Legislative Summary **LS-615E**

BILL C-60: AN ACT TO AMEND THE NATIONAL DEFENCE ACT (COURT MARTIAL) AND TO MAKE A CONSEQUENTIAL AMENDMENT TO ANOTHER ACT

Robert Dufresne
Law and Government Division

2 September 2008

Library of Parliament

Bibliothèque du Parlement

Parliamentary Information and Research Service

LEGISLATIVE HISTORY OF BILL C-60

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	6 June 2008	First Reading:	17 June 2008
Second Reading:	16 June 2008	Second Reading:	17 June 2008
Committee Report:	17 June 2008	Committee Report:	17 June 2008
Report Stage:	17 June 2008	Report Stage:	17 June 2008
Third Reading:	17 June 2008	Third Reading:	17 June 2008

Royal Assent: 18 June 2008

Statutes of Canada 2008, c. 29

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

CE DOCUMENT EST AUSSI PUBLIÉ EN FRANÇAIS

TABLE OF CONTENTS

Page

CANADA
LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

BILL C-60: AN ACT TO AMEND THE NATIONAL DEFENCE ACT (COURT MARTIAL) AND TO MAKE A CONSEQUENTIAL AMENDMENT TO ANOTHER ACT*

BACKGROUND

Bill C-60, An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act was introduced in the House of Commons by the Honourable Peter MacKay, Minister of National Defence. It received first reading on 6 June 2008, passed quickly through both the House of Commons and the Senate, and received Royal Assent on 18 June 2008.

The bill makes changes to the military justice system through a series of amendments to Part III of the *National Defence Act* (also called the Code of Service Discipline) and a set of consequential amendments to the *Geneva Conventions Act*. It makes four main changes to the system of military justice. First, it modifies and simplifies the structure of military courts by reducing the number of types of courts martial from four to two. Second, it creates a right to choose the type of court martial to be convened in relation to certain offences. Third, it establishes a rule that decisions of a General Court Martial must be taken unanimously. Fourth, it brings clarifications to the period of liability in relation to summary trials under the Code of Service Discipline.

Bill C-60 can be seen as part of a long-term process of reform of the system of military justice.(1) While this process embraces and confirms the existence of a separate system of justice for military matters, it seeks to ensure its fairness and respect for fundamental justice

---

* 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) See Department of National Defence, Backgrounder, "Amendments to the National Defence Act: Bill C-25, its review, and Bill C-7, An Act to Amend the National Defence Act," 27 April 2006, http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=1917.

principles. As a first step, 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. It can be regarded as a response to important reports from the Dickson Special Advisory Group on Military Justice and Military Police Investigation Services[(2)] and the Somalia Commission of Inquiry.[(3)] Bill C-25 became itself the object of a review, conducted by former Chief Justice Antonio Lamer,[(4)] whose report ultimately set out a number of recommendations, several of which were accepted by Parliament and have since been incorporated into the *National Defence Act* (NDA).

Bill C-7, An Act to amend the National Defence Act, which then Defence Minister Gordon O'Connor introduced in the House of Commons on 27 April 2006, proposed further modifications to Part III of the *National Defence Act*, some as recommended in the Lamer report. However, this bill died on the Order Paper. Bill C-60 also contains changes recommended in the Lamer report.

In addition, Bill C-60 is a response to more pressing considerations. On 24 April 2008, the Court Martial Appeal Court of Canada delivered a decision in *R.* v. *Trépanier*[(5)] which would have an impact on the entire military court system. In that decision, the Court declared unconstitutional the provisions of the NDA that enable the Director of Military Prosecution to select which type of court martial will hear proceedings for a given accused (section 165.14 of the NDA). The court based this conclusion on the right of the accused to full answer and defence, as protected under the *Canadian Charter of Rights and Freedoms*. The effect of striking down this provision was significant – declaring the court martial selection process unconstitutional meant that no court martial could be convened. Bill C-60 sets in place a system meant to respond to, and comply with, the terms of the Trépanier decision, and to restore the possibility of convening courts martial in relation to new proceedings so as to have a fully functional court martial system.

---

(2) *Report of the Special Advisory Group on Military Justice and Military Police Investigation Services*, 14 March 1997, http://www.forces.gc.ca/site/minister/eng/Dickson/EXECSUMdicksonENG.htm.

(3) *Report of the Somalia Commission of Inquiry*, 1997, http://www.dnd.ca/somalia/somaliae.htm.

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

(5) *R.* v. *Trépanier*, 2008 CMAC 3.

DESCRIPTION AND ANALYSIS

A. Types of Courts Martial

Clause 1 introduces a new definition of court martial to the NDA. It identifies two types of courts martial: a General Court Martial and a Standing Court Martial. The new definition eliminates two other types of courts martial – the Special General Court Martial and the Disciplinary Court Martial – which are repealed by clauses 10 through 12.

B. Limitation Period on Liability

Clause 2 amends section 69 of the NDA, which deals with the period during which a person is liable for the alleged commission of a service offence. It reiterates the general principle that someone subject to the Code of Service Discipline at the time of the alleged commission of a service offence can be charged and tried at any time under the Code. However, it amends the exceptions, stating that limitation periods for offences similar to section 130 or 132 offences that are criminalized in other statutes remain applicable to service offences under those provisions of the NDA.

Clause 4 also moves the provision for a one-year limitation period for trial by summary conviction from section 69 to section 163(1.1), while clause 5 adds a similar provision to section 164 of the NDA, thus imposing a one-year limitation period specific to summary trials by superior commanders.

C. Determination of the Competent Court Martial for Trial

Clause 6 merely repeals section 165.14 of the NDA but is nonetheless a core element of Bill C-60. Section 165.14 of the NDA allowed the Director of Military Prosecutions to determine the type of court martial to be convened.

Formally, clauses 7 and 8 deal with the duties and functions of the Court Martial Administrator. In effect, they create a new regime for the determination or selection of the type of court martial to be convened. First, reference to the determination of the Director of Military Prosecution for the convening of a court martial in section 165.19(1) is eliminated. Second, specific duties of the Court Martial Administrator to convene either a General Court Martial or a Standing General Court Martial are set out in a set of new provisions (165.191 to 165.193 of the

NDA). These new provisions thus create a threefold regime: instances where convening a General Court Martial is mandatory, instances where convening a Standing General Court Martial is mandatory, and instances where the accused can choose which of the two types of courts martial he or she is to be tried by.

More specifically, the court designation process can be summarized as follows:

- Mandatory General Court Martial: for offences under the NDA (except for offences under section 130 or 132) that are punishable by imprisonment for life; for offences under section 130 that are punishable by imprisonment for life; for offences under section 130 that are referred to in section 469 of the *Criminal Code* (e.g. treason, piracy, etc.);

- Mandatory Standing General Court Martial: for offences under the NDA (except under section 130) punishable by imprisonment for less than two years or "by a punishment which is lower in the scale of punishments"; for offences under section 130 that are punishable by summary convictions under any Act of Parliament;

- Choice between the two: for all instances not covered under the other provisions.

Offences under section 130 of the NDA are those that are punishable under Part VII of the NDA, the Criminal Code of any Act of Parliament. They include breach of regulation on "the access to, exclusion from, and safety and conduct of any persons in, on or about any defence establishment, work for defence or materiel," false answer on enrolment, desertion, etc. Section 132 of the NDA makes an offence of acts/omissions outside Canada that would constitute offences under the applicable law (the law applicable in the relevant territorial jurisdiction).

In instances where an accused has a choice, the Court Martial Administrator must notify him or her of that choice. Failure to choose under the set procedure will lead to a default imputation of a General Court Martial as the selected court for trial. But new court choices can also be made later in the process. Under new section 165.193(4) of the NDA, an accused also has the right to make one new choice of court within the first 30 days of the commencement of proceedings. The accused may make a new choice of court at any time thereafter with the consent of the Director of Military Prosecution.

D. Miscellaneous Elements of Court Martial Powers and Proceedings

Bill C-60 also brings a series of amendments to the legislative attributes of the two remaining types of courts martial and to the conduct of proceedings before them. First, clause 9 amends the sentencing powers of General Courts Martial. Under new section 166.1 of the NDA, defendants other than officers and non-commissioned members tried by such a court martial face only imprisonment or a fine and not work-related disciplinary actions. Section 175 of the NDA, as amended by clause 12, applies the same principle to trials and convictions before a Standing Court Martial.

Second, clause 11 amends the wording in section 173 of the NDA describing the jurisdiction of Standing Courts Martial by replacing "may try any officer or non-commissioned member who is liable to be charged" with "may try any person who is liable to be charged."

Third, section 187 of the NDA, which deals with preliminary proceedings, is simplified and made to reflect the transition from multiple types of courts martial to two (clause 13 of Bill C-60).

Fourth, clause 14 replaces the entire section dealing with "Decisions by General or Disciplinary Court Martial" with one entitled "Decisions of General Court Martial." While most of the changes in the wording of the new provisions reflect the focus on only one type of court martial, there are two noteworthy changes. The new version of section 192(2) of the NDA introduces an important change: decisions on guilt, unfitness to stand trial or non-responsibility on grounds of mental disorder are made unanimously (and no longer by a vote of a majority of panel members). Moreover, a new section 192.1 of the NDA is added to deal with the case of the inability of panel members to agree on a finding. Under this provision, the presiding military judge who finds an inability of panel members to agree on a finding can discharge the panel. This dissolves the court martial and permits a new trial to take place (formally, the accused can be dealt with as if no trial had commenced).

