Legislative Summary **LS-598E**

BILL C-45: AN ACT TO AMEND THE NATIONAL DEFENCE ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

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LEGISLATIVE HISTORY OF BILL C-45

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	3 March 2008	First Reading:	
Second Reading:		Second Reading:	
Committee Report:		Committee Report:	
Report Stage:		Report Stage:	
Third Reading:		Third Reading:	

Royal Assent:

Statutes of Canada

This bill did not become law before the 39th Parliament ended on 7 September 2008.

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

Legislative history by Michel Bédard

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BILL C-45: AN ACT TO AMEND THE NATIONAL DEFENCE ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS*

BACKGROUND

A. Purpose of the Bill

Bill C-45, An Act to amend the National Defence Act and to make consequential amendments to other Acts, was introduced in the House of Commons on 3 March 2008 by the Minister of National Defence (the Minister).

The bill largely reproduces the provisions in the former Bill C-7, which received first reading on 27 April 2006 during the 1st Session of the 39th Parliament. In addition, Bill C-45 takes into account the amendments to the *National Defence Act* (NDA) made by the former Bill S-3, which was passed into law in March 2007(1) and provides for a national databank for information about persons found guilty of military offences of a sexual nature. However, unlike the former Bill C-7, Bill C-45 does not spell out the responsibilities of the Military Police Complaints Commission, nor does it include the 60-day deadline for placing a decision before the Commission, as did the former Bill C-7.(2)

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

(1) *An Act to amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act and the Criminal Records Act*, S.C. 2007, c. 5.

(2) Under the NDA as it stands, a complainant who has brought a conduct complaint against a member of the military police and who wishes to request a review of the Provost Marshal's decision by the Military Police Complaints Commission has unlimited time in which to do so. To make the procedure more efficient, clause 94 of the former Bill C-7 required a complainant to act within 60 days.

Overall, Bill C-45 responds to most of the recommendations made by the Right Honourable Antonio Lamer, former Chief Justice of Canada, in his 2003 report (Lamer Report).[3]

Essentially, the amendments set out in the bill clarify the amendments introduced in 1998 by Bill C-25[4] and make substantial improvements to the military justice system. While that system is made more consistent with the system established in the *Criminal Code*,[5] Bill C-45 also recognizes the unique nature of the military system, in order to provide the degree of flexibility that is needed for maintaining discipline. As well, the bill enhances the effectiveness of the military justice system and provides for the key players in that system, in particular military judges and the Director of Defence Counsel Services, to be more independent and impartial.

B. Bill C-25

Bill C-25, assented to in 1998, took into account most of the recommendations made in the Report of the Special Advisory Group on Military Justice and the Military Police Investigation Services, chaired by Brian Dickson (Dickson Report).[6] Other provisions of the bill had been written in response to some of the recommendations made in the report of the Somalia Commission of Inquiry (Somalia Report)[7] and the Report to the Prime Minister on Leadership and Management in the Canadian Forces.[8]

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

(4) Bill C-25: An Act to amend the National Defence Act and to make consequential amendments to other Acts, received Royal Assent in December 1998 and came into force on 1 September 1999. For an overview of the military justice system and the changes made to the military regime, see David Goetz, *Bill C-25: An Act to amend the National Defence Act*, LS-311E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 25 November 1998, http://lpintrabp.parl.gc.ca/lopimages2/PRBpubsArchive/ls1000/361c25-e.asp.

(5) R.S., 1985, c. C-46.

(6) Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, March 1997. The second part of the report, tabled in July 1997, dealt with the quasi-judicial role of the Minister of National Defence under the *National Defence Act*, R.S., 1985, c. N-5.

(7) Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair*, June 1997.

(8) Report to the Prime Minister on Leadership and Management in the Canadian Forces, released by the Minister of National Defence in March 1997.

Bill C-25 made far-reaching amendments to the NDA. The purpose of the amendments was to promote integrity and fairness within the system established by the NDA. The principal changes made by that major reform included:

- abolition of the death penalty;
- 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 of the independence of military judges, by amending the provisions relating to their appointment, powers and tenure.

C. Lamer Report

Clause 96 of Bill C-25 required that the Minister undertake an independent review of the amendments to the NDA every five years following the bill's coming into force. Accordingly, former Chief Justice Lamer began the first review in March 2003, and his report was tabled in Parliament by the then Minister of National Defence, John McCallum, on 5 November 2003.

The independent review related solely to the provisions and operation of Bill C-25, and did not encompass the NDA as a whole.

In the conclusion to his report, Justice Lamer observed that "Canada's military justice system generally works very well, subject to a few changes."(9) To improve an already effective military justice system that provides a model on the international scene, he recommended that certain changes be made.

(9) Lamer Report, p. 111.

The recommendations in the Lamer Report were primarily designed to provide better guarantees of the independence of key players, in particular military judges and the Director of Defence Counsel Services, and to improve the grievance and military police complaints process. The proposed amendments to the Code of Service Discipline expressed a desire to incorporate certain *Criminal Code* rules into the military justice system.

D. Principal Amendments in Bill C-45

Bill C-45 implements most of the recommendations in the Lamer Report relating to amendments to be made to the NDA.(10) The most significant amendments include:

- 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 by a court martial panel, essentially in relation to guilt;
- statement of sentencing principles;
- inclusion of new sentences: absolute discharge, intermittent sentences and restitution;
- greater consistency with the rules in the *Criminal Code*, including in relation to arrest, preventive custody and victim impact statements;
- clarification of the duties and functions of the Canadian Forces Provost Marshal;
- delegation of the powers of the Chief of Defence Staff (CDS) in relation to the grievance process.

