

Senate



Sénat

CANADA

EQUAL JUSTICE: REFORMING CANADA'S SYSTEM OF COURTS MARTIAL

Final Report

**A Special Study on the provisions and
operation of *An Act to amend the National
Defence Act (Court Martial) and to make a
consequential amendment to another Act,*
S.C.2008, c. 29**

The Honourable Joan Fraser
Chair

The Honourable Pierre Claude Nolin
Deputy Chair

**Standing Senate Committee
on Legal and Constitutional Affairs**

May 2009

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THE STANDING SENATE COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS

40th Parliament, 2nd Session

(January 26, 2009 - ...)

The Honourable Joan Fraser
Chair

The Honourable Pierre Claude Nolin
Deputy Chair

and

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George Baker, P.C.
John G. Bryden
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ORDER OF REFERENCE

Extract from the *Journals of the Senate*, Tuesday, February 24, 2009:

The Honourable Senator Fraser moved, seconded by the Honourable Senator Rompkey, P.C.:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report on the provisions and operation of An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act (S.C. 2008, c. 29); and

That the committee submit its final report no later than June 30, 2009.

The question being put on the motion, it was adopted.

Paul C. Bélisle

Clerk of the Senate

INTRODUCTION

On 24 February 2009, our Committee received an Order of Reference from the Senate to study the provisions and operation of *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act* (the Act).¹ The Act, formerly known as Bill C-60, was introduced to Parliament on 6 June 2008 by the Honourable Peter Mackay, Minister of National Defence, near the end of the 2nd Session of the 39th Parliament.

Bill C-60 was designed to respond to the 24 April 2008 decision of the Court Martial Appeal Court (CMAC) in *R. v. Trépanier*.² In that decision, the court found certain provisions of the *National Defence Act* (NDA) and the *Queen's Regulations and Orders for the Canadian Forces* (QR&O)³ to be in violation of sections 7⁴ and 11(d)⁵ of the *Canadian Charter of Rights and Freedoms* (the Charter), and declared them to be invalid. These provisions had allowed the Director of Military Prosecutions (DMP) to decide, when preferring a charge, which type of court martial would try an accused person and allowed the Court Martial Administrator to convene courts martial in accordance with the DMP's decision.

Because this declaration took effect immediately after it was made, it introduced uncertainty as to how or whether courts martial under the NDA could proceed.⁶ As a result of the impact of the *Trépanier* decision on Canada's military justice system,

¹ S.C. 2008, c. 29.

² 2008 CMAC 3.

³ The specific provisions struck down were sections 165.14 and 165.19(1) of the NDA, and article 111.02(1) of the QR&O, as they formerly read.

⁴ Section 7 of the Charter guarantees the right to life, liberty and security of the person, as well as the right not to be deprived of these rights, except in accordance with the principles of fundamental justice.

⁵ Section 11(d) guarantees the right to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal.

⁶ The government contended that courts martial could not proceed unless Bill C-60 was enacted. One witness before our Committee, retired Colonel Michel W. Drapeau, suggested that this was erroneous. He stated that the CMAC, in the *Trépanier* decision, had set out "a straightforward and practical solution to deal with the deletion of the clause which impinged on the rights of the accused." See *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 2, 2nd Session, 40th Parliament, 4 and 5 March 2009, at p. 42. This document is available on-line at:

<http://www.parl.gc.ca/40/2/parlbus/commbus/senate/Com-e/lega-e/pdf/02issue.pdf>.

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Parliament was asked to expedite the passage of Bill C-60, and we agreed. The new Act came into force on 18 July 2008, thirty days after it received Royal Assent.

Given the speed with which Bill C-60 was studied in both the House of Commons and the Senate, concern was expressed that it was difficult to thoroughly assess the potential impact of this legislation. Consequently, the bill was amended by the House of Commons Standing Committee on National Defence to add a review clause. Section 28 of the Act requires a comprehensive review of the provisions and operation of the Act within two years of the date it receives Royal Assent by either a committee of the Senate or House of Commons or both. It also requires the committee conducting the review to submit a report on that review to Parliament, including a statement of any recommendations for change, within one year after the review was undertaken. It should be noted that our Committee does not consider our current study and report to constitute this statutory review.

Rather, the Committee is conducting its present review at the request of the Minister of National Defence. In a letter dated 17 June 2008, he asked our Committee to study the provisions and operation of Bill C-60 once it had become law, and to provide him with our findings and recommendations on it. Acknowledging the speed with which the Act was studied, the Minister stated:

I would ask, however, that your Committee consider studying the provisions and operation of Bill C-60 and provide me with a report on your findings and any recommendations the Committee may choose to make, by December 31, 2008. The Government will review these recommendations and provide the Committee with a written response, that could include proposed amendments, within 90 calendar days.⁷

Due to the dissolution of Parliament for the 40th general election, the Committee was unable to provide its report to the Minister by the requested date. However, we sought and received an Order of Reference from the Senate to complete our study of the Act following the commencement of the 2nd Session of the 40th Parliament, and to file our

⁷ The full text of the Minister of National Defence's 17 July 2008 letter to the Chair of the Standing Senate Committee on Legal and Constitutional Affairs has been included as an Appendix to this report.

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final report in the Senate by 30 June 2009. This report sets our views and recommendations on this Act.

OUR STUDY AND ITS CONTEXT: PRIOR MILITARY JUSTICE REFORM INITIATIVES

The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.

***R. v. Généreux*, [1992] 1 S.C.R. 259 at 293.**

There can be no doubt that discipline is an integral characteristic of any well-functioning military force. As was acknowledged by the Supreme Court of Canada in the remarks from *R. v. Généreux* cited above, the need for discipline in the military context is reflected both in the broader scope of offences in military law as compared to those found in the civilian criminal justice system, and in the need for a separate tribunal system, capable of responding to the military's specific disciplinary needs. Accordingly, certain service offences contained in the Code of Service Discipline,⁸ such as, for example, disobeying an order of a superior officer, exist in the military, but not the civilian, justice system. In addition, sanctions that members of the Canadian Forces receive for committing such offences are often unique to the military justice system, such

⁸ The Code of Service Discipline is found at Part III of the NDA. It describes all services offences, the mechanism for enforcing and investigating them, and the procedures for prosecuting, trying and punishing those who commit them. It is important to note that both military personnel and civilians may be subject to the Code of Service Discipline.

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as, for example, reduction in rank or dismissal from Her Majesty's service. There is therefore a need for Canada's military justice system to contain both unique features and offences.

Having said this, however, it is important to note that military personnel are not the only individuals subject to the Code of Service Discipline. Civilians may also be subject to it in certain circumstances, such as, for example, when they accompany the military on service. In addition, it must further be noted that by joining the military, one does not surrender one's rights under the Charter of Rights and Freedoms (the Charter), and that, the military, as an organization, benefits when the rules that govern it largely reflect those that apply to Canadian society in general. As was stated by then Minister of National Defence, the Honourable Doug, Young, in his 1997 *Report to the Prime Minister on the Leadership and Management of the Canadian Forces*, (the Young Report):⁹

The record of modern warfare clearly demonstrates that military effectiveness depends upon armed forces being integral parts of the societies they serve, not being isolated from them. The society in which and for which the CF [Canadian Forces] serve is in the process of rapid legal, economic and social change. As a result, the Forces must respect women's rights, reject discrimination based on race or sexual orientation, and conform to other legislation reflecting evolving social values.¹⁰

By approaching military justice in the manner recommended by former Minister Young, the public is also likely to have increased confidence in the military justice system. Such increased confidence could, in turn, have a positive effect on military recruitment.

There have been numerous studies, reports and bills concerning military justice reform in Canada promulgated over the last 12 years. All have recognized the tension between the principles described above and have attempted to reconcile or respond to them. While the Committee's Order of Reference instructed us to study the provisions and operation of the Act specifically, we are of the view that our study must be conducted within the context of these various reform initiatives.

⁹ *Report to the Prime Minister on the Leadership and Management of the Canadian Forces*, released by the Minister of National Defence on 25 March 1997.

¹⁰ *Ibid.* at p. 11.

