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LEGISLATIVE SUMMARY

Bill C-16:
An Act to amend the National Defence Act (military judges)

Publication No. 41-1-C16-E
29 November 2011

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Legislative Summary of Bill C-16

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Publication No. 41-1-C16-E
Ottawa, Canada, Library of Parliament (2011)

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LEGISLATIVE SUMMARY OF BILL C-16: AN ACT TO AMEND THE NATIONAL DEFENCE ACT (MILITARY JUDGES)*

1 BACKGROUND

1.1 PURPOSE OF THE BILL

Bill C-16, An Act to amend the National Defence Act (military judges) (short title: Security of Tenure of Military Judges Act), was introduced in the House of Commons on 7 October 2011 by the Minister of National Defence (the Minister). The Bill received Royal Assent on 29 November 2011.

Prior to the passage of Bill C-16, military judges were appointed by the Governor in Council with security of tenure for a term of five years. Military judges could be removed during their tenure only by the Governor in Council on the recommendation of an Inquiry Committee created under the *National Defence Act*.[1] Terms were renewable on the recommendation of a Renewal Committee until judges reached the age of retirement set out in articles 101.15, 101.16 and 101.17 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&Os).[2] In making a recommendation regarding reappointment, the Renewal Committee was prohibited from considering a judge's record of judicial decisions.[3]

On 2 June 2011, in the case of *R.* v. *Leblanc*, the Court Martial Appeal Court declared sections 165.21(2) to 165.21(4) of the *National Defence Act* and articles 101.15, 101.16 and 101.17 of the QR&Os to be invalid and of no force and effect. The Court suspended the declaration of invalidity for six months to give Parliament an opportunity to amend the legislation.[4]

Bill C-16 responds to the *Leblanc* decision, and aims to remove any impression of outside influence on the decisions of military judges. The bill provides security of tenure for military judges until a fixed age of 60 years, subject only to removal for cause on the recommendation of an Inquiry Committee. The bill repeals current provisions of the *National Defence Act* relating to the tenure and reappointment of military judges.[5]

Bill C-16 was introduced in the House Commons on the same day as Bill C-15, An Act to amend the National Defence Act and to make consequential amendments to other Acts, which proposes comprehensive amendments to the provisions of the *National Defence Act* governing the military justice system. The stated intention of Bill C-16 was to facilitate the swift passage of the amendments to section 165.21 necessary to cure the constitutional defect identified by the Court Martial Appeal Court in *Leblanc*, while leaving more comprehensive reforms to be undertaken in Bill C-15.

1.2 The Constitutional Principle of Judicial Independence and Impartiality

Section 11(*d*) of the *Canadian Charter of Rights and Freedoms* guarantees to any person charged with an offence "the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[6] This right applies "to courts and tribunals that determine the guilt of those charged with criminal offences,"[7] including trials in both military and civilian courts.[8]

In respect of judges, "[i]mpartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case."[9] The concept connotes an absence of bias, at both the individual and the institutional levels.[10]

The concept of judicial independence has two dimensions: the individual independence of judges to hear and decide freely on cases before them; and the institutional independence of the court or tribunal on which individual judges sit from other branches of government and bodies that can exercise pressure on the judiciary through power conferred by the state.[11] In order to maintain public confidence in the administration of justice and to safeguard the rule of law under the Constitution, judges must both be and be seen to be independent.[12]

The Supreme Court of Canada has characterized judicial independence as "the lifeblood of constitutionalism in democratic societies";[13] such independence has been said to exist "for the benefit of the judged, not the judges."[14] The Supreme Court has also stated:

> Independence is necessary because of the judiciary's role as protector of the Constitution and the fundamental values embodied in it, including the rule of law, fundamental justice, equality and preservation of the democratic process.[15]

The Court has also emphasized that judicial independence is a concept that continues to evolve over time.[16]

Security of tenure has been described by the Supreme Court as "the first of the essential conditions of judicial independence."[17] A judge may only be removed for a "cause related to the capacity to perform judicial functions"[18] and that cause must "be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard."[19]

1.3 Military Justice in Canada: An Overview of Recent Recommendations and Reforms

The *National Defence Act* creates a separate system of military justice, including a system of military courts. The Act sets out a *Code of Service Discipline*, which includes specific military offences and incorporates all offences under the *Criminal Code* or any other Act of Parliament.[20] The *Code of Service Discipline* applies to members of the Canadian Forces and, in limited circumstances enumerated in the *National Defence Act*, to specific categories of civilians.[21] The military courts exercise

the full powers of superior and provincial courts of criminal jurisdiction, with the exception of the power to try individuals for murder, manslaughter or abduction of a child under the age of 14 or 16 years, if these crimes are committed in Canada.[22]

Since the Charter came into force in 1982, Parliament and the courts have considered issues relating to judicial independence and the structure of the military justice system several times, and the system has evolved considerably.[23] The last comprehensive legislative reform of the military justice system occurred in 1998 pursuant to Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts.[24]

1.3.1 BILL C-25 (1998)

Bill C-25 made comprehensive amendments to the *National Defence Act*. The bill responded to many of the recommendations made in the *Report of the Special Advisory Group on Military Justice and the Military Police Investigation Services*, chaired by former Supreme Court Chief Justice Brian Dickson;[25] the report of the Somalia Commission of Inquiry;[26] and the report of the Minister of Defence, the Honourable M. Douglas Young, to the Prime Minister in *Report to the Prime Minister on Leadership and Management in the Canadian Forces*.[27] The purpose of the amendments was to promote integrity and fairness within the system established by the *National Defence Act*. Among other reforms, Bill C-25 sought to strengthen the independence of military judges by amending the provisions relating to their appointment, powers and tenure. The bill received Royal Assent on 10 December 1998.

1.3.2 LAMER REPORT (2003)

Clause 96 of Bill C-25 required that the Minister undertake an independent review of the amendments to the *National Defence Act* every five years following the bill's coming into force. Accordingly, former Chief Justice Antonio Lamer conducted such a review in 2003. His independent review related solely to the provisions and operation of Bill C-25, and did not encompass the Act as a whole. The former Chief Justice considered the development of the doctrine of judicial independence in Canada and the significant changes to the role, powers and functions of military judges over the preceding 10 years. Among other recommendations, Justice Lamer's report stated that military judges should enjoy security of tenure on the same basis as their civilian counterparts, and recommended other reforms aimed at enhancing the independence and impartiality of the military judiciary.[28]

1.3.3 BILLS C-7 (2006) AND C-45 (2008)

Bill C-7, An Act to amend the National Defence Act, was introduced on 27 August 2006. It did not go beyond first reading and died on the *Order Paper* at the end of the session in September 2007. Bill C-45, An Act to amend the National Defence Act and to make consequential amendments to other Acts, which was virtually identical to Bill C-7, was introduced on 3 March 2008 but met the same fate as its predecessor when Parliament was dissolved for the 40th general election. Both bills would have implemented some of the Lamer Report recommendations in the form of amendments

to the *National Defence Act*. For example, they would have ensured that military judges were granted security of tenure until retirement at the age specified under regulations established by the Governor in Council. The appointment of part-time military judges also would have been permitted.

1.3.4 BILL C-60 (2008)

Bill C-60, An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act, received Royal Assent on 18 June 2008.[29] Bill C-60 introduced three significant amendments to the military justice system:

- it reduced the types of court martial from four to two (General Court Martial and Standing Court Martial), specifying the circumstances in which each type of court martial could be used;
- it gave accused persons the possibility, in certain cases, of selecting the type of court martial to be convened; and
- it required that military panels, which act like juries in General Courts Martial, reach unanimous, as opposed to majority, verdicts of guilty or not guilty, of unfitness to stand trial or of not responsible on account of mental disorder.

The bill was introduced in response to the 24 April 2008 decision of the Court Martial Appeal Court of Canada in *R.* v. *Trépanier*,[30] which declared unconstitutional the provisions in the *National Defence Act* enabling the Director of Military Prosecutions to choose the type of court martial for a given accused (section 165.14 of the *National Defence Act*).

1.3.5 *EQUAL JUSTICE*: THE REPORT OF THE STANDING SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS (2009)

The Standing Senate Committee on Legal and Constitutional Affairs was asked to study the provisions and applications of Bill C-60 following its enactment, and to provide the Minister of National Defence with its observations and recommendations.[31] The Committee's final report, *Equal Justice: Reforming Canada's System of Courts Martial*, was tabled in the Senate in May 2009.[32] The Committee issued nine recommendations relating to the conduct of courts martial and sentencing in the military courts, but did not make specific recommendations relating to the security of tenure of military judges.

1.3.6 BILL C-41 (2010)

Bill C-41, An Act to amend the National Defence Act and to make consequential amendments to other Acts (short title: Strengthening Military Justice in the Defence of Canada Act), was introduced in the House of Commons on 16 June 2010 by the Minister of National Defence. The bill was reported back to the House of Commons following study by the House of Commons Standing Committee on National Defence,[33] but it died on the *Order Paper* when Parliament was dissolved for a general election in March 2011.

Among other reforms aimed at ensuring greater independence for military judges, Bill C-41 provided security of tenure, but it did not legislate a fixed retirement age. The bill incorporated the core provisions proposed in Bills C-7 and C-45, while taking into account the amendments to the *National Defence Act* upon passage of Bill C-60. The amendments in Bill C-41 followed up on many of the recommendations in the 2003 Lamer Report as well as on those made in the May 2009 report of the Standing Senate Committee on Legal and Constitutional Affairs.[34]

1.3.7 Second Independent Review Authority: Review of the Military Justice System, Canadian Forces Grievance Process and the Military Police Complaints Process (2011)

In May 2011, the Minister of National Defence appointed the Honourable Patrick J. LeSage, retired Chief Justice of the Ontario Superior Court of Justice, to conduct the second independent review of Bill C-25 (first reviewed in the Lamer Report) and Bill C-60, passed in 2008.[35]

1.4 The Evolution of the Doctrine of Judicial Independence and Impartiality in Courts Martial

In the 1992 case of *R.* v. *Généreux*, Chief Justice Antonio Lamer, writing for the majority of the Supreme Court, recognized that the separate system of military tribunals in Canada is intended to allow the Canadian Forces "to deal with matters that pertain directly to the discipline, efficiency and morale of the military" in order "to enforce internal discipline effectively and efficiently."[36] In *Généreux*, the Court went on to hold that the Charter contemplates "the existence of a system of military tribunals with jurisdiction over cases governed by military law."[37] After reviewing the unique features and exigencies of the military justice system, a majority of the Court found that the Charter did not require that the *National Defence Act* provide military judges with security of tenure until retirement as enjoyed by their civilian counterparts.[38]

In 1995 and again in 1998, the Court Martial Appeal Court affirmed that the judicial appointment and tenure system set out in section 165.21 of the *National Defence Act* met constitutional requirements.[39] However, in his 2003 review of Bill C-25, former Chief Justice Lamer expressed the view that accused persons might reasonably believe that judicial decisions could be influenced by the judge's desire for reappointment.[40] Subsequent to the Lamer Report and a series of Supreme Court cases developing the concept of judicial independence, a number of trial judgments from the courts martial have held that the system of five-year renewable terms for military judges set out in the *National Defence Act* and the QR&Os is unconstitutional, but have stopped short of striking down the relevant sections of the legislation and regulations.[41] In 2007, in *R.* v. *Dunphy*, the Court Martial Appeal Court reconsidered its 1995 and 1998 decisions, recommending that military judges be awarded security of tenure until retirement subject to removal for cause.[42]

1.5 *R.* v. *Leblanc*

On 2 June 2011, the Court Martial Appeal Court of Canada rendered its judgment in the case of *R.* v. *Leblanc*. The Court held that the provisions of the *National Defence Act* that allow the Governor in Council to appoint military judges for renewable five-year terms,[43] combined with the discretionary power of the Minister of Defence under the QR&Os to extend the retirement age for officers, including military judges,[44] breach the right of an accused to a trial before an independent and impartial tribunal under section 11(*d*) of the Charter.