(10) The recommendations made by Justice Lamer also relate to the *Queen's Regulations and Orders for the Canadian Forces*, which are key subordinate legislation (http://www.smafinsm.forces.gc.ca/qr_o/intro_e.asp), and certain administrative provisions.

DESCRIPTION AND ANALYSIS

A. Director of Military Prosecutions and Director of Defence Counsel Services

Before Bill C-25 came into force, the Office of the Judge Advocate General handled both prosecution services and defence services for accused persons. Bill C-25 eliminated those functions by creating two positions: the Director of Military Prosecutions (DMP) and the Director of Defence Counsel Services (DDCS). The DMP is primarily responsible for laying charges and conducting prosecutions in courts martial. The DDCS is primarily responsible for supervising and managing the provision of legal services to accused persons.

1. Removal for Cause (clause 71)

The Minister appoints the DMP and the DDCS,[(11)] and they have security of tenure for a maximum renewable term of four years. At present, however, the security of tenure enjoyed by the DMP differs from that of the DDCS. In order to remove the DMP, the Minister must obtain a recommendation from an Inquiry Committee. The DDCS does not have that protection. Subclause 71(1) of the bill remedies that situation by giving the DDCS the same protection.[(12)]

2. Remuneration (clause 2)

Neither the NDA nor the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) state how the remuneration of the DMP and the DDCS is established. To ensure that the process is transparent, subclause 2(1) of the bill provides that the pay of both directors shall be prescribed by Treasury Board regulation.[(13)]

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(11) Sections 165.1 and 249.18, respectively, of the NDA.

(12) This amendment is in response to recommendation 3 of the Lamer Report.

(13) This amendment is in response to recommendations 2 and 4 of the Lamer Report.

B. Court Martial Administrator (clause 37)

The Court Martial Administrator is responsible for convening the court martial, in response to a decision by the DMP, and appointing the members of the General Court Martial(14) or Disciplinary Court Martial.(15) Clause 37 of the bill provides that the Court Martial Administrator shall make an order fixing the date, time and place of a trial before the court martial and directing the accused to appear.(16)

C. Military Judges

1. Oath of Military Judges (clause 38)

At present, military judges must take an oath before each trial.(17) New subsection 165.21(2) of the NDA provides that they will henceforth take an oath when they are appointed.(18)

2. Security of Tenure of Military Judges (clause 38)

At present, military judges are appointed with security of tenure for a term of five years.(19) The term is renewable on recommendation of a Renewal Committee.(20) In making a recommendation, the Renewal Committee considers the requirements of the Office of the Chief Military Judge, any compelling military requirement to employ the military judge in a non-judicial capacity, and the military judge's physical and medical fitness. In the view of Justice Lamer, accused persons might believe that a judge's desire to be renewed would influence his or her judicial decisions.(21)

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(14) "General Courts Martial – may try *any person* who is liable to be charged, dealt with and tried on a charge of having committed a service offence. A General Court Martial is composed of a *military judge and a panel of five members*, and has the power to order a maximum punishment of imprisonment for life" (Lamer Report, p. 34).

(15) "Disciplinary Courts Martial – may try *any officer of or below the rank of major or any non-commissioned member* who is liable to be charged, dealt with and tried on a charge of having committed a service offence. A Disciplinary Court Martial is composed of a *military judge and a panel of three members* and may not pass a sentence that includes a punishment higher in the scale of punishments than dismissal with disgrace from Her Majesty's service" (ibid., pp. 34-35); s. 165.19 of the NDA.

(16) This amendment is in response to recommendation 19 of the Lamer Report.

(17) Section 251 of the NDA.

(18) See the Lamer Report, p. 21.

(19) Section 165.21 of the NDA.

(20) Subsection 101.17(2) of the QR&O.

(21) Lamer Report, p. 19.

To avoid any impression of outside influence on the decisions of military judges, new subsection 165.21(4) of the NDA provides that a military judge holds office until retirement or release, at his or her request, from the Canadian Forces.(22)

3. Military Judges Inquiry Committee (clause 42)

While the present NDA provides that the Governor in Council must obtain a recommendation of an Inquiry Committee to remove a military judge, the composition of the Committee and the factors it must consider are set out only in the QR&O.(23)

The bill therefore incorporates into the NDA the essence of the rules set out in the QR&O.(24) The members of the Committee will still be judges of the Court Martial Appeal Court and be appointed by the Chief Justice of that Court (new subsection 165.31(1) of the NDA). As well, the Committee must commence an inquiry as to whether a military judge should be removed from office at the request of the Minister (new subsection 165.32(1) of the NDA), and it may inquire into any complaint or allegation made against a military judge (new subsection 165.32(2) of the NDA).

On the other hand, the bill differs in some respects from the scheme established by the QR&O, in particular with regard to the number of members of the Committee and the grounds for removal. While the QR&O required that the Committee be composed of at least two judges of the Court Martial Appeal Court, new subsection 165.31(1) of the NDA requires one more. New subsection 165.32(7) of the NDA reiterates the four grounds for removal set out in the QR&O:

- infirmity;
- having been guilty of misconduct;
- having failed in the due execution of his or her judicial duties; or
- having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of his or her judicial duties.

