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EXTERNAL REVIEW OF THE CANADIAN MILITARY PROSECUTION SERVICE

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FINAL REPORT

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1 INTRODUCTION

"If the competing demands of justice and efficiency are to be satisfactorily reconciled, there must be willingness on the part of all the co-operative participants to change, to some extent, the ways in which they have traditionally carried out their respective functions." (Martin Committee)[1]

1.1 THE TASK

Our task was to conduct a review of the Canadian Military Prosecution Service (CMPS) in order to identify those factors within it's purview that contribute to delay in the military justice system, and, based on our experience and knowledge of the civilian prosecution systems, to make recommendations about what the Service could do to reduce those delays. We were asked to examine the services provided by the CMPS, its organizational structure, human resources management, and policies and procedures. We were to compare the CMPS with prosecution services in three civilian jurisdictions, including Ontario and one jurisdiction that have a "charge approval" system. In formulating our recommendations, we were to take into account recent studies conducted in Canada that were aimed at strategies to increase the efficiency of the criminal justice system. (The Terms of Reference for the Review are attached as Appendix "A")

The Director of Military Prosecutions (DMP) specified that we were to look at the Court Martial system, which involves the CMPS, and not the Summary Trial system. She asked us to focus on the stage of the system where the CMPS has the greatest impact on overall delays, namely, the period from referral of a charge to the DMP for disposition to the preferral of the charge for Court Martial.

1.2 METHODOLOGY

Our approach to this review was as follows:

- Acquire a full understanding of CMPS needs with respect to practices and procedures and the operation of the military justice system
- Maintain effective communication during our review with the DMP and the DDMP and their staff
- Focus on initial reviews of existing documentation and data provided by CMPS
- Conduct extensive interviews with key internal and external stakeholders
- Examine three civilian jurisdictions and their prosecution services to compare with CMPS operations
- Consider feedback from DMP and DDMP at an Interim Report meeting
- Conduct research of the prosecution systems of Nunavut, Ontario, PPSC and N.B.
- Provide an accurate comparison between these (civilian) prosecution systems and the CMPS
- Prepare a final report including findings, analysis, options and recommendations for moving forward

Our aim was to determine whether there are practices, policies and procedures in the civilian prosecution services that may be adaptable to the CMPS and could improve efficiency that would lead to decreased delays.

We examined three main categories for comparison purposes between the CMPS and the civilian prosecution services.

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[1] Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, 1993, Queen's Printer for Ontario

- Organization and structure
- Human Resource management
- Policies, practices and procedures

A most important part of our review was to interview the participants and stakeholders in the military justice system. We conducted a total of 46 interviews. Reference may be made to Appendix "B" for a list of those interviewed during the course of our review. We spoke with people from coast to coast, including every full-time and Reservist RMP who was available. The following groups of participants and stakeholders were interviewed:

- Interviews in the Central Region, Headquarters, and Ottawa
    - The Judge Advocate, the DMP and the DDMP and staff members
    - Regional Military Prosecutors
    - Senior Military Judge and Court Martial Coordinator
    - Director of Defence Counsel Services
    - Reservist Defence Counsel
    - Commanding Officer of CFNIS
    - NIS investigators
    - The Provost Martial
    - Deputy Crown Attorney, a senior Asst. Crown Attorney and Staff, Ottawa

- Interviews in other Regions
    - Commanding Officers in the Western and Atlantic Regions
    - Deputy Judge Advocate and Staff
    - Military Police Captain
    - Reservist Military Prosecutors from across Canada by telephone conference
    - Regional Crown Prosecutor and Senior Prosecutor in New Brunswick

Our interviews of the various participants in the military justice system focused on practices, procedures and policies with a goal of determining the extent of the delay in the system and its probable causes. We were not concerned with attaching blame to any individual or group; but with focusing on assisting the CMPS with recommendations on how to decrease the delay and improve practices and procedures that may have contributed to the situation. Detailed notes taken at each interview were later examined to identify issues and potential recommendations.

Another important aspect of our task was to examine documentation and other written material that we consider relevant to the military justice system. This material included documentation and data provided by JAG and CMPS:

- National Defence Act
- Queen's Regulations and Orders
- Policy directives of CMPS, JAG and the Military Police
- Organizational structure charts
- Annual reports of CMPS and JAG
- Internal weekly reports
- Memoranda of JAG and CMPS
- CMPS files of active and completed cases
- Statistical data and charts

We were assisted by a review of various studies and reports that dealt with policies, practices and procedures in Canada and the Provinces such as the Report of the Martin Committee, 1993; report of the Criminal Justice Review Committee, Ontario, 1999 and the like. These are listed in our Bibliography.

We also examined Prosecution Manuals or Deskbooks for PPSC, Ontario and New Brunswick because, in addition to Ontario, we chose to compare the CMPS with the Public Prosecution Service of Canada in Nunavut and with the Ministry of the Attorney General of New Brunswick, where a "charge approval" system is in effect.

Statistics were of particular interest to us in our review because they established that there is a considerable delay in several stages of the progress of an investigation and charge. We examined statistics with respect to the length of the investigations by the Units, the Military Police and the CFNIS. We scrutinized the period of time from the completion of the investigation of an offence to the time that the RMP conducted a pre-charge review and the length of time that it took for the Commanding Officer of the alleged offender to decide whether he/she was going to proceed with a charge. Next we considered the statistics that were relevant to the period of time that was required for the Referral Authority to consider the charge and send it to the RMP for the Region for post-charge review. The amount of time that was required for this latter review and the preferring of the charge was of the most concern to us, as was the length of time it took to convene a Court Martial and commence the trial. We found several important sources of statistics particularly helpful. We were provided with a copy of a "chart" described as "Comparative Analysis of Court Martial Time Lines by Fiscal Year", attached as Appendix E. We were given access to a Binder, maintained by the Paralegal at the offices of the DMP, of Courts Martial that have been completed during the fiscal year of April 1, 2007 to the present.

We conducted a review of a number of CMPS files pertaining to charges that had been disposed of and files that are on-going in the military justice system. We were interested in discerning the types of charges that were destined for a Court Martial, the seriousness of the alleged offences, the quality of the investigations and court briefs and the pre and post-charge review memoranda that had been prepared by the RMP's. This file review was quite revealing with respect to the amount of effort that was expended in the preparation of the pre and post-charge review reports, as well as the memoranda that were written after the charges had been disposed of at Court Martial. The time-lines for the various stages of a charge were also disclosed in these files

1.3 ACKNOWLEDGMENTS

We wish to acknowledge with gratitude all those who agreed to be interviewed. Their names are listed in Appendix B. Everyone was very accommodating, frank and helpful. We wish to especially mention the DMP, Capt.(N) MacDougall and the DDMP, Lt. Col. MacGregor, for their cooperation and guidance. They permitted us unlimited access to the facilities at CMPS Headquarters, as well as the assistance of their professional and administrative staff.

The Chief Military Judge, Col. Mario Dutil was frank and helpful when we met with him at Asticou, as was the Director of Defence Counsel Services, Lt. Col. Jean-Marie Dugas.

We also wish to thank Phyllis Nadeau, the Paralegal at CMPS Headquarters, who contributed her time and expertise to assist us with this report. We called on her frequently for assistance with statistics, graphs and charts. Ashley McClure and Angela Douma, Administrative Staff at CMPS Headquarters, were both very helpful in providing support services.

In February 2008, we traveled to the Atlantic Region to conduct interviews and we are most grateful for the help that Major Dennis Pawlowski provided in setting up an interview with the Commanding Officer aboard the HMCS Athabaskan. Equally of assistance in Halifax was Major Jason Sampson.

In Gagetown, we were well-received by MWO Steve Bartlett who arranged interviews on the Base and gave us a great deal of assistance.

In conclusion, we were most impressed with the dedication and professionalism of all those in the Canadian Armed Forces whom we interviewed and who provided us with support.

2 EXECUTIVE SUMMARY

"If the competing demands of justice and efficiency are to be satisfactorily reconciled, there must be willingness on the part of all the co-operative participants to change, to some extent, the ways in which they have traditionally carried out their respective functions." (Martin Committee)[2]

2.1 INTRODUCTION

We were asked to conduct a review of the Canadian Military Prosecution Service (CMPS) in order to identify those factors within its purview that contribute to delay in the military justice system and to make recommendations about what the Service could do to reduce those delays.

We conducted a total of 46 interviews, examined Courts Martial files, reviewed applicable legislation, and looked at policies and data available to us. In addition to Ontario, we chose to compare the CMPS with the Public Prosecution Service of Canada in Nunavut and with the Ministry of the Attorney General of New Brunswick where a "charge approval" system is in effect.

As instructed by the Director of Military Prosecutions (DMP), we focused our review on that stage of the overall process where the cases rest primarily in the hands of the military prosecutors, namely, from referral of the charges for disposition until preferral for Court Martial. We quickly came to the conclusion, however, that the delays are system-wide and any improvements at one stage will have limited effect unless changes also take place throughout the system, starting with the investigation until the final disposition of the case at Court Martial. The CMPS plays an important role at the other stages, as well, and our review therefore ended up being somewhat broader than originally anticipated.

We found that the delays in the Court Martial tier of the Military Justice System are so severe that the very purpose of having a separate military justice system is threatened. Nothing less than a "sea change" in approaches, policies, and procedures on the part of all participants is required to correct this. However, it is not an impossible task. Fortunately, the number of cases is small, most of the offences dealt with are not of the most serious nature and there are adequate resources within the system to make it work much better. Unlike the civilian justice systems that have had to deal with increasing caseloads with limited resources, the challenges for the Court Martial system come from within.

2.2 NUMBER AND NATURE OF COURT MARTIAL CASES

The number of Courts Martial cases in Canada is surprisingly small. From April 1, 2007 to March 31, 2008, there were only 78 Courts Martial held. In the seven previous fiscal years starting April 1, 2000 and ending March 31, 2007, there were, on average, 62 Courts Martial per year. The numbers are small because the vast majority of breaches of military discipline are dealt with by Summary Trials.

This means that the four military judges dealt with, on average, 20 Courts Martial each in 2007-08, while the nine Regional Military Prosecutors (RMP's) each handled, on average, 9 cases that proceeded to Court Martial.

Of the 82 Courts Martial cases heard in calendar year 2007, 52 (64%) resulted in pleas of guilty and/or withdrawal of charges. This means that on average, each judge dealt with 7 fully contested trials in 2007, while

[2] Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, 1993, Queen's Printer for Ontario

each RMP dealt with only three. We acknowledge that Court Martial cases are very different from criminal cases in the civilian system. However, looking at numbers alone, the average civilian system judge and prosecutor deal with much greater case loads.

Delays in the civilian justice systems are often attributed to the lack of adequate judicial and prosecutorial resources to deal with the huge volumes of cases. We have concluded that lack of resources is not a contributing factor to Court Martial delays. Some of the people we spoke to even suggested that the system is over-resourced. Without going that far, we believe that delays are caused by the policies and practices employed in the system rather than by any lack of resources.

On the surface, most of the offences under the Code of Service Discipline appeared quite minor in nature. There were some serious offences, including drug trafficking, sexual assault, assault with a weapon, significant frauds and possession of child pornography. With those notable exceptions, most of the charges were of the type that would be dealt with by "diversion" in the civilian justice system or would be allocated a couple of hours of court time if they proceeded to trial. Of the 82 cases that were dealt with by Court Martial in 2007, only 7 (8.5%) resulted in sentences involving any actual imprisonment or detention.

We appreciate that a charge that may seem minor in the civilian world can have serious consequences with respect to discipline, morale, and collective safety in the military. We conducted our review with that perspective in mind. Good examples to illustrate the point are the case of the soldier who feigns illness and refuses to take his turn on watch while his unit is in theatre, and that of the soldier responsible for guiding helicopters landing on ships who is found in possession of a small amount of marihuana. The "public interest" aspect in prosecuting such infractions is clearly much greater when they arise in the military context.

2.3 THE OBJECTIVE OF A SEPARATE MILITARY JUSTICE SYSTEM

The objective of a separate military justice system was described by the Supreme Court of Canada in the often-quoted passage from the case of *Regina vs. Genereux*:

> The purpose of a separate system of military tribunals is to allow the armed forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military of the military. 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.[3]

It is clear that the military justice system is intended to deal with breaches of discipline in an efficient and speedy manner. Its very existence is premised on its ability to deal with them more expeditiously than can be expected of the civilian justice system that has broader, societal goals.

What does "speedy" mean? We spoke to those responsible for enforcing discipline, the commanding officers, to obtain their views about what they expect from the military justice system in terms of efficiency in order to do their jobs. The consensus seems to be that most charges of breach of discipline should be dealt with by the justice system within approximately six months of the incident if enforcement of discipline is to be effective. After that, the formal military justice system becomes largely irrelevant, or worse, even counterproductive.

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3 R. vs. Genereux, (1992) 70 C.C.C. (3d) 1 at p.25, S.C.C.

We were left with the impression that Commanding Officers have become detached from the Courts Martial system. The process takes so long that it has become irrelevant to them for the enforcement of discipline. By the time a trial is completed, the members who were in the Unit when the offence occurred are no longer there and do not see the consequences to the accused of his/her conduct.

We heard that accused persons are electing to be tried by Court Martial in the expectation that it will take so long to complete that the case against them will eventually be lost. Another reason for the election is the perception that Courts Martial result in less severe sentences than at Summary Trials. Although it is hard for us to understand why so many disciplinary offences are electable, we decided not to examine that question in light of the conclusions of former Chief Justice Lamer in his review of the military justice system in 2003.

We believe that it is reasonable to expect a properly functioning Court Martial system to take no longer than six months to deal with the "typical" disciplinary cases. Obviously, complex cases like manslaughter, major sexual assaults, drug trafficking and large frauds will require considerably more time and those responsible for enforcing military discipline would accept that. The civilian jurisdictions, like Ontario, are able to accomplish this timeline because of the large number of cases, 75%, that are resolved without trials. In some of the efficient civilian jurisdictions, even contested trials can be held within six months of the date of the offences.

2.4 EXTENT OF THE DELAY

For Courts Martial completed in calendar year 2007, the mean time from the date of the offence to final disposition was 593 days (19.45 months)[4]. The average from April 1, 2006 to March 31, 2007 was 650 days (21 months). This is more than three times longer than the 6 months delay that Commanding Officers say they can accept and still enforce discipline. The situation has not changed over the last 8 years. It is not surprising, then, that 24 Commanders and 17 CWO/CPO1's interviewed in a survey conducted by the Judge Advocate General from January to March 2007 expressed dissatisfaction with delays in the Court Martial system.[5] This was confirmed by the Commanders with whom we spoke.

Rather than providing a separate speedier forum for dealing with breaches of military discipline as intended, the Court Martial system is, in fact, slower in disposing of cases than the civilian system. Ironically, a serious argument could be made that, if timeliness is the most important consideration, all charges presently laid under the Code of Service Discipline that are based on alleged Criminal Code or other Federal act offences should be dealt with in the civilian criminal justice systems.[6] We are not recommending that be done; but we use it to illustrate the extent of the problem.

2.5 STAGES OF THE COURT MARTIAL PROCESS

Cases destined to be dealt with by Court Martial pass through several stages and many hands in the overall process. They are:

- The Investigation stage, from the time of the incident to the laying of the charge. The investigating authorities, that is, either the Unit investigators, regular Military Police or the National Investigation Service (NIS) of the Military Police play the central role at this stage.
- The Chain of Command stage, from the time the charge is laid until it is referred to the DMP. The Commanding Officers, Referral Authorities, and their legal advisors control this stage.

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4 In order to calculate "mean" time we excluded all cases where the delay was more than 3 years.

5 Annual Report of the Judge Advocate General 2006-2007

6 Currently by CF policy, impaired driving and domestic violence cases are dealt with in the civilian justice system even though they involve military personnel and were committed on military property.

- The Prosecutors' stage, from the time of referral until the charge is preferred for Court Martial. The prosecutors are in charge of the case during this stage.
- The Court Martial stage, from preferral of the charge until final disposition. The Military Judges and the Court Martial Administrator are involved at this stage.

We learned that there are excessive delays at each of the above stages. Furthermore, failure to deal with cases expeditiously at one step in the process contributes to delay at the other steps.

We have tried to determine why a well-resourced system is seemingly unable to deal with a relatively small volume of cases in a timely manner, particularly when efficiency is such an important objective. There are multiple reasons, but a few things stood out:

- The various participants or "players" in the system generally carry out their individual responsibilities as if overall delay was not a problem. Despite the delays, they do not act with a sense of urgency. For example, the Military Police may spend months investigating a simple bar fight, tracking down every witness and videotaping all statements. The Chain of Command may sit on files for a long time before referring them to the DMP. The prosecutors prepare lengthy written legal opinions for their superiors justifying their decisions whether to proceed or not to proceed with a case. The military judges will spend two days on a sentencing matter, even where there is a joint submission. While such expenditures of time would be acceptable in an ideal world, they simply cannot be afforded if the objective of swift justice is a priority.

- The participants are very "risk-adverse". They feel they must do their work very thoroughly, even if it takes a long time. They are unwilling or afraid to "cut any corners", even if such a meticulous approach contributes to overall delay.

- Many of the participants, including investigators, prosecutors, defence counsel and some military judges, are relatively inexperienced and have difficulty making quick decisions.

- Since the reorganization of the military justice system in 1998, there has been a great emphasis on the independence of each branch. Pressure by one branch on another branch to speed up the process is resisted and seen as an interference with independence.

- The Charter of Rights places emphasis on the rights of individuals, rather than the interests of the CF as a whole, and legal procedures have become more complex and lengthy.

- The Chain of Command is not as engaged in the Court Martial process as they are with the Summary Trials and the impetus for change is not coming from them. Once the NIS and the Military Prosecutors get involved, the Commanders generally consider the matters to be out of their hands.

Reducing the time that it takes to deal with even the most simple of cases from approximately 20 months to approximately 6 months, will require a dramatic change in approach. The timeline Chart, attached to this Executive Summary and as Appendix "E", illustrates that point. Reducing or even completely eliminating delay at any one stage will not accomplish this. In order to meet that target, a holistic approach is required, with all participants changing the way they traditionally do business.

2.6 REFERRAL TO PREFERRAL STAGE (PROSECUTORS' STAGE)

The period from the sending of charges by the Referral Authority to the DMP for "disposition" until she prefers them for Court Martial accounts for approximately 15-20 % of the total delay from incident to completion of Court Martial. In 2006-2007, this stage took an average of 103 days to complete, and, in a

sample of 10 typical cases for 2007-08, it took 92 days. Needless to say, this time contributes substantially to overall delays in the system and in our opinion is much too long.

During this stage, the RMP's conduct "post-charge" reviews of cases to determine whether they should proceed to Court Martial, draft charges if the cases are proceeding, and prepare "will-say" summaries of witnesses' evidence to disclose to the defence. They may require additional information from the investigating authority in order to make their decision whether to proceed. The standard applied by the RMP is that there must exist, on the evidence, a reasonable prospect of conviction and that it is in the public interest to proceed.

We found that there are many reasons why post-charge review takes so long. They are referred to throughout the report and include the following:

- Post-charge review is made more difficult by the delays that have occurred earlier in the process, starting from the date of the offence and continuing to the time of the review itself. Time is wasted trying to locate some investigation files, investigators, and witnesses;

- Most RMP's have not been in their positions for very long and particularly lack the court experience that makes it easy for a seasoned prosecutor to quickly assess a file;

- Some investigations, particularly unit investigations and those conducted by regular members of the Military Police, are not of the quality required for Courts Martial;

- RMP's have problems obtaining follow-up to their requests for additional information or investigation;

- Deputy Judge Advocates (DJA's) have not adequately considered what is required for Courts Martial when giving legal advice to investigators and the chain of command.

- The reviews conducted by the RMP's are exceedingly detailed. They are very "risk adverse" and attempt to plug every possible hole in the investigations.

- RMP's have been required to write lengthy, time-consuming legal memoranda to their superiors on every case justifying their decisions. [7] This is sometimes followed by additional questions from their superiors.

- Certain policies and practices of the CMPS have not promoted timely and confident decision-making by the RMP's. There has been insufficient delegation of authority to the RMP's to make prosecutorial decisions on files.

- Time is taken up preparing "will-say" statements of witnesses that must, by Regulation, be disclosed to defence counsel.

The DMP has set a target of 60 days for the completion of post-charge reviews and closely monitors compliance with that timeline. Considering the above statistics, it appears that this target is often not met.

In the civilian justice system, post-charge review is conducted by prosecutors much differently. Rather than taking days, in most cases it takes a matter of minutes. Unlike the CMPS, prosecutors seldom interview witnesses during this stage and complete a standard form rather than drafting a legal opinion. A prosecutor's decision is usually not reviewed by a superior.

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[7] During the course of our Review there was a DMP policy shift in this area involving devolution of some decision making to the RMP's

There are reasons why post-charge reviews can be done more quickly in the civilian system. One of them is that the quality of police investigations is more consistent than in the military justice system. Nevertheless, we believe that even the CMPS target of 60 days is far too long. If the overall goal is to complete most cases within 6 months, the system simply cannot afford to have prosecutors take up one third of that time deciding whether charges that have already been laid and referred should proceed to Court Martial.

We have made a number of recommendations in our Report for procedural changes to address these issues, including:

- Instituting a "pre-charge approval" system for those NIS-investigated cases that can only be tried by Courts Martial, and eliminating the formal post-charge review of those cases;
- For the other categories of cases (accused or Commanding Officer elections to proceed by Court Martial), the post-charge review would continue. However, the depth of the review should be proportional to the seriousness of the matters and should generally be less detailed than at present;
- Imposing strict timelines on the investigating authorities for providing follow-up information to the RMP's;
- Delegating even more authority to the RMP's for the decision whether to prefer charges to court martial;
- Eliminating the need for RMP's to submit legal memoranda to their superiors justifying their decisions, except in special circumstances;
- Forwarding the complete investigation file to the RMP's as soon as a Commanding Officer decides to proceed to Court Martial.

We have also made a number of recommendations in Chapter 8 addressing the relative inexperience of prosecutors which we believe is a factor contributing to delays at this and other stages of the total process:

- There is a need to recognize that prosecution is a specialty in the legal profession and it is not reasonable to expect that the work can be done effectively and efficiently by military lawyers who are "generalists";
- The initial appointment to the position of RMP should be for a minimum of 5 years. After that, RMP's should be permitted to remain in the position as long as they wish if their performance is satisfactory;
- The development of a corps of highly experienced military lawyers who specialize in litigation, whether as prosecutors or defence counsel should be encouraged;
- Arrangements should be made with civilian prosecution services to allow newly appointed RMP's the opportunity to do work in placements with those services as a way of getting court experience;
- There should be more opportunities for junior RMP's to act as co-counsel at trials with senior military prosecutors including with the Reservists;
- The Appeals' Counsel (DMP-4) in the CMPS should be made responsible for the co-ordination of a continuing education program for all RMP's, as well as being responsible for distributing information about recent court decisions and other developments in the law to all RMP's on a regular basis.

In Chapter 9 we make recommendations about organizational changes in the CMPS that we feel will strengthen the Service. We believe that, generally, the problem in the CMPS that contributes to delays is the

lack of senior experienced litigators as opposed to a shortage of prosecutors. We recommend, therefore, that two new Lieutenant Colonel positions be allocated to the CMPS. One would be based in Western Canada, and the other (bilingual) in the East/Atlantic Region. Importantly, we want to emphasise that they would replace existing RMP positions in those Regions rather than adding to the total complement of prosecutors. The current Lieutenant Colonel position, which should also be bilingual, would remain in the Central Region. The main responsibilities of the three Lieutenant Colonels would be to act as "senior litigators", conducting trials on a regular basis, providing advice to the police on major investigations and mentoring junior RMP's. The Lieutenant Colonel in the Central Region (DDMP) would also replace the DMP in her absence.

We believe that the possibility of promotion to the three Lieutenant Colonel positions would also provide the incentive for RMP's to remain in the CMPS and to become experienced "career" prosecutors.

2.7 INVESTIGATION STAGE

The investigation of cases ending up in Courts Martial may be conducted by either the units themselves, regular members of the Military Police, or the NIS. Delays at this stage, as well as the inconsistent quality of the investigations, are major problems for the entire system. This subject would merit a separate study; but we felt we must at least refer to it in our Review, as it impacts greatly on the work of prosecutors.

In our analysis of the "mean" timelines for 10 "typical" Court Martial cases in 2007-08, we found that it took approximately 136 days from the date of the incident to the laying of charges (the average time in 2006-07 was 236 days). This amount of delay should be of great concern to everyone, since a good part of the target total time period of 6 months to deal with most cases from incident to final disposition is used up during this initial stage.

Police superiors and legal advisors, including DJA's and RMP's, play a role leading up to the laying of charges. We found that further data is needed, therefore, to identify exactly what the reasons for delays are during this stage.

In Chapter 4 we make a number of findings about investigations. Most of the problems we heard about apply more to the unit and MP investigations and less to the NIS, which is considered to be a maturing, but generally competent, organization. The problems include:

- Investigations don't measure up to Court Martial standards. Prosecutors feel they have to re-do some investigations.
- Investigators are inexperienced and there is a large turnover;
- The length of investigations is disproportionate to the seriousness and complexity of the cases;
- There is a lack of focus on the essential elements that have to be proven at Courts Martial;
- There is indiscriminate video-taping of virtually all witnesses' statements;
- Investigation reports are unwieldy and confusing;
- Prosecutors have difficulty tracking down investigators and witnesses and receiving timely responses to their requests.

We recognize that there is a unique feature in the military justice system that makes addressing the problems of investigations particularly challenging. That is, most disciplinary offences proceed by Summary Trials with very flexible rules of evidence. Investigators usually do not know, until the investigation is completed and the accused is charged and elects, whether the case will be proceeding to a Court Martial with very strict rules of evidence. A different investigation may be required depending on which tribunal will try the case.

We have made a number of recommendations, including the following that we feel could help address some of the problems:

- A time standard or target of one month should be established for the completion of investigations in straightforward cases. This applies to investigations conducted by the Units, regular Military Police officers, and the NIS.
- All investigators and DJA's who provide advice on the files should receive additional training on the essential elements of offences and the type of evidence that is required for Courts Martial.
- When an accused elects to proceed by Court Martial, the DJA's and investigators should give the case special attention. They should make sure that the investigation is complete and that that all the essential elements of the offence can be established at a Court Martial. They should do this pro-actively without waiting for the RMPs' to make the requests.
- As soon as a decision is made by a Commanding Officer to send a case to a Referral Authority, the process of transmitting the complete investigation file to the RMP's in the Region must begin immediately.
- It must be understood by everyone that RMP's cannot wait indefinitely for the investigation of outstanding matters to be completed and that they have the discretion not to proceed with cases which they believe have taken too long to bring to Court Martial.
- A new Service-level Agreement between the CMPS and the NIS dealing with the issues between the two organizations ought to be negotiated and signed as soon as possible.
- Consideration should be given to the appointment of staff in the Military Police, including at the branches of the NIS, to act as "Court Liaison Officers". These officers would carry out similar duties to those performed by Court Liaison Officers in the civilian police forces.

2.8 CHAIN OF COMMAND STAGE (CHARGE TO PREFERRAL)

The Chain of Command is responsible for discipline and it follows that they have a legitimate and important role to play in making decisions or recommendations regarding Court Martial cases. The problem is that the procedure currently followed for their input adds substantially to the overall delay in the completion of those cases. In the sample of 10 typical Court Martial cases dealt with in 2007-08, the cases were in the hands of the Chain of Command for 78 days from "charge laid to referral to the DMP for disposition". During that time, little else happens to advance the cases towards completion and we believe that the system cannot afford this extent of delay.

We found that the cases sometimes pass through too many different officials during this stage and too many legal opinions are requested. We deal with this in Chapter 5 and make several recommendations including:

- In most cases, there should be only one written legal opinion before referral. The opinion should be prepared by either the DJA's, for the members of the Units responsible for laying charges, or by the RMP's for the NIS. These opinions should deal with the sufficiency of evidence, applying the "reasonable prospect of conviction" standard, the charges to be laid, and the "public interest". In deciding whether to proceed, the Commanding Officers should not be required to seek another opinion and should normally act on those initial opinions. The Referral Authorities should do the same when considering their recommendations to the DMP.

We suggest that a time limit needs to be established for input from the Chain of Command and we recommend:

- That the standard time period for Commanding Officers to make their decisions whether to proceed with cases after charges have been laid should be two weeks. If they decide to proceed, they should send a request for prosecution directly to the DMP and forward copies of all documentation to the Referral Authorities. The Referral Authorities should have two weeks to forward their recommendations, if any, to the DMP. If the DMP does not hear from the Referral authorities within that timeframe, she may assume

they have nothing to add to the positions already taken by the Commanding Officers

We believe that it is important for Commanding Officers to have some say in the sentences that are imposed in Court Martial cases since they are most aware of the impact of the offences on the units. We have made recommendations in this report calling for the greater use of resolution discussions between counsel and for procedural changes that would allow for pleas of guilty at the earliest opportunity. We have recommended, therefore, that:

- When cases are sent to the DMP for prosecution, the Commanding Officers indicate their views on the appropriate sentence that should be imposed for the offence if the accused pleads guilty or is adjudged guilty after a Court Martial trial. Those opinions should be taken into consideration by the RMP's; but would not be binding on them.

2.9 PREFERRAL TO COMPLETION STAGE (COURT STAGE)

We learned how cases are dealt with following the preferral of charges and it became obvious that reforms are needed at that final stage if overall delays are to be addressed. For the typical case dealt with by Court Martial in 2007-08, there was a total delay of 196 days (6.5 months) from the date when the charge was preferred to when the Court Martial was commenced. From the laying of charges it was 373 days.

We found that, with the exception of some recent initiatives on the part of the Chief Military Judge, modern case management techniques now widely used in the civilian criminal justice systems in Canada and elsewhere have generally not been applied to the Court Martial system. For example, there is little case-differentiation in the scheduling of trials with Standing Courts Martial routinely set to last one week, even when the allegations are relatively minor and the issues not complex. Similarly, we learned that it is not unusual for sentencing hearings to take two days, even when there are joint submissions. While such generous allocations of court time may be ideal, they can hardly be afforded in a system seemingly incapable of meeting its principal objective of providing swift justice in order to enforce military discipline.

In Chapter 7, we make recommendations that we believe could speed up the process after the preferral of charges. They are based on the findings of various studies dealing with delays in the civilian justice system and on our own experience working as prosecutors in Ontario, particularly following the *Askov* "crisis".

Some feel that an obstacle to the wider use of case-management approaches is the fact that there is not a permanent court in the military justice system. We believe that any problems that issue may have caused should largely be removed if Bill C-45 is passed. If that takes place, court Rules of Practice should be formulated dealing with matters such as notice for Charter applications, mandatory Judicial Pre-trial Conferences, and earlier opportunities for entering guilty pleas.

Experience has shown that co-operation between all of the parties is essential for the efficient operation of the system. We have recommended, therefore, that a Case Management Committee be established that meets on a regular basis and is made up of all of the key participants in the military justice system. In keeping with this same approach, we suggest that a special effort be made by the leadership of the CMPS and DCS to place less emphasis on traditional adversarialism and more emphasis on co-operative case management.

Accurate statistics are key to understanding exactly what is going on and where to focus initiatives. Despite the relatively small caseload, we had difficulty at this stage finding the data required and we make recommendations about keeping management information.

We believe that a target should be established to have Courts Martial commence within 3 months of preferral for ordinary cases and compliance with this standard should be consistently monitored.

Inefficient trial scheduling is clearly a problem. We recommend that the practice of routinely scheduling one week for each Standing Court Martial and two weeks for Disciplinary Courts Martial should be discontinued. The amount of time scheduled for trials should depend on the complexity of the cases, the issues identified by counsel and the time estimate given at Judicial Pre-trial Conferences. To help address this, we recommend the creation of the position of "Trial Co-ordinator" based on the positive experience of that initiative in Ontario. We feel that the practice, recently launched by the Chief Military Judge, of having the judge who travels to a location deal with more than one case is excellent and should become the norm. In fact, we suggest that whenever a judge visits a location, he or she should also have all the pending cases from that location listed in court "to be spoken to".

We found that 64% of all cases are resolved without trial on the date set for the hearing. However, that is too late, and, for the efficient functioning of the courts, those resolutions must take place earlier. We recommend that procedures be put in place to provide an early opportunity for pleas of guilty to be entered before trial dates are set. Consideration should be given to deal with the pleas more often from the courtroom in Gatineau, Quebec, with the proceedings broadcast by video to the accused's Unit in another part of Canada.

We feel that more efficient use, aided by technology, could be made of the Gatineau facility where all of the Judges are located. The traditional practice of holding Courts Martial at the physical location of the Units no longer has much meaning because of the delays. Commanding Officers should be given some say concerning the importance of holding the Court Martial at the location of their Unit in individual cases.

We found that the Court Martial hearings themselves could be streamlined. We recommend that, in the effort to reduce overall delays, sentencing hearings be made shorter and more efficient. Finally, we recommend that a review be conducted of the Military Evidence Act (Military Rules of Evidence) with the view to simplifying the methods for proving certain elements of offences without unduly infringing on the fundamental rights of accused persons.

3 THE ROLE OF THE C.M.P.S.

3.1 INTRODUCTION

We were asked to examine and compare the services provided and tasks performed by the CMPS with those provided and performed by civilian Crown prosecutors' offices. We were to identify identical, analogous, dissimilar and unique, services, objectives and tasks.

3.2 OBJECTIVES

The most significant difference between the military prosecution service and the civilian prosecution services is the objective that the CMPS has to maintain military discipline. In a memorandum by the DMP, Capt.(N) MacDougall, dated January 10, 2007, she emphasized this point:

> Within the military justice system, there is a further institutional requirement for the delivery of prompt but fair justice directly related to a Commander's obligation to maintain morale, efficiency and discipline within ...the Units, elements and formations under command. The military justice system is one of the key tools available to commanders in satisfying this obligation.[8]

A similar statement with regard to the importance of discipline is to be found in a Judge Advocate General Discussion Paper, entitled "Court Martial Delay" where it is stated:

> Institutional concerns are related to the underlying rationale for a separate and parallel system of military justice within the Canadian legal system. This separate system of justice is, in large part, premised on the military requirement for prompt justice. The requirement for prompt justice is, in turn, directly related to a commander's obligation to maintain morale, efficiency and discipline within the units, formations and elements under command. The military justice system is simply one of the tools, albeit a very important one, to allow commanders to satisfy this obligation. This unique role was expressly recognized by the Supreme Court of Canada in the 1992 *Genereux* decision.....[9]

This objective, which the civilian prosecution systems do not have, has a major impact on the role of the CMPS and must be constantly kept in mind when comparing the two systems. For example, we were surprised at the attention that the military justice system gives in terms of time and resources to what, in the civilian system, seemed like relatively routine and minor cases. Only after gaining some understanding of the importance of discipline in the Armed Forces did we come to appreciate that these cases can have great significance to the military.

In considering whether it is in the "public interest" to conduct a prosecution, the military prosecutors must take into account the aspect of discipline as well as the other public interest factors analysed by civilian prosecutors. In the Judge Advocate General's Policy Directives, there is a statement in paragraph 8 of Policy Directive #010/00:

> Unit authorities, and in particular the commanding officer, will normally be in the best position to assess what the interests of unit discipline require when discharging their roles and responsibilities under the Code of

[8] Memorandum by M.H.MacDougall, Capt (N), DMP, January 7, 2007, # 5200-2 (DMP), page 1

[9] Judge Advocate General Discussion Paper, "Court Martial Delay", Part II – Background, paragraph 4 "Institutional Interests", page 1. Author unknown. 2000

> Service Discipline. Referral authorities will also have views on such matters, although the focus of their concern may well be broader.[10]

Footnote # 4 to Directive 010/00 indicates: "A referral authority's concerns might be expected to be centred on the disciplinary interests of the command or the CF as a whole." (emphasis added).

The Policy Directives of the Director of Military Prosecutions are quite clear on the importance of the analysis of the "public interest" when RMP's are considering whether to prefer charges. In Policy Directive #003/00 it is stated in Paragraph 7:

> 7. Prosecutors must ensure that all reasonable steps have been taken to obtain all current information relating to these issues (sufficiency of evidence and public interest) whenever advice is given or charges proceed. In most cases sufficient public interest information will be found in the package provided by the referral authority, in the letter from the CO and the letter from the referral authority.[11]

The DMP Policy Directives further deal with the "public interest" under the heading "The Public Interest Criteria". Paragraph 14 states:

> 14. If satisfied there is sufficient evidence to justify the continuation of a prosecution, the Prosecutor must then consider whether, in the light of the provable facts and all surrounding circumstances, the public interest (which includes as a primary factor the interests of the Canadian Forces) requires a prosecution to be pursued.[12]

The importance of discipline is emphasized in paragraph 16 which deals with the criteria that relate to the exercise of RMP discretion with regard to "public interest":

> 16. Public interest factors that may arise on the facts of a particular case include:
> (f) the prosecution's likely effect on good order and discipline;
> (g) the prosecution's likely effect on public confidence in military discipline or the administration of military justice.
> (j) the prevalence of the alleged offence in the unit or military community at large and the need for general and specific deterrence
> (k) whether the alleged offence is of considerable public concern;
> (r) the effect of prosecution, or failure to prosecute, on the maintenance of good order and discipline in the Canadian Forces, including the likely impact, if any, on military operations.[13]

The Policy Directive in paragraph 17 provides assistance to the RMP on the issue of public interest:

> The application of these and other relevant factors, and the weight to be given to each, will depend on the circumstances of each case. Generally speaking, the effect of prosecution on good order and discipline in the Canadian Forces is the same whether the offence charged is a purely military offence or one which involves the breach of another federal statute.[14]

Finally, the importance of consultation is stressed in paragraph 20:

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[10] Judge Advocate General Policy Directives, Directive #010/00, July 10, 2000, "Charge Screening Policy", page 4, paragraph 8.
[11] ibid, para. 7
[12] ibid, para. 14
[13] ibid, para. 16
[14] ibid, para. 17

> Prosecutors will usually have the views of the referral authorities as to whether service interests require that a prosecution be commenced or continued. The Unit Commanding Officer will normally be in the best position to determine what are the broader interests of his or her command...[15]

The need to maintain discipline will also be a factor that RMP's, unlike their civilian counterparts, will take into account in any resolution agreements they may enter into with Defence Counsel as well as their sentencing submissions in court. Since Commanding Officers are responsible for discipline in the Armed Forces, this will also mean that they should have an input into some of the decisions that prosecutors make including whether charges should proceed and the type of sentence that would be appropriate. DMP Policy Directive #008/00 deals with "Plea, Trial and Sentence Resolution Discussions". In the "Statement of Policy", it is stated in paragraph 3:

> Prosecutors' approach to resolution discussions must be based on several important principles: accuracy, openness, fairness, non-discrimination and the Canadian Forces interest in the effective and consistent enforcement of the Code of Service Discipline.[16]

We believe that military prosecutors have a greater challenge in maintaining their professional independence because not only do Commanding Officers have a legitimate role to play in the military justice system; but are also of superior military rank to the military prosecutors. "Accountability, Independence and Consultation" is the subject of DMP Policy Directive #010/00. With respect to "Accountability", paragraph 10 is relevant:

> ...The duties of a Prosecutor are carried out under the authority of the DMP and, in the performance of those duties, the Prosecutor is not subject to the direction of any other officer who is not a legal officer posted to a position within the CMPS.[17]

"Prosecutorial Independence" is specifically referred to in Policy Directive #010/00 in these terms:

> Accountability and independence are corollary principles at work in the military justice system. In respect of justice matters, the JAG enjoys independence from the judiciary, the chain of command and inappropriate forces that might influence such matters. Prosecutors exercise their independence as the representative of the DMP. As such, the "independence of the Prosecutor is a delegated independence.[18]

The military prosecutors are urged to consult with superiors in the CMPS and with investigators. Paragraph 16 of Policy #010/00, however, states:

> ...Prosecutors do not take instructions as to how to proceed except from those in the line of authority leading to the Minister of National Defence, namely, the Deputy DMP and DMP.[19]

While recognizing this challenge of maintaining independence, there is nothing that we have seen to suggest that RMP's have not met the challenge and remained independent.

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[15] ibid, para. 20

[16] Director of Military Prosecutions, Policy Directives, Policy Directive #008/00, "Plea, Trial and Sentence Resolution Discussions", March 15, 2000, page 2, para. 3

[17] Director of Military Prosecutions, Policy Directives, Policy Directive #010/00, "Accountability, Independence and Consultation", March 15, 2000, page 4, para. 10

[18] Ibid, page 5, para. 14

[19] Director of Military Prosecutions, Policy Directives, Policy Directive #010/00, "Accountability, Independence and Consultation", March 15, 2000, page 4, para. 10

Sentences, even for less serious offences, take on special significance in the military justice system since they are intended to reinforce discipline and send a message to the Units that infractions will be dealt with appropriately. In the civilian system, unless it is a major case, sentences attract less attention. This places an additional responsibility on military prosecutors and may also account for the exceptional amount of court time dedicated to sentencing even following pleas of guilty.

We have observed that cases involving the breach of military rules of discipline appear to be very technical in terms of what must be proved by the prosecutors. For example, it may be difficult to prove that an accused was aware of certain rules. This technical nature of cases is comparable to the requirements to prove an impaired driving charge in the civilian system. We are aware that much court time is taken up by impaired driving cases in the civilian system.

The Charter of Rights applies to military cases as well as to civilian cases and prosecutors must be current with the complex and prolific case law. We have heard from a number of people that we interviewed that there is a proliferation of Charter applications in the military justice system, since all accused are entitled to counsel without any financial ramifications. From our review of CMPS files, we have observed that Charter applications are frequently raised by defence counsel and sometimes with respect to issues that we seldom see litigated in the civilian courts. However, it has become apparent from our study of case files and reports of dispositions, many of these superfluous Charter applications have been dismissed.

3.3 UNIQUENESS OF ROLE

There are unique requirements as a legal officer in the CMPS/CF. We have learned that one peculiar feature pertaining to the role of the JAG military lawyer, especially in the past, is that the military legal officer was expected, if not encouraged, to be a "generalist" in several aspects of military law. There are apparently "three pillars" of military law and the JAG lawyer was supposed to be competent in at least two of the three areas: Administrative Law, Operational Law and military prosecutions. This is quite foreign to a civilian prosecution service where the prosecutor is expected to become a courtroom specialist, as is borne out by our examination of the Prosecution Offices in New Brunswick, Nunavut and Ontario. In our experience, the prosecutor must become a specialist and must be viewed as such because of the amount of knowledge that they must acquire with respect to criminal legislation, case law, legal texts and advocacy skills. The fact that the RMP may not be regarded as having to be a specialist may have the effect on the skill-sets that they are able to achieve in prosecutions, with an indirect impact on increasing delay because of their lack of experience.

Another unique requisite of for a JAG legal officer is that they must pass their "basic military training" and continue during their career to be in a constant state of "combat preparedness". We were informed that they must be tested in skills that relate to the military, such as firearms qualifications and the like. This, apparently, takes time away from their role as a military prosecutor and potentially their experience in the court room, distracting them from continuing to become a criminal litigation specialist. It may have an effect on delay to the same extent as mentioned in the previous paragraph. It is trite to say that civilian prosecutors, other than Reservist RMP's, do not have these same requirements and are able to devote all their professional time to their duties and gaining experience as a prosecutor.

Another feature that is unique to military prosecutors is that they are subject to being deployed to areas of conflict with the concomitant effect on their specializing to become a courtroom advocate and hardship on their family life. Civilian prosecutors may request leaves of absence or secondments to other aspects of the justice system; but they are not subject to being "posted" as is their military justice counterparts.

Travel out of their home Region was mentioned during our interviews with the RMP's who find it a taxing requirement for the military lawyer. The civilian prosecutor in New Brunswick and Ontario does not have to travel the great distances that the RMP's are expected to cover to appear at Courts Martial. In Nunavut,

Crown Prosecutors do have to travel extensively. It is not certain what, if any, effect this may have on the issue of delay in the court process except that it makes sense that, the more time the RMP spends "on the road", the less time he/she is able to spend in court-related activities.

Another distinction between the RMP and their civilian counterpart is that a civilian prosecutor's office in the larger centres typically has ten or more prosecutors with a mix of junior and senior prosecutors. This is certainly the situation in Fredericton, Ottawa and Iqaluit and it provides opportunities for mentoring and advice which are unavailable at the regional level in the CMPS. This may contribute to delay because the RMP must attempt to obtain advice from colleagues who may be far-removed from their office or courtroom and they do not have the same resources "just down the hall" as the civilian prosecutors.

Another difference is that civilian prosecutors are more subject to media scrutiny than the RMP and their court cases are regularly reported in the media. This may not have any effect on the issue of delay; but it is a distraction for the civilian prosecutor.

3.4 DUTIES

In the CMPS, Appeals are handled by one counsel: usually, the DMP-4 Appeals Counsel. In the civilian prosecutors service, the regular Crown counsel only appear at Summary Conviction Appeals. This is so in Ontario and Nunavut, where there are specialized appeal counsel who argue cases in the Courts of Appeal. In New Brunswick, the Crown prosecutors deal with all levels of appeals. There does not appear to be any relationship between whether there are specialized appeal counsel and the issue of delay.

A unique aspect of the practice of law by RMP's is that some of the investigations that the RMP's have to deal with are performed by Unit investigators who are not trained police officers. The RMP's have to spend more time "fixing-up" these cases. This is a most important contributor to "pre-charge delay". This appears to be a very relevant consideration in the military justice system because of the *Perrier* case, decided by the Court Martial Appeal Court in the year 2000.[20] The civilian prosecutor in New Brunswick, Ontario and Nunavut uniformly deals with cases that are investigated by professionally trained law enforcement officers, although these officers may have varying degrees of competency and experience.

The preparation of written memoranda is a task that the military prosecutor is charged with, particularly with regard to pre and post-charge reviews. The RMP is also tasked with preparing a lengthy report after the "disposition" of a Court Martial case. In the Ontario Crown Attorneys system, there is no pre-charge review performed and the first time the Crown Attorney sees a police file and charge is after the charge has been laid. A post-charge review is completed by filling out a form, a procedure that takes about 20-30 minutes for the ordinary file. In New Brunswick, a pre-charge approval regime, the Charge Approval Crown Prosecutor completes a form and this takes about 10-15 minutes. The situation in Nunavut is similar to that of Ontario. In none of the civilian jurisdictions examined did the prosecutor have to complete a lengthy report on the outcome of the trial or plea negotiation. The preparation of the pre-charge review memorandum by the RMP is a contributor to delay.

Civilian prosecutors in New Brunswick, Ontario and Nunavut frequently deal with members of the public who attend at their offices seeking information or making complaints about investigations or the manner in which a prosecutor handled a file. Sometimes this is very time-consuming. The RMP's don't appear to have this degree of contact with the general public. There is no effect on delay that is apparent with respect to this issue.

[20] CAMAC 434, 24 November, 2000

Generally, civilian prosecutors in the three jurisdictions we examined do not interview witnesses when conducting a charge review. Military prosecutors often interview witnesses for post-charge, and sometimes, pre-charge reviews. This does have a contributing effect on delays.

Our study of the CMPS and of the prosecution systems in New Brunswick, Ontario and Nunavut revealed that both civilian and military prosecutors provide advice to the police regarding investigations. In the civilian prosecution branches, in the ordinary case, the police will not seek advice and will proceed to lay a charge, or present a charge to the prosecutor for approval, without contacting the prosecutor for input. Consultation will occur in the serious and sensitive cases. It is mandatory for the CMPS prosecutor to be contacted by the NIS investigators, no matter how serious the charge, to discuss a case pre-charge and this does have an adverse effect on delay.

Both civilian prosecutors and military prosecutors have to contend with incomplete investigations conducted by inexperienced police officers. This situation results in much more time and effort being expended reviewing files and ensuring that the investigations are completed properly. It is a significant contributor to delay in both the military and civilian justice systems; but the impact of such delay is more serious for the RMP's because the "Charter Clock" starts when the charge is laid.

Both military and civilian prosecutors have some involvement in training the police.

3.5 EXTERNAL FACTORS

There are a number of factors external to the CMPS that impact the work of the RMP's and contribute to delay in the military justice system. For example, the dearth of experience of the Military Police investigators, the lack of investigators, the constant turn-over of personnel and the excessive length of time that it takes to investigate and approve a charge has a deleterious effect on the expediting of military justice. The same comments sometimes hold true for NIS investigators and investigations. There were a number of adverse comments from those interviewed concerning the poor quality of the Unit investigators and investigations. We were advised that the DJA's take a long time to provide advice to the Commanders and referral authorities, with the ensuing contribution to the delay of a charge getting to the military court. In Ontario, New Brunswick and Nunavut, the situation is not nearly as egregious with respect to investigators and investigation length. In addition, the civilian prosecutor does not have to contend with a chain of command and unit legal advisors and the delays caused when military charges are being examined at the unit level.

3.6 COURTS

Civilian prosecutors usually deal with several levels of trial judges in the hierarchy of the court system in the Provinces and Territories. For example, in Ontario, Asst. Crown Attorneys appear before Justices of the Peace, Judges of the Ontario Court of Justice (formerly the Provincial Court) and Justices of the Superior Court of Justice. In New Brunswick, there are no Justices of the Peace; but Crown prosecutors do appear before their Provincial Court and the Court of Queen's Bench day in and day out. RMP's, on the other hand, apart from appeals, appear before only four Military Judges, all of the same level.

Civilian prosecutors conduct jury trials in New Brunswick, Ontario and Nunavut quite frequently after they have gained a few years experience. Military prosecutors may appear at Disciplinary Courts Martial and gain jury trial-like experience. In 2007, 16 out of 78 military trials were Disciplinary Courts Martial and, in 2006, 6 trials out of 67 military trials were Disciplinary Courts Martial.

Following upon the above, civilian prosecutors, especially in Ontario, deal with different levels of courts as well as specialized courts such as Domestic Violence, Drug, Youth Justice and Mental Disorder Courts. Most of these courts have a positive effect on the reduction of delay by removing charges from the regular courts

and dealing with them more expeditiously and holistically in the specialized courts. It is to be noted that none of these specialized courts exist in the Military Justice system.

Review Board cases involving accused who are suffering from mental disorders are part of the responsibilities of both civilian prosecutors and military prosecutors.

Preliminary Inquiries are not conducted in the military justice system. Although they add to overall delay by the institution of another court proceeding in the criminal justice system, Preliminary inquiries can benefit the prosecution by providing an opportunity to hear from witnesses under oath and assess the strength of cases for trial. Issues can then be narrowed for the trial, with concomitant saving of trial time.

RMP's are rarely involved in bail hearings; whereas civilian prosecutors appear at bail hearings regularly. Show Cause or Bail Hearings do provide an opportunity for the novitiate prosecutor to gain experience and confidence in the courtroom, thereby improving advocacy skills.

3.7 COURT-RELATED PROGRAMMES

The CMPS has no assistance from a Victim-Witness Assistance Programme or similar initiative designed to help witnesses and victims who must appear in court. This type of assistance is available in New Brunswick. Both Ontario and Nunavut have a well-organized and funded programme in place. Such initiatives are very effective in preparing the victim-witness for trial and have had a positive effect in most cases on the proper unfolding of the evidence of the victim-witness, with a saving of trial time being a positive side-effect. We were advised that this issue has been left in the hands of the NIS; but we were not informed of the success of such a programme.

Post-charge Diversion Programmes have not been instituted in the military justice system at this time. We were informed that there are some informal types of pre-charge diversion at the unit level, for example, by a decision of Commanding Officers to take administrative action. We believe that greater use could be made of this authority that Commanding Officers have to ensure compliance with conditions of a diversion agreement. Some of the charges that are preferred to Court Martial are certainly the type that would be eligible for diversion programmes in the civilian system. In the three civilian justice systems examined, diversion programmes, either formal or informal, have been instituted with a noticeable impact on reduction of delay by diverting minor criminal cases from the trial system and saving precious court time for serious and sensitive cases.

3.8 COURT RELATED ISSUES

Both civilian and military prosecutors are required to deal with Charter applications. In New Brunswick, Ontario and Nunavut, Charter motions have been responsible for utilizing a great deal of court time. The RMP's advise that, in most Courts Martial, they must argue Charter applications and that they consume considerable time at Courts Martial. It is our experience in recent years that judges in the Provincial and Superior courts have been less receptive to Charter Motions that appear to be frivolous and are trivializing the Charter of Rights. Judges in the civilian court system insist on proper notice being provided to opposing counsel and are quick to dismiss a motion that appears to be frivolous, stultifying argument and thereby saving court time. This does not appear to have been the situation with the Court Martial court and trials appear to us to be excessively long, considering the minor nature of the charges that this court hears. In addition, the RMP's must provide advice to the police, which has to take into account Charter implications.

At present there are fewer sentencing options available to the Military Judges than in the civilian systems of New Brunswick, Ontario and Nunavut. This could limit the ability for RMP's to resolve cases through plea negotiations. We have been informed that this situation may change if Bill C-45 is passed by Parliament.

3.9 CASES AND CASELOAD

RMP's deal with minor disciplinary matters under the military Code of Discipline. These charges, which are foreign to the civilian jurisdictions of New Brunswick, Ontario and Nunavut, take up a great deal of the time of the RMP's.

A further distinction between the cases that a military prosecutor and a civilian prosecutor in New Brunswick, Ontario and Nunavut have to deal with is that a large part of case-load for civilian prosecutors consists of impaired driving charges and domestic assaults. By policy, the RMP's do not deal with these categories of cases even if they involve CF personnel. These cases, which often proceed to trial in the civilian system because of the adverse effects of a conviction on the accused, add considerably to the volume of trials that are heard in the three civilian jurisdictions.

A final point that is worth mentioning is that, in New Brunswick, Ontario and Nunavut, civilian prosecutors have much greater case loads than do their RMP counterparts. They do not have the time to conduct lengthy pre and post-charge reviews. This will be dealt with later in the Report.

4 THE INVESTIGATION STAGE

4.1 INTRODUCTION

Delays at the investigation stage, as well as the inconsistent quality of investigations, are major problems for the military justice system. They have an impact on all subsequent stages of the process up to and including the Court Martial trials. The issues connected with investigations would merit a separate study; but we felt we should at least touch on them in our Review as they are closely related to the work of prosecutors.

Investigations in the military justice system are conducted by the Units, regular Military Police officers, or the National Investigation Service branch of the Military Police. Approximately 50-60% of the Court Martial cases are investigated by the NIS. The practices of the three investigating authorities are different; but excessive delay in completing the investigations is common to all.

For the sake of clarity, when we refer to the "Military Police" in this chapter we mean the regular members who are not attached to the NIS.

4.2 DELAYS AT THE INVESTIGATION STAGE

The statistics that we were able to obtain show the average number of days from the date of the incident to the charge laid (Appendix "C"). In 2004-2005, it was 296 days or a full 50% of the total time from incident to final disposition of the charges. In 2005-2006, it was 191 days (38%), and in 2006-2007, it took 236 days (36%). Since these figures can be skewed by the late-reporting of incidents to the authorities, we analysed the "mean" time for 10 "typical" cases completed in 2007 and found it to be approximately 136 days (27%) (See Appendix "D"). This amount of delay should be of great concern to everyone, since the target total time period of 6 months to deal with cases from incident to final disposition of charge is used up to a great extent during this initial stage.

There are several steps between the incident and the laying of charges. We could find no data that indicates the time taken up with each step. There are contradictory views. For example, the NIS advised us that, in 2005, they carried out 112 sexual assault investigations and on average they took 84 days to investigate each. The NIS maintains that the biggest single cause of delay is the pre-charge reviews conducted by the RMP's. The RMP's, on the other hand, told us they usually complete the reviews within the 14 day target.[21]

A breakdown of the available data is required to fully understand the delays at this stage and to know where to focus initiatives. It would be important to have the following information:

- The number of days from the completion of the investigation to the approval of the police report by police superiors (We understand that this may sometimes take longer than the investigation itself, and is particularly a problem with the Military Police)
- The number of days from when the police report is forwarded to the Unit until charges are laid.(It may take some time for the DJA's to analyze the case, provide an opinion, and for the charge-laying authority to make a decision)
- The number of days that it takes for the RMP's to conduct their pre-charge review and give their opinion to the NIS.

[21] A Service-level Agreement between the CMPS and the NIS set a target of 14 days for the completion of the pre-charge reviews. The agreement has expired and has not been re-signed.

- The amount of time spent by the investigating authorities following up on requests made by DJA's and RMP's for additional investigation.

> **4.1 We recommend that, in order to better understand the reasons for delay and to know where to focus initiatives, more detailed statistics should be kept with respect to the time that has elapsed from the incident to the laying of charges. There should be a breakdown showing how long it took for the investigation reports to be approved by superiors, how long it took to obtain the required legal advice and to follow-up on that advice before charges were laid.**

We understand that the initial Unit investigations usually do not take very long; but the problem is with their poor quality and subsequent delays when follow-up is requested by the RMP's. We were advised that investigations conducted by the regular Military Police may take an inordinate amount of time to complete. NIS investigations are the most professional; but improvements are still required, particularly with respect to timeliness and focus.

The problems with the Military Police, including the NIS, are similar to the problems in the CMPS. The police officers and investigators are frequently rotated and they are not in their positions long enough to acquire a great deal of experience. Furthermore, because of the small number of Court Martial trials, they are seldom called upon to testify in court, which, in our experience, is one of the most valuable lessons for any police officer. Like RMP's, Military Police officers also tend to be "risk adverse". We heard concerns expressed about police "over-investigation" and about "lack of focus" on the essentials. Too much time is spent videotaping every witness interviewed. A simple bar fight may take several months to investigate. The briefs prepared may be excessively long and difficult to understand.

In the civilian system, investigation of the types of cases that go to Courts Martial would usually be completed within a couple of days at most. The sheer volume of cases that the civilian police have to process simply does not permit lengthy investigations, except for complex or sensitive matters.

It is difficult, in principle, to criticize the practice of conducting thorough investigations. However, in a system where speedy justice is a high priority, investigations need to be completed in a timely manner with an awareness of the impact that delay can have on the entire process. The time spent on investigations should also be proportionate to the seriousness of the matters involved.

We believe that a time standard or target needs to be established for the completion of investigations. We suggest that it would be reasonable to expect that investigations of matters that are relatively straight-forward should be completed in one month. This should include whatever time is required for police superiors to review the investigation report. Obviously, complex cases, for example those involving forensic examinations, will require more time to investigate.

> **4.2 We recommend that a time standard or target of one month be established for the completion of investigations in straightforward cases. This applies to investigations conducted by the Units, regular Military Police officers, and the NIS.**

4.3 QUALITY OF THE INVESTIGATIONS

All of the RMP's we interviewed advised us that the Unit investigations were far below the standard required for Courts Martial and that, quite often, investigations conducted by the regular Military Police were not much better. They referred to having to "re-do" these investigations and advised us that this accounts for much of the time taken up doing their post-charge reviews.

The members of the Units who conduct investigations are not professional investigators. The regular Military Police officers also have very limited investigation experience. Most of the cases they handle are dealt with at Summary Trials where the rules of evidence are much more flexible than at Courts Martial. In most cases, while carrying out the investigations, they do not know that the matter will be proceeding by Court Martial and learn that only after the accused is charged and put to his/her election. We believe that the problem for RMP's is that these cases are investigated to the "Summary Trial standard" with which the investigators are familiar; but not to a "Court Martial standard" that they are not used to and of which they may not even be aware.

We suggest that the way to address this is through training of the Unit investigators, the regular Military Police members, and, as well, the Deputy Judge Advocates (DJA's) who provide advice on the files. We deal in more detail with the DJA's in Chapter 5.

The CMPS does not have the same opportunity to influence the conduct of Unit and Military Police investigations as do the AJAG's and the DJA's. There is little consistency in how those investigations are carried out. We believe the AJAG's, in consultation with the CMPS, should take the lead in developing standard practices for those investigations.

From our experience in the civilian system, we have found that checklists, prepared by prosecutors, for some of the more technical offences can be of assistance to police investigators. They help ensure that the officers turn their minds to each element that must be proven with regard to those offences under investigation. We believe that such checklists, dealing with the most common disciplinary offences, such as "disobeying orders", may also be helpful to Unit investigators and the Military Police.

The cases where an accused elects trial by Court Martial are spread across Canada and are not that many. When that election is made, the investigators and the DJA's should pay special attention to those few cases. They should review them again if necessary, make certain that the investigation is complete and that there is sufficient evidence to prove the essential elements of the offences at a Court Martial. This should be done as quickly as possible and pro-actively rather than waiting for requests to come from the RMP's.

4.3 We recommend that the AJAG's , in consultation with the CMPS, take the lead in developing standard practices for Unit and Military Police investigations.

4.4 We recommend that Unit investigators and Military Police officers be provided with additional training concerning the evidence that is required if a case proceeds to Court Martial. This training should be done by Deputy Judge Advocates and, whenever possible, by RMP's. The use of checklists should be considered.

4.5 We recommend that, when an accused elects to proceed by Court Martial, the DJA's and investigators should give the case special attention. They should make sure that the investigation is complete and that all the essential elements of the offence can be established at a Court Martial. They should do this pro-actively without waiting for the RMP's to make the requests.

4.6 We recommend that, when RMP's make a request for additional information or investigation from Unit investigators, Military Police or NIS officers, they should provide a reasonable timeline by which the results are expected. A copy of the request and timeline should be sent to the investigators' superiors. The timelines should be enforced. It must be understood by investigators that RMP's will not wait indefinitely for outstanding matters to be completed and that they have the discretion not to proceed with cases that they believe have taken too long to bring to Court Martial.

We have learned that the RMP's are generally satisfied with the investigations carried out by the NIS. However, there are areas where the relations between the two organizations could be improved.

The following views were expressed by some of the people we interviewed:

- Sometimes RMP's have to wait for months for NIS officers to complete further investigation that has been requested. It is quite common for NIS investigators to be transferred, or are otherwise unavailable, and the RMP's have difficulty finding someone to take responsibility for the file.
- The briefs prepared by the NIS are long and unwieldy.
- There is no need to videotape the statements of so many witnesses.
- NIS officers feel that the expectations of RMP's are too high; they try to anticipate every conceivable defence and they want cases that are absolutely "air-tight".
- NIS officers find it difficult to get timely legal advice from RMP's on the conduct of investigations.

We reviewed a number of files involving NIS investigations and found them to be very detailed and complete. The investigations appear to be very thorough and the volume of reports, statements, videotapes and other documents in the files is comparable to what we would see only in the most serious criminal cases in the civilian system. Given the relatively minor nature of most of the matters involved, we feel the investigation reports could be shorter and more focused.

We suggest that a standard format for Military Police briefs would be helpful. We understand that there is an NIS initiative underway to develop an electronic brief and the CMPS should work jointly with the police on this brief. The investigation reports that are filed on the SAMPIS program currently used by the NIS are too voluminous and do not deal with information in a focused manner.

We were advised that time is expended by RMP's preparing will-say statements for witnesses that the Regulations dictate must be disclosed to Defence Counsel. The quality of the will-say statements in the police briefs should be sufficiently high to meet this obligation.

There is some perception that the NIS is resistant to receiving advice about their investigative practices and has the tendency to assert its independence when issues arise. If the efficiency of the Court Martial system is to improve, co-operation between all of the participants is absolutely essential.

The Service-level Agreement that covered the working relations between the CMPS and the NIS has expired and a new one has not been signed. We feel that it should be a high priority for the DMP and the Commanding Officer of the NIS to negotiate and enter into a new agreement as quickly as possible. The agreement should address the issues between the CMPS and the NIS referred to above, including:

- A timeline within which pre-charge reviews by the CMPS should be completed. This will become particularly important if a decision is made to apply the higher standard of "reasonable prospect of conviction" at this stage as we have recommended in Chapter 7 of this report. We feel it would be reasonable to maintain the 14 day target even if there is this new standard.
- A timeline for the NIS to conduct any further investigation requested by the NIS. Again, we consider that 14 days would be reasonable.
- The requirement that all RMP requests to NIS investigators for additional investigation be copied to the officer in charge of the NIS branch.
- A process whereby a new investigator is assigned to the case if the original one becomes unavailable.
- NIS accessibility to RMP's for timely legal advice on matters pertaining to investigations.

4.7 We recommend that a new Service-level Agreement between the CMPS and the NIS, dealing with the issues between the two organizations, be negotiated and signed as soon as possible.

4.8 We recommend that the CMPS work with the Military Police (NIS) to develop a standard electronic brief format. The brief should include a list of the essential elements of the offence and the evidence available to prove those elements. We recommend that the standard brief include will-say statements of witnesses that are of sufficient quality to comply with the disclosure requirements in the Regulations.

4.9 We recommend that the CMPS and the Military Police, including the NIS, engage in discussions in order to arrive at an agreement dealing with those situations in which it is necessary to videotape or audio-tape witness statements and when that is not essential. This should result in guidelines from the police superiors to their investigators.

We suggest that some of the issues relating to investigations, such as the need to focus on the essentials and restricting the use of videotaping statements, can best be addressed through police training. The CMPS should be actively involved in that training and this would be greatly facilitated if an RMP is permanently located at CFB Borden, the site of the Military Police Academy.

4.10 We recommend that the CMPS be actively involved in training programs for Military Police officers.

We were told that much time is expended by RMP's attempting to locate those investigators who are responsible for the investigation of cases and witnesses to be interviewed for post-charge review. This difficulty is caused by deployments, reassignments, training, sick-leave etc. Most large civilian police forces have "Court Liaison" officers or sections. The people doing that job act as the liaison between the force and the courts, prosecutors, and defence counsel. Sometimes they are civilian members of the police forces. They have a broad range of functions. The prosecutors find it convenient to have someone they can easily contact if they need something from the police in relation to a case rather than trying to track down the investigators. The court liaison officers also assist in providing disclosure to defence counsel and are in a position to advise the courts about members' availability when trial dates are scheduled. We believe that the creation of such positions in the Military Police Service, including the NIS, could be of assistance.

4.11 We recommend that consideration be given to the appointment of staff in the Military Police, including the branches of the NIS, to act as "Court Liaison Officers" and to carry out similar duties as are performed by those personnel in the civilian police forces.

4.4 THE INVESTIGATION FILE (DISCLOSURE TO THE PROSECUTION)

In the fiscal year commencing April 1, 2006 to March 31, 2007, it took an average of 73 days from the date the charges were laid until the referral. In the ten cases dealt with in 2007-08 that were examined, this time period was approximately 78 days. During this time period the accused has already been charged, but no action on the file is being taken by a prosecutor. In order that the time be put to good use, we feel that the RMP who will likely be dealing with this case, assuming there is a referral, should begin familiarizing himself/herself with it as soon as possible. In order to make this happen, we believe that, as soon as a decision is made by a Commanding Officer to send the case to a Referral Authority, the process of transmitting the complete investigation file to the RMP's in the Region should begin immediately.

The file that is needed by the RMP's is the complete investigation file, including the video-taped witness statements. We understand that the DJA's who have been providing legal advice up to that point in time, and the Commanding Officers, usually rely on investigation reports and summaries rather than the entire file. It is our suggestion that someone should be assigned the specific responsibility for taking steps to ensure that the entire investigation file is forwarded to the RMP's. That person should take the initiative to have the file sent rather than waiting for an RMP to request it. Consideration should be given to making this the responsibility of either the Commanding Officer who decides to proceed with a charge or the DJA who has been providing advice on the case.

At the same time that the file is sent to the RMP's, they should be notified of the name of the individual who will be responsible for the case on behalf of the investigation. This will be the person who the RMP's should deal with during the post-charge review in order to answer any questions they may have and to arrange for such further investigation as may be required. The same person will also assist the RMP's through to the completion of the Court Martial. If that individual is deployed, transferred or becomes unavailable to work on the file for any other reason, a replacement must be appointed forthwith.

We also believe that it would be very helpful for the RMP's who are conducting the post-charge reviews to have access to all opinion memoranda regarding the cases that have been prepared by the DJA's to support their advice to charging authorities and Commanding Officers. We believe that, in law, these memoranda are privileged and they would not normally have to be disclosed to the Defence, even if they are made available to the RMP's. These memoranda should be forwarded to the RMP's at the same time as the case file.

4.12 We recommend that, as soon as a decision is made by a Commanding Officer to send a case to a Referral Authority, the process of transmitting the complete investigation file to the RMP's in the Region should begin immediately. It should not be necessary for the RMP's to wait until after the case has worked its way through the chain of command to referral to get the file.

4.13 We recommend that someone should be assigned the specific responsibility for taking steps to ensure that the entire investigation file is forwarded to the RMP's. That person should take the initiative to have the file sent rather than waiting for an RMP to request it. Consideration should be given to making this the responsibility of either the Commanding Officer who decides to proceed with a charge or the DJA who has been providing advice on the case.

4.14 We recommend that, at the same time that the file is sent to the RMP's, they should be notified of the name of the individual who will be responsible for the case on behalf of the investigation. This will be the person who the RMP's should deal with during the post-charge review in order to answer any questions they may have and to arrange for such further investigation as may be required. The same person will also assist the RMP's through to the completion of the Court Martial. If that individual is deployed, transferred or becomes unavailable to work on the file for any other reason, a replacement must be appointed forthwith.

4.15 We recommend that the legal advice memoranda to the charging authorities and to the Commanding Officers prepared by the DJA's be made available to the RMP's who are conducting the post-charge reviews and they be forwarded to the RMP's at the same time as the case file.

4.16 We recommend that, absent special circumstances, the post-charge review should be completed within the Region where the charge is laid. A good practice would be for the

RMP's in the Region to begin familiarizing themselves with the file once the Commanding Officer has decided to proceed, even before referral.

5 THE CHAIN OF COMMAND AND THEIR LEGAL ADVISORS

5.1 INTRODUCTION

The objective of the military justice system is to enforce discipline. The Chain of Command is responsible for discipline and it follows that they have a legitimate and important role to play in making decisions or recommendations regarding Court Martial cases. The problem is that the procedure currently followed for their input adds substantially to the overall delay in those cases.

5.2 EXTENT OF THE DELAY

The data available to us shows the extent of delays while cases were in the hands of the Chain of Command, that is, the number of days from the date the charge was laid to referral for disposition. In 2006-2007, it was 73 days. In our sample of 10 typical cases in 2007 it was approximately 78 days. This constitutes between 11 to 15% of the total overall delay. We believe that this period is much too long considering the goal of 6 months from "incident to completion" for most cases.

Unfortunately, data was not available to show how much delay was attributable to the various steps during this stage. Following the laying of charges, Commanding Officers must decide whether to proceed with the charges. They are first required to obtain the advice of the unit legal advisor.[22] We do not know how long it takes to obtain that advice and how long Commanding Officers take to act on that advice. If the Commanding Officers decide to proceed with the charges they must send an application to a Referral Authority. The Referral Authority may seek the advice of a legal officer before sending his/her recommendations on to the DMP. Again, we do not know how long it takes for the Referral Authority to obtain the advice and then to act on it. This type of information is necessary to manage the system and to know where to focus initiatives.

> **5.1 We recommend that, in order to better understand the reasons for delay and to know where to focus initiatives, more detailed statistics should be kept with respect to the time from the laying of charges until referral to the DMP. There should be a breakdown showing how long it took for the Commanding Officers and the Referral Authorities to obtain legal advice and to act on it.**

5.3 LEGAL ADVICE TO THE CHAIN OF COMMAND

The DJA's provide legal advice on the same case on at least three occasions. Firstly, the DJA advises the member of the Unit who has been delegated by the Commanding Officer to lay charges, then provides advice to the Commanding Officer and, finally, may provide advice to the Referral Authority. Sometimes it is the same DJA providing the advice at all these points and sometimes it is a different DJA. Quite clearly, this is inefficient, unnecessarily time consuming, and the process for obtaining legal advice should be streamlined.

We suggest that the DJA's should prepare one written legal opinion for the member of the unit delegated by the Commanding Officer to lay charges. That memorandum should deal with the sufficiency of evidence to lay charges and the public interest in proceeding. A copy of that opinion should be sent to the Commanding Officer. We see no reason why the Commanding Officer should be required to obtain another legal opinion before deciding whether to proceed with the charges. Seeking that opinion should be optional. The relevant

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22 QR&O's article 107.11

issues for the Commanding Officer should already have been covered in the initial legal opinion from the DJA or from an RMP if it is an NIS laid charge.

As discussed below, we are suggesting that the Commanding Officers send a request for prosecution directly to the DMP. They should simultaneously forward all relevant documentation to the Referral Authorities, including the initial legal opinions. The Referral Authorities should normally base their recommendations on those opinions without seeking further advice.

In Chapter 6, we discuss the evidentiary test that should be applied by the legal advisors and recommend that both the DJA's and the RMP's use the "reasonable prospect of conviction" standard at the pre-charge stage.

> **5.2 We recommend that, in most cases, there should only be one written legal opinion before referral. The opinion should be prepared by either the DJA's, for the members of the Units responsible for laying charges, or by the RMP's for the NIS. These opinions should deal with the sufficiency of evidence, applying the "reasonable prospect of conviction" standard, the charges to be laid, and the "public interest". In deciding whether to proceed, the Commanding Officers should not be required to seek another opinion and should normally act on those initial opinions. The Referral Authorities should do the same when considering their recommendations to the DMP.**

5.4 THE INPUT OF THE CHAIN OF COMMAND WITH RESPECT TO CHARGES

For a speedy system of military justice, the Chain of Command cannot afford to hold up the process for 73 to 78 days while deciding whether charges that have already been laid should proceed. From what we can determine, it appears that no other work is presently being done on the cases during this time period. Furthermore, the accused, although charged, is left "in limbo", not knowing whether the charges will be proceeding.

We believe that the Chain of Command should continue to have input in decisions relating to cases heading for disposition by Court Martial; but, for the sake of efficiency, restrictions must be placed on how long that input takes. The process following the laying of charges, until the cases come into the hands of the prosecutors, must be streamlined. The quicker the CMPS gets the Court Martial cases after charges are laid the better. They could begin reviewing the cases immediately. We feel, therefore, that Commanding Officers should send the cases to the CMPS for prosecution as soon as they decide to proceed. They should forward copies of the relevant documentation to the Referral Authorities who should then be given a standard time to provide their input to the DMP before the case is preferred to Court Martial. If the Referral Authorities do not provide their recommendations within that time period, it would be assumed they have nothing to add.

We have recommended in Chapter 4 that the target time for the completion of investigations, including obtaining advice from the DJA's or the RMP's, should be one month for a usual type of case. It is our belief that it would be reasonable for the Chain of Command, including the Commanding Officer and the Referral Authority, to have another thirty days (in total) to provide their input. This time period could be divided between them, with the Commanding Officer having two weeks to decide whether to proceed with the charges and the Referral Authority having a further two weeks to send recommendations, if any, to the DMP.

We appreciate that these timeframes are extremely short compared to the current situation where it takes, on average, 9 months from "incident to referral". However, we see no other way to achieve the overall target of 6 months from "incident to completion", which we understand is necessary for effective enforcement of discipline.

5.3 We recommend that the standard time period for Commanding Officers to make their decisions whether to proceed with cases after charges have been laid should be two weeks. If they decide to proceed, they should send a request for prosecution directly to the DMP and forward copies of all documentation to the Referral Authorities. The Referral Authorities should have two weeks to forward their recommendations, if any, to the DMP. If the DMP does not hear from the Referral authorities within that timeframe, the DMP may assume they have nothing to add to the positions already taken by the Commanding Officers.

The input from the Chain of Command is most important on the issue of "public interest". Firstly, it is germane to the public interest in proceeding with the prosecution. Secondly, it is relevant to the sentence that should be imposed for the offence if the accused pleads guilty or is adjudged guilty after a Court Martial trial. We believe that it would be helpful for Commanding Officers to advise the DMP, in their request for prosecution, what sentence they believe would be appropriate for the enforcement of discipline in the specific case. This information could be of assistance to prosecutors in their resolution discussions with defence counsel and potentially speed up matters at sentencing hearings.

We heard that Commanding Officers have become detached from the Court Martial system. The process takes so long that it has become irrelevant to them for the enforcement of discipline. By the time a trial is completed, the members who were in the Unit when the offence occurred often in the same unit and do not see any consequences.

We heard concerns that, when cases go into the lengthy Court Martial system, Commanding Officers lose touch and are not kept aware of the progress of charges. This reinforces their general sense of detachment from the process. We believe they should be "kept in the loop" and advised, on a regular basis, by the RMP's of the status of each case that pertains to their Units.

5.4 We recommend that, when referring cases to the DMP for prosecution, the Commanding Officers indicate their views on the appropriate sentence that should be imposed for the offence if the accused pleads guilty or is adjudged guilty after a Court Martial trial. Those opinions should be taken into consideration by the RMP's, but would not be binding on them.

5.5 We recommend that the RMP's regularly update Commanding Officers on the progress through the Court Martial system of every charge pertaining to their Unit.

5.5 THE ROLE OF THE DJA'S

The DJA's play a very important role in providing advice to the delegated charging authorities, Commanding Officers, and Referral Authorities. The quality of the advice they provide at the "front end" has a great impact on the CMPS and the entire Court Martial process. An efficient system is dependent on the DJA providing sound legal guidance to Unit and Military Police investigators. Failure on their part to screen out weak cases will add to delays.

The above emphasizes that close co-operation between the DJA's and the prosecutors in the CMPS is essential. At the same time, their independence from one another must be recognized. The DJA's are advisors to the Chain of Command, whereas the military prosecutors act in the interests of the justice system as a whole.

5.6 We recommend that the CMPS provide continuing education, on a regular basis, to DJA's with respect to the requirements of Courts Martial. Most importantly, the education should deal with the elements of offences and what is necessary to prove them. The Appeals Counsel (DMP-4), as part of his/her responsibilities, should ensure that the DJA's are kept up to date with current decisions relevant to Courts Martial and informed of problems encountered in court as the result of inadequate investigation or advice.

5.7 We recommend that DJA's be given the opportunity to participate as co-counsel (second chair) with RMP's at a few Courts Martial in order to give them a better appreciation of what is expected at those trials.

5.8 We recommend that DJA's be invited to attend the joint educational program conducted for RMP's and for the military defence counsel in order to keep them appraised of issues pertaining to Courts Martial.

We have already recommended in Chapter 4 that, when an accused elects to proceed by Court Martial, the DJA's should give the case special attention. They should make sure that the investigation is complete and that all the essential elements of the offence can be established at a Court Martial. They should do this pro-actively without waiting for the RMPs' to make the requests.

6 POLICIES AND PRACTICES OF THE C.M.P.S.

6.1 INTRODUCTION

We were asked to review the policies and practices of the CMPS, to compare them with three civilian prosecution services, identify any policies and practices that can contribute to delay and to make recommendations about changes that may assist in minimizing delay. We have considered the various policies contained in the CMPS Policy Manual, the policies and procedures that relate to military prosecutors that are found in the Queen's Regulations and Orders (QR&O's), directives issued by the DMP, as well as practices followed by the prosecutors that are not reduced to writing.

Although there are delays throughout the military justice system, we believe that changes to CMPS policies and practices can have a considerable impact on overall delay reduction. Some of the changes we are recommending can be made by the DMP, while others are beyond the authority of the DMP and would require amendments to the Queen's Regulations and Orders.

6.2 PROSECUTORIAL INDEPENDENCE

It is clear that there is much less delegation of independent decision-making authority to RMP's in the CMPS than to civilian prosecutors in the other jurisdictions we have examined. We must acknowledge, however, that there has been a substantial change in position taken by the DMP on this issue following a conference call with the RMP's on March 5, 2008. We believe that this is a very positive first step in delegating more authority to the RMP's.

The Attorney General of Ontario Advisory Committee chaired by the Honourable G. Arthur Martin stated the following in their report:

> During the course of the Committee's oral hearings, the point was repeatedly made that Crown Counsel need to be accorded generous latitude by the Attorney General to exercise their discretion in the circumstances of each individual case. The submissions to the Committee, from Crown and Defence Counsel alike, were virtually unanimous that Crown Counsel conducting any given case ought not to be constrained by binding directives applicable across the Province.
>
> As will become apparent in its recommendation, the Committee accepts the submission that directives binding the discretion of Crown Counsel in the conduct of a case should be few and far between. In the Committee's view it is important to preserve a prosecutor's independent discretion for two reasons. Firstly, in the Committee's view, prosecutorial discretion is necessary to appropriately respond to the infinite variety of circumstances that may lead to an allegation of criminal wrong-doing..... Second, comprehensive prosecutorial discretion is, in the Committee's view, necessary to preserve and perpetuate sensitivity in the administration of criminal justice to unique local conditions, local practices, and local needs.[23]

We have examined the written policies relating to independence and accountability of prosecutors in the CMPS, in the Public Prosecution Service of Canada and Crown policies in Ontario and New Brunswick in order to see if there are any differences. The relevant extracts from those policies are reproduced in Appendix "F".

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[23] Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, 1993, Queen's Printer for Ontario, pp.40-41

It is evident that the written policies for the CMPS, the PPSC, and the Ministries of the Attorney General for the Provinces of Ontario and New Brunswick are essentially the same. Each policy makes it clear that the independence of individual prosecutors is not absolute. Prosecutors in the four jurisdictions are accountable to their superiors who may delegate independent decision-making to them. Prosecutorial discretion is guided by general policies applicable to all prosecutors.

The difference between the CMPS and the other jurisdictions is in the delegation of authority. We have been told by the RMP's that they are given practically no discretion. They must explain their post-charge review decisions in lengthy memoranda to the DDMP, analysing each element of the offence and the available proof. This is required even of highly experienced and competent Reserve Prosecutors on minor charges. Questions are often raised by the DDMP about the RMP's decisions and they must provide further detailed explanations. Military prosecutors are required to seek approval from the DDMP on all of their case-resolution and sentencing positions. We were told by the RMP's that it is particularly difficult for them to decide not to proceed with a charge and that only the DMP herself can make that decision.

This degree of control over the decision-making of prosecutors is something we have not seen in the civilian prosecution services. It was explained to us that it is necessary because of the relative inexperience of RMP's. We disagree and believe that delegation of discretion should be dealt with on a principled basis rather than by a rigid prohibitive policy.

We believe that the high degree of control and supervision to which the RMP's have been subjected has led to an atmosphere in which some are afraid to make decisions and their confidence has been eroded. The requirement that they obtain approval for many decisions from their superiors has affected their relations with the police, judges, and defence counsel. Very importantly, it has impaired the ability of some to conduct meaningful resolution discussions with defence counsel. These factors have made some RMP's less effective prosecutors and this has contributed to delays.

We believe that the findings and conclusions on prosecutorial discretion made by the Criminal Justice Review Committee in the Province of Ontario in 1999 are so applicable to the CMPS that we decided to repeat them in full:[24]

> **Creating an environment conducive to the proper exercise of prosecutorial discretion**
>
> The professional judgement of experienced prosecutors is a valuable public resource which should be brought to bear at every stage of criminal proceedings. If the prosecution service concludes at any point in the criminal process that there is no reasonable prospect of obtaining a conviction, the prosecution should be halted. If the prosecutor concludes on reasonable grounds that the evidence of a witness is untrue or likely untrue on a material point, it is an appropriate exercise of prosecutorial discretion not to tender the evidence.
>
> In his report on the proceedings involving Guy Paul Morin, Commissioner Kaufman notes that the exercise of prosecutorial discretion requires great independence and security.
>
> > Complainants, victims, police officers and the media may be vocal in expressing their anger and concern if a prosecutor chooses not to call a witness due to doubts about reliability. The decision not to call a complainant for that reason may result in complaint to the Ministry. The decision not to call a police officer for that reason is difficult, particularly in jurisdictions where prosecutors deal with the same officers on a daily basis. ..... The exercise of such discretion by a less senior prosecutor may be particularly difficult.[25]

[24] Report of the Criminal Justice Review Committee, February 1999, Queen's Printer of Ontario, Chapter III, "Crown Charge Screening"

[25] Ontario, Report of the Commission on Proceedings involving Guy Paul Morin, Volume 2 (Toronto: Queen's Printer, 1998) at 1141 (Chair: Hon. Fred Kaufman).

We have been told that some Crown Counsel are reluctant to screen out charges in controversial cases because of fear that, to do so, will have adverse career consequences. It has also been suggested to us that some Crown Counsel feel that they will not be supported by their superiors if they make unpopular charge-screening decisions in high-profile cases. Whether these fears are valid or not, their existence highlights the need for the Ministry of the Attorney General and the Department of Justice (Canada) to foster work environments where prosecutors feel free to fearlessly exercise discretion on a principled basis, without concern for personal or professional repercussions.

An environment conducive to the fearless and principled exercise of prosecutorial discretion is fostered by ensuring that Crown Counsel have available to them experienced and respected mentors. Some Crown Offices have informally struck committees to review difficult charge-screening decisions. In at least one office, the review committee keeps a record of its deliberations to serve as precedents for future cases. As well as providing future guidance, this practice promotes a more uniform application of the charge-screening standards and ensures similar treatment for similar cases. So does the use of dedicated charge-screening units and long-term charge-screening assignments.

Principled decision-making is an essential aspect of the prosecutor's public function. A Crown Counsel who is not prepared to make difficult decisions is shirking one of the prosecutor's most important responsibilities. Prosecutors should expect neither to be exempt from public scrutiny nor shielded from public accountability. They must expect on occasion to be called upon to explain controversial decisions. They are also entitled to expect support from their superiors if they exercise their discretion on a principled basis.

[The Committee then made the following recommendation]

> 3.2 The Criminal Justice Review Committee recommends that the Ontario Ministry of the Attorney General and the Department of Justice (Canada) examine ways to foster work environments where prosecutors feel free to fearlessly exercise discretion on a principled basis, without concern for personal or professional repercussions. We endorse the recommendation of Commissioner Kaufman that the Ministry of the Attorney General take measures, including but not limited to, further education and training of Crown Counsel and their superiors to ensure strong institutional support for the exercise of such discretion.[26]

The exact issues identified by the Criminal Justice Review Committee with respect to prosecutorial independence were raised repeatedly throughout our interviews with the RMP's and others. We feel that the recommendation made by the Committee is equally applicable to the CMPS and we adopt it for our report.

> **6.1 We recommend that the CMPS examine ways to foster a work environment where Military Prosecutors feel free to fearlessly exercise discretion on a principled basis, without concern for personal or professional repercussions. We further recommend that the CMPS take measures to ensure strong institutional support for the exercise of such discretion.**

On March 5, 2008, the DMP announced planned changes to DMP Policy Directive #3 that would result in the delegation of prosecutorial discretion to the RMP's for all decisions in cases assigned to them, except for those particularly serious or sensitive cases specified in a list. The RMP's clearly welcomed this change in policy, and, as indicated, we see it as a step in the right direction. There has not been an opportunity at this time to evaluate how this new approach will work in practice.

We believe that the approach taken in the civilian jurisdictions to the delegation of authority to prosecutors is preferable. Rather than being defined by certain categories of offences, it is dealt with by principles. This is a better approach since the circumstances of offences vary a great deal. For example, there may be certain cases

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26 Report of the Criminal Justice Review Committee, February 1999, Queen's Printer of Ontario, Chapter III, "Crown Charge Screening", pages 21-22

involving minor offences where the DMP and DDMP may wish to maintain tight control over decision-making, while there may be some very serious offences that can be dealt with by the most experienced RMP's with little or no supervision. We recommend the following approach to the delegation of authority:

6.2 We recommend that the general approach of the DMP and the DDMP should be to delegate responsibility for all aspects of decision-making to the RMP's with respect to the cases that are assigned to them. This delegation of authority should be subject to the following:

- **The RMP's should be encouraged to freely consult with the DMP, the DDMP and other Regular Force and Reservist RMP's when they feel they could benefit from advice.**
- **When assigning specific cases to the RMP's, the DMP and the DDMP should indicate whether it will be a requirement of the RMP's assigned to consult with them before the RMP's make certain decisions on those cases.**
- **The RMP's should be required to initiate consultation with the DMP or DDMP before making a final decision on one of their assigned cases that has the potential to become controversial or precedent-setting and may have consequences that could affect the military justice system as a whole.**

6.3 CHARGE REVIEW

Policies and practices of the CMPS relating to charge-review have a considerable impact on delay in the military justice system. The representative sample of ten typical cases dealt with in 2007-2008 shows that, on average, there is a delay of approximately 92 days from the time that the referral for disposition is received by the DMP until preferral of the charge. The Comparative Analysis of Court Martial time-lines by fiscal year indicates that the delays at this stage over the last seven years ranged from 77 to 139 days. In the fiscal year April 1, 2006 to March 31, 2007, the delay for the average case was 103 days.

There are also delays at the stage where the NIS is required to consult a military prosecutor before laying charges. We have not seen any statistics that indicate the extent of this delay. The 2000 Service-level Agreement between the CMPS and the NIS provided that pre-charge review should normally be completed in 14 days. As discussed in Chapter 4, there is disagreement between the NIS members and the prosecutors we interviewed about whether this target is being met. The prosecutors say it is usually met, whereas the NIS members say it often takes much longer than 14 days. Further analysis of this issue is required.

In any event, it is clear that the RMP's spend a great deal of their time reviewing cases. Considering that, on average, they each appear at only about 8 or 9 Court Martial hearings a year, it is safe to say that case-review and writing reports related to those reviews occupies the greatest part of their time. (We are aware that they also provide advice to NIS officers on investigations and have other responsibilities as well). We have paid particular attention to the issues associated with case-review to determine whether the time involved is well spent and necessary.

The current charge-review system in the military justice system is unlike any in the Canadian civilian justice systems. It is unique in the following ways:

- Military lawyers who are not prosecutors (Deputy Judge Advocates), provide initial legal advice on some decisions whether to lay charges and on all decisions whether to proceed with charges before the CMPS makes the final decision. This two-tier system of legal advice does not exist in the Canadian civilian system.

- The RMP's conduct pre-charge reviews of all NIS-investigated matters and post-charge reviews of all cases sent to the DMP by a Referral Authority, including the same NIS charges. In the civilian prosecution system, there are provinces, namely British Columbia, Quebec and New Brunswick that have pre-charge review (or charge-approval) systems for all cases, while the other provinces and territories have post-charge review systems for all cases. Only the CMPS has a system whereby prosecutors conduct both types of reviews with respect to some of the same cases.

Charge Review in the military justice system is an unusually complex area that took us considerable time to analyze. (We found that even those working in the system had to constantly refer to the QR&O's to refresh their memory on certain points as we discussed this topic) The following is a brief overview, as we understand it, of the main features:

- Charges may be laid by either a Commanding Officer, a person delegated by him/her, or by an NIS police officer.

- Where the charge-laying authority is not an NIS police officer, he/she must obtain advice from a unit legal adviser (DJA) before laying a charge in respect of all but the most minor breaches of the Code of Service Discipline.[27]

- At this pre-charge stage, the unit legal adviser is to consider both the sufficiency of evidence and the public interest. The evidence must give rise to a reasonable belief that the accused person committed the alleged offence. This is the same evidentiary standard as required for the laying of an Information pursuant to section 504 the Criminal Code of Canada.

- Where the NIS are considering laying charges, they must obtain advice from a military prosecutor (RMP). The military prosecutor is to apply the same standard as the unit legal adviser above, that is, "reasonable belief" and "public interest".[28]

- After a charge has been laid by anyone (including the NIS), it must be referred to the Commanding Officer who decides whether to proceed. The Commanding Officer must obtain the advice of the unit legal adviser.[29] Again, the unit legal adviser is to consider both the "sufficiency of the evidence" and the "public interest". At this stage, however, the evidentiary standard is somewhat more onerous than for the laying of a charge. In order to proceed, there must exist "admissible evidence upon which a service tribunal, acting reasonably, could convict the accused". This is the same evidentiary standard which a prosecutor must meet to justify a committal to stand trial after a preliminary inquiry pursuant to the Criminal Code of Canada (the "Sheppard Test"). It is also the standard that a Judge must consider if an accused brings a motion for a non-suit at the end of the evidence for the prosecution. It is a lesser standard than "reasonable prospect of a conviction" which involves some weighing of the evidence of prospective witnesses.

- If a Commanding Officer decides to proceed, he/she sends an application to a Referral Authority. The Referral Authority must forward the application to the DMP together with recommendations. At this point, the Referral Authority may seek advice from a legal adviser. The legal adviser should apply the same standard as in paragraph (e) above.

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27 Queen's Regulations and Orders, article 107.03

28 Military Police Investigations: Investigation Policy, Chapter 6, Annex A, "Interaction with Prosecutors", page 12, paragraphs 30 and 33

29 Ibid, article 107.11

- If the Commanding Officer decides not to proceed with an NIS-laid charge, the NIS may forward an application directly to a Referral Authority.[30]

- Once a charge has been forwarded by a Referral Authority to the DMP, a prosecutor conducts a post-charge review to decide whether to proceed with a Court Martial. The prosecutor must be satisfied that there is a "reasonable prospect of a conviction" and that it is in the "public interest" to proceed. This is essentially the same post-charge standard applied by civilian prosecutors throughout Canada and the same pre-charge standard applied by prosecutors in the provinces of Quebec, New Brunswick and British Columbia.[31]

6.3.1 PRE-CHARGE REVIEW

Pre-charge review by RMP's is usually conducted on the basis of a brief and draft charges provided by the NIS. We understand that it is not required, by any DMP Policy Directive, that RMP's prepare a formal written legal opinion to the NIS at this stage. We learned from our interviews of RMP's, however, that they usually provide a written memorandum to the NIS which may be quite lengthy and time-consuming. We were told that, if a different RMP is assigned to do the post-charge review, he/she finds it helpful to be able to refer to the pre-charge memorandum.

CMPS Pre-charge Policy # 002/99 on "Pre-charge Screening" provides in section 8 that "At this point in the process the prosecutor should not be conducting further investigation or interviewing witnesses." We found that, despite this policy, some RMP's feel that it is appropriate to interview important witnesses at this stage and do so from time to time.

In Ontario and Nunavut, it is not mandatory for the police to seek the advice of prosecutors before laying charges and, in the vast majority of cases, they do not. When they decide to consult, the opinions are usually provided verbally by the prosecutors, and it is good practice for the prosecutors to keep their own notes of the advice given.

The policies in Ontario and for the PPSC on pre-charge advice to the police relating to the laying of charges are not very specific when it comes to the test or standard to be applied by the prosecutors. It is generally understood by the prosecutors that, at this stage, they are to advise the police whether there is sufficient evidence to swear an Information in accordance with the Criminal Code. The Ontario Crown Policy on "Police Relationship with Crown Counsel" simply states as follows:

> Police may seek advice from Crown Counsel concerning legal issues arising in the investigation of offences. Crown Counsel may ask the assistance of police in conducting further investigations and providing further information. Each agency has a role to play, independent of the other, and neither agency is subordinate. This independence is fundamental to the maintenance of their role as "ministers of justice", and is essential to the proper administration of justice.[32]

It is interesting to note that an experimental programme has recently been started in Ontario introducing the practice of "pre-charge approval" of police charges by the Crown Attorneys in the jurisdiction of Manitoulin

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30 QR and O, articles 107.12 and 109.03

31 The exact wording varies somewhat and in BC, for example, the standard is " a substantial likelihood of a conviction"

32 Crown Policy Manual, Ministry of the Attorney General of Ontario, "Police: Relationship with Crown Counsel", March 21, 2005

Island. The aim of the programme is to reduce the large number of charges laid against aboriginal people in that area and to ensure that diversion is considered as an alternative to criminal charges.[33]

The policy of the PPSC on the relationship between Crown Counsel and the Police indicates as follows:

> Crown Counsel should be available for consultation during an investigation and before the laying of charges. This will encourage investigators to ask their advice. In complex cases, Crown Counsel may need to work closely with the police in identifying and acquiring relevant and cogent evidence. This does not mean, however, that Crown Counsel should assume responsibility for work that properly should be done by investigators. At the end of an investigation, counsel's role is to provide the investigators with a fair and objective assessment of the strength of the case and the appropriateness of proceeding. In performing this assessment, counsel must guard against the possibility that he or she has been afflicted by "tunnel vision", ie, has lost the ability to conduct an objective assessment of the case through contact with the investigative agency.[34]

The PPSC Policy also addresses the issue of prosecutors interviewing witnesses before charges are laid. It provides the following:

> Generally, Crown Counsel do not interview witnesses before charges are laid..... However, in some circumstances, it may be appropriate for Crown Counsel to interview a witness prior to charges being laid. Situations where this might be appropriate include:
>
> - Where the prosecution will depend on witnesses of an unsavoury background ....
> - Where the prosecution will depend on witnesses who may be reluctant to testify...
> - Where the case involves particularly problematic Charter issues.....
> - Cases where there is a statutory requirement for the Crown to consent to the laying of charges.[35]

The Policy in New Brunswick, which effectively has a pre-charge approval system, is much different than in Ontario, the PPSC, and CMPS. The Public Prosecution Services Operational Manual describes pre-charge review in the following terms:

> **The Decision to Prosecute**
> On completion of the investigation, if the police are satisfied that there is sufficient evidence to lay an information, they will formulate a charge, or charges, based on their assessment of the case and then forward a full report or court brief to the appropriate Crown Prosecutor's office for pre-charge review.
>
> **Pre-Charge Review by a Crown Prosecutor**
> This pre-charge review involves the application of the evidential test and the public interest test. This process includes an assessment of the proposed charge, and the determination of any procedural issues. It must be noted that the evidential test and the public interest test are essential considerations in the decision to prosecute that must be applied by Crown Prosecutors, on behalf of the Attorney General...
>
> **The Evidential Test**
> Crown Prosecutors must be satisfied that there is evidence to provide a reasonable prospect of conviction against each alleged offender on each charge. A reasonable prospect of conviction is an objective test. It means that an impartial trier of fact (a Judge, or a Jury properly directed in accordance with the law) is more likely than not to convict on the offence charged. .....

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33 It is to be noted that Reservist RMP Lt. Cmdr. Rob Fetterly of the Atlantic Region is seconded to that office at the present time and is familiar with this new programme.

34 Federal Prosecution Service Deskbook, (PPSC), Part III, Chapter 11, "Principles Governing Crown Counsel's Conduct", Section # 11.3.1, October 2005.

35 Ibid, Section 11.3.3.8, "Interviewing of Potential Witnesses Prior to Charges being laid", October 2005

The Public Interest Test
Having been satisfied that the evidence itself can justify proceedings, Crown Prosecutors will then consider whether the public interest requires a prosecution...

Role of the Police in Laying the Information

With Police Agreement after Pre-charge Crown Prosecutor Review
On agreement with a Crown Prosecutor the police will lay the information.

Dispute Resolution on lack of Agreement between Police and Crown Prosecutor
In cases where the Crown Prosecutor and the police are unable to reach agreement, the Crown Prosecutor will consult with the Regional Crown Prosecutor before a final decision is made on the file. It is expected that in certain cases the Regional Crown Prosecutor will also discuss the matter with the appropriate senior police officer with the objective of reaching agreement. .....[36]

The senior prosecutors who we interviewed in New Brunswick told us that pre-charge reviews are usually done very quickly, in a matter of minutes for most cases. The police submit files to the Crown Prosecutor's office and the files are given to a "Pre-charge approval Crown Prosecutor" who is assigned to do the pre-charge approvals for a month at a time. Crown Prosecutors are not given this responsibility until they have gained at least two to three years of experience and have the confidence to be firm with the police investigators. If the charge-approval Crown decides not to approve a charge, that is normally the end of the matter unless the investigator is adamant that the charge proceed. In that case, the superiors of the investigator contact the Regional Prosecutor for a review of the decision of the charge-approval Crown Prosecutor. That is, it is expected that in certain cases the Regional Crown Prosecutor will also discuss the matter with the appropriate senior police officer with the objective of reaching agreement. The Policy continues to add that, where the lack of agreement involves an issue affecting a provincial policing policy, the police agency should advise the Director of Policing and Emergency Services, Department of Public Safety, in order to provide an opportunity for law enforcement input with the Director of Public Prosecutions. If circumstances warrant, the Regional Crown Prosecutor or appropriate senior police administrator (the Municipal or Regional Chief of Police or the RCMP Officer in Charge of Criminal Operations) may refer the matter to the Director of Public Prosecutions with the objective of reaching agreement.[37]

Most accused persons in New Brunswick are given Appearance Notices to attend court or are summonsed to a first appearance court date in about six weeks from the date of the incident. During that time, the police prepare the court files and submit them to the Crown Prosecutor's office for a pre-charge review. If the Crown Prosecutor does not approve any charges the Appearance Notices are cancelled.

It was explained to us by the Regional Crown Prosecutor that, if further investigation is required and the file is incomplete, he will return the file to the police investigator and withhold his approval of the charge until he is satisfied that the investigation is completed and the Brief is adequate.

If a person is arrested, and the police are seeking to detain him in custody, the prosecutor does not have much time to review the file, since a charge must be laid and the accused brought before a Justice of the Peace within 24 hours for a Show-cause hearing. In such case, a more complete review of the case will be done by the prosecutor after the charge has been laid.

The Crown Prosecutor in New Brunswick will sometimes interview witnesses before a charge is approved; but this is usually reserved for special cases. Unless the cases are particularly serious or there are unusual

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36 Public Prosecution Services Operational Manual, Attorney General of New Brunswick, Attorney General's Policy-Public Prosecutions, page 2, "The Decision to Prosecute".

37 Ibid, pages 6-7

circumstances, the Crown Prosecutors will generally not review any video-taped statements of witnesses during the pre-charge review process.

Unless new information is brought forward, there is no post-charge review done by the Crown Prosecutors in New Brunswick until they are preparing the cases for Preliminary Inquiry or trial.

6.3.2 POST-CHARGE REVIEW

The tests applied by prosecutors in Canada at the post-charge screening stage (and at the pre-charge stage in New Brunswick, British Columbia and Quebec) are essentially the same as in the military justice system. The wording may vary from jurisdiction to jurisdiction; but it is generally recognized that the decision to prosecute should take into account the sufficiency of the evidence available to support the charge and an assessment of whether the public interest requires a prosecution.[38] The most onerous prosecution standard in Canada is applied in British Columbia, where the charge-approval process requires a "substantial likelihood of conviction". In Alberta, Saskatchewan and Manitoba the test is expressed in the phrase "reasonable likelihood of conviction". In Ontario, the formulation "reasonable prospect of conviction" is used and conveys that an appeal court would not be justified in overturning as an unreasonable verdict a conviction based on the evidence. For the Public Prosecution Service of Canada, it is also "reasonable prospect of conviction". The prosecution test in Nova Scotia is a "reasonable chance of conviction" and in Newfoundland and Labrador a prosecution cannot proceed, despite the presence of reasonable and probable grounds to believe an offence has occurred, if there is no "probability of conviction". It is somewhat incongruous that there are so many different formulations of the prosecution standard in jurisdictions subject to the same codified criminal law and procedure.[39]

The differences between the civilian jurisdictions and the military justice systems are not with respect to the tests to be applied by prosecutors doing the post-charge review, but rather with the depth of the reviews, the oversight by superiors, and the documentation that must be prepared to support the prosecutors' opinions.

In Ontario and Nunavut, the post-charge reviews are done by prosecutors based on briefs submitted by the police. For most cases, the reviews take a matter of minutes to complete. Often, one prosecutor will be assigned the responsibility of doing post-charge reviews of a large number of cases, sometimes as many as 20 a day. The prosecutors rely on the summary of the facts provided by the police, a summary of the statements of the witnesses and a copy of the Information containing the charges that have been laid by the police. It would be unusual for prosecutors to view video-tapes of witness statements. Only in very exceptional cases would the prosecutors interview witnesses at this stage. If clarification of something is required from the police or if the prosecutor is suggesting further investigation, a memo is sent to the investigating officer. The prosecutors may recommend that different or additional charges be laid and this is also conveyed to the police by means of a memorandum.

In addition to a review of the sufficiency of evidence and the public interest, a number of other decisions are made by the prosecutors at this stage. A decision is made on the election if "Crown-election" offences are involved. The prosecutors may refer the case for diversion, as well as to victim assistance programmes. An estimate is given of the length of court time that would be required for trial or, if applicable, for a Preliminary Inquiry. The prosecutors may also indicate whether a Judicial Pre-trial should be conducted with respect to the case and whether a Crown Attorney should be immediately assigned to deal with it. The prosecutors indicate the Crown's position on an early plea of guilty. The reviews are done by completing a standard form, mainly ticking off appropriate boxes. A legal memorandum is prepared only in exceptional cases.

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38 John Pearson, Director of Crown Operations, Central West Region, Ontario Ministry of the Attorney General, unpublished paper, "Preserving the Independent and Objective Public Prosecutor", November 2000.

39 Ibid, John Pearson.

In our experience, it is quite rare that a case will be screened-out at the post-charge review stage in Ontario and Nunavut on the basis of their being no reasonable prospect of conviction. (More cases are diverted). One of the reasons is that it is difficult to assess the strength of a case based on a brief without actually interviewing the investigating officer and the main witnesses. Time and the huge volume of cases simply do not permit that. There is also a tendency by prosecutors to leave the hard decisions to those who will be conducting the trials. Experience shows that, if post-charge screening is done by the prosecutors who know they will be conducting the trials, it is completed much more thoroughly. This has happened in jurisdictions where files are assigned to teams of prosecutors that are responsible for them from the beginning to the end.[40]

We acknowledge that the post-charge reviews in the civilian jurisdiction are often not sufficiently thorough. However, in the CMPS, we see the opposite extreme. In our opinion, the post-charge reviews by RMP's are conducted in excessive detail. The RMP's are very "risk-adverse" and are reluctant to leave any stone unturned. In general, the post-charge reviews are conducted to "trial preparation standards". We do not believe it is necessary for the RMP's to anticipate every possible defence. Neither is it essential for them to view every video-taped witness statement. We believe that fewer witnesses should be interviewed by them at this stage. The depth of their post-charge reviews is disproportional to the seriousness of the cases, most of which are quite minor in nature. In order to keep the process moving and reduce delays, the in-depth preparation should be done after the charges have been preferred when the prosecutors get ready for trial.

We see no necessity for RMP's to prepare a lengthy written analysis of the elements of each offence, and the evidence available to prove them, unless they wish to do so for their own trial preparation purposes. We have already referred to this in our discussion about prosecutorial independence. We believe it would be sufficient for RMP's to keep their own notes of their review in the file. We think it would be helpful to develop a standard form that they could use to guide them in the reviews.

6.3 We recommend that the post-charge reviews of cases, to the extent they are maintained for some or all cases, be conducted by the RMP's more expeditiously and in less detail than at present. We see no need for the RMP's to interview many witnesses or view all videotapes of witnesses' statements in most cases.

6.4 We recommend that the practice of requiring RMP's to submit lengthy written analysis of the cases they review post-charge be discontinued. They should keep their own notes of their review in the file and a standard form should be developed that they could use as a guide for conducting the reviews.

6.3.3 ADVANTAGES AND DISADVANTAGES OF A "CHARGE-APPROVAL" SYSTEM

Pre-charge approval systems exist in Quebec, New Brunswick and British Columbia. Under these schemes, charges are laid only if a Crown Counsel reviews and approves them. As described in the FPS Deskbook, "four main arguments have been advanced in support of a charge-approval process:

- it is fairer to the accused;
- it ensures that only cases with a reasonable prospect of a conviction will proceed;
- it is more efficient because fewer mistakes will occur in the laying of charges;
- and the decision whether to prosecute is more objective.

On the other hand, opponents of pre-charge screening say that:

[40] This has happened in the Crown Attorney's Office in the City of Ottawa since a system of "Vertical File Management" was introduced and specific teams of prosecutors are responsible for cases from the beginning to the end.

- Crown control of the process leads to the erosion of police independence,
- the making of decisions is behind closed doors rather than in open court,
- and a pre-empting by the Crown of the role to be played by the courts in the criminal trial process."[41]

The Attorney General of Canada considers that the following policy principles strike the appropriate balance between the role of the police and the role of Crown Counsel before charges are laid:

> Members of investigative agencies are entitled to investigate offences and carry out their duties in accordance with the law and general standards, practices and policies established by those agencies. During the investigation, investigators are entitled and encouraged to consult with Crown Counsel about the evidence, the offence and proof of the case in court. At the end of the investigation, investigators are again entitled (and strongly encouraged in difficult cases) to consult with Crown Counsel on the laying of charges. This consultation might include discussions about the strength of the case and the form and content of proposed charges. Ultimately, however, investigators have the discretion at law to commence any prosecution according to their best judgement, subject to statutory requirements for the consent of the Attorney General, and the authority of the Attorney General to stay proceedings if charges are laid.[42]

In Ontario, the policy governing the relationship between Crown Attorneys and police investigators was issued following a comprehensive review of the pre-trial stages of the criminal process by The Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions. The committee described the relationship between Crown counsel and police investigators in Ontario as one of mutual independence. While acknowledging the value of police consultation with Crown counsel when difficult legal issues arise during an investigation, the Committee stressed that:

> .....as a matter of law, police officers exercise their discretion in conducting investigations and laying charges entirely independently of Crown counsel. The police seek the advice of the Crown only where they "think" it appropriate. And while it is no doubt prudent to do so in many cases, the police are not bound to follow the advice of Crown counsel as that advice relates to the conduct of the investigation and the laying of charges.[43]

Ontario's policy for Crown Attorneys, as found in the Crown Policy Manual, reflects this position. It states that prior to the laying of charges by the police, the role of Crown Attorneys is of advisory nature only and not directive.

The Crown Policy Manual for Ontario states that, in difficult cases, police officers may be tempted to seek direction from Crown counsel on the charging decision rather than legal advice. Crown Attorneys are advised to make it clear to police requesting charging advice that the advice is not binding. To protect the hallmark principle of mutual independence, the police must ensure that the prosecutor is fully apprised of all circumstances giving rise to the request for advice, and, to avoid any misunderstanding about the advice provided, the policy recommends that, in difficult cases, Crown Attorneys take the following steps.

1. Require the police to furnish a full written investigative brief.
2. Provide the requested advice in writing, stating explicitly that it is based solely on the investigative brief.
3. Set out the legal test for determining whether the threshold test for laying a criminal charge has been met.

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41 Federal Prosecution Service Deskbook, Part III, Chapter 11, "Relationship between Crown Counsel and the Police", Section 11.3.4, "Charge Review"

42 Ibid

43 Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions (Toronto: Queen's Printer, 1993) at 37.

> There are historical, legal, and functional reasons for Ontario's view that Crown Attorneys should be limited to a purely advisory role during police investigations.[44] Central to Ontario's approach is the common law position, given statutory force in the provincial *Police Services Act*, that police officers maintain the status of a "constable" and are holders of a public office possessing original and not delegated authority. They are answerable to the law and to the law alone. Neither the "government" in general nor a specific "Minister of the Crown" can direct a police investigation. It follows that Crown counsel, who are agents of a Minister of the Crown, have no authority to direct police during an investigation or at the charging stage.[45]

The position taken by British Columbia, Quebec and New Brunswick is that the decision to lay a charge is distinct from the investigation of a crime.[46] The charging decision involves a judgement whether sufficient evidence exists to support a conviction. A police officer's belief that the accused committed a crime, even if based on reasonable grounds, is no guarantee that the accused can be successfully prosecuted. Supervision of the charging process by a legally trained Crown official avoids the infringement on individual liberty and the waste of public resources that are consequences of an unjustified prosecution. Mandatory screening of police charges by Crown counsel before they are laid also detects and corrects technical errors in the form of charges and reduces the time spent in court dealing with formal defects in Informations.[47]

The Provinces of Quebec, New Brunswick, and British Columbia have had their pre-charge approval systems in place for a considerable period of time and they have withstood legal scrutiny. We are confident that, from a legal point of view, there would be nothing preventing the Canadian Military Justice System from adopting the charge-approval regime. We believe that this is a policy question rather than a legal one.

In our view, the benefits of a charge approval system out-weigh the disadvantages and may be summarised as follows:

- It avoids the situation where someone is charged by the police only to have the charge dropped following post-charge review. Even if the charged is not proceeded with, the person's reputation has been negatively affected.
- It is more likely that trivial matters will be screened-out or diverted at this early stage rather than after a charge has been laid when expectations that the charge will proceed have already been raised.
- The post-charge start of the "Askov Clock" is delayed to the point where a prosecutor is satisfied that there is a reasonable prospect of a conviction and that it is in the public interest to proceed.
- The holding-up of the charges pending a prosecutor's approval provides an incentive for the police to complete their investigation efficiently and to provide a complete brief.

We note that in the military justice system, it is not necessary that a charge be laid before a suspect may be held in detention or subject to bail conditions.

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44 This is explained by John Pearson in his unpublished paper entitled "The Prosecutor's Role at the Investigative Stage from an Ontario Perspective". Undated.

45 Ibid

46 Ibid

47 Ibid, John Pearson's Paper

6.3.4 CHARGE REVIEW AND THE ACCUSED'S ELECTION TO PROCEED BY COURT MARTIAL OR SUMMARY TRIAL

We recognize that the introduction of a charge-approval regime in the military justice system would provide some problems, but we think they are surmountable. One concern is that many offences are subject to an option by the accused to elect trial by Court Martial or Summary Trial after the charges have been laid. The rules of admissibility of evidence are substantially different for Courts Martial and for Summary Trials. The Queen's Regulations and Orders dealing with Summary Proceedings state in Chapter 108.21(1): "The Military Rules of Evidence do not apply at a summary trial". Subsection (2) states: "The officer presiding at a summary trial may receive any evidence that the officer considers to be of assistance and relevant in determining whether or not the accused committed any of the offences charged..." Based on the same evidence, a prosecutor may well conclude that there is a reasonable prospect of conviction if the matter proceeds to a Summary Trial but not if it proceeds to a Court Martial.

We do not feel that it would be appropriate for the DJA's or RMP's to provide two opinions: one on the prospect of conviction if the accused elects a Summary Trial and possibly a different opinion if the accused elects Court Martial. This could have the effect of encouraging people to elect Court Martial because of the more onerous test. We are convinced, therefore, that, for electable offences, the pre-charge advice provided by the DJA's to charging authorities, and by RMP's to the NIS officers, must be based on the assumption that the accused will elect to proceed by Summary Trial. This position is supported by the policy governing the advice provided by DJA's to Commanding Officers whether to proceed with charges after they have been laid, but before the accused is put to his or her election. The JAG post-charge advice policy set out in Regulation 107.11, states in section 23:

> No election will have been given at this stage in the proceedings unless it is apparent that a commanding officer or superior commander would be precluded from trying the accused on that charge, it should be presumed that if the charge proceeds it will be dealt with at summary trial. Therefore, in most cases, the relevant standard of admissibility that will be applied by the unit legal adviser when assessing the evidence will be the one contained in QR & O Article 108.21 (reception of evidence) rather than the one used a court martial and reflected in the Military Rules of Evidence.

In conclusion, when the DJA's and the RMP's give pre-charge advice in relation to offences which they know will proceed by Court Martial, they should apply the test of "reasonable prospect of conviction" based on the rules of evidence applicable at Courts Martial. However, when they are giving pre-charge advice in relation to offences where the accused will be given the election, they should apply the test of "reasonable prospect of conviction" based on the assumption that the accused will be electing to proceed by Summary Trial.

> **6.5 We recommend that the tests described in the CMPS policies for pre-charge advice to the NIS, be changed to "reasonable prospect of conviction" and "in the public interest" for all offences.[48] Where the proposed charges are ones for which the accused will be given an election (following the laying of a charge), the prospect of conviction should be determined on the assumption that the rules of evidence applicable to Summary Trials will govern. Where the accused will have no election, the prospect of conviction should be determined based on the rules of evidence applicable at Courts Martial.**

The intended effect of introducing the higher standards for review of charges at the pre-charge stage will be to introduce a pre-charge approval regime akin to those of British Columbia, Quebec and New Brunswick.

We do not believe that the above recommendation would require any amendment to the "Military Police Investigations Policy" Chapter 6, Annex "A", article 33 which states:

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48 This would require an amendment to the DMP's Policy Directive # 001/00, March 1, 2000, section 3 and Directive # 002/00, March 1, 2000, sections 5 and 6.

> CFNIS members, before laying charges, shall consult with and obtain the opinion of their assigned RMP. In those rare situations where there is any disagreement regarding the laying of charges, the matter will be referred up both the CFNIS and Prosecution chains of command for resolution. Ultimately, the CFNIS will lay a charge if the resolution process fails.[49]

In the unlikely event that the disagreement cannot be resolved and the NIS proceeds to lay a charge, the DMP should decline to prefer it to Court Martial if the DMP remains convinced that there is no "reasonable prospect of conviction" or it is not in the "public interest" to proceed.

Our recommendation that the RMP's be given a greater role in the initial charging decision does not mean that they should assume responsibility for the conduct of the investigation. That will still remain the sole duty of the police and the respective roles of the RMP and the NIS investigator must be kept distinct. The New Brunswick Crown Prosecutors Manual states:

> ...it is of the utmost importance that Crown Prosecutors be aware that there is a fine line between providing legal advice during the investigative process and becoming unduly involved in these investigations to the extent of assuming control of the investigation.[50]

On completion of the investigation, if the NIS are satisfied that there is sufficient evidence to lay a charge, they should formulate the charge, or charges, based on their assessment of the case and forward a full report or court brief to the appropriate RMP's office for pre-charge review. Following the practice in New Brunswick, the RMP's should not approve charges until they are satisfied that the investigation is complete and they have been provided with all of the documentation that will be required for a trial. When a charge is laid, the brief should remain at the RMP's office.

RMP's should assess the evidence by reviewing the material in the Brief prepared by the police and decide whether the tests are met. Where necessary, they may view video-taped statements of witnesses; but that should not be mandatory and should depend upon the circumstances of the case. Generally, RMP's should not interview witnesses at the pre-charge review stage.[51] However, in some circumstances, that may be necessary. The FPS Deskbook in Part III, Chapter 11, section 11.3.3.8 lists situations where it might be appropriate for prosecutors to interview witnesses prior to charges being laid. We believe that the list is helpful and that a similar list should be made part of a new CMPS Policy on pre-charge reviews.

The amount of time that the RMP's should spend in conducting the pre-charge reviews of cases investigated by the NIS, if the above recommendation is implemented, should depend upon the nature and complexity of the case. We learned that in New Brunswick, for standard cases, the pre-charge approval Crown Prosecutor spends a matter of minutes completing the review. We are not suggesting that the pre-charge reviews by the RMP's should be as brief and routine as those of their counterparts in New Brunswick who have experienced investigators upon which to rely. We recognize that there are complex issues that pertain to military discipline matters that have no parallel in the civilian justice system.

The pre-charge reviews should take less time for electable offences, since the existence of reasonable prospect of a conviction will be determined on the assumption that the rules of evidence at a Summary Trial will apply. Even though we have recommended a more onerous standard for pre- charge reviews, we believe that the

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49 "Military Police Investigations Policy" Chapter 6, Annex "A", page 13, Article 33: A-SJ-100-004/AG- OOO. This is consistent with the New Brunswick Attorney General's Policy-Public Prosecutions, "Role of the Police in Laying the Information", "Without agreement or without pre-charge Crown Prosecutor Review", page 7

50 Public Prosecution Services Operational Manual, Attorney General of New Brunswick, page 2, "Police Investigations"

51 This issue was dealt with by the Supreme Court of Canada in the case of Regina vs. Regan, [2002] 1 S.C.R. 227

present goal of completing the pre-charge reviews within 14 days still should apply. This, of course, may not be achievable in situations where the RMP's are recommending further investigation.

RMP's should not be required to prepare a detailed pre-charge legal memorandum similar to what they are currently required to submit to the DDMP in their post-charge reviews. There may be complex and sensitive cases where such a memorandum would be appropriate. It should be left up to the individual RMP to decide on the necessity for such a memorandum. We believe that, in most cases, a notation or written record in the file for the RMP's own purposes would suffice. Consideration could be given to the use of a standard "charge screening and review form" such as those employed in Ontario and New Brunswick, attached as Appendices "G" and "H".

6.6 We recommend that the RMP's conduct the pre-charge reviews based on a court brief submitted to them by the NIS. They should not approve charges until they are satisfied that the investigation is complete and they have been provided with all of the documentation that will be required for trial.

6.7 We recommend that the general practice should be for RMP's not to interview witnesses during the pre-charge review stage. However, it may be appropriate to do so in the special circumstances set out in a list contained in the Federal Prosecutions Service Deskbook. A similar list should be made part of a new CMPS Policy Directive on pre-charge reviews. We recommend that, although the time required to conduct the pre-charge review will be dependent upon the nature and complexity of the case, the present goal of completing pre-charge reviews within 14 days should still apply.

6.8 We recommend that it should be left to the individual RMP to decide how detailed a memorandum the RMP will prepare to support the pre-charge review decision. Generally, it should not be necessary for them to complete a written analysis of all of the elements of each offence and the proof thereof. In most cases, a record in the RMP's file should suffice. Consideration should be given to the development of a standardized charge-screening and review form, such as those employed in Ontario and New Brunswick.

6.3.5 POST-CHARGE SCREENING AND REVIEW

There are three categories of cases that are referred to the DMP for preferral and disposition by Courts Martial:

- NIS-investigated charges which by definition must be tried by Court Martial
- NIS-investigated charges where the accused elected Court Martial
- Other charges where the RMP's were not involved in conducting the pre-charge review

We believe that it is necessary to distinguish these categories of cases when considering the CMPS post-charge screening and review policies and practices that we have recommended.

NIS-investigated charges which by definition must be tried by courts martial

RMP's will already have conducted the pre-charge reviews for these cases. If our recommendations about pre-charge reviews are adopted, the reviews will have been based on the criteria of "reasonable prospect of conviction" and "public interest". The rules of evidence applicable at Courts Martial will have been considered.

We recognize that the prosecutors' review obligation is a continuing one, up to the point where the Court Martial is completed. However, in our opinion, there will be no need to conduct a formal post-charge review of these cases unless new information comes to the prosecutor's attention. Consequently, when a case falling into this category is referred to the DMP by the Referral Authority, a preferral should take place without delay.

NIS-investigated charges where the accused has elected Court Martial

RMP's will have already conducted the pre-charge reviews of these cases. If our recommendations about pre-charge reviews are adopted, the reviews will have been based on the criteria of "reasonable prospect of conviction" and "public interest". However, the rules of evidence applicable at Summary Trials will have been considered. This means that a post-charge review will have to be conducted by an RMP based on the rules of evidence applicable at Courts Martial. Absent exceptional circumstances, this should be done by the same RMP who did the pre-charge review. Our comments about post-charge reviews set out in our report apply to this category of cases.

Other charges where RMP's were not involved in conducting the pre-charge reviews

DJA's will have conducted the pre-charge reviews of these cases and provided legal opinions to the Commanding Officers whether to proceed with the charges. If our recommendations about pre-charge reviews by DJA's are adopted, the reviews will have been based on the criteria of "reasonable prospect of conviction" and "public interest". However, the rules of evidence applicable at Summary Trials will have been applied. This means that a post-charge reviews of these cases will have to be conducted by RMP's based on the rules of evidence applicable at Courts Martial. Absent exceptional circumstances, this should be done by RMP's in the Region where the charges were laid. Our comments in this report about post-charge reviews apply to this category of cases as well.

6.4 DISCLOSURE TO THE DEFENCE

6.4.1 WILL-SAY STATEMENTS

The obligation to provide disclosure to the defence is clearly defined by case law and applies to the CMPS in the same way as to the civilian prosecution services. However, there are a few differences in the practices.

Regulation 111.11(1)(b) requires the CMPS to provide "will-say" statements of witnesses to the defence. The RMP's advised us that defence counsel sometimes complain about the adequacy of the "will-say" statements and military judges enforce compliance with the regulation. RMP's consequently spend considerable time drafting the statements.

We believe the Regulation is outdated. It may have been relevant at a time before the courts defined the broad disclosure obligation and when prosecutors were not in the practice of routinely providing the witness's entire statement to the defence. The practice in the civilian system is for the police to prepare will-say statements of witnesses in order to assist the prosecution and these are normally also given to the defence along with the entire statements. However, we are not aware of any law or policy in the civilian system that makes it mandatory for the prosecutors to provide the defence with a "will-say" statement in addition to the witness' entire statement. If the witness has not given a statement, there is an obligation to provide a summary of what the prosecution expects the witness to say in court.

6.9 We recommend that Regulation 111.11(1)(b) be amended to remove the requirement for the CMPS to provide the defence with "will-say" statements of all of the witnesses it intends to call. A list of those witnesses along with their entire statements should be sufficient. In the

alternative, or pending the amendment of the Regulation, the investigating authorities should provide "will-say" statements in the prosecution briefs that comply with the requirement of the Regulation.

6.4.2 TIMING OF DISCLOSURE

The practice in the civilian system is to provide disclosure to the defence as soon as possible after charges are laid. Not only is this fair to the accused but also experience shows that timely disclosure results in earlier resolution of cases. In the military justice system, some basic disclosure is provided to the accused after he/she is charged and before he/she is required to make his/her election. However, it appears that the accused is not given the entire investigation file at that stage.

The RMP's usually get access to the investigation files during their post-charge reviews. We were told that sometimes complete disclosure is given to the defence before preferral of the charges for Court Martial; but usually it is provided simultaneously with the preferral. In 2006-07 the average time from "charge to preferral" was 176 days. This was the same for the ten cases in 2007-08 that we analysed. This is much longer than most accused have to wait before receiving complete disclosure in the civilian system.

We are told that sometimes defence counsel are not appointed until charges are preferred.
In light of this, the practice in Nunavut may be appropriate. There is a "public defender" system of legal aid in Nunavut. As soon as the file has been vetted by a prosecutor, the "disclosure package" is sent automatically to the Legal Aid office, unless a lawyer has already been identified. If a lawyer is on record, the disclosure is given to him/her. If there is no lawyer on record, the disclosure package is kept at the Legal Aid office until a legal aid lawyer is appointed or a private lawyer is retained. The private counsel would then obtain the disclosure package from the Legal Aid office.

We have recommended, in Chapter 4, that the complete investigation file be sent to the RMP's in the Region as soon as the Commanding Officer decides to proceed with the Court Martial process. If this is done, the RMP's could vet the files as soon as they have them and provide disclosure either to an identified lawyer or send the "package" to the DDCS.

6.10 We recommend that complete disclosure be provided to counsel for the accused as soon as possible after charges are laid. This should be done shortly after RMP has had the opportunity to vet the investigation file and should not be delayed until charges are preferred. If the accused does not have counsel, the disclosure "package" ought to be forwarded to the DDCS.

6.5 RESOLUTION DISCUSSIONS

In some jurisdictions in the civilian justice system, as many as 75% of all cases are resolved without the necessity of a trial. Resolution discussions between counsel play a major role in bringing this about.

In the Court Martial system, approximately 64% of cases are resolved on the dates set for trial. Resolving these cases at an earlier stage would have a very positive effect on overall delay reduction.

In Chapter 9, we deal with the necessity of having procedures instituted in the Court Martial system, such as some form of "plea court", whereby pleas of guilty could be entered without trial dates being set. There would have to be two essential changes to the CMPS resolution discussion policies and practices to make this a more effective way of resolving cases. Policy Directive 008/99, paragraph 4 provides that "All resolution discussions must be initiated by defence counsel." This has led to convoluted practices. In civilian

jurisdictions policies provide that prosecutors should initiate plea discussions.[52] Everyone we spoke to indicated that the CMPS policy is clearly outdated and should be removed. We find it difficult to understand why that has not been done to this date.

The Criminal Justice Review Committee of Ontario in its report recommended that a list of early resolution "best practices" be circulated to provincial and federal Crown Counsel. One of those practices is that "Crown Counsel should take the initiative in contacting defence counsel and not wait for defence counsel to come to the Crown".[53]

It has also been a policy of the CMPS that all case-resolution and sentencing positions taken by prosecutors must be approved by the DDMP. Until the very recent change, this policy applied to all military prosecutors, including Reservists, some of whom have more than 20 years experience, and even in respect to the most minor offences. It is a good sign that this unnecessary and counterproductive policy has been discontinued.

In some civilian jurisdictions prosecutors provide a form to counsel for the accused, along with the disclosure package, that indicates the prosecutor's sentencing position on an early plea of guilty. It is made clear that the position is not binding on the court. This results in the early resolution of cases and should be considered by the CMPS.

6.11 We recommend that Policy Directive 008/99, paragraph 4 that provides that "All resolution discussions must be initiated by defence counsel" be revoked.

6.12 We recommend that the CMPS adopt the practice of indicating the prosecutor's sentencing position on an early plea of guilty on a form that accompanies the disclosure package.

[52] The Criminal Justice Review Committee of Ontario in its report recommended that a list of early resolution "best practices" be circulated to provincial and federal Crown Counsel. One of those practices is that "Crown Counsel should take the initiative in contacting defence counsel and not wait for defence counsel to come to the Crown". Report of the Criminal Justice Review Committee, February 1999, Queen's Printer of Ontario, Chapter III, "Crown Charge Screening", page 59

7 THE COURT MARTIAL

7.1 INTRODUCTION

We were asked to focus our review on the role of the CMPS in the Military Justice System. We deal specifically with that in other Chapters of this report. However, as we have stated, it is clear that the causes of the delays are system-wide and any improvements in CMPS practices will have limited effect unless changes also take place throughout the system. This starts with the investigation until the final disposition of the case at Court Martial. During our review, we learned about how cases are dealt with following the preferral of charges and it became obvious that reforms are needed at that final stage if overall delays are to be addressed. The CMPS, along with the military judges, the Court Martial Administrator, and defence counsel, plays an important role at this final stage as well.

In this chapter we make some recommendations that we believe could improve the Court Martial process. They are based on the findings of various studies that have dealt with delays in the civilian justice system and on our own experience working as prosecutors in Ontario, particularly following the *Askov* "crisis". We acknowledge that our review of this stage of the total proceedings has been general. For example, we only consulted with the Chief Military Judge and not with the other Judges. A more in-depth review would definitely be helpful.

The statistics, based on our sample of 10 typical cases dealt with by Court Martial in 2007-08 (Appendix "D"), show that there was a delay of approximately 196 days (6.5 months) from the date when the charge was preferred to the date when the Court Martial was commenced. (The number of days from "preferred to convened" was approximately 133. The number of days from "convened to commenced" was approximately 62)

In the civilian system, the court assumes jurisdiction for a matter shortly after the accused is charged and when the Information is placed before the court. In comparing delays in the two systems, the date of the charge is, therefore, the most relevant starting point. The average Court Martial case in 2007-08 took approximately 177 days from the charge to the preferral. This means that the total time from "charge to commencement of Court Martial" was approximately 373 days or 12.4 months. In 2006-07, it was 410 days or 13.6 months. This is considerably longer than the average criminal case in the civilian systems across Canada that deal with much larger caseloads.[54]

Despite this, we found that the military Court Martial system generally operates as if delay was not a problem. With some recent exceptions, it has not incorporated many of the modern case-management techniques and strategies now widely used in the civilian criminal justice systems in Canada and elsewhere. For example, there is little case-differentiation in the scheduling of trials and most Standing Court Martial trials are routinely set to last a whole week, even when the alleged offences are minor and the issues not complex. Similarly, we learned that it is not unusual for sentencing hearings to take two days, even when there are joint submissions on sentence. While such generous allocations of court time may be ideal, they can scarcely be afforded in a system that is seemingly incapable of meeting it's principal objective of providing swift justice in order to enforce military discipline.

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54 The Steering Committee on Justice Efficiencies and Access to Justice looked at criminal courts across Canada and found that the mean elapsed time for cases from first to last court appearance was 226 days in 2003-04. It should be noted that this figure includes the many cases in the civilian system that are resolved without the setting of trial dates.

7.2 THE ISSUE OF A PERMANENT MILITARY COURT

We understand the fact that there is no permanent military court has been seen as an obstacle to the implementation of practices that could improve efficiency in dealing with charges after preferral. Courts Martial must be convened in order for military judges to have jurisdiction to deal with specific cases. This creates problems in utilizing some of the procedures and practices that are common in the civilian system, including first appearance courts, pleas of guilty courts and the holding of mandatory judicial pre-trial conferences before trials are scheduled. In the civilian system, these are court procedures that are conducted by judges without the requirement that they become "seized" of the cases.

In his report, Chief Justice Lamer recommended the establishment of a permanent military court.[55] This recommendation has not been implemented. We learned that this is a controversial subject about which there are different opinions and we felt that any analysis of those views was beyond the scope of our review. It is clear, however, that leaving the issue of the court status unresolved, has contributed to the delays in military justice system. We believe that it has also had some impact on the military judges who feel they should be members of a permanent court like other judges in Canada.

7.3 CASE MANAGEMENT

Case Management has been defined as the "supervision or management of the time and events involved in the movement of a case through the court system from the point of initiation to disposition"[56]. We believe that some of the delay between the preferral of charges and the completion of Courts Martial could be reduced by adopting modern case-management practices. We are encouraged that this is beginning to happen in a limited fashion, even while the issue of a permanent court remains unresolved. We learned that the Chief Military Judge has begun conducting informal, administrative pre-trial conferences with counsel before convening Courts Martial. He has also made special arrangements with counsel that will allow for a number of cases to be brought forward and dealt with by pleas of guilty during the next visit by a military judge to Victoria.

Bill C-45, An Act to amend the National Defence Act,[57] if passed by Parliament, should give military judges the tools necessary to improve the efficiency of the Court Martial system. The following sections of that Bill are relevant to case management

> 187. At any time after a charge has been preferred but before the commencement of the trial, any question, matter or objection in respect to a charge may, on application, be heard and determined by any military judge or, if the court martial has been convened, the judge assigned to preside at the court martial.
>
> 165.3. The Chief Military Judge may, with the approval of the Governor in Council, and after consulting with a rules committee established under regulations made by the Governor in Council, make rules governing the following:
> (a) pre-trial conferences and other preliminary proceedings;
> (b) the making of applications under section 158.7;
> (c) the bringing of persons before a military judge under section 159;
> (d) the scheduling of trials by court martial;
> (e) the minutes of proceedings of courts martial and other proceedings;
> (f) documents, exhibits or other things connected with any proceeding, including public access to them; and
> (g) any other aspect of practice and procedure that are prescribed in regulations...

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[55] Justice Antonio Lamer, formerly of the Supreme Court of Canada, was appointed by the Minister of National Defence to conduct a review of the military justice system. His report was tabled in Parliament in November 2003

[56] Steering Committee on Justice Efficiencies and Access to Justice

[57] First Reading, March 3, 2008

Section 187 will be helpful, since it will allow any judge to deal with a case before a Court Martial is convened. However, we feel that it should go even further. As it is currently worded, only the assigned judge will be able to deal with the case once the Court Martial is convened. There is usually a considerable amount of time between the convening date and the commencement of the trial (on average 62 days in 2007-08). There may be need for judicial intervention during that time period, for example, to deal with an application for an adjournment, to conduct a pre-trial conference with counsel or to accept a plea of guilty. In order to provide even greater flexibility for dealing with these types of matters, we believe any military judge should have jurisdiction to deal with the case at any time prior to the trial actually commencing. In the civilian system, judges do not become seized of cases until they begin hearing evidence, and we see no reason why this same approach should not apply to Courts Martial. We accept that it may be preferable for the assigned judge to deal with all matters once the court martial is convened; but there should room for exceptions. This ought to be a matter of policy, determined by the Chief Military Judge, rather than a question of jurisdiction.

Court rules have given the judiciary in the civilian justice system greater ability to regulate proceedings and to ensure that they are conducted by the parties in a fair and orderly manner. For example, there are rules that specify the amount of notice that must be given to the other side when an application under the Charter of Rights is made. We have learned that there is a proliferation of Charter applications at Courts Martial, with little advance notice being given. This can drag out proceedings, cause adjournments and contribute to delays. Currently this is difficult to control because there are no Court Rules for Courts Martial. If section 165.3 is passed, the Chief Judge should make rules with respect to Charter applications and other case-management issues. One suggestion we have heard is that the rules of one of the civilian criminal courts, such as the Rules of Practice of the Ontario Court of Justice, be made applicable to Courts Martial, subject to specified exceptions.

7.1 We recommend that modern case-management practices that are widely used in the civilian criminal justice system be adopted for use in the Court Martial system. The recent initiatives in this respect, that have been taken by the Chief Military Judge, should be encouraged and supported by all stakeholders.

7.2 We recommend that section 187 of Bill 45 be amended to allow any military judge to deal with a case after a charge has been preferred up to the point when the Court Martial trial actually commences. Subject to that amendment, we hope that Parliament will give swift passage to the Bill.

7.3 We recommend that, if Bill C-45 is passed, Court Rules be developed and implemented by the Chief Military Judge pursuant to section 165.3. The Rules should deal with matters such as the amount of notice required for applications pursuant to the Charter of Rights and mandatory Judicial Pre-trial Conferences.

7.4 THE PRINCIPLES OF EFFECTIVE CASE MANAGEMENT

The Steering Committee on Justice Efficiencies and Access to Justice was created by the Federal Minister of Justice to recommend solutions to problems relating to the efficient and effective operation of the criminal court system, without compromising its fairness.[58] The Committee, in its Report on the Management of Cases Going to Trial (November 2005), identified five basic principles that can contribute to the effective handling of cases:

[58] http://www.justice.gc.ca/eng/esc-cde/ecc-epd/p4.html . The Steering Committee is composed of six representatives of the Judiciary, six Federal and Provincial Ministers of Justice and three members of the private Bar.

- Effective case management requires cooperation and clear expectations.
- The court has a leadership role in effective case management.
- A Legal Culture that does not tolerate delay.
- Local control
- Effective case management requires management information

It also found that there is a broad consensus that the following measures that can be taken by courts contribute to effective case flow management.[59]

- Meaningful court events, designed to resolve cases or narrow issues.
- Case differentiation, with separate tracks used for the processing of cases depending upon their complexity.
- Case-scheduling practices that facilitate expeditious disposition of simple cases.
- Rapid identification of cases likely to require more counsel time and judicial attention so that good use can be made of limited courtroom capacity and counsel preparation time.
- Case timetables set by the judge in consultation with counsel and geared to the complexity of the case.

The Martin Committee in Ontario had earlier concluded that "co-operative case management" for the judiciary means participating, within the limits of appropriate judicial conduct, in:

- resolution discussions to assist in narrowing issues,
- pre-hearing conferences,
- plea courts,
- by giving joint sentencing submissions sufficient weight to ensure, without sacrificing the interests of justice in any particular case, that early co-operative resolutions are encouraged.

We believe that these principles and measures are applicable to the Court Martial system and may provide guidance for the implementation of practices aimed at reducing delays.

7.5 THE LEADERSHIP ROLE OF THE COURT IN CASE MANAGEMENT.

The Criminal Justice Review Committee (1999) stated that:

> Judicial commitment and leadership are critical components of an effective caseflow which will govern proceedings and must be diligent in enforcing compliance with those deadlines.[60]

The "Cases Going To Trial" Subcommittee of the "Justice Efficiencies and Access To Justice" initiative further clarified the role of the judiciary in case management:

> In an adversarial justice system, judges have the independence and authority to lead the other players. In short, their impartiality gives judges a unique opportunity to lead effective case management. Impartiality is required for effective judicial decision making; but it also gives judges a unique opportunity to lead effective case management. Moreover, good judicial leadership does not detract from impartiality. Judicial case management is less about "managing" the cases than it is about ensuring the parties are prepared for an effective hearing. While some of the skills and activities required by case management are fundamentally different than the traditional role of judges, case management is not inconsistent with it. Judges and court administration can

[59] From: "Improving Your Jurisdiction's Felony Caseflow Process: A Primer on Conducting an Assessment and Developing an Action Plan" prepared by the Justice Management Institute for the Bureau of Justice Assistance, Criminal Courts Technical Assistance Project, American University (April 2000).

[60] Report of the Criminal Justice Review Committee, February 1999, Queen's Printer of Ontario

oversee cases to ensure they are managed in accordance with commonly accepted norms while retaining the flexibility to respond to the unique needs of individual cases.[61]

We believe that The Criminal Case Management Protocol that has been developed by the Ontario Court of Justice is a good example of active leadership by the courts in case management and could provide a useful precedent for the court martial system.[62]

7.4 We recommend that the Chief Military Judge, with the assistance of the other Military Judges and the Court Martial Administrator, continue to assume an active leadership role in Case Management.

7.6 CO-OPERATION OF ALL STAKEHOLDERS THROUGH A CASE-MANAGEMENT COMMITTEE

Effective case-management requires cooperation of all of the stakeholders. Experience in the Province of Ontario, following the *Askov* decision, has shown that one of the most effective delay-reduction strategies has been to establish "Court Users Committees" in each court jurisdiction that had a significant back-log of cases and problems with delays. The Committees are chaired by the Senior Regional Justice and include, as members, the Senior Justice of the Peace, the Director of Court Services, the Trial Co-ordinator, the Area Director of Legal Aid, the Crown Attorney, the Regional Director of the Public Prosecution Service of Canada, the President of the local Defence Counsel Association, and senior Police representatives. The Committees monitor delays in the system, identify causes and jointly come up with solutions to address those problems. The type of issues dealt with by the Committees include, for example, ways to provide Crown disclosure more quickly to defence counsel, ways to ensure that defence counsel are appointed early, providing opportunities for early pleas of guilty, efficient trial scheduling practices, Judicial Pre-trial Conferences etc.

We understand that there is a Committee that includes the Chief Military Judge, the Court Marshal Administrator, the DMP, and the DDCS; but it does not meet on a regular basis. We believe that greater use could be made of that committee and that its membership could be expanded to include, for example, the Provost Marshall. We have found that certain policies and practices of the police can have significant impact on the early resolution of cases, for example, by providing timely disclosure of the investigation file. We are also recommending the establishment of the position of "Trial Co-ordinator" (see below) and that person should also participate on the Committee.

7.5 We recommend that a permanent Case Management Committee be established by the Chief Military Judge and that it meet on a regular basis. The Committee should be chaired by the Chief Military Judge and it should include the Court Martial Administrator, a "Trial Co-ordinator", the DMP, the DDMP, the DDCS, the Provost Marshall and others invited by them to attend. Its role should be to address case- management issues, including setting time standards, monitoring the flow of cases, identifying problems that contribute to delay and jointly devising solutions to those problems.

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61 The Steering Committee on Justice Efficiencies and Access to Justice, Report on the Management of Cases going to Trial, 2005

62 Criminal Case Management Protocol, September 2004, prepared by the Effective Scheduling Working Group of the Criminal Justice Steering Committee for presentation to The Justice Summit 2004

7.7 CO-OPERATION BETWEEN THE CMPS AND THE DCS

Meaningful consultation between prosecution and defence counsel plays an important role in ensuring that the parties determine what can be agreed upon and what can be settled as early in the process as possible. We realize, from our own experience in the civilian justice system, that complete co-operation between prosecutors and defence counsel is difficult to achieve and that a certain amount of tension between the two sides is inevitable in any adversarial system. That being said however, we feel that relations between the CMPS and the DCS need to be improved, particularly at the higher levels of those organizations, and greater cooperation between the services would definitely help in delay reduction. RMP's have advised us that the friction that exists between the leadership of the two organizations sometimes impacts negatively on their own relations with military defence counsel.

We believe that the following words of the Martin Committee are apt:

> "…..the sectors or "players" in the justice system are autonomous within their sphere. Each depends, however, on the others. This combination of autonomy and interdependence means they must cooperate appropriately to be effective.... If the competing demands of justice and efficiency are to be satisfactorily reconciled, there must be willingness on the part of all the co-operative participants to change, to some extent, the ways in which they have traditionally carried out their respective functions. The participants must be willing to take initiatives to properly and fairly resolve cases early and place less emphasis on adversarialism and more emphasis on co-operative case management."[63]

7.6 We recommend that, in carrying out their respective functions, special effort be made by the leadership of the CMPS and DCS to place less emphasis on traditional adversarialism and more emphasis on co-operative case management.

7.8 MANAGEMENT INFORMATION

Solid empirical analysis is crucial in designing effective delay reduction measures.[64] As has been said, "You can't manage what you can't measure." Knowledge, in the form of statistics or management information, is a crucial component in understanding exactly what is going on and where to focus initiatives.

We had difficulty finding complete data required to identify and analyze all the areas in the system where delays are occurring. For example, there is data that shows the time from the beginning of the investigation to the laying of a charge. However, data showing the delay from the completion of the investigation to the laying of the charge is not readily available. We were also not able to obtain complete statistics showing the overall delays in the recently completed fiscal year since that data is not updated on a regular or monthly basis. It was therefore difficult to measure current trends and to identify specific areas where delays are increasing or decreasing.

The data which we were shown for past fiscal years also indicates "average" delays at the various stages of the total process. Those figures could be substantially skewed by a few exceptional cases. Statistics that show "mean", rather than average times, would be more helpful for case management.

7.7 We recommend that the Military Justice Planning and Research Branch keep accurate statistics measuring delays in cases at every stage of the military justice process, from the

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[63] Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolution Discussions, 1993, Queen's Printer for Ontario.

[64] Reducing Court Delays: Five Lessons From The United States" The World Bank (December 1999)

time of the alleged offence until the completion of the Court Martial. A compilation of these statistics should be produced every month and they should identify areas where delays are increasing or decreasing. The data should be made available to the Case Management Committee for regular monitoring purposes.

7.9 TIME STANDARDS

It is very important for courts to have case-flow management standards and goals. They are meant to guide the processing of cases by the court system as a whole rather than apply to individual judges. Ideally, the goals are arrived at, and "bought-into", by all of the key participants. Monitoring compliance with the standards allows evaluation of how the system is performing and the identification of problems in order that corrective action can be taken. We believe that this should be one of the functions of the proposed Case Management Committee.

An example of the introduction of standards in the civilian system was the 1992 "Investment Strategy" of the Ontario Ministry of the Attorney General that followed the *Askov* decision. One of the major objectives of the Strategy program was to reduce the number of cases unresolved until the day set for trial. The Investment Strategy initiative set measurable case-management targets of a pre-trial resolution rate of 72% and a trial rate of 9%. This would reduce the number of cases unresolved until the day of trial from 30% to 19%, with 10% of the cases being resolved on the day set for trial without a trial taking place.

The means used to achieve these results in Ontario were early charge-screening, early disclosure, and early resolution discussions. Province-wide implementation of the Investment Strategy commenced in 1994. The pre-trial resolution rate and trial rate targets were met within eighteen months. By the third quarter of 1998, the resolution before trial rate in Ontario was 75.5% and the trial rate was 8.9%. Consequently, the number of cases unresolved until the day set for trial had been reduced to 15.8%. The success of the Investment Strategy initiative reduced demand on the trial courts and likely played a major role in averting a second *Askov* crisis.[65] Compliance with these standards continues to be regularly monitored today.

We believe that a reasonable target for the Court Martial system would be to have most Court Martial hearings on straightforward cases commence within 3 months of the date of the preferral. Complex and very serious cases would obviously require more time to complete. A different target could be set for those cases, perhaps 6 months from the date of preferral.

7.8 We recommend that case-flow management standards and goals be established and monitored by the Case Management Committee. We believe that a reasonable target would be to have most Court Martial hearings on simple, straightforward cases commence within 3 months of the date of the preferral.

7.10 THE POSITION OF "TRIAL CO-ORDINATOR"

We suggest that it could be helpful to establish the position of "Trial Co-ordinator" within the office of the Chief Military Judge or attached to the Court Martial Administrator. Trial Co-ordinators were appointed in several court jurisdictions across Ontario in the early 1990's in response to the crisis created by the *Askov* decision and proved invaluable. Today the position exists in most locations of the Ontario Court of Justice and of the Superior Court of Justice throughout the province and have become indispensable.

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65 John Pearson, unpublished paper, "Justice Delayed, Justice Denied", 2007

Unlike other court administration staff, the Trial Co-ordinators in Ontario report directly to the Senior Regional or Administrative Judges. Their role is to oversee the scheduling of trials and to monitor the trial list in order to ensure that judicial resources are used efficiently. Most importantly, they take a pro-active role with defence counsel and prosecutors, initiating communications with them constantly to ensure that cases set for trial will actually be proceeding and revising time estimates as required. When they learn that a trial may collapse, or take less time than estimated, they take steps to ensure that a judge's time will not be wasted by filling the timeslot with other matters.

We feel that the Trial Co-ordinator's function would be particularly useful in the Court Martial system, where some changes in trial scheduling practices are clearly needed. It is simply not a good use of judicial resources, and certainly not economical, for a judge to travel from Ottawa to a distant location to deal with a single case, unless that case is particularly complex. The practice, recently started by the Chief Military Judge, of having the judge who travels to a location deal with more than one case should become the norm and the Trial Co-ordinator's help in scheduling would become particularly important.

We suggest that whenever a military judge travels to a given location to conduct one or more Courts Martial, he or she should also have all the pending cases in that location listed in court "to be spoken to". This would include cases where trial dates have already been set and those with trials yet to be scheduled. We believe this practice would facilitate the earlier resolution of some cases and provide greater certainty that cases set for trial will actually proceed.

7.9 We recommend that the position of "Trial Coordinator" be created within the office of the Chief Military Judge or attached to the Court Martial Administrator. The role of the Trial Coordinator would be to oversee the scheduling of trials, to communicate regularly with counsel and to monitor the trial list in order to ensure that judicial resources are used efficiently.

7.10 We recommend that the practice, recently started by the Chief Military Judge, of having the judge who travels to a location deal with more than one case should become the norm. Whenever a military judge travels to a given location to conduct one or more Courts Martial, he or she should also have all the pending cases in that location listed in court "to be spoken to".

7.11 EFFICIENT COURT MARTIAL TRIAL SCHEDULING PRACTICES

We were advised that the practice of the Court Martial Administrator is to routinely schedule one week for Standing Courts Martial and two weeks for Disciplinary Courts Martial, regardless of how simple the cases may be. Similarly, cases are generally scheduled for trial in the order they were received by the CMA, in other words, "first in - first out", without assigning any priority.

Modern case management practices involve some degree of case-differentiation, with separate tracks or different allocations of judicial resources for the processing of cases depending upon their complexity. Less court time is reserved for simple cases and more time for the complex ones. Cases for which swift disposition is a high priority and scheduled for trial ahead of those that are less urgent, even though they may have entered the justice system earlier.

Case differentiation means that the court must take a pro-active role and scrutinize each case carefully to arrive at an estimate of the required court time before scheduling trial dates. We feel that, due to the high importance of timely disposition of cases for the military and the high costs associated with each Court Martial trial, this should be done by the Chief Military Judge or another judge designated by him. The practice

of routinely scheduling one week for each Standing Court Martial and two weeks for Disciplinary Courts Martial should be discontinued.

The scheduling of trial dates should take place at a mandatory Judicial Pre-trial Conference. The most important objective of that conference should be to determine from counsel whether the case will be proceeding, what the issues will be, and how much time will be required.

7.11 We recommend that the practice of routinely scheduling one week for each Standing Court Martial and two weeks for Disciplinary Courts Martial be discontinued. The amount of time scheduled for trials should depend on the complexity of the cases, the issues identified by counsel and the time estimate given at Judicial Pre-trial Conferences.

7.12 JUDICIAL PRE-TRIAL CONFERENCES

We believe that the extensive court time dedicated to each Court Martial hearing and the proliferation of applications under the Charter of Rights with short notice to the other side require that there be an efficient judicial pre-trial conference system. The Advisory Committee that made recommendations for the Ontario Superior Court Rules governing the conferences found that one consequence of the enactment of the *Charter* in Canada is that applications for *Charter* relief now often take far longer than the trial itself. During its consultations, the Committee was told that trial judges are hearing far too many frivolous pre-trial applications.[66] The same can be said for the Courts Martial.

The purpose of a judicial pre-trial conference is to maximize the use of judicial and other resources by resolving and/or narrowing the issues that must be litigated, and facilitating resolutions where appropriate.[67] The Criminal Justice Review Committee of Ontario recognized that there is a great deal of variation throughout the province with respect to the scheduling and conduct of the conference. It recommended that each court location have the freedom to experiment with different service delivery models in order to find the system that best suits its needs. (The system of pre-trial conferences recently introduced in the Superior Court of Justice in Ontario is an example of a very formal model).[68] The Justice Review Committee limited itself to suggesting that local criminal justice coordinating committees consider adopting a list of "best practices" set out in its report.[69] It did however make it clear that the conferences should take place before trial dates are scheduled and that they should be mandatory where it is anticipated that a matter will involve a half-day or more of court time.[70]

Although the Chief Military Judge does not have the authority to make rules governing Judicial Pre-trial Conferences, the current practice is for assigned judges to hold a pre-trial conference, on an informal basis, with counsel after Courts Martial are convened. We believe this is a good practice; but the problem is that the conferences are held very shortly before the scheduled trial dates. At that stage the benefits of the conference

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66 http:/www.ontariocourts.on.ca/superior_court_justice/rules/rules.htm

67 Report of the Criminal Justice Review Committee, Ontario, 1999 at page 63

68 The Superior Court Rules require the use of a comprehensive pre-trial conference form. The purpose of the form is to 1) focus the attention of counsel on all the issues that could arise at trial, 2) assist the pre-trial conference judge in focussing on the contested issues, and 3) to assist the trial judge in preparing for and conducting the trial. The Crown must file the form ten days in advance of the pre-trial conference, along with a synopsis. The defence must file its form five days in advance. Counsel's positions, as indicated on the form, are binding, subject to counsel and the court being notified otherwise and another pre-trial conference arranged. If an application is not noted on the pre-trial conference form, the presumption is that it will not be heard at trial.

69 Ibid at pages 66 to 68

70 Idid at page 67

are limited. Even if the judge is advised that the case will be resolved it is too late at that point to schedule another case to be heard in that time period. If defence counsel give notice for the first time at the conference that a Charter application will be made, or expert evidence is to be called, it still may not provide the prosecution with sufficient time to prepare. To be effective, Judicial Pre-trial Conferences should be conducted well before the scheduled trial date of the case and, ideally, before the trial date is set.

The Chief Military Judge has recently taken the initiative to conduct conferences with counsel before Courts Martial are convened. Again, we believe that this is a step in the right direction towards systematic case management. Hopefully, Bill C-45 will be passed and Rules of Practice governing these conferences will be made. So far, it is difficult for us to see the benefits of these conferences except, perhaps, in providing a way to bring counsel together for scheduling trial dates. As we understand it, there is still no comprehensive way to accommodate early pleas of guilty, Standing Court Martial trials are still routinely being scheduled for one week and defence counsel are not compelled to clearly advise the Judge and RMP's whether Charter applications will be made.

We understand that the Military Judges may not be willing to indicate their views on an appropriate sentence during pre-trial conferences. On that issue, the practice in the civilian system is not uniform across Canada. It is common for judges to provide their views on sentencing at judicial pre-trials in Ontario, but not in Western Canada. Regardless of what approach the Military Judges take on this aspect, there is great value, nevertheless, in having thorough pre-trial conferences with well-prepared counsel.

7.12 We recommend that, if Bill C-45 is passed, Judicial Pre-trial Conferences should be mandatory and should be held before trial dates are set. The model for these conferences should be developed by the Chief Military Judge in consultation with the Court Management Committee. The "Best Practices" listed in the Report of the Criminal Justice Committee (Ontario, 1999) provide a good guide.

7.13 CONFIRMATION HEARINGS

It is now the practice in some jurisdictions in the civilian system for Confirmation Hearings to be held in advance of trial dates. They are intended to ensure that the time set aside by judges, court staff, counsel, witnesses and other personnel is not wasted when cases collapse on the trial date. Ideally, they are scheduled far enough in advance in order that the reserved court time may be filled with another case if the one originally scheduled does not proceed.

We believe that it is particularly important to have Confirmation Hearings for Courts Martial because of the long distances that the judges and other participants have to travel and the preparation that is required at the location where they are to take place. In 2007, 64% of the cases were resolved by pleas of guilty and/or withdrawal of charges on the trial date.

7.13 We recommend that, when a court martial is convened, a date should also be set for the matter "to be spoken to" one month in advance of the trial date for the purpose of holding a Confirmation Hearing by teleconference before a judge, preferably the judge assigned to conduct the court martial. The court should require counsel for both sides to confirm they are ready to proceed to trial and to confirm the time estimates previously given.

7.14 EARLY RESOLUTION BY PLEAS OF GUILTY

We believe that one of the improvements to the Court Martial system that would have the biggest impact on delay reduction would be to provide for a forum or procedure for dealing with early pleas of guilty. In the civilian system, every attempt is made to have the resolution of cases take place earlier in special "plea courts" established for that purpose.

Bill-C45, if passed, will provide the Chief Judge with more "tools" to schedule early pleas of guilty. Consideration should be given to making greater use of the courtroom in Gatineau, Quebec for pleas of guilty in appropriate cases, with the proceedings broadcast by video to the accused's Unit in another part of Canada. Video technology would allow for the proceedings in Gatineau to be broadcast to the accused's Unit in another part of Canada.

> **7.14 We recommend that procedures be put in place by the Chief Military Judge to facilitate the early resolution of cases by pleas of guilty and/or withdrawal of charges before trial dates are set. Consideration should be given to making greater use of the courtroom in Gatineau, Quebec for pleas of guilty in appropriate cases, with the proceedings broadcast by video to the accused's Unit in another part of Canada.**

7.15 VENUE OF COURTS MARTIAL

When charges are preferred, the DMP or DDMP determines the venue of the Courts Martial. The tradition is to for them to be held where the accused's Unit is located. The objective is that members of the Units will see and learn from the example of disciplinary consequences imposed on a fellow member who has have broken the rules. The reality is that this objective can no longer be met since Courts Martial take so long to complete. The Unit no longer consists of the same members when discipline is finally imposed. We even heard of cases where the accused was no longer a member of the Armed Forces when the Court Martial was held.

Clearly, then, the traditional practice should be reassessed and a higher premium placed on earlier disposition of cases. More Courts Martial could be held in the Gatineau courtroom and the Commanding Officers should be given some say in the venue for cases involving their Units. We heard from the senior members of the Chain of Command who we spoke to that they would prefer to fly an accused to a central location for plea or trial if the matter could be dealt with earlier. This would also relieve the Units of the time and resource-consuming requirements of setting up the Courts Martial to take place in the Units. The use of video technology, for example, for the testimony of some witnesses from remote locations, should be considered.

> **7.15 We recommend that, in the interests of greater efficiency, there should be, when appropriate, some deviation from the traditional practice of holding Courts Martial at the physical location of the Units. More Courts Martial should be held from the courtroom in Gatineau, Quebec, with the assistance of video technology. Prior to preferring a charge, an inquiry should be made of the Commanding Officer about the importance of holding the Court Martial at the location of the Unit.**

7.16 SENTENCING HEARINGS

There are two issues relating to sentencing at Courts Martial that we consider need to be addressed. The first one is the time taken up with sentencing. We were advised that sentencing hearings may take two days, even if there are joint submissions. We assume that the principle endorsed by civilian appellate courts that a

sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest, is also applied in the military justice system.[71]

We realize that sentencing is a very important matter and there are special considerations involving military discipline that do not apply to the civilian justice system. However, we feel that the Court Martial system has such lengthy delays that it simply cannot afford to take up the amount of time it does on sentencing, particularly in straight-forward cases. Alternative ways must be found to put before the court the information judges require on sentencing. The civilian system makes use of pre-sentence reports. Perhaps presentation of information in report form or by affidavit, as well as more efficient use of case law, could shorten the process. Bill-C45, if passed, will introduce sentencing principles and new forms of sentences. We hope this will have the general effect of shortening sentencing hearings.

There is a second matter that we believe must be addressed. We learned from a number of members we interviewed that some accused are electing to be tried by Court Martial rather than Summary Trial in the hope of receiving a lighter sentence. We were told that this is particularly the case with offences involving the use or possession of drugs.

It is clear that an accused should not receive a greater penalty for exercising his/her right to a Court Martial hearing. However, we believe that the accused should also not receive a lesser sentence for the same reason. We imagine that consistency in sentencing must be even more important in the military justice system than in the civilian. We find it difficult to understand why Military Judges, are reluctant, as we are told, to take into consideration sentences imposed at Summary Trials for like offences. Surely, if an important objective of the military justice system is to assist Commanding Officers to impose military discipline, the type of penalties they impose at summary trials should be relevant at Court Martial sentencing hearings. Perhaps this is an issue that should be clarified by the Court Martial Appeal Court.

7.16 We recommend that, in an effort to reduce overall delays, sentencing hearings in straightforward cases be shortened and more efficient. Alternative ways of presenting the information that Military Judges consider necessary to arrive at a just sentence should be explored.

7.17 We recommend that, in order to promote consistency in sentencing for the same types of offences across the CAF, precedents from Summary Trials should be admitted and considered on sentencing by Military Judges at Courts Martial.

7.17 THE MILITARY RULES OF EVIDENCE

We learned that cases that would be considered very simple in the civilian justice system, and would take a matter of hours to try, drag on for days at the Courts Martial. We have been informed that the rules of evidence are different and that strict proof is required on elements that are presumed in the civilian system. For example, much time may be taken up proving that an accused was aware of a certain order or rule of conduct that he allegedly breached.

It has not been within our mandate to examine the Military Rules of Evidence. However, it is clear to us that the rules relating to proof at a Court Martial trial should be simplified and made more realistic if the objectives of a separate military justice system are to be met.

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[71] This principle is also in accordance with recommendation 58 of the Martin Committee Report, and endorsed by the Criminal Justice Review Committee, (Ontario, 1999)

The Criminal Justice Review Committee considered trial procedure, evidence and preliminary inquiries.[72] The Committee concluded that greater use could be made, for example, of affidavit evidence in criminal courts.

> More widespread use of affidavits could shorten proceedings by reducing the number of witnesses, limiting the amount of viva voce evidence called, and allowing the trier of fact to study the evidence without using up court time. There are numerous precedents in the Criminal Code and other federal legislation for facts to be established by affidavit, rather than viva voce evidence.[73]

7.17 We recommend that a review be conducted of the Military Evidence Act (Military Rules of Evidence) with the view to simplifying the methods for proving certain elements of offences without unduly infringing on the fundamental rights of accused persons.

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72 Chapter Nine, *Report Of The Criminal Justice Review Committee* (February, 1999) at p. 82.

73 Ibid, at p. 84. See, for example, the Criminal Code, s. 657.1 (proof of ownership and value of property) and Canada Evidence Act s. 42 (proof of loss).

8 HUMAN RESOURCES MANAGEMENT AT THE C.M.P.S.

8.1 INTRODUCTION

We were asked to review the human resources management of CMPS, including the posting of military prosecutors, training, mentoring and their level of experience. We were to compare these to the three civilian prosecution services, to address issues that may be contributing to delay and to make recommendations that could assist in minimizing delay.

8.2 EXPERIENCE AND POSTING OF MILITARY PROSECUTORS

We believe that "experience" has at least four aspects in the context of work done by prosecutors. The first relates to the amount of time that a person has worked as a prosecutor or engaged in other forms of litigation, for example, as Defence Counsel. Secondly, the volume of cases dealt with by the person (the caseload) has a bearing on this issue. Thirdly, another aspect of "experience" has to do with the types of cases that the person has dealt with and their seriousness or complexity with regard to the facts and legal issues. Finally, the degree of autonomy or independence that is accorded to them in the prosecution of cases is most important.

The chart attached as Appendix "I" shows the experience of military prosecutors in terms of length of time spent at CMPS or practising in other fields of litigation.

One can see from the chart, Appendix "I", that, on average, the RMP's each have about two years experience. Most have little, if any, previous litigation experience in the criminal field. It must be noted, however, that the DMP and the DDMP both have a more extensive background in criminal litigation.

Appendix "J" is an analysis of the Court Martial cases completed in the 2007 calendar year. It shows that, on average, Regular Force RMP's dealt with 8 to 9 cases each during the year. On average, only three of those cases proceeded to a full trial, while the remainder were dealt with by pleas of guilty or withdrawals.

The majority of the offences dealt with by the RMP's, with a few exceptions, were of a relatively minor nature. We recognize, however, that these cases may well have involved some serious breaches of discipline. In a significant number of cases, applications under the Charter of Rights were made by counsel for the accused. Furthermore, difficult and challenging evidentiary issues may have been raised which related to the proof of all of the essential elements of the offences. We understand that these cases cannot necessarily be equated to similar charges dealt with by prosecutors in the civilian system.

It was indicated in Chapter 6 of this report that some CMPS policies and practices have resulted in the RMP's having limited independent decision-making authority in the conduct of their cases. For example, they have had to obtain the approval of the DDMP for all resolution agreements with defence counsel. In our opinion, this has had a limiting effect on their gaining complete prosecutorial experience.

There are several reasons for the relatively brief time spent by RMP's in the CMPS. The first is the general policy of rotating JAG officers through the three pillars: operations, administration and military justice. It appears that the Executive of the Office of the Judge Advocate General has believed that it is advantageous that military lawyers be "generalists" and be competent in a number of areas of military law. Military legal officers are posted-out after three or four years. Secondly, there is a perception by RMP's that, in order to be promoted, it is not desirable to remain in the same position for too long a time. Thirdly, there is little opportunity for promotion beyond the rank of Major within the CMPS because there is only one Lt. Colonel position. In addition, the amount of travelling that the RMP's do poses difficulties for them and their

families. Further, in the past, some RMP's were posted into the CMPS without that posting being their first choice.

Based on our experience in the civilian prosecution service, we have found that it takes the average lawyer three to four years of regular courtroom experience dealing with progressively more complex and serious cases to become fully competent as a prosecutor. We believe that, because of the relatively small volume of cases that RMP's deal with at the trial level, the number of years required for them to become fully proficient as prosecutors will be even greater.

8.1 We recommend that the JAG should encourage and facilitate the development of an experienced cadre of criminal lawyers, both defence counsel and military prosecutors, and cross-postings should be encouraged. The present mind-set that the military lawyer practising in the criminal field ought to be a generalist should no longer be emphasized.

8.2 We recommend that, with regard to posting policies concerning JAG lawyers, it must be recognized that the position of a military prosecutor is a very specialized one that encompasses the acquiring of a considerable amount of knowledge and expertise with respect to advocacy skills, the rules of evidence, substantive criminal law and the Charter of Rights.

8.3 We recommend that the initial appointment to the position of RMP be for a minimum of five years.

8.4 We recommend that the military prosecutors be encouraged to stay as long as possible in the RMP position. They should be permitted to spend their career as military prosecutors if they so wish.

8.5 We recommend that, whenever possible, the appointment of new military prosecutors to regional offices should occur when a more senior prosecutor is still posted to that office and is able to remain until the new appointment is able to become familiar with their position.

8.3 TRAINING, MENTORING AND CONTINUING EDUCATION

Most newly appointed RMP's have little or no prior criminal litigation experience. We believe that the standard requirement that all new JAG lawyers fully participate in one Court Martial is of limited value in providing them with the skills necessary to become prosecutors. It is essential that new RMP's receive appropriate training and mentoring in order that they can properly carry out their responsibilities both in and outside the courtroom. It is also important that all RMP's, including those that have been in the position for some time, receive continuing education to help them improve their advocacy skills and in order that they are up to date with the most current law and procedures.

We have found that there are some very positive aspects to the training and continuing education opportunities available to RMP's. For example, they are permitted to attend the annual programme offered by the Federation of Law Societies and courses for prosecutors in the civilian prosecution systems. We heard many favourable comments about the Joint Advocacy Course that was organized for military prosecutors and military defence counsel. We also learned that several RMP's were given the invaluable experience of being junior counsel on cases together with highly experienced Reserve military prosecutors. However, we found that there is no specific training programme for prosecutors within the CMPS and much of what takes place is done on an *ad hoc* basis. We recognize that the CF Military Law Centre in Kingston is responsible overall for training JAG lawyers; but we submit that there should be an additional separate programme for military prosecutors.

Unlike their civilian counterparts, new military prosecutors do not get much experience by handling large volumes of cases. Although they have some access to experienced Reservists, and may also consult with each other, RMP's are not exposed, on a daily basis, to the same mix of prosecutors with varying experience as in the civilian system. We believe, therefore, that it would be very beneficial for new military prosecutors to be seconded for at least six to twelve months to an active civilian prosecution service. We also feel that even greater advantage should be taken of the experienced Reservist military prosecutors who could mentor the new prosecutors.

In Chapter 9, we make recommendations regarding the role of the Appeal Counsel – DMP-4 in training and continuing education of all RMP's. We make additional recommendations for the creation of two new Lt. Colonel positions whose responsibilities would include mentoring. Consequently, we are making the following recommendations:

8.6 We recommend that a specific training programme, both for new appointees and for those more experienced military prosecutors, be developed and the job description of the Appeal counsel DMP-4 should include the responsibility for instituting and coordinating the training plan and programme. That person should also be responsible for distributing new case law to all military prosecutors on a regular basis.

8.7 We recommend that information about potential educational programmes should be disseminated by the Coordinator of Training to military prosecutors across Canada and that everyone be given an equal opportunity to attend these courses.

8.8 We recommend that the DMP provide an opportunity for every new prosecutor to work for a minimum of six to twelve months in a civilian prosecution service in order to gain experience in court. A similar opportunity should be repeated after several years of experience for military prosecutors to be seconded to a civilian prosecution office for a period of time that can be negotiated. An example would be that an experienced military prosecutor could have an opportunity to "junior" to a civilian prosecutor on a serious case, such as a homicide.

8.9 We recommend that new prosecutors should have the opportunity to conduct a number of Courts Martial as "juniors" to experienced military prosecutors, including Reservist prosecutors. This is especially relevant with regard to drug prosecutions which involve a degree of prosecutorial expertise and which compose a good percentage of the cases that the RMP's are facing.

8.10 We recommend that the DDMP, subject to his/her availability, should participate in some Courts Martial as a mentor with the assistance of junior military prosecutors. [This should occur frequently if our recommendation for three DDMP's is accepted]

8.11 We recommend that Joint Conferences/Training Sessions (the Advocacy Course), involving all defence counsel and all military prosecutors, be held at least once per year and should involve the military judges as panellists and presenters. The emphasis of these conferences/training sessions should be on advocacy skills.

8.4 HUMAN RESOURCE MANAGEMENT OF PROSECUTORS IN ONTARIO

Appendix "K" is a table that shows the experience of the prosecutors currently employed by the Ministry of the Attorney General of Ontario in the Crown Attorney's Office in the City of Cornwall.

One can see that there is a mix of highly experienced prosecutors and more junior ones. This is consistent with the situation in Crown Attorney's Offices across the Province. There are two reasons for this. Firstly, because the salaries of Ontario prosecutors are the highest in Canada, there are a large number of applicants for every vacancy, including prosecutors with experience from other jurisdictions and lawyers with experience as defence counsel. Secondly, for various reasons, including favourable working conditions and salaries, the prosecutors, once appointed, often stay in the position for a significant part of their careers.

The normal practice is for new prosecutors to be hired initially on contract. They are eligible then to compete for permanent positions as they become available, either through vacancy or through additions to the complement. Generally, a contract Asst. Crown Attorney, who is performing well, stands a good chance of being appointed to a permanent position within a few years.

Prosecutors in the Ontario system receive promotions and salary increases to reflect their experience and abilities. In contrast to the CMPS, it is not necessary for them to be promoted to the management level in order to achieve salary increases. It is recognized that, in order to keep highly experienced litigators in the system, they must be financially rewarded regardless of whether they wish to assume management positions. This is discussed in Chapter 9.

Upon initial appointment, a new Asst. Crown Attorney will be assigned to attend courts with more senior prosecutors for three to four weeks. They are then assigned to courts that have less serious cases on their own; but they are expected to consult with more senior prosecutors as the need arises. A special course for new prosecutors from across the province is held every year. Thereafter, all Crown Attorneys, including experienced ones, attend a succession of courses organized by the Ontario Crown Attorneys Association each summer. In the spring and fall of each year, a conference is held for all Crown Attorneys that has a significant educational component.

It is normal practice to assign two prosecutors to the most serious and complex cases including homicides. Ideally, a more junior prosecutor will be assigned to assist a senior prosecutor. In our experience, this type of mentoring or team approach provides the best learning experience.

Although there are some highly experienced part-time Asst. Crown Attorneys in Ontario, they are rarely used to act as mentors to junior prosecutors, as is the case with the Reservist prosecutors in the CMPS.

8.5 HUMAN RESOURCE MANAGEMENT OF PROSECUTORS IN NUNAVUT

Appendix "K" is a Table entitled "Experience - Prosecutors in the Nunavut (Iqaluit) PPSC Office". This Table shows the experience of the prosecutors currently employed by the Public Prosecution Service of Canada who work in the Nunavut Regional Office in Iqaluit.

As illustrated in the staffing Table, there is some mix of experience and non-experienced prosecutors. Some become attached to the northern lifestyle and choose to settle there with their families. However, Nunavut has some of the same challenges as the CMPS in attracting and keeping experienced prosecutors. The isolation and the requirement for regular long-distance travel to remote communities has resulted in a tendency for a large turnover of prosecutors on a regular basis. Another contributing factor to the turnover is the disproportionately large number of domestic violence and sexual assault cases that place an extra burden on the prosecutors. It is quite common for prosecutors to leave after two to three years in the position. The new people hired are often in their first job or have very little previous experience.

The large volume of cases allows prosecutors to quickly acquire significant courtroom experience. The normal practice is for new prosecutors to go on circuit with experienced ones until they have acquired sufficient experience to appear in court on their own. Since all of the prosecutors work out of the same office in Iqaluit, junior staff have ready access to experienced members for advice on issues as they arise. Recently, the prosecutors were divided into three teams, with each team headed by a senior prosecutor and the new prosecutors distributed among the teams.

Prosecutors in Nunavut have access to the formal training programmes offered by the PPSC and they can also take part in some programmes for prosecutors in the provinces. There are some continuing education programmes that are conducted by the Law Society of Nunavut that are relevant to the work of prosecutors as well as defence counsel.

8.6 HUMAN RESOURCE MANAGEMENT OF CROWN PROSECUTORS NEW BRUNSWICK.

Appendix "M" is a Table entitled "Experience of Prosecutors in the Fredericton, New Brunswick Crown Prosecutors' Office". This Table shows the experience of the prosecutors currently employed by the Attorney General of New Brunswick.

As illustrated in the staffing Table provided by the Regional Crown Prosecutor in Fredericton, there is a mix of experienced and non-experienced prosecutors. Newly appointed Crown prosecutors are at first assigned to summary conviction matters and motor vehicle accident cases until they gain enough experience to deal with more serious cases. After three years on the job, it is expected that the Crown prosecutor will be able to prosecute serious cases except homicides. With respect to the latter, we were advised that less experienced New Brunswick prosecutors may "junior" or "second-chair" with a more senior prosecutor on murder cases and the like. It is not expected that a prosecutor will fulfil the function of "charge-approval Crown prosecutor" until he/she has at least two to three years with the office.

Like their counterparts in the Ontario system, New Brunswick prosecutors receive promotions and salary increases to reflect their experience and abilities. It is not necessary for them to be promoted to the management level in order to achieve salary increases. There are four levels of Crown prosecutor and, like Ontario, recognition is given to the fact that, in order to keep experienced lawyers in the system, they must be financially rewarded regardless of whether they wish to assume management positions. This has resulted in a low turnover of prosecutors, some of the Crown prosecutors having been in the New Brunswick system for over twenty years.

The less experienced prosecutors are expected to consult with more senior members of the office on serious or sensitive cases; but they are not required to seek approval of the Regional Crown prosecutor for any plea resolutions or sentence positions that they may take.

Although there is no budget for education of Crown prosecutors in New Brunswick, they do attend at the Federation of Law Societies lectures and joint-seminars with prosecutors from Nova Scotia. There is no school such as that operated by the Ontario Crown Attorneys Association.

The Regional Crown prosecutor advised us that he does employ ad hoc (part-time or per diem) Crown prosecutors; but not many lawyers wish to engage in prosecution work and ad hoc prosecutors are hard to find.

No New Brunswick Crown prosecutor is charged with the responsibility of distributing recent case law or research material; but this is done fairly regularly by the Regional Crown prosecutor disseminating these items on an ad hoc basis.

9 ORGANIZATION OF THE C.M.P.S.

9.1 INTRODUCTION

We were asked to review the organization of the CMPS and to identify any structural elements that may be contributing to delay within the military justice system. The organizational chart of the CMPS is attached as Appendix "N". We have interviewed virtually all of the people in the organization with a few exceptions, notably the secretaries in the Regional Offices.

9.2 REGIONALIZATION

The Military Prosecutors are spread out across Canada and located in four Regional Offices; West (Edmonton), Central (Ottawa), East (Val Cartier) and Atlantic (Halifax). We understand that the rationale for regionalization was to locate prosecutors in close proximity to the NIS Detachments. Originally, there was one RMP in each region; but the complement has now been increased to two per region. One of the RMP's from the Atlantic Region is currently deployed to Afghanistan and one of the RMP's from the West Region has recently resigned. The DMP 3-2 position, normally attached to Headquarters, has been engaged as the third RMP in the Central Region.

Regionalization could potentially contribute to delay. The regional offices are very small and, therefore, there is not the mix of experienced and less experienced prosecutors one would have in a large centralized office. This could be particularly problematic if both prosecutors in the region are inexperienced. This may result in greater reliance on advice from Headquarters and slow down the decision-making process.

In contrast, the prosecutors in the regional office of the Public Prosecution Service of Canada in Nunavut, who serve a vast territory, are all centrally located in Iqaluit and travel to the communities "on circuit" with the court party. This is also the case with the military Defence Counsel Services which is centralized in the National Capital Region. In Ontario and New Brunswick, most prosecutors' offices have more than two prosecutors. Centralization allows for greater day-to-day communication and dialogue among prosecutors and this can be a great advantage.

A disadvantage of regionalization is the fact that it is not possible to spread the workload equally between the regions and it is difficult to accommodate illness or absence for an extended period. Prosecutors in the regions are regularly called upon to take cases from outside their region. Several RMP's advised us that they sometimes have a difficult time communicating with, and obtaining disclosure from, Units and investigators from outside their region. Furthermore, the RMP's may have to travel across Canada to prosecute those cases assigned to them from outside their jurisdiction.

Another disadvantage of regionalization is that there is less opportunity for communication between the RMP's and Defence Counsel because the latter are centralized. Except in the Central Region, communication by the RMP's with the DCS and the CMA must be effected by long-distance. Furthermore, there is less opportunity for the DMP and DDMP to observe, supervise and appraise the level of competence of the RMP's and to provide mentorship to them.

There are, however, advantages to regionalization. The RMP's are located in the jurisdiction where the offence was committed. The RMP is aware of the local conditions and problems. The RMP is closer to the Military Police or NIS office to be able to give advice. The Court Martial will likely be held in the region where the offence was committed. The RMP's may have to travel less frequently. Of all those interviewed for the preparation of this report, only one RMP recommended that the RMP's be centralized. Additionally, we

believe that most of the disadvantages of regionalization that we have cited above can be overcome by locating a DDMP in each region which we are recommending and we discuss further in this Report.

9.1 We recommend that the current regional structure of the CMPS be continued, with some modification.

9.3 CFB ESQUIMALT AND CFB BORDEN

9.3.1 ESQUIMALT

We have learned during our interviews that there is a need to have an RMP on Base at Esquimalt because of the volume of work. There is an NIS Detachment on the Esquimalt Base and it would be more efficient and effective for the police to be able to consult with an RMP co-located at CFB Esquimalt. At present, the RMP's from the Edmonton office are dealing with cases from Esquimalt, with the necessity of repeated travel to Victoria.

Creating a full-time RMP position at CFB Esquimalt would assist in minimizing delay in that the NIS investigators will have more ready access to a prosecutor who is familiar with the situation on the Base.[74] With an RMP posted on the Base at Esquimalt, there will be a military prosecutor on the spot to conduct the prosecution of Courts Martial and to deal with pleas of guilty. We are proposing that one of the two RMP's in the West Region be posted at CFB Esquimalt and this would not entail, therefore, an increase in the total complement of RMP's.

9.2 We recommend that one of the RMP's in the West Region be posted at CFB Esquimalt.

9.3.2 CFB BORDEN

There is a considerable amount of work originating at the Base at CFB Borden and a CFNIS Detachment is located at the Base. We have heard some opinions that an RMP position should be located at the Base for the same reasons as for CFB Esquimalt. However, we have also heard the opposing opinion that it is better to have the RMP's from the Central Region co-located in one office because of the ease of access for consultation with RMP colleagues. We note that CF Military Police Academy is located on the Base and we recognize the importance of military prosecutors being actively involved in the training of the Military Police. We have concluded, therefore, that, on balance, it would be preferable to have one of the RMP's from the Central Region posted at CFB Borden. In addition to that person's usual functions, he/she would be responsible for training at the CF Military Police Academy.

9.3 We recommend that one of the RMP's in the Central Region be posted at CFB Borden. That position would also be responsible for training at the CF Military Police Academy.

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[74] In her memorandum of January 10, 2007 on Court Martial Delay, the DMP stated: "CFNIS Detachment Victoria was involved in 43 investigations (13 of which were drug-related) in 2005. There are currently seven CFNIS investigators plus administrative staff posted to the Detachment. The OC of this Detachment has commented that 'although we have received excellent support from RMP (Western), the timelines associated with the packages traveling to and from Edmonton for opinion/advice is a negative. We are also unable to confer face to face with RMP, a luxury other Detachments enjoy'"

9.4 SENIOR LITIGATOR POSITIONS

The DMP does not act as a prosecutor at Courts Martial and, because of his administrative responsibilities, the DDMP only occasionally appears in court. We believe that there is a need to have some senior litigators in the system whose main responsibility is to conduct Courts Martial, provide advice to the police on major investigations and mentor junior prosecutors. Court delays can be reduced by highly skilled prosecutors who possess judgment that is gained only through experience.

To achieve this, we suggest that two new Lt. Colonel positions should be created, one position in the East/Atlantic Region and one in the Western Region. The incumbents would be posted to those Regions and these positions would be additional to the existing position of DDMP located at the Central Region Office. The additional Lt. Colonels would be designated as "DDMP/West" and "DDMP East/Atlantic". The positions for Central Region and East/Atlantic Regions should be bilingual. Although we recognize that some of the responsibilities of the positions would be of an administrative nature, we emphasize that their main responsibility should be litigation.

We believe that, generally, the problem in the CMPS that contributes to delays is the lack of senior, experienced litigators as opposed to the overall shortage of prosecutors. In fact, we consider that the total complement of prosecutors is sufficient, given the relatively small caseload. Consequently, we are proposing that the new DDMP's would replace existing RMP positions in the Region rather than being "in addition to" the current complement of RMP's in each Region. This proposal, we believe, would free up the current Lt. Colonel DDMP position to also act primarily as a senior litigator in the Central Region. He or she would also act as DMP when required.

> **9.4 We recommend that two new Lt. Colonel positions be created. These would be Senior Litigator positions, one for the West and one for the East/Atlantic Regions. They would replace existing RMP positions in those Regions rather than adding to the total complement. These positions would have the title "DDMP West" and "DDMP East/Atlantic" and would be at the same level as the existing DDMP position which would remain in the Central Region.**

9.5 THE ROLE OF THE APPEAL COUNSEL/DMP-4

We believe that the responsibilities of this position should be expanded to encompass coordinating the training of RMP's, both initial training for new prosecutors and continuing education of all RMP's. We recognize that the Directorate of Law/Training in Kingston is responsible for the training and continuing education for the entire JAG organization. However, we propose that within CMPS there should be somebody tasked with organizing and coordinating training specifically for prosecutors. This would include, for example, advising RMP's across the country about external courses that they may be eligible to take. It would also include organizing an annual joint educational programme for military prosecutors and Defence Counsel.

The Appeals Counsel should also be responsible for the dissemination of new case law on a regular basis to RMP's across the country. This would include relevant decisions of the civilian appellate courts and the Supreme Court of Canada. This Counsel would also be responsible for maintaining a data-base of Court Martial decisions, appeal decisions and sentencing decisions. With respect to all of the above functions, the Appeals Counsel would be assisted by the paralegal.

The incumbent will necessarily have to be someone with extensive litigation experience and an in-depth knowledge of the law. We expect that he/she would be consulted regularly on legal issues by RMP's and, subject to availability, would act as mentor to more junior RMP's at Courts Martial.

We believe that the duties performed by the Appeal Counsel with respect to training and the dissemination of case law will result in increasing the level of competence, advocacy skills and decision-making ability of RMP's and thereby have the effect of reducing delays.

9.6 THE ROLE OF POLICY COUNSEL (DMP-3)

We have been informed that a number of essential tasks have been put on hold pending the filling of the currently vacant DMP-3 Policy Counsel position. These include a much- needed comprehensive review of the CMPS Policy Manual and the drafting of a Standing Agreement between the CMPS and the NIS. We believe that these are important matters that need to be addressed immediately as part of the overall strategy to reduce delays. The position of Policy Counsel should be filled quickly or, if that is not possible, another member of the CMPS organization should take on these tasks.

The Policy Counsel should assist in identifying QR&O's and policies that contribute to delay, draft the necessary changes to those policies, and prepare submissions for legislative amendments. Further responsibilities of the Policy Counsel should include tracking the extent of delays at the various stages in the Court Martial process, maintaining statistics, conducting research, and preparation of the Annual Report. He/she would also be involved in preparation of an operational plan for the organization and negotiating agreements with other stakeholders in the military justice system.

The Policy Counsel should work with the police on the design and implementation of a new standardized Brief in an electronic format. We believe that a new standardized and electronic Military Police Brief, as well as the implementation of a standing agreement with the NIS, will lead to increased efficiency and better coordination of police and prosecution responsibilities and have a positive effect on delay reduction

> **9.5 We recommend that the DMP-3 Policy Counsel position be filled immediately, or, alternatively, another member of the CMPS organization should take on the tasks of that position. A number of important issues that have not been addressed, pending the appointment of the Policy Counsel, should be dealt with immediately. For example, the comprehensive review of the Policy Manual and the drafting of the agreement with the NIS are matters of some urgency.**

9.7 ADMINISTRATOR FOR CMPS

The DMP and the DDMP have many administrative tasks to carry out in running the CMPS operation. These are functions which are not directly related to cases but rather involve budgets, supervision of administrative staff, accommodations and like duties. This reduces the time they have available to spend on prosecution-related issues. In the civilian prosecution system, including in large prosecutors offices in Ontario and in the PPSC Regional Office in Nunavut, there are Office Managers or Administrators who deal with non-legal matters in those offices. We believe that the creation of such a position should be considered for the CMPS. We envisage this position being filled by a person who is not a lawyer, but rather one who has strong administration experience. There are currently two paralegals working at the CMPS Headquarters. It may be appropriate to appoint one of the paralegals to the Administrator position.

The appointment of a CMPS Administrator would give the DDMP more time to perform the function of a Senior Litigator. This would contribute to reducing delay by providing the DDMP with the opportunity to personally conduct Courts Martial, to act as a mentor to junior counsel and increase his accessibility to RMP's for consultation on substantive issues relating to Courts Martial.

9.6 We recommend that consideration be given to the creation of the position of Administrator or Office Manager at the CMPS Headquarters. This position would be filled by a person who is not a lawyer and who has a strong administrative background and ability.

9.8 ORGANIZATIONAL STRUCTURE OF THE CROWN ATTORNEYS SYSTEM IN ONTARIO

Ontario is not a jurisdiction with an independent Director of Public Prosecutions model. The Attorney General or Minister of Justice is ultimately responsible for all prosecutions; but his authority is delegated to his Deputy and Assistant Deputy Attorneys General. Effectively, the head of the Criminal Prosecution Service in Ontario is the Assistant Deputy Attorney General for Criminal Law. Below him are the Directors and Counsel in the Crown Law Office, Criminal who deal with appeals and special prosecutions. The Province is divided into Regions and there is a Regional Director of Crown Operations for each Region. For administrative matters, the Regional Directors are assisted by Regional Managers. Within each Region, there are a number of Crown Attorney's Offices, each having one Crown Attorney and a number of Assistant Crown Attorneys depending on the size of the jurisdiction. Larger offices also have one or more Deputy Crown Attorneys. Crown Attorney's Offices also have Case Management Coordinators who are paralegals and administrative staff.

We note that there is no position in the CMPS system which is equivalent to the position of the Crown Attorney who has the administrative responsibility of supervising the local Crown Attorney's Office in Ontario. The closest analogy to this position is the more senior RMP in the Region, recognizing, however, that the more junior RMP's do not report to him or her administratively.

There are more opportunities in the Ontario system for promotion of prosecutors than there are in the CMPS. An Assistant Crown Attorney may be promoted to Deputy Crown Attorney, Crown Attorney and Director of Crown Operations for the Region. This provides some incentive for prosecutors to remain in the system. There is also recognition in Ontario that some prosecutors should be promoted to the highest salary levels without taking on administrative responsibilities. The class of Crown Law Officer 4 was created for highly experienced senior litigators and their salaries are comparable to the Crown Attorneys who are responsible for the overall administration of the prosecutor's office. The creation of this class has provided some incentive to remain in the system. We believe that the creation of the two additional Lt. Colonel positions will also have this result in the CMPS.

It is to be noted that the larger Crown Attorneys offices in Ontario, including the Ottawa Crown Attorneys Office, converted to a "vertical file system" with teams which handle the files of accused persons based on an alpha system. There is a "team lead" for each team who is responsible for the post-charge screening of each file assigned to that team. This initiative, which commenced in 2004, was in response to an ever-increasing problem with delays in the court system. All indications are that this new system has been quite successful in many respects, including the management of court delays.

9.9 ORGANIZATIONAL STRUCTURE OF THE PUBLIC PROSECUTION SERVICE OF CANADA REGIONAL OFFICE FOR NUNAVUT

The new Public Prosecution Service of Canada (PPSC) was established with a DPP model. The independence of the Director of the PPSC from the Federal Minister of Justice is in some respects comparable to the independence of the DMP from the Judge Advocate General. There is a Regional Director for Nunavut who reports to the Director and Deputy Director of the PPSC.

The PPSC in Nunavut is centralized in the sense that all of the prosecutors are permanently based in Iqaluit, but travel on circuit to the communities that are spread across Nunavut. Although it would be possible to post individual prosecutors in some of the larger communities outside Iqaluit, this has not been done, as the benefits of centralization are seen to outweigh any that could be gained by decentralization.

There are approximately sixteen prosecutors in the Office. In addition to the Regional Director, there is a Deputy Regional Director of the PPSC in Nunavut whose main roles have been the assignment of cases to prosecutors, providing advice to prosecutors and the police and conducting major trials. There are two senior prosecutors who are team-leaders and they are classified at "LA 2B". There are five Crown witness coordinators and a number of administrative support staff. It should be noted that the two senior prosecutor positions were recently created in order that the experienced prosecutors in the office would have an incentive to stay in Nunavut. The prosecutors in the office were recently divided into three teams headed by the Deputy Director and the two senior prosecutors. One team is responsible for the cases in Iqaluit and the other communities are divided between the two teams. It is expected that this will provide greater continuity between prosecutors and cases, improve overall efficiency and reduce delays.

9.10 ORGANIZATIONAL STRUCTURE OF THE CROWN PROSECUTORS' OFFICES OF NEW BRUNSWICK

The organizational structure of the prosecutions system in New Brunswick is similar to that of Ontario. However, there are no positions of Crown Attorney and Assistant Crown Attorney in each jurisdiction as there is in Ontario. There are Regional Crown Prosecutors in each Region who oversee a group of Crown Prosecutors that varies in size from Region to Region. The most senior prosecutors, including the Regional Crown Prosecutors, are classified as Lawyer 4. Promotion to that level provides an incentive for experienced prosecutors to remain in the system.

10 LIST OF RECOMMENDATIONS

Chapter 4: The Investigation Stage

4.1 We recommend that, in order to better understand the reasons for delay and to know where to focus initiatives, more detailed statistics should be kept with respect to the time that has elapsed from the incident to the laying of charges. There should be a breakdown showing how long it took for the investigation reports to be approved by superiors, how long it took to obtain the required legal advice and to follow-up on that advice before charges were laid.

4.2 We recommend that a time standard or target of one month be established for the completion of investigations in straight-forward cases. This applies to investigations conducted by the Units, regular Military Police officers, and the NIS.

4.3 We recommend that the AJAG's , in consultation with the CMPS, take the lead in developing standard practices for Unit and Military Police investigations.

4.4 We recommend that Unit investigators and Military Police officers be provided with additional training concerning the evidence that is required if a case proceeds to Court Martial. This training should be done by Deputy Judge Advocates and, whenever possible, by RMP's. The use of checklists should be considered.

4.5 We recommend that, when an accused elects to proceed by Court Martial, the DJA's and investigators should give the case special attention. They should make sure that the investigation is complete and that all the essential elements of the offence can be established at a Court Martial. They should do this pro-actively without waiting for the RMP's to make the requests.

4.6 We recommend that, when RMP's make a request for additional information or investigation from Unit investigators, Military Police or NIS officers, they should provide a reasonable timeline by which the results are expected. A copy of the request and timeline should be sent to the investigators' superiors. The timelines should be enforced. It must be understood by investigators that RMP's will not wait indefinitely for outstanding matters to be completed and that they have the discretion not to proceed with cases that they believe have taken too long to bring to Court Martial.

4.7 We recommend that a new Service-level Agreement between the CMPS and the NIS, dealing with the issues between the two organizations, be negotiated and signed as soon as possible.

4.8 We recommend that the CMPS work with the Military Police (NIS) to develop a standard electronic brief format. The brief should include a list of the essential elements of the offence and the evidence available to prove those elements. We recommend that the standard brief include will-say statements of witnesses that are of sufficient quality to comply with the disclosure requirements in the Regulations.

4.9 We recommend that the CMPS and the Military Police, including the NIS, engage in discussions in order to arrive at an agreement dealing with the those situations in which it is necessary to videotape or audio-tape witness statements and when that is not essential. This should result in guidelines from the police superiors to their investigators.

4.10 We recommend that the CMPS be actively involved in training programs for Military Police officers.

4.11 We recommend that consideration be given to the appointment of staff in the Military Police, including the branches of the NIS, to act as "Court Liaison Officers" and to carry out similar duties as are performed by those personnel in the civilian police forces.

4.12 We recommend that, as soon as a decision is made by a Commanding Officer to send a case to a Referral Authority, the process of transmitting the complete investigation file to the RMP's in the Region should begin immediately. It should not be necessary for the RMP's to wait until after the case has worked its way through the chain of command to referral to get the file.

4.13 We recommend that someone should be assigned the specific responsibility for taking steps to ensure that the entire investigation file is forwarded to the RMP's. That person should take the initiative to have the file sent rather than waiting for an RMP to request it. Consideration should be given to making this the responsibility of either the Commanding Officer who decides to proceed with a charge or the DJA who has been providing advice on the case.

4.14 We recommend that, at the same time that the file is sent to the RMP's, they should be notified of the name of the individual who will be responsible for the case on behalf of the investigation. This will be the person who the RMP's should deal with during the post-charge review in order to answer any questions they may have and to arrange for such further investigation as may be required. The same person will also assist the RMP's through to the completion of the Court Martial. If that individual is deployed, transferred or becomes unavailable to work on the file for any other reason, a replacement must be appointed forthwith.

4.15 We recommend that the legal advice memoranda to the charging authorities and to the Commanding Officers prepared by the DJA's be made available to the RMP's who are conducting the post-charge reviews and they be forwarded to the RMP's at the same time as the case file.

4.16 We recommend that, absent special circumstances, the post-charge review should be completed within the Region where the charge is laid. A good practice would be for the RMP's in the Region to begin familiarizing themselves with the file once the Commanding Officer has decided to proceed, even before referral.

Chapter 5: Chain of Command and their Legal Advisers

5.1 We recommend that, in order to better understand the reasons for delay and to know where to focus initiatives, more detailed statistics should be kept with respect to the time from the laying of charges until referral to the DMP. There should be a breakdown showing how long it took for the Commanding Officers and the Referral Authorities to obtain legal advice and to act on it.

5.2 We recommend that, in most cases, there should only be one written legal opinion before referral. The opinion should be prepared by either the DJA's, for the members of the Units responsible for laying charges, or by the RMP's for the NIS. These opinions should deal with the sufficiency of evidence, applying the "reasonable prospect of conviction" standard, the charges to be laid, and the "public interest". In deciding whether to proceed, the Commanding Officers should not be required to seek another opinion and should normally act on those initial opinions. The Referral Authorities should do the same when considering their recommendations to the DMP.

5.3 We recommend that the standard time period for Commanding Officers to make their decisions whether to proceed with cases after charges have been laid should be two weeks. If they decide to proceed, they should send a request for prosecution directly to the DMP and forward copies of all documentation to the Referral Authorities. The Referral Authorities should have two weeks to forward their recommendations, if any, to the DMP. If the DMP does not hear from the Referral authorities within that timeframe, the DMP may assume they have nothing to add to the positions already taken by the Commanding Officers.

5.4 We recommend that, when referring cases to the DMP for prosecution, the Commanding Officers indicate their views on the appropriate sentence that should be imposed for the offence if the accused pleads

guilty or is adjudged guilty after a Court Martial trial. Those opinions should be taken into consideration by the RMP's, but would not be binding on them.

5.5 We recommend that the RMP's regularly update Commanding Officers on the progress through the Court Martial system of every charge pertaining to their Unit.

5.6 We recommend that the CMPS provide continuing education, on a regular basis, to DJA's with respect to the requirements of Courts Martial. Most importantly, the education should deal with the elements of offences and what is necessary to prove them. The Appeals Counsel (DMP-4), as part of his/her responsibilities, should ensure that the DJA's are kept up to date with current decisions relevant to Courts Martial and informed of problems encountered in court as the result of inadequate investigation or advice.

5.7 We recommend that DJA's be given the opportunity to participate as co-counsel (second chair) with RMP's at a few Courts Martial in order to give them a better appreciation of what is expected at those trials.

5.8 We recommend that DJA's be invited to attend the joint educational program conducted for RMP's and for the military defence counsel in order to keep them appraised of issues pertaining to Courts Martial.

Chapter 6: Practices and Policies of CMPS

6.1 We recommend that the CMPS examine ways to foster a work environment where Military Prosecutors feel free to fearlessly exercise discretion on a principled basis, without concern for personal or professional repercussions. We further recommend that the CMPS take measures to ensure strong institutional support for the exercise of such discretion.

6.2 We recommend that the general approach of the DMP and the DDMP should be to delegate responsibility for all aspects of decision-making to the RMP's with respect to the cases that are assigned to them. This delegation of authority should be subject to the following:

- The RMP's should be encouraged to freely consult with the DMP, the DDMP and other Regular Force and Reservist RMP's when they feel they could benefit from advice.

- When assigning specific cases to the RMP's, the DMP and the DDMP should indicate whether it will be a requirement of the RMP's assigned to consult with them before the RMP's make certain decisions on those cases.

- The RMP's should be required to initiate consultation with the DMP or DDMP before making a final decision on one of their assigned cases that has the potential to become controversial or precedent-setting and may have consequences that could affect the military justice system as a whole.

6.3 We recommend that the post-charge reviews of cases, to the extent they are maintained for some or all cases, be conducted by the RMP's more expeditiously and in less detail than at present. We see no need for the RMP's to interview many witnesses or view all videotapes of witnesses' statements in most cases.

6.4 We recommend that the practice of requiring RMP's to submit lengthy written analysis of the cases they review post-charge be discontinued. They should keep their own notes of their review in the file and a standard form should be developed that they could use as a guide for conducting the reviews.

6.5 We recommend that the tests described in the CMPS policies for pre-charge advice to the NIS, be changed to "reasonable prospect of conviction" and "in the public interest" for all offences.[75] Where the proposed charges are ones for which the accused will be given an election (following the laying of a charge), the prospect of conviction should be determined on the assumption that the rules of evidence applicable to Summary Trials will govern. Where the accused will have no election, the prospect of conviction should be determined based on the rules of evidence applicable at Courts Martial.

6.6 We recommend that the RMP's conduct the pre-charge reviews based on a court brief submitted to them by the NIS. They should not approve charges until they are satisfied that the investigation is complete and they have been provided with all of the documentation that will be required for trial.

6.7 We recommend that the general practice should be for RMP's not to interview witnesses during the pre-charge review stage. However, it may be appropriate to do so in the special circumstances set out in a list contained in the Federal Prosecutions Service Deskbook. A similar list should be made part of a new CMPS Policy Directive on pre-charge reviews. We recommend that, although the time required to conduct the pre-charge review will be dependent upon the nature and complexity of the case, the present goal of completing pre-charge reviews within 14 days should still apply.

6.8 We recommend that it should be left to the individual RMP to decide how detailed a memorandum the RMP will prepare to support the pre-charge review decision. Generally, it should not be necessary for them to complete a written analysis of all of the elements of each offence and the proof thereof. In most cases, a record in the RMP's file should suffice. Consideration should be given to the development of a standardized charge-screening and review form, such as those employed in Ontario and New Brunswick.

6.9 We recommend that Regulation 111.11(1)(b) be amended to remove the requirement for the CMPS to provide the defence with "will-say" statements of all of the witnesses it intends to call. A list of those witnesses along with their entire statements should be sufficient. In the alternative, or pending the amendment of the Regulation, the investigating authorities should provide "will-say" statements in the prosecution briefs that comply with the requirement of the Regulation.

6.10 We recommend that complete disclosure be provided to counsel for the accused as soon as possible after charges are laid. This should be done shortly after RMP has had the opportunity to vet the investigation file and should not be delayed until charges are preferred. If the accused does not have counsel, the disclosure "package" ought to be forwarded to the DDCS.

6.11 We recommend that Policy Directive 008/99, paragraph 4 that provides that "All resolution discussions must be initiated by defence counsel" be revoked.

6.12 We recommend that the CMPS adopt the practice of indicating the prosecutor's sentencing position on an early plea of guilty on a form that accompanies the disclosure package.

Chapter 7: The Court Martial

7.1 We recommend that modern case-management practices that are widely used in the civilian criminal justice system be adopted for use in the Court Martial system. The recent initiatives in this respect, that have been taken by the Chief Military Judge, should be encouraged and supported by all stakeholders.

7.2 We recommend that section 187 of Bill C-45 be amended to allow any military judge to deal with a case after a charge has been preferred up to the point when the Court Martial trial actually commences. Subject to that amendment, we hope that Parliament will give swift passage to the Bill.

7.3 We recommend that, if Bill C-45 is passed, Court Rules be developed and implemented by the Chief Military Judge pursuant to section 165.3. The Rules should deal with matters such as the amount of notice required for applications pursuant to the Charter of Rights and mandatory Judicial Pre-trial Conferences.

7.4 We recommend that the Chief Military Judge, with the assistance of the other Military Judges and the Court Martial Administrator, continue to assume an active leadership role in Case Management.

7.5 We recommend that a permanent Case Management Committee be established by the Chief Military Judge and that it meet on a regular basis. The Committee should be chaired by the Chief Military Judge and it should include the Court Martial Administrator, a "Trial Coordinator", the DMP, the DDMP, the DDCS, the Provost Marshall and others invited by them to attend. Its role should be to address case- management issues, including setting time standards, monitoring the flow of cases, identifying problems that contribute to delay and jointly devising solutions to those problems.

7.6 We recommend that, in carrying out their respective functions, special effort be made by the leadership of the CMPS and DCS to place less emphasis on traditional adversarialism and more emphasis on co-operative case management.

7.7 We recommend that the Military Justice Planning and Research Branch keep accurate statistics measuring delays in cases at every stage of the military justice process, from the time of the alleged offence until the completion of the Court Martial. A compilation of these statistics should be produced every month and they should identify areas where delays are increasing or decreasing. The data should be made available to the Case Management Committee for regular monitoring purposes.

7.8 We recommend that case-flow management standards and goals be established and monitored by the Case Management Committee. We believe that a reasonable target would be to have most Court Martial hearings on simple, straightforward cases commence within 3 months of the date of the preferral.

7.9 We recommend that the position of "Trial Co-ordinator" be created within the office of the Chief Military Judge or attached to the Court Martial Administrator. The role of the Trial Co-ordinator would be to oversee the scheduling of trials, to communicate regularly with counsel and to monitor the trial list in order to ensure that judicial resources are used efficiently.

7.10 We recommend that the practice, recently started by the Chief Military Judge, of having the judge who travels to a location deal with more than one case should become the norm. Whenever a military judge travels to a given location to conduct one or more Courts Martial, he or she should also have all the pending cases in that location listed in court "to be spoken to".

7.11 We recommend that the practice of routinely scheduling one week for each Standing Court Martial and two weeks for Disciplinary Courts Martial be discontinued. The amount of time scheduled for trials should depend on the complexity of the cases, the issues identified by counsel and the time estimate given at Judicial Pre-trial Conferences.

7.12 We recommend that, if Bill C-45 is passed, Judicial Pre-trial Conferences should be mandatory and should be held before trial dates are set. The model for these conferences should be developed by the Chief Military Judge in consultation with the Court Management Committee. The "Best Practices" listed in the Report of the Criminal Justice Committee (Ontario, 1999) provide a good guide.

7.13 We recommend that, when a Court Martial is convened, a date should also be set for the matter "to be spoken to" one month in advance of the trial date for the purpose of holding a Confirmation Hearing by teleconference before a judge, preferably the judge assigned to conduct the Court Martial. The court should require counsel for both sides to confirm they are ready to proceed to trial and to confirm the time estimates previously given.

7.14 We recommend that procedures be put in place by the Chief Military Judge to facilitate the early resolution of cases by pleas of guilty and/or withdrawal of charges before trial dates are set. Consideration should be given to making greater use of the courtroom in Gatineau, Quebec for pleas of guilty in appropriate cases, with the proceedings broadcast by video to the accused's Unit in another part of Canada.

7.15 We recommend that, in the interests of greater efficiency, there should be, when appropriate, some deviation from the traditional practice of holding Courts Martial at the physical location of the Units. More Courts Martial should be held from the courtroom in Gatineau, Quebec, with the assistance of video technology. Prior to preferring a charge, an inquiry should be made of the Commanding Officer about the importance of holding the Court Martial at the location of the Unit.

7.16 We recommend that, in an effort to reduce overall delays, sentencing hearings in straightforward cases be made shorter and more efficient. Alternative ways of presenting the information that Military Judges consider necessary to arrive at a just sentence should be explored.

7.17 We recommend that, in order to promote consistency in sentencing for the same types of offences across the CAF, precedents from Summary Trials should be admitted and considered on sentencing by Military Judges at Courts Martial.

7.18 We recommend that a review be conducted of the Military Evidence Act (Military Rules of Evidence) with the view to simplifying the methods for proving certain elements of offences without unduly infringing on the fundamental rights of accused persons.

Chapter 8: Human Resources Management at CMPS

8.1 We recommend that the JAG should encourage and facilitate the development of an experienced cadre of criminal lawyers, both defence counsel and military prosecutors, and cross-postings should be encouraged. The present mind-set that the military lawyer practising in the criminal field ought to be a generalist should no longer be emphasized.

8.2 We recommend that, with regard to posting policies concerning JAG lawyers, it must be recognized that the position of a military prosecutor is a very specialized one that encompasses the acquiring of a considerable amount of knowledge and expertise with respect to advocacy skills, the rules of evidence, substantive criminal law and the Charter of Rights.

8.3 We recommend that the initial appointment to the position of RMP should be for a minimum of five years.

8.4 We recommend that the military prosecutors be encouraged to stay as long as possible in the RMP position. They should be permitted to spend their career as military prosecutors if they so wish.

8.5 We recommend that, whenever possible, the appointment of new military prosecutors to regional offices should occur when a more senior prosecutor is still posted to that office and is able to remain until the new appointment is able to become familiar with their position.

8.6 We recommend that a specific training programme, both for new appointees and for those more experienced military prosecutors, be developed and the job description of the Appeal counsel DMP-4 should include the responsibility for instituting and coordinating the training plan and programme. That person should also be responsible for distributing new case law to all military prosecutors on a regular basis. Furthermore, the position would be responsible for maintaining a data-base of Court Martial decisions. In all of these functions the incumbent would be aided by a paralegal.

8.7 We recommend that information about potential educational programmes should be disseminated by the Coordinator of Training to military prosecutors across Canada and that everyone be given an equal opportunity to attend these courses.

8.8 We recommend that the DMP provide an opportunity for every new prosecutor to work for a minimum of six to twelve months in a civilian prosecution service in order to gain experience in court. A similar opportunity should be repeated after several years of experience for military prosecutors to be seconded to a civilian prosecution office for a period of time that can be negotiated. An example would be that an experienced military prosecutor could have an opportunity to "junior" to a civilian prosecutor on a serious case, such as a homicide.

8.9 We recommend that new prosecutors should have the opportunity to conduct a number of Courts Martial as "juniors" to experienced military prosecutors, including Reservist prosecutors. This is especially relevant with regard to drug prosecutions which involve a degree of prosecutorial expertise and which compose a good percentage of the cases that the RMP's are facing.

8.10 We recommend that the DDMP, subject to his/her availability, should participate in some Courts Martial as a mentor with the assistance of junior military prosecutors. [This should occur frequently if our recommendation for three DDMP's is accepted]

8.11 We recommend that Joint Conferences/Training Sessions (the Advocacy Course), involving all defence counsel and all military prosecutors, be held at least once per year and should involve the military judges as panellists and presenters. The emphasis of these conferences/training sessions should be on advocacy skills.

Chapter 9: Organization of the CMPS

9.1 We recommend that the current regional structure of the CMPS be continued, with some modification.

9.2 We recommend that one of the RMP's in the West Region be posted at CFB Esquimalt.

9.3 We recommend that one of the RMP's in the Central Region be posted at CFB Borden. That position would also be responsible for training at the CF Military Police Academy.

9.4 We recommend that two new Lt. Colonel positions be created. These would be Senior Litigator positions, one for the West and one for the East/Atlantic Regions. They would replace existing RMP positions in those Regions rather than adding to the total complement. These positions would have the title "DDMP West" and "DDMP East/Atlantic" and would be at the same level as the existing DDMP position which would remain in the Central Region.

9.5 We recommend that the DMP-3 Policy Counsel position be filled immediately, or, alternatively, another member of the CMPS organization should take on the tasks of that position. A number of important issues that have not been addressed, pending the appointment of the Policy Counsel, should be dealt with immediately. For example, the comprehensive review of the Policy Manual and the drafting of the agreement with the NIS are matters of some urgency.

9.6 We recommend that consideration be given to the creation of the position of Administrator or Office Manager at the CMPS Headquarters. This position would be filled by a person who is not a lawyer and who has a strong administrative background and ability

APPENDICES

A. Terms of Reference

B. List of People Interviewed

C. Comparative Analysis of Court Martial Time Lines by Fiscal Year

D. Analysis of Court Martial Time Lines for Ten "Typical" Cases Completed in 2007-08

E. Comparative Analysis of Actual and Proposed Time Lines

F. Policies dealing with Prosecutorial Independence in the CMPS, PPSC, Province of Ontario and the Province of New Brunswick

G. Post-charge Screening Form – Crown Attorney's Office, Ottawa (hard-copy only**)

H. Pre-charge Review Sheet – Fredericton Crown Prosecutors Office (hard-copy only**)

I. Table: "Experience of Military Prosecutors"

J. Court Martial Cases Completed in Calendar Year 2007

K. Table: "Experience of Prosecutors in the Cornwall, Ontario Crown Attorney's Office"

L. Table: "Experience of Prosecutors in the Nunavut (Iqaluit) PPSC Office"

M. Table: "Experience of Prosecutors in the Fredericton, New Brunswick Crown Prosecutors Office"

N. Organizational Chart of the C.M.P.S.

APPENDIX "A"
TERMS OF REFERENCE

2.0 REQUIREMENTS

2.1 General

2.1.1 DMP requires an external review of the CMPS's organization, structure, human resource management, policies and practices. This review is to be conducted by a civilian prosecution service expert and is to include the provision of practical recommendations to increase efficiency and reduce delay in the provision of military prosecution services, without compromising fundamental principles of military justice and discipline.

2.2 The tasks identified and detailed in Section 2.3 of this SOW fall into three general categories of review; the organization and structure of CMPS, human resource management of CMPS and CMPS policies and practices. As strategies or recommendations proposed in one area will impact the others, it is, therefore, imperative that any recommendations made in accord with this SOW address the delay issue within the paradigm of a necessarily integrated strategy.

2.3 Tasks

The review shall be conducted by completing the following tasks:

(a) Examine and compare the services provided and tasks performed by CMPS with those provided and performed by civilian crown prosecutors' offices, and identify identical, analogous, dissimilar and unique, services, objectives and tasks.

(b) Review of the organisation of the CMPS as defined by the DMP organizational chart (orgchart) and:

a. Identify the reasons for the current structure of CMPS;

b. Compare the structure of CMPS with three civilian prosecution services of the following jurisdictions:

i. Ontario;

ii. A charge approval jurisdiction of either British Columbia, Québec or New Brunswick; and

iii. One other province;

c. Identify the structural elements and components of CMPS that can contribute to delay within the military justice system and explain why they can contribute to delay;

d. Identify and analyse potential structural changes to CMPS that will assist in minimising delay in the military justice system; and

e. Identify and analyse the impact these recommended structural changes may have on CMPS operations including the two other general categories of review (Human Resource Management; Policy and Procedure).

(c) Review the human resources management of CMPS and:

a. Review the experience, training, mentoring and posting of military prosecutors;

b. Identify the reasons for the current human resources management of CMPS;

c. Compare the human resources management of CMPS with three civilian prosecution services of the following jurisdictions:

i. Ontario;

ii. A charge approval jurisdiction of either British Columbia, Québec or New Brunswick; and

iii. One other province;

d. Identify human resources management issues within CMPS that may contribute to delay in the military justice system and explain why they can contribute to delay;

e. Identify and analyse potential human resources management changes for CMPS that will assist in minimising delay in the military justice system; and

f. Identify and analyse the impact these recommended structural changes may have on CMPS operations including the two other general categories of review (CMPS Structure and Organization; Policy and Procedure).

(d) Review the policy and practices of CMPS including policy directives, practice directives, and any other appropriate documents of CMPS or DMP;

a. Identify the reasons for the current policies and practices of CMPS;

b. Compare the current policies and practices of CMPS with three civilian prosecution services of the following jurisdictions:

i. Ontario;

ii. A charge approval jurisdiction of either British Columbia, Québec or New Brunswick; and

iii. One other province;

c. Identify the policies and practices of CMPS that can contribute to delay in the military justice system and explain why they can contribute to delay;

d. Identify and analyse any changes to the policies and practices of CMPS that will assist in minimising delay in the military justice system; and

APPENDIX "B"
LIST OF PEOPLE INTERVIEWED

APPENDIX "B"
LIST OF PEOPLE INTERVIEWED

Judge Advocate General's Office

Brig. Gen. Ken Watkin, Judge Advocate General, Headquarters, Ottawa
Col. Bert Herfst, Chief of Staff, JAG
Col. Pat Gleeson, Deputy JAG, Military Justice and Admin. Law
Lt. Col. Jill Wry

Commanders

Brig.General Mark Skidmore, Commander, Joint Land Forces, Western Area
Cmdr. Steve Jorgensen, Captain of H.M.C.S. Athabaskan
Lt. Col. Geoff Parker, Commanding Officer, 2 RCR, Gagetown

Non-Commissioned Members

RSM Baisley, Regimental Sgt. Major, 2RCR, Gagetown

Office of the Chief Military Judge

Col. Mario Dutil, Chief Military Judge, Asticou
Simone Morrissey, Court Martial Administrator, Asticou

Canadian Military Prosecution Service

Capt.(N) Holly MacDougall, Director, Military Prosecutions
Lt. Col. Bruce MacGregor, Deputy Director Military Prosecutions

Major Jason Sampson, RMP (Regional Military Prosecutor) Halifax
Major Jean Caron, RMP, Val Cartier, Quebec
Lt. Cmdr. Martin Raymond, RMP, Val Cartier, Quebec
Major Ben McMahon, RMP, Central Region, Ottawa
Major Marylene Trudel, Appeal Counsel, Central Region, Ottawa
Major Tony Tamburro, RMP, Central Region, Ottawa
Major Sherry MacLeod, RMP, Central Region, Ottawa
Capt. Rob Henderson, RMP, Western Region, Edmonton
Capt. Trina Bussey, RMP, Western Region, Edmonton

Lt. Cmdr. Rob Fetterly, Reservist RMP, Halifax, (Manitoulin)
Capt. David Kirk, Reservist RMP, Central Region, Sault Ste. Marie
Lt. Col. Buster Young, Reservist RMP, Central Region, Rainy River
Capt. Doug Curliss, Reservist RMP, Western Region, Saskatoon
Lt. Cmdr. Geoff Gaul, Reservist RMP, Western Region, Victoria

Phyllis Nadeau, Paralegal, Office of DMP, Ottawa
Ashley McClure, Administrative Assistant
Angela Douma, Clerk

Deputy Judge Advocate Generals and Staff

Major Dennis Pawlowski, Deputy Judge Advocate, Atlantic Region, Halifax
Chief Petty Officer Al Robb, Atlantic Region, Halifax

MWO Steve Bartlett, Office of DJAG, Gagetown
Nancy Cashin, Office of DJAG, Gagetown

Defence Counsel Services

Lt. Col. Jean-Marie Dugas, Director, Defence Counsel Services, Asticou
Lt. Col. Denis Couture, Reservist Defence Counsel, Ottawa
Lt. Cmdr. John McMunagle, Reservist Defence Counsel, DCS, Ottawa

National Investigation Service

Lt. Col. Bud Garrick, Director, NIS, Canada, Ottawa
Capt. Kevin Cadman, NIS, Central Region, Ottawa
Sgt. Cameron Hillier, NIS, Central Region, Ottawa

Military Police

Capt.(N) Steve Moore, Provost Marshall, Ottawa
Capt. Dan Perron, i/c Military Police, Gagetown

Crown Prosecutors

Bill Corby, Regional Crown Prosecutor, Fredericton, New Brunswick
Paul Hawkins, Crown Prosecutor, Oromocto-Burton, New Brunswick

Louise Dupont, Deputy Crown Attorney, Ottawa
Don MacDougall, Asst. Crown Attorney, Ottawa
Lorraine McWatty, Case Management Coordinator, Ottawa Crown Attorney's Office

APPENDIX "C"
COMPARATIVE ANALYSIS OF COURT MARTIAL TIME LINES BY FISCAL YEAR

APPENDIX "C"
Comparative Analysis of Court Martial Time Lines by Fiscal Year

Timeframe	# of Courts Martial	# of Days from Incident to Charge laid	# of Days from Charge laid to Referral	# of days from Referral to Preferral	# of days from Preferral to start of CM	# of days from Charge laid to start of CM	# of days from start of CM to Disposition	# of days in Court	# of days from charge laid to Disposition
1 Apr 00 to 31 Mar 01	*65	336	68	83	98	249	10	2	259
1 Apr 01 to 31 Mar 02	67	218	49	139	112	300	14	2	314
1 Apr 02 to 31 Mar 03	73	511	63	119	69	254	7	2	296
1 Apr 03 to 31 Mar 04	56	263	71	88	65	224	8	3	232
1 Apr 04 to 31 Mar 05	*63	296	70	87	110	267	7	2	274
1 Apr 05 to 31 Mar 06	41	191	68	77	137	282	36	4	318
1 Apr 06 to 31 Mar 07	66**	236	73	103	235	410	4	2	414

* Figure excludes Matchee (Inquiry by a SCM pursant to s.202.12 NDA).

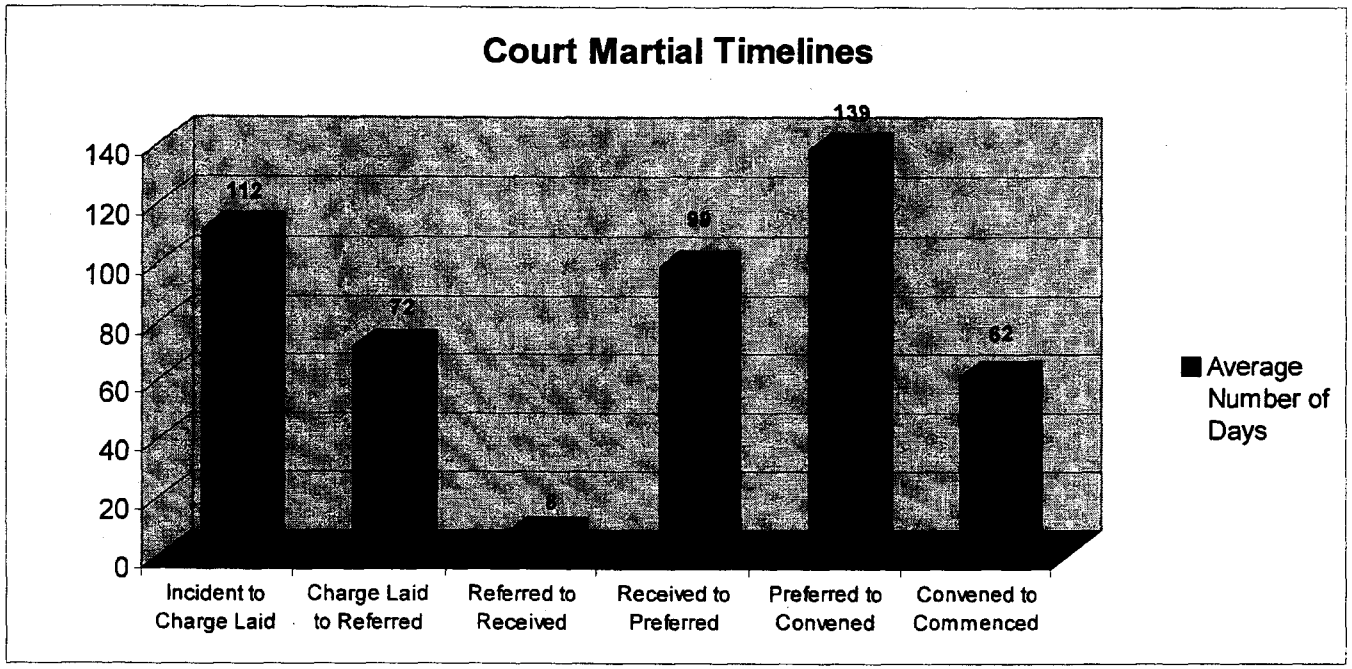
** Although the total number of courts martial for this year is 66, the figures do reflect the data for 63 courts martial as the records for LS Rogers, WO Charest and Cpl Matthews were incomplete. The dates of Charges Preferred to CMA were not inputted in CMRS when this report was produced (actions are taken to correct this situation). As a result, we excluded this court martial from the figures.

APPENDIX "D"
ANALYSIS OF COURT MARTIAL TIME LINES
FOR TEN 'TYPICAL' CASES COMPLETED IN 2007-08

APPENDIX "D"
Analysis of Court Martial Time Lines for Ten "Typical" Cases Completed in 2007-08

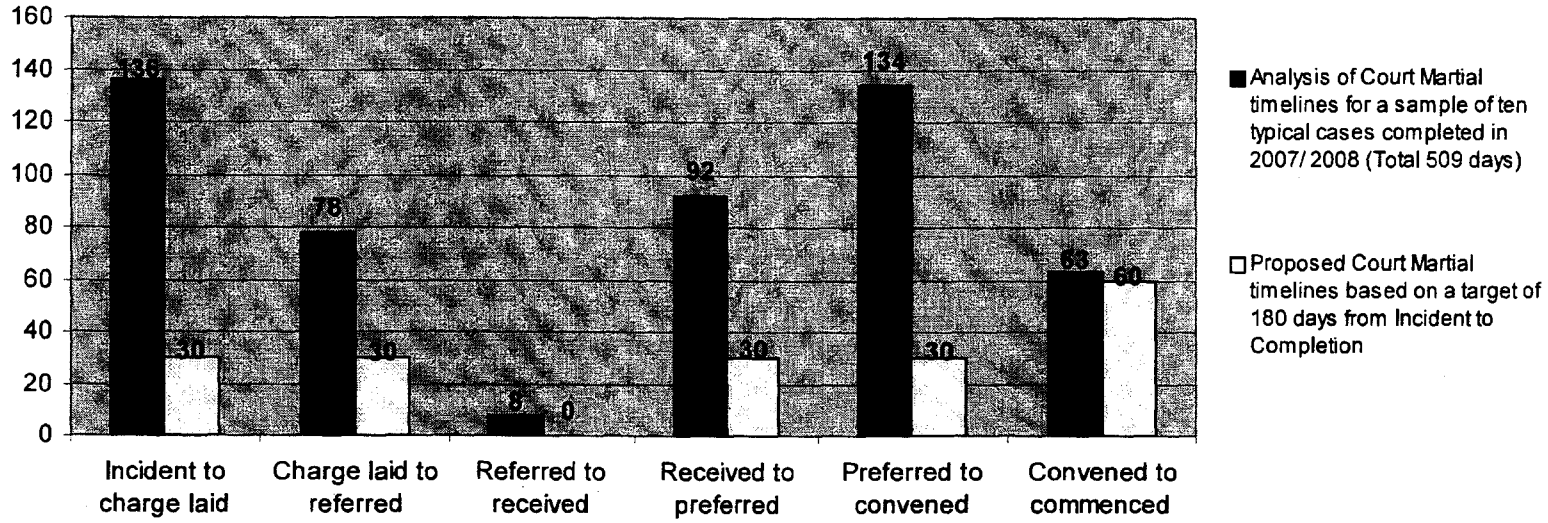
	No of days from incident to charge laid (Investigative Body)	No of days from charge laid to referred (Referral Authority)	No of days from referred to received (Transit)	No of days from received to preferred (Prosecutor)	No of days from preferred to convened (CMA)	No of days from convened to commenced	Number of days to bring case to trial
1	80	119	6	105	162	76	548
2	242	83	7	79	154	22	587
3	229	121	8	152	150	11	671
4	61	44	6	108	208	47	474
5	249	106	1	53	91	58	558
6	166	26	6	95	172	119	584
7	167	63	8	64	98	7	407
8	52	67	16	108	96	146	485
9	81	73	9	106	127	50	446
10	34	75	8	47	78	89	331
Averages	**136.1**	**77.7**	**7.5**	**91.7**	**133.6**	**62.5**	**509.1**

APPENDIX "D"
Analysis of Court Martial Time Lines for Ten "Typical" Cases Completed in 2007-08



APPENDIX "E"
COMPARATIVE ANALYSIS OF ACTUAL AND PROPOSED TIME LINES

APPENDIX "E"
COMPARATIVE ANALYSIS OF ACTUAL AND PROPOSED COURT MARTIAL TIME LINES



APPENDIX "F"
POLICIES DEALING WITH PROSECUTORIAL INDEPENDENCE IN THE CMPS, PPSC, PROVINCE OF ONTARIO AND THE PROVINCE OF NEW BRUNSWICK

APPENDIX "F"

POLICIES DEALING WITH PROSECUTORIAL INDEPENDENCE IN THE CMPS, PPSC, THE PROVINCE OF ONTARIO AND THE PROVINCE OF NEW BRUNSWICK

THE CMPS

The following are relevant extracts from DMP Policy Directive 010/00

Accountability, Independence and Consultation

Statement of Policy

2. One can summarize the challenging nature of a Prosecutor's work in terms of a balance among the competing concepts of accountability, independence and consultation. The interaction of these principles mean that what is protected is a system of prosecutorial decision-making in which the Prosecutor is an integral component. A large measure of independence is conferred on the Prosecutor, but absolute discretion is not.

Accountability

4. A Prosecutor must clearly understand to whom he or she is accountable, and for what. The answers to these questions begin with an understanding of the relationship between the Prosecutor; the Judge Advocate General (JAG) and the chain of command.

5. Every Prosecutor is accountable to the DMP for the manner in which each prosecution is conducted.

10. In summary, then, the Prosecutor is accountable directly to the DMP. Generally, the conduct of the Prosecutor will be guided by instructions and guidelines from the DMP. Specific instructions in a particular case can be given from the DMP or, through the DMP, from the JAG. The duties of a Prosecutor are carried out under the authority of the DMP and in the performance of those duties the Prosecutor is not subject to the direction of any other officer who is not a legal officer posted to a position within the CMPS9.

12. An equally important form of accountability is internal accountability. All Prosecutors are accountable to their superiors for decisions taken11. One of the goals of this and other policies of the DMP is to assist Prosecutors in making the numerous difficult decisions which arise in disciplinary litigation. In so doing, it sets objective standards against which prosecutorial conduct may be measured.

Prosecutorial Independence

14. Accountability and independence are corollory principles at work in the military justice system. In respect of justice matters, the JAG enjoys independence from the judiciary, the chain of command and inappropriate forces that might influence such matters. Prosecutors exercise their independence as the representative of the DMP. As such, the "independence" of the Prosecutor is a delegated independence.

15. Prosecutors retain a significant degree of discretion in individual cases[15]. They are, however, obliged to make decisions in accordance with instructions or guidelines issued by the DMP. They act under the direction of the DMP, who in turn acts under the general supervision of the JAG. The concept of prosecutorial independence, then, encompasses the principles of

a) Independence from political or inappropriate interference, accountability to the DMP; and

b) independence to make decisions in the conduct of prosecutions, while adhering to policies and direction designed to guide this exercise of discretion.

Consultation

16. The independence principle does not mean that Prosecutors need not consult. Quite to the contrary: responsible prosecutorial decision-making often requires consultation with colleagues, superior officers within the CMPS, or investigators. Indeed prosecutorial discretion is not exercised in a vacuum. Prosecutors do not take instructions as to how to proceed except from those in the line of authority leading to the Minister of National Defence, namely, the Deputy DMP (D/DMP) and DMP.

THE PPSC

Extracts from the Federal Prosecution Service Deskbook

Part III Principles governing Crown Counsel's conduct: Chapter 8

Independence and Accountability in Decision Making

Perhaps less well understood is the operation of the independence principle in the day-to-day decision-making of individual Crown counsel. Crown counsel exercise their independence **as the representative of the Attorney General.** As such, the "independence" of Crown counsel is a **delegated** independence. Crown counsel are obliged to make decisions in accordance with the policies of the Attorney General in this deskbook, and they act under the direction of FPS Directors, Regional and Senior Regional Directors, who are in turn responsible to the Assistant Deputy Attorney General (Criminal Law). Crown counsel retain a significant degree of discretion in individual cases[2].

Crown counsel, like the Attorney General, are accountable for their decisions. Since the Attorney General is accountable to Parliament and the public[3] for decisions made in his or her name, this may mean that the Attorney General (either personally, or through the Assistant Deputy Attorney General (Criminal Law)), may provide Crown counsel with instructions in a particular case, though such situations would be relatively rare.

The independence principle also does not mean that Crown counsel need not consult. Quite to the contrary, responsible prosecutorial decision-making often requires consultation with colleagues, superiors or investigators. Indeed prosecutorial discretion is not exercised in a vacuum. The principle of independence means that the Attorney General does not take instructions as to how to exercise discretion. Similarly, Crown counsel do not take instructions as to how to proceed, except from those in the line of authority leading to the Attorney General, namely, the FPS Director, the Regional and Senior Regional Director, the Assistant Deputy Attorney General (Criminal Law) and the Deputy Attorney General.

The interaction of the principles of independence, accountability and consultation mean that **what is protected is a system of prosecutorial decision-making** in which the prosecutor is an integral component. A large measure of independence is conferred on Crown counsel, but absolute discretion is not.

8.2 Statement of the Policy

Crown counsel are obliged to exercise independent judgment in making decisions. Because their decision-making powers are delegated to them by the Attorney General, Crown counsel are subject to the same constraints faced by the Attorney General personally: they are accountable for their decisions, and they must consult where required. Prosecutorial independence is not a license to do as one wishes, but to act as the Attorney General personally should act.

8.3 Accountability

An equally important form of accountability is internal accountability. All counsel for the Attorney General, whether employees within the Department of Justice, or standing or *ad hoc* agents, are accountable to their superiors for decisions taken.6 The Department of Justice is organized to foster principled, competent and responsible decision making7. One of the goals of the Federal Prosecution Service Deskbook is to assist counsel in making the numerous difficult decisions which arise in criminal litigation. In so doing, it sets objective standards against which prosecutorial conduct may be measured.

THE PROVINCE OF ONTARIO

Ontario Crown Attorneys Manual

> The common practice is for the Attorney General to grant broad areas of discretion in criminal prosecutions to Crown counsel (except in those few circumstances where the *Criminal Code* requires the Attorney's personal involvement or consent). This granting of decision-making latitude reflects respect for the professional judgment of Crown counsel and is consistent with Crown counsel's Minister of Justice role.
>
> The Attorney General is accountable to the Legislature for the entire process through which justice is administered in the province. Because of this accountability, which includes specific cases, a continuum of responsibility within the Ministry has been established. This continuum extends from Crown counsel at the operational level upward to the Deputy Attorney General and the Attorney General. Each Crown counsel or Assistant Crown Attorney reports to a Crown Attorney or Director. Crown Attorneys in turn report to Directors, while Directors report to the Assistant Deputy Attorney General, who reports to the Deputy Attorney General. The Ministry also employs *per diem* counsel to act as Crown counsel and provincial prosecutors. They are subject to this internal reporting structure.

Role of the Crown Attorney – Relationship between the Independence of the Crown, Accountability and the Crown Policy Manual

Independence

> The common practice is for the Attorney General to grant broad areas of discretion in criminal prosecutions to his/her Crown Attorneys (except in those few circumstances where the Criminal Code requires his personal involvement). This granting of decision-making latitude, necessary for practical reasons, reflects respect for the professional judgement of Counsel, and is consistent with the Crown's Minister of Justice role.

3. Accountability

The Attorney General is accountable to the legislature and accordingly, must answer in the legislature for the entire process through which justice is administered in the province. The Attorney is accountable for policy decisions and for the decisions made in individual cases. Because of this accountability in regard to specific cases, a continuum of accountability within the Criminal Law Division has been established. This continuum extends from Crown counsel at the operational level upward to the Deputy Attorney General and the Attorney General. "Accountability" has been defined by Management Board of Cabinet as the obligation of an individual or agency to be answerable for fulfilling responsibilities that flow from the authority given to that individual or agency. Accountability involves establishing expectations, delegating authority, monitoring activity, and taking corrective action when required. This description of accountability recognizes that "independence" and "accountability " are not contradictory terms. Independent officials can be fully accountable, and transparent accountability is one of the principle mechanisms through which abuses of power can be prevented or exposed.

4. The Crown Policy Manual: Honouring Crown Policy

The policies provided by the Attorney General to Crown counsel are not intended to replace the judgement that counsel exercise. Crown counsel are expected to exercise their discretion in accordance with the overall priorities defined in the Manual, keeping in mind the Crown's duty to see justice done in individual cases. Comprehensive prosecutorial discretion is necessary in order to permit counsel to respond appropriately and with sensitivity to the infinite variety of delicts, offenders, victims, and local conditions, which they encounter. Providing this relatively broad independence to Crown counsel, however, does not diminish the need to hold counsel accountable to their superiors. Indeed, it emphasizes why transparent accountability is necessary – to ensure consistency, fairness, responsibility, and integrity in the exercise of discretion.

The fact that Crown counsel are accountable to their superiors for the exercise of discretion in the criminal process and that there is an expectation of compliance with policy directions given by the Attorney General should not cause counsel to be fearful of making difficult decisions. Only a small number of policies specifically eliminate options or require consultation with a superior before decisions are made. The vast majority of decisions, which are left to counsel, envisage a range of options. The usual challenge for counsel is to select from those options the one, which, in counsel's assessment of the public interest is most responsive to the circumstances at hand. It is clearly understood at all levels of the administrative hierarchy that the exercise of judgement in the criminal process is not an exact science. Reasonable, competent people often disagree. Frequently, there is no single "right" answer. When the balancing of competing factors is precarious, inexperienced counsel are encouraged to consult with more experienced counsel in order to arrive at an appropriate decision. It is important for counsel to be aware that to neglect or to avoid making a necessary decision can be more harmful to the administration of justice and the public interest than actually making a decision that, in retrospect, is challenged.

While the Attorney General sets out his expectations of Crown counsel in the Manual, Crown counsel also expect to be supported by the Attorney General when they make difficult decisions which are within their discretionary powers.

Introduction

.... It follows that the Attorney General's responsibility in day-to-day public prosecutions is discharged mostly by means of general policy direction to Crown Prosecutors in various areas of prosecutions that require a fair and consistent approach throughout the province.
By tradition and necessity, Crown Prosecutors have a broad and generous area of discretion in prosecutions, subject to general policy directions of the Attorney General or specific direction in exceptional cases. They act under the direct supervision of the Director of Public Prosecutions and Regional Crown Prosecutors. Guidelines issued by the Director are mainly advisory and are designed to further assist Crown Prosecutors in achieving a uniform approach to prosecutions.

Authority and Responsibilities

Director of Public Prosecutions
The Director of Public Prosecutions is responsible for the day-to-day conduct of all prosecutions within the mandate of the Attorney General. The Director acts as chief counsel for the Attorney General in providing advice on the conduct of prosecutions and in the administration of the system. The Director acts through the Regional Crown Prosecutors in discharging both administrative and operational responsibility for all prosecution activity within the province.

Regional Crown Prosecutors
Regional Crown Prosecutors are responsible for local office management and are responsible for supervision of all prosecutions within a defined region. This includes supervision of Crown Prosecutors as well as attendance in and service to the courts. Regional Crown Prosecutors report directly to the Director of Public Prosecutions.

APPENDIX "G"
POST-CHARGE SCREENING FORM – CROWN ATTORNEY'S OFFICE, OTTAWA

CROWN SCREENING FORM – CONFIDENTIAL **R. v.**

Screened By (Print Name)	**Occ#**
File Complete: Yes No **Information:** Okay Amend **Election:** Summary Indictment **Time:** Trial _____ PH _____ **CR:** Yes No O/S **YO:** Suitable for EJS Adult Sentence SVO **Notice Served:** SVO / Adult Sent. Date: Domestic: Yes No CAS Notified?: Yes No **Orders:** DNA: Already on Databank? Yes No If yes, CPIC printout in file Yes No If no, order sought Yes No s.109/10 s.161 **Referral:** Collaborative Justice V/WAP Assign Crown: Immediately After JPT At C.O.R.	**SET:** **JPT** I/O Required Yes No CPT Held **Ready to Set Trial** **Information to Read:** **POLICE NOTES TO CROWN**

INITIAL /SCREENING RESOLUTION POSITION

S.516/515(12) Order to be requested at Show Cause Reverse onus / s.524 Application

WITNESS LIST

CIVILIANS	**POLICE**
Subpoena All Civilians Yes No	Subpoena All Officers Yes No
Additions:	Additions:
Personal Service Required:	
Deletions:	Deletions:

SCREENING – MISSING MATERIALS	**DATE:**
Notes of:	**NOTES TO POLICE:**
Reports:	
Will State of:	
Statement:	
Notice of Intent:	
Photographs:	
Video / Audio Tape:	
911 Tape	
Notice of Expert Witness:	
Other Items:	

APPENDIX "H"
PRE-CHARGE REVIEW SHEET –
CROWN PROSECUTORS OFFICE, FREDERICTION

PTA

FEB 0 5 2008

New Nouveau
Brunswick

FREDERICTON POLICE FORCE

STANDARD CHARGE REVIEW SHEET

PART I (POLICE)

ACCUSED: [redacted] FILE NUMBER [redacted]

DATE PRESENTED TO PROSECUTOR [redacted] COURTROOM # [redacted]

SCHEDULED PLEA DATE (IF APPLICABLE) MAR 2 8 2008

COURT: ☒ ADULT ☐ YOUTH ☐ ALTERNATIVE MEASURES

PROPOSED CHARGES

1. [redacted]
2.
3.
4.

PART II (CROWN PROSECUTOR)

PROSECUTOR: _____ DATE REVIEWED: _____

CHARGES: ☐ APPROVED ☐ NOT APPROVED ☐ HOLD

WORDING OF INFORMATION: ☐ APPROVED ☐ NOT APPROVED

FOLLOW UP REQUESTED (SEE BELOW)

Comments, Modifications or follow up requested:

DNA IDENTIFICATION ACT
☐ Primary ☐ Secondary
☐ Has sample been previously provided.

VICTIM IMPACT STATEMENT
Does the victim wish to provide a Victim Impact Statement? ☐ Yes ☐ No

☐ **SEX OFFENDER REGISTRY**

☐ **NOTICES REQUIRED**

FPF 321 (October 2005)

APPENDIX "I"
TABLE: "EXPERIENCE OF MILITARY PROSECUTORS"

APPENDIX "I"
EXPERIENCE OF REGIONAL MILITARY PROSECUTORS

Reg. Force Prosecutors	Years (or months) of experience as a prosecutor	Years (or months) of other litigation experience
1	4 years	Several
2	1.5 years	None
3	2.5 years	None
4	1.5 years	4 years +
5	2.5 years	None
6	2 years	None
7	1.5 years	None
8	2.5 years	1 year +
Reservist Prosecutors		
9	10 years	24 years
10	7 years	9 years
11	10 years	22 years
12	7 years	28 years
13	7.5 years	Many years

APPENDIX "J"
COURT MARTIAL CASES COMPLETED IN CALENDAR YEAR 2007

APPENDIX "J"
COURT MARTIAL CASES COMPLETED IN CALENDAR YEAR 2007

Completed Court Martial Cases: 80 cases

Cases proceeding to trial: 29 cases (36.25%)

Cases resulting in Pleas of Guilty and/or Withdrawals: 51 cases (63.75%)

Average number of Court Martial cases per Military Judge: 20

Average number of cases proceeding to trial per Judge: 7.25 cases

Average number of cases per Regular Force RMP: 8.8 cases

Average number of cases per Regular Force RMP proceeding to trial: 3.2 cases

Number of cases in which jail/detention sentences were imposed: 7 cases (8.75%)

Number of cases stayed for Section 11(b) delay: 2 cases

Cases involving Criminal Code or CDSA offences: 57 cases

Cases involving strictly military discipline offences: 23 cases

Time delay (mean) from date of offence to completion: 19.45 months (593 days)

APPENDIX "K"
TABLE: "EXPERIENCE OF PROSECUTORS IN THE CORNWALL, ONTARIO CROWN ATTORNEY'S OFFICE"

APPENDIX "K"
EXPERIENCE OF PROSECUTORS IN THE CORNWALL, ONTARIO CROWN ATTORNEY'S OFFICE

Prosecutor	Years (or months) of experience as a prosecutor	Years (or months) of other litigation experience
1	21 Years	Nil
2	20 Years	Nil
3	5 Years	25 Years
4	14 Years	Nil
5	9 Years	3 Years
6	6 Years	9 Years
7	7 Years	2 Years
8	3 Years	Nil
9	18 months	18 months
10	2 Years	1 year
11		
12		
13		
14		
15		

APPENDIX "L"
TABLE: "EXPERIENCE OF PROSECUTORS IN THE NUNAVUT (IQALUIT) PPSC OFFICE"

APPENDIX "L"
EXPERIENCE - PROSECUTORS IN THE NUNAVUT (IQALUIT) PPSC OFFICE

Prosecutor	Years (or months) of experience as a prosecutor	Years (or months) of other litigation experience
1	2 months	1 year
2	2 months	1 year
3	2 months	1 year
4	5 years	0
5	2 years	1 year
6	2 years	2 years
7	14 years	12 years
8	8 years	15 years
9	3.5 years	3 years
10	6 years	12 years
11	2 years	0
12	2 years	0
13	21 months	2 years
14	18 years	4 years
15	10 years	0
16	2 years	3 years

APPENDIX "M"
TABLE: "EXPERIENCE OF PROSECUTORS IN THE FREDERICTON, NEW BRUNSWICK CROWN PROSECUTORS OFFICE"

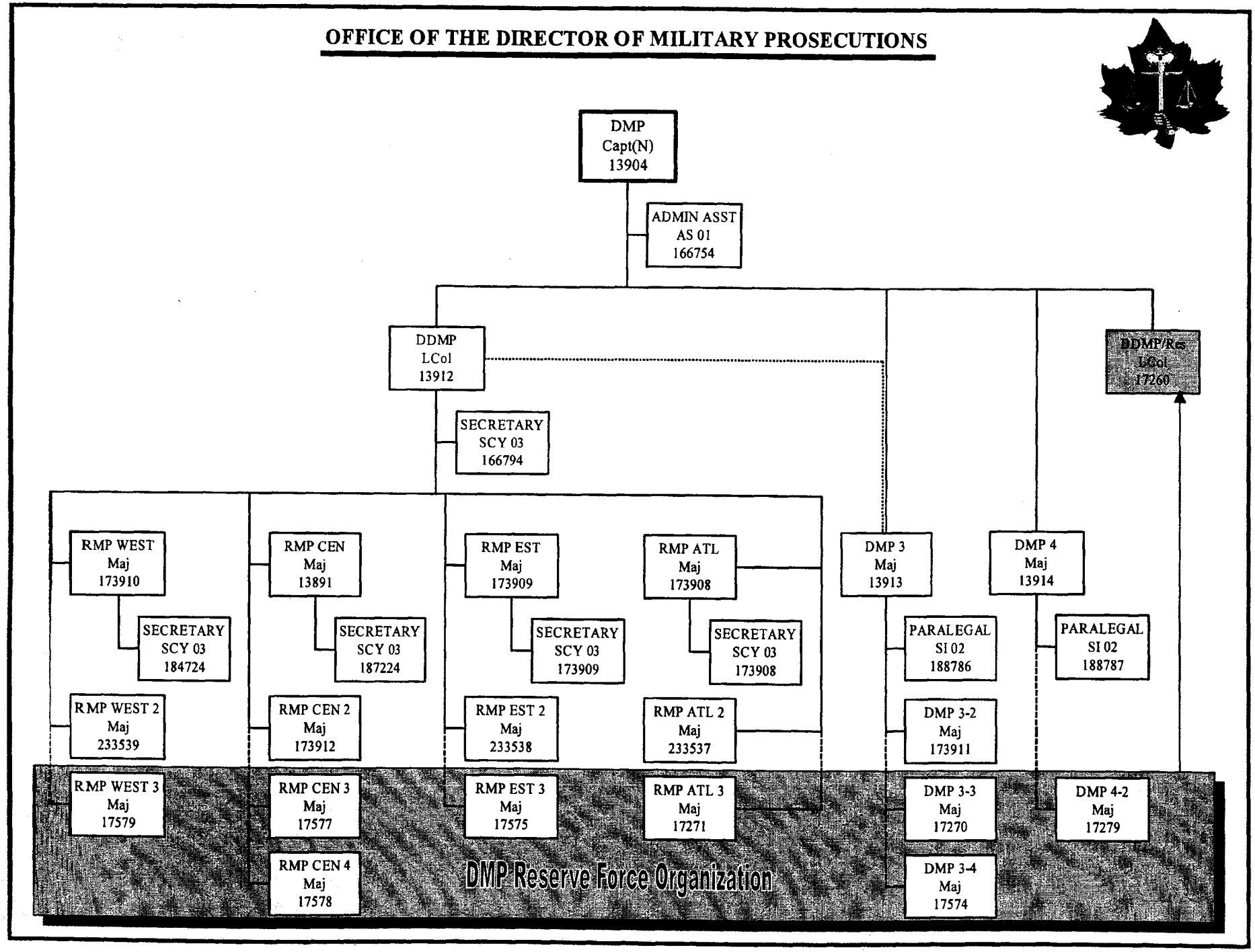
APPENDIX "M"
EXPERIENCE OF PROSECUTORS IN THE FREDERICTON, NEW BRUNSWICK CROWN PROSECUTORS OFFICE

Prosecutor	Years (or months) of experience as a prosecutor	Years (or months) of other litigation experience
1	31	31
2	20	26
3	10	14
4	22	25
5	26	30
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		

Fax: 613-723-2824

APPENDIX "N"
ORGANIZATIONAL CHART OF THE C.M.P.S.

OFFICE OF THE DIRECTOR OF MILITARY PROSECUTIONS



LE GROUPE CONSEIL

CONSULTING GROUP

EXTERNAL REVIEW OF DEFENCE COUNSEL SERVICES

FINAL REPORT

Prepared for:

DEPARTMENT OF NATIONAL DEFENCE

Prepared by:

BRONSON CONSULTING GROUP
6 MONKLAND AVENUE
OTTAWA, CANADA, K1S 1Y9

September 15, 2009

EXECUTIVE SUMMARY

INTRODUCTION

Many changes have been made to the military justice system in the last three decades. One significant change has been the creation of the Directorate of Defence Counsel Services (hereinafter DCS) which is an organization that is independent from the chain of command. Its role is to advise and represent Canadian Force members charged with offences that are tried by court martial.

Bronson was asked to do an external review of the DCS to assess its efficiency and to provide recommendations. Our review included research and extensive interviews with participants in the military justice system.

While the DCS generally provides good service to Canadian Forces members, a number of concerns relating to its function became apparent. Some of the problems identified were the following:

- The caseload was small compared to the civilian system, yet some counsel felt overwhelmed and demoralized;
- The Director acted primarily as an administrator and did not carry a caseload or share in the responsibility of the duty phone;
- Most defence counsel were relatively inexperienced yet there was an absence of adequate training and mentorship;
- The duty phone was identified as an onerous and disruptive responsibility;
- Travel was identified as demanding and disruptive to one's home and family life;
- The role of the support staff did not include much assistance to the lawyers other than research;
- Frequent postings resulted in fewer staff to handle cases;
- The inability to deploy was a factor that made a posting to DCS unappealing and
- The staff at DCS felt that it was not a well respected part of the JAG branch.

We have made a number of recommendations to address these issues, including but not limited to:

- Developing the role of the Director to include taking a caseload and mentoring and training counsel;

- Implementing a comprehensive training and mentoring program which includes secondments to legal aid staff offices or to the offices of private criminal defence counsel;
- Training one of the support staff to take the duty phone to screen calls and respond to inquiries of an administrative nature;
- Developing an easily accessible FAQ website to respond to frequently asked questions of an administrative nature;
- Training the support staff to assist counsel substantively on client files;
- Adding two staff lawyer positions to better manage deployment and other absences by counsel for extensive training or education;
- Regionalizing some operations;
- Creating a career path in litigation, including 5 year postings with an option to renew for a second 5 year term; and
- Showcasing DCS, as well as CMPS, as an important and integral part of a fair and just military system.

THE LEGAL AID ONTARIO TARIFF AND MANDATE

The mandate and tariff of Legal Aid Ontario was compared to the mandate of the DCS. We concluded that it would not be appropriate for the DCS to be governed by the same tariff that governs legal aid. The many differences between the civilian and military justice system make this infeasible.

That being said, we concluded that guidelines ought to be set to manage the staff lawyer's time spent preparing a case. We therefore recommend that guidelines be developed to assist counsel to manage the time they spend on a file to ensure it is appropriate and reasonable.

ACCOUNTABILITY

Another concern we identified as part of our review of the DCS was a lack of accountability. We are not suggesting that the office has acted improperly in the course of carrying out its work; our observation however, was that the lack of structure in the office and the manner in which it operated could leave the office vulnerable to criticism regarding its accountability.

We recommend:

- DCS be governed by a Board of Directors;
- Composition of the Board of Directors include military personnel who do not provide legal advice to the chain of command in any capacity;

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- The Board should oversee the operation of the DCS and to review its activities monthly; and
- The Board direct policies to be implemented in DCS and be responsible for evaluating the performance of the Director on an annual basis.

DELAY

While other participants in the military justice system are partially responsible for delays in the system, we found that the DCS contributed to delay by some of its practices.

We recommend:

- Complete disclosure be provided as soon as possible after a charge is laid and well before the charge is preferred;
- The Director have weekly meetings with staff lawyers and reservists to discuss cases including caseload and that the issue of delay be canvassed in the allocation of new files;
- The Director's practice of assigning cases to himself in order to delay the opening of a file until the next budget year be discontinued;

TENSIONBETWEEN THE DCS AND PROSECUTION

We heard from almost all of the interviewees that there was a considerable amount of animus between the DCS and the CMPS.

We recommend:

- Measures regarding co-operation set out in the External Review of the CMPS[1] be implemented immediately;
- The two Directors meet together with the staff at both the DCS and the CMPS as well as the Court Martial Administrator and the staff in the Military Judge's Office, to set the tone for future more cooperative relationships; and
- CMPS and the DCS implement and attend joint training on an annual basis.

ORGANIZATIONAL STRUCTURE OF THE DCS AND REGIONALIZATION

One of the ~~lightening~~lightning rods for criticism was the fact that the Director of CMPS's position is ranked as a full Colonel and the Director of DCS is ranked as a Lieutenant Colonel. It is perceived as unfair and there is a concern that it is prejudicial to the career progression of the staff lawyers.

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[1] Andrejs Berzins and Malcolm Lindsay, Bronson Consulting, "External Review of the Canadian Military Prosecution Service (2008)" p. 60

Also perceived as unfair was the inequality of staffing between the DCS and the CMPS. In addition to better staffing, the fact that the CMPS was regionalized was believed to be a benefit not available to DCS.

For a number of reasons, we concluded that the staffing at DCS should be increased and the office should be reorganized and regionalized.

We recommend:

- The Director of DCS should have an opportunity to achieve the rank of Colonel;
- Two new staff lawyer positions be created for the DCS one of whom should be a Deputy Director and who should be able to achieve the rank of Lieutenant Colonel;
- DCS be regionalized;
- The regional offices be co-located in a cost-sharing arrangement with reservists where possible, or private defence counsel to address the issues of isolation and support;
- All motions and applications be conducted centrally by the Director and a staff lawyer in Asticou; and
- Reservists be treated as a much more integral part of the team than they are at present.

THE COURT

It was the view of a number of participants in the military justice system that the lack of permanence of a military court was an obstacle to the implementation of a number of efficiencies that are present in the civilian system.

We recommend:

- Bill C-45 be re-tabled in order to allow court martial judges to make rules;
- The Chief Military Judge convene a meeting with the Director of DCS and the Director of CMPS to try to implement "practices" that will be followed by counsel; and
- The Chief Military Judge, the Director of DCS and the Director of CMPS should meet monthly or bi-monthly to discuss systemic issues and other matters of mutual concern.

CHARTER MOTIONS

At present, a number of Charter motions are being filed in many of the cases coming before the court. The motions are a challenge to perceived systemic unfairness to an accused. These motions are prolonging proceedings. In addition, there was some concern expressed that some clients may not be aware that there is delay occasioned in their cases when Charter motions form part of the proceedings.

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We recommend:

- Clients be provided with an information sheet about the motions associated with their case and further, that the information sheet address the issue of delay in relation to the said motions;
- The challenges to the system that arise out of the aforementioned motions ought to be expedited to the Court Martial Appeal Court for consideration;
- The systemic issues set out above should be reviewed and discussed with the Judge Advocate General by all parties including the DCS with a view to considering recommendations for legislative amendments; and
- Monthly Bench and Bar meetings be convened for the purpose of discussing procedural problems and issues of mutual concern with a view to addressing and resolving them.

CONCLUSION

Our conclusion was that the while there were some similarities between the military justice system and the civilian justice system, there were also many notable differences. It is these differences that explain how such a small caseload can be difficult to manage at times.

We have made numerous recommendations to improve the functioning of the system but we concluded that the kind of efficiency possible in the civilian system is probably not attainable in the military justice system at present. We have outlined numerous reasons for this result in our report.

It is our hope that our review of the DCS provides some insight regarding the significant problems in the current system and that the participants in the military justice system have the will to make the system better.

ACKNOWLEDGEMENTS

We would like to begin by thanking Lieutenant Colonel Jean-Marie Dugas for being so tolerant of the intrusion in his offices and allowing us unfettered access to his staff and his boardroom.

We were grateful to all of the participants for their willingness to talk to us and for their candor. In particular, we were thankful to Major Steve Turner for meeting with us twice and for responding to our many emails. He and Major Edmond Thomas provided us with thoughtful written submissions. In addition, Major Pascal Levesque shared his draft ~~Masters~~Master's Thesis with us and although we could not quote it because it was a draft, some of his observations were noted in our report.

Finally, thank you to Colonel Michel Drapeau for sharing his book on Canadian Military Law with us. It was an extremely valuable and allowed us to understand how the military and the military justice system worked.

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1 INTRODUCTION

1.1 CONTEXT

The military justice system in Canada is an integral part of the Canadian Forces. Former Chief Justice Antonio Lamer endorsed a separate system of military justice in the case of R. v. Genereux [1992] 1 S.C.R. 259. In that case, he said:

"The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. 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."

Many changes have been made to the military justice system since that case was decided; indeed many changes have been made over the last three decades.[2] Included in those changes has been the creation of a separate and independent defence counsel service to defend Canadian Forces members who are charged with service offences that result in trial by court martial.

We have been honoured with a request to do an external review of the Defence Counsel Services of the Office of the Judge Advocate General. The work involved the research and review of reports, case law, policies and legislation as well as numerous interviews with participants in the military justice system. Throughout this task, we have been impressed by the extraordinary commitment of the men and women who work in the military justice system. While many have differing views about how to improve the system overall, it is apparent that the people working in the system care about it deeply and want to make it function as effectively as possible. The office of the Judge Advocate General is fortunate to have so many people with such a high degree of commitment.

1.2 THE MANDATE

Our mandate was to do an external review of the Defence Counsel Services of the Office of the Judge Advocate General (hereinafter DCS). The purpose of the external review was to examine the service delivery of defence counsel services to members of the Canadian Forces by the DCS and to make practical recommendations to increase efficiency and reduce delays in

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[2] Speaking Notes of Louise Cobetto, Chairperson Military Police Complaints Commission June 12, 2000 " The 1990's saw tremendous change within the Department of National Defence and the Canadian Forces. Inherent in this change was the need to modernize the military justice system. The last three years of the decade saw two Special Advisory Groups and one Commission of Inquiry that dealt specifically with military justice".

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the provision of military defence counsel services, without compromising fundamental principles of justice.

1.3 OUR METHODOLOGY

Our methodology involved the review of policies, reports, case law and legislation as well as detailed and comprehensive interviews with numerous of participants in the military justice system. We interviewed lawyers who acted as staff defence counsel either in the past or at present, support staff at DCS, Canadian Military Prosecutions Service (hereinafter CMPS) prosecutors, reservists, judges, private defence counsel, the Director of New Brunswick Criminal Legal Aid Operations and finally, the Judge Advocate General. Everyone was asked for candor and was assured anonymity.

Please note, throughout this report there are references to counsel or "defence counsel", these references include staff lawyers, reservists or private lawyers who worked for DCS either in the past or at present. Similarly, any reference to "prosecutors" refers to lawyers who worked for the CMPS either in the past or at present.

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2 THE SYSTEM AND THE ROLE OF EACH FUNCTION

The military justice system is indeed a critical component of our military and is due a great deal of respect for the work it does. It has been described as "one of the three "pillars" of Canadian military law (the other two pillars being operational law and military administrative law)"[3] and is essential to a properly high functioning military force.

2.1 THE CODE OF SERVICE DISCIPLINE

The Code of Service Discipline can be found in Part III of the National Defence Act R.S.C. 1985 c. N-5 and is best described on the website of the Judge Advocate General as follows:

"Comprising approximately 50 percent of the NDA, the Code of Service Discipline is the foundation of the Canadian military justice system. It sets out disciplinary jurisdiction and describes service offences, punishments, powers of arrest, and the organization and procedures for service tribunals, appeals, and post-trial review."[4]

When a member of the Canadian Forces is charged with a service offence under the Code of Service Discipline, the charge will be dealt with by one of the two types of service tribunals: summary trial or court martial. Summary trials are less formal; they are typically presided over by an officer within the chain of command of the accused, and they deal with offences of a less serious nature. Courts martial are formal military courts that are presided over by military judge and are conducted in accordance with rules and procedures similar to those followed in civilian criminal courts. Accused persons have the right to be tried by court martial for all service offences with the exception of five specific minor offences where the circumstances of the offence charged are considered sufficiently minor so that the accused will be tried by summary trial. While there are some services offences of a more serious nature that can only be dealt with by court martial, for the majority of offences, the accused with have the right to choose between summary trial or court martial.

A Canadian Forces member facing court martial in entitled to be represented before the tribunal by a staff lawyer from Defence Counsel Services, free of charge. If a member wishes to be represented by private counsel, he/she may do so, but at his own expense.

The Canadian Military Justice System has (4) four military Judges and a Chief Military Judge, located at Asticou in Gatineau, Quebec. In addition, there are fourteen (14) prosecutors located in four regional offices around the country and there are (4) four defence lawyers, (5) five reservist positions ((2) two of which are filled at present) and a Director working at DCS which is located centrally, at Asticou in Gatineau, Quebec.

Generally, courts martial take place in the location where an alleged offence took place thus the Judge and defence lawyer travel from the Ottawa area to convene courts at bases all around the country and sometimes abroad. The travel requirements for the prosecutors are less onerous as their regional offices are usually not very far from the bases where courts martial are convened.

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[3] http://www.forces.gc.ca/jag/justice/index-eng.asp

[4] http://www.forces.gc.ca/jag/justice/basis-base-eng.asp

2.2 THE ROLE OF THE DEFENCE COUNSEL SERVICES OF THE OFFICE OF THE JUDGE ADVOCATE GENERAL

Prior to the passing of Bill C 25, the role of defending military accused persons was performed by legal officers of the Office of the JAG. This mode of operation was fraught with difficulties as a legal officer could act as either a prosecutor or defence counsel at any given time. This presented issues regarding conflict of interest and changed with the passing of Bill C-25. Bill C-25 created the Directorate of Defence Counsel Services which operates independently from the chain of command.

The role of the DCS is multi-faceted. It serves to provide duty counsel and legal advice as well as representation to Canadian Forces members at large all over the country and indeed all over the world. It is not uncommon for the duty counsel lawyer to receive calls from Victoria, British Columbia or Afghanistan with respect to both summary and serious matters. All manner of inquiries summary or otherwise, are made to the defence counsel duty lawyer who has the duty phone one week at a time a minimum of once every four weeks. In their capacity as duty counsel, lawyers at the DCS provide advice and assistance to assisting officers as well as members charged with service offences. The DCS is also charged with providing representation for members facing court martial or with respect to appeals to the Court Martial Appeals Court

There are four defence counsel, one director and three support staff to meet the needs of members requiring the above-noted services. The work can be a labour intensive and of late, court martials can be laden with charter applications which challenge the military justice system. The result of the work of the DCS is most apparent in the recent decision of Trepanier[5] which led to a change in legislation.

2.3 THE ROLE OF THE DIRECTOR

The Role of the Director of DCS is set out comprehensively in the Queens Regulations and Orders (Hereinafter QR&Os) as follows:

101.20 – DUTIES AND FUNCTIONS OF DIRECTOR OF DEFENCE COUNSEL SERVICES

(1) Section 249.19 of the National Defence Act provides:

249.19 The Director of Defence Counsel Services provides, and supervises and directs the provision of, legal services prescribed in regulations made by the Governor in Council to persons who are liable to be charged, dealt with and tried under the Code of Service Discipline."

In addition, the Director is responsible for the general administration of the DCS office including but not limited to training, performance evaluations, the assignment of cases, the authorization of expenses associated with representation, drafting an annual report for the JAG annual Report and responding to inquiries regarding DCS.

The Legal Services Provided By Defence Counsel Services

The QR & Os set out the services which are to be provided by the DCS as follows:

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[5] R. v. Cadet J.S.K. Trépanier, 2007 CM 1002

"(2) For the purposes of section 249.19 of the National Defence Act, the following legal services are prescribed:

(a) provision of legal advice to a person arrested or detained in respect of a service offence;

(b) provision of legal counsel to an accused person where there are reasonable grounds to believe that the accused person is unfit to stand trial (see article 107.10 – Appointment of Legal Counsel – Accused Unfit To Stand Trial);

(c) provision of legal advice of a general nature to an assisting officer or accused person on matters relating to summary trials;

(d) provision of legal advice with respect to the making of an election to be tried by court martial (see articles 108.17 – Election to be Tried by Court Martial and 108.18 – Opportunity to Consult Legal Counsel on Election);

(e) provision of legal counsel in respect of a hearing under subsection 159(1) of the National Defence Act;

(f) provision of legal counsel to an accused person in respect of whom an application to a referral authority has been made under article 109.03 (Application to Referral Authority for Disposal of a Charge);

(g) where the Minister appeals the legality of a finding or sentence or the severity of a sentence awarded by a court martial (see articles 115.03 – Right to Appeal of Minister and 115.27 – Appeal to Supreme Court of Canada), provision of legal counsel to the Respondent;

(h) provision of legal counsel to a person on an appeal or an application for leave to appeal under section 230 or 245 of the National Defence Act with the approval of the Appeal Committee established under article 101.21 (Appeal Committee); and

(i) provision of legal advice to a person who is the subject of an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry.

(3) For greater certainty, the provision of legal counsel to an accused person under subparagraph 2(f) includes representation at:

(a) a court martial;

(b) a hearing for release pending appeal; and

(c) a hearing as to the sufficiency of admissible evidence to put the accused person on trial where a finding of unfit to stand trial has been made.

(4) Legal officers performing defence counsel services may, with the concurrence of the Director of Defence Counsel Services, perform other duties that are not incompatible with their duties as defence counsel.

(5) The Director of Defence Counsel Services shall report annually to the Judge Advocate General on the provision of legal services prescribed under paragraph (2) and the performance of any other duties under paragraph (4).

(6) Legal counsel is not provided by the Director of Defence Counsel Services under paragraph (2) in connection with any matter for which a person is represented by civilian legal counsel."

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2.4 THE ROLE OF THE OFFICE OF THE CANADIAN MILITARY PROSECUTION SERVICE

The Office of the Director of the Canadian Military Prosecution Service is responsible for reviewing all charges referred by the chain of command and to consider whether the charges warrant being tried by court martial. If a case meets the requirements for proceeding by way of a court martial, charges that are referred to CMPS or any other charges deemed appropriate on the facts of the case are preferred. The CMPS is responsible for the prosecution of all charges tried by court martial, including conducting bail hearings. The CMPS also acts as appellate counsel for the Minister of National Defence on all appeals from courts martial. The office also provides advice to the Canadian Forces National Investigations Service.[6] The CMPS is staffed by a Director of Military Prosecutions, three Deputy Directors, an appellate counsel, one staff prosecutor responsible for communications, training and policy development, a legal advisor working directly with the CFNIS and seven staff prosecutors. These seven staff prosecutors are located at four (4) Regional Military Prosecutor's (RMP) Offices in Halifax, Nova Scotia, Val Cartier, Quebec, Ottawa Ontario and Edmonton Alberta. In addition, there are nine reserve force prosecution positions located across Canada. [7]

2.5 THE ROLE OF THE COURT

The role of military judges in the Canadian court martial system is similar to that of a Judge in the civilian criminal justice system. Their function is to preside over and rule on the cases that come before them. In the event that a matter is tried before a panel, their role is to provide the panel with the law that pertains to the particular circumstances of the trial.

There is no permanent military court at present and as detailed in the External Review of the Canadian Military Prosecution Service,[8] that lack of permanence is viewed as an obstacle to implementing procedures and practices that would increase the efficiency of the military justice system. As that issue has been canvassed in the above-noted review conducted by Andrejs Berzins and Malcolm Lindsay, it will only be touched on briefly in this report.

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[6] National Defence Act R.S.C. 1985 c. N-5.

[7] Annual Report of the Director of Military Prosecutions 2006-2007 Annex C to the Annual Report of the Judge Advocate General 2006-2007 p. 75

Online: http://www.forces.gc.ca/jag/publications

[8] Andrejs Berzins and Malcolm Lindsay, Bronson Consulting, "External Review of the Canadian Military Prosecution Service (2008)" p. 60.

3 OPERATION OF THE DCS OFFICE

3.1 OBSERVATIONS

We were advised that the DCS operates much like a private law office with some notable differences. The work involved includes general and specific telephone advice as well as individual representation at courts martial and at the Court Martial Appeal Court. The caseload varies from year to year but involves representation on sixty (60) to seventy five (75) courts martial per year and responding to over one thousand four hundred (1400) telephone inquiries per year. We were provided with statistical evidence from the Director of DCS that in the twelve (12) month period from March 2008 to March 2009, that showed that the DCS had conducted seventy (70) courts martial including three (3) homicides from outside of Canada. In addition, the office prepared two (2) appeals to the Supreme Court of Canada and acted on twenty one (21) appeals to the Court Martial Appeal Court (hereinafter CMAC). The court martial work is performed primarily by the four defence counsel employed by the DCS as well as reservists and less frequently, private defence counsel.

In addition to representing clients at courts martial, each defence lawyer is responsible to take the duty phone approximately once every four (4) weeks or less. The telephone operates twenty four (24) hours per day and receives calls from all over the country and indeed overseas. The calls are from members with any number of different inquiries, many of which are administrative in nature, such as how to grieve a certain situation or issue. In addition, there are calls from clients who are charged with a service offence, or who require advice regarding their summary trial or other members who are facing more serious charges. There are also a significant number of calls from members who are facing impaired driving charges, particularly at night.

In carrying out the duties described in the paragraphs above, the lawyers working at DCS operate quite independently from one another and from the Director. Each lawyer is free to conduct his/her case as he/she sees fit. The lawyers do not docket their time and can devote as much time to an AWOL case as they would to a manslaughter case if they so choose. We had an opportunity to have extensive discussions with the staff lawyers working in the office and to ask challenging questions about how they conduct their cases. While we came away from the interviews satisfied that the manner in which the lawyers were conducting their cases was reasonable and appropriate for the most part, we could not establish how much time the lawyers were spending on their various cases. We know from statistics that the average number of cases per staff lawyer is between ten (10) and twelve (12) cases each, per year. The reservists are supposed to take three (3) to five (5) cases per year but their caseload last year was closer to ten (10) cases each. We were provided with anecdotal evidence from one reservist that his average length of time to prepare for a court martial was three days, plus travel, plus attendance. These statistics raise questions regarding the activities of the defence counsel as the caseload appears to be quite low in comparison with the civilian staff offices of legal aid in Ontario.

4 COMPARISON BETWEEN THE DCS AND CIVILIAN LEGAL AID IN ONTARIO

In the criminal legal aid system in Ontario, there are three Criminal Law Offices: Brampton, Barrie and Ottawa. The offices are part of a pilot project that was commenced in 2004 to experiment with different service delivery models. At this point, Legal Aid Ontario is evaluating whether these offices should become permanent, modified or discontinued. They were evaluated for a three year period and that evaluation is being analyzed by the Board of Directors of Legal Aid Ontario. For the purposes of this report, we will be referring to the Brampton and Ottawa Criminal Law Offices because the ratio of support staff to number of lawyers is similar to that in the DCS. In the Brampton Criminal Law Office there are two staff lawyers, one Director, one community legal worker and one receptionist. At present, the staffing in Ottawa is considerably less but for the purposes of comparison, we will be using the staffing in 2006 and 2007 which at the time consisted of one Director, two staff lawyers, one community legal worker and one receptionist. In 2006 and 2007 in each of the Criminal Law Offices, the staff lawyers and the Director carried a full caseload and provided legal services to clients at all levels of court including appeals to Superior Court. The lawyers did not provide telephone advice. The role of the community legal worker in the criminal law offices was, and continues to be extensive and generally includes interviewing clients, making appointments with witnesses, serving subpoenas, contacting experts, appearing in first appearance court, binding documents, sending correspondence, some data entry of dockets, and community outreach. [9]

The role of the receptionist in the Criminal Law Offices is to answer the phone and properly direct calls, assist with setting up appointments, maintaining the court calendar for a busy office, data entry, drafting correspondence and assisting with the binding and serving of documents where appropriate.

The Brampton Criminal Law Office opened 314 files in 2006 and opened 162 files for the 6 month period from January to June of 2007.[10] The Ottawa Criminal Law Office opened 276 files in 2006 and opened 120 files for the 6 month period from January to June of 2007.[11] At the time both offices were staffed with one Director and two staff lawyers as well as the above-noted support staff. It must be stated that most of the files opened were for clients charged with criminal code offences for which there was little prospect of incarceration if they were convicted. Each office carried a relatively small caseload of files that would be considered "serious offences".

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[9] Robert Hann, Joan Nuffield, and Fred Zemans, Robert Hann & Associates Limited "Evaluation of Criminal Staff Offices First Year Report" (2005) p. 44 and 83

Online: http://www.legalaid.on.ca/en/publications/PDF/clo_eval_1st_year_rpt_pac_060120a.pdf

[10] Robert Hann, Joan Nuffield, and Fred Zemans, Robert Hann & Associates Limited "Evaluation of Criminal Law Offices Third Year Report " (2008) p.132
Online: http://www.legalaid.on.ca/en/publications/reports/doc/CLO_EVAL_3rdYearReport_FINAL.pdf

[11] Robert Hann, Joan Nuffield, and Fred Zemans, Robert Hann & Associates Limited "Evaluation of Criminal Law Offices Third Year Report " (2008) p. 133

Online: http://www.legalaid.on.ca/en/publications/reports/doc/CLO_EVAL_3rdYearReport_FINAL.pdf

Suffice it to say, the difference in caseload between the DCS counsel and the staff legal aid offices is remarkable and warrants more in-depth analysis, which analysis will follow.

In comparison with the civilian system, the number of cases being conducted by the DCS defence lawyers is very low. In the civilian system it would not be uncommon for a private criminal defence lawyer to have a caseload of 70 – 100 or more files per year and as noted above, staff lawyers at civilian legal aid offices carry a comparable number of cases annually.

As noted previously, the total annual caseload of the DCS is between sixty (60) and seventy five (75). A review of the court martial decisions reveals that in 2008 the staff lawyers had a caseload of ten (10) to twelve (12) files each. In our observation, despite the seemingly small caseload, the DCS lawyers appeared at times to be quite fatigued and in some cases, even overwhelmed by the work.

4.1 ROLE OF THE DIRECTOR

4.1.1 Observations

A major difference between a civilian staff office and the DCS is the role of the Director. Our interviews and indeed our review of court martial decisions revealed that the Director of the DCS does not carry a trial caseload. We also learned that the Director does not participate in the regular rotation of the duty phone. The Director advised us that he sometimes takes calls on the duty phone during the day and occasionally French speaking callers may be transferred to him at nights. He estimates that in this manner, he handles approximately 300 duty phone calls a year. He advised that he does some appeal work but that he spends the majority of his time performing administrative duties including committee work, managing personnel including performance appraisals, managing the budgets, authorizing expenses and assigning cases. In addition, he reviews the civilian lawyer's accounts and he is also responsible for drafting an annual report on the activities of the DCS which forms part of the JAG Annual Report.

Most interviewees could not readily identify the role of the Director of DCS other than very generally. They considered his role to be primarily administrative. They advised that for the most part they did not go to the Director for advice on files but would provide the Director with a report regarding the outcomes of courts martial or discussed possible appeals with him.

Most of the interviewees told us that their relationship with the Director was somewhat distant and primarily administrative, involving obtaining approval for travel or for disbursements on a file or human resource issues such as leave. Some defence counsel advised that at times they occasioned delay in obtaining authorization on a file if the Director was absent or otherwise unavailable.

We were told that most of the lawyers relied on one particular experienced staff lawyer in the office and on the experienced reservists for advