made by Mr. David Price (Compton-Stanstead, PC) during the Presentation of the report of the Standing Committee on National Defence and Veterans Affairs, Wednesday, June 10, 1998 at 1630.

[111] According to the Grievance Board, more than 30% of the Grievance Board's findings have been favourable to the grievor.

[112] Although I do not agree that the CFGA should be under the control of JAG. This issue will be dealt with later in this chapter.

3. Outstanding Issues

Unfortunately, as indicated above, there remain major problems with the grievance process. In particular, the grievance process continues to suffer from unacceptable delays, it is overly bureaucratic and continues to lack transparency.

(a) Unacceptable Delays

During my review, I received many comments regarding the length of time that it takes for a grievance to proceed through the Canadian Forces grievance process. For example, in one high profile case, that of Major Bruce Henwood, resolution of a grievance relating to the loss of his legs to a land mine in Croatia was initiated more than six years ago with no decision received from the CDS as of the date of the writing of this report.[113] Even in less complicated cases, we were advised that the grievance process is taking many years. While there have been some complaints that initial authorities are not meeting their 60 day deadline and thus extensions are requested, the lengthy delays are at the CDS level, with the Grievance Board, the CDS and the CFGA. Of particular concern is that the large number of grievances that have not yet been resolved, including those from the former grievance process, have created a backlog of grievances that is growing substantially every year (see Chart 1).

In the following section, I attempt to provide clarity as to how and where the backlog has developed. It should be noted that the numbers that I have used are estimates based on information from various sources. The CFGA database is still in the final stage of development and their numbers have a 5% margin of error.

Overall Backlog of grievances at CDS level

As mentioned previously, the total number of grievances unresolved and awaiting adjudication at the CDS level as of July 14, 2003 is 789.[114] As Chart 3 below indicates, at the end of 1999, a backlog of approximately 362 grievances existed. Due to the inability of the grievance process to cope with the influx of grievances at the CDS level, each year there has been a balance of unresolved grievances that was

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[113] The Minister did intervene in this case, with the result that Bill C-44, *An Act to compensate military members injured during service*, was passed on June 20, 2003. The new act will provide for the payment of a lump-sum benefit for a service-related injury incurred on or after 1 October 1972 and before 13 February 2003, thus rectifying what was a disparity in the benefits provided to Canadian Forces personnel based on rank. However, Mr. Henwood alleges that notwithstanding the efforts of the Minister, to his knowledge his grievance is still outstanding, with no final decision having yet been made by the CDS.

[114] Grievances at the CDS level are awaiting adjudication by CFGA, Grievance Board, CDS and the Minister. It should be noted that there are also approximately 30 grievances that are not currently under review with an adjudicative authority because they have been suspended or are being dealt with under alternative dispute resolution.

added to the previous year's backlog. Eventually this grew to the 789 grievances that remain outstanding as of July 14, 2003.

Chart 3

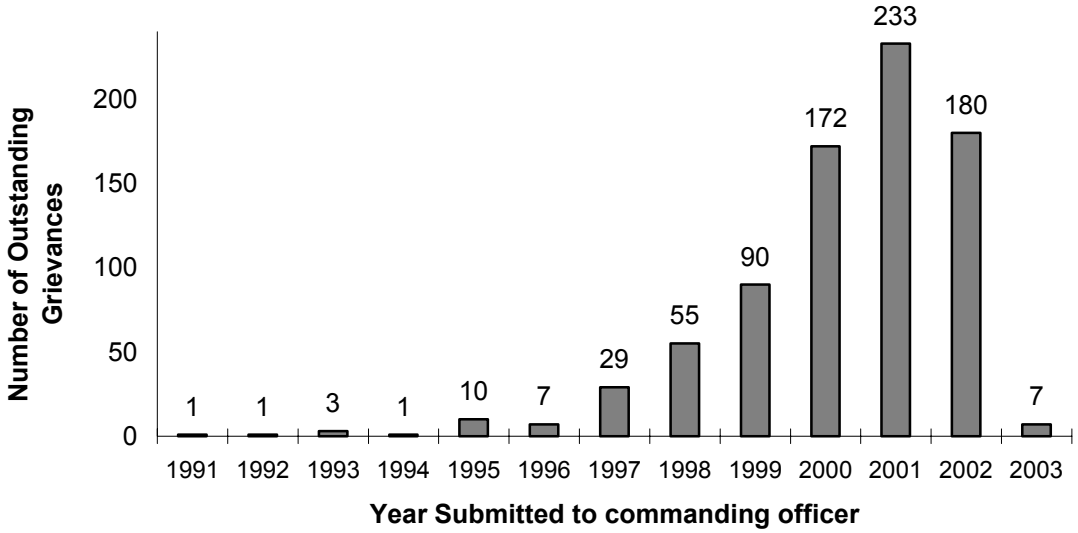
New Grievances Received/Resolved at CDS level by year

YEAR	RECEIVED	RESOLVED	BALANCE
1999	–	–	362 (Backlog)
2000	110	85	25
2001	340	116	224
2002	247	149	98
2003[115]	135	55	80
		Balance	**789**

While the backlog in itself is a problem, the fact that many of the 789 grievances were submitted to a commanding officer many years ago gives serious cause for concern. Chart 4 demonstrates the number of grievances awaiting adjudication by the year they were submitted to their commanding officer. There are currently almost 200 unresolved grievances dating from 1999 and before, with over 50 that date from five years ago, of which five are at least ten years old.

[115] Grievances received and resolved as at July 14, 2003.

Chart 4 - Backlog of Grievances by Year Submitted to Commanding Officer



The JAG has acknowledged that the system is not functioning well. The JAG's Business Plan for 2003 and 2004, states that:

> The Grievance Process has not been working as a national process. DCFGA (the predecessor to the CFGA) is not organized, established or staffed to manage a full life cycle process. There is a growing backlog of approximately 500 files. The appointment of a full time adjudicator to relieve CDS workload pressures has not yet taken place. DCFGA has insufficient analysts and most analysts lack critical skill sets for grievance work. The grievance system is designed to provide administrative justice. DCFGA's analyst team must be an interdisciplinary one, well versed in law, policy and equity, and capable of independent case analysis and the preparation of written decisions with supporting reasons.[116]

In the Business Plan, the JAG explains the actions that have been taken to address these problems. The DCFGA, renamed the CFGA, has been reorganized under the JAG, additional professional and support staff have been hired, together with temporary analysts to deal with the backlog. In addition, a registration and tracking system linked to a comprehensive database and strengthened information technology has been created.

[116] *JAG Business Plan for Fiscal Year 2003/2004,* (31 March 2003), at 22.

Grievances to the Grievance Board and the CDS

In order to understand the delay at the CDS level, it is necessary to break down grievances into those that must go to the Grievance Board before being decided by the CDS and those that need not. Clearly, grievances that do not have to be reviewed by the Grievance Board are being decided too slowly. The measures referred to in the JAG Business Plan have been put in place to speed up the process, including the appointment of the DGCFGA who is able to adjudicate these grievances as a delegate of the CDS.

There are also significant delays for grievances that must be sent to the Grievance Board and then to the CDS for his personal adjudication. As will be discussed below, these delays can be attributed to both the Grievance Board and the CDS.

While the Grievance Board has increased the number of grievances for which it is able to provide findings and recommendations to the CDS every year, it still faces a growing backlog. Compounding the problem is that the CDS is understandably unable to adjudicate all of the grievances he receives each year from the Grievance Board. The result is that very few of the grievances that are required to be reviewed by the Grievance Board are resolved.

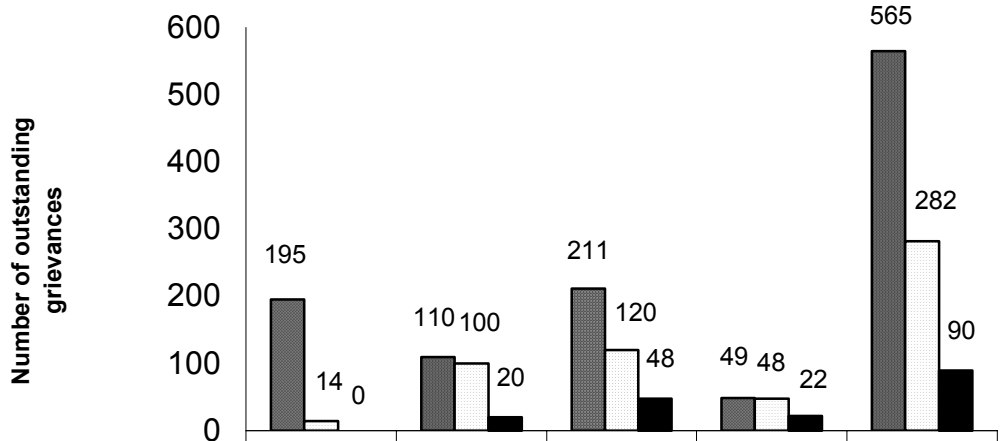
Chart 5 shows the number of grievances that the Grievance Board has received, the number of grievances for which the Grievance Board has provided findings and recommendations to the CDS, and the number of these grievances that the CDS has adjudicated. As this Chart demonstrates, the Grievance Board has been steadily increasing the number of grievances that it is able to review in a year from 14 in 2000, to 100 in 2001, to 120 in 2002, and 48 in 2003 (as of July 24, 2003), for a total of 282 out of the 565 grievances that it has received. Nevertheless, in each of these years, the Grievance Board has had a balance of grievances that it has been unable to finish reviewing. The result is that the number of unresolved grievances with the Grievance Board has grown to 283 as of July 24, 2003.

As Chart 5 also demonstrates, of the 282 grievances with findings and recommendations that the Grievance Board has sent to the CDS, the CDS has rendered decisions with respect to only 90. Therefore, the CDS has 192 grievances currently outstanding that he must personally adjudicate and, as of July 24, 2003, the CDS can expect a further 283 grievances from the Grievance Board for his adjudication.[117] It is quite clear that not only will the CDS never catch up, the

[117] These numbers are based on numbers received from the Grievance Board and differ slightly from those of the CFGA. According to the DGCFGA, the differences can be attributed to files having being subdivided by the Grievance Board and because certain files are in transit. The outstanding grievances with the CDS do not include the 18 grievances that must be adjudicated personally by the CDS (with no possibility of delegation)

number of outstanding grievances will continue to grow rapidly, unless fundamental changes are made to the grievance process.

Chart 5 - Grievances sent to CFGB



	2000	2001	2002	2003	Total
Received at CFGB	195	110	211	49	565
Sent to CDS	14	100	120	48	282
Received CDS Decision	0	20	48	22	90

According to statistics from the Grievance Board, the time taken by the CDS to provide his final decision on Grievance Board findings and recommendations is over 200 calendar days, more than nine months if one excludes weekends and vacation days. Note that this is just for the cases that the CDS has actually decided: the period would increase dramatically if one included the 192 grievances that the CDS has received from the Grievance Board but has not yet decided.

Reasons for delays

Grievance Board

There appear to be many factors that have affected the Grievance Board's ability to cope with the number of grievances that it receives every year. First, it is still a relatively young organisation. When it was established three years ago, it immediately received a large number of old grievances. Therefore, in addition to

because the grievance was submitted to the CDS prior to 15 June 2000.

putting into place an infrastructure, recruiting staff, and establishing policies and procedures, it was faced with a backlog of grievances.

Second, according to the Grievance Board, for budgetary reasons it has been able to fill only 7 of the 13 analyst positions that it requires to review grievances in a timely fashion. If it were able to fill these positions, it would be in a better position to deal with the influx of grievances that it receives each year.

Third, the Grievance Board continues to receive grievances dating from the grievance process in place prior to Bill C-25, including a grievance dating from 1991 which it received early this year. The Grievance Board has indicated in its 2002 Annual Report that:

> [I]t cannot predict if and when more of these (grievances from the former system) will come. Still having to work on grievances that were filed during the time that the former review system was in place delays the Board from working on more current grievances.

Other factors that affect the Grievance Board's review of grievances include the number of complex cases raising several issues, the magnitude of the documentation provided by the parties, the need for reasonable time for parties to provide relevant information, and the age of a grievance.[118]

CDS

It seems quite clear that the reason for the delay in the review of grievances by the CDS can be attributed primarily to the fact that the CDS is extremely busy. He is the top military officer in the country and has primary and ultimate responsibility for command, control and administration of the Canadian Forces and military strategy, plans, and requirements. Expecting the CDS to devote his time to catching up on grievances from the Grievance Board, in addition to defending Canada and meeting Canada's international commitments as regards Canada's contributions to international peace and security, makes no sense.

Solutions:

(i) Allow CDS to delegate

It seems quite clear that having the CDS personally decide all of the grievances that must be reviewed by the Grievance Board is unrealistic. Taking into account the duties of the CDS described above, it is clear the CDS must be allowed

[118] See the *Canadian Forces Grievance Board Annual Report* (2002) at 11.

to delegate his role as final adjudicator in all but the cases that have far-reaching implications for the Canadian Forces.

While I was unable to obtain a definitive answer as to the reason for having the CDS review all grievances that must be reviewed by the Grievance Board, one could surmise that it was to ensure that they receive serious attention at the highest level. In keeping with this rationale, and while recognizing the impossibility of having the CDS personally review all grievances that must be reviewed by the Grievance Board, I believe that it is appropriate that the CDS be entitled to delegate his authority to act as the final authority for all grievances, including those that must go to the Grievance Board and those at the CDS level from June 15, 2000 and before, to a senior officer who is under his direct command and control. The CDS should not have to review all grievances in order to see which ones he should personally adjudicate, as this process would defeat the goal of reducing the grievance-related workload of the CDS. However, the CDS will want to establish guidelines regarding the grievances that would be required to be submitted to him by this senior officer for his personal adjudication because, for example, the resolution of the grievance would have policy implications, affect the capacity of the Canadian Forces, or have significant financial implications. It is of vital importance that the CDS retain *full control of the Canadian Forces.*

I note that currently the DGCFGA has been authorized by the CDS to act as the final authority in the grievance process for those grievances that are not referred to the Grievance Board. However, while the DGCFGA is under the control of the CDS, the DGCFGA is under the command of JAG. As expressed above, I think as the CDS is the final arbiter of grievances, it is only appropriate that his delegate, the Director General of the CFGA or some other person to whom he may wish to delegate, be under his direct command and control.