(22) This amendment is in response to recommendation 5 of the Lamer Report.

(23) Sections 101.13 and 101.14.

(24) This amendment is in response to recommendation 6 of the Lamer Report.

It adds a fifth ground: the fact that the military judge does not satisfy the physical and medical fitness standards applicable to officers. This last ground is currently considered by the Renewal Committee when renewing the appointment of a military judge.

4. Military Judges Compensation Committee (clauses 42 and 43)

The rates and conditions of issue of military judges' pay are prescribed by Treasury Board.(25) At present, the NDA provides that judges' remuneration must be reviewed regularly by a committee, but the composition of the committee and the factors it is to consider in its review are set out in the QR&O.(26)

Clause 42 of the bill reiterates the rules set out in the QR&O.(27) The Committee is always composed of three part-time members appointed by the Governor in Council and nominated by the military judges, the Minister and the members of the Committee (new subsection 165.33(1) of the NDA). To determine whether military judges' remuneration is adequate, the Committee has regard to the same factors as set out in the QR&O, including the federal government's economic position, the financial security of the military judiciary and the need to attract outstanding candidates to the military judiciary (new subsection 165.34(2) of the NDA).

The Committee conducts its review of the military judiciary every four years (new subsection 165.34(3) of the NDA), and at any time at the request of the Minister (new subsection 165.35(1) of the NDA).

Clause 43 stipulates that military judges represented before the Committee by a lawyer shall be entitled to the costs of such representation.

5. Chief Military Judge (clauses 40 and 42)

The Chief Military Judge, who must be at least a colonel (new subsection 165.24(2) of the NDA), may, with the approval of the Governor in Council, make rules governing practice and procedure in courts martial. For example, rules may be made regarding pre-trial conferences, orders for release or detention, documents filed in court and the scheduling of trials (new section 165.3 of the NDA).

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(25) Paragraph 12(3)(*a*) and subsection 165.22(1) of the NDA.

(26) Sections 204.23 to 204.27.

(27) This amendment is in response to recommendation 9 of the Lamer Report.

The Governor in Council may appoint a Deputy Chief Military Judge who can exercise the responsibilities of the Chief Military Judge in the event that the latter is absent or unable to carry out his or her duties, or the office is vacant (new sections 165.28 and 165.29 of the NDA).

6. Part-time Judges (clauses 1, 38, 40, 41 and 42)

So that more military judges will be available to meet the growing need for judicial services, clause 38 of the bill permits a Reserve Force Military Judges Panel to be established (new subsection 165.22(1) of the NDA).

The Governor in Council may name to the panel any officer of the reserve force who been an officer for at least 10 years and:

- is a barrister or advocate of at least 10 years' standing at the bar of a province;
- is a sitting or retired judge of a superior or provincial court;
- has been a military judge;
- has presided at a Standing Court Martial or a Special General Court Martial; or
- has been a judge advocate at a court martial (new subsection 165.22(1) of the NDA).

It is the Chief Military Judge who selects a reserve force officer named to the panel to perform the duties of a military judge (new subsection 165.222(1) of the NDA).

The Supreme Court of Canada has held that the fact that a judge performs his or her duties part-time does not create a reasonable apprehension of bias.(28) However, the judge's activities outside his or her judicial functions may cause problems.(29) Clause 38 of the bill provides that a part-time military judge shall not engage in any business or professional activity that is incompatible with his or her judicial duties (new section 165.223 of the NDA). As well, a part-time military judge may not be the Chief Military Judge, Acting Chief Military Judge or Deputy Chief Military Judge (clauses 40, 41 and 42).

In addition, under clause 38, the name of a reserve force military judge will be removed from the panel upon retirement or release, at his or her request, from the Canadian Forces (new subsection 165.221(2) of the NDA).

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(28) *R.* v. *Lippé*, [1991] 2 S.C.R. 114.

(29) Lamer Report, pp. 20-21 and 31.

7. Immunity of Military Judges (clause 39)

Clause 39 of the bill expressly grants military judges protection from civil liability.(30)

D. Courts Martial

1. Decisions of Court Martial Panel by Unanimous Vote (clauses 52 and 53)

Under the present rules, in the case of a General Court Martial or Disciplinary Court Martial, the court martial panel pronounces the verdict(31) and the judge presiding at the court martial determines the sentence.(32)

The panel's decisions are made by majority vote of its members.(33) Given that a guilty verdict may have serious consequences, clause 52 of the bill institutes the unanimous vote rule for decisions of a court martial panel in respect of a finding of guilty or not guilty, unfitness to stand trial or not responsible on account of mental disorder.(34) The unanimous vote rule would help to create a climate more conducive to discussion, in which the members would pay more attention to the minority opinion.(35)

Clause 53 provides that if the members of a panel are unable to agree on a finding, the military judge presiding at the court martial may discharge the panel. The Court Martial Administrator will then convene a new court martial.

2. Public Access to Judicial Proceedings (clause 47)

Clause 47 of the bill provides that proceedings before military judges, including proceedings relating to release from custody and sentencing, and courts martial, will be public proceedings (new subsection 180(1) of the NDA).

New subsection 180(2) of the NDA adds two situations in which a court martial and a military judge may order that the public be excluded: cases that may cause injury to national defence or national security.

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(30) This amendment is in response to recommendation 12 of the Lamer Report.

(31) Subsection 192(1) of the NDA.

(32) Section 193 of the NDA.

(33) Subsection 192(2) of the NDA.