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

As a first step towards such reform, results from two thorough reviews of Canada's military justice system were released in 1997. The first review was undertaken by the Special Advisory Group on Military Justice and Military Police Investigation Services, which was chaired by the Right Honorable Brian Dickson, former Chief Justice of the Supreme Court of Canada. The Special Advisory Group was charged with examining the Code of Service Discipline under the *National Defence Act*, the part of that Act that provides the statutory basis for service offences,¹¹ and the procedures for enforcing and investigating these offences and prosecuting, trying and punishing those who commit them. It was also charged with examining the quasi-judicial role played by the Minister of National Defence under the NDA. The second review was undertaken by the Commission of Inquiry into the Deployment of the Canadian Forces to Somalia (the Somalia Commission of Inquiry), which was established under the *Inquiries Act* to investigate actions of Canadian Forces members during their time in that country. The Commissioner appointed under the *Inquiries Act* for the purposes of this inquiry was Federal Court Justice Gilles Létourneau. Both the Special Advisory Group's Report (the Dickson Report)¹² and the Somalia Commission of Inquiry's Report¹³ recommended numerous changes to the Code of Service Discipline, the role played by the Minister of National Defence under the NDA and the leadership structure of the Canadian Forces.

An Act to amend the National Defence Act and to make consequential amendments to other Acts (formerly Bill C-25)

Following these two reviews, and following the issuance of the Young Report, referred to above, the government introduced Bill C-25, *An Act to amend the National*

¹¹Under section 2(1) of the NDA, "service offence" means "means an offence under this Act, the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline."

¹² This report was released in two parts, the first dealing with the Code of Service Discipline (Special Advisory Group on Military Justice and Military Police Investigation Services, *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, 14 March 1997) and the second dealing with the role played by the Minister of National Defence (Special Advisory Group on Military Justice and Military Police Investigation Services, *Report on the Quasi-Judicial Role of the Minister of National Defence*, 25 July 1997).

¹³ Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair*, 2 July 1997, available on-line at: <http://www.dnd.ca/somalia/somaliae.htm>.

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*Defence Act and to make consequential amendments to other Acts.*¹⁴ Bill C-25 came into force on 1 September 1999, and responded, in part, to the concerns expressed and the recommendations made in all three reports. Principal changes introduced to the NDA by that Act included:

- abolition of the death penalty in the military justice system;
- application of common law provisions concerning ineligibility for conditional release;
- creation of the Canadian Forces Grievance Board (Grievance Board), an independent body responsible for the impartial disposition of grievances in the Canadian Forces;
- establishment of the Military Police Complaints Commission, to provide independent oversight of complaints about the conduct of the military police and allegations of interference in investigations conducted by the military police;
- creation of new positions within the military justice system – the Director of Military Prosecutions and the Director of Defence Counsel Services – thus segregating the functions of investigation, prosecution and defence of accused persons;
- clarification and limitation of the functions of the Judge Advocate General, the Minister of National Defence and the members of the chain of command; and
- strengthening the independence of military judges, by amending the provisions relating to their appointment, powers and tenure.

The Lamer Report

Section 96 of *An Act to amend the National Defence Act and to make consequential amendments to other Acts* (formerly Bill C-25) required the Minister of National Defence to undertake an independent review of the amendments introduced to the NDA by that bill every five years following the date that Act came into force. In March 2003, the Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada, was appointed to conduct this review. He completed his review in September of 2003, at which time he released his report (the Lamer Report).¹⁵ While he concluded, in his

¹⁴ S.C. 1998, c. 35.

¹⁵ *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 by section 96 of Statutes of Canada 1998, c. 35*, 3 September 2003, available on-line at: http://www.forces.gc.ca/site/reports/review/en/report_e.pdf.

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report, that “Canada’s military justice system generally works well . . . [and] it is not surprising that observers from other countries see it as a system their country might wish to learn from,”¹⁶ Justice Lamer, like other individuals charged with reviewing Canada’s military justice system before him, also believed that improvements should be made to the system. Areas he singled out for improvement included arrest and pre-trial custody procedures for accused persons, the charge laying process, tribunal structure and sentencing. With respect to the rights of accused persons tried by military tribunals, he recommended changes so that their rights would more closely resemble those of accused persons who were tried in the civilian justice system, including allowing accused persons to elect their mode of trial and requiring decisions of court martial panels in relation to guilt and innocence to be unanimous. He also made recommendations designed to provide better guarantees of independence for key players in the military justice system and to improve the grievance and military police complaints process.

Bill C-7 and Bill C-45

Following the Lamer Report, the government made efforts to respond to some of Justice Lamer’s 88 recommendations for change by making policy adjustments and by amending Volume II of the QR&O, the volume of regulations which deals with disciplinary proceedings, including courts martial.¹⁷ It also made two separate attempts to amend the NDA itself. Bill C-7, An Act to Amend the National Defence Act, was introduced in Parliament by the former Minister of National Defence, the Honourable Gordon O’Connor, on 27 August 2006, during the 1st Session of the 39th Parliament. The bill did not progress past first reading, and died on the Order Paper at the end of that session. Bill C-45, An Act to Amend the National Defence Act, containing virtually identical provisions to Bill C-7, was then introduced in Parliament by the current Minister of National Defence, on 3 March 2008, during the 2nd Session of the 39th Parliament. Like its predecessor, it did not progress past first reading, and died on the Order Paper when Parliament was dissolved for the 40th general election. If either bill had been

¹⁶ Ibid. at p. 111.

¹⁷ The *Queen’s Regulations and Orders for the Canadian Forces* (QR&O) are regulations made under the authority of section 12 of the NDA, which empowers the Governor in Council to make regulations “for the organization, training, discipline, efficiency, administration and good government of the Canadian Forces and generally for carrying the purposes and provisions of this Act into effect.” Volume II of the QR&O amplifies the provisions set forth in the Code of Service Discipline.

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enacted, it would have introduced the following changes to the NDA, many of which were changes recommended by Justice Lamer:

- removal of the Director of Defence Counsel Services for cause only;
- security of tenure for military judges until retirement, and appointment of part-time military judges;
- description of the Military Judges Inquiry Committee and the Military Judges Compensation Committee in the provisions of the NDA;
- unanimous decisions of a court martial panel in relation to guilt, unfitness to stand trial or non-responsibility on the grounds of mental disorder;
- inclusion of a statement of sentencing principles;
- addition of the following sentencing options for military judges: absolute discharge, intermittent sentences and restitution;
- greater consistency with the rules contained in the *Criminal Code* in relation to arrest without warrant, preventive custody and victim impact statements;
- delegation of the powers of the Chief of Defence Staff (CDS) in relation to the grievance process.

THE SCOPE OF OUR STUDY

In our view, all of the reform efforts outlined above have been attempts to reconcile or respond to the following factors:

- the Code of Service Discipline contains rules that are not applicable or enforceable in general society, and are aimed at meeting the disciplinary needs of the military;
- with the exception of section 11(f) of the Charter, the rights enumerated in the Charter do not distinguish between proceedings under the military and civilian justice systems; and
- in certain circumstances, civilians, as well as military personnel, may be subject to the Code of Service Discipline (for example, civilian contractors working on Canadian Forces bases in Afghanistan).

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The challenge presented by these factors is how to preserve a system of justice that takes the military's unique culture, role and need to preserve discipline into consideration, while, at the same time, ensuring that all persons, regardless of whether they are military personnel or civilians, enjoy the full spectrum of rights guaranteed to them under the Charter and are not disadvantaged, in terms of justice done, by their decisions to serve in military or accompany it on service.