Finally, clauses 15 to 19, as well as 3, bring grammatical amendments or linguistic precision to existing provisions. Clauses 20 to 22 substitute the expression "Standing Court Martial" for "Court Martial" in the provisions of the NDA that deal with sex offender information registration, thereby specifying the type of court martial to be convened in specific contexts.[6]

---

(6) The provisions so amended have been enacted by section 4 of chapter 5 of the Statutes of Canada 2007, *An Act to amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act and the Criminal Records Act*.

E. Court Martial Appeal Court of Canada

Clauses 23 to 26 amend the provisions dealing with the disposition of appeals by the Court Martial Appeal Court of Canada. Previously, provisions of the NDA referring to the possibility of ordering a new trial referred to a "new trial." The expression now reads "new trial by court martial," which eliminates for instance the possibility of ordering a summary trial.

F. Review and Reporting

Clause 28 creates a specific review and reporting process. This provision was introduced as an amendment to the original draft of Bill C-60. Bill C-60 was adopted rapidly so as to permit the military justice system to operate, thereby offering limited time and opportunity for parliamentarians to study its content and impact in depth. Clause 28 provides for the review of the provisions and operation of Bill C-60 by a House of Commons or Senate committee or a joint parliamentary committee within two years of Royal Assent. Such a committee must issue its report and any recommendations within one year (or longer if authorized) of undertaking the review.

G. Transitional Provision

Clause 29 is the only measure that deals with transitional provisions. It limits the ability of the Court Martial Appeal Court of Canada to impose a guilty verdict on appeal of decisions by the General Court Martial and Disciplinary Court Martial in on-going proceedings.

The original draft of Bill C-60 contained a more general transitional provision; however, it was removed by amendment during second reading before the House of Commons and replaced by clause 28, described above. The absence of general transitional provisions is not likely to mean that there are no rules governing the transition, nor that the new provisions are all immediately applicable and all the provisions that are repealed or amended through Bill C-60 immediately cease to have effect. Absent specific rules, sections 42 to 45 of the *Interpretation Act*, which deal with repeal and amendment, govern the transition.

H. Consequential Amendment

Clause 30 amends the *Geneva Convention Act* to ensure that the definition of court that it uses reflects amendments to the typology of court martial found in the NDA.

I. Coordinating Amendments

Clause 31 provides for a series of amendments that are conditional on Royal Assent being granted to Bill C-45, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*. Bill C-45 received first reading in the House of Commons on 3 March 2008.

COMMENTS

Bill C-60 has not been the subject of much national debate and has attracted almost no media coverage. Meaningful and informed debate on the bill appears to have been confined to the legislative process.

Before the House of Commons Standing Committee on National Defence, most witnesses endorsed the general policies underpinning Bill C-60. Retired Colonel Michel Drapeau (who appeared as an individual) gave his general support but voiced two concerns with Bill C-60 in its original version.(7) He expressed his discomfort with the idea of rushing the adoption of Bill C-60 while an appeal from the Trépanier decision was pending before the Supreme Court of Canada. He was also displeased with the version of clause 28(1) that existed when he appeared before the committee. Under this version, the previous system and rules would have continued to govern in cases commenced, but not completed, before Bill C-60 entered into force (subject to a few modifications – notably the change from majority to unanimity to come up with a verdict). He noted that he would have preferred a more complete shift to the new rules of military justice, which would have involved starting on-going trials anew.

Debate among members of the House of Commons Standing Committee on National Defence focused primarily on two issues: (1) understanding what made the adoption of Bill C-60 urgent and what forms of *ex post facto* control ought to be put in place to compensate for the rushed passage of the Bill; and (2) determining whether the transitional provisions, as they then stood, were appropriate.

---

(7) House of Commons, Standing Committee on National Defence, *Evidence*, 2nd Session, 39th Parliament, 16 June 2008, 1635–1725 (Colonel [Retired] Michel Drapeau), http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=13195&SourceId=245188&SwitchLanguage=1.

The first issue led to the adoption of a new version of clause 28. The review and reporting process is a form of enhanced parliamentary oversight of Bill C-60, which was considered a means of compensating for the absence of an in-depth study of the bill due to time constraints.

The second issue largely concerned the appropriateness of the transitional provisions in the original version of the bill, under which trials that had commenced, but were not completed, were to proceed as if Bill C-60 had not been adopted. Amendments to the original version of clause 28 had the effect of removing such transitional provisions from the Bill.