Submission on the Operation of Canadian Military Law — *National Defence Act* and Bill C-25

NATIONAL MILITARY LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association (CBA) is a national association representing 38,000 jurists including lawyers, notaries, law teachers and students across Canada. The CBA's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Military Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the CBA Legislation and Law Reform Committee and approved as a public statement of the National Military Law Section of the Canadian Bar Association.

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I. EXECUTIVE SUMMARY

On 21 March 2003, the Minister of National Defence appointed former Chief Justice of Canada, The Right Honourable Antonio Lamer, to conduct an independent review of the provisions and operation of the far reaching changes to Canadian military law brought into effect by Bill C-25[1], a law passed by Parliament in 1998. Section 96 of Bill C-25 requires an independent review to be conducted every five years, and the Minister of National Defence must table the report of the independent review in Parliament no later than December 2003.

Notwithstanding that Chief Justice Lamer's mandate is limited to reviewing Bill C-25, the National Military Law Section of the Canadian Bar Association (the CBA Section) has taken this opportunity to analyze the provisions and operation of the *National Defence Act* (NDA) as a whole. In this manner, the CBA Section hopes to make a more meaningful contribution to the overall development and reform of Canadian military law.

The CBA Section's analysis focuses on Canada's military justice system and military administrative law. The overarching themes emerging from this analysis include:

- The need for a regular, independent and meaningful review of Canadian military law;
- The need to strengthen the independence of the military justice system and the principal actors within in it;

1 *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35.

- The ongoing need to reform military law to bring it into conformity with the *Canadian Charter of Rights and Freedoms* and Canadian values; and

- The need for technical and procedural changes to military law to ensure fairness and efficiency as well as to meet the needs of the Canadian Forces (CF) and its members.

While our focus is on these broad themes, in certain instances we have also proposed specific wording for legislative amendments. Given that our primary expertise lies in military law rather than legislative drafting, such suggestions should be considered primarily for the principles they advance, rather than as advocating particular wording.

1. Regular, Independent and Meaningful Review of Military Law

The impetus for the reform of military law has often come from outside forces such as court decisions, public inquiries and outside reports commissioned by the Government. Indeed, Bill C-25 was a major part of the Government's response to the report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia delivered in 1997.

In 1997, a special advisory group, appointed by the Minister of National Defence and chaired by the late Chief Justice Brian Dickson, recommended that an independent review of the NDA be undertaken every five years. Bill C-25 provided for an independent review every five years, but limited its application to the bill rather than the entire NDA.

The CBA Section views the independent review every five years of the *entire* NDA and regulations as an important engine for the re-examination, reform and renewal of military law in Canada. A statutorily-mandated global review will lead to a more cohesive body of law. Therefore, the CBA Section recommends that the NDA be amended to provide for an independent review every five years,

that sufficient resources be provided to properly complete the review, and that the independent review authority be appointed well enough in advance (12 months) so that the work is meaningful and useful.

2. Strengthening the Independence of the Military Justice System

Notwithstanding the improvements that have been made in military law, the CBA Section is of the opinion that further measures must be taken to strengthen the independence of the military justice system and the principal actors within it. Such measures will improve the credibility of the system, the quality of the justice it dispenses and the level of discipline within the CF.

The CBA Section is, for example, concerned that the provisions of the NDA do not provide for appropriate independence for the Director of Defence Counsel Services, military defence counsel, CF Provost Marshal and some Court Martial Appeal Court judges. The perception that these very important actors in the military justice system do not have an appropriate level of independence undermines the credibility of the system. Accordingly, the CBA Section recommends reforms to strengthen the independence and credibility of the military justice system, including the establishment of a permanent Canadian military court to replace *ad hoc* courts martial, more professional diversity in the appointment of military judges, the creation of a vibrant reserve military bench, improvements to the tenure of the position of Director of the Defence Counsel Services, a special study of the best ways for military lawyers to deliver effective and independent defence counsel services, the establishment in the NDA of an independent CF Provost Marshal position, the continuation of the Court Martial Appeal Court through separate legislation and the improvement of the security of tenure of some Court Martial Appeal Court judges.

3. Conformity with the *Charter* and Canadian Values

Despite the many important improvements to the NDA made by Bill C-25, the CBA Section is of the view that there is an ongoing need to bring many provisions of Canada's military law into conformity with the *Charter* and fundamental Canadian values of justice and fairness. The *Charter* protection of fundamental rights, freedoms and democratic principles constitutes a set of Canadian values. In times of need, members of the armed forces have been put in harm's way to protect or uphold these values. Members of the CF are entitled to the benefit of the *Charter* and to have disciplinary proceedings under the NDA conducted in conformity with the *Charter*.

The CBA Section believes that some provisions of military law inadequately conform with the *Charter*. For instance, provisions of the NDA that permit a CF member to be subject to restrictive conditions of bail for lengthy periods without being charged with an offence do not comply with the *Charter* section 7 right to liberty and security of the person. Similarly, provisions of the NDA that permit a person to be found guilty of a serious offence, such as murder, on the basis of a majority – rather than a unanimous – verdict of a court martial panel (i.e., jury) may be seen as inconsistent with sections 7, 11(d) and 15 of the *Charter*.

To bring suspect provisions of military law into conformity with the *Charter* as well as Canadian values of justice and fairness, the CBA Section recommends a variety of reforms. These include changes to military bail provisions, disclosure, scheduling of court martial trial dates and majority court martial verdicts.

4. Technical and Procedural Changes

The analysis conducted by the CBA Section indicates that technical and procedural changes to military law are required to ensure fairness and efficiency as well as to meet the needs of the CF and its members.

The changes suggested are intended to make military law and the military justice system work better, striking a reasonable balance between the rights and freedoms of the individual members of the CF and the disciplinary needs of the institution.

Without attempting to list all the technical and procedural changes, the recommendations include such matters as elimination of certain rarely used types of courts martial, appeal reforms, more flexible sentencing powers, and adjustments to the statutory frameworks for the Canadian Forces Grievance Board and the Military Police Complaints Commission. The CBA Section also recommends that the office of the Department of National Defence / Canadian Forces Ombudsman be established in the NDA, rather than continuing to operate under a ministerial directive.

II. INTRODUCTION

On 21 March 2003 the Government of Canada announced that the Right Honourable Antonio Lamer, former Chief Justice of Canada, would conduct the independent review of the provisions and operations of Bill C-25[2], a law passed by Parliament in 1998 to amend the *National Defence Act* (NDA). Bill C-25 enacted the greatest changes to Canadian military law in 50 years.[3] The National Military Law Section of the Canadian Bar Association (the CBA Section) is delighted that a distinguished jurist has been appointed to carry out this review.

The CBA Section welcomes the opportunity to comment on the provisions and operation of the NDA as well as military law and justice issues in general. The submission has benefited from the input of members of the CBA Section (both military and civilian), military lawyers with the Office of the Judge Advocate

2 *Ibid*.

3 For background on the changes brought about by Bill C-25 and on military law in general, see David McNairn, "A Military Justice Primer, Part I" (2000) 43 Criminal Law Quarterly 243, "A Military Justice Primer, Part II" (2000) 43 Criminal Law Quarterly 375, and "Introduction au système de justice militaire" (2002) Canadian Criminal Law Review 299. See also *Annual Report of the Judge Advocate General 2001-2002* (Ottawa: Office of the Judge Advocate General, 2002) Annex A.

General, civilian lawyers who practise or have an interest in military law, and experienced lawyers from other disciplines and areas of practice who have provided a broader perspective. These lawyers have contributed their wealth of knowledge, experience and expertise in military law, military justice and broader legal issues. The CBA Section has also benefited from the input of the National Institute of Military Justice in Washington, D.C.

The CBA Section was formed in 1999. It deals with military law including the military system of justice and operational law, as well as uniquely military aspects of other substantive bodies of law, such as criminal law, tort law, intellectual property, employment and human rights law, air law, maritime law and international law. One of the main objects of the Section is to regularly submit recommendations for effective action with regard to legal issues and improvements to legislation.

In February 2003, the CBA Section struck a committee, in keeping with the foregoing objects, to contribute to the five-year review of Bill C-25. However, the process of consultation and seeking input for the Section's submission began prior to that. In October 2002, Section members attending the CBA continuing legal education program, *The Five Year Review of Canada's National Defence Act: An Opportunity for Change in the Military Justice System*, were asked to provide ideas for constructive reform of military law and justice. Section members were asked for input in the February 2003 edition of the Section's newsletter, *Sword & Scale*, and again in March and April 2003. In addition, the Chair consulted with a range of stakeholders. The input received from these wide consultations formed the core of this submission. Regrettably, due to limitations of time and resources, not all of the excellent ideas could be addressed in this submission.

III. SCOPE OF THE INDEPENDENT REVIEW

Section 96 of Bill C-25 contains the following provision:

> (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 section (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 section. [Emphasis added]

Section 96 of Bill C-25 did not become part of the NDA. Therefore, the independent review is limited to the provisions and operation of Bill C-25. Indeed, the Ministerial Direction setting out the scope of the review to be conducted by Chief Justice Lamer makes it clear that it is limited to the provisions of Bill C-25. It is unfortunate that the opportunity was not taken to expand this mandate to include the provisions and operation of the NDA as a whole. Indeed, the Department of National Defence did not conduct external consultations with stakeholders or interested parties to ascertain whether the scope of the review should be expanded to include the entire NDA.

While the CBA Section acknowledges Chief Justice Lamer's limited mandate, we have nonetheless reviewed the NDA in its entirety, including the plethora of regulations, orders, directives and instructions issued under the authority of the NDA. The CBA Section is of the view that a comprehensive approach is a more useful contribution to the improvement of Canadian military law. In this manner, it is hoped that the provisions and operation of the NDA can be put in their proper perspective and context, with useful recommendations for reform being proposed for the entire system of military law and justice. The CBA Section has analyzed the provisions and operation of the entire NDA in the context of two broad areas:

- the military justice system; and
- military administrative law.

The impetus for change to military law has frequently come from outside forces such as court decisions[4], public inquiries[5] and outside reports commissioned by the Government.[6] Perhaps it is fairer to say that these outside forces have brought reform issues to a head and stimulated action to change.

Section 96 of Bill C-25 is a unique and useful provision that permits an independent review of the provisions and operation of the bill to be conducted every five years. However, it seems contrary to common sense to limit this independent review to Bill C-25, artificially divorcing the review from the overall context of the NDA, military law and the military justice system. This restrictive approach means that difficulties related to parts of the NDA not amended in 1998 can never be the subject of an independent review under section 96. Moreover, any subsequent changes to the NDA would fall outside the scope of the review.

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. This appears to have been the intention of the Special Advisory Group on Military Justice and Military Police Investigation Services, chaired by the late Chief Justice of Canada Brian Dickson, which commented:

> "… as is currently the practice in the United Kingdom, a legislative review should take place every five years to ensure that the *National Defence Act* and the Code of Service Discipline remain compatible with the requirements and values of the country. Therefore:
>
> . . .
>
> 17 b) We recommend that an independent review of the **legislation that governs the Department of National Defence and the Canadian Forces** be undertaken

4 E.g., *Genereux v. The Queen* (1992), 70 C.C.C. (3d) 1 (S.C.C.).

5 E.g., *Dishonoured Legacy : The Lessons of the Somalia Affair* [Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia], 5 Vols. (Ottawa: Minister of Public Works and Government Services Canada, 1997).

6 E.g., Brian Dickson, Charles H. Belzile and J.W. Bud Bird, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, 14 March 1997.

> every five years following the enactment of the legislative changes required to implement the recommendations contained in this Report and in our March 1997 Report."[7] [Emphasis added]

Section 96 of Bill C-25 does not reflect the intent of the Special Advisory Group nor implement its recommendation.

RECOMMENDATION:

The National Military Law Section of the Canadian Bar Association recommends that the NDA be amended to provide for an independent review of its provisions and operations as a whole. The CBA Section recommends that the new provision of the NDA read as follows:

> **(1) The Minister shall cause an independent review of the provisions and operation of the Act and regulations to be undertaken from time to time.**
>
> **(2) The Minister shall cause the report on a review conducted under section (1) to be laid before each House of Parliament by the last day of the year 2008, and within every five year period following the tabling of a report under this section.**

IV. TIMING OF APPOINTMENT OF THE INDEPENDENT REVIEW AUTHORITY

Pursuant to the March 21, 2003 Ministerial Direction, Chief Justice Lamer is required to deliver a final report to the Minister of National Defence by September 10, 2003. Chief Justice Lamer has less than six months to complete the independent review of Bill C-25.

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7 Brian Dickson, Charles Belzile and J.W. Bud Bird, *Report on Quasi-Judicial Role of the Minister of National Defence* [Report of the Special Advisory Group on Military Justice and Military Police Investigation Services], 25 July 1997, at 27-28.

Given the scope of the task of the Independent Review Authority, six months to complete the work is inadequate. In our view, a period of nine to twelve months to complete the review is more in keeping with the formidable task. Should, as we recommend, the law be amended to provide for an independent review of the entire NDA, it is more likely that a period of at least twelve months would be required to complete the review. The Independent Review Authority must also be provided with sufficient financial resources to carry out a thorough and meaningful review.

RECOMMENDATION:

The CBA Section recommends that for future reviews pursuant to section 96 of Bill C-25 (or a similar provision applying to the entire NDA), the Independent Review Authority be appointed not less than twelve months before the final report is to be delivered to the Minister of National Defence, and that the Independent Review Authority be given sufficient resources to carry out a thorough and meaningful review.

V. PERMANENT CANADIAN MILITARY COURT (BILL C-25[8])

At the court martial level, the Canadian military justice system is an *ad hoc* system. In other words, there is no permanent military court. The *ad hoc* court martial system should be replaced with a permanent military court. A court martial comes into existence only when it is convened and lasts only so long as is necessary to try and, if necessary, sentence an accused.

8 *National Defence Act*, R.S.C. 1985, c.N-5, as amended by S.C. 1988, c.35 (Bill C-25) (hereafter referred to as the "*NDA*", sections 165.21-179.

Military judges are not appointed as judges of a court. Rather, they are simply appointed as military judges. Their powers are derived principally from the NDA and are not engaged until a court martial is convened. Unless a court martial is convened, a military judge is generally powerless.[9] For example, a disclosure issue could arise at an early stage after a charge is laid and referred to the Director of Military Prosecutions. However, a military judge is powerless to entertain a disclosure application until the accused's court martial is actually convened. In light of the delay between the laying of a charge and the convening of a court martial, which may be many months, this unsatisfactory situation prevents issues from being resolved at an early stage. In the case of disclosure issues, the trial date is actually scheduled (i.e., the court martial is convened) before the assigned military judge becomes seized of jurisdiction to address those issues.

Accordingly, the court martial system should be formalized into a permanent military court. Military judges would be appointed to this court and would be empowered to exercise their authority under the NDA at all times. Establishing a permanent military court would improve the actual and perceived independence of the military justice system, but would not affect the ability of the system to be portable (i.e., to conduct courts martial anywhere in the world), flexible or speedy in the disposition of cases.

RECOMMENDATION:

The CBA Section recommends that the NDA be amended to establish a permanent military court known as the "Canadian Military Court" pursuant to section 101 of the *Constitution Act, 1867*.

9 Military judges do have powers in respect of bail hearings (section 159), boards of inquiry (section 165.23 (3)), commission evidence (section184), issuance of summons (section 249.22), etc..

VI. PROFESSIONAL DIVERSITY IN THE APPOINTMENT OF MILITARY JUDGES (BILL C-25[10])

Notwithstanding the changes with respect to the appointment of military judges brought about by Bill C-25, serious efforts must be made to ensure greater professional diversity in the appointment of military judges. Pursuant to section 165.21 of the NDA, military judges must now be appointed by the Governor in Council. Accordingly, the authority for the appointment of military judges has been brought into line with the civilian practice.

To be eligible for appointment as a military judge, a person must be both a military officer and a lawyer of at least ten years standing at the bar of a province.[11] A civilian is precluded from being appointed as a military judge. Officers who meet these requirements must express their interest in an appointment as a military judge by submitting an application, through the Commissioner for Federal Judicial Affairs, to the Military Judges Selection Committee.[12] The Committee consists of five members:

- A lawyer or judge nominated by the Judge Advocate General;
- A civilian lawyer nominated by the Canadian Bar Association;
- A civilian judge nominated by the Chief Military Judge;
- An officer of the CF, holding the rank of major-general or higher, nominated by the Chief of Defence Staff; and

10 *NDA*, section 165.21.

11 *Ibid.*

12 *Military Judges Selection Process* (Ottawa: Office of the Judge Advocate General, 2000).

- A non-commission member of the CF of the rank of chief warrant officer or equivalent nominated by the Chief of Defence Staff.[13]

"Professional competence and overall merit," according to the Military Judges Selection Process, "are the primary qualifications for appointment as a military judge." The Committee assesses candidates according to three categories: "recommended", "highly recommended" or "unable to recommend" for appointment.[14] The assessments are provided to the Minister of National Defence, who makes a recommendation for appointment of a candidate as a military judge to the Governor in Council.[15]

Military judges have predominantly been appointed from among regular force military lawyers serving with the Office of the Judge Advocate General. Nevertheless, reserve force military lawyers and lawyers in the reserve force serving in other military occupations are also eligible for appointment. It appears that if reserve force legal officers were appointed as military judges, they would be expected to transfer to the regular force. The pool of candidates for appointment as military judges is small – 105 regular force military lawyers and 62 reserve force military lawyers.[16] The number of lawyers serving in the reserve force in non-legal officer occupations is unknown.

The Military Judges Selection Process was first put into practice when the Governor in Council filled three vacant positions on the four-judge military bench. In January 2001, the Governor in Council appointed three regular force military prosecutors as new military judges - the Director of Military Prosecutions (chief military prosecutor for the CF), the Deputy Director of Military Prosecutions (deputy chief military prosecutor) and the immediate former Deputy Director of Military Prosecutions. While the individual qualifications, merit or

13 *Ibid.,* at 2.

14 *Ibid.,* at 2-3.

15 *Ibid.*, at 4.

integrity of these new military judges is clear, the appointment of three of the top military prosecutors in the CF as military judges – in effect, seventy-five percent of the military bench – could justifiably be criticized as inadequately reflecting an appropriate range of professional diversity (i.e., there are many qualified candidates from non-prosecution backgrounds, such as experienced litigators from the reserve force, officers with a background as defence counsel in the military or civilian justice systems, lawyers who serve in the reserve force in non-legal officer
occupations, and lawyers with non-advocacy, advisory backgrounds). Following the retirement of one military judge in the fall of 2002, all of the serving military judges are former military prosecutors.

It would be unfortunate if these appointments, no matter how well qualified individually, created a negative perception that the military bench was heavily weighted with former military prosecutors, generating a pro-prosecution bias. Also, from a practical perspective, the appointment of three military prosecutors created issues with respect to the appearance of military prosecutors before the new military judges who had a short time before been their superiors and colleagues at the Directorate of Military Prosecutions.

The military judges appointed in 2001 became the subject of prerogative relief proceedings in the Federal Court of Canada to determine, among a number of things, the circumstances in which they were disqualified from presiding at courts martial. These proceedings were abandoned when the Federal Court declined to grant an interim order prohibiting a particular court martial from proceeding, and one of the newly appointed military judges presiding at that court martial declined to adjourn the matter to permit the prerogative relief proceedings to be determined by the Federal Court.

16 *Annual Report of the Judge Advocate General 2001-2002*, *supra,* note 3, at 2.

RECOMMENDATION:

The CBA Section recommends that maximum effort be made to ensure that the professional diversity of the military bar is reflected in the appointments of military judges, to strengthen the independence and credibility of the military justice system.

VII. RESERVE MILITARY JUDGES

The proposed legislation with respect to the appointment of reserve military judges should be revisited and reconsidered. Bill C-17 (*Public Safety Act*, 2002), currently before the House of Commons, includes amendments to the NDA so that reserve officers can be named as members of a Reserve Military Judges Panel (section 165.28). However, the officers eligible to serve as reserve military judges are limited to:

- Reserve officers who have previously served as a military judge (i.e., those appointed as military judges pursuant to the NDA on or after 1 September 1999); or
- Reserve officers who served as military judges[17] prior to 1 September 1999 pursuant to the NDA and Queen's Regulations & Orders for the CF (QR&O).

The effect of this provision is to make most reserve legal officers ineligible for appointment as reserve military judges. Predominantly, those eligible for appointment as reserve military judges would be limited to regular force military judges who have retired and transferred to the reserve force.

17 For the sake of consistency of terminology, the term "military judge" is used in the text of this submission. However, it should be noted that prior to 1 September 1999 a military judge was known varyingly as the "president" of a Standing Court Martial, "presiding judge" of a Special General Court Martial, or the "judge advocate" of a General Court Martial or Disciplinary Court Martial.

Many reserve legal officers are prominent civilian lawyers in their own right and have rich experience as litigators in both the criminal and civil courts. The scheme proposed in Bill C-17 forecloses access to this rich pool of legal talent for the military bench. Reserve legal officers can and should be eligible for appointment as reserve military judges and for membership on the Reserve Military Judges Panel. Moreover, the Reserve Military Judges Panel should be composed primarily of military judges appointed from among reserve force legal officers, rather than former regular force military judges.

RECOMMENDATION:

The CBA Section recommends that the establishment of a Reserve Military Judges Panel in Bill C-17 (*Public Safety Act, 2002*) be amended in the following terms:

> **165.28 There is established a panel, called the Reserve Military Judges Panel (in this section and sections 165.29 to 165.32 referred to as the "Panel"), to which the Governor in Council may name officers of the reserve force**
>
> > **(a) who have been appointed reserve *military judges* under this Act;**
> >
> > **(b) who have previously performed the duties of a regular force military judge under this Act; or**
> >
> > **(c) who have previously performed before September 1, 1999, the duties of a president of a Standing Court Martial, a presiding judge of a Special General Court Martial or a judge advocate of a General Court Martial or Disciplinary Court Martial."**

The CBA Section recommends that the appointment of reserve military judges be from the ranks of reserve force legal officers.

The CBA Section recommends that the Reserve Military Judges Panel be composed predominantly of military judges

appointed from among reserve legal officers (i.e., not former regular force military judges who have transferred to the reserve force).

VIII. DIRECTOR OF DEFENCE COUNSEL SERVICES (BILL C-25[18])

Bill C-25 created a number of new statutory positions, including the position of Director of Defence Counsel Services.[19] The Director of Defence Counsel Services is appointed by the Minister of National Defence and is responsible for the delivery of defence counsel services to members of the CF. The purpose of NDA section 249.18 appears to be to create an independent Director of Defence Counsel Services. Security of tenure is an important aspect of independence. However, the Director of Defence Counsel Services was not granted security of tenure equal to that of the counterpart, Director of Military Prosecutions:

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. **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.** **(2.1) The Inquiry Committee is deemed to have the powers of a court martial**.
(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.

18 *NDA*, section 249.18.

19 *Ibid.*, section 249.18.

The Director of Defence Counsel Services has a security of tenure inferior to that of the Director of Military Prosecutions. In contrast to the provisions relating to the removal of the Director of Military Prosecutions from office, the NDA does not require the Minister of have "cause" to remove the Director of Defence Counsel Services. Nor does the NDA require the same independent review process that applies to the Director of Military Prosecutions (i.e., Inquiry Committee) to be undertaken before the Director of Defence Counsel Services may be removed from office. At present, it arguable that the Director of Defence Counsel Service is a "public officer" as defined by the *Interpretation Act*, holding office during pleasure only and removable as such.[20]

The Standing Senate Committee on Legal and Constitutional Affairs highlighted the problems with the security of tenure of the Director of Defence Counsel Services in November 1998 prior to the passage of Bill C-25. In its Fifteenth Report, the Committee commented:

> The Committee is also concerned about the difference in the security of tenure between the proposed new positions of Director of Military Prosecutions and Director of Defence Counsel Services, which are dealt with in clauses 42 and 82 of the bill, respectively. It was noted that, while the recommendation of a special Inquiry Committee would be required for the removal from office of the Director of Military Prosecutions, the bill contemplates no such safeguard for the Director of Defence Counsel Services. **This discrepancy is of concern in light of the Director of Defence Counsel Services' responsibility for the representation of accused persons who would then be in an adversarial position with the chain of command – a chain of command which includes the Minister of National Defence, the person responsible for the Director's appointment, re-appointment and possible removal from office**.[21] [Emphasis Added]

It is unclear why the drafters of Bill C-25 would have provided security of tenure for the Director of Military Prosecutions, but not for the Director of Defence Counsel Services. As pointed out by the Standing Senate Committee on Legal and Constitutional Affairs, there is a greater need for security of tenure in the case of the Director of Defence Counsel Services. Military defence counsel must defend their clients against the prosecutorial powers of the state in

20 *Interpretation Act*, R.S.C. 1985, c. I-21, sections 2(1) and 23-24.

circumstances where their clients, their actions and their causes may be unpopular or objectionable. This role is particularly challenging where the Director of Defence Counsel Services is part of the CF, one of the principal organs of the state.

RECOMMENDATION:

The CBA Section recommends that section 249.18 of the NDA be amended to provide the Director of Defence Counsel Services with the same security of tenure accorded to the Director of Military Prosecutions in section 165.1 of the NDA.

IX. INDEPENDENCE OF THE MILITARY DEFENCE BAR (BILL C-25[22])

The issue of whether the military defence counsel (i.e., legal officers in uniform who defend CF members at courts martial) have sufficient professional independence within the military structure deserves special scrutiny. During the course of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia in 1997, the independence of military prosecutors was the subject of an outside study by two criminal law professors.[23] No similar study was conducted by the Commission with respect to the independence of the military defence bar. In its report, the Somalia Commission did not address the independence of military defence counsel in a substantive way, but still recommended the establishment of independent institutions to deliver military legal services including defence counsel services.[24]

21 Fifteenth Report of The Senate Standing Committee on Legal and Constitutional Affairs, 24 November 1998.

22 *NDA*, sections 249.18 - 249.21.

23 James W. O'Reilly and Patrick Healy, *Independence in the Prosecution of Offences in the Canadian Forces: Military Policing and Prosecutorial Discretion* (Ottawa: Minister of Public Works and Government Services Canada, 1997).

24 *Dishonoured Legacy*: *The Lessons of the Somalia Affair, supra*, note 6, Recommendation 40.35, at 1306.

The Special Advisory Group chaired by the late Chief Justice of Canada, Brian Dickson, also briefly addressed the issue of the independence of military defence counsel. In its 1997 report, the Special Advisory Group recommended "whenever a Canadian Forces member is entitled to legal advice under the Code of Service Discipline, the Judge Advocate General provide such advice in a manner that is independent of the Judge Advocate General's prosecution and judicial functions."[25] The Special Advisory Group conceded that it was unable to fully examine the options as to how independent defence counsel services should be structured but was firm in its belief that such services should be provided.[26]

Then Minister of National Defence, Douglas Young, supported the full implementation of the Special Advisory Group's recommendations. Thus, in the summer of 1997, the Judge Advocate General conducted an internal study to develop detailed recommendations for the provision of independent defence counsel services. The Defence Counsel Study Team consisted of a retired regular force legal officer, one regular force legal officer (Director of Law/Defence), and two reserve force legal officers (in their civilian law careers, one a prosecutor and the other a private practitioner). The team did not include representation from among civilian defence counsel, defence counsel organizations, legal aid organizations delivering defence counsel services, law societies, or other professional organizations for lawyers such as the Canadian Bar Association. The Defence Counsel Study Team delivered its report in August 1997.[27] Afterwards, the Office of the Judge Advocate General did make considerable changes in the way military defence counsel services were delivered. However, the professional independence of military defence counsel has continued to be a live issue and has

25 *Supra*, note 6, Recommendation 7, at 25.

26 *Ibid*., at 24.

27 *Provision of Defence Counsel Services in the Canadian Forces: Report of the Defence Counsel Study Team* (Ottawa: Office of the Judge Advocate General, 15 August 1997).

been the subject of a detailed study in a recent paper.[28] The issues that bear on the professional independence of military defence counsel include:

- Military defence counsel are under the command of the Judge Advocate General, who also commands military prosecutors.[29]

- The Directorate of Defence Counsel Services is not independently funded by the government, but through the budget of the Office of the Judge Advocate General.

- The Office of the Judge Advocate General determines who will be assigned to perform duties as a military defence counsel.

- Military defence counsel have no security of tenure and may be removed by the Judge Advocate General at any time.

- Military defence counsel may be viewed as labouring under a conflict of interest as a result of being part of the CF, the same organization that charges and prosecutes their clients. Moreover, military defence counsel can be viewed as being part of and under the control of government, in the form of the Office of the Judge Advocate General. This situation, where a military defence counsel and a military prosecutor, both members of the CF and the Office of the Judge Advocate General, represent adverse interests at a court martial, raises clear ethical questions.

- Military defence counsel are subject to a regulation that

28 David McNairn, "The Canadian Forces' Criminal Law Firm: A Blueprint For Independence" (unpublished paper, 2003). The author is the chair of the National Military Law Section, chair of the Section's Legislation & Law Reform Committee, and has been involved in the drafting of this submission.

obliges them to report breaches of military law, rules orders and instructions.[30] Military defence counsel ignore this obligation in favour of their professional duty of confidentiality to their clients.

- There is no clear statement in law that the CF and Department of National Defence are devoted to the principle that military defence counsel provide services to their clients independently from the CF and the government.

- One policy directive issued by the Office of the Judge Advocate General can clearly be argued to violate the professional independence of military defence counsel by requiring the Director of Defence Counsel Services to exercise "authorities and discretion in a manner that is consistent with the military expectation of expeditious justice" rather, presumably, than what may be in the best interests of a client.[31]

- Military defence counsel do not have sufficient financial security. Their performance pay (i.e., bonus) is determined by the Office of the Judge Advocate General in a process where they are evaluated against all other legal officers including military prosecutors.

- Unlike the position of Director of Defence Counsel Services, the CF's defence counsel organization has no recognition in law. The Directorate of Defence Counsel

29 QR&O, article 4.081.

30 QR&O, article 4.02 and 19.01.

31 Judge Advocate General Policy Directive #013/01, "General Instructions in Respect of Delay in the Court Martial Process," 30 March 2001.

Services exists as part of the organizational structure of the Office of the Judge Advocate General.

The current arrangements for the delivery of defence counsel services in the CF raise a number of concerns about the professional independence of military defence counsel, particularly those who serve in the regular force. The issues relating to the professional independence of military defence counsel should be the subject of an outside study including strong representation from the military defence bar, civilian defence bar, defence counsel organizations, law societies and professional organizations for lawyers.

RECOMMENDATION:

The CBA Section recommends that the Minister of National Defence establish a special advisory group to examine:

(a) whether legal officers who act as military defence counsel are in a position to deliver independent and effective legal advice and representation to members of the CF who face charges under the Code of Service Discipline; and

(b) the measures that should be taken to ensure that legal officers who act as military defence counsel are in a position to deliver independent and effective legal advice and representation to members of the CF who face charges under the Code of Service Discipline.

The CBA Section recommends that the special advisory group contain strong representation from the military defence bar, civilian defence bar, defence counsel organizations, provincial law societies and professional organizations for lawyers (such as the Canadian Bar Association).

X. CANADIAN FORCES PROVOST MARSHAL (BILL C-25[32])

In 1997, the military police component of the CF was reorganized. Two important changes brought about by this reorganization were the creation of the position of CF Provost Marshal (CFPM), and the establishment of the CF National Investigation Service as a special investigative branch of the military police.

The CFPM is the highest ranking member of the military police in the CF, reporting directly to the Vice Chief of Defence Staff. The reporting relationship is somewhat similar to a civilian chief of police who reports to a police services board. The written accountability framework under which the CFPM operates is intended to keep the Vice Chief of Defence Staff and the operational chain of command at arm's length from the CFPM in professional policing matters.

The principal task of the military police has always been to support military commanders by providing security and policing services. Accordingly, military police have been under the command of military commanders. This role has sometimes put the military police in a difficult and conflicted position in respect of professional policing and law enforcement duties. This situation may arise where military police are, for example, investigating military personnel in the chain of command that they serve. In professional policing and law enforcement matters, the military police must act independently and in accordance with the law. The solution to this dilemma was seen to be the creation of the CF National Investigation Service, an independent investigation service, under the command of the CFPM.