(34) This amendment is in response to recommendation 24 of the Lamer Report.

(35) See the Lamer Report, quoting, on p. 38, Working Paper 27 published by the Law Reform Commission of Canada entitled *The Jury in Criminal Trials*, Minister of Supply and Services Canada, Ottawa, 1980, p. 29.

E. Appeal Committee (clause 73)

A person who appeals a decision of a court martial to the Court Martial Appeal Court or the Supreme Court of Canada may ask the Appeal Committee to have the DDCS provide him or her with the services of counsel. The Appeal Committee is mentioned only in the QR&O, and not in the NDA.(36)

New section 249.211 of the NDA refers expressly to the Appeal Committee.(37) As well, the QR&O provide that the Committee, which is composed of two members, makes decisions by unanimous vote.(38) Justice Lamer recommended that the QR&O be amended to provide, among other things, that the Committee be composed of three members and that its decisions be made by majority vote.(39)

F. Code of Service Discipline

The bill introduces into the NDA a number of rules modelled on the *Criminal Code*. Other amendments specify the powers and responsibilities of the actors in the military justice system.

1. Arrest Without Warrant (clauses 25 and 26)

Pursuant to the decision of the Court Martial Appeal Court in *R.* v. *Gauthier*,(40) and of the Federal Court of Appeal in *Delude* v. *The Queen*,(41) which held that the power to arrest without warrant conferred by section 156 of the NDA was unconstitutional, clause 25 of the bill essentially incorporates into the NDA the grounds set out in the *Criminal Code*(42) for a lawful arrest without warrant.(43) An officer, a non-commissioned member or a member of the military police (clause 26) can now arrest a person without warrant only in the case of a serious offence,(44) if the arrest is in the public interest (for example, to identify the person or

(36) Section 101.21.

(37) This amendment is in response to recommendation 29 of the Lamer Report.

(38) Subsection 101.21(6).

(39) Recommendations 26 and 27 of the Lamer Report.

(40) [1998] C.M.A.J. No. 4, CMAC-414.

(41) [2001] 1 F.C. 545 (FCA).

(42) Subsection 495(2).

(43) This amendment is in response to recommendation 32 of the Lamer Report.

(44) Subsection 2(1) of the NDA defines a serious offence: "an offence under this Act or an indictable offence under any other Act of Parliament, for which the maximum punishment is imprisonment for five years or more, or an offence that is prescribed by regulation under subsection 467.1(4) of the *Criminal Code*."

preserve evidence), or if there are reasonable grounds to believe that the person will attempt to evade prosecution if he or she is released.

2. Pre-trial Release and Retention in Custody of a Person Who Has Been Arrested (clauses 29, 30 and 31)

At present, the NDA allows an officer in the chain of command to change a custody review officer's decision to release a person who has been arrested.(45) Clause 29 of the bill provides that a military judge may review the decision of the custody review officer and the officer in the chain of command.(46) A military judge may also, after the expiry of 30 days (new subsection 158.7(3)), review the earlier decision of a military judge and make a direction regarding release.

A military judge may direct that a person be retained in custody before trial (pre-trial detention) where there is "any other just cause."(47) Given that in *Hall*(48) the Supreme Court of Canada held that this ground, which also appears in the *Criminal Code*,(49) was contrary to the *Canadian Charter of Rights and Freedoms*, clause 30 replaces the expression "other just cause" with "public trust in the administration of … justice" in paragraph 159.2(*c*) of the NDA.(50) That ground was held to be valid in *Hall*.

The NDA does not clearly specify the point at which an order for retention in custody, or the conditions of release on bail, expire. Clause 31 provides that the circumstances in which an order for retention in custody or conditions of release terminate are to be prescribed by the Governor in Council.(51) The Canadian Bar Association suggested that a custody order or conditions of release should expire 14 days after arrest, if no charge has been laid.(52)

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(45) Subsection 158.6(2).

(46) This amendment is in response to recommendation 34 of the Lamer Report.

(47) Paragraph 159.2(*c*) of the NDA.

(48) [2002] 3 S.C.R. 309.

(49) Paragraph 515(10)(*c*).

(50) This amendment is in response to recommendation 36 of the Lamer Report.

(51) However, Justice Lamer proposed that the circumstances be specified in the NDA (see recommendation 37 of the Lamer Report).

(52) Lamer Report, p. 54.

3. Laying Charges (clauses 32, 36 and 50)

The NDA does not currently require that a charge be laid within a reasonable time against a person who has been retained in custody or released on parole.(53) Clause 32 of the bill provides that a charge must be laid as expeditiously as circumstances permit.(54)

Clause 36 provides that a charge remains valid despite an irregularity, an informality or a defect. In addition, if the DMP decides not to prefer a charge against an accused, the DMP may reverse that decision and file a charge against the accused later.(55) At present, the NDA permits only the withdrawing of a charge already laid.(56)

In addition, clause 50 provides that once a charge has been preferred, a military judge may determine any question or matter of objection in respect of a charge.

4. Absconding Accused (clause 54)

Clause 54 of the bill, like section 475 of the *Criminal Code*, deals with the case of an accused person who absconds during the course of his or her trial.(57) Frequently, a person accused of a military offence fails to appear at trial.(58) The military judge presiding over a court martial may now continue the trial and pass sentence in the absence of the accused. An accused who is absent may, however, be represented by counsel.

5. Mental Disorder (clause 59)

Clause 59 of the bill imports the procedure set out in the *Criminal Code*(59) regarding the holding of hearings concerning mental disorders, with a few slight differences. Once the accused is declared to be unfit to stand trial or not responsible on account of mental disorder, the court martial may decide whether to release the individual or order that the

(53) The *Criminal Code* allows for a period of 24 hours in the case of a person in custody (para. 503(1)(*a*)). In the case of a person who has been released from custody, an information must be laid as soon as practicable (para. 505(*b*) of the *Criminal Code*).

(54) This amendment is in response to the recommendation of the Canadian Bar Association, reiterated in recommendation 33 of the Lamer Report.

(55) This amendment is in response to recommendation 38 of the Lamer Report.

(56) Subsection 165.12(3).

(57) This amendment is in response to recommendation 20 of the Lamer Report.

(58) Lamer Report, p. 33.

(59) Section 672.5.

individual be detained in custody in a hospital. In making a disposition, the court martial will consider, among other things, any victim impact statement (new subsection 202.201(15) of the NDA). The court may appoint counsel for an accused who is not already represented (new subsection 202.201(8) of the NDA).

6. Sentencing (clause 62)

The Lamer Report stated that the sentencing provisions "require extensive reform."[60] As well, the current powers of punishment are not adequate. Clause 62 of the bill therefore adds a new division to the NDA on sentencing.[61]

a. Purposes and Principles

New sections 203.1 to 203.4 of the NDA deal with the purposes and principles of sentencing.

Subsection 203.1(1) of the NDA stipulates that the fundamental purposes of sentencing are to promote the operational effectiveness of the Canadian Forces – in particular the maintenance of discipline, efficiency and morale – and respect for the law, in the interests of ensuring the protection of society. In addition to the purposes stated in the *Criminal Code*,[62] which include denunciation, deterrence and rehabilitation, subsection 203.1(2) of the NDA sets out certain purposes specific to the military justice system, including public trust in the Canadian Forces.

Sections 203.2 and 203.3 of the NDA also reiterate the sentencing principles stated in the Code[63] and add certain principles specific to the military justice system, such as the fact that a service tribunal[64] must impose the least severe sentence required to maintain discipline, efficiency and morale (paragraph 203.3(*d*) of the NDA). Paragraph 203.3(*e*) of the NDA provides that a service tribunal must take into consideration any indirect consequences of the finding of guilty or the sentence.

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(60) Lamer Report, p. 65.

(61) This amendment is in response to recommendation 52 of the Lamer Report.

(62) Section 718.

(63) Except paragraphs 718.2(*c*) ("where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh") and 718.2(*e*) ("all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders").

(64) Includes a court martial or a person presiding at a summary trial (subsection 2(1) of the NDA).

Paragraph 203.3(*a*) of the NDA sets out the aggravating circumstances listed in the Code[65] and adds a number of aggravating circumstances specific to the military justice system:

- abuse of rank (paragraph 203.3(*a*)(i));
- substantial harm to the conduct of a military operation (paragraph 203.3(*a*)(v)); and
- offence committed in a theatre of hostilities (paragraph 203.3(*a*)(vi)).

b. Evidence

New section 203.5 of the NDA provides that when a court martial sentences an individual, a disputed fact must be proved on a balance of probabilities. However, the prosecution must always prove aggravating facts and previous convictions beyond a reasonable doubt.

c. Victim Impact Statement

New sections 203.6 to 203.8 of the NDA incorporate the rules in the *Criminal Code* relating to victim impact statements into the NDA in their entirety.[66] The statement relates to the harm done to or loss suffered by the victim arising out of the perpetration of the offence.

The victim must be informed that he or she may prepare a statement. If that is not done, the court martial may adjourn the proceedings to permit a victim to prepare a statement (subsection 203.8 of the NDA).

Under the definition in new section 203 of the NDA, a victim is a person to whom harm was done or who suffered loss as a direct result of the commission of the offence, and includes, if that person is incapable of making a statement, a relative, the spouse or common-law partner, or a caregiver.

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(65) Paragraph 718.2(*a*).

(66) Sections 722 to 722.2.

d. New Sentences[67]

The bill introduces three new types of sentences into the NDA that are also found in the *Criminal Code*: absolute discharge, intermittent sentences and restitution orders.

(i) Absolute Discharge

Having regard to the best interests of the accused and to the public interest, a service tribunal may direct that an accused person who is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life, be discharged absolutely (new subsection 203.9(1) of the NDA). These are the same criteria as are provided in the *Criminal Code*,[68] although the Code also allows for conditional discharge.

A discharged offender is deemed not to have been convicted (new subsection 203.9(2) of the NDA). However, a firearms prohibition order (clause 20 of the bill), a restitution order (new section 203.91 of the NDA) or an order for restitution of property (clause 74) may be made.

(ii) Restitution

New sections 203.91 to 203.95 deal with restitution orders, which a court martial may impose in addition to any other sentence imposed on an offender. A restitution order will require that the offender pay the victim an amount to cover property damage or bodily or psychological harm resulting from the offence (section 203.91 of the NDA). For example, a victim may have lost income or, where the victim is a member of the offender's household, had expenses for housing, food and transportation. Money found in the possession of the offender at the time of the arrest may be used to cover part of those expenses (section 203.93 of the NDA). These rules are taken from sections 738 *et seq.* of the *Criminal Code*.

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(67) At present, subsection 139(1) sets out the scale of punishments:

> (*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.