The reports on the military justice system issued since 1997 have made many worthwhile recommendations for change, and many of these have been acted upon by the Department of National Defence through the adoption of new policy or regulations. However, comparatively few of these changes have been enacted through statute. This is particularly true of the recommendations contained in the Lamer Report. As a result, we have determined that to restrict the scope of our study to the Act would be an inappropriately narrow approach, preventing the Committee from understanding the reforms introduced to the NDA by this Act in context and from suggesting an appropriate way forward for additional statutory reforms to Canada's system of courts martial. Furthermore, when he appeared before the Committee on 11 March 2009, the Minister of National Defence asked the Committee to consider including recommendations outside the scope of the Act in our report for possible inclusion in a successor bill to Bill C-45. He stated:

I might take this opportunity, Madam Chair, to suggest that recommendations such as have been put forward by Senator Nolin [on including additional sentencing options in the Code of Service Discipline], if they find their way into your report, and depending on the timing of the reintroduction of Bill C-45 under a new title, could certainly, at an early stage, find their way into amendments were that bill to be introduced prior to your report. I would encourage your input of suggestions such as the one the senator referred to that was discussed by another witness for consideration and possible inclusion in this bill.¹⁸

Our report is therefore divided into two sections:

1. Recommendations in relation to the Act; and

¹⁸ *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 3, 2nd Session, 40th Parliament, 11 and 12 March 2009 at p. 10. This document is available on-line at: <http://www.parl.gc.ca/40/2/parlbus/commbus/senate/Com-e/lega-e/pdf/03issue.pdf>.

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2. Selected recommendations for reform of Canada's system of courts martial generally, for possible inclusion in a successor bill to Bill C-45.

WITNESSES

During the course of our study, the Committee met with the Minister of National Defence, the Honourable Peter Mackay, the Judge Advocate General, Brigadier-General Ken Watkin, Deputy Judge Advocate General, Colonel B.B. Cathcart, Director of Law, Military Justice and Policy Research, Office of the Judge Advocate General, Lieutenant-Colonel Jill Wry, the Director of Defence Counsel Services, Lieutenant-Colonel Jean-Marie Dugas, Defence Counsel, Office of the Director of Defence Counsel Services, Lieutenant-Commander Pascal Levesque, the Director of Military Prosecutions, Captain Holly MacDougall, a retired military officer who is both a lawyer and expert in military law, Retired Colonel Michel W. Drapeau, and Lynn Larson, a lawyer who assisted former Chief Justice Lamer in drafting the Lamer Report.

RECOMMENDATIONS IN RELATION TO AN ACT TO AMEND THE NATIONAL DEFENCE ACT (COURT MARTIAL) AND TO MAKE A CONSEQUENTIAL AMENDMENT TO ANOTHER ACT

The Act (formerly Bill C-60) introduced the following significant changes to the system of courts martial outlined in the NDA:

- it streamlined the systems of courts martial in the NDA, reducing the number of types of courts martial from four to two, and removed distinctions based on rank in terms of which type of court martial will try an accused person;
- it replaced provisions in the NDA that had allowed the DMP to select the type of court martial that would try an accused person with provisions mirroring those found in the *Criminal Code*, so that an accused person may elect the mode of trial, except in certain statutorily prescribed cases;
- it added provisions to the NDA that state that, in the event of trial by judge and panel (in other words, trial by General Court Martial), decisions of guilt or innocence, unfitness to stand trial or non-responsibility on account of mental disorder must be unanimous; and
- in response to the decision of the CMAC in *R. v. Grant*,¹⁹ it clarified that in the event that the CMAC remits a case back to a lower court for

¹⁹ 2007 CMAC 2.

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a new trial, it only has authority to refer the case back for a court martial. The CMAC cannot remit the matter back for a summary trial by the accused person's commanding officer. Provisions were also introduced to clarify that the one year limitation period for summary trials, from the time the alleged offence was committed until the time the summary trial commences, continues to apply.

Our Committee has made recommendations in relation to three out of the four key changes outlined above.

Streamlining the System of Courts Martial and Reducing Distinctions of Rank

Prior to the enactment of Bill C-60, there were four types of courts martial under the NDA:

- **General Courts Martial**, composed of a military judge and a panel of five members, which could try any person, including civilians subject to the Code of Service Discipline, charged with committing a service offence and which could sentence someone to a maximum sentence of life in prison;
- **Disciplinary Courts Martial**, composed of a military judge and a panel of three members, which could try any officer of or below the rank of major and any non-commissioned officer, and which could sentence someone to a maximum sentence of dismissal with disgrace from Her Majesty's service;
- **Standing Courts Martial**, composed of a military judge alone, which could try only military personnel, and which could impose a punishment no greater than dismissal with disgrace from Her Majesty's service; and
- **Special General Courts Martial**, composed of a military judge alone, which could try civilians subject to the Code of Service Discipline charged with a service offence, and which could pass a sentence of a fine or imprisonment.

When Bill C-60 was enacted, this four-tribunal system was eliminated. Now there are only two types of courts martial: a General Court Martial, which is composed of a military judge and a panel of five members, and a Standing Court Martial, which is composed of a military judge alone. Both types of court martial may try any person charged with a service offence, whether a civilian or member of the military, and the type of tribunal that hears the case now depends on the offence one is charged with and/or the election of the accused person.

The four-tribunal court martial system that existed under the NDA prior to the enactment of Bill C-60 was the subject of criticism in the Lamer Report, where Justice

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Lamer stated: “To look at the rank of an accused as one of the factors governing the type of court martial to be convened is contrary to the modern-day spirit of equality before the law.”²⁰ He expressed his view that “The Canadian Forces would be best served by reorganizing military tribunals based on their jurisdiction to try and punish different offences, without regard to the rank of the accused.”²¹

The Committee is pleased to see that in altering the method of election for trial as required by the *Trépanier* decision, the government also amended the NDA in accordance with Recommendation 23 of the Lamer Report, creating a system whereby General Courts Martial try serious offences, and Standing Courts Martial try less serious offences, with no distinctions in terms of type of court martial that are based on rank or status (military personnel or civilian) of an accused person. However, the Committee remains concerned that some distinctions based on rank or status remain with respect to military tribunals.

When officials from the Office of the Judge Advocate General and the Director of Military Prosecutions appeared before the Committee, they advised that, in the case of offences tried by a General Court Martial where the accused person is in the military, the composition of the panel will differ, depending on whether or not an accused person is an officer in or a non-commissioned member of the Canadian Forces. According to section 167(3) of the NDA, officers may only be tried by officers, whereas under section 167(7) of the NDA, where the accused is a non-commissioned member, three General Court Martial panel members must be officers, while two panel members must be non-commissioned members who are of the rank of warrant officer or above. Further, under section 168 of the NDA, no officers below the rank of captain may sit as members of a General Court Martial panel. Accordingly, trial by General Court Martial panel sometimes does not constitute a trial by one’s peers, which is what the civilian criminal justice system provides for. Officials from the Office of the Judge Advocate General explained the purpose behind rank distinctions in panel composition as follows:

Part of the rationale [for differences in panel composition based on the rank of the accused] would be that officers or senior non-commissioned officers who could potentially in the future become panel members, because of their experience, bring more to the table in terms of military

²⁰ Lamer Report, supra note 15 at p. 36.

²¹ Ibid.

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ethos, understanding and leadership. When they are sitting in judgment of individuals, that is an added factor; where, with respect, a bright, intelligent young private may not bring that same element to bear.

Then it starts to cause one to think if a private could have a panel of his peers, being other privates, why could not privates sit in judgment of sergeant majors and captains and generals? We are into problematic areas.²²

However, officials from the Office of the Judge Advocate General also acknowledged, in their appearance before us, that the issue of distinctions in panel composition based on the rank of the accused is under consideration, and that modifications to the current system may find their way into a successor bill to Bill C-45.

Other witnesses, most notably individuals from the Office of the Director of Defence Counsel Services, were of the view that distinctions in rank in terms of panel composition should definitely not be preserved. As was stated by one witness:

We believe that, if a soldier is big enough to enlist in the armed forces, is big enough to vote and to go to war, his duty being to defend himself and to fire as necessary, and if he would be entitled to sit on a civilian jury, we have some difficulty with the fact that that individual cannot be a member of the committee.²³

While the Committee recognizes that military courts have recently upheld the constitutional validity of sections 167 and 168 of the NDA, which preserve distinctions in panel composition on the basis of the rank of the accused,²⁴ the Committee remains concerned that these sections of the NDA do not provide military personnel with a system as close to a trial by a jury of one's peers as they potentially could or should. We are encouraged to hear that the military is considering introducing amendments to reduce or remove these distinctions based on rank in a future bill. It is our view that, absent a compelling rationale for retaining them, such distinctions are contrary to the spirit of equality before the law embodied in section 15 of the Charter, and should therefore be eliminated.