It is submitted that independence must start at the top. While the CFPM is mentioned in numerous provisions of the NDA dealing with complaints about or

32 *NDA*, sections 250, 250.21, 250.26-250.29, 250.3-250.37, 250.48-250.49 and 250.53.

by military police[33], the CFPM's position is not provided for in the NDA. At the present time, the CFPM is posted to the position by the chain of command like any other CF member. In order for the CFPM and the military police organization
to be seen as being independent, the position of the CFPM must be more secure. Thus, the CFPM should be appointed to the position by the Minister of National Defence rather than posted by the chain of command. The CFPM should have security of tenure similar to that presently enjoyed by the Director of Military Prosecutions pursuant to section 165.1 of the NDA.

RECOMMENDATION:

The CBA Section recommends that the NDA be amended to provide that the CFPM is appointed by the Minister of National Defence for a fixed term, holds office during good behaviour, may be removed only for cause on the recommendation of an inquiry committee, and may be re-appointed at the end of a first or subsequent term of office.

The CBA Section recommends that the general duties and responsibilities of the CFPM be prescribed in the NDA.

XI. BAIL (BILL C-25[34])

1. Obligation To Lay A Charge As Soon As Practicable

The bail provisions of the NDA must be amended to address some obvious problems that have arisen since it was amended in 1998. For example, the NDA allows a person subject to the Code of Service Discipline to be arrested, released on conditions of bail, and then be subject to these conditions without a charge

33 *NDA*, Part IV, sections 250-250.53.

34 *NDA*, sections 153-159.9.

being laid against the person for an unreasonably long time. In other words, a person can be subjected to very restrictive conditions of bail for a lengthy period before a charge is even laid. They can be left in the dark – sometimes for months – with regard to exactly what charges, if any, they will face. There is no statutory obligation on military authorities to lay a charge as soon as possible following the arrest and release of a person on conditions of bail.

This anomaly in the NDA has led to abuse that, it is submitted, is not in keeping with the right to liberty and security of the person guaranteed by section 7 of the *Charter*. For instance, in the case of Sergeant Hunter[35], the accused was arrested and initially released on conditions of bail that, among eight conditions, required him to remain on the military base where he worked and to report daily to the military police. A week later the bail conditions were varied by his commanding officer and made more restrictive except that he was permitted to travel within 50 kilometres of the base. Three months later, the terms of bail were varied again and eased slightly. Sergeant Hunter was subject to these extremely restrictive conditions of bail for **five months** before being charged. Similar scenarios have arisen in other cases. This type of situation is completely unacceptable.

Pursuant to the NDA, a person who has been arrested may be released by a military officer in the chain of command known as a "custody review officer" or by a military judge after a bail hearing.[36] Release on bail by a custody review officer under section 158.6 of the NDA is in many respects similar to a release by an officer in charge pursuant to section 498 of the *Criminal Code*. The significant difference is section 505(b) of the *Criminal Code*:

> Where … (b) an accused has been released from custody under section … 498, **an information relating to the offence alleged to have been committed by the accused or relating to an included or other offence alleged to have been committed by him shall be laid before a justice as soon as practicable thereafter** and in any event before the time stated in the … promise to appear or recognizance issued to or given or entered into by the accused for his attendance

35 *R. v. Sergeant Michael Hunter* (2001, SCM).

36 *NDA*, sections 158.6 and 159.4.

at court. [Emphasis Added]

Military authorities do not have a similar obligation to lay a charge "as soon as practicable." Therefore, military personnel can be subject to restrictions on their liberty for months before they are formally charged. What is perhaps even more troubling is that there is no obligation to lay a charge even where a person is detained in custody. Such a situation cannot persist. The NDA must be amended to include a provision similar to section 505 of the *Criminal Code*.

RECOMMENDATION:

The CBA Section recommends that the NDA be amended to provide that, where a person is detained in custody or released on conditions of bail pursuant to the NDA, the person must be charged with a service offence as soon as practicable and in any event not later than 14 days following the person's arrest, failing which the person shall be released from custody forthwith or the conditions or the direction or undertaking for the person's release immediately terminated. The provision could read:

> **(1) Where a person has been detained in custody pursuant to this Division [3][37], a charge relating to the offence alleged to have been committed by the person or relating to an included or other offence alleged to have been committed by the person shall be laid as soon as practicable following the person's arrest and in any event not more than fourteen days following the arrest of the person, failing which the person shall be released from custody forthwith without conditions.**
>
> **(2) Where a person has been released with conditions pursuant to sections 158.6, 159.4 or 159.9, a charge relating to the offence alleged to have been committed by the person or relating to an included or other offence alleged to have been committed by the person shall be laid as soon as practicable following the person's arrest**

37 Division [3] deals with arrest and pre-trial custody, sections 153-159.9.

> **and in any event not more than fourteen days following the arrest of the person, failing which the direction for release is forthwith cancelled and the person is no longer subject to conditions of release.**

2. Review of Bail by a Military Judge

Pursuant to NDA section 158.6(2), where a custody review officer directs the release of a person from custody, an application may be made for a review and/or variation of those conditions to an officer in the chain of command. A military judge, however, has no jurisdiction to review the conditions of the direction for release. It is submitted that the review mechanism does not provide a sufficient legal safeguard for the liberty of individuals, nor sufficient judicial supervision of directions for release. A person released from custody on conditions of bail by a custody review officer should have recourse to a military judge, in addition to an officer in the chain of command, to review the conditions.

RECOMMENDATION:

The CBA Section recommends 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. The amendment should read:

> **(2) A direction to release a person with or without conditions may, on application, be reviewed by,**
>
> > **(a) if the custody review officer is an officer designated by a commanding officer, that commanding officer or a *military judge*; or**
> >
> > **(b) if the custody review officer is a commanding officer, the next superior officer to whom the commanding officer is responsible in matters or discipline or a *military judge*.**

> **(3) After giving a representative of the Canadian Forces and the released person an opportunity to be heard, the officer or *military judge* conducting the review may make any direction respecting conditions that a custody review officer may make under section (1).**

3. Termination of Detention or Conditions of Bail

Anecdotal evidence suggests that there has been confusion at times among military authorities as to when a direction releasing a person from custody on bail is terminated. Since custody review officers and others in the chain of command are responsible for administering the bail provisions of the NDA in certain circumstances, it seems desirable that there be clear statutory direction indicating when a direction for release is terminated and a person is no longer subject to conditions of bail.

RECOMMENDATION:

The CBA Section recommends that the NDA be amended to specify the circumstances in which a detention order and conditions of bail are terminated, as follows:

> **An order detaining a person in custody or a direction or undertaking for release made pursuant to sections 158.6, 159.4 or 159.9 is forthwith terminated where,**
>
> > **(a) a charge has not been laid within fourteen days of the arrest of a person who is retained in custody or released on conditions;**
> >
> > **(b) a commanding officer or superior commander decides not to proceed with a charge;**
> >
> > **(c) the Director of Military Prosecutions gives notice in writing that a charge will not be preferred;**

(d) the Director of Military Prosecutions withdraws a charge; or

(e) the summary trial or court martial with respect to the charge is concluded.

4. Denial of Bail on the Basis of "Any Other Just Cause"

Criminal Code section 515(10)(c) provides that the detention of a person in custody can be justified on the basis of "any other just cause being shown" and "where detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances." NDA section 159.2(c) provides that the retention of a person in custody may be justified where "any other just cause has been shown, having regard to the circumstances …". Section 159.2(c) does not provide for the retention of a person in custody on the basis that it is required to maintain confidence in the administration of justice, although the circumstances in the NDA are similar to those in the *Criminal Code*.

The constitutionality of the grounds for detention in section 515(10)(c) were challenged in the case of *Hall v. The Queen*.[38] The appellant argued that detention on these grounds violated sections 7 and 11(e) of the *Charter*. The majority of the Supreme Court of Canada ruled that the words "on any other just cause being shown and, without limiting the generality of the foregoing" in section 515(10)(c) of the *Criminal Code* were unconstitutional and should be severed. However, the majority also ruled that the detention of a person in custody to "maintain confidence in the administration of justice" was constitutionally acceptable. Section 159.2(c) of the NDA should be amended to bring it into conformity with the Supreme Court of Canada's decision in *Hall v. The Queen.*

RECOMMENDATION:

The CBA Section recommends that section 159.2(c) of the NDA

be amended by replacing "any other just cause has been shown" with "custody is necessary in order to maintain confidence in the administration of justice".

XII. NOTICE OF DECISION NOT TO PREFER A CHARGE (BILL C-25[39])

Pursuant to NDA section 165.12 and article 110.04(1) of the QR&O, the Director of Military Prosecutions may decide not to prefer a charge that has been referred. Neither the provisions of the NDA nor the QR&O require the Director of Military Prosecutions to give written notice of a decision not to prefer a charge, although in practice this notice is provided. For some time, there was a difficulty resulting
from the Director of Military Prosecutions, or counsel acting on his behalf, communicating this notice directly to accused persons who were represented by counsel.[40] This unacceptable practice appears to have been altered by way of policy. However, it would be preferable to provide for a specific practice in the QR&O. Such notice provisions in the QR&O should ensure that all interested parties are given notice of a decision not to prefer a charge.

RECOMMENDATION:

The CBA Section recommends that the article 110.04 of the QR&O be amended by adding article (3):

> **(3) Where the Director of Military Prosecutions decides not to proceed with a charge, the Director of Military Prosecutions shall forthwith give notice in writing to**

38 (2002), 167 C.C.C. (3d) 449 (S.C.C.).

39 *NDA*, section 165.12.

40 Commentary 8 of Chapter XVI of the Canadian Bar Association *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1987) provides that a lawyer should not communicate with any party who is represented by a lawyer except through or with the consent of that lawyer.

(a) the accused person if that person is not represented by legal counsel or the accused person's legal counsel if that person is represented by legal counsel;

(b) the Director of Defence Counsel Services;

(c) the referral authority; and

(d) the accused person's commanding officer.

XIII. PRELIMINARY PROCEEDINGS (BILL C-25[41])

The provisions in the NDA and QR&O with respect to "preliminary proceedings" should be amended to permit pre-trial applications to be made at any time after a charge has been preferred rather than only after a court martial has been convened.

Convening a court martial has been synonymous with scheduling a trial date. The current policy of the Court Martial Administrator in scheduling courts martial requires it to be convened for trial within 60 days of preferring a charge.[42] Prior to a court martial being convened, the assigned military judge is powerless to hear pre-trial applications (e.g., disclosure application).

In the interests of efficiency, it is desirable that preliminary applications be resolved by a military judge as soon as possible. Accordingly, a military judge should have jurisdiction to hear and determine preliminary applications as soon as a charge is preferred (i.e., when the Director of Military Prosecutions has determined that a matter will proceed to court martial).

41 *NDA*, section 187; and QR&O, article 112.02(2).

42 Court Martial Administrator's Policy on Scheduling Courts Martial, 16 May 2001.

RECOMMENDATION:

The CBA Section recommends that section 187 of the NDA be amended to read:

> **(1) *At any time after a charge has been preferred for trial* by a General Court Martial or a Disciplinary Court Martial, any military judge may, on application,**
>
> > **(a) hear and determine any question, matter or objection for which the presence of the panel of the court martial is not required; and**
> >
> > **(b) receive the accused person's plea of guilty in respect of any charge and, if there are no other charges remaining before the court martial to which pleas of guilty have not been recorded, determine the sentence.**
>
> **(2) *At any time after a charge has been preferred for trial* by a Standing Court Martial or a Special General Court Martial, any military judge may, on application, hear and determine any question, matter or objection.**

XIV. CONVENING OF COURTS MARTIAL (BILL C-25[43])

In September 1999, when amendments to the NDA and the QR&O came into force, the Court Martial Administrator became legally responsible for convening courts martial. The practice that developed for scheduling court martial trial dates consisted of the Court Martial Administrator consulting with the military prosecutor and defence counsel to ascertain a date agreeable to both. The Court Martial Administrator would then issue a convening order, scheduling the court martial for the date counsel had agreed on for trial.

43 *NDA*, sections 165.18-165.2 and QR&O, article 111.02.

Some difficulties were encountered in scheduling trial dates with this procedure during the period September 1999 to May 2001. The wishes and availability of counsel were not always respected in scheduling trial dates and convening courts martial. Defence counsel would on occasion decline to agree to a trial date because there had not been adequate disclosure. Counsel would sometimes fail to provide information on their availability for trial. By and large, however, the procedure worked reasonably well. Delays did flow from these difficulties, but more directly as a result of the lack of military judges.

In May 2001, the Court Martial Administrator issued a policy for scheduling trial dates for courts martial. The policy can be summarized as follows:

- The trial date must be scheduled to commence within 60 days of the preferral of the charge.
- The military prosecutor and defence counsel have 14 days from the preferral of the charge to agree on a trial date within the 60 days.
- The Court Martial Administrator will convene the court martial for the date agreed to by counsel, provided it is within 60 days of the preferral of the charge. If counsel cannot agree on the trial date, the Court Martial will convene the trial to begin within 60 days, effectively imposing a trial date.
- If the date on which the court martial is convened is not satisfactory, counsel must bring an application pursuant to article 112.03 of the QR&O to fix a new trial date.[44]

If such a policy were at work in the civilian justice system, defence counsel would be required to proceed **with a trial** within 60 days of the accused's first

44 Court Martial Administrator's Policy on Scheduling Courts Martial, 16 May 2001, paras. 4-6.

appearance in court. If a trial date within that timeframe was not agreed to within two weeks of the accused's first appearance, the judge or justice of the peace would simply impose a trial date, even over the objection of defence counsel, regardless of whether disclosure was complete, whether the accused was in a position to make full answer and defence, whether defence counsel was available or had other commitments that made the trial date unsatisfactory.

The business plan of the Office of the Chief Military Judge indicates a commitment to "expeditious" courts martial:

> It is fundamental that courts martial must be scheduled in a manner that respects the rights of all parties and takes into account the interests of the various stakeholders; however, it is also essential that military justice be done expeditiously. The challenge is to ensure that these rights and interests are reconciled in a manner that ensures courts martial are fair while at the same time bringing charges under the Code of Service Discipline to trial as expeditiously as circumstances permit.
>
> The new policy on scheduling courts martial has accelerated the process of convening courts martial and has ensured that submissions about the necessity for further delays are made in open court, on the record, and adjudicated by a military judge. We will continue to refine this policy, in consultation with the prosecution and defence bar, and seek to find other ways of expediting the process.[45]

It is noteworthy that the policy does not mention a bedrock principle of criminal law – the right of the accused to make full answer to the charges – although the notion that courts martial should be expeditious is given considerable prominence. This policy is problematic on a number of levels:

- Under the current practice, convening a court martial is synonymous with scheduling a trial date. In other words, once the convening order is issued the court martial is scheduled **for trial**. The trial proceeds unless an

45 FY [Fiscal Year] 2002/2003 Business Plan (Part 2) – Office of the Chief Military Judge, 1 November 2001, at 4. Available on-line at http://www.forces.ca/cmj/docs_e.asp.

application to adjourn or fix a new date is allowed. The onus generally shifts to the accused to justify why the trial should not proceed.

- The court martial may be convened to proceed in a location a great distance from the offices of counsel. For example, the officers of regular force military defence counsel are located in the Ottawa area. The court martial could be convened at a location anywhere in Canada or, for that matter, anywhere in the world.

- The current policy permits a trial date to be set before disclosure is complete. The jurisprudence suggests and the practice of criminal courts generally suggests that full disclosure should be provided before an accused is called upon to schedule a trial date.[46]

- The policy is an attempt to address, on the backs of the accused, the delay in courts martial proceeding to trial. Statistical analysis suggests that the majority of the delay in courts martial proceeding to trial rests with the Crown. The chain of command controls the speed with which charges are referred to the Director of Military Prosecutions. Military prosecutors control the timing of the preferral of a charge and are in a position to prepare their case and proceed to trial immediately after the referral. The defence, on the other hand, is uncertain that a charge will even proceed until it is preferred. Significant

46 In *R. v. Stinchcombe* (1991), 68 C.C.C. (3d) 1, the Supreme Court of Canada states at 14 that "disclosure should occur before the accused is called upon to elect the mode of trial or to plead." In *R. v. Girimonte* (1997), 121 C.C.C. (3d) 33, the Ontario Court of Appeal acknowledged at 41-42 that full disclosure is required to permit the accused to make full answer and defence and "encompasses the right to meet the case presented by the prosecution, advance a case for the defence, and make informed decisions on procedural and other matters which affect the conduct of the defence."

work in preparing a defence will occur only after the preferral. The courts martial scheduling policy can therefore be prejudicial to an accused making full answer and defence, since the accused may be pressured to proceed to trial before being fully prepared. On average, military prosecutors take many months to post-charge screen cases referred to them. How can this be expeditious? It is difficult to accept that a case that languished in post-charge screening for months suddenly takes on such urgency that it must be tried within 60 days.