In *Leblanc*, the Court Martial Appeal Court emphasized the changing nature of the role of military judges and the evolution of the concept of judicial independence. The Court also took into account the discretionary power of the Minister to permit military judges to continue to serve past the prescribed age of retirement.[45] The Court found that the current scheme of five-year renewable terms for military judges has the potential to undermine the freedom of an individual military judge to decide a case without influence from others, and "almost assuredly, [to] raise a reasonable apprehension in a reasonable and right-minded person that this independence may be undermined by external interference, in this case, that of the Minister."[46] The Court held that the provisions have the potential to undermine the independence of the court as a whole from the executive and legislative branches of government.

The Court declared sections 165.21(2) to 165.21(4) of the *National Defence Act* and articles 101.15, 101.16 and 101.17 of the QR&Os, which set out the procedure for the reappointment of military judges, to be invalid and of no force and effect, but suspended the declaration for six months to give Parliament an opportunity to amend the legislation.

2 DESCRIPTION AND ANALYSIS

2.1 Ceasing to Hold Office, Removal for Cause and Resignation (Clause 2)

Bill C-16 amends sections 165.21(2), (3) and (4) of the *National Defence Act* to provide that military judges hold office until they request to resign, or until they reach the age of 60 years (clause 2(3)). Under the bill, a military judge may be removed for cause only on the recommendation of an Inquiry Committee established under regulations by the Governor in Council (clause 2(2)).[47] The bill also sets out the notification process for resignation by military judges (clause 2(4)).

NOTES

* Anna Gay, formerly of the Library of Parliament, contributed to the preparation of *Legislative Summary of Bill C-41: An Act to amend the National Defence Act and to make consequential amendments to other Acts* (8 December 2010), some elements of which form part of this legislative summary.

1. *National Defence Act*, R.S.C., 1985, c. N-5, s. 165.21(2).

2. *Queen's Regulations and Orders for the Canadian Forces* (QR&Os), as amended by Order in Council P.C. 2008-0548, 11 March 2008.

3. *National Defence Act*, ss. 165.21(3)–165.21(4); and QR&Os, arts. 101.17 and 101.175. The age of retirement for military officers is set out in QR&Os, art. 15.17.

4. *R.* v. *Leblanc*, 2011 CMAC 2 [*Leblanc*].

5. *National Defence Act*, ss. 165.21(2)–165.21(4).

6. *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. See *R.* v. *Valente (No. 2)*, [1985] 2 S.C.R. 673 [*Valente*]; and *R.* v. *Lippé*, [1991] 2 S.C.R. 114 (also cited as *Lippé* v. *Charest*) [*Lippé*].

7. *Ell* v. *Alberta*, [2003] 1 S.C.R. 857 [*Ell*], para. 18.

8. Ibid.; *R.* v. *Généreux*, [1992], 1 S.C.R. 259 [*Généreux*]; and *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 [*Re Remuneration of Judges*], para. 84. See also the pre-Charter case of *MacKay* v. *The Queen*, [1980] 2 S.C.R. 370, in which a majority of the Supreme Court of Canada judges found that the trial of a member of the Canadian Armed Forces by a Standing Court Martial does not violate that individual's rights under ss. 1(*b*) and 2(*f*) of the *Canadian Bill of Rights* (S.C. 1960, c. 44), whose provisions guarantee the right to equality before the law and the right to be tried by an independent and impartial tribunal.

9. *Valente*, para. 15 (also cited as *Valente* v. *The Queen*).

10. Ibid.; *Lippé*.

11. *Valente*, paras. 111 and 123–130; *Ell*, paras. 21–22; *Lippé*; *Provincial Court Judges' Association of New Brunswick* v. *New Brunswick (Minister of Justice)*, 2005 SCC 44, [2005] 2 S.C.R. 286, [*Provincial Court Judges' Association of New Brunswick*], para. 5.

12. *Valente*, para. 22; *Ell*, para. 29; *Provincial Court Judges' Association of New Brunswick*, para. 6.

13. *Beauregard* v. *Canada*, [1986] 2 S.C.R. 56 (also cited as *The Queen* v. *Beauregard*), p. 20.

14. *Ell*, para. 29.

15. *Provincial Court Judges' Association of New Brunswick*, para. 4.

16. *Valente*, para. 24; *Re Remuneration of Judges*, para. 106; *Provincial Court Judges' Association of New Brunswick*, para. 2.

17. *Valente*, para. 27. See also *Provincial Court Judges' Association of New Brunswick*, para. 7.

18. *Valente*, para. 30.

19. Ibid., para. 31.

20. *National Defence Act*, s. 130. See also s. 70 for certain offences excepted from the jurisdiction of the military courts.

21. Ibid., ss. 60–61.

22. Ibid., s. 70. The offences of child abduction that are excepted from the jurisdiction of the military courts are those set out in ss. 280–283 of the *Criminal Code* (R.S.C., 1985, c. 46). See also *Leblanc*. Military courts have jurisdiction to try these offences if committed outside Canada. See: *R.* v. *Deneault* (1994), 5 CMAC 182; *R.* v. *Brown* (1995), 5 CMAC 280; *R.* v. *Brocklebank* (1996), 5 CMAC 390 and *R.* v. *Semrau*, 2010 CM 4010.

23. For a review of reforms to the military justice system up to 1997, see Michel Rossignol, National Defence Act*: Reform of the Military Justice System*, Publication no. 96-1E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 22 January 1997.

24. Bill C-25: An Act to amend the National Defence Act and to make consequential amendments to other Acts, 1st Session, 36th Parliament (Royal Assent version: S.C. 1998, c. 35).

25. *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, March 1997 (often referred to as Dickson Report I in other sources). The second part of the report, tabled in July 1997, dealt with the quasi-judicial role of the Minister of National Defence under the *National Defence Act*.

26. Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair*, June 1997 (often referred to as the "Somalia Report" in other sources).

27. Minister of National Defence, *Report to the Prime Minister on Leadership and Management in the Canadian Forces*, March 1997 (often referred to as the "Young Report" in other sources).

28. Antonio Lamer, *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 the Statutes of Canada 1998, c. 35* [Lamer Report], 3 September 2003, pp. 19–25.

29. Bill C-60: An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act, 2nd Session, 39th Parliament (Royal Assent version: S.C. 2008, c. 29).

30. *R.* v. *Trépanier*, 2008 CMAC 3.

31. It should be noted that because of the dissolution of Parliament for the 40th general election, the Committee was unable to submit its report to the Minister on the date requested. The Committee did, however, obtain an order of reference from the Senate authorizing it to complete its study at the start of the 2nd Session of the 40th Parliament and to table its final report in the Senate by 30 June 2009.

32. Senate, Standing Committee on Legal and Constitutional Affairs, *Equal Justice: Reforming Canada's System of Courts Martial – Final Report. A Special Study on the provisions and operation of* An Act to amend the National Defence Act (Court Martial) and to make a consequential amendment to another Act, *S.C. 2008, c. 29*, May 2009.

33. Bill C-41: An Act to amend the National Defence Act and to make consequential amendments to other Acts, 3rd Session, 40th Parliament (report stage version, 24 March 2011).

34. Senate, Standing Committee on Legal and Constitutional Affairs, *Equal Justice* (2009).

35. National Defence, "Second Independent Authority Appointed to Review Amendments to the National Defence Act," News release, 20 May 2011.

36. *Généreux*.

37. Ibid. Section 11(*f*) of the Charter guarantees the right to trial by jury for offences punishable by a term of imprisonment of five years or more, but contains an explicit exception for offences under military law tried before a military tribunal.

38. Ibid.

39. *R.* v. *Edwards*, [1995] C.M.A.J. No. 10 (QL); and *R.* v. *Lauzon* (1998), 18 C.R. (5th) 288.

40. Lamer Report (2003), p. 19.

41. See the discussion in *Leblanc*, paras. 18–27, and *R.* v. *Dunphy*, 2007 CMAC 1 [*Dunphy*], paras. 14–23.

42. *Dunphy*, para. 23.

43. *National Defence Act*, ss. 165.21(2), (2.1), (3) and (4).

44. QR&Os, art. 15.17(5)(*a*).

45. For the retirement age for officers, see QR&Os, art. 15.17. For the Minister's discretionary authority to retain an officer past the release age, see QR&Os, art. 15.17(5)(*a*).

46. *Leblanc*, para. 62.

47. This amendment is in response to Lamer Report (2003), recommendation 5.