(68) Subsection 730(1).

(iii) Intermittent Sentences (clause 22)

The *Criminal Code* provides that an offender may be ordered to serve a sentence intermittently,(69) which often means on weekends. If this were not possible, a reservist who had to serve a sentence of imprisonment or detention might lose his or her civilian employment.(70)

Clause 22 of the bill therefore allows a service tribunal that imposes a sentence of imprisonment or detention for 14 days or less(71) to order that the offender serve the sentence intermittently (new subsection 148(1) of the NDA). During periods when the offender is not in confinement, he or she must comply with the conditions prescribed in the order. If the offender breaches a condition, the service tribunal may vary the conditions or add other conditions, or order that the offender serve the sentence on consecutive days (new subsection 148(5) of the NDA).

7. Suspension of Imprisonment or Detention (clauses 64, 65 and 66)

At present, to meet the needs of the army, the NDA allows a service tribunal and a "suspending authority" prescribed in regulations by the Governor in Council(72) to suspend the execution of punishment of an offender sentenced to imprisonment or detention.(73) The sentence is served later.

Clause 64 of the bill provides that the Court Martial Appeal Court also has this power (new subsection 215(1) of the NDA).(74) Clause 65 provides that the suspending authority may suspend a punishment only if there are imperative reasons relating to military operations or the welfare of the offender (new subsection 216(2) of the NDA).(75)

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(69) Section 732.

(70) Lamer Report, p. 66.

(71) Ninety days, in the case of the *Criminal Code* (subsection 732(1)).

(72) They include the Chief of the Defence Staff (CDS) and an officer commanding a command (subsection 114.02(3) of the QR&O).

(73) Sections 215 and 216.

(74) This amendment is in response to recommendation 31 of the Lamer Report.

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

As well, a service tribunal, a court martial (new paragraph 215.2(2)(*a*) of the NDA) and a suspending authority (new subsection 216(2.2) of the NDA) may revoke the suspension and commit an offender, if:

- the offender has breached the conditions of the order suspending execution of punishment;
- the imperative reasons relating to military operations or the welfare of the offender no longer exist; or
- the conduct of the offender is inconsistent with the reasons for which the punishment was suspended.

The suspending authority must still review the suspension every three months. The suspending authority may, at the time of the review, remit the punishment, in accordance with regulations to be made by the Governor in Council, as provided by clause 66.

8. Enforcement of Fines (clause 19)

While the current NDA allows a service tribunal to sentence an offender to pay a fine,[(76)] it is silent as to recovery of unpaid fines. Clause 19 of the bill establishes a mechanism for the civil enforcement of fines.[(77)]

9. Officer Cadets and Lieutenant-Colonel (clause 33)

At present, the NDA allows a superior commander presiding at a summary trial of an officer cadet to impose three types of punishment only: severe reprimand, reprimand and fine.[(78)] To allow the superior commander greater flexibility, subclause 33(4) of the bill also allows him or her to impose a minor punishment.[(79)] This kind of punishment would be effective for maintaining discipline in an educational environment.[(80)]

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(76) Paragraph 139(1)(*k*).

(77) This amendment is in response to recommendation 53 of the Lamer Report.

(78) Section 164(4).

(79) These punishments are: confinement to ship or barracks; extra work and drill; stoppage of leave; and caution (subsection 104.13(2) of the QR&O).

(80) This amendment is in response to recommendation 51 of the Lamer Report.

As well, only non-commissioned members and officers of or below the rank of major are now covered by the summary trial scheme.(81) Subclause 33(1) makes officers holding the rank of lieutenant-colonel subject to the summary trial provisions as well.(82) However, the superior commander presiding at the summary trial of a lieutenant-colonel must be of or above the rank of colonel, and he or she may not try a military judge (subclause 33(2)).

10. Criminal Record (clauses 75, 105 and 113)

Clause 75 of the bill provides that an accused who is convicted of an offence has not been convicted of a criminal offence in two situations:

- the person was convicted of one of the five listed offences (insubordinate behaviour;(83) quarrels and disturbances;(84) absence without leave;(85) drunkenness;(86) and conduct to the prejudice of good order and discipline(87)) and has been sentenced to a minor punishment or a fine of $500 or less, or both;

- the person was convicted of an offence punishable by ordinary law(88) and designated as a "contravention" by regulation of the Governor in Council.(89)

Asking a question in the course of a hiring process that requires an applicant to disclose a conviction for one of the above offences is an offence (clause 105). Anyone who asks such a question in relation to an application for employment with a federal government department, a federal Crown corporation, the Canadian Forces or an undertaking that comes within federal jurisdiction is liable to a fine of not more than $500 and imprisonment for not more than six months, or both. Clause 113 provides that this offence is retroactive.

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(81) Paragraph 164(1)(*a*) of the NDA.

(82) This amendment is in response to recommendation 42 of the Lamer Report.

(83) Section 85 of the NDA.

(84) Section 86 of the NDA.

(85) Section 90 of the NDA.

(86) Section 97 of the NDA.

(87) Section 129 of the NDA.

(88) Section 130 of the NDA.

(89) Section 2 of the *Contraventions Act*, S.C. 1992, c. 47, defines "contravention" as "an offence that is created by an enactment and is designated as a contravention by regulation of the Governor in Council."

G. Complaints About or by Military Police

1. Canadian Forces Provost Marshal[90]

a. Appointment and Duties and Functions (clause 3)

The NDA does not clearly describe the role of the Provost Marshal. Clause 3 of the bill therefore addresses the appointment and duties and functions of the Provost Marshal.[91]

The Provost Marshal, who must have been a member of the military police for at least ten years and hold a rank that is not less than colonel, is appointed by the CDS for a term not exceeding four years. The Provost Marshal is eligible to be reappointed and may be removed by the CDS on the recommendation of an Inquiry Committee established under regulations (new section 18.3 of the NDA).

The main duties and functions of the Provost Marshal are listed in the new section 18.4 of the NDA. The Provost Marshal's responsibilities include the establishment of training standards applicable to candidates for the military police and of professional standards applicable to serving members of the military police. The Provost Marshal must ensure compliance with those standards. The Provost Marshal is also responsible for investigations assigned to any unit and investigations in respect of conduct inconsistent with professional standards or the *Military Police Code of Professional Conduct*.[92]

The Provost Marshal acts under the general supervision of the Vice Chief of Defence Staff, who may issue general instructions or guidelines in respect of a particular investigation (new section 18.5 of the NDA). The Provost Marshal must also submit an annual report to the CDS concerning the activities of the Provost Marshal and the military police (new section 18.6 of the NDA).[93] The report is then submitted to the Minister.

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(90) The bill replaces the expression "prévôt" with the expression "grand prévôt" in the French version of the NDA (see, *inter alia*, clause 106 of the bill).

(91) This amendment is in response to recommendation 58 of the Lamer Report.

(92) SOR/2000-14, 16 December 1999. It should be noted that the Provost Marshal is the Commanding Officer of the Canadian Forces National Investigation Service, which is responsible for laying charges as a consequence of investigations into serious or sensitive service offences (Lamer Report, p. 74).

(93) This amendment is in response to recommendation 59 of the Lamer Report.

b. Conduct Complaint (clause 83)

A conduct complaint is made under subsection 250.18(1) of the NDA against a member of the military police concerning the member's conduct in the performance of his or her duties or functions.(94) The Provost Marshal is responsible for dealing with conduct complaints.(95)

At present, the NDA requires that the Provost Marshal explain why any conduct complaint has not been resolved or disposed of within six months.(96) To enhance the effectiveness of the process for resolving complaints against the military police, clause 83 of the bill provides that the Provost Marshal must resolve or dispose of a conduct complaint within one year after receiving it.(97) However, the one-year time limit does not apply if the complaint results in an investigation of a service offence or a criminal offence.

2. No Penalty for Complaints (clauses 78 and 79)

The bill provides that a person may not be penalized for making a conduct complaint (new subsection 250.18(3) of the NDA) or an interference complaint (new subsection 250.19(3) of the NDA) in good faith.(98)

H. Grievance Procedure

The grievance procedure consists of two levels. A grievance is initially brought before the commanding officer of the grievor, or the commanding officer's next superior officer. Next, the grievor may refer the grievance to the CDS, who represents the final authority.(99)

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(94) Part IV of the NDA provides for two types of complaints: conduct complaints and interference complaints. An interference complaint is made under subsection 250.19(1) of the NDA by a member of the military police against an officer, non-commissioned member or senior official who is alleged to have interfered in an investigation.

(95) Section 250.26 of the NDA.

(96) Section 250.3.

(97) This amendment is in response to recommendation 66 of the Lamer Report.

(98) This amendment is in response to recommendation 63 of the Lamer Report.

(99) Section 29.11 of the NDA.

Before the CDS may begin the review, certain grievances[100] must be referred to the Canadian Forces Grievance Board (Grievance Board) for its findings and recommendations.[101]

Justice Lamer noted that the grievance process "is not working properly,"[102] particularly because of the lengthy times taken for grievances to be disposed of: "Grievances still caught in the grievance process after ten and even twelve years are not unheard of, and those of two or more years at the level of the CDS seem to be the norm."[103]

1. Duty of the Chief of Defence Staff to Act Expeditiously (clause 5)

The NDA requires that the Grievance Board act expeditiously and informally.[104] Clause 5 of the bill assigns the same duty to the CDS (new section 29.11 of the NDA).[105]

2. Power of the Chief of Defence Staff to Delegate (clause 8)

Under the present NDA, the CDS must personally handle grievances submitted to the Grievance Board,[106] and may not delegate that responsibility. Clause 8 of the bill implements one of the solutions proposed by Justice Lamer[107] to expedite the grievance process by permitting the CDS to delegate this responsibility to an officer under his or her direct command and control. The CDS will therefore be able to delegate the task of disposing of a grievance, whether the grievance has been submitted to the Grievance Board or not.

However, the CDS will not be able to delegate his or her power to dispose of grievances in certain cases:

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(100) For example, grievances relating to pay, allowances, conflict of interest and harassment (section 7.12 of the QR&O). The CDS may also refer any other grievance to the Grievance Board (section 29.12 of the NDA).

(101) Section 29.12 of the NDA. However, the findings and recommendations of the Grievance Board are not binding on the CDS.

(102) Lamer Report, p. 86.

(103) Ibid.

(104) Subsection 29.2(2).

(105) This amendment is in response to recommendation 75 of the Lamer Report.

(106) Section 29.14. However, the CDS may delegate this task in the case of a grievance that need not be referred to the Grievance Board.

(107) Recommendation 72 of the Lamer Report. The other solutions are to eliminate the grievance backlog, place an overall time limit on the grievance process and increase the resources available for reviewing grievances (Lamer Report, pp. 98 *et seq.*).

- a grievance submitted by an officer may be delegated only to an officer of equal or higher rank;
- a grievance may not be delegated to an officer who is in a conflict of interest; and
- a grievance submitted by a military judge may not be delegated.

Justice Lamer recommended that the CDS should personally dispose of any grievance that might have policy implications for the Canadian Forces, affect the capacity of the Canadian Forces, and/or have significant financial implications.(108)

3. Grievance Submitted by a Military Judge (clauses 4, 5 and 6)

Clause 5 of the bill provides that the CDS must personally deal with a grievance submitted by a military judge (new section 29.101 of the NDA). Under clause 6, before considering and determining a grievance submitted by a military judge, the CDS must refer it to the Grievance Board. The Grievance Board will provide the CDS with its findings and recommendations.(109)

However, a military judge may not submit a grievance in respect of a matter that is related to the exercise of his or her judicial duties (clause 4).

4. Reinstatement of a Member of the Canadian Forces (clause 10)

Clause 10 of the bill expressly provides that the CDS has the power to reinstate a grievor who has been improperly released from the Canadian Forces.(110) The grievor is therefore not required to re-enrol and does not lose seniority.

I. Limitation Period (clause 99)

Clause 99 of the bill extends to two years (from six months) the time limit for bringing an action against the government for acts, neglect or default in execution of the NDA or any regulations or military or departmental duty or authority.

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(108) Recommendation 72 of the Lamer Report.

(109) Justice Lamer recommended that the Grievance Board be awarded jurisdiction to issue a final decision in respect of a grievance submitted by a military judge (recommendation 11 of the Lamer Report).

(110) This amendment is in response to recommendation 80 of the Lamer Report.

J. Independent Review of the *National Defence Act*, and Coming Into Force (clauses 101 and 123)

Under clause 101, the Minister shall cause a review of certain provisions of the NDA to be undertaken every seven years; those provisions include the grievance process, the Code of Service Discipline and military police complaints.

With the exception of certain specified clauses, including provisions relating to military judges, the bill will come into force on a day or days to be fixed by order of the Governor in Council (clause 123 of the bill).

COMMENTARY

To date, there has been little comment in the media. When the former Bill C-7 was introduced, Canadian Press reported the comments of Brigadier-General Ken Watkin, Judge Advocate General:

> This legislation is the culmination of a great deal of effort on the part of many people. … Extensive analysis was undertaken both within and outside DND [Department of National Defence] to ensure that the changes proposed are reflective of current Canadian values and legal standards while still meeting military requirements.(111)

On the question of independent review of the amendments made to the *National Defence Act* by Bill C-25, the Canadian Bar Association considered that the time that the Department of National Defence gave Justice Lamer to prepare his report – slightly less than six months – was not sufficient.(112) A thorough review would have taken 9 to 12 months. The Association also argued that there should be an independent review of the entire NDA, and not only of the provisions amended by the bill.(113) While Justice Lamer noted that a review

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(111) Department of National Defence, "DND Acting Upon Recommendations to Amend the *National Defence Act*," News release, 27 April 2006, http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=1918, quoted by Canadian Press.

(112) Mike Blanchfield, "Lawyers say DND whitewashing review of military justice," *CanWest News*, 26 June 2003, p. 1.

(113) Lamer Report, p. 9. See also the letter to Justice Lamer from Eugene Fidell, President of the National Institute of Military Justice in the United States, reproduced in Annex F to the Lamer Report.

of the Office of the Ombudsman for the Department of National Defence and the Canadian Forces was outside the scope of his mandate,(114) since the Office was not created by Bill C-25, the Association recommended that the duties and functions of the Office be expressly set out in the NDA.(115)

Bill C-45 implements most of the recommendations made by Justice Lamer. However, the recommendations that have not been acted on include important proposals for improving the military justice system, such as establishing a permanent military court of record,(116) modernizing the types of courts martial, with no distinction made on the basis of rank,(117) imposing time limits on requesting a review of a conduct complaint against a member of the military police,(118) and imposing an overall time limit of 12 months for a decision respecting a grievance.(119)

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(114) Lamer Report, p. 9.

(115) Blanchfield (2003). At present, the legal basis for the Office's operations is set out in Ministerial Directives and Defence Administrative Orders and Directives. The Ombudsman is appointed by Order in Council.

(116) Recommendation 13 of the Lamer Report.

(117) Recommendation 23 of the Lamer Report.

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

(119) Recommendation 74 of the Lamer Report. Recommendation 6 by the Subcommittee on Veterans Affairs of the Standing Senate Committee on National Security and Defence was to the same effect: the Committee recommended that "The Department of National Defence limit to 12 months the length of time the Canadian Forces take to complete the Redress of Grievance procedure. This period should include the time required for the Chief of Defence Staff to make a final decision, but exclude those times during which the grievance is awaiting action by its originator. If this limit cannot be met, the person who initiated the grievance must be informed in writing of the reasons for the delay and must be given a not-later-than date for a final decision by the Chief of Defence Staff" (*Fixing the Canadian Forces' Method of Dealing with Death or Dismemberment*, Eighth Report, 2nd Session, 37th Parliament, April 2003). The Royal Canadian Legion proposed a two-year time limit (Lamer Report, p. 102). Justice Lamer also recommended that if the time limit was not met, the grievor should be allowed to apply to the Federal Court (recommendation 74 of the Lamer Report).