²² *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 2, 2nd Session, 40th Parliament, 4 and 5 March 2009, supra note 6 at p. 29.

²³ *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 3, 2nd Session, 40th Parliament, 11 and 12 March 2009, supra note 18 at p. 47.

²⁴ See *R. v. Master Seaman R.J. Middlemiss*, 2009, CM 1001, where the court determined that the selection process for the members of the General Court Martial and the composition of the panel did not violate the rights of the accused under sections 7 and 11(d) of the Charter.

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RECOMMENDATION 1

That sections 167 and 168 of the *National Defence Act* be amended to remove or reduce distinctions based on rank in the composition of panels for General Courts Martial when the accused person is a member of the Canadian Forces.

In addition, as was highlighted in the 9 March 2009 brief provided to the Committee by Retired Colonel Michel Drapeau, there is currently no provision in the NDA that would allow accused persons who are civilians to have a General Court Martial panel composed, at least in part, of civilians. Currently, civilians subject to the Code of Service Discipline are tried by panels composed of Canadian Forces members. In an effort to come as close as is possible to trial by a jury of one's peers for civilians, while still preserving the unique nature and role of the military justice system, the Committee believes that the capacity to include civilian panel members on General Courts Martial panels established to try civilians would be beneficial.

RECOMMENDATION 2

That the *National Defence Act* be amended to allow civilians to be selected as members of General Courts Martial panels when the accused person being tried is a civilian.

Statutory Selection of Mode of Trial and Election of Mode of Trial by the Accused

Offences under the Code of Service Discipline naturally include infractions that relate uniquely to military service; however, the Code of Service Discipline also incorporates offences against the *Criminal Code* and other federal Acts and, with a few notable exceptions, allows the military justice system to have jurisdiction over persons who commit them while subject to the disciplinary jurisdiction of the Canadian Forces.²⁵ Prior to the Court Martial Appeal Court's decision in *R. v. Trépanier*, the DMP who preferred the charge against the accused person could elect the mode of trial, and the Court Martial Administrator was compelled to convene the type of court martial chosen by the DMP. Under the new scheme introduced to the NDA in response to the *Trépanier* decision, election of mode of trial belongs to the accused person, rather than the DMP, unless the choice of mode of trial is made for the accused by statute. This change to the military justice system was recommended by Chief Justice Lamer in Recommendation 25 of his report.

²⁵ See section 130 of the NDA.

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Now, section 165.191(1) of the NDA provides that the Court Martial Administrator must convene a General Court Martial:

- when a person has been charged with an offence that is not an offence under the *Criminal Code* or another Act of Parliament or an offence under law applicable outside of Canada, but is an offence under the NDA, that carries a maximum sentence of life imprisonment;
- when a person has been charged with an offence outside of Canada that would have been punishable under the *Criminal Code* or another Act of Parliament if it had taken place in Canada, where the offence carries a maximum sentence of life imprisonment, or
- when an accused person has been charged with an offence set out in section 469 of the *Criminal Code* (i.e. treason, piracy, sedition, murder, etc.).

Trial by General Court Martial in these circumstances is mandatory, unless both the DMP and the accused person agree to a Standing Court Martial (trial by military judge alone).

Similarly, under section 165.192 of the NDA, the Court Martial Administrator must convene a Standing Court Martial:

- when a person is charged with an offence that is not an offence under the *Criminal Code* or another Act of Parliament or an offence which, if committed outside of Canada, would have been punishable under these statutes had it been committed in Canada, but instead, is charged with an offence under the NDA carrying a maximum sentence of less than two years' imprisonment or a punishment that is "lower in the scale of punishments" under the Code of Service Discipline; or
- when a person is charged with an offence under the *Criminal Code* or any Act of Parliament or an offence which, if committed outside of Canada, would have been punishable under these statutes if committed in Canada, punishable on summary conviction.

In all other cases, pursuant to section 165.193(1) of the NDA, the accused person may elect his mode of trial. In cases where the accused has a choice, the Court Martial Administrator must advise him or her of that choice. Failure to choose on the part of the accused will result in trial by General Court Martial. However, the accused may re-elect a mode of trial within the first 30 days of commencement of proceedings, or at any time thereafter, with the consent of the DMP.

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The system of trial election enacted by Bill C-60 now more closely mirrors the system of election under the *Criminal Code*, where the most serious offences are tried by superior court judge and jury, unless the prosecutor and the accused agree to a trial by judge alone (sections 469 and 573 of the Code) and where summary conviction offences are tried by provincial court or its equivalent. In the case of hybrid offences, where the prosecutor decides to proceed by indictment, the default position is that the trial will be in superior court, and that the accused will be tried by judge and jury, unless Parliament explicitly states otherwise (sections 471 and 553 of the Code) or the accused elects otherwise. Accordingly, in the case of most hybrid offences, where the prosecution proceeds by indictment, the accused may elect to be tried by superior court judge and jury, superior court judge or provincial court judge.

Bill C-60, as originally drafted, had transitional provisions in clauses 28 and 29, governing how cases that had been commenced under the former four-tribunal court martial system, where the DMP elected the mode of trial for the accused, were to be dealt with under the new system. Essentially, clause 28 indicated that any court martial proceedings that had commenced under the former system would continue under that system. However, in its report on Bill C-60 during the 2nd Session of the 39th Parliament, the House of Commons Standing Committee on National Defence amended the bill to remove the transitional provision in clause 28. That Committee was concerned that the provision would mean that courts martial commenced under the NDA under the former system would be continued under a system that had been declared unconstitutional by the courts.²⁶ However, clause 29 was left in place.²⁷ Clause 29 (now section 29 of the Act) provides that if a guilty verdict, a finding of unfitness to stand trial, or a finding of non-responsibility as a result of mental disorder rendered by a Disciplinary Court Martial under the old system is successfully appealed to the CMAC, the CMAC cannot substitute its verdict for that of the trial court.

²⁶ *Proceedings of the House of Commons Standing Committee on National Defence*, Issue No. 32, 2nd Session, 39th Parliament, 16 June 2008, at pp. 12 – 13, available on-line at:

<http://www2.parl.gc.ca/content/hoc/Committee/392/NDDN/Evidence/EV3579699/NDDNEV32-E.PDF>.

²⁷ See the 4th Report of the House of Commons Standing Committee of National Defence during the 2nd Session of the 39th Parliament, available on-line at:

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3579585&Language=E&Mode=1&Parl=39&Ses=2>.

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As a result of the decision to amend the bill, our Committee was interested in how cases that were already in the system had been handled by the military after 18 July 2008, when the new Act came into force. Officials from the Judge Advocate General's office advised us that, at the time the CMAC rendered its decision in *R. v. Trépanier*, there were approximately 45 cases in the court martial system. Of those 45 cases, 5 courts martial under the former four-tribunal system had already commenced. Of the remaining 40 cases, some courts martial had been convened by the Court Martial Administrator, but proceedings had not yet commenced. In other cases, charges had been preferred against an individual by the DMP and the method of trial had been chosen, but no court martial had yet been convened. Each of these circumstances was dealt with differently by the Judge Advocate General. Courts martial where proceedings had already commenced under the former system were allowed to continue. Where courts martial had already been convened but not yet commenced, the accused person was given the option of proceeding under the old system, or filing an objection with the court. In those cases, 11 individuals were content to proceed under the former system. Others filed objections, at which point the judges either stayed the charges or terminated the proceedings. Once the new system was in place, the prosecution re-examined the cases where objections had been filed. In some cases, based on the delay, the nature of the charge and other factors, the prosecution decided not to re-prefer charges against these individuals. In other cases, charges were re-preferred against the individual under the new system. Finally, in cases where a charge had been preferred against an individual under the old system, but no court martial had yet been convened (24 cases in all), officials from the Judge Advocate General's office advised that all of these cases were sent back to the Court Martial Administrator to be dealt with under the new system.