The creation of the DGCFGA under JAG is also not appropriate because it creates the appearance of a conflict of interest. Currently the JAG is tasked with giving legal advice to the chain of command. Having a JAG officer make the final decision as to whether or not a grievance is well-founded creates a perception of a lack of independence – i.e., that the interests of the Canadian Forces will trump those of a grievor. Having had a professional relationship with the JAG, I personally know him to be capable of maintaining the necessary objectivity. However, a successor may not be able to be objective. Further, concerns about the role of JAG in the grievance process have been expressed to me by many with whom I have spoken, including The Royal Canadian Legion.[119] Further, having the DGCFGA under the command of JAG seems to represent the view that grievances relate to the

[119] The Submission made to me by the Royal Canadian Legion regarding the grievance process states at paragraph 49: "Placing DGCFGA under JAG increases at least the perception JAG has a greatly increased role in the grievance process and increases the perception of systemic bias."

JAG's role as superintendant of the military justice system and that grievances involve military justice. As I stated previously, grievances should not be viewed as a matter relating to military justice so much as human resource and personnel matters.

> **(72) I recommend that the Chief of Defence Staff be given the authority to delegate to any officer under his direct command and control, any of the powers, duties or functions of the Chief of Defence Staff as final authority in the grievance process, including the duty to act as final authority in respect of a grievance that must be referred to the Canadian Forces Grievance Board and a grievance dating from the Canadian Forces grievance system in place prior to 15 June 2000. Notwithstanding the above, I recommend that the officer to whom the Chief of Defence Staff delegates be required to submit to the Chief of Defence Staff for final adjudication all grievances that fall within guidelines to be established by the Chief of Defence Staff (e.g., grievances that have policy implications for the Canadian Forces, affect the capacity of the Canadian Forces, and/or have significant financial implications).**

ii. **Eliminate Backlog**

It is evident that the backlog of grievances at the CDS level must be resolved as soon as possible. This goal will require that the Grievance Board and the CFGA receive the resources that they require and work cooperatively together with respect to grievances that both must review. I emphasize that by recommending that old grievances be resolved immediately, by no means do I expect that more recent grievances will not be resolved in an expeditious fashion.

One of the possible solutions to this problem would be the creation of a temporary task force, composed of people who are competent in the review of grievances. The sole role of this task force would be to promptly and fairly adjudicate the outstanding grievances that are at the CDS level. I note that the CDS would still be required to decide those grievances that fall under the guidelines established by the CDS and that the Grievance Board would retain responsibility for reviewing those grievances that must be sent to the Grievance Board by the CDS. More recent grievances would be reviewed through the regular grievance process. Once the taskforce finished its task, it would be disbanded.

Originally, I had considered that the taskforce should be composed of retired judges. However, in a discussion with the JAG, he pointed out to me that retired

judges would have to undergo further training while senior military personnel would be better placed to undertake this task because of their general knowledge regarding the matters being grieved. Instead, I accept the merits of JAG's recommendation that the Chief of the Maritime Staff, the Chief of the Air Staff, and the Chief of the Land Staff all second at least one of their senior officers to serve on this task force.

> **(73) I recommend that a task force of senior members of the Canadian Forces be created with the sole responsibility of resolving the backlog of grievances at the Chief of Defence Staff level within one year of the date that this report is submitted by the Minister of National Defence to Parliament.**

iii. **Time Limit**

I believe that clear time limits must be established for a grievance to proceed through the grievance process. Although time limits are imposed on various participants in the grievance process, including on grievors, there are no time limits at the CDS level and no overall time limit for a grievance to proceed through the grievance process. Placing an overall deadline on the grievance process would resolve overall delays and increase accountability. I note that the civil justice system has many time limits in place to ensure promptness of decisions.[120] As it currently stands, grievors have no recourse to the Federal Court until the grievance process is exhausted, and in some cases, it is still not exhausted over ten years after the grievance was initiated. The lack of firm time limits effectively denies a grievor an adequate alternative remedy to the grievance process.

The Report of the Subcommittee on Veterans Affairs of the Standing Senate Committee on National Security and Defence suggested in its April 2003 report on Fixing the Canadian Forces' Method of Dealing with Death and Dismemberment that a limit of 12 months be imposed on the length of time the Canadian Forces takes to complete the Redress of Grievance procedure.[121] This period would exclude those times during which the grievance is awaiting action by the grievor**.** If this limit was not met, the report recommended that the person who initiated the grievance must

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[120] For example, the Canadian Judicial Council has resolved that reserved judgments by federally appointed judges should be delivered within six months after a hearing, except in special circumstances (Canadian Judicial Council Resolution, September 1995).

[121] In the Proceedings of the Senate Subcommittee on Veteran Affairs on February 12, 2003**,** Lieutenant General Couture, Assistant Deputy Minster, Human Resources, Military, Department of National Defence stated: "We have reviewed the grievance system and introduced a new way of doing business, as of 2000. Although there is still no limit at the CDS level, we have introduced performance measurement standards and put more people and staff into the grievance administration to improve on that. Our goal is to shorten the time by a great deal. My own wish would be that a person would have a response within one year. We are not there yet, but we are working on it."

be informed in writing of the reasons for the delay and must be given a not-later-than date for a final decision by the CDS. The Royal Canadian Legion made a similar recommendation to me but with a 2 year limit.

I am of the opinion that a one year limit from the date that a grievance is submitted to a commanding officer is sufficient. It should be emphasized that this would require that the Grievance Board cooperate with the CDS to meet this limit – a fact that in no way affects the independent, arm's-length status of the Grievance Board. It merely reflects the reality that the Grievance Board is part of the Canadian Forces grievance process and must work in tandem with the CDS in order to reduce delays. Establishing a time limit that did not affect the Grievance Board would be completely ineffectual.

With respect to the issue of what recourse a grievor would have if the time limits were not met, I believe that a recourse that is external to the grievance process is necessary. Currently, a grievor is not entitled to seek judicial intervention in the matter until he/she has exhausted the Canadian Forces grievance review process.[122] Further, the Ombudsman has been established as a method of last resort, with the grievor denied the possibility of assistance from the Ombudsman while the grievance is still pending (except in compelling circumstances).[123]

However, as stated previously, the grievance process as it stands, without any time limits and, in some cases, with delays of up to ten years, is not an adequate alternative remedy to judicial review. This is a clear breach of fairness and must be remedied.

Therefore, I am of the view that if the one year limit at the CDS level is not met, the grievor would have recourse to the Federal Court. This would avoid the current absurd situation whereby a grievor does not have recourse to the Federal Court regarding delays in the Canadian Forces grievance process until the Canadian Forces grievance process is finished but because of extensive delays, the grievance process drags on. In order to ensure that this recourse is financially viable for a grievor, a grievor should be entitled to legal representation to pursue his or her case at the Federal Court at the expense of the Canadian Forces.

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[122] *Anderson v. Canada (Armed Forces)*, [1997] 1 F.C. 273 (C.A.).

