



OFFICE OF THE PRESIDENT
CABINET DU PRÉSIDENT

April 27, 2004

The Honourable David Pratt, P.C., M.P.
Minister of National Defence
National Defence Headquarters
101 Colonel By Drive
Ottawa, Ontario
K1A 0K2

Dear Minister:

I am writing on behalf of the Canadian Bar Association (CBA), a national association representing over 38,000 lawyers and other jurists and dedicated to the improvement of the law and the administration of justice, to offer our organization's assistance in your Department's ongoing efforts to improve Canada's military law and military justice system. We spoke when you visited the Moose Jaw Air base to speak to community members about the rejuvenated Air Show.

First, I have enclosed for your consideration a copy of *National Defence Act Review: Response to the Lamer Report*, our Military Law Section's helpful comments on the former Chief Justice Antonio Lamer's independent review of Canadian military law (Bill C-25). This response contains a number of positive proposals for the improvement of Canada's military law.

Second, I wish to indicate the CBA's willingness to participate in a working group regarding the creation of a permanent military court. In his recent report, former Chief Justice Lamer recommended that your Department establish a working group to address issues arising from the creation of a permanent military court of record pursuant to section 101 of the *Constitution Act, 1867* (recommendations #13, 14 and 23). The Lamer Report states that this working group should include an "independent authority" in addition to representatives from the Department of Justice, the Office of the Chief Military Judge, the Office of the Judge Advocate General, the Director of Military Prosecutions and the Director of Defence Counsel Services (p. 28).

The CBA is well suited to serve in the role of an independent authority on the working group. Our association has a long and distinguished history of providing independent input into law reform initiatives. We would welcome the opportunity to make a positive contribution to the creation of a new permanent military court of record.

.../2

Our proposal for involvement in the working group regarding a permanent military court will, we believe, result in an inclusive, transparent and credible process. I would, therefore, welcome the opportunity to have CBA representation on the proposed working group. Thank you for your consideration of our request, and I look forward to hearing from you in due course.

Yours truly,

A handwritten signature in black ink, appearing to read "William Johnson". The signature is written in a cursive style with a large, sweeping flourish at the end.

F. William Johnson, Q.C.
President

cc.

Major-General Jerry S.T. Pitzul, Judge Advocate General of the Canadian Forces
David J. Bright, Q.C. Chair, National Military Law Section

***National Defence Act Review
Response to the Lamer Report***

**NATIONAL MILITARY LAW SECTION
CANADIAN BAR ASSOCIATION**



April 2004

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PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association'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 Legislation and Law Reform Committee and approved as a public statement of the National Military Law Section of the Canadian Bar Association.

National Defence Act Review *Response to the Lamer Report*

I. INTRODUCTION

On November 5, 2003, the Minister of National Defence tabled in Parliament the report of the first independent review of the provisions and operation of major changes made to Canadian military law in 1998¹. This report was prepared by the Rt. Hon. Antonio Lamer, a retired Chief Justice of Canada, and delivered to the Minister in September 2003.

The National Military Law Section of the Canadian Bar Association (the CBA/NMLS) welcomes the *Lamer Report* and congratulates Chief Justice (ret'd) Lamer on its outstanding contribution to the improvement and advancement of Canadian military law.

The CBA/NMLS commends the central theme of the report: “Those responsible for organizing and administering Canada’s military justice system have strived, and must continue to strive, to offer a better system than merely that which cannot be constitutionally denied.”²

The CBA/NMLS is gratified that Chief Justice (ret'd) Lamer accepted, in full or in part, 67% of the recommendations in its submission entitled *Submission on the Operation of Canadian Military Law – National Defence Act and Bill C-25*³. In addition,

1 *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the Provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c. 35, 3 September 2003 (the Lamer Report)*. See http://www.forces.gc.ca/site/Reports/review/index_e.htm.

2 *Ibid*, Foreword p. (1). At p. 21, Chief Justice (ret'd) Lamer comments, “...constitutionality is a minimum standard. As I said at the outset, those responsible for organizing and administering a military justice system must strive to offer a better system than merely that which cannot be constitutionally denied.”

3 Canadian Bar Association, June 2003. See <http://www.cba.org/CBA/News/pdf/03-28-eng.pdf>.

Chief Justice (ret'd) Lamer expressed appreciation to the CBA/NMLS for its contribution to the review. Appendix A summarizes which CBA/NMLS recommendations were accepted in the *Lamer Report*.

The CBA/NMLS has conducted a comprehensive review of the *Lamer Report*. In the vast majority of cases, the CBA/NMLS supports the Lamer recommendations. Appendix B sets out the CBA/NMLS position on each recommendation. The CBA/NMLS will not respond in detail to each recommendation, but rather will attempt to group its comments under important themes.

II. OVERALL

The *Lamer Report* focuses on two important areas of Canadian military law – the military justice system and military administrative law. With regard to the first area of focus, the CBA/NMLS agrees that Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence. The improvements to Canada's military justice system have made it a world leader in this field. Canadians can be justifiably proud of this achievement due, in no small part, to the commitment of the Department of National Defence (DND) to military law reform. Nevertheless, as Chief Justice (ret'd) Lamer points out, certain aspects of the military justice system need improvement⁴. According to the *Lamer Report*, members of the CF “who risk their lives for our country deserve a military justice system that protects their rights in accordance with our *Charter*, while maintaining the necessary discipline for achieving successful missions.”⁵ These themes are entirely consistent with the approach and intent of the CBA/NMLS submission.

4 *Lamer Report*, pp. (1)-(2).

5 *Ibid.*, p. (4).

The second area of focus in the *Lamer Report* is military administrative law. For example, Lamer devotes a great deal of attention to the military grievance process. Even after the improvements to the CF grievance process brought into effect by the 1998 amendments to the *National Defence Act* (NDA), the grievance system continues to have problems. The CBA/NMLS agrees with Chief Justice (ret'd) Lamer that CF members “deserve a grievance process that addresses their grievances in a fair, transparent and prompt manner.”⁶ Likewise, the *Lamer Report* suggests improvements to the Military Police Complaints Commission.

The CBA/NMLS supports the vast majority of the recommendations made by Chief Justice (ret'd) Lamer in his report. When implemented, these recommendations will provide Canada with an even better system of military justice and military administrative law. Nevertheless, the CBA/NMLS does differ with the *Lamer Report* on some details.

Furthermore, the CBA/NMLS continues to encourage the DND to implement the 19 recommendations in the CBA/NMLS submission that fell outside of Chief Justice (ret'd) Lamer's mandate. Since it is apparent that legislative changes will be required to implement many of the Lamer recommendations, the opportunity should not be lost to reform military law on a wide scale regardless of whether a matter fell within Lamer's mandate.

III. PARTICIPATION IN THE PERMANENT MILITARY COURT WORKING GROUP (LAMER #14 AND 23)

The CBA/NMLS would welcome the opportunity to participate in and contribute to the working group recommended in the *Lamer Report* for the purpose of devising a permanent military court. The CBA/NMLS believes that it can effectively serve the

function of an “independent authority” on the working group as envisioned by Chief Justice (ret’d) Lamer.

The *Lamer Report* recommends that a working group be established to identify the most effective framework for the creation of a permanent military court of record and that a schedule for the implementation of the court be designed accordingly (Lamer #14). Lamer recommends that this working group address the modernization of the types and jurisdiction of courts martial with a goal of devising a two-tiered court martial system (Lamer #23). The CBA/NMLS strongly supports these recommendations and the proposed composition of the working group.

Chief Justice (ret’d) Lamer states that such a working group should include an “independent authority” in addition to representatives from the Department of Justice, Office of the Chief Military Judge, Office of the Judge Advocate General, Director of Military Prosecutions and Director of Defence Counsel Services⁷. The CBA is well suited to serve in the role of an independent authority. The CBA has a long and distinguished history of providing independent input into law reform initiatives. The inclusiveness, transparency and credibility of the proposed working group will be enhanced by CBA involvement.

IV. OTHER WORKING GROUPS

The *Lamer Report* raises many issues that may merit further study or consideration. Working groups are an effective way to conduct such studies. The CBA/NMLS would welcome the opportunity to participate in any working groups established by DND.

We look forward to working with the DND to make Canada's military law even better. Of course, the broad experience and expertise of the CBA/NMLS comes at no expense to the DND. Some of the following matters might merit study by working groups:

- Sentencing reforms (Lamer # 52 and 54);
- Security of tenure for military judges to retirement (Lamer #5);
- Implementation of interim measures to have the court martial system operate like a permanent court (Lamer #15);
- Determination of the definition of "professional merit" to be used by the Appeal Committee (Lamer #28);
- Powers of arrest under military law (Lamer #32); and
- CBA/NMLS recommendations falling outside the *Lamer Report* mandate (CBA #4, 5-7, 9-11, 18, 21, 31-43, 45-46, 50-51, 59 and 62-65).

V. INDEPENDENCE OF MILITARY DEFENCE COUNSEL (CBA #9-10; LAMER #3-4)

The independence of the military defence bar has never been scrutinized in a study that involved not just military lawyers but also the broader legal and professional community (such as, prominent members of the civilian bar, civilian defence counsel and organizations, and the judiciary). The one review of military defence counsel services that has been conducted was an internal military affair with no outside involvement⁸.

The CBA/NMLS believes that DND should establish a working group, with broad military and civilian representation, to study the military public defender system that has operated in Canada's military justice system for decades. Such a study would consider the measures that are necessary to ensure that lawyers in uniform who, as military public

⁸ *Provision of Defence Counsel Services in the Canadian Forces: Report of the Defence Counsel Study Team* (Ottawa: Office of the Judge Advocate General, 1997).

defenders, advise and represent CF members before courts martial can do so effectively and independently.

The reasons favouring such a study are many, and the objections to it are not persuasive. Concerns about the independence of military defence counsel have been raised and should be addressed in a direct, transparent and credible way⁹. These concerns may ultimately undermine public confidence in the military justice system. The proposed study would permit the military defence counsel system to be judged by modern Canadian legal and professional standards.

“While the establishment of the DDCCS does indeed go a long way toward ensuring the independence of defence counsel,” wrote Chief Justice (ret’d) Lamer, “it must be noted that the hallmarks of independence, security of tenure and financial security could benefit from even greater protection.¹⁰” The CBA/NMLS supports the recommendations in the *Lamer Report* regarding the improvement of the security of tenure and financial security of the Director of Defence Counsel Services. Nonetheless, the CBA/NMLS believes that the DND should go further.

The CBA/NMLS urges DND to implement its recommendations for a comprehensive study of the independence of military defence counsel services. The Chief Justice of Ontario’s Advisory Committee on Professionalism identifies independence as one of the

9 David McNaim, “The Canadian Forces’ Criminal Law Firm: A Blueprint For Independence” [Part I] (2003), 8 *Canadian Criminal Law Review* 237 and [Part II] (2004), 8 *Canadian Criminal Law Review* 329.

10 *Lamer Report*, pp. 14-15.

ten essential elements, or building blocks, of the professionalism of lawyers¹¹. The issue of independence of defence counsel, within a military public defender system, merits careful consideration.

William Johnson, Q.C. made the issue of the independence of the bar a priority for his tenure as CBA President. “As lawyers, we must be vigilant in our defence of our independence,” commented Mr. Johnson, “not only for ourselves, but for the citizens of our nation.” Moreover, the CBA is currently considering the addition of a new rule to the *Code of Professional Conduct* that emphasizes the fundamental importance of the independence of the bar¹². The CBA/NMLS call for a special study of the issue of the independence of military defence counsel is in keeping with the CBA President’s outlook and the proposed new rule for the *Code of Professional Conduct*. Canada can again show itself to be a leader in the military law and justice field by carrying out such a study.

Moreover, this issue should not remain an internal DND matter. Independence of the military defence bar is of sufficient importance that it deserves input from leading members of the bar, the defence bar (military and civilian), defence counsel organizations, provincial law societies, professional organizations for lawyers and the judiciary. This input is essential for the study to be considered transparent, credible and reflective of current legal and professional standards.

11 *Defining Professionalism* (A Draft Report of the Working Group on the Definition of Professionalism, Chief Justice of Ontario Advisory Committee on Professionalism) (June 2002 version), available online at the Law Society of Upper Canada website (<http://www.lsuc.on.ca/news/pdf/definingprofessoct2001revjune2002.pdf>). An earlier version was published in *Professionalism: A Century of Perspectives* [A special edition of the Law Society of Upper Canada Gazette] (Toronto: Law Society of Upper Canada, 2002), pp. 29-38.

12 The proposed *Chapter XXII – Independence of the Bar* of the CBA *Code of Professional Conduct* would include the following rule: “(a) The lawyer must exercise independent professional judgment in providing legal advice, services and representation to a client. (b) The lawyer must conduct himself or herself in a manner that respects, protects and advances the independence of the bar.” See the CBA website at <http://www.cba.org/CBA/EPIIgram/Mar2004/>.

VI. THE MILITARY BENCH (LAMER #5 AND CBA #4-7)

The issue of security of tenure for military judges is a challenging one. The *Lamer Report* recommends military judges be awarded security of tenure until their retirement from the CF (Lamer #5). The contrary argument is that the current five-year renewable appointments of military judges strikes an appropriate balance.

The CBA/NMLS is of the view that the issues relating to regular force (i.e., full-time) military judges and reserve force (i.e., part-time) military judges should not be considered in isolation. A broader perspective should guide considerations relating to military judges including the issue of security of tenure. The CBA/NMLS believes that its recommendations (CBA #4-7) should be addressed as part of this broader perspective.

It may well be that the Lamer recommendation of security of tenure until retirement for regular force (full-time) military judges is an appropriate and workable arrangement if judicial capacity is supplemented by reserve force (part-time) military judges¹³.

However, that matter should be considered as part of a broader study. Accordingly, the CBA/NMLS supports the creation of a working group to study the military judiciary (reserve and regular force) including the issue of security of tenure. One of the first issues such a working group would have to consider is whether the retirement age of military judges should be prescribed in statute rather than regulations as it presently is¹⁴.

13 Chief Justice (ret'd) Lamer hints at p. 31 of his report that this arrangement may be desirable:

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

14 *Queen's Regulations & Orders for the Canadian Forces* (QR&O), art. 15.17, Table B.

The argument can be raised that the executive could interfere with the security of tenure of a military judge by simply reducing the applicable retirement age set out in the regulations. The working group should have wide representation from the military and civilian legal community including members of the military and civilian judiciary.

VII. APPEAL COMMITTEE (CBA #47-48 AND LAMER #26-30)

The CBA/NMLS agrees that the Appeal Committee should consist of three members but disagrees with the *Lamer Report* recommendation that two of the three members should be a retired civilian judge and a representative of the Office of the JAG. This membership structure would not facilitate the goal of objective peer review, would not eliminate an obvious conflict of interest, and would not allow the Appeal Committee to operate at arm's length from the executive.

The *Lamer Report* accepts that the Appeal Committee requires substantial reform. Chief Justice (ret'd) Lamer accepts that the Appeal Committee should consist of three members rather than two and recommends that the Appeal Committee be chaired by the Director of Defence Counsel Services (Lamer #26). However, he recommends that the other two members of the Appeal Committee should be a retired civilian judge and a representative from the Office of the JAG. The CBA/NMLS sees such membership on the Appeal Committee as problematic and prefers the membership structure it recommended (CBA #47):

- The Director of Defence Counsel Services as chair;
- A civilian defence counsel nominated by the CBA; and
- A lawyer, who is neither a legal officer nor a prosecutor, nominated by the CBA or another professional legal organization.

In his report, Lamer accepts the merits of “peer review” of the professional merit of a proposed appeal¹⁵. The peer review should come from lawyers, in particular defence counsel. Of course, an element of peer review results from the membership of the Director of Defence Counsel Services on the Appeal Committee, who has in-depth knowledge of military law and the military justice system. An even more effective peer review would result from the presence of another defence counsel – preferably a civilian – who can bring a fresh, independent and objective perspective on the professional merit of an appeal.

It can be argued that a judge on the appeal committee does not advance “peer” review, since the judge cannot be considered a peer of the lawyer who recommends that the proposed appeal has professional merit. Furthermore, there is some concern that a judge, even a retired one, may be too sympathetic to the sensibilities of other judges when considering the professional merit of an appeal.

In addition to the Director of Defence Counsel Services and a civilian judge, the *Lamer Report* recommends that the third member of the Appeal Committee should be a representative of the Office of the Judge Advocate General. The CBA/NMLS does not agree that this is desirable. The presence of a JAG representative on the Appeal Committee allows the executive – in the form of the Office of the JAG and the CF chain of command – to directly influence what defence appeals will receive state funding. In other words, the presence of a JAG representative on the Appeal Committee would prevent it from operating at arm’s length from the executive. A representative from the Office of the JAG, while knowledgeable about military law, will face the same conflict of interest as the present members of the Appeal Committee. A reasonable person could clearly conclude that the JAG representative might be influenced by the interests of the Office of the JAG in considering the professional merit of an appeal.

The suggestion that the Office of the JAG should have representation on the Appeal Committee because a defence appeal involves the use of JAG resources (i.e., the time and efforts of military defence counsel with the DDCS or the fees paid to outside counsel) is untenable. It faces the very reasonable criticism that the JAG representative might give considerable weight – or perhaps even priority – to a JAG concern about the use of scarce resources. This would put the JAG representative in a clear conflict of interest in judging the professional merit of a defence appeal. Moreover, the presence of a JAG representative on the Appeal Committee can be viewed as a direct attempt by the executive to influence the freedom of action, independence and effectiveness of the DDCS. To overcome the concern about resource implications of defence appeals, DDCS funding could be made a separate line item in the DND budget, terminating the current arrangement where DDCS is funded through the JAG budget. JAG's own study of defence counsel services recommended exactly this, but this recommendation was never implemented¹⁶.

The CBA/NMLS supports Chief Justice (ret'd) Lamer's recommendation that the Appeal Committee must provide a summary of the reasons for its decision where an applicant has received a custodial sentence, and is permitted to provide reasons in other cases. The CBA/NMLS also believes that the reasons of the Appeal Committee should include which members voted in favour of approving counsel for the appeal and which members were opposed.

¹⁶ *Provision of Defence Counsel Services in the Canadian Forces: Report of the Defence Counsel Study Team, supra*, footnote 8, recommendation 4, p. 37: "To further promote the fact and the perception of independence, the OMDC [Office of Military Defence Counsel] should have its own budget as a separate line item in the National Defence budget. This budget would include funds for the administrative costs of the Office, payment of the costs of witnesses of the defence, and any other costs associated with providing defence counsel services."

VIII. DECISION NOT TO PROCEED WITH CHARGES (LAMER #38)

The *Lamer Report* recommends that the NDA be amended to provide that a decision by the Director of Military Prosecutions to withdraw or not proceed with a charge does not preclude the charge from being proceeded with at a subsequent time, subject to applicable limitation periods.

Section 165.12 (3) of the NDA already provides that withdrawing a charge does not prevent it from being proceeded with at a subsequent time. However, military law could stand to be clarified by providing that the same principle applies where the Director of Military Prosecutions decides, after a charge has been referred to him by a referral authority but before preferral, that it should not proceed.

Where a subsequent decision is made to revive a charge that has not been proceeded with prior to preferral or has been withdrawn after preferral, the matter would not only be subject to applicable limitation periods but also to an appropriate remedy where the subsequent proceeding is an abuse of process or violates the accused's constitutional rights.

To further enhance the independence of military prosecutors, serious consideration should be given to granting them the power to stay charges in the manner provided for in s. 579 of the *Criminal Code*. Given the independence of the Directorate of Military Prosecutions, there appears to be little merit in depriving military prosecutors of powers available to their civilian counterparts.

IX. ACCESS TO MILITARY LAW JURISPRUDENCE (LAMER #16)

One of the longstanding problems with the military justice system is a lack of access to military law jurisprudence. Decisions of military judges are not reduced to writing and made available as decisions of civilian courts are. Rather, decisions of military judges remained buried in court martial transcripts. This lack of access to military law jurisprudence has, in the view of the CBA/NMLS, constituted a serious impediment to the scholarly study of military law and contributed to a lack of understanding of military law in the wider community. Accordingly, the CBA/NMLS strongly supports Chief Justice (ret'd) Lamer's recommendation that military judges be required to reduce their decisions to writing in certificate form and that the decisions be made readily accessible.

Indeed, the CBA/NMLS would go further. First, the CBA/NMLS proposes that all prior decisions of military judges be compiled, put into an appropriate judgment format and made accessible. These decisions are available in the transcripts of courts martial. Buried in these transcripts is a wealth of jurisprudence relating to military law including important interpretations of the NDA, *Code of Service Discipline* and *Military Rules of Evidence*. Summer law students hired by the Office of the JAG could undertake the project.

Second, the CBA/NMLS proposes that the Office of the JAG establish a system for reporting and promptly publishing judicial decisions relating to military law. The question of whether these law reports should be in paper format or electronic format, or should involve legal publishers who incorporate this information into their publications or electronic data bases (e.g., QuickLaw) deserves further study. The CBA/NMLS suggests two military law reporting series:

- *Military Justice Reports*, reporting decisions of courts martial, the Federal Court of Canada, the Court Martial Appeal Court and the Supreme Court of Canada that bear on military justice issues; and
- *Military Administrative Law Reports*, reporting judicial decisions bearing on military administrative law from Federal Court, provincial courts, Federal Court of Appeal and Supreme Court of Canada).

These steps would result in a profound improvement in the quality of military legal information available to military law practitioners, lawyers, scholars and the public. The military legal system would be more transparent and accessible to serious scholarly study. Longer-term projects such as the preparation of citators, annotated statutes/regulations and other research aids should also be considered.

X. MILITARY POLICE COMPLAINTS COMMISSION (CBA #52-57 AND LAMER #58-71)

The CBA/NMLS remains firmly committed to strong, effective civilian oversight of the military police through the Military Police Complaints Commission (MPCC). The focus of this oversight must be on ensuring proper and ethical police conduct. At the same time, this oversight must be mindful that military policing takes place in a military context. The CBA/NMLS remains committed to all of its recommendations including CBA #53 which was not accepted by the *Lamer Report*.

Nevertheless, important policy issues relating to the MPCC remain to be resolved. The CBA/NMLS proposes that a working group be established to tackle these issues and arrive at a reasonable and balanced approach. The working group should, of course, include the primary stakeholders – the MPCC and the Canadian Forces Provost Marshal. Representatives from other police complaints commissions would also be

useful assets to the working group. It is the hope of the CBA/NMLS that if all stakeholders and interested parties are able to freely and openly discuss issues relating to the MPCC, an even more effective and harmonious scheme for civilian oversight of the military police will be devised.

XI. SCOPE OF FIVE YEAR REVIEW (CBA #1 AND LAMER #1)

On the issue of an independent review of the NDA, the CBA /NMLS submission and the *Lamer Report* are in substantial agreement. Both advocate that the requirement for an independent review of military law should be retained and incorporated into the NDA rather than left in Bill C-25. However, positions diverge in respect of the scope of the review. The CBA /NMLS suggested that the entire NDA be subject to an independent review every five years, whereas the *Lamer Report* proposed that the review be restricted to the military justice system and the CF grievance process.

The CBA /NMLS maintains that the entire NDA should be periodically subject to an independent review. Were the review limited in the manner proposed by Chief Justice (ret'd) Lamer, he would not have been empowered to review some important issues. Nevertheless, the CBA/NMLS is mindful of the burden in conducting a comprehensive review of the NDA. Accordingly, the CBA/NMLS proposes a compromise, that the entire NDA be subject to an independent review every ten years. Under this proposal, the entire NDA (including the military justice system and the CF grievance process) would be subject to independent review in 2008, but in 2013 the independent review would be limited to the military justice system and the CF grievance process.

The compromise CBA/NMLS proposal would ensure that the entire panoply of military law issues would receive an independent review every ten years. This proposal is a

balanced approach that is mindful of the large burden involved in such an independent review.

XII. TIME FOR THE REVIEW AND THE MEDIA RESPONSE (CBA #2)

The CBA/NMLS regrets the distorted media reports that resulted from its suggestion that the six months accorded to Chief Justice (ret'd) Lamer to complete the review was not entirely adequate.

The language used by the CBA/NMLS in its submission led to a misleading article in the *Ottawa Citizen* and other newspapers¹⁷. The article suggested that the CBA/NMLS had stated that the independent review was a “whitewash” because inadequate time had been provided to do the job properly. This suggestion was wrong and misleading to readers. The CBA/NMLS embraced the independent review conducted by Chief Justice (ret's) Lamer. At the urging of CBA/NMLS, then CBA President Simon Potter immediately wrote to the editor of the *Ottawa Citizen* and expressed these views¹⁸. The CBA/NMLS regrets this unfortunate incident and the failure to express its position in more precise terms.

While the six months granted to Chief Justice (ret'd) Lamer to complete the review appears to have been adequate, we believe more time would have been better. The CBA/NMLS, accordingly, stands by its recommendation that the independent review authority should be appointed not less than twelve months before the final report is due, and that sufficient resources be granted to carry out a thorough and meaningful review.

17 “Military law review slammed as ‘whitewash’, *Ottawa Citizen*, 27 June 2003, p. A3.

18 The CBA President's letter to the editor of the *Ottawa Citizen* may be accessed at the NMLS website (<http://www.cba.org/CBA/Sections/military/>).

Appendix A

Analysis of the *Lamer Report* by Reference to Canadian Bar Association / National Military Law Section Recommendations

Of the 65 recommendations made in the CBA/NMLS law reform submission, 46 (71%) related to Bill C-25 issues. Of those 46 Bill C-25 recommendations, the results break down as follows:

- 27 CBA/NMLS recommendations (56.5%) were accepted in full by the *Lamer Report*;
- 3 CBA/NMLS recommendations (8.7%) were accepted in part by the *Lamer Report*;
- 1 CBA/NMLS recommendation (2.2%) was rejected in the *Lamer Report*; and
- 15 CBA/NMLS recommendations (32.6%) were not specifically addressed in the *Lamer Report*.

In total, 67.2% of the CBA/NMLS Bill C-25 recommendations were accepted in whole or in part in the *Lamer Report*.

| CBA/NMLS Recommendation ¹⁹ | Comments | <i>Lamer Report</i> Reference |
|---------------------------------------|--|-------------------------------|
| CBA #1 | Accepted in part. | Lamer #1 |
| CBA #2 | Not addressed. | |
| CBA #3 | Accepted | Lamer #13, 14 and 23 |
| CBA #4 | Not addressed. | |
| CBA #5 | Not addressed. The Reserve Military Judges Panel is discussed briefly in the <i>Lamer Report</i> . | <i>Lamer Report</i> , p. 31 |

¹⁹ The recommendations made by the CBA / NMLS in its law reform submission are numbered and set out at pp. 86-101.

| CBA/NMLS Recommendation ¹⁹ | Comments | Lamer Report Reference |
|---------------------------------------|---|--------------------------------------|
| CBA #6 | Not addressed. | |
| CBA #7 | Not addressed. | |
| CBA #8 | Accepted. | Lamer #3 |
| CBA #9 | Not addressed. | |
| CBA #10 | Not addressed. | |
| CBA #11 | Not addressed. | |
| CBA #12 | Accepted. | Lamer #58 |
| CBA #13 | Accepted. | Lamer #33 |
| CBA #14 | Accepted. | Lamer #34 |
| CBA #15 | Accepted. | Lamer #37 |
| CBA #16 | Accepted. | Lamer #36 |
| CBA #17 | Accepted. | Lamer #39 |
| CBA #18 | Not addressed in the Lamer recommendations. The issue of preliminary proceedings is discussed in the <i>Lamer Report</i> . | <i>Lamer Report</i> , pp. 26 and 29. |
| CBA #19 | Accepted. <i>Lamer Report</i> recommends that the NDA be amended to define the role of the Court Martial Administrator to include non-judicial work delegated by the Chief Military Judge “including the making of an order fixing the time and place of a trial <i>or hearing</i> ”. | Lamer #19 |
| CBA #20 | Accepted. <i>Lamer Report</i> recommends that the NDA be amended to define the role of the Court Martial Administrator to include non-judicial work delegated by the Chief Military Judge “including the making of an order fixing the time and place of a trial <i>or hearing</i> ”. | Lamer #19 |
| CBA #21 | Not addressed in the Lamer recommendations. | |
| CBA #22 | Accepted. | Lamer #19 and 20 |
| CBA #23 | Not addressed in the Lamer recommendations. | |
| CBA #24 | Accepted. | Lamer #49 |
| CBA #25 | Accepted. | Lamer #23 |
| CBA #26 | Accepted. | Lamer #23 |
| CBA #27 | Accepted. | Lamer #25 |
| CBA #28 | Accepted. | Lamer #24 |

| CBA/NMLS Recommendation ¹⁹ | Comments | <i>Lamer Report Reference</i> |
|---------------------------------------|---|-------------------------------|
| CBA #29 | Accepted in part. | Lamer #53 |
| CBA #30 | Accepted. | Lamer #52 |
| CBA #31 | Not addressed in the Lamer recommendations. | |
| CBA #32 | Not addressed in the Lamer recommendations. | |
| CBA #33 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. The <i>Lamer Report</i> does suggest that as part of the establishment of a permanent military court consideration must be given to the availability of prerogative writs. | <i>Lamer Report</i> , p. 28 |
| CBA #34 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #35 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #36 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #37 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #38 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #39 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #40 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #41 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #42 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #43 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #44 | Accepted. | Lamer #31 |
| CBA #45 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #46 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #47 | Accepted in part. | Lamer #26 |
| CBA #48 | Accepted. | Lamer #26 |
| CBA #49 | Accepted. | Lamer #27 and 30 |
| CBA #50 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #51 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #52 | Accepted. | Lamer #71 |
| CBA #53 | Rejected. | <i>Lamer Report</i> , |

| CBA/NMLS Recommendation¹⁹ | Comments | Lamer Report Reference |
|---|---|-------------------------------|
| | | p. 80. |
| CBA #54 | Accepted in part. | Lamer #62 |
| CBA #55 | Not addressed in the Lamer recommendations. | |
| CBA #56 | Accepted. | Lamer #68 |
| CBA #57 | Accepted. | Lamer #69 |
| CBA #58 | Accepted. | Lamer #81 |
| CBA #59 | Not addressed in the Lamer recommendations. | |
| CBA #60 | Accepted. | Lamer #87 |
| CBA #61 | Accepted. | Lamer #80 |
| CBA #62 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #63 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #64 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |
| CBA #65 | Not addressed in the Lamer recommendations. Outside of the scope of Bill C-25. | |

Appendix B

CBA/NMLS Position on *Lamer Report* Recommendations

| <i>Lamer Report</i> Recommendation | Comments | CBA/NMLS Reference |
|---|---|-------------------------------|
| Lamer #1 | Supported, subject to our comments. | CBA #1 |
| Lamer #2 | Supported. | |
| Lamer #3 | Supported. | CBA #8 |
| Lamer #4 | Supported. | |
| Lamer #5 | Requires further study as set out in our comments. | |
| Lamer #6 | Supported. | |
| Lamer #7 | Supported, except that articles 101.08 and 118.15 (2) may also require amendment to implement Chief Justice (ret'd) Lamer's intent. | |
| Lamer #8 | Supported. | |
| Lamer #9 | Supported. | |
| Lamer #10 | Supported. | |
| Lamer #11 | Supported. | |
| Lamer #12 | Supported. | |
| Lamer #13 | Supported. | CBA #3 |
| Lamer #14 | Supported. See comments above. | |
| Lamer #15 | Supported. | |
| Lamer #16 | Supported. See comments above. | |
| Lamer #17 | Supported. | |
| Lamer #18 | Supported. | |
| Lamer #19 | Supported. | CBA #19, 20 and 22 |
| Lamer #20 | Supported. | CBA #22 |
| Lamer #21 | Supported. | |
| Lamer #22 | Supported. | |
| Lamer #23 | Supported. | CBA #25 and 26 |

| Lamer Report Recommendation | Comments | CBA/NMLS Reference |
|------------------------------------|--|---------------------------|
| Lamer #24 | Supported. However, it should be noted that the decision as to whether an accused will be tried lies with the Director of Military Prosecutions. | CBA #28 |
| Lamer #25 | Supported. | CBA #27 |
| Lamer #26 | Supported, subject to the comments above regarding the membership of the Appeal Committee and the giving of reasons. | CBA #47 and 48 |
| Lamer #27 | Supported. | CBA #49 |
| Lamer #28 | Supported. | |
| Lamer #29 | Supported. | |
| Lamer #30 | Supported. | |
| Lamer #31 | Supported. | CBA #44 |
| Lamer #32 | Supported. | |
| Lamer #33 | Supported. | CBA #13 |
| Lamer #34 | Supported. | CBA #14 |
| Lamer #35 | Supported. | |
| Lamer #36 | Supported. | CBA #16 |
| Lamer #37 | Supported. | CBA #15 |
| Lamer #38 | Supported, subject to the exception as well that subsequent proceedings might also constitute an abuse of process or a violation of the <i>Charter</i> . | |
| Lamer #39 | Supported. | CBA #17 |
| Lamer #40 | Supported. | |
| Lamer #41 | Supported. | |
| Lamer #42 | Supported. | |
| Lamer #43 | Supported. | |
| Lamer #44 | Supported. | |
| Lamer #45 | Supported. | |
| Lamer #46 | Supported. | |
| Lamer #47 | Supported. | |
| Lamer #48 | Supported. | |
| Lamer #49 | Supported. | CBA #24 |

| Lamer Report Recommendation | Comments | CBA/NMLS Reference |
|------------------------------------|--|---------------------------|
| Lamer #50 | Supported. | |
| Lamer #51 | Supported. | |
| Lamer #52 | Supported. | CBA #30 |
| Lamer #53 | Supported. | CBA #29 |
| Lamer #54 | Supported. | |
| Lamer #55 | Supported. | |
| Lamer #56 | Supported. | |
| Lamer #57 | Supported. | |
| Lamer #58 | Supported. | CBA #11 and 12 |
| Lamer #59 | Supported, subject to the proviso that the annual report should be due within three months of the end of the fiscal year. | |
| Lamer #60 | Supported. | |
| Lamer #61 | Supported. | |
| Lamer #62 | Supported. | CBA #54 |
| Lamer #63 | Supported. | |
| Lamer #64 | Supported. | |
| Lamer #65 | See comments. | |
| Lamer #66 | Supported. | |
| Lamer #67 | See comments. | |
| Lamer #68 | Supported. | CBA #56 |
| Lamer #69 | Supported. | CBA #57 |
| Lamer #70 | Supported. | |
| Lamer #71 | Supported. | CBA #52 |
| Lamer #72 | Supported. | |
| Lamer #73 | Supported. | |
| Lamer #74 | Supported. | |
| Lamer #75 | Supported. | |
| Lamer #76 | Supported. | |

| Lamer Report Recommendation | Comments | CBA/NMLS Reference |
|------------------------------------|-----------------|---------------------------|
| Lamer #77 | Supported. | |
| Lamer #78 | Supported. | |
| Lamer #79 | Supported. | |
| Lamer #80 | Supported | CBA #61 |
| Lamer #81 | Supported | CBA #58 |
| Lamer #82 | Supported. | |
| Lamer #83 | Supported. | |
| Lamer #84 | Supported. | |
| Lamer #85 | Supported. | |
| Lamer #86 | Supported. | |
| Lamer #87 | Supported. | CBA #60 |
| Lamer #88 | Supported. | |