- The policy is fixed, arbitrary and fails to take into account the array of relevant principles that should play an important part in scheduling a trial date.

- The court martial scheduling policy is a serious threat to the actual and perceived independence of military defence counsel. So long as this policy is applied by the Court Martial Administrator, military defence counsel will be perceived as captives of the military justice system, not even being able to control their own schedules, rather than independent actors within that system.[47]

47 Problems with the independence of public defenders was one of the chief concerns that arose out of the study of a public defender experiment in Burnaby, British Columbia, in 1979-1980: Nancy Maxim and Patricia Brantingham, *The Burnaby, British Columbia Experimental Public Defender Project: An Evaluation - Report VI: Relationships Analysis* (Vancouver: Department of Justice and British Columbia Legal Services Society, 1981). Public defenders were convinced that judges considered them part of the system and "not independent counsel" (at 22). The authors of the report commented at 44-45:

> Public defenders were thought to be pressured into performing tasks at the convenience of the court; and were expected to contribute to its steady functioning. One judicare lawyer noted that 'the judges see public defence counsel as the means to make the system work more smoothly', a perception that was similar to that held of the Crown. Crown counsel also observed that the relationship between judges and the public defenders was more like the Crown's relationship with judges, and less like the relationship with defence counsel.

The role of the Court Martial Administrator in convening courts martial is a quasi-judicial one. The function is akin to that performed by a judge or justice of the peace in the civilian justice system. Scheduling of hearing and trial dates in the civilian justice system falls within the purview of judges and justices of the peace.

In this light, the conclusion that the role of the Court Martial Administrator is a quasi-judicial one seems irresistible. Therefore, in discharging the primary duty of convening courts martial, the Court Martial Administrator must act in a fair and judicial manner taking into account proper legal principles.

RECOMMENDATIONS:

The CBA Section recommends that section 165.19 of the NDA be amended by adding section (1.1):

> **The Court Martial Administrator may convene a court martial for the purpose of conducting a trial or for the purpose of conducting a hearing with respect to a matter other than a trial.**

In the alternative, the CBA Section recommends that article 111.02 of the QR&O be amended by adding article (1.1):

> **The Court Martial Administrator may convene a court martial for the purpose of conducting a trial or for the purpose of conducting a hearing with respect to a matter other than a trial.**

The CBA Section recommends that article 111.02(2) of the QR&O be amended by adding article (b.1):

> **state whether the court martial is convened for the purpose of conducting a trial or for the purpose of conducting a hearing with respect to a matter other than a trial.**

The CBA Section recommends that the Court Martial Administrator develop a policy for scheduling hearings and trials that strikes a more reasonable and appropriate balance of the interests of all parties involved including the pre-eminent right of the accused to make full answer and defence.

XV. COMPELLING THE APPEARANCE OF ACCUSED (BILL C-25[48])

The NDA and QR&O should be amended to clarify the power of the Court Martial Administrator to compel the appearance of an accused before a court martial. The legal authority of the Court Martial Administrator to compel the appearance of an accused before a court martial was challenged in the court martial of Master Corporal Larocque. The presiding military judge ruled that the Court Martial Administrator has the inherent power to require the accused to appear before the service tribunal convened to judge him. Notwithstanding this ruling, the notion that section 165.19 grants the Court Martial Administrator legal authority to compel the appearance of the accused before a court martial is not entirely satisfactory or convincing, especially in light of the general principle that penal statutes should be interpreted strictly and frequently in a manner most favourable to the accused. The *Criminal Code*, for example, has very explicit provisions relating to compelling the appearance of an accused in court.

Accordingly, it seems prudent for the NDA to grant the Court Martial Administrator clear and explicit power to compel the appearance of an accused before a court martial. Such a provision might have little impact on regular force

48 *NDA*, sections 118.1 and 165.19.

members who would be ordered to appear before a court martial. The power of the Court Martial Administrator to compel appearance before a court martial would have the greatest application to reserve force members and civilians, the former who may not feel compelled to obey an order to appear before a court martial and the latter who are no longer subject to military authority.

Of course, some court martial proceedings may not require the accused to appear for the matter to be dealt with, and this should be stated. Most military defence counsel are located in the Ottawa area, but their clients are located throughout Canada. If a motion or application with respect to a routine matter is brought before a judge in the Ottawa area, it would be a needless expense for the accused who lives elsewhere in Canada to be required to travel to Ottawa for a routine matter.

RECOMMENDATION:

The CBA Section recommends that section 165.19 of the NDA be amended to grant the Court Martial Administrator explicit power to compel the accused to appear at a court martial that has been convened.

The CBA Section recommends that article 111.02(2) of the QR&O be amended to provide that the convening order issued by the Court Martial Administrator shall indicate whether the accused is required to personally attend the hearing or may have counsel appear as agent.

XVI. DISCLOSURE OF WILLSAY STATEMENTS (BILL C-25[49])

Article 111.11 of the QR&O should be amended to oblige military prosecutors to disclose "willsay" statements at an earlier juncture. Before a trial by court martial commences, the prosecutor must:

- Notify the accused of any witness 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.

Article 111.11 of the QR&O currently permits the prosecution to wait until the commencement of a trial before disclosing willsay statements. While this may rarely happen in practice, the fact remains that there is legal authority to delay this important disclosure. The list of prosecution witnesses and the substance of their evidence is an important part of disclosure to the accused. This information should be disclosed to the defence as soon possible so that the defence can assess the case to be met.

Willsay statements required by article 111.11 of the QR&O should be provided to the defence when a charge is preferred or before. Before a charge is preferred, the military prosecutor having carriage of the matter will have completed a post-charge screening to determine if the charge should proceed. The military prosecutor will have assessed the evidence, determined what charges should proceed, and that there is a reasonable prospect of a conviction. Accordingly, before the charge is preferred the military prosecutor will clearly know the evidence and witnesses required to prove the Crown's case. Such an approach

49 Article 111.11 of the QR&O is part of substantial regulatory changes made in order to bring the operation of Bill C-25 into effect on 1 September 1999. Thus, it falls within the scope of the Bill C-25 review.

falls clearly within the principles of disclosure enunciated by the Supreme Court of Canada in *R. v. Stinchcombe*[50] and required by section 7 of the *Charter*.

RECOMMENDATION:

The CBA Section recommends that article 111.11(1) of the QR&O be amended by replacing the phrase "Before a trial by court martial commences" with "At or prior to the time when a charge is preferred".

XVII. MODE OF TRIAL (BILL C-25[51])

At present, the NDA provides for four different types of court martial:

- Standing Court Martial;
- Disciplinary Court Martial;
- General Court Martial; and
- Special General Court Martial.

A judge alone presiding at a Standing Court Martial tries most charges in the military justice system. For example, in the fiscal years 2000-2001 and 2001-2002, 98 percent of the courts martial in the Canadian military justice system were Standing Courts Martial. The other two percent were Disciplinary Courts Martial. There were no General Courts Martial or Special General Courts Martial.[52]

The various types of courts martial[53] are distinguished by their jurisdiction over

50 *Supra*, note 46.

51 *NDA*, sections 166-178.

52 *Annual Report of the Judge Advocate General 2000-2001*, Annex E; and *Annual Report of the Judge Advocate General 2001-2002*, Annex E.

53 See *NDA*, sections 166-178.

persons, their powers of punishment and their composition:

Type of Court Martial	**Jurisdiction Over Persons**	**Maximum Custodial Punishment**	**Composition**
Standing Court Martial	Non-commissioned member or officer of any rank	Imprisonment for less than 2 years	Military judge alone
Disciplinary Court Martial	Any non-commissioned member and any officer of or below the rank of major	Imprisonment for less than 2 years	Military judge and a panel of 3 members
General Court Martial	Any non-commissioned member or officer, and any civilian subject to the Code of Service Discipline	Imprisonment for life	Military judge and a panel of 5 members
Special General Court Martial	Any civilian subject to the Code of Service Discipline	Imprisonment for life	Military judge alone

The question of whether the military justice system needs to retain four different types of court martial requires careful consideration. It is submitted that the disciplinary needs of the CF would be met by retaining two types of court martial – the Standing Court Martial and the General Court Martial.

The Standing Court Martial (military judge alone), the most common type of court martial, would keep the same limited powers of punishment (i.e., maximum custodial punishment of less than two years imprisonment), but would assume jurisdiction over civilians subject to the Code of Service Discipline and presently triable only by Special General Courts Martial. For civilians, the powers of punishment would be limited to the non-military punishments in section 139 of the NDA (i.e., fine, imprisonment or other suitable punishments that may be

added).

The General Court Martial (military judge and panel of five members) should be retained to try more serious offences, whereas the Disciplinary Court Martial (military judge and a panel of three members) should be eliminated. The jurisdiction of the General Court Martial over persons would remain the same (i.e., military personnel and civilians subject to the Code of Service Discipline). The powers of punishment would include any of the punishments in section 139 of the NDA up to a maximum custodial sentence of life imprisonment but subject to the maximum punishment provided for the offence with which an accused is charged. Again, for civilians, the powers of punishment should be limited to non-military punishments. Out of fairness, an accused tried by a General Court Martial for a serious offence should have the option of being tried by a military judge and a panel of five members, or a military judge alone.

These changes would streamline the military justice system and eliminate seldom-used modes of trial, Special General Courts Martial and Disciplinary Courts Martial. The remaining two-tier court martial system – Standing Courts Martial for most matters and General Courts Martial for serious matters – would serve the disciplinary needs of the CF.

RECOMMENDATIONS:

The CBA Section recommends elimination of Disciplinary Courts Martial and Special General Courts Martial.

The CBA Section recommends that the jurisdiction of Standing Courts Martial be expanded to include civilians subject to the Code of Service Discipline who would otherwise be tried by Special General Court Martial, but that powers of punishment relating to civilians be limited to non-military punishments.

The CBA Section recommends that an accused person being tried by a General Court Martial have the right to elect between a trial by a military judge and panel of five members, and a trial by a military judge alone.

XVIII. COURT MARTIAL VERDICTS (BILL C-25[54])

The provisions of the NDA that permit an accused to be found guilty of an offence as a result of a majority – rather than a unanimous – verdict of the court martial panel require change.

A General Court Martial is composed of a military judge and a panel (i.e., jury) of five military members.[55] Similarly, a Disciplinary Court Martial is composed of a military judge and a panel of three military members.[56] The court martial panel determines whether an accused is guilty on the basis of a majority vote. In other words, an accused will be found guilty of an offence, in the case of a General Court Martial, even if two of five members of the panel (40%) are not prepared to convict. Similarly, an accused before a Disciplinary Court Martial can be found guilty of an offence if one of the three panel members (33%) would not convict. While the majority vote of a court martial to determine the guilt of an accused has been a historical part of military law, there does not appear to be a compelling argument to retain a majority verdict for courts martial. It has been argued that court martial panels and juries are different. Nevertheless, their most basic function is exactly the same – deciding whether guilt beyond a reasonable doubt has been proven. How can this function be said to differ from a court martial panel to a jury?[57]

54 *NDA*, section 192.

55 *NDA*, section 167.

56 *NDA*, section 170.

57 It should be borne in mind as well, that a court martial panel no longer has any role in determining the sentence: *NDA*, section 193.

Where two of five members of General Court Martial panel are not prepared to convict an accused, there appears to be an almost irresistible conclusion that a reasonable doubt with respect to guilt exists. It is submitted that fairness, principles of fundamental justice (section 7 of the *Charter*) and Canadian values weigh heavily in favour of imposing a requirement that a court martial panel must be unanimous in its verdict that the accused is guilty.[58]

An example may serve to illustrate this point. A service member accused of committing a murder in Canada must be charged and tried in the civilian justice system. A conviction is only by the unanimous verdict of jury of twelve peers.[59] A service member accused of committing a murder outside Canada may be charged and tried in the military justice system. A conviction may be by the majority verdict of three of five members of a General Court Martial panel. This anomaly permits a profound inequality in Canadian law.

Not all members of the CBA Section accepted the need for unanimous verdicts from court martial panels. One member pointed out that the prospect of "hung" panels of courts martial held in faraway places would be problematic. However, the overwhelming consensus of opinion was that a requirement for a unanimous verdict by court martial panels was appropriate and more in keeping with sections 7, 11(d) and 15 of the *Charter*.

It has been submitted above that Disciplinary Courts Martial should be eliminated. However, the discussion above has been conducted on the basis that Disciplinary Courts Martial may be retained.

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58 See, for example, Guy Cournoyer, "Annotation to *R. v. Brown"* (1995) 35 C.R. (4th) 318 (C.M.A.C.) at 320-321. In *R. v. Brown,* the Court Martial Appeal Court rejected the argument that a majority verdict at a court martial violates section 11(d) of the *Charter*. However, the CBA Section has not found the Court's reasoning to be particularly persuasive nor does it address all aspects of the issue.

59 Note that this applies unless the accused elects a trial by judge alone.

RECOMMENDATION:

The CBA Section recommends that section 192 of the NDA be amended to provide that a finding of guilty or not guilty by a court martial panel may be arrived at only by a unanimous vote. In particular, the CBA Section recommends replacing NDA section 192(2) with the following:

> **(2) The decision of the panel of a General Court Martial or Disciplinary Court Martial to find an accused guilty or not guilty of an offence must be unanimous.**
>
> **(3) Subject to section (2), the decisions of the panel of a General Court Martial or a Disciplinary Court Martial are determined by a vote of a majority of its members."**

XIX. SENTENCING (BILL C-25[60])

The sentencing provisions and powers of punishment under the NDA urgently require reform. The powers of punishment available in the military justice system are limited to those in NDA section 139(1) and include, from the most severe to the least severe:

- Imprisonment for life;
- Imprisonment for two years or more;
- Dismissal with disgrace from Her Majesty's service;
- Imprisonment for less than two years;
- Dismissal from Her Majesty's service;
- Detention;

60 *NDA*, section 139.

- Reduction in rank;
- Forfeiture of seniority;
- Severe reprimand;
- Reprimand;
- Fine; and
- Minor punishments.

The military justice system has jurisdiction over members of the regular force (full-time, continuing military service), members of the reserve force (generally part-time military service), and civilians (released members of the CF and civilians subject to the Code of Service Discipline). The range of punishments and sentences available in the military justice system must be sufficiently wide and flexible to permit an appropriate sentence for a person in any of these groups.

The military justice system has remained largely oblivious to the many changes in the law relating to sentencing in the civilian justice system. The range of sanctions in military law has remained limited and inflexible. For example:

- There is no provision in the NDA similar to *Criminal Code* section 734 for imprisonment or detention in default of payment of a fine. In the case of regular force members owed pay and other benefits by the Crown, this presents no difficulty since a fine can be recovered through administrative deductions. In the case of reserve force members or civilians, the ability of the Crown to enforce payment of fines is more limited.
- A reserve force member of the CF sentenced to imprisonment or detention cannot serve the sentence

intermittently.[61] Nor can a reserve force member seek a conditional sentence of imprisonment.[62] Therefore, a reserve force member may suffer the additional punishment of loss of full-time civilian employment if sentenced to a substantial period of imprisonment or detention.

- For civilians (e.g., released members and other civilians subject to the Code of Service Discipline), the only available or often viable sentencing options are a fine or imprisonment.

Where a CF member is charged with a criminal offence that is converted into a service offence by virtue of NDA section 130, a glaring inequality under the law can occur. If the person were charged with the same criminal offence in the civilian justice system, the full range of sentencing options under the *Criminal Code* would be available. In the military justice system, only the limited sentencing options in the NDA are available.

The report of the Somalia Commission recommended that sentencing powers in the military justice system be brought into line with those available in the civilian criminal justice system.[63] The time has certainly come for a thorough review and modernization of the sentencing provisions of the NDA. More flexible sentencing options can be introduced into the military justice system that are still in keeping with the CF's need to maintain and enforce discipline.

RECOMMENDATIONS:

The CBA Section recommends that the sentencing powers in the NDA be immediately amended to provide for:

61 Intermittent sentences are provided for in section 732 of the *Criminal Code*.

62 Conditional sentences are provided for in section 742.1 of the *Criminal Code*.

63 *Dishonoured Legacy: The Lessons of the Somalia Affair, supra*, note 5, Recommendation 40.31.