[123] Ministerial Directive Regarding the Ombudsman for the Department of National Defence and the Canadian Forces, August 28, 2001, DAOD 547-1 states at 13(1) Except in compelling circumstances, the Ombudsman shall not deal with a complaint if the complainant has not, within the applicable time limit, first availed himself or herself of one or more of the following existing mechanisms available to the complainant (a) the CF redress of grievance process…For determining whether there are compelling circumstances under subsection (1), the Ombudsman shall consider if (a) access to a complaint mechanism will cause undue hardship to a complainant; (b) the complaint raises systemic issues; or (c) the complainant and the competent authority agree to refer the complaint to the Ombudsman.

(74) I recommend that going forward, there be a time limit of 12 months for a decision respecting a grievance from the date that a grievance is submitted to a commanding officer to the date of a decision by the Chief of Defence Staff or his delegate (under my proposed modified grievance system). This 12 month time limit would apply to all grievances, excepting those that must be personally adjudicated by the Chief of Defence Staff because they fall within the guidelines to be established by the Chief of Defence Staff. If the one year time limit is not met, subject to the exception for grievances that the Chief of Defence Staff must personally adjudicate, a grievor should be entitled to apply to the Federal Court for such relief as that court may deem appropriate. The grievor should also be entitled to his/her costs on a solicitor client basis, regardless of the outcome of the case.

While the above initiatives may increase the speed with which grievances are dealt with by the CFGA, the CDS and his delegate must also be under an obligation to deal with grievances promptly. Notably, section 29.2(2) of the *NDA* imposes an obligation on the Grievance Board, but not on the CDS, to deal with grievances before it "informally and expeditiously as the circumstances of fairness permit."

(75) I recommend that the *National Defence Act* be amended to include an obligation on the Chief of Defence Staff and the person that he may designate to act as his delegate as final authority to deal with all matters before them as informally and expeditiously as the circumstances of fairness permit.

iv. **More Resources**

It is clear that for many years, the redress of grievances has not been a priority for the Canadian Forces and thus sufficient resources have not been made available to review grievances. This is unfortunate as I have been advised that those involved in running the grievance process in the past have been extremely competent. However, without adequate resources, they have been unable to cope with the influx of grievances. Clearly, grievances of CF members must be made a priority and more resources for their review must be made available. It seems that some progress has been made in this regard with the establishment of the CFGA.

According to the Grievance Board, it also suffers from a lack of resources. In particular, it attributes to this lack of funds its inability to fill six of the 13 analyst positions required to review all of the grievances that it receives each year. It would

seem likely that if the Grievance Board were able to hire six more analysts, it would be able to process all of the grievances that it receives in a year. However, whether money to hire additional analysts is obtained through an increase in government funding for the Grievance Board or through the reallocation of Grievance Board resources is not for me to decide, and in any event, is better left to those more familiar with the matter.

> **(76) I recommend that the Canadian Forces Grievance Authority and the Canadian Forces Grievance Board both receive the necessary resources to finish their review of their current backlog of grievances and to review in a timely fashion all new grievances that they receive in a given year.**

(b) Bureaucratic

This current grievance process was never intended to be as complicated and bureaucratic as it is presently. It was intended to be an informal procedure through which matters that affect a CF member can be dealt with quickly. While the manner in which the Canadian Forces organizes its grievance process is not for me to determine, I am concerned that the process be organized so as to deal with grievances in an informal and expedient manner.

Towards this end, it is imperative that as many grievances as possible be resolved at the level of the initial authority. Grievances involving relatively minor matters that reach the CDS level develop into huge files, involving a large number of people including analysts, lawyers, subject matter experts, and often the Grievance Board. The cost of a grievance to go through the grievance process all the way to the Grievance Board and the CDS is astronomical, for matters which generally involve minimal or no money. Different sources estimate that a grievance that is reviewed by the Grievance Board and the CDS to cost taxpayers at least $100,000.[124]

Clearly, grievances can be decided at the initial authority level more quickly, with less expense, and with the involvement of the fewest number of people. The introduction of alternative dispute resolution may help to resolve disputes at the initial authority level. However, in order for initial authorities to be able to resolve disputes, they must be provided with the tools to do so. It seems that very often initial authorities, believing that they do not have the necessary authority to make a decision regarding a grievance, pass it on to the CDS level. Further, initial authorities have many other responsibilities in addition to resolving grievances and

[124] In the article in *The Gazette*, "An Eye on the Military" (July 27, 2003), the Ombudsman alleges that the cost of sending a complaint through the Grievance Board process is $100,000. The Royal Canadian Legion in its submission to me estimates the cost of the review of one grievance by the Grievance Board at $100,000.

may need additional resources to enable to resolve grievances in a timely fashion. Finally, initial authorities should have the necessary training so that they have the expertise to resolve grievances.

> **(77) I recommend that initial authorities be given the requisite training, authority and resources in order to be able to resolve grievances.**

The CDS Submission raises the issue of extending the current 10 day limit for a commanding officer to respond to a grievance in order to allow the commanding officer the time to explore alternatives to the grievance process.[125] I have been advised that the current 10 day period is often not enough time for the commanding officer, who has many other duties, to find alternative means to resolve a grievance. In keeping with my view that every effort should be made to resolve grievances as early as possible, I support this view. However, I emphasize that my intent is not to further delay the resolution of grievances, but rather to facilitate their early resolution.

> **(78) I recommend that article 7.05 of the *Queen's Regulations and Orders* be amended to provide a commanding officer with a maximum of 20 days in order to explore alternatives to the grievance process.**

Another point that was made in the CDS Submission and in comments to me by CF members is that the current time limit of 60 days imposed on the initial authority to consider and decide grievances is often too short to provide for a fair and complete grievance process. Some commented that because this period is too short, initial authorities often ask grievors for an extension. We have also been advised that in other cases, initial authorities merely send the grievance to the CDS after the 60 day period has expired in order to get the grievance off of their desk. It would seem clear that in many cases the initial authority is the person best placed to resolve a grievance because of his or her ability to quickly obtain the facts surrounding the grievance. Extending the 60 day period should have the effect of increasing the number of grievances that are resolved at the initial authority level and thus reducing the number of grievances that must be adjudicated at the CDS level.

I believe that 90 days is a realistic amount of time for a commanding officer to consider a grievance and seek alternative means, if necessary, to resolve the grievance. However, I do not think that it is necessary or appropriate to allow the initial authority to ask for additional time from the grievor, a person who is often his or her subordinate. The fact that a grievance cannot be decided in three months

[125] The 10 day limit is set out in Article 7.05 of the *Queen's Regulations and Orders*.

should be an indication that the grievance is complicated or that the resolution of a grievance could have far-reaching implications for the Canadian Forces.

> **(79) I recommend that article 7.07 of the *Queen's Regulations and Orders* be amended to give an initial authority a maximum of 90 days to decide a grievance.**

Another matter that slows down the grievance process is the fact that neither an initial authority nor the CDS have the power to reinstate a successful grievor where a member has been improperly released from the Canadian Forces as a result of administrative action. The result is that a successful grievor must re-enrol and receives no time credit for the period between the date of release and the date of re-enrolment (losing time credits for annuity calculation and service decorations, pay, incentive pay and allowances). Reinstatement would be efficient with a single administrative decision by initial authority or the CDS to reinstate a CF Member who has been released administratively. The CBA Submission supports this position.

> **(80) I recommend that the *National Defence Act* be amended to provide for reinstatement of Canadian Forces members who have been unjustly or wrongfully dismissed administratively.**

A further measure that would reduce the red tape in reviewing grievances and speed up the grievance process would be to ensure that the CDS and/or the CFGA have the necessary internal management authority to make decisions regarding financial compensation and claims, including claims against the Crown and *ex gratia* payments. Currently, the CDS has not been given the necessary authority to settle financial aspects of grievances. The CBA Submission supports this position.

> **(81) I recommend that the Chief of Defence Staff be given the necessary financial authority to settle financial claims in grievances and that the Chief of Defence Staff be entitled to delegate this authority.**

(c) Lack of Transparency

Many grievors complained that the grievance process was not transparent. In particular, statistics regarding the grievances at the CDS level are only publicly available in relation to the Grievance Board.

Although the Grievance Board must submit a report before Parliament on the activities of the Grievance Board and any recommendations that it might have, there is no similar reporting obligation on the CDS with respect to the activities of the CDS

and CFGA relating to the grievance process. As a result, there is a lack of transparency with statistics on grievances at the CDS level difficult to obtain. The CDS should have an obligation to report annually on the grievance process, and include in the report statistics clearly outlining how many grievances are being adjudicated in a year and any backlog.

> **(82) I recommend that the Chief of Defence Staff be required to report annually on the Canadian Forces grievance process, including the timeliness of the adjudication of grievances, and that this report be made public.**

Another issue relating to the lack of transparency is the fact that many grievors have indicated that they are not advised as to the status of the grievance at the CDS level. Grievors should be able to find out, without delay, where their grievance is located in the grievance process, be it with the Grievance Board, subject matter experts or awaiting decision by the CDS. As noted previously, grievors should now be able to find out about the status of their grievance by calling toll-free numbers established by the Grievance Board and the CFGA.

> **(83) I recommend that a grievor with a grievance at the Chief of Defence Staff level be entitled to find out the status of their grievance from the Canadian Forces Grievance Authority and the Canadian Forces Grievance Board without delay.**

Finally, as it stands, there is no consistent methodology between the Grievance Board and the CDS to monitor grievances that must be reviewed by the CDS and then adjudicated by the CDS. As a result, it was impossible to obtain with a high degree of certainty confirmation from both parties as to the exact number of grievances that the CDS had sent to the Grievance Board for findings and recommendations and the number of grievances that had been returned to the CDS from the Grievance Board for final adjudication.

> **(84) I recommend that the Canadian Forces Grievance Authority and the Canadian Forces Grievance Board be required to develop a common methodology for monitoring grievances that are sent to the Canadian Forces Grievance Board for findings and recommendations.**

4. Other Matters

Both the CDS Submission and that of the Grievance Board make suggestions as to other changes that could be made to the grievance process. Below I have made recommendations regarding those that I felt were compelling.

(a) Transitional measures for Grievance Board Members

Currently there are no transitional measures to allow Grievance Board members not re-appointed at the end of their term to complete work on the cases that were assigned to them. Section 29.16(4) of the *NDA* allows for a member to be re-appointed to the Grievance Board on expiry of a first or subsequent term of office but is silent on the issue of how to manage the caseload of a member whose term has expired. The submissions of both the Grievance Board and the CDS agree that members of the Grievance Board whose terms have expired should be entitled to complete cases that were assigned to them.

> **(85) I recommend that the *National Defence Act* be amended to provide authority for Canadian Forces Grievance Board members whose terms have expired to complete their caseloads.**

(b) Timing of Grievance Board Annual Report

The *NDA* states at subsection 29.28(1) that the Chairperson of the Grievance Board shall prepare an annual report within three months after the end of the year. However, the Grievance Board believes that it would be better management practice to align its annual reporting requirement with its business processes and thus issue an annual report within three months after the end of the fiscal year. The CDS Submission supports this position.

> **(86) I recommend that the *National Defence Act* be amended to require that the Canadian Forces Grievance Board provide an annual report within three months after the end of the fiscal year.**

(c) Subpoena power for Grievance Board

The Grievance Board has requested that it be given subpoena power for investigations in order to gather the relevant material to thoroughly analyse grievances and to provide findings and recommendations to the CDS. This power would allow the Grievance Board to require the production of documents without having to hold a hearing. The CDS submission does not accept that this power is necessary because the Canadian Forces already has a duty to provide all information under the control of the Canadian Forces that is relevant a case. Further, the CDS

Submission states that in the event that a party is unwilling to provide certain information, the Grievance Board has the power to hold a hearing.

I agree with the Grievance Board's suggestion that it be given a subpoena power. Currently, all kinds of administrative bodies that are called upon to inquire into matters are given a subpoena power.

> **(87) I recommend that the Canadian Forces Grievance Board be given a subpoena power.**

(d) Grievance resolved in other forum

The CDS Submission suggests that grievors should be obliged by regulation to inform the grievance authorities when their grievance is resolved in another forum. The suggestion makes sense as it would ensure that the Grievance Board and the CFGA are not working on grievances that have already been resolved.

> **(88) I recommend that grievors be obliged to inform grievance authorities of the status of their grievance when their grievance is resolved in another forum.**

IX – PAY AND ALLOWANCES

The CDS provided to me a submission on non-military justice issues relating to pay and allowances. This submission looked at amendments made by Bill C-25 to sections 12(3)[126] and 35[127] of the *NDA* dealing with the authority to make regulations governing pay, allowances, reimbursement of expenses and other compensation and benefit matters for members of the Canadian Forces.

While the main purpose of the Bill C-25 changes to these provisions was to establish the requisite authority for pay for military judges, the changes also provided for the use of administrative instructions to govern compensation and benefits for members, other than the pay of military judges. Instead of reiterating the proposed changes, which are very well set out in the submission, I have attached the entire submission at Annex H.

I have not received any submissions on these sections of the *NDA* from the Treasury Board. The Treasury Board might well not be in total or even partial agreement with the submission from the CDS.

I do not profess to be an expert in this area, but I believe that any changes having the effect of creating a simplified and more efficient pay and allowance system in keeping with modern management practices are desirable. It would be pretentious on my part to take objection to any of the proposed changes set out in the submission by the CDS as they were drafted by professionals with far more expertise in this area than I have. I emphasize again that others, including the Treasury Board, might well disagree with these recommendations.

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[126] Subsection 12(3) of the *NDA:*
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.

[127] Section 35 of the *NDA:*
(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.

X – CONCLUSION

AFTERWORD

Because I believe that my report, and in particular, my recommendations, speak for themselves, I will limit my final comments to only a few points.

I was very pleased to find that Canada's military justice system generally works very well, subject to a few changes. It is not surprising that observers from other countries see it as a system that their country might wish to learn from.

While the grievance system clearly needs some work, I am confident that once my recommendations are implemented, a more responsive and efficient grievance system will be established.

My final point is merely to emphasise that I was extremely impressed by the calibre of the members of the Canadian Forces that I met, spoke with, or who took the time to write in to me. These soldiers deserve the best possible military justice system and grievance process available. I believe that the recommendations that follow will help achieve this goal.

LIST OF RECOMMENDATIONS

(1) I recommend that the requirement that there be an independent review by the Minister of National Defence be amended to specifically require a review of the military justice system and the Canadian Forces grievance process. This requirement for a review should be entrenched in the *National Defence Act*.

(2) I recommend that the *National Defence Act* be amended to require that the salary of the Director of Military Prosecutions be prescribed by regulation, and that the method of determining remuneration be clearly specified.

(3) I recommend that the *National Defence Act* be amended to provide the Director of Defence Counsel Services with security of tenure equivalent to that granted the Director of Military Prosecutions, as set out in section 165.1 of the *National Defence Act*.

(4) I recommend that the *National Defence Act* be amended to require that the salary of the Director of Defence Counsel Services be prescribed by regulation, and that the method of determining remuneration be clearly specified.

(5) I recommend that military judges be awarded security of tenure until retirement from the Canadian Forces, subject only to removal for cause on the recommendation of an Inquiry Committee.

(6) I recommend that the *National Defence Act* be amended to include the composition of the Inquiry Committee that may make a recommendation that a military judge be removed for cause and the factors that the Inquiry Committee must take into consideration when making such a recommendation.

(7) I recommend that article 19.75 of the *Queen's Regulations and Orders* be amended to exempt military judges from temporary suspension of judicial duties.

(8) I recommend that the yearly salary of military judges and the Chief Military Judge be set out in the *National Defence Act*, along with a formula for the periodic adjustment and revision of salaries.

(9) I recommend that the *National Defence Act* be amended to define the composition of the Compensation Committee tasked with reviewing the remuneration of the military judges and the factors that the Compensation Committee must take into consideration in their quadrennial review.

(10) I recommend that the *National Defence Act* be amended to provide that the authority to suspend a custodial sentence shall reside with a military judge or judge

of the Court Martial Appeal Court in the first instance, subject only to situations of military exigency when the decision to suspend a sentence may be taken by the chain of command and approved at the earliest opportunity by a military judge.

(11) I recommend that the Canadian Forces Grievance Board be awarded jurisdiction to issue a final decision in any grievance submitted by a military judge to the Canadian Forces.

(12) I recommend that the *National Defence Act* be amended to grant military judges statutory immunity from civil liability when acting in their capacity of military judge.

(13) I recommend that the *National Defence Act* be amended to establish a permanent military court of record pursuant to the authority given the Parliament of Canada under section 101 of the Constitution Act, 1867.

(14) I recommend that a working group be established and tasked with identifying the most effective framework for the creation of a permanent Military Court of record and that a schedule for the implementation of the Court be designed accordingly.

(15) I recommend that interim measures be adopted that will allow military judges to function within a system that is administered as much like a permanent court as possible until the establishment of said permanent military court can be accomplished.

(16) I recommend that military judges be required to reduce their findings, sentences, and any orders made to writing on a form or certificate as soon as practicable after that finding, sentence or order is made or awarded.

(17) I recommend that military judges approach service on a board of inquiry with caution, and adopt the position of the Canadian Judicial Council on the Appointment of Federally Appointed Judges to Commissions of Inquiry (March 1998).

(18) I recommend that, once a permanent Military Court of record is established, the Court Martial Administrator be required to develop and maintain a court registry system, which would include all court files in respect of proceedings (stamped with the date and time of filing in the order of filing), as well as a Book of Charges and a Book of Judgments.

(19) I recommend that the role of the Court Martial Administrator be defined in the *National Defence Act* to include such non-judicial work as may be delegated by the Chief Military Judge in accordance with any instructions given by them, including the making of an order fixing the time and place of a trial or hearing,

compelling the attendance of an accused or adjourning a trial or hearing in addition to arranging for the distribution of judicial business.

(20) I recommend that the *National Defence Act* be amended to mirror the provision in the *Criminal Code* allowing a court martial continued jurisdiction to try an accused who absconds during the course of his/her trial.

(21) I recommend that the Court Martial Administrator be made deputy head of department pursuant to section 12 of the *Financial Administration Act*.

(22) I recommend that the *Queen's Regulations and Orders* be amended to require service of documents by the Court Martial Administrator on legal counsel for an accused suffering from, or suspected to be suffering from, a mental disorder.

(23) I recommend that the working group convened to consider the creation of a permanent Military Court also be charged with modernizing the types and jurisdiction of courts martial provided for under the *National Defence Act*. The goal of the working group would be the creation of a two-tiered system whereby the General Court Martial would try serious offences and the Standing Court Martial would try minor offences, with no distinction made on the basis of rank. Necessary further consideration should be given to the offences listed in the *Code of Service Discipline*, and a scheme must be developed that will define what constitutes a serious offence as opposed to a minor offence.

(24) I recommend that the *National Defence Act* be amended to provide that a finding of guilty or not guilty by a court martial panel must be arrived at by unanimous vote. In the case of a panel that cannot reach a unanimous verdict, the *National Defence Act* must grant the Court Martial Administrator the authority to convene a fresh panel upon the direction of a military judge who is satisfied that the panel is unable to agree on its verdict.

(25) I recommend that the *National Defence Act* be amended to give an accused facing trial by court martial the option of electing for a trial by military judge alone, or military judge and panel, subject to the right of the Judge Advocate General to require that the accused be tried by judge and panel in cases that would meet the conditions under section 568 of the *Criminal Code*.

(26) I recommend that the *Queen's Regulations and Orders* be amended to provide that the Appeal Committee responsible for determining whether or not to provide legal counsel for a person seeking representation by the Director of Defence Counsel Services for an appeal of a court martial to the Court Martial Appeal Court consist of: (i) as Chair, the Director of Defence Counsel Services or, in cases where the Director of Defence Counsel Services has represented the person applying for representation at trial, a person nominated by the Director of Defence Counsel

Services; (ii) a retired civilian judge; and (iii) a representative from the Office of the Judge Advocate General.

(27) I recommend that the *Queen's Regulations and Orders* be amended to provide for the determination of the "professional merit" of an appeal based on majority vote.

(28) I recommend that the *Queen's Regulations and Orders* be amended to set out the factors that will determine the standard of "professional merit", including as a factor, the reasonable chance of success of the appeal.

(29) I recommend that the *National Defence Act* be amended to include reference to the Appeal Committee responsible for determining whether or not to provide legal counsel for a person seeking representation by the Director of Defence Counsel Services for an appeal of a court martial to the Court Martial Appeal Court (currently set out in the *Queen's Regulations and Orders)*.

(30) I recommend that the *Queen's Regulations and Orders* be amended to require the Appeal Committee to provide a summary of the reasons for its decision, should it decline to approve provision of counsel by the Director of Defence Counsel Services in cases where the appellant has been sentenced to a custodial sentence at trial, and to allow the Appeal Committee or its members to issue reasons in other circumstances.

(31) I recommend that the *National Defence Act* be amended to provide that the carrying into effect of a sentence of imprisonment or detention may be suspended by the Court Martial Appeal Court.

(32) I recommend that sections 155 and 156 of the *National Defence Act*, in relation to offences that are not "serious offences" as defined in the *National Defence Act*, be amended to mirror section 495(2) of the Criminal Code which makes provision for an assessment of all of the circumstances (i.e., the need to establish the identity of the person, secure or preserve evidence of or relating to the offence or prevent the continuation or repetition of the offence or the commission of another offence) when considering an arrest without a warrant.

(33) I recommend that the *National Defence Act* be amended to provide that where a person is retained in custody or released on conditions of bail, that the person be charged with a service offence as soon as practicable.

(34) I recommend that sections 158.6(2) and (3) of the *National Defence Act* be amended to permit a military judge to review a direction for release made by a custody review officer. I also recommend that article 105.23 of the *Queen's Regulations and Orders* be amended to clarify that a representative of the Canadian Forces (under section 158.6(2) of the *National Defence Act)* will normally be counsel

appointed by the Director of Military Prosecutions but in the absence of such counsel, the custody review officer may appoint another representative.

(35) I recommend that *Queen's Regulations and Orders*, Chapter 105, be amended to advise custody review officers to seek legal advice in the course of their duties.

(36) I recommend that section 159.2(c) of the *National Defence Act* be amended to address the issue raised in the Supreme Court of Canada decision in *R. v. Hall* concerning the conditions necessary to retain a person in pre-trial custody.

(37) I recommend that the *National Defence Act* be amended to specify the circumstances in which a detention order and conditions of bail would be terminated.

(38) I recommend that the *National Defence Act* be amended to provide that a decision by the Director of Military Prosecutions to withdraw or not proceed with a charge does not preclude the charge from being proceeded with at any subsequent time, subject to any applicable limitation periods.

(39) I recommend that the *Queen's Regulations and Orders* be amended to require that the Director of Military Prosecutions give notice in writing to the accused person or the accused person's counsel, the Director of Defence Counsel Services, the referral authority, and the accused's commanding officer of a decision not to prefer a charge that has been referred.

(40) I recommend that the circumstances under which an election for a court martial is not available, under section 129 of the *National Defence Act* or any other section, not be expanded.

(41) I recommend that article 108.07 of the *Queen's Regulations and Orders* be amended to permit offences under sections 122, 123 and 125 of the *National Defence Act* to be tried by summary trial.

(42) I recommend that the *Queen's Regulations and Orders* be amended to allow a superior commander to try an accused of the rank of lieutenant-colonel by summary trial.

(43) I recommend that the current one year limitation period for summary trials be retained.

(44) I recommend that immediately after being asked to act as an assisting officer, the Canadian Forces member be given a standardized package of material (e.g., on the role of the assisting officer, the difference between court martial and summary trial, right to request a review, etc.) and then be required to pass a test on the material before being entitled to act as assisting officer.

(45) I recommend that at the beginning of a summary trial, the presiding officer be required to confirm that the accused has discussed with his or her assisting officer the matters referred to in article 108.14 of the *Queen's Regulations and Orders* and at the conclusion of a summary trail that the presiding officer be required to inform an offender of his or her right to request a review of the presiding officer's finding or sentence.

(46) I recommend that amendments to the *National Defence Act* and the *Queen's Regulations and Orders*, as necessary, be made to provide a greater measure of confidentiality between an assisting officer and an accused person. These amendments would address the issue of the compellability of the assisting officers in other proceedings under the *National Defence Act*, and would impose a duty of non-disclosure on the assisting officer in respect of his or her communications with the accused, except in the limited circumstances required by public policy.

(47) I recommend that the *National Defence Act* or the *Queen's Regulations and Orders*, as necessary, be amended to parallel the rules applicable in respect of compellability of military spouses and the privilege of communications between spouses.

(48) I recommend that an additional Note be provided to article 108.21 of the *Queen's Regulations and Orders* indicating that evidence concerning prior convictions is rarely permissible during a summary trial because of its potentially prejudicial nature. The Note should state that when such an issue arises during a summary trial, a presiding officer must consult with a legal officer before proceeding further.

(49) I recommend that article 111.11 of the *Queen's Regulations and Orders* be amended to require that willsay statements be provided to the defence at or prior to the time when a charge is preferred rather than simply before a court martial commences.

(50) I recommend that article 108.10 of the *Queen's Regulations and Orders* be amended to permit delegated officers to try officer cadets.

(51) I recommend that officer cadets be subject to a wider range of minor punishments, such as confinement to barracks, extra work and drill and stoppage of leave.

(52) I recommend that the Department of National Defence undertake a comprehensive review of the sentencing provisions of the *National Defence Act* with a view to providing for a more flexible range of punishments and sanctions, as is available under the civilian criminal justice system.

(53) I recommend that the *National Defence Act* be amended to allow for the civil enforcement of fines awarded by service tribunals.

(54) I recommend that the punishments of reprimand and severe reprimand be retained but that additional guidance as to the circumstances in which it would be appropriate to impose one as opposed to the other be provided by way of regulation or Note thereto.

(55) I recommend that presiding officers have access to the summary trial sentencing database that is collected and maintained within the Office of the Judge Advocate General.

(56) I recommend that section 129 of the *National Defence Act* be amended to clarify the requisite elements of an offence under this provision.

(57) I recommend that consideration be given to reducing the instances in which charging authorities must obtain legal advice before laying a charge, provided first that the elements of an offence under section 129 of the *National Defence Act* are clarified.

(58) I recommend that the *National Defence Act* be amended to define the role of the Canadian Forces Provost Marshal and set out the legislative framework governing the relationship between the Canadian Forces Provost Marshal and the military police, including the National Investigation Service.

(59) I recommend that the *National Defence Act* be amended to require that the Canadian Forces Provost Marshal produce an annual report within three months after the end of each year, to be submitted to the Minister of National Defence.

(60) I recommend that the definition of "policing duties or functions", both in relation to the military police and the Canadian Forces Provost Marshal when he or she is investigating a conduct complaint, be clarified.

(61) I recommend that an audit of the Military Police Complaints Commission be conducted and a business plan produced detailing the requisite number of employees and financial commitment required to ensure the Military Police Complaints Commission caseload can be more effectively managed.

(62) I recommend that the *National Defence Act* be amended to allow the Chairperson of the Military Police Complaints Commission to submit a conduct complaint for investigation by the Canadian Forces Provost Marshal where the Military Police Complaints Commission Chairperson is satisfied that there are reasonable and probable grounds for such an investigation.

(63) I recommend that the *National Defence Act* be amended to explicitly state that an officer or non-commissioned member of the Canadian Forces who brings a complaint in good faith to the Military Police Complaints Commission will not be penalized for bringing such complaint.

(64) I recommend that the Canadian Forces Provost Marshal draft a framework that would set out the criteria to be applied by the Canadian Forces Provost Marshal to conduct complaints in order to determine whether or not the conduct complained of triggers the jurisdiction of the Military Police Complaints Commission.

(65) I recommend that the *National Defence Act* be amended to clarify that the obligation of the Canadian Forces Provost Marshal to notify the Chairperson of the Military Police Complaints Commission of the informal resolution of a conduct complaint does not require the disclosure of confidential minutes of settlement.