While it appears that efforts have been made to ensure as smooth a transition as possible from the old system of courts martial to the new, our Committee is concerned that some of the 45 individuals whose cases were at some stage of the process under the former four-tribunal system have been disadvantaged by the transition to the new system. Some of the witnesses who appeared before the Committee advised us that military personnel, in particular, may have suffered some legal disadvantage as a result of this change. For example, under the former system of courts martial, the DMP could have elected to try a member of the Canadian Forces of or below the rank of major by Disciplinary Court Martial, even for a serious offence, such as disobeying a superior

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officer, which carries a maximum sentence of life imprisonment (section 83 of the NDA). However, a Disciplinary Court Martial could only impose a maximum sentence of dismissal with disgrace from Her Majesty's service. Under the new system of courts martial following *R. v. Trépanier*, using the transitional process described above by officials from the Judge Advocate General office, this Canadian Forces member would have to be tried by General Court Martial, in accordance with section 169.191 of the NDA, unless his trial had already commenced at the time that the new Act came into force. Thus, he or she could find him or herself facing a much stiffer sentence (life imprisonment) under the new system than he or she may have faced under the old system.

While such cases may be few and far between, our Committee is concerned with the fairness of being exposed to stiffer sentences through transitions of this sort. We are aware that one case, involving a matter akin to the one described above, has been appealed to the CMAC, and that no decision has yet been rendered.²⁸ The Committee does not wish to suggest any legal interpretation or to comment on the case as such. It fully respects the independence of courts martial. But the Committee considers that it is within its purview to recommend that the DMP implements a policy with respect to sentences requested by the prosecution in such cases, so as to address this fairness concern. Specifically, this policy should specify that in cases where members of the Canadian Forces had charges preferred against them prior to 18 July 2008, and where their trials, as a result of the election of the DMP, would have proceeded by Disciplinary Court Martial under the former tribunal system, the prosecution will not request a imposition of a sentence greater than that the maximum sentence that a Disciplinary Court Martial was authorized to impose.

RECOMMENDATION 3

That the Director of Military Prosecutions implement a policy specifying that, in ongoing cases where members of the Canadian Forces had charges preferred against them prior to 18 July 2008, and where their trials, as a result of the election of the DMP, would have proceed by Disciplinary Court Martial under the former tribunal system, the prosecution will not request the imposition of a sentence greater than the maximum sentence a Disciplinary Court Martial was authorized to impose.

²⁸ *R. v. Corporal A.E. Liwyj*, 2008 CM 1212. The Court Martial Appeal Court heard arguments in this case on 13 March 2009.

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Limitation Period for Summary Trial and Right of Court Martial Appeal Court to Remit a Matter for Summary Trial

In addition to introducing changes in response to the *Trépanier* decision, the Act also introduced changes to the NDA in response to the CMAC's decision in *R. v. Grant*.

Unlike proceedings under the *Criminal Code*, which proceed only summarily or by indictment, there is a third trial stream under the NDA. A person accused of a less serious offence under the NDA can also be tried by his or her commanding officer in proceedings known as summary trials. It is important to note that only military personnel below the rank of lieutenant-colonel can be tried in this manner, and civilians cannot be tried by this mode of trial. In addition, summary trial jurisdiction over an accused is not automatic. It depends on many statutory and regulatory factors including:

- fitness of the accused to be tried;
- status and rank of the accused and of the presiding officer;
- the nature of the charges;
- the limitation period;
- the interests of justice and discipline;
- the nature of the punishment that may be imposed on the accused if found guilty; and
- if applicable, the election of the accused to be tried summarily.²⁹

There are other important differences between court martial proceedings and summary trial proceedings including the following:

- there is no requirement for the presiding officer at a summary trial to be legally trained, although he or she must pass a training course and be certified by the Office of the Judge Advocate General as qualified to preside at such trials;
- generally, military personnel facing summary trials are not represented by counsel, although they are entitled to an assisting officer;

²⁹ See sections 60, 69, 70, 163 and 164 of the NDA and articles 108.05 to 108.10, 108.12, 103.125, 108.16, 103.17 and 119.02 of the QR&O.

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- if accused persons are represented by legal counsel at a summary trial, they must generally pay for such counsel themselves;
- the level of disclosure provided to the accused for the purposes of a summary trial is less complete than the level provided for the purposes of court martial;
- there is no ability for the accused person, at summary trial, to make Charter arguments that might result in a stay of proceedings or dismissal of the case against him or her; and
- no appeal to a court martial lies from a verdict of a commanding officer at summary trial. Instead, a person convicted at summary trial may request that the appropriateness of the conviction or sentence be reviewed by the next level of command,³⁰ or apply to the Federal Court³¹ or the superior court of a province³² for judicial review of the decision.

However, the fact remains that this type of trial is the most common form of trial in Canada’s military justice system. A summary trial is meant to try cases where persons are charged with less serious offences under the NDA and where the matter can be dealt with expeditiously. Accordingly, there has always been a limitation period associated with summary trials. A summary trial must commence within one year of the date that the offence is alleged to have been committed. If it does not commence within that time, then the matter must proceed by court martial. It is interesting to note that former Chief Justice Lamer recommended in his 2003 report that this limitation period for summary trials be retained (Recommendation 43 of the Lamer Report). In his view, “. . . once an accused has been forced to wait a year for trial, if the matter is to proceed at all, a court martial should be convened to ensure that the accused is given the attendant procedural and legal guarantees.”³³

In *R. v. Grant*, the CMAAC heard an appeal from an individual who had been charged under section 130 of the NDA with assault causing bodily harm under the *Criminal Code*. The accused person indicated that if it had been up to him, he would have elected to proceed by summary trial. In addition, individuals who were above the

³⁰ See sections 249(3) and (4) of the NDA, and articles 108.45, 116.02 and 107.14 of the QR&O.

³¹ See sections 18 and 18.1 of the *Federal Court Act*.

³² Provincial superior courts can hear such judicial review applications as a result of their inherent jurisdiction to control their own process and procedures, pursuant to the doctrine of inherent jurisdiction.

³³ Lamer Report, supra note 15 at p. 59.

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accused in the chain of command testified that the summary trial option would likely have been offered to the accused by his commanding officer. Due to pre-charge delay, however, the accused's trial did not commence within the applicable limitation period, and thus, this option was not available to him. The matter was referred to the DMP, who asked the Court Martial Administrator to convene a court martial. The accused was tried by court martial and found guilty of the offence. He appealed of his conviction, as well as of the order of the court to provide a DNA sample as a result of his conviction, to the CMAC, alleging that his section 7 and 11(b)³⁴ Charter rights had been violated as a result of the pre-charge delay and requesting a stay of proceedings.

After hearing the case, the CMAC determined that the accused's Charter rights had not been violated. However, it was of the view that the matter should be remitted back to the accused's commanding officer for a summary trial, since that was in accordance with the intentions of the parties. It was also of the view that the CMAC had the necessary authority to remit the matter back for such a trial under section 238(1)(b) of the NDA, notwithstanding the fact that section 230 of the NDA gives the CMAC the authority to hear appeals rendered by court martial only.

Witnesses from the Office of the Judge Advocate General indicated that they were surprised by the CMAC's ruling in *R. v. Grant*, and that, as a result of this decision, amendments to sections 163, 164, 238(1)(b) and 239.1(1)(a) of the NDA were included in the Act. The objectives of the amendments were twofold. First, they clarified that the one year limitation period continues to apply to summary trials conducted by an accused person's commanding officer. Second, they specified that when allowing an appeal with respect to the legality of a finding of guilty or not guilty, the CMAC only has the power to order a new trial by court martial, rather than by summary trial.

In light of the ruling in *R. v. Trépanier*, a ruling founded on the principle of making the military justice system mirror the civilian justice system as much as possible, our Committee feels that improvements should be made to the summary trial system under the NDA. First, based on the understanding that the intent behind summary trials is to deal with less serious service offences as expeditiously as possible, we believe that a limitation period of six months between the commission of the alleged offence and the

³⁴ Section 11(b) of the Charter guarantees accused persons the right to be tried within a reasonable time.

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time when the charge is laid by the commanding officer or other individual authorized to do so³⁵ would be more appropriate than the one year limitation period between the time that the offence was allegedly committed and the time that the trial commences, which is the period currently set forth in the NDA. Such a limitation period would also parallel the six month limitation period for summary conviction offences found in section 786(2) of the *Criminal Code*.

RECOMMENDATION 4

That sections 163(1.1) and 164(1.1) of the *National Defence Act* be amended to reduce the limitation period for summary trials from within one year after the day on which the service offence is alleged to have been committed to the time of trial, to six months after the day on which the service offence is alleged to have been committed to the laying of the charge.

Second, we note that summary trials and trials by courts martial are two separate trial streams. As a result, neither a court martial, nor the CMAC, upon allowing an appeal of a verdict, has the authority necessary to remit a matter back for summary trial by an accused person’s commanding officer. As stated previously, summary trial verdicts may be appealed to a reviewing authority, who is an officer at one level of command higher than the individual who rendered the initial verdict. Alternatively, judicial review of the decision made at first instance may be sought at Federal Court or the provincial superior court of a province.

While the summary trial system, which includes a separate appeal stream for verdicts and sentences rendered at such trials, appears to work well in most circumstances, the Committee remains concerned that accused persons may, in the future, find themselves in positions similar to that of the defendant in *R. v. Grant*, and be prohibited from proceeding by summary trial due to the expiration of the limitation period, even though both they and their commanding officers would have preferred to proceed in this fashion. Because there is no standing, permanent court system for military trials, and because military personnel often serve in remote locations outside of Canada, which can make evidence gathering in support of a charge difficult, it seems likely that the limitation period for summary trials might preclude an accused person and

³⁵ Under article 107.02 of the QR&O, a charge may be laid by the commanding officer of a member of the Canadian Forces, an officer or non-commissioned member who is authorized by the commanding officer to lay charges, or an officer or non-commissioned member of the Military Police assigned to investigative duties with the Canadian Forces’ National Investigative Service.

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his or her commanding officer from proceeding in this manner more frequently in the context of the military justice system than the limitation period for summary proceedings does in the civilian criminal justice system. Given this fact, and given the fact that persons may face less severe sanctions at summary trial than they face at court martial,³⁶ the Committee would like to make the summary trial option more available to accused persons in appropriate circumstances. In our view, where a case has ended up in the court martial stream solely because the limitation period for summary trials has expired, courts martial, as well as the CMAC, should be empowered to remit matters back to an accused person's commanding officer for summary trial. Prior to exercising their authority in this regard, however, these courts must be satisfied that the following conditions have been met:

- a court martial was convened to try the accused for the offence in question solely because the limitation period for summary trials had expired;
- the offence is one that the commanding officer would have had jurisdiction to try by summary trial, had the limitation period not expired;³⁷
- prior to remitting the matter back for summary trial, the court martial's presiding judge, or the CMAC, as the case may be, receives written confirmation from both the accused person and his or her commanding officer that they are both willing to proceed by summary trial; and
- the accused waives the limitation period applicable to summary trials in writing.

By amending the NDA in this fashion, at least as the amendments pertain to the CMAC, the military justice system would be made more similar to proceedings under the *Criminal Code* in the civilian justice system, where appeal courts are empowered to order new trials for summary conviction offences (see, for example, sections 822(1), 822(2) and 686(2)(b) of the *Criminal Code*).

While a court martial is not an appeal court, in our view, it would not be expedient to make an accused person wait until he or she reaches the appeal stage in the

³⁶ See sections 163(3) and 164(4) of the NDA.

³⁷ Section 108.07 lists the offences where the commanding officer has jurisdiction to proceed summary trial. Only certain offences described in the NDA, the *Criminal Code* and the *Controlled Drugs and Substances Act* may be tried in this manner.

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court martial process before he or she could potentially obtain an order to remit a matter back for summary trial. Such a solution would not be expedient, and would not serve the interests of justice as well as it could. We consequently believe that the authority to remit a matter back for summary trial should also be provided to courts martial at first instance, not just to the CMAC.

RECOMMENDATION 5

That the *National Defence Act* be amended to empower courts martial, as well as the Court Martial Appeal Court, upon allowing an appeal of a guilty or not guilty verdict or an appeal of a stay of proceedings, to remit matters for summary trial if satisfied that the following conditions have been met:

- (a) a court martial was convened to try the accused for the offence in question solely because the limitation period for summary trials had expired;**
- (b) the offence is one that the commanding officer would have had jurisdiction to try by summary trial, had the limitation period not expired;**
- (c) prior to remitting the matter back for summary trial, the court martial's presiding judge, or the Court Martial Appeal Court, as the case may be, receives written confirmation from both the accused person and his or her commanding officer that they are both willing to proceed by summary trial; and**
- (d) the accused waives, in writing, the limitation period applicable to summary trials.**

SELECTED RECOMMENDATIONS FOR REFORM OF THE SYSTEM OF COURTS MARTIAL GENERALLY

In addition to making recommendations in relation to the Act, the Committee sees this study as an opportunity to contribute to the completion of certain reforms outlined in the Lamer Report. The Committee stresses that it was invited, by the Minister and other witnesses, to make recommendations on matters of military justice reform more broadly. Witnesses also testified on these broader issues of reform, and in drafting this report, Committee members debated among themselves on desirable changes that future reform could bring. Comments and recommendations offered below have been formulated with a view to contribute to the next round of reforms, and address various issues raised in the Lamer Report in relation to the system of courts martial that have yet to be dealt with.

Our Committee is mindful that future reforms are still being worked on and that a successor bill to C-45 is likely to be introduced before Parliament. In that regard, comments and recommendations found in this section should be seen as general recommendations for improvements, rather than specific recommendations in relation to proposed amendments introduced in prior bills or that may come before the Committee in the future. When legislative amendments are put before our Committee at a future date, we will then be in a position to comment in a more specific and formal manner. It should also be noted that, in this section, our Committee did not attempt to provide an all-encompassing view of military justice reform. It focused its attention on issues specifically highlighted by witnesses or its members. Comments and recommendations are offered in relation to three issues: the range of available sentences; the disclosure of willsay statements, and the legislative route for future reform.

Additional Sentencing Alternatives

The Committee is concerned with the current lack of flexibility in the range of punishments and sanctions for accused under the Code of Service Discipline. This aspect of the military justice system was highlighted in the Lamer Report, in which current

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powers of punishment were considered “not adequate” and sentencing provisions under the NDA were regarded as “requir[ing] extensive reform”³⁸.

Under section 139(1) of the NDA, the current range of available sanctions for service offences includes: (a) imprisonment for life; (b) imprisonment for two years or more; (c) dismissal with disgrace from Her Majesty’s service; (d) imprisonment for less than two years; (e) dismissal from Her Majesty’s service; (f) detention; (g) reduction in rank; (h) forfeiture of seniority; (i) severe reprimand; (j) reprimand; (k) fine; and (l) minor punishments. Some of these sentences can only be imposed on military personnel.

By comparison, under Part XXIII of the Criminal Code, the range of sanctions includes: absolute and conditional discharges, probation, fines and forfeiture, restitution, conditional sentence of imprisonment, imprisonment, and imprisonment for life.

The Committee acknowledges that the types of sanctions available in the mainstream criminal legal system might not always be sufficient to respond adequately to the specific needs of the system of military justice. However, we are of the view that adding some of the sentencing options available in the *Criminal Code* to the NDA would improve the military justice system.

In line with what the Lamer Report highlights and with the testimony of some witnesses, the Committee notes the following discrepancies between the two systems:

- the NDA contains no provision providing for imprisonment and detention in case of default in paying a fine, which makes enforcement of fine payment difficult;
- there is no provision for intermittent conditional sentences under the NDA – which can be problematic for reservists and civilians condemned to imprisonment, notably in relation to their civilian employment; and
- the only two possible sentences for civilians are imprisonment or a fine.

While the above discrepancies in the types of sentences available are generally not the result of the enactment of Bill C-60 (the reform of courts martial brought about by

³⁸ Lamer Report, supra note 15 at p. 65.

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the Act did not expand or narrow the range of available punishments within the military justice system), the Act has an indirect impact on the range of available sanctions in specific cases, given that certain types of punishments can only be rendered by specific types of courts martial and the types of courts left in place have different jurisdictional attributes.

For instance, under the system that existed prior to the adoption of the Act, an accused before a Disciplinary Court Martial could only be punished by a “dismissal with disgrace” or a lower form of punishment.³⁹ With the adoption of Bill C-60, the Disciplinary Court Martial disappeared and some of the service offences over which it had jurisdiction would now fall under the jurisdiction of a Standing Court Martial, which has the power to impose stiffer penalties.⁴⁰ Accordingly, an indirect effect of the change in the types of courts martial is that in relation to certain offences, an accused found guilty could now face harsher punishment. Similarly, prior to the adoption of the Act, a Special General Court Martial could only impose a sentence of imprisonment or a fine on civilians; no such limit existed in relation to the sentencing powers of a General Court Martial, which was the only other type of court martial with jurisdiction over civilians.⁴¹ Amendments to the NDA brought about by the enactment of Bill C-60 now leaves imprisonment or fine as the only two sentencing options for civilians under the two types of courts martial currently in place.⁴²

Our Committee believes that future reforms of the military justice system should ensure that judges imposing sentences have access to an appropriate range of sanctions. In that regard, the Committee endorses the Lamer Report’s finding that “Because the military justice system has jurisdiction over members of the regular force, the reserve force and in certain cases, civilians, the range of punishments and sentences must be appropriate for all of these groups.”⁴³ Moreover, the thrust of Recommendation 52 of the

³⁹ See former section 172 of the NDA.

⁴⁰ See, in this regard, the change to section 175 of the NDA, brought about by section 11 of the Act.

⁴¹ See former sections 166 and 178 of NDA.

⁴² See sections 166.1 and 175 NDA.

⁴³ Lamer Report, supra note 15 at p. 65.

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Lamer Report seems to involve bringing into military justice sentencing a flexibility similar to that found in the civilian criminal justice system.

Our Committee also notes that Bill C-45 contained clauses which, had it been enacted, would have expanded the range of sentencing options in relation to military personnel.⁴⁴ For example, it would have allowed military judges to impose sentences of absolute discharge, restitution, and intermittent sentences on members of the Canadian Forces. While expressing no opinion on the relevant clauses of Bill C-45, the Committee believes that the additional flexibility that new sentencing possibilities such as these would provide would constitute a step in the right direction.

RECOMMENDATION 6

That the *National Defence Act* be amended to provide for absolute discharge, restitution, and intermittent sentences as possible sanctions for members of the Canadian Forces convicted of service offences, as was provided for in Bill C-45.

However, the Committee remains particularly concerned that, even had Bill C-45 been enacted, military judges sentencing civilians would still have had only two sentencing options available to them: a fine or imprisonment.

The military justice system has wide-ranging jurisdiction over civilians who are subject to the Code of Service Discipline. As a result, military judges should have access to other sentencing options when they are of the view that neither a fine nor imprisonment would be appropriate. This is particularly important given the fact that the NDA gives military tribunals jurisdiction to try civilians for offences that also exist under general criminal law.⁴⁵ In that context, the Committee fails to see a convincing rationale for existing discrepancies in sentencing options between both systems. Sentences available in the civilian criminal justice system that are not available in the military justice system include absolute and conditional discharge, probation, forfeiture, restitution and suspended or intermittent sentences.

⁴⁴ See clauses 22 and 62 of Bill C-45.

⁴⁵ See section 130 NDA.

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The Committee is aware that sentences that require the imposition of conditions on those convicted of them, such as conditional discharges or probation orders, would create challenges for the administration of Canada's military justice system. Among such challenges, we note that there are no permanent standing courts to bring convicted persons back to in the event that they violate one or more of their conditions and no probation officers in the military justice system to supervise offenders. It is also possible that the connection between a civilian and the military may be severed prior to the civilian's completion of his or her sentence. However, we are of the view that the military could manage such challenges. For example, the military could create the necessary infrastructure within the Canadian Forces to supervise sentences that involve the imposition and fulfilment of conditions. Alternatively, sentence supervising and/or transfer agreements could be entered into by the Department of National Defence, Justice Canada and the various provincial justice departments. Such agreements could have the civilian court systems providing, at a cost, probation officers to supervise civilians convicted of service offences under the military justice system and taking jurisdiction over civilian offenders if the connection between the civilian offender and the military ends prior to the expiration of the offender's sentence. The fact that the necessary infrastructure and these types of agreements are not presently in place is not, in our view, a reason to refrain from recommending that such sentencing options be made available to a military judge when sentencing civilians convicted of service offences.

RECOMMENDATION 7

That the *National Defence Act* be amended to provide for additional sentencing flexibility in relation to civilians over whom the military justice system has jurisdiction, by adding absolute and conditional discharge, probation, forfeiture, restitution and suspended and intermittent sentences as sentencing options.

Finally, the Committee has reflected on whether sentencing options not contemplated in Bill C-45 should also be part of the sentencing arsenal for officers and non-commissioned members. It is clear that the Lamer Report embraces the enhancement of flexibility in sentencing as a matter of principle, but it is uncertain whether this means that punishment options for civilians and non-civilians ought to be alike. Clearly, because of the enrolment nexus, there are forms of punishment that could

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be appropriate for military personnel that would not be so for civilians. However, it is unclear whether or not the opposite is true. In other words, if sentencing options for punishment of civilians are expanded as recommended as above, should the same options be made available for non-civilians?

As mentioned, Bill C-45 would have opened the door to absolute discharge and intermittent sentences for military personnel. The Committee would welcome such a change. But the Committee believes that two other types of sentences – probation and suspended sentences – should also be available in these circumstances. Sentencing is very much a fact-dependent decision and the Committee will not venture to identify circumstances in which such punishments could be appropriate. The Committee simply notes that making such options available to courts martial brings additional sentencing flexibility to the military justice system, and that such flexibility is desirable. Our Committee trusts that military judges would use such new options judiciously. We are also confident that, in the case of probation orders, the necessary infrastructure and/or agreements could be put in place to allow for the imposition of such sentences on military personnel, as was described in the preceding section in relation to sentences containing conditions imposed on civilian offenders.

RECOMMENDATION 8

That the *National Defence Act* be amended to provide for probation and suspended sentences as possible sanctions for the commission of service offences by military personnel, in addition to the new sentencing options that Bill C-45 would have provided for.

Willsay Statements

Judge Advocate General officials testified that the Department of National Defence (DND) had accepted 84 of the 88 recommendations of the Lamer Report. Acceptance included implemented and non-yet-implemented measures alike. Based on such testimony, the Committee notes that recommendations number 21, 49, 71 and 74 of

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the Lamer Report stand out as not having received DND approval.⁴⁶ In other words, DND does not intend to give effect to these recommendations.

The Committee wishes to express its concern with the DND's decision not to accept one recommendation, dealing with willsay statements made by the prosecution. As this recommendation deals with the operations of courts martial, it therefore falls within the scope of this report. By focusing on this particular recommendation in the Lamer Report, the Committee does not express any opinion over the other three recommendations that were not accepted by the DND.

Willsay statements are statements made by the prosecution to identify the witnesses that it proposes to call to testify and the nature of the evidence that such witnesses would bring. In relation to these statements, Recommendation 49 of the Lamer Report states:

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

In his Report, former Chief Justice Lamer explained the context and rationale for this recommendation as follows:

Under article 111.11 of the *QR&O*, military prosecutors may wait until the start of a court martial before notifying an accused of any witness that the prosecutor proposes to call and inform the accused of the purpose for which a witness will be called and of the nature of the proposed evidence of that witness. While in practice willsay statements are likely disclosed before this point, the possibility that the disclosure of the list of prosecution witnesses and their purpose could be delayed until the start of a trial hinders the ability of the defence to prepare for the trial. I agree with the suggestion made in the CBA Submission that willsay statements should be provided to the defence prior to or when a charge is preferred. By the time a charge is preferred, the military prosecutor should know the evidence and witnesses required to prove the Crown's case. In *R. v. Stinchcombe*, the Supreme Court held that initial disclosure should occur before the accused is called upon to elect the mode of trial or plead.

⁴⁶ *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, Issue No. 3, 2nd Session, 40th Parliament, 11 and 12 March 2009, supra note 18 at p. 24.

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Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory. I have not been given any military justification as to why military personnel should not enjoy the same rights as other citizens.

Officials from the Office of the Judge Advocate General stated that altering the rules about willsay statements in the way recommended in the Lamer Report could lead to additional delay in the laying of charges and would be of little benefit to the accused. The Committee is not convinced by that argument, and shares the concern of former Chief Justice Lamer regarding the prompt disclosure of willsay statements and their importance in terms of preparing a full defence. Accordingly, the Committee is of the opinion that disclosure of willsay statements to the accused should occur earlier in the process than what article 111.11 of the QR&O currently provides for. Disclosure of willsay statements in trials before courts martial should be subject to requirements similar to those set out by the Supreme Court in the *R. v. Stinchcombe* decision.

RECOMMENDATION 9

That article 111.11 of the *Queen's Regulations and Orders* be amended to oblige the prosecution to disclose willsay statements to the accused at or prior to the time when a charge is preferred rather than simply before a court martial commences.

Introduction of the Next Bill in the Senate

The Committee believes that reform of the military justice system should continue and be completed as soon as practically feasible. Elements of reform, including the ones that necessitate legislative amendments, should not be further delayed. With that objective in mind, and in a spirit of cooperation, members of the Committee suggested to the Minister, during his appearance before us, that consideration be given to introducing the successor to Bill C-45 in the Senate. Given that this Committee has just completed a review of the provisions and operation of the Act (formerly Bill C-60), Parliament will benefit from its fresh knowledge of some of the issues that are likely to be raised in the new bill. During our 11 March 2009 meeting, the Minister received this suggestion positively, and undertook to consider this possibility. The Committee hopes that this suggestion will be acted upon, and offers its continued collaboration.

APPENDIX A – LIST OF ABBREVIATIONS

Bill C-7	An Act to amend the National Defence Act (introduced 27 April 2006, but not assented to)
Bill C-45	An Act to amend the National Defence Act and to make consequential amendments to other Acts (introduced 8 March 2008, but not assented to)
Bill C-60	<i>An Act to amend the National Defence Act (court martial) and make a consequential amendment to another Act</i> (assented to 18 June 2008, S.C. 2008, c. 29)
Charter	<i>Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11</i>
CMAC	Court Martial Appeal Court
Code of Service Discipline	Code of Service Discipline contained in Part III of the <i>National Defence Act</i>
Dickson Report	First Report, Special Advisory Group on Military Justice and Military Police Investigation Services, <i>Report of the Special Advisory Group on Military Justice and Military Police Investigation Services</i> , 14 March 1997 and Second Report, Special Advisory Group on Military Justice and Military Police Investigation Services, <i>Report on the Quasi-Judicial Role of the Minister of National Defence</i> , 25 July 1997
DMP	Director of Military Prosecutions
DNA	Deoxyribonucleic acid
Lamer Report	<i>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 by section 96 of Statutes of Canada 1998, c. 35, 3 September 2003</i>

APPENDIX A – LIST OF ABBREVIATIONS

NDA	<i>National Defence Act, R.S.C. 1985, c. N-5</i>
QR&O	<i>Queen’s Regulations and Orders for the Canadian Forces</i>
Somalia Commission of Inquiry’s Report	Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, <i>Dishonoured Legacy: The Lessons of the Somalia Affair</i> , 2 July 1997
Young Report	<i>Report to the Prime Minister on the Leadership and Management of the Canadian Forces</i> , released by the Minister of National Defence on 25 March 1997

APPENDIX B – RECOMMENDATIONS

RECOMMENDATION 1

That sections 167 and 168 of the *National Defence Act* be amended to remove or reduce distinctions based on rank in the composition of panels for General Courts Martial when the accused person is a member of the Canadian Forces.

RECOMMENDATION 2

That the *National Defence Act* be amended to allow civilians to be selected as members of General Courts Martial panels when the accused person being tried is a civilian.

RECOMMENDATION 3

That the Director of Military Prosecutions implement a policy specifying that, in ongoing cases where members of the Canadian Forces had charges preferred against them prior to 18 July 2008, and where their trials, as a result of the election of the DMP, would have proceeded by Disciplinary Court Martial under the former tribunal system, the prosecution will not request the imposition of a sentence greater than the maximum sentence a Disciplinary Court Martial was authorized to impose.

RECOMMENDATION 4

That sections 163(1.1) and 164(1.1) of the *National Defence Act* be amended to reduce the limitation period for summary trials from within one year after the day on which the service offence is alleged to have been committed to the time of trial, to six months after the day on which the service offence is alleged to have been committed to the laying of the charge.

RECOMMENDATION 5

That the *National Defence Act* be amended to empower courts martial, as well as the Court Martial Appeal Court, upon allowing an appeal of a guilty or not guilty verdict or an appeal of a stay of proceedings, to remit matters back for summary trial if satisfied that the following conditions have been met:

- (a) a court martial was convened to try the accused for offence in question solely because the limitation period for summary trials had expired;
- (b) the offence is one that the commanding officer would have had jurisdiction to try by summary trial, had the limitation period not expired;
- (c) prior to remitting the matter back for summary trial, the court martial's presiding judge, or the Court Martial Appeal Court, as the case may be, receives written confirmation from both the accused person and his or her commanding officer that they are both willing to proceed by summary trial; and

APPENDIX B – RECOMMENDATIONS

(d) the accused waives, in writing, the limitation period applicable to summary trials.

RECOMMENDATION 6

That the *National Defence Act* be amended to provide for absolute discharge, restitution, and intermittent sentences as possible sanctions for members of the Canadian Forces convicted of service offences, as was provided for in Bill C-45.

RECOMMENDATION 7

That the *National Defence Act* be amended to provide for additional sentencing flexibility in relation to civilians over whom the military justice system has jurisdiction, by adding absolute and conditional discharge, probation, forfeiture, restitution and suspended and intermittent sentences as sentencing options.

RECOMMENDATION 8

That the *National Defence Act* be amended to provide for probation and suspended sentences as possible forms sanctions for the commission of service offences by military personnel, in addition to the new sentencing options that Bill C-45 would have provided for.

RECOMMENDATION 9

That article 111.11 of the *Queen's Regulations and Orders* be amended to oblige the prosecution to disclose willsay statements to the accused at or prior to the time when a charge is preferred rather than simply before a court martial commences.

APPENDIX C – LETTER FROM THE HON. PETER MACKAY, P.C., M.P.

Minister of National Defence

Ministre de la Défense nationale

June 17, 2008

Honourable Senator Joan Fraser,
Chair,
Standing Committee on Legal and Constitutional Affairs,
The Senate of Canada,
Ottawa, Ontario,
K1A 0A4.

Joan
Dear Senator Fraser,

I am very appreciative of the Senate agreeing to consider Bill C-60 on an expeditious manner. It is important that our military justice system can continue to operate.

I would ask, however, that your Committee consider studying the provisions and operation of Bill C-60 and provide me with a report on your findings and any recommendations the Committee may choose to make, by December 31, 2008. The Government will review these recommendations and provide the Committee with a written response, that could include proposed amendments, within 90 calendar days.

Thank you for your kind consideration of this request and I look forward to your response.

Yours sincerely,

Peter Mackay
Peter G. MacKay

Ottawa, Canada K1A 0K2

APPENDIX D – WITNESSES

March 4, 2009

Office of the Judge Advocate General:

Colonel B.B. Cathcart, CD, Deputy Judge Advocate General /
Military Justice and Administrative Law;

Lieutenant-Colonel Jill Wry, Director of Law / Military Justice and
Policy Research.

March 5, 2009

As an individual:

Colonel Michel W. Drapeau, O.M.M., C.D. (Ret).

March 11, 2009

The Honourable Peter MacKay, P.C., M.P., Minister of National
Defence.

National Defence:

Brigadier-General Ken Watkin, Judge Advocate General of the
Canadian Forces.

As an individual:

Lynn Larson, Lawyer.

March 12, 2009

National Defence:

Lieutenant-Colonel Jean-Marie Dugas, Director of Defence Counsel
Services;

Lieutenant-Commander Pascal Levesque, Defence Counsel,
Director of Defence Counsel Services;

Captain (N) Holly MacDougall, Director, Military Prosecution.