- **Absolute discharges (e.g., section 730 of the *Criminal Code*);**

- **Intermittent sentences of imprisonment and detention (e.g., section 732 of the *Criminal Code*);**

- **Imprisonment or detention in default of payment of a fine (e.g., section 734 of the *Criminal Code*); and**

- **Enforcement of an unpaid fine by way of a civil judgment (e.g., section 734.6 of the *Criminal Code*).**

The CBA Section recommends that the Department of National Defence undertake a comprehensive review of the sentencing provisions of the NDA with a view to reforming them at the earliest opportunity.

The CBA Section recommends that the sentencing provisions in the NDA contain a statement of principles of sentencing similar those in sections 718, 718.1 and 718.2 of the *Criminal Code*.

The CBA Section recommends that sentencing reforms to the NDA provide for a more flexible range of punishments and sanctions including, but not limited to:

- **Suspended sentences and probation (e.g., section 731 of the *Criminal Code*);**

- **Conditional discharges (e.g., section 730 of the *Criminal Code*);**

- **Community service;**

- **Conditional sentences of imprisonment and detention (e.g., section 742.1 of the *Criminal Code*);**

- **Fine option program (e.g., section 736 of the *Criminal Code*); and**

- **Payment of restitution to the victim of an offence (e.g., section 738, 741, 741.1 and 741.2 of the *Criminal Code*).**

XX. PREROGATIVE RELIEF

The statutory provisions and rules of practice relating to applications for prerogative relief with respect to courts martial should be reformed.

Recently, court martial proceedings have been the subject of prerogative relief proceedings in the Federal Court (Trial Division).[64] In the *Rushnell* case, the military judge presiding at the accused's court martial declined to adjourn the proceeding to permit the accused to obtain a final decision from the Federal Court (Trial Division) in a prerogative relief application seeking a writ of prohibition. The accused was forced to seek an interim order prohibiting the military judge from proceeding with the court martial. The Federal Court (Trial Division) declined to grant an interim order, and the accused's right to seek prerogative relief was rendered illusory. In the *Forsyth* case, the accused brought an application for a writ of prohibition in the Federal Court (Trial Division). The accused was also forced to seek an interim order prohibiting the military judge from proceeding with his court martial. The interim order was granted, but it took 18 months to finally dispose of the prerogative relief application in the Federal Court (Trial Division).

A number of points are noteworthy in respect of prerogative relief applications in court martial proceedings. First, prerogative relief applications are quite rare.

64 *Rushnell v. Canada*, [2001] F.C.J. No. 366 (T.D) and *Forsyth v. Canada*, [2002] F.C.J. No. 879 (T.D.).

Therefore, such proceedings are unlikely to disrupt the military justice system in any significant way. Nevertheless, prerogative relief applications are an important legal safety valve, permitting supervision of courts martial by a superior court.

Second, the unwillingness of military judges to adjourn court martial proceedings to allow prerogative relief applications to be determined by the Federal Court (Trial Division) is quite problematic. Unless the accused is able to persuade the Federal Court (Trial Division) to grant an interim order, the right to seek and obtain prerogative relief is illusory. The court martial will be completed long before the prerogative relief application is dealt with. In the civilian criminal justice system, inferior court judges generally adjourn cases before them to permit a superior court to determine an application for prerogative relief. Military judges have not embraced this approach.

Third, notwithstanding that the liberty of an accused in the military justice system is at stake, applications for prerogative relief in respect of court martial proceedings appear to be treated in the same manner under the *Federal Court Rules*, *1998* as administrative decisions from other federal tribunals. When liberty is at stake, such an approach is unacceptable. The 18-month delay in dealing with the prerogative relief application in *Forsyth* is an inordinate length of time to wait for a final determination. Finally, in the *Forsyth* case, the Federal Court (Trial Division) cited the potential further delay resulting from an appeal to the Federal Court of Appeal as a ground for declining prerogative relief.[65]

Some potential solutions to these problems are:

- Where a prerogative relief application is brought, the jurisdiction of the court martial should be suspended until the application is determined. Such an approach will ensure

65 *Forsyth v. Canada*, paras. 21-22.

that an accused's right to seek prerogative relief is not rendered illusory as a result of a military judge declining to adjourn a court martial proceeding, notwithstanding the pending prerogative relief application.

- Prerogative relief applications with respect to courts martial, like all criminal cases, stand in a special category because the liberty of the accused is at stake. Such applications must dealt with in an expeditious way. One possible approach is to amend the *Federal Court Rules, 1998* to provide for an expeditious procedure for prerogative relief applications involving courts martial. However, the Federal Court is a busy – perhaps overburdened – court. Amending the *Federal Court Rules* is unlikely, in itself, to resolve the delay problem. A preferable approach may be to permit prerogative relief applications involving courts martial to be brought before a single judge of the Court Martial Appeal Court. This approach would permit an expeditious resolution of prerogative relief applications with a minimum delay in the court martial proceedings. Again, prerogative relief applications with respect to court martial proceedings are likely to be rare. Notwithstanding that broad appellate rights are granted by statutes such as the NDA, there is still an important place for prerogative remedies in respect of decisions that are prejudicial to a person. Therefore, the right to seek prerogative relief must be preserved and kept effective.

- As the law presently stands, an appeal with respect to a prerogative relief application involving a court martial lies

to the Federal Court of Appeal. In addition to the likely delay, this creates the potential for the Federal Court of Appeal and the Court Martial Appeal Court to render inconsistent decisions. For example, in the *Forsyth* case, the accused argued that the military justice system had lost jurisdiction over the subject matter of the case because he had previously been prosecuted for the same conduct in the civilian criminal justice system. The Federal Court (Trial Division) dismissed the application. The decision was not appealed. However, consider the scenario if an appeal had been taken and dismissed by the Federal Court of Appeal. If the accused then appealed the decision of the court martial on jurisdiction to the Court Martial Appeal Court, the potential for inconsistent appellate decisions is clear. The Court Martial Appeal Court could agree with the accused's argument on jurisdiction and would then be forced to issue a decision inconsistent with that of the Federal Court of Appeal. A possible solution to this conundrum would be to provide for an appeal from the decision of a single judge of the Court Martial Appeal Court to a full panel of the Court. Thus the Court Martial Appeal Court could settle matters relating to military law that come to it as an appeal of a court martial decision or as an appeal of a prerogative relief application.

RECOMMENDATIONS:

The CBA Section recommends that the NDA be amended to permit an application for prerogative relief (certiorari,

prohibition, mandamus, habeas corpus, declaratory relief) in respect of courts martial or the decisions of military judges to be made to a single judge of the Court Martial Appeal Court.

The CBA Section recommends that the NDA be amended to provide that the jurisdiction of a court martial or military judge is suspended pending the determination of a prerogative relief application.

The CBA Section recommends that the NDA be amended to permit an application for prerogative relief in respect of any member of the Canadian Forces serving outside Canada to be made to a single judge of the Court Martial Appeal Court.

The CBA Section recommends that section 18(2) of the *Federal Court Act* be repealed.

The CBA Section recommends that the definition of "federal board, commission or other tribunal" in section 2(1) of the *Federal Court Act* be amended to exclude courts martial established pursuant to the NDA and military judges appointed pursuant to the NDA.

XXI. APPEALS

1. Separate Legislation for the Court Martial Appeal Court

As a general rule, courts are established by separate statute, enhancing the appearance of judicial independence and dignity. That is not so for the Court Martial Appeal Court, which is established pursuant to sections 234 and 236 of the NDA. A similar situation might exist if, for example, the Supreme Court of

Canada were established pursuant to the *Criminal Code* or the Federal Court were established by a statute that created an administrative tribunal. The provisions relating to the establishment of the Court Martial Appeal Court and its powers should be removed from the NDA and incorporated into a separate statute.

RECOMMENDATION:

The CBA Section recommends that the provisions of the NDA relating to the establishment and powers of the Court Martial Appeal Court be removed and incorporated into a separate statute entitled the *Court Martial Appeal Court Act*.

2. Independence of Court Martial Appeal Court Judges

NDA section 234(2) provides that the Court Martial Appeal Court will include judges from provincial superior courts and the Federal Court of Canada. Provincial superior court judges are "appointed" by the Governor in Council, whereas Federal Court judges are "designated" by the Governor in Council.

This difference in terminology raises the question of whether Federal Court judges who serve as Court Martial Appeal Court judges have less security of tenure than their counterparts from provincial superior courts. There would appear to be a qualitative and legal difference between an "appointment" and a "designation." If the Governor in Council can designate a judge from the Federal Court to serve as a judge of the Court Martial Appeal Court, could it not also "un-designate" a Federal Court judge? The logical conclusion of this argument is that Federal Court judges serving on the Court Martial Appeal Court could be "un-designated"
for rendering judgments unfavourable to the state. Given this situation, it would be open to a party appearing before the Court Martial Appeal Court to argue that the Court is not "independent" because the judges who are designated rather than appointed could, at least in theory, be removed from office in a manner other than in the usual one for the removal of superior court judges from office.

RECOMMENDATION:

The CBA Section recommends that section 234(2) of the NDA be amended by replacing "to be designated" with "appointed."

3. Recognition of the Court Martial Appeal Court as a Superior Court

While the Court Martial Appeal Court is established as a superior court of record by section 236(1) of the NDA, this status has not been recognized in other legislation. Specifically, the definition of "superior court" in section 35 of the *Interpretation Act*[66] does not include the Court Martial Appeal Court. This omission would appear to be an oversight.

RECOMMENDATION:

The CBA Section recommends that the definition of "superior court" in section 35 of the *Interpretation Act* be amended to recognize the Court Martial Appeal Court as a superior court.

4. Panel for the Hearing of Appeals

The NDA should be amended to allow greater flexibility in the number of judges who may hear appeals to the Court Martial Appeal Court. At present, section 235(2) requires an appeal to be heard by three judges of the Court Martial Appeal Court.

This provision makes it impossible for a larger panel of judges to hear appeals on matters of particular importance. The flexibility to have an appeal heard by a larger panel of judges (e.g., five) would serve the ends of justice in any of the following circumstances:

- Where a particularly important issue is brought before the Court (e.g., an important constitutional issue);

66 R.S.C. 1985, c. I-21.

- Where the Court is asked to overrule one of its previous decisions; or

- Where the Court is asked to reconcile two or more seemingly inconsistent decisions rendered by different three-judge panels of the Court.

This amendment would bring the NDA in line with provincial and federal statutes dealing with the size of the panel of judges hearing an appeal. For example, section 7(1) of the *Ontario Courts of Justice Act*[67] provides, "A proceeding in the Court of Appeal shall be heard and determined by not fewer than three judges sitting together, and always by an uneven number of judges." Section 16(1) of the *Federal Court Act*[68] is similar.

RECOMMENDATION:

The CBA Section recommends that section 235(2) of the NDA be amended to read, "Every appeal shall be heard by not fewer than three judges sitting together, and always by an uneven number of judges. The decision of the majority of judges hearing the appeal shall be the decision of the Court, and any other matter before the Court shall be disposed of by the Chief Justice or such other judge or judges of the Court as the Chief Justice may designate for that purpose."

The CBA Section recommends that the Court Martial Appeal Court Rules be amended to provide for a request by a party to an appeal for the hearing of that appeal by a panel of judges larger than three judges.

67 R.S.O. 1990, c. C.43.

68 R.S.C. 1985, c. F-7.

5. Crown's Rights of Appeal

The right of the Crown to appeal a finding of not guilty pursuant to the NDA requires clarification. Pursuant to sections 230.1(b) and (d) respectively the Crown has the right to appeal a decision of a court martial to the Court Martial Appeal Court in respect of :

- The **legality** of any finding of not guilty; and
- The **legality** of a finding of not responsible on account of mental disorder.

Pursuant to section 228 of the NDA, the expressions "**legality**" and "illegal" are "deemed to relate either to questions of law alone **or to questions of mixed law and fact.**" By virtue of the combination of these provisions, the rights of appeal of the Crown under section 230.1 of the NDA are broader than those open to the Crown under the *Criminal Code*.

Section 675 of the *Criminal Code* limits the Crown's right to appeal an acquittal or a verdict of not criminally responsible on account of mental disorder to a "question of law alone." The practical effect of the wider right of appeal under the NDA can be illustrated with an example. Under section 675 of the *Criminal Code*, the Crown could not appeal an acquittal on a criminal charge on a question of mixed fact and law. The Crown is limited to appealing on the basis of a question of law alone. In contrast, if the acquittal occurred at a court martial for the same criminal offence – converted into a service offence by virtue of section 130 of the NDA – the Crown could appeal on the basis of a question of law, and also on the basis of a question of mixed fact and law. This creates an inequality before the law for accused persons tried for criminal offences in the military justice system.

RECOMMENDATION

The CBA Section recommends that the NDA be amended to make it clear that the Crown's right to appeal under section 230.1(b) or section 230.1(d) is limited to a question of law alone.

6. Power of the Court Martial Appeal Court to Suspend Carrying into Effect of Custodial Sentence (Bill C-25[69])

The NDA should be amended to permit the Court Martial Appeal Court to suspend the carrying into effect of a sentence of imprisonment or detention. Under sections 230(a) and 230.1(a) of the NDA, the Court Martial Appeal Court may consider an appeal with respect to the severity of sentence. If the Court Martial Appeal Court allows an appeal with respect to the severity of sentence, it may "substitute for the sentence imposed by the court martial a sentence that is warranted in law" under section 240.1 of the NDA.

Notwithstanding the powers in section 240.1, the Court Martial Appeal Court does not have authority to suspend the carrying into effect of a sentence of imprisonment or detention. Under section 215, only the service tribunal that imposes a sentence of imprisonment or detention (an officer presiding at a summary trial or a military judge presiding at a court martial) may suspend the carrying into effect of the sentence. The Court Martial Appeal Court considered this issue in respect of a previous version of section 215 of the NDA in *Blaquiere v. The Queen*.[70] The Court concluded that it had no jurisdiction to suspend the carrying into effect of a custodial sentence under the previous version of section 215.

69 *NDA*, section 215.

70 [1999] C.M.A.J. No. 2.

The suspension of the carrying into effect of a custodial sentence under section 215 of the NDA should not be confused with a "suspended sentence" under section 731(1)(a) of the *Criminal Code*. Under the *Criminal Code*, where a person is convicted of an offence and no minimum punishment is prescribed by law, the Court may suspend the sentence and direct that the offender be released on conditions prescribed in a probation order. If the offender fails to comply with the probation order or commits another offence, the Court has the power to revoke the suspended sentence and impose the sentence that would be warranted.[71]

A service tribunal has no power to impose a "suspended sentence" pursuant to section 731 of the *Criminal Code*. A service tribunal has only the power to suspend the carrying into effect of the custodial sentence pursuant to section 215 of the NDA. In other words, the service tribunal actually imposes a custodial sentence (imprisonment or detention) but then suspends the carrying into effect of that sentence. The offender does not serve the custodial sentence, but is not on any form of probation. However, in the case of regular force members of the CF, the offender is under the control of military authorities and subject to supervision in that manner. A greatly reduced level of supervision can be applied to reserve force members of the CF and civilians.

The discretion under section 215 of the NDA to suspend the carrying into effect of a custodial sentence is an important aspect of crafting a fit sentence for an offender. Thus, the power of the Court Martial Appeal Court to substitute a sentence warranted in law should include the power to suspend the carrying into effect of a custodial sentence.

71 *Criminal Code*, section 732.2(5).

RECOMMENDATION:

The CBA Section recommends that section 215 of the NDA 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.[72]

7. Curative Proviso

Both the *Criminal Code* and the NDA permit the appeal court to dismiss an appeal where there has been no substantial miscarriage of justice. Even where a trial court has made a wrong decision on a question of law, the *Criminal Code* enables an appeal court to dismiss the appeal if "it is of the opinion that no substantial wrong or miscarriage of justice has occurred."[73] This power, in section 686(1)(b)(iii) of the *Criminal Code*, is frequently referred to as the "curative proviso."

The test for the appellate court to apply this power has been varyingly described as whether the verdict would necessarily have been the same if the error of law had not occurred and whether there is any possibility, if the error of law had not been committed, a judge or properly instructed jury would have acquitted the accused. Under either test, the principal task of the appellate court is to determine whether "there is any reasonable possibility that the verdict would have been different had
the error at issue not been made."[74] The curative proviso in the *Criminal Code* may be applied only to errors of law made by the trial court. It cannot be applied where the verdict is unreasonable or cannot be supported by the evidence.

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72 Section 215 of the *NDA* could be amended to read as follows: "Where an offender has been sentenced to imprisonment or detention, the carrying into effect of the punishment may be suspended by the service tribunal that imposed the punishment *or by the Court Martial Appeal Court*."

73 *Criminal Code*, section 686 (1)(b)(iii).

74 *R. v. Bevan* (1993), 50 C.C.C. (3d) 310 (S.C.C.).

The military justice curative proviso is in section 241 of the NDA. The power of the Court Martial Appeal Court to dismiss an appeal on the basis of the curative proviso is broader than that open to an appellate court under the *Criminal Code*. The curative proviso may be applied by the Court notwithstanding "anything" in Division 9 of the NDA relating to appeals.[75] In the words of section 241, the Court Martial Appeal Court "may disallow an appeal if, in the opinion of the Court, to be expressed in writing, there has been no substantial miscarriage of justice."

The language of section 241 is broad enough to be applied to situations where the verdict is unreasonable or unsupported by the evidence. For example, in *Simard v. The Queen*[76] the Court Martial Appeal Court disallowed an appeal on a conviction for drunkenness, even though it held that the military judge's verdict was unreasonable. The Court was of the view the conviction for drunkenness on the basis of inability to perform or be entrusted with a duty was unreasonable but concluded that there was ample evidence on which the appellant could have been found guilty of drunkenness on the basis of disorderly conduct. One must question how the Court could arrive at this conclusion. It would seem reasonable to postulate that a finding that a verdict is unreasonable is, in itself, an indication of a miscarriage of justice. A finding that a verdict is unreasonable or unsupported by the evidence taints the trial court's decision and supports, at a minimum, a direction for a new trial. Thus, a finding that a verdict was unreasonable or unsupported by the evidence and the application of the curative proviso in section 241 would seem to be mutually exclusive.

RECOMMENDATION:

The CBA Section recommends that section 241 of the NDA be amended to limit the power of the Court Martial Appeal Court to disallow an appeal on the basis that there has been no

75 *NDA*, section 241. Division 9 of the *NDA* relating to appeals covers sections 228-245.

76 [2002] C.M.A.J. No. 5.

substantial miscarriage of justice to circumstances where there has been a wrong decision on a question of law. Section 241 could be amended to read: "Notwithstanding that there has been a wrong decision on a question of law and the appeal might be decided in favour of the appellant on that basis, the Court Martial Appeal Court may disallow an appeal if, in the opinion of the Court, to be expressed in writing, there has been no substantial miscarriage of justice."

8. Forensic DNA Orders

Where a person is found guilty of a designated offence, a court martial can make an order authorizing the taking of samples of bodily substances for forensic DNA analysis.[77] On application by a military prosecutor, the court martial has discretion to make a forensic DNA order in respect of a person found guilty of a designated offence prior to the coming into force of the *DNA Identification Act*.[78] Both the offender and the Crown have the right to appeal the decision of a court martial granting or refusing a forensic DNA order.[79]

While the NDA specifies the right to appeal decisions relating to forensic DNA orders, it has not granted the Court Martial Appeal Court specific powers to dispose of such appeals, as it has for all other types of appeals. This statutory oversight appears to grant the right to appeal decisions relating to forensic DNA orders, but denies the Court the power to grant a remedy. For example, if the Court Martial Appeal Court allowed an appeal of a conviction in which a forensic DNA order was granted, it is unclear whether it has the power to order data already entered in the national DNA data bank to be purged and destroyed.

77 *NDA*, section 196.14 (1).

78 *NDA*, section 196.15 (1).

79 *NDA*, sections 230(f) and 230.1(g).

RECOMMENDATION:

The CBA Section recommends that the NDA be amended to specify the powers that may be exercised by the Court Martial Appeal Court in respect of forensic DNA orders.

9. Appeal Committee (Bill C-25[80])

Prior to 1999, a person who initiated an appeal of a court martial decision could not have a military lawyer act as counsel for the appeal.[81] The appellant was forced to retain civilian counsel at personal expense, or pursue an application for the provision of appeal counsel under Rule 20 of the previous *Court Martial Appeal Court Rules*. This gap in the military legal aid system meant that some meritorious appeals of court martial decisions were not pursued. The inequity was addressed by the creation of the Appeal Committee under section 249.17 of the NDA. A two-person Appeal Committee has been established by article 101.20 of the QR&O to consider applications for the provision of appeal counsel by the Director of Defence Counsel Services for appeals to the Court Martial Appeal Court and the Supreme Court of Canada.

Following delivery of a notice of appeal, an appellant has 21 days to deliver a copy of the notice of appeal and an application for the provision of appeal counsel to the Director of Defence Counsel Services[82]. The application is submitted directly to the Director of Defence Counsel Services rather than through the military chain of command. No formal form of application has been prescribed.

The application, with an opinion letter from the trial counsel on whether the proposed appeal has professional merit, is forwarded to the Appeal Committee. The Director of Defence Counsel Services may make a recommendation to the

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80 QR&O, article 101.21. The provisions of the QR&O establishing the Appeal Committee are part of the regulatory changes intended to give effect to Bill C-25 pursuant to section 249.17. Thus, the Appeal Committee falls within the scope of this review.

81 In contrast, a person would be provided with military counsel if the appeal were initiated by the Crown.

Appeal Committee in respect of the disposal of the application. If both members of the Appeal Committee agree that the proposed appeal has professional merit, the provision of appeal counsel by the Director of Defence Counsel Services at public expense is approved.[83] Typically, the appeal counsel will be a military defence counsel from the Directorate of Defence Services. However, the Director of Defence Counsel Services has the legal authority to engage outside civilian counsel to represent the appellant.[84]

While the creation of the Appeal Committee was a great stride forward for military justice, the constitution of the committee is problematic. The Appeal Committee consists of one person appointed by the Judge Advocate General and one appointed by the Chief of the Defence Staff. At present, the Appeal Committee consists of a senior legal officer who is chief of staff of the Office of the Judge Advocate General and a retired senior legal officer who was senior reserve legal officer for the Office of the Judge Advocate General immediately prior to retirement.[85] The problems with the committee structure are numerous:

- The Appeal Committee members are in a clear conflict of interest, since they are, or until recently were, legal advisors to the CF, the very organization that charged and prosecuted the applicant. A compelling argument can be made that loyalty to their client or former client compromises their ability to objectively and independently evaluate whether an appeal has professional merit.

82 QR&O, article 101.21 (3).

83 QR&O, article 101.21 (4)-(6).

84 *NDA*, section 249.21 (2).

85 The Chief of Defence Staff appointed Colonel Bruno Champagne, the Deputy Judge Advocate General / Chief of Staff, to the Appeal Committee. The Judge Advocate General appointed Colonel Sandy Fairbanks, a prosecutor in the Province of Nova Scotia in his civilian legal career, who recently retired from the reserves where he held the position of Deputy Judge Advocate General / Reserves.

- Administrative law principles are clear that an applicant to the Appeal Committee is entitled to a decision from unbiased decision makers. If the Appeal Committee structure were transposed to the legal system in Ontario, the question of whether Legal Aid Ontario would fund an appeal would be decided by two lawyers (not prosecutors) employed by the Ministry of the Attorney General, the same government department that employs the prosecutors. The conclusion is almost irresistible that the present members of the Appeal Committee are not unbiased decision makers.

- The two-member constitution of the Appeal Committee creates a difficult obstacle for the applicant to overcome. Each member has a veto on the application for appeal counsel, since both members must support the application for it to be approved. Therefore, even where one member of the Appeal Committee is of the view that a proposed appeal has professional merit, it can be overruled by the other member.

- Provincial governments deliver legal services through legal aid plans administered by independent, arm's length organizations. For example, in Ontario an "area committee" decides whether a proposed appeal has professional merit and will be funded by Legal Aid Ontario. The area committee, which normally includes defence counsel in private practice, provides an objective, independent peer review of the trial counsel's opinion that

an appeal has professional merit. Objective, independent peer review is entirely absent from matters before the Appeal Committee.

- The Appeal Committee provides no reasons for decision, reporting only whether or not the application is approved or denied. Similarly, it does not disclose whether a denied application was supported by one of the committee members. Again, such a situation supports the notion that there is a breach of procedural fairness.

- The unfairness of the Appeal Committee process is highlighted by the fact that there is no administrative process for the decision to be reviewed or appealed. In fact, the QR&O specifically prohibits a military member from submitting a grievance to review the decision.[86]

A military member wishing to challenge the decision of the Appeal Committee has no choice but to resort to the courts. As presently constituted, it would seem that the decisions of the Appeal Committee are extremely vulnerable on a number of grounds to an application for judicial review in the Federal Court of Canada.

RECOMMENDATION:

The CBA Section recommends that article 101.21(1) of the QR&O be amended to provide that the Appeal Committee consist of (a) the Director of Defence Counsel Services, (b) a civilian defence counsel nominated by the Canadian Bar Association, and (c) a lawyer, who is neither a legal officer nor a prosecutor, nominated by the Canadian Bar Association or another professional legal organization.

86 QR&O, article 101.21 (7).

The CBA Section recommends that article 101.21(5) of the QR&O be replaced with: "The application shall be considered by the three members of the Committee, which shall be chaired by the Director of Defence Counsel Services."

The CBA Section recommends that article 101.21(6) of the QR&O be amended to read: "Where a majority of members of the Committee agree that the appeal has professional merit, the Committee shall approve the provision of legal counsel by the Director of Defence Counsel Services. The Committee, or its individual members, may give reasons for the decision. Each member of the Committee shall indicate whether, in the opinion of that member, the appeal has professional merit."

XXII. FREEDOM OF EXPRESSION

Provisions of the QR&O that restrict the freedom of expression of members of the CF require scrutiny and reform.[87] These provisions must strike an appropriate balance between a minimum impairment of military members' constitutionally protected right to freedom of expression and the reasonable needs of the CF.

The freedom of thought, belief, opinion and expression is a fundamental freedom protected by section 2(b) of the *Charter*. Members of the CF, like other Canadians, benefit from this freedom. It is submitted that articles 19.36 and 19.37 of the QR&O unduly and unreasonably restrict the freedom of expression of members of the CF. Unless permission is obtained from the Chief of Defence Staff, a member of the CF may not:

87 QR&O, articles 19.36 and 19.37.

- Publish in any form whatever any military information or the member's views on any military subject to an unauthorized person;

- Deliver publicly, or record for public delivery, either directly or through the medium of radio or television, a lecture, discourse or answers to questions relating to a military subject;

- Prepare a paper or write a script on any military subject for delivery or transmission to the public;

- Publish the member's opinions on any military question that is under consideration by superior authorities; and

- Publish in writing or deliver any lecture, address or broadcast in any way dealing with a subject of a controversial nature affecting other departments or the public service or pertaining to public policy.[88]

For the purposes of article 19.36 of the QR&O, the expression "military" is construed "as relating not only to the Canadian Forces but also to the armed forces of any country."

It is fair to say that membership in the armed forces of Canada may legitimately involve a reasonable and balanced limitation on one's freedom of expression. However, the Section's view is that the limitations on freedom of expression imposed by articles 19.36 and 19.37 of the QR&O are excessive, unreasonable and draconian. The scope of the restriction in article 19.36 is so broad that, on its face, it prohibits a CF member from writing a history essay on a military subject for a university course. The prohibitions in article 19.36 of the QR&O may be

88 *Ibid*.

overcome if the Chief of Defence Staff grants permission to publish or communicate information or opinion pursuant to article 19.37. Article 19.37 states, "Permission for the purposes of article 19.36 **may be granted** by the Chief of Defence Staff or such other authority as he may designate." The decision as to whether permission will be granted is entirely discretionary. Article 19.37 contains no legal criteria for determining when permission should be granted. The process for obtaining permission may be slow in that the Chief of Defence Staff's other more pressing duties may prevent the Chief from addressing permission requests in a timely manner.

Articles 19.36 and 19.37 are easy to apply to regular force members of the CF, but their application to part-time, reserve force members of the CF is more problematic. As a general rule, members of the reserve force are subject to the provisions of the QR&O only when they are subject to the Code of Service Discipline.[89]

The issue of freedom of expression in the context of service in the CF deserves careful study in order to strike the correct balance. The issue was explored in an American context in a paper published in the Air Force Law Review in 1998.[90] A careful study of this issue in the Canadian context is urgently required.

RECOMMENDATIONS:

The CBA Section recommends that articles 19.36 and 19.37 of the QR&O be replaced with provisions that are reasonable, balanced and minimally impair the freedom of expression of members of the CF.

89 QR&O, article 1.03.

90 John A. Carr, "Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity" (1998) 45 Air Force Law Review 303.

The CBA Section recommends that the new provisions set out clear legal criteria for granting permission, and an expeditious and straightforward procedure for obtaining permission, for the publication or communication of information or opinion pursuant to article 19.37 of the QR&O.

XXIII. MILITARY POLICE COMPLAINTS COMMISSION (BILL C-25[91])

The establishment of the Military Policy Complaints Commission (MPCC) was one of the major changes initiated by Bill C-25 to modernize and strengthen Canada's military justice system. The MPCC acts as a quasi-judicial and independent civilian oversight body that examines complaints arising from the conduct of military police in the exercise of policing duties or functions as well as complaints alleging interference with an investigation.

The Chair of the MPCC was appointed on 1 September 1999 and three months later it commenced operations. As might be expected, the first three and a half years of operation of the MPCC have brought to light strengths and weaknesses of the legislative framework in Bill C-25. While the MPCC has functioned effectively, experience has shown that certain refinements will improve the ability of the MPCC to carry out its mandate:

- From time to time the military police have utilized members of civilian police forces, who have been attached or seconded to the military police and assumed positions of responsibility within the organization. However, members of civilian police forces who serve with the military police are not officially appointed as "military police" pursuant to section 156 of the NDA. Therefore, they cannot be the

91 *NDA*, sections 250-250.53.

subject of a conduct complaint pursuant to section 250.18 of the NDA. Presumably, any complaint about their conduct would have to be made to the police complaints commission having jurisdiction over their home police force. Where conduct complaints arising out of the same matter are made against a military police member and a civilian police member serving with the military police, two separate complaint processes would be engaged with resulting duplication of effort and the prospect of contradictory outcomes. The definition of "military police" in section 250 of the NDA should specify that military police includes a civilian police member seconded or attached to the military police and performing military police duties or functions.

- Section 250.19 of the NDA permits only a military police investigator or supervisor to make a complaint that an officer, non-commissioned member or senior official of the DND "has improperly interfered with an investigation." Even though there has been some interference with an investigation, one can understand the natural reluctance of a member of the military police to lodge a complaint. Moreover, a person who may have reasonable grounds to believe that an investigation has been interfered with has no standing to make an interference complaint. It would be more effective to allow any person who believes on reasonable grounds that an investigation has been interfered with to have standing to make a complaint. Section 250.19(1) should be amended accordingly.

- Unlike the Chair of the RCMP Public Complaints

Commission[92], the Chair of the MPCC does not have power to independently initiate a conduct complaint or an interference complaint pursuant to sections 250.18 and 250.19 of the NDA. The Chair of the MPCC should have this power, and the NDA should specifically provide for it.

- Access to information, documents and things as well as the cooperation of persons are important issues for bodies such as the MPCC, CF Grievance Board and the Office of the DND/CF Ombudsman. The effectiveness of an organization such as the MPCC depends very much on gaining access to the necessary information, documents and things to establish the facts relating to a complaint. Absent a public interest hearing pursuant to section 250.38 of the NDA, the MPCC must generally rely on the goodwill and cooperation of persons with information relevant to a complaint. Hence, the powers available to the MPCC pursuant to section 250.41 with respect to a hearing should also apply with respect to an investigation.

- Pursuant to section 250.26 of the NDA, the CFPM is responsible for dealing with conduct complaints. However, where the complaint is about the conduct of the CFPM, the Chief of the Defence Staff is responsible for dealing with the complaint. A problem arises where the complaint is not directly about the CFPM's conduct , but the CFPM is implicated or involved in the matter (e.g., where the CFPM condoned the conduct or issued orders which led to the

92 *Royal Canadian Mounted Police Act*, R.S.C. 1985 (2nd Supp.), c. 8, section 45.37(1).

conduct). In such circumstances, it is very likely inappropriate for the CFPM to deal with the conduct complaint. The Chief of Defence Staff should deal with the complaint.

- The English and French versions of Part IV of the NDA are inconsistent. They should be reviewed and amended to make them consistent.

RECOMMENDATIONS:

The CBA Section recommends that the definition of "military police" in section 250 of the NDA be amended to provide that persons attached or seconded to the military police (i.e., members of civilian police forces) are deemed to be military police for the purposes of Part IV of the NDA.

The CBA Section recommends that section 250.19(1) of the NDA be amended to permit any person – not just the military police investigator or supervisor – to make a complaint that an officer or non-commissioned member or senior official of DND has improperly interfered with an investigation.

The CBA Section recommends that the NDA be amended to specifically provide that the Chair of the MPCC may, where satisfied that reasonable grounds exist, initiate a conduct complaint or interference complaint pursuant to sections 250.18 and 250.19 respectively of the NDA.

The CBA Section recommends that section 250.41 of the NDA be amended to read, "When conducting a hearing or an *investigation* …" and that section 250.45(1) be amended to read, "In a hearing or an *investigation* …".

The CBA Section recommends that section 250.26 of the NDA be amended to provide that the Chief of Defence Staff is responsible for dealing with a conduct complaint where the CFPM is implicated or involved in the impugned conduct.

The CBA Section recommends that a review of Part IV of the NDA be conducted to reconcile any inconsistencies in the English and French versions.

XXIV. CANADIAN FORCES GRIEVANCE BOARD (BILL C-25[93])

The creation of the Canadian Forces Grievance Board (CFGB) was another major reform brought about by Bill C-25 in 1998. The change principally arose as a result of the work of the Somalia Commission of Inquiry and the policy decisions of then Minister of National Defence, Douglas Young.[94]

In November 1999 the Government of Canada appointed the chair and vice-chair of the CFGB. The work of the CFGB began in earnest in June 2000 when the regulatory framework was put in place.[95] The CFGB inherited many grievances that had been making their way through the old system. Subject to a few

93 *NDA*, sections 29-29.28.

94 *Dishonoured Legacy: The Lessons of the Somalia Affair, supra*, note 5, Recommendation 40.34; and Douglas Young [Minister of National Defence], *Report to the Prime Minister on the Leadership and Management of the Canadian Forces*, 25 March 1997.

95 QR&O, ch. 7.

difficulties, the CFGB appears to have functioned reasonably well under the statutory and regulatory framework brought into existence by Bill C-25. Areas where the grievance system might be refined include:

- Many grievances expressly or by implication involve a claim for financial compensation by the griever. However, the Chief of Defence Staff, as final arbiter of grievances, has no authority under the NDA, regulations or policy to settle the financial aspects of grievances. For the sake of expediency, it would appear prudent that the Chief of Defence Staff be granted such authority.

- Where a grievance has been processed by the CFGB, its findings and recommendations are forwarded to the Director of the CF Grievance Administration. The findings and recommendations of the CFGB are not sent immediately to the Chief of Defence Staff for a decision on the grievance. Rather, they are sent to the "Initial Authority," the first level in the chain of command with power to deal with the grievance. Taking into account the findings and recommendations of the CFGB, the Initial Authority attempts to resolve the matter with the griever prior to seeking a formal decision from the Chief of Defence Staff. If an administrative resolution is reached, the Chief of Defence Staff never makes a decision with respect to the grievance and, in particular, the larger policy or systemic issues raised by it. Thus, the system may not benefit fully from the effort invested by the CFGB. In such circumstances, it would appear reasonable that the Chief of Defence Staff render a decision or set policy on the broader

issues raised by a grievance. The system may be saved the time and effort of having to process a similar grievance in the future.

- Access to information and documents, as well as the cooperation of persons, are important issues for organizations such as the CFGB, Military Police Complaints Commission and the Office of the DND/CF Ombudsman. It would appear prudent, therefore, to review and further refine the powers of the CFGB to compel access to information, documents and things and to compel the cooperation of persons.

- Grievances frequently involve a CF member objecting to a release from the CF as a result of administrative action. However, the powers to reinstate a person released from the CF in section 30(4) are not sufficiently broad or flexible to address situations where the administrative decision to release a person is reversed. Section 30 of the NDA should be amended to permit the reinstatement of CF members released administratively.

RECOMMENDATIONS:

The CBA Section recommends that the Chief of Defence Staff be given financial authority by way of statute, regulation or delegation to settle financial claims in grievances.

The CBA Section recommends that where the CFGB has made findings and recommendations for the use of the Chief of Defence Staff in determining a grievance, the Chief of Defence Staff shall render a decision with respect to the general policy

or systemic issues raised by the grievance, notwithstanding that the grievance is resolved administratively prior to a final decision by the Chief of Defence Staff.

The CBA Section recommends that section 29.21 of the NDA be amended to grant the CFGB power to issue a summons for production of documents in respect of a grievance, even if no hearing is to be held in respect of the grievance.

The CBA Section recommends that section 30 of the NDA be amended to provide for the reinstatement of CF members who have been released administratively. In particular, the CBA Section recommends that a section be added to section 30:

> **(5) Subject to regulations made by the Governor in Council, where**
>
> > **(a) an officer or non-commissioned member has been released administratively from the CF, and**
> >
> > **(b) the administrative release ceases to have force and effect as a result of a decision of a competent authority,**
>
> **the release may be cancelled, with the consent of the officer or non-commissioned member concerned, who shall, except as provided in those regulations, be deemed for the purposes of this Act or any other Act not to have been so released.**

XXV. DEPARTMENT OF NATIONAL DEFENCE / CANADIAN FORCES OMBUDSMAN

In its five volume report on the deployment of the CF to Somalia, the Somalia Commission of Inquiry[96] recommended that the NDA be amended to establish an independent review body, the Office of the Inspector General, with well defined, independent jurisdiction. The Office of the Inspector General was to have comprehensive powers, including the powers to evaluate systemic problems in the military justice system, conduct investigations into officer misconduct, protect those who report wrongdoing from reprisals, and protect individuals from abuse of authority and improper personnel actions including racial harassment.[97]

In its response, DND opted not to follow the recommendation to establish an Office of the Inspector General, but indicated that the objectives would be achieved through the current and planned initiatives for change:

- Improvements to the grievance process;
- The creation of an independent grievance board to make recommendations to the Chief of Defence Staff;
- The establishment of a Military Police Complaints Commission to review and investigate complaints concerning the conduct of military police as well as allegations of interference by the chain of command;
- The establishment of the CF National Investigation Service;
- The appointment of a Department of National Defence / Canadian Forces (DND/CF) Ombudsman; and

96 *Dishonoured Legacy*: *The Lessons of the Somalia Affair*, *supra*, note 5.

97 *Ibid*., Recommendation 16.2, at 404. As to the Commission's views on the need for an Inspector General, see at 397- 403.

- The requirement for annual, public reporting by the Chief of Defence Staff, Judge Advocate General, CF Provost Marshal, Military Police Complaints Commission, DND/CF Ombudsman, and the independent grievance board.

A number of these initiatives were implemented in Bill C-25. However, the office of the DND/CF Ombudsman was not established by statute in Bill C-25.

1. Evolution of the Office of the DND/CF Ombudsman

In June 1998 the Minister of National Defence appointed the first DND/CF Ombudsman. The Ombudsman, appointed by an Order in Council pursuant to section 5 of the NDA, holds office during good behaviour.[98] The Ombudsman was made accountable directly to the Minister and independent of the CF chain of command and DND management. It was intended that the Ombudsman would be accessible to all DND/CF employees and members without fear of retribution.

The newly appointed Ombudsman was given the task of developing a mandate and determining how the Office would carry out its work. Extensive consultations were held within and outside DND/CF. Research into various ombudsman models, including those of the armed forces of other nations, was undertaken to determine the parameters of the Office's mandate and its method of operation. In January 1999 the DND/CF Ombudsman submitted a plan to the Minister of National Defence with recommendations that would allow the Office to operate as a neutral, independent and credible office that would contribute to positive change within DND/CF.[99]

The Ombudsman's first mandate was arrived at following negotiations involving the Ombudsman's Office, the Minister of National Defence, and DND/CF officials. The mandate became effective in June 1999 when the Minister released

98 Section 5 allows the Governor in Council, on the recommendation of the Minister of National Defence, to designate any other person to exercise any power or perform any duty or function that is performed by the Minister under the *NDA*.

the *Ministerial Directives* for the Ombudsman's Office and the Office began operations. The *Ministerial Directives* and the accompanying Defence Administrative Order and Directive (DOAD)[100] gave legal authority for the day-to-day operation of the Ombudsman's Office. The *Ministerial Directives* stated that they would guide the operation of the Ombudsman's Office for six months, after which they would be reviewed, amended as required, and subsequently incorporated into law by way of a regulation.

After six months of operation, the Ombudsman's Office released a report that outlined areas of improvements or adjustments needed to the *Ministerial Directives* before they were incorporated into regulations.[101] The report included draft regulations. Although the Minister of National Defence made a commitment to embed the Ombudsman's mandate in a recognized legal framework, no action in this regard has been taken. In June 2001 the Ombudsman was reappointed for a further five-year term. In September 2001 the revised mandate came into effect.

2. Current Mandate of the DND/CF Ombudsman

The DND/CF Ombudsman operates independently from the management and chain of command of the DND and CF. The Ombudsman reports directly to the Minister of National Defence and is accountable only to the Minister, but operates at arm's length from the Minister, preserving independence from the executive function. The general duties and functions of the Ombudsman[102] are:

- To act as a neutral and objective sounding board, mediator, investigator and reporter on matters related to the DND and CF;

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99 *The Way Forward*: *Action Plan for the Office of the Ombudsman*.

100 Defence Administrative Order and Directive (DAOD) 5047-1 [Office of the Ombudsman]. The *Ministerial Directives* respecting the DND/CF Ombudsman are attached to this DAOD as Annex A.

101 *A Regulatory Regime for the Ombudsman*, 16 December 1999.

102 See DAOD 5047-1.

- To act as a direct source of information, referral and education to assist individuals in accessing existing channels of assistance and redress within the DND and CF;

- To serve to contribute to substantial and long-lasting improvements in the welfare of employees and members of the DND and CF community;

- To review how complaints are handled under existing DND/CF review mechanisms, and to ensure that individuals are treated in a fair and equitable manner;

- To conduct investigations into matters in order to identify and substantiate systemic problems and to make recommendations to contribute to improvements in the welfare of the DND and CF community;

- To report annually to the Minister of National Defence on trends in complaints and issues facing members of the DND/CF community which may impact on broader departmental objectives such as recruiting, retention and operational capacity;[103] and

- To issue other public reports concerning investigations or on any other matters within the mandate, if considered in the public interest to do so.

The Ombudsman also has authority to investigate matters by his "own motion", thereby enabling the Ombudsman to investigate matters which may not necessarily fall within the strict provisions of its mandate. As well, the Minister can directly ask the Ombudsman to investigate any matter. The Ombudsman has the ability to provide objective and independent insights into issues facing CF

103 This report is tabled in Parliament by the Minister and is made public by the Ombudsman.

members as a whole that are vital to the organization, and to the Minister, especially in light of the many challenges and pressures facing the DND/CF today.

Since its creation, the Office of the DND/CF Ombudsman has shown its ability to effectively and promptly review complaints and make positive recommendations for change to the management of DND/CF. The Office provides effective oversight of DND/CF internal dispute mechanisms and is able to accomplish many things that other oversight mechanisms created by Bill C-25 cannot do. The Office has also gained acceptability, credibility and respect within DND/CF.

3. Need To Establish the Office of the DND/CF Ombudsman in the NDA

The Office of the DND/CF Ombudsman should be established in the NDA. A statutory basis would ensure the continued effective operation of the Ombudsman. With no statutory foundation, a stroke of the Minister's pen could dispose of it. This leaves the Office in a precarious and unnecessarily vulnerable position. The Minister should carry through with the commitment to establish the Office of the DND/CF Ombudsman in law. The statutory recognition would also address the criticism that the Ombudsman acts as a "delegate" of the Minister, since the Ombudsman is currently exercising duties and functions delegated pursuant to section 5 of the NDA. Incorporation of the Office of the DND/CF Ombudsman into the NDA would bring this office into line with the status of ombudsman offices established in many other jurisdictions.

Any amendment to the NDA creating the Office of the Ombudsman should set out the nature and scope of the Ombudsman's role and powers. The current mandate for the Office of the Ombudsman provides an effective framework for the Office's work. To carry out this work, the Ombudsman requires access to information and documents as well as the cooperation of people. Any amendment

to the NDA should specify the rights and powers of the Ombudsman to access information and documents as well as to obtain the cooperation of members of the CF and employees of the Government of Canada (i.e., DND, entities created by the NDA and other government departments). The business of the Ombudsman must be
carried out on a confidential basis. Complainants and others who assist the Ombudsman must be assured that they will not be subject to reprisal or oppressive treatment.

RECOMMENDATIONS:

The CBA Section recommends that the position of DND/CF Ombudsman be added to the NDA as a Governor in Council appointment for a period of five years, holding office during good behaviour, and being eligible for re-appointment for one or more terms.

The CBA Section recommends that the functions, powers and responsibilities of the DND/CF Ombudsman should be specified in the NDA and should include the functions and responsibilities set out in the current mandate from the Minister of National Defence.

The CBA Section recommends that the NDA specify that the DND/CF Ombudsman operates independently from the DND management and CF chain of command.

The CBA Section recommends that the NDA specify the rank and status of the DND/CF Ombudsman within the Department of National Defence, to ensure the necessary authority for effective operation.

XXVI.CONCLUSION

The CBA Section appreciates the opportunity to provide input into the independent review of the provisions and operation of Bill C-25, and to make suggestions for reform and improvement in all areas of military law.

Canadian military law took a great stride forward in 1998 with the passage of Bill C-25. Five years later, we now have the opportunity to examine how well the changes have worked. Our analysis suggests that further work remains to be done to make Canada's military law more effective, efficient and *Charter*-compliant.

The CBA takes this opportunity to thank the Independent Review Authority, the Right Honourable Antonio Lamer, for his prodigious effort in conducting this review under considerable time constraints.

It is our hope that the recommendations contained in this submission with respect to Bill C-25 and the NDA as a whole will be accepted by the Government of Canada and that appropriate action will be taken to implement them.

XXVII. SUMMARY OF RECOMMENDATIONS

Scope of the Independent Review

1. The National Military Law Section of the Canadian Bar Association (CBA Section) recommends that the NDA be amended to provide for an independent review of the provisions and operations of the NDA as a whole. The CBA Section recommends that the new provision of the NDA read as follows:

> (1) The Minister shall cause an independent review of the provisions and operation of the Act and regulations to be undertaken from time to time.
>
> (2) The Minister shall cause the report on a review conducted under section (1) to be laid before each House of Parliament by the last day of the year 2008, and within every five year period following the tabling of a report under this section.

Timing of the Appointment of the Independent Review Authority

2. The CBA Section recommends that for future reviews pursuant to section 96 of Bill C-25 (or a similar provision applying to the entire NDA), the Independent Review Authority be appointed not less than twelve months before the final report is to be delivered to the Minister of National Defence, and that the Independent Review Authority be given sufficient resources to carry out a thorough and meaningful review.

Permanent Military Court

3. The CBA Section recommends that the NDA be amended to establish a permanent military court known as the "Canadian Military Court" pursuant to section 101 of the *Constitution Act, 1867*.

Professional Diversity in the Appointment of Military Judges

4. The CBA Section recommends that maximum effort be made to ensure that the professional diversity of the military bar is reflected in the appointments of military judges, to strengthen the independence and credibility of the military justice system.

Reserve Military Judges

5. The CBA Section recommends that the provision for the establishment of a Reserve Military Judges Panel in Bill C-17 (*Public Safety Act, 2002*) be amended in the following terms:

> 165.28 There is established a panel, called the Reserve Military Judges Panel (in this section and sections 165.29 to 165.32 referred to as the

"Panel"), to which the Governor in Council may name officers of the reserve force

(a) who have been appointed reserve military judges under this Act;

(b) who have previously performed the duties of a regular force military judge under this Act; or

(c) who have previously performed before September 1, 1999, the duties of a president of a Standing Court Martial, a presiding judge of a Special General Court Martial or a judge advocate of a General Court Martial or Disciplinary Court Martial."

6. The CBA Section recommends that the appointment of reserve military judges be from the ranks of reserve force legal officers.

7. The CBA Section recommends that the Reserve Military Judges Panel be composed predominantly of military judges appointed from among reserve legal officers (i.e., not former regular force military judges who have transferred to the reserve force).

Director of Defence Counsel Services

8. The CBA Section recommends that section 249.18 of the NDA be amended to provide the Director of Defence Counsel Services with the same security of tenure accorded to the Director of Military Prosecutions in section 165.1 of the NDA.

Independence of the Military Defence Bar

9. The CBA Section recommends that the Minister of National Defence establish a special advisory group to examine:

(a) whether legal officers who act as military defence counsel are in a position to deliver independent and effective legal advice and representation to members of the CF who face charges under the Code of Service Discipline; and

(b) the measures that should be taken to ensure that legal officers who act as military defence counsel are in a position to deliver independent and effective legal advice and representation to members of the CF who face charges under the Code of Service Discipline.

10. The CBA Section recommends that the special advisory group contain strong representation from the military defence bar, civilian defence bar, defence counsel organizations, provincial law societies and professional organizations for lawyers (such as the Canadian Bar Association).

Canadian Forces Provost Marshal (CFPM)

11. The CBA Section recommends that the NDA be amended to provide that the CFPM is appointed by the Minister of National Defence for a fixed term, holds office during good behaviour, may be removed only for cause on the recommendation of an inquiry committee, and may be re-appointed at the end of a first or subsequent term of office.

12. The CBA Section recommends that the general duties and responsibilities of the CFPM be prescribed in the NDA.

Bail

13. The CBA Section recommends that the NDA be amended to provide that, where a person is detained in custody or released on conditions of bail pursuant to the NDA, the person must be charged with a service offence as soon as practicable and in any event not later than 14 days following the person's arrest, failing which the person shall be released from custody forthwith or the conditions or the direction or undertaking for the person's release immediately terminated. The provision could read:

(1) Where a person has been detained in custody pursuant to this Division [3], a charge relating to the offence alleged to have been committed by the

person or relating to an included or other offence alleged to have been committed by the person shall be laid as soon as practicable following the person's arrest and in any event not more than fourteen days following the arrest of the person, failing which the person shall be released from custody forthwith without conditions.

(2) Where a person has been released with conditions pursuant to sections 158.6, 159.4 or 159.9, a charge relating to the offence alleged to have been committed by the person or relating to an included or other offence alleged to have been committed by the person shall be laid as soon as practicable following the person's arrest and in any event not more than fourteen days following the arrest of the person, failing which the direction for release is forthwith cancelled and the person is no longer subject to conditions of release.

14. The CBA Section recommends 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. The amendment should read:

(2) A direction to release a person with or without conditions may, on application, be reviewed by

(a) if the custody review officer is an officer designated by a commanding officer, that commanding officer or a military judge; or

(b) if the custody review officer is a commanding officer, the next superior officer to whom the commanding officer is responsible in matters or discipline or a military judge.

(3) After giving a representative of the Canadian Forces and the released person an opportunity to be heard, the officer or military judge conducting

the review may make any direction respecting conditions that a custody review officer may make under section (1).

15. The CBA Section recommends that the NDA be amended to specify the circumstances in which a detention order and conditions of bail are terminated, as follows:

> An order detaining a person in custody or a direction or undertaking for release made pursuant to sections 158.6, 159.4 or 159.9 is forthwith terminated where,
>
> (a) a charge has not been laid within fourteen days of the arrest of a person who is retained in custody or released on conditions;
>
> (b) a commanding officer or superior commander decides not to proceed with a charge;
>
> (c) the Director of Military Prosecutions gives notice in writing that a charge will not be preferred;
>
> (d) the Director of Military Prosecutions withdraws a charge; or
>
> (e) the summary trial or court martial with respect to the charge is concluded.

16. The CBA Section recommends that section 159.2(c) of the NDA be amended by replacing "any other just cause has been shown" with "custody is necessary in order to maintain confidence in the administration of justice".

Notice of Decision Not to Prefer a Charge

17. The CBA Section recommends that the article 110.04 of the QR&O be amended by adding section (3):

> (3) Where the Director of Military Prosecutions decides not to proceed with a charge, the Director of Military Prosecutions shall forthwith give notice in writing to
>
> (a) the accused person if that person is not represented by legal counsel or the accused person's legal counsel if that person is represented by legal counsel;

(b) the Director of Defence Counsel Services;

(c) the referral authority; and

(d) the accused person's commanding officer.

Preliminary Proceedings

18. The CBA Section recommends that section 187 of the NDA be amended to read:

> (1) At any time after a charge has been preferred for trial by a General Court Martial or a Disciplinary Court Martial, any military judge may, on application,
>
> (a) hear and determine any question, matter or objection for which the presence of the panel of the court martial is not required; and
>
> (b) receive the accused person's plea of guilty in respect of any charge and, if there are no other charges remaining before the court martial to which pleas of guilty have not been recorded, determine the sentence.
>
> (2) At any time after a charge has been preferred for trial by a Standing Court Martial or a Special General Court Martial, any military judge may, on application, hear and determine any question, matter or objection.

Convening of Courts Martial

19. The CBA Section recommends that section 165.19 of the NDA be amended by adding section (1.1):

> The Court Martial Administrator may convene a court martial for the purpose of conducting a trial or for the purpose of conducting a hearing with respect to a matter other than a trial.

In the alternative, the CBA Section recommends that article 111.02 of the QR&O be amended by adding article (1.1):

> The Court Martial Administrator may convene a court martial for the purpose of conducting a trial or for the purpose of conducting a hearing with respect to a matter other than a trial.

20. The CBA Section recommends that article 111.02(2) of the QR&O be amended by adding clause (b.1):

> state whether the court martial is convened for the purpose of conducting a trial or for the purpose of conducting a hearing with respect to a matter other than a trial.

21. The CBA Section recommends that Court Martial Administrator develop a new policy for the scheduling of hearings and trials that strikes a more reasonable and appropriate balance of the interests of all parties involved including the pre-eminent right of the accused to make full answer and defence.

Compelling the Appearance of Accused

22. The CBA Section recommends that section 165.19 of the NDA be amended such that the Court Martial Administrator is granted the explicit power to compel the accused to appear at a court martial that has been convened.

23. The CBA Section recommends that article 111.02(2) of the QR&O be amended to provide that the convening order issued by the Court Martial Administrator shall indicate whether the accused is required to personally attend the hearing or may have his counsel appear as agent.

Disclosure of Willsay Statements

24. The CBA Section recommends that article 111.11(1) of the QR&O be amended by replacing the phrase “Before a trial by court martial commences” with “At or prior to the time when a charge is preferred”.

Mode of Trial

25. The CBA Section recommends the elimination of Disciplinary Courts Martial and Special General Courts Martial.

26. The CBA Section recommends that the jurisdiction of Standing Courts Martial be expanded to include civilians subject to the Code of Service Discipline who would otherwise be tried by Special General Courts Martial, but that powers of punishment relating to civilians be limited to non-military punishments.

27. The CBA Section recommends that an accused person being tried by a General Court Martial have the right to elect between a trial by a military judge and panel of five members, and a trial by a military judge alone.

Court Martial Verdicts

28. The CBA Section recommends that section 192 of the NDA be amended to provide that a finding of guilty or not guilty by a court martial panel may be arrived at only by a unanimous vote. In particular, the CBA Section recommends replacing NDA section 192(2) with the following:

> (2) The decision of the panel of a General Court Martial or Disciplinary Court Martial to find an accused guilty or not guilty of an offence must be unanimous.
>
> (3) Subject to section (2), the decisions of the panel of a General Court Martial or a Disciplinary Court Martial are determined by a vote of a majority of its members."

Sentencing

29. The CBA Section recommends that the sentencing powers in the NDA be immediately amended to provide for:

- Absolute discharges (e.,g. section 730 of the *Criminal Code*);

- Intermittent sentences of imprisonment and detention (e.g., section 732 of the *Criminal Code*);
- Imprisonment or detention in default of payment of a fine (e.g., section 734 of the *Criminal Code*); and
- Enforcement of an unpaid fine by way of a civil judgment (e.g., section 734.6 of the *Criminal Code*).

30. The CBA Section recommends that the Department of National Defence undertake a comprehensive review of the sentencing provisions of the NDA with a view to reforming those provisions at the earliest opportunity.

31. The CBA Section recommends that any amendments to the sentencing provisions in the NDA contain a statement of principles of sentencing similar to those in sections 718, 718.1 and 718.2 of the *Criminal Code*.

32. The CBA Section recommends that any sentencing reforms to the NDA provide for a more flexible range of punishments and sanctions including, but not limited to:

- Suspended sentences and probation (e.g., section 731 of the *Criminal Code*);
- Conditional discharges (e.g., section 730 of the *Criminal Code*);
- Community service;
- Conditional sentences of imprisonment and detention (e.g., section 742.1 of the *Criminal Code*);
- Fine option program (e.g., section 736 of the *Criminal Code*); and

- Payment of restitution to the victim of an offence (e.g., sections 738, 741, 741.1 and 741.2 of the *Criminal Code*).

Prerogative Relief

33. The CBA Section recommends that the NDA be amended to permit an application for prerogative relief (certiorari, prohibition, mandamus, habeas corpus, declaratory relief) in respect of courts martial or the decisions of military judges to be made to a single judge of the Court Martial Appeal Court.

34. The CBA Section recommends that the NDA be amended to provide that the jurisdiction of a court martial or military judge is suspended pending the determination of a prerogative relief application.

35. The CBA Section recommends that the NDA be amended to permit an application for prerogative relief in respect of any member of the Canadian Forces serving outside Canada to be made to a single judge of the Court Martial Appeal Court.

36. The CBA Section recommends that section 18(2) of the *Federal Court Act* be repealed.

37. The CBA Section recommends that the definition of "federal board, commission or other tribunal" in section 2(1) of the Federal Court Act be amended to exclude courts martial established pursuant to the NDA and military judges appointed pursuant to the NDA.

Appeals

38. The CBA Section recommends that the provisions of the NDA relating to the establishment and powers of the Court Martial Appeal Court be removed and incorporated into a separate statute entitled the *Court Martial Appeal Court Act*.

39. The CBA Section recommends that section 234(2) of the NDA be amended by replacing the words "to be designated" with "appointed."

40. The CBA Section recommends that the definition of "superior court" in section 35 of the *Interpretation Act* be amended to recognize the Court Martial Appeal Court as a superior court.

41. The CBA Section recommends that section 235(2) of the NDA be amended to read: "Every appeal shall be heard by not fewer than three judges sitting together, and always by an uneven number of judges. The decision of the majority of judges hearing the appeal shall be the decision of the Court, and any other matter before the Court shall be disposed of by the Chief Justice or such other judge or judges of the Court as the Chief Justice may designate for that purpose."

42. The CBA Section recommends that the Court Martial Appeal Court Rules be amended to provide for a request by a party to an appeal for the hearing of that appeal by a panel of judges larger than three judges.

43. The CBA Section recommends that the NDA be amended to make it clear that the Crown's right to appeal under section 230.1(b) or section 230.1(d) is limited to a question of law alone.

44. The CBA Section recommends that section 215 of the NDA 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.

45. The CBA Section recommends that section 241 of the NDA be amended to limit the power of the Court Martial Appeal Court to disallow an appeal on the basis that there has been no substantial miscarriage of justice to circumstances where there has been a wrong decision on a question of law. Section 241 could

be amended to read: "Notwithstanding that there has been a wrong decision on a question of law and the appeal might be decided in favour of the appellant on that basis, the Court Martial Appeal Court may disallow an appeal if, in the opinion of the Court, to be expressed in writing, there has been no substantial miscarriage of justice."

46. The CBA Section recommends that the NDA be amended to specify the powers that may be exercised by the Court Martial Appeal Court in respect of forensic DNA orders.

47. The CBA Section recommends that article 101.21(1) of the QR&O be amended to provide that the Appeal Committee consist of (a) the Director of Defence Counsel Services, (b) a civilian defence counsel nominated by the Canadian Bar Association, and (c) a lawyer, who is neither a legal officer nor a prosecutor, nominated by the Canadian Bar Association or another professional legal organization.

48. The CBA Section recommends that article 101.21(5) of the QR&O be repealed and replaced with: "The application shall be considered by the three members of the Committee which shall be chaired by the Director of Defence Counsel Services."

49. The CBA Section recommends that article 101.21(6) of the QR&O be amended to read as follows: "Where a majority of the members of the Committee agree that the appeal has professional merit, the Committee shall approve the provision of legal counsel by the Director of Defence Counsel Services. The Committee, or its individual members, may give reasons for the decision. Each member of the Committee shall indicate whether, in his opinion, the appeal has professional merit."

Freedom of Expression

50. The CBA Section recommends that articles 19.36 and 19.37 of the QR&O be replaced with provisions that are reasonable, balanced and minimally impair the freedom of expression of members of the CF.

51. The CBA Section recommends that the new provisions set out clear legal criteria for the granting permission, and an expeditious and straightforward procedure for obtaining permission, for the publication or communication of information or opinion pursuant to article 19.37 of the QR&O.

Military Police Complaints Commission (MPCC)

52. The CBA Section recommends that the definition of "military police" in section 250 of the NDA be amended to provide that persons who are attached or seconded to the military police (i.e., members of civilian police forces) are deemed to be military police for the purposes of Part IV of the NDA.

53. The CBA Section recommends that section 250.19(1) of the NDA be amended to permit any person – not just the military police investigator or supervisor – to make a complaint that an officer or non-commissioned member or senior official of DND has improperly interfered with an investigation.

54. The CBA Section recommends that the NDA be amended to specifically provide that the Chairperson of the MPCC may, where satisfied that reasonable grounds exist, initiate a conduct complaint or interference complaint pursuant to sections 250.18 and 250.19 respectively of the NDA.

55. The CBA Section recommends that section 250.41 of the NDA be amended to read, "When conducting a hearing or an investigation …" and that section 250.45(1) be amended to read, "In a hearing or an investigation …".

56. The CBA Section recommends that section 250.26 of the NDA be amended to provide that the Chief of Defence Staff is responsible for dealing with a conduct complaint not only where the complaint is about the conduct of the CFPM, but also where the CFPM is implicated or involved in the impugned conduct.

57. The CBA Section recommends that a thorough review of Part IV of the NDA be conducted with a view to reconciling any inconsistencies in the English and French versions.

Canadian Forces Grievance Board (CFGB)

58. The CBA Section recommends that the Chief of Defence Staff be given the necessary financial authority by way of statute, regulation or delegation to settle financial claims in grievances.

59. The CBA Section recommends that where the CFGB has made findings and recommendations for the use of the Chief of Defence Staff in determining a grievance, the Chief of Defence Staff shall render a decision with respect to the general policy or systemic issues raised by the grievance, notwithstanding that the grievance is resolved administratively prior to a final decision by the Chief of Defence Staff.

60. The CBA Section recommends that section 29.21 of the NDA be amended to provide the CFGB with the power to issue a summons for the production of documents in respect of a grievance, even if no hearing is to be held in respect of the grievance.

61. The CBA Section recommends that section 30 of the NDA be amended to provide for the reinstatement of CF members who have been released administratively. In particular, the CBA Section recommends that the following section be added to section 30:

(5) Subject to regulations made by the Governor in Council, where

(a) an officer or non-commissioned member has been released administratively from the CF, and

(b) the administrative release ceases to have force and effect as a result of a decision of a competent authority,

the release may be cancelled, with the consent of the officer or non-commissioned member concerned, who shall, except as provided in those regulations, be deemed for the purposes of this Act or any other Act not to have been so released."

Department of National Defence / Canadian Forces Ombudsman

62. The CBA Section recommends that the position of DND/CF Ombudsman be added to statute in the NDA as a Governor in Council appointment for a period of five years, holding office during good behaviour, and being eligible for re-appointment for one or more terms.

63. The CBA Section recommends that the functions, powers and responsibilities of the DND/CF Ombudsman should be specified in the NDA and should include the functions and responsibilities set out in the current mandate from the Minister of National Defence.

64. The CBA Section recommends that the NDA specify that the DND/CF Ombudsman operates independently from the DND management and CF chain of command.

65. The CBA Section recommends that the NDA specify the rank and status of the DND/CF Ombudsman within the Department of National Defence, to ensure the necessary authority for effective operation.