(66) I recommend that the *National Defence Act* be amended to require the Canadian Forces Provost Marshal to resolve a conduct complaint within a year. Once a conduct complaint has been resolved by the Canadian Forces Provost Marshal, the complainant or the member of the military police whose conduct was the subject of the complaint would have 60 days within which to request a review, except in cases where there is a compelling case for a review in the public interest. If a review is not requested within the 60 day period, the case would be deemed closed.

(67) I recommend that the *Queen's Regulations and Orders* be amended to clarify the definition of "record" as it is referred to in section 250.25 of the *National Defence Act*, to include only a record of the manner in which a complaint was handled, all letters required under the statute and a summary of the findings, recommendations and/or corrective or remedial action to be undertaken as a result of the investigation.

(68) I recommend that the *National Defence Act* be amended to provide that the Chief of Defence Staff is responsible for dealing with a conduct complaint where the Canadian Forces Provost Marshal is implicated or involved in the impugned conduct.

(69) I recommend that Part IV of the *National Defence Act* ("Complaints by or about the Military Police") be reviewed to correct inconsistencies between the French and the English language versions of the text.

(70) I recommend that the *National Defence Act* be amended to provide authority to members of the Military Police Complaints Commission whose terms have expired to complete their caseloads.

(71) I recommend that the *National Defence Act* be amended to provide that persons seconded to or working for the military police are deemed to be military police for the purposes of Part IV of the *National Defence Act*.

(72) I recommend that the Chief of Defence Staff be given the authority to delegate to any officer under his direct command and control, any of the powers, duties or

functions of the Chief of Defence Staff as final authority in the grievance process, including the duty to act as final authority in respect of a grievance that must be referred to the Canadian Forces Grievance Board and a grievance dating from the Canadian Forces grievance system in place prior to 15 June 2000. Notwithstanding the above, I recommend that the officer to whom the Chief of Defence Staff delegates be required to submit to the Chief of Defence Staff for final adjudication all grievances that fall within guidelines to be established by the Chief of Defence Staff (e.g., grievances that have policy implications for the Canadian Forces, affect the capacity of the Canadian Forces, and/or have significant financial implications).

(73) I recommend that a task force of senior members of the Canadian Forces be created with the sole responsibility of resolving the backlog of grievances at the Chief of Defence Staff level within one year of the date that this report is submitted by the Minister of National Defence to Parliament.

(74) I recommend that going forward, there be a time limit of 12 months for a decision respecting a grievance from the date that a grievance is submitted to a commanding officer to the date of a decision by the Chief of Defence Staff or his delegate (under my proposed modified grievance system). This 12 month time limit would apply to all grievances, excepting those that must be personally adjudicated by the Chief of Defence Staff because they fall within the guidelines to be established by the Chief of Defence Staff. If the one year time limit is not met, subject to the exception for grievances that the Chief of Defence Staff must personally adjudicate, a grievor should be entitled to apply to the Federal Court for such relief as that court may deem appropriate. The grievor should also be entitled to his/her costs on a solicitor client basis, regardless of the outcome of the case.

(75) I recommend that the *National Defence Act* be amended to include an obligation on the Chief of Defence Staff and the person that he may designate to act as his delegate as final authority to deal with all matters before them as informally and expeditiously as the circumstances of fairness permit.

(76) I recommend that the Canadian Forces Grievance Authority and the Canadian Forces Grievance Board both receive the necessary resources to finish their review of their current backlog of grievances and to review in a timely fashion all new grievances that they receive in a given year.

(77) I recommend that initial authorities be given the requisite training, authority and resources in order to be able to resolve grievances.

(78) I recommend that article 7.05 of the *Queen's Regulations and Orders* be amended to provide a commanding officer with a maximum of 20 days in order to explore alternatives to the grievance process.

(79) I recommend that article 7.07 of the *Queen's Regulations and Orders* be amended to give an initial authority a maximum of 90 days to decide a grievance.

(80) I recommend that the *National Defence Act* be amended to provide for reinstatement of Canadian Forces members who have been unjustly or wrongfully dismissed administratively.

(81) I recommend that the Chief of Defence Staff be given the necessary financial authority to settle financial claims in grievances and that the Chief of Defence Staff be entitled to delegate this authority.

(82) I recommend that the Chief of Defence Staff be required to report annually on the Canadian Forces grievance process, including the timeliness of the adjudication of grievances, and that this report be made public.

(83) I recommend that a grievor with a grievance at the Chief of Defence Staff level be entitled to find out the status of their grievance from the Canadian Forces Grievance Authority and the Canadian Forces Grievance Board without delay.

(84) I recommend that the Canadian Forces Grievance Authority and the Canadian Forces Grievance Board be required to develop a common methodology for monitoring grievances that are sent to the Canadian Forces Grievance Board for findings and recommendations.

(85) I recommend that the *National Defence Act* be amended to provide authority for Canadian Forces Grievance Board members whose terms have expired to complete their caseloads.

(86) I recommend that the *National Defence Act* be amended to require that the Canadian Forces Grievance Board provide an annual report within three months after the end of the fiscal year.

(87) I recommend that the Canadian Forces Grievance Board be given a subpoena power.

(88) I recommend that grievors be obliged to inform grievance authorities of the status of their grievance when their grievance is resolved in another forum.

ABBREVIATIONS

Accountability Framework	VCDS/Provost Marshal Accountability Framework
Bill C-25	Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1 Sess., 36th Parl., 1998 (assented to 10 December 1998, S.C. 1998, c. 35)
CBA	Canadian Bar Association
CBA Submission	Submission of the National Military Law Section of the Canadian Bar Association
CDS	Chief of the Defence Staff
CFGA	Canadian Forces Grievance Authority
CF Members	Officers and non-commissioned members of the Canadian Forces
Charter	*Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11
Code of Service Discipline	Code of Service Discipline contained in Part III of the *National Defence Act*
Court Martial Appeal Court Rules	Rules of Appeal Practices and Procedures of the Court Martial Appeal Court of Canada, P.C. 1986, 11 September 1986
DMP	Director of Military Prosecutions
DDCS	Director of Defence Counsel Services
Grievance Board	Canadian Forces Grievance Board
First Dickson Report	Report of Special Advisory Group on Military Justice and Military Police Investigation Services (March 1997)
Independent Review Authority	Bill C-25 five-year independent review authority
JAG	Judge Advocate General

JAG Annual Report	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 2002 to 31 March 2003)
JAG Internal Review Team	JAG Internal Review Team on the operation of the military justice provisions of Bill C-25
JAG Report	First Report of the JAG Internal Review Team, dated May 2003
MPCC	Military Police Complaints Commission
Military Rules of Evidence	Military Rules of Evidence C.R.C., c. 1049
MPCRB	Military Police Credentials Review Board
Minister	Minister of National Defence
NDA	*National Defence Act* R.S. 1985, c. N-5
NDHQ	National Defence Headquarters
NIS	Canadian Forces National Investigation Service
Ombudsman	Canadian Forces Ombudsman
Provost Marshal	Canadian Forces Provost Marshal
QR&O	*Queen's Regulations and Orders for the Canadian Forces*
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)
Second JAG Report	Second Report of the JAG Internal Review Team, dated July 2003
Senate Committee Hearings	Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs

Somalia Report	Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair*, June 1997
Third JAG Report	Third Report of the JAG Internal Review Team, dated July 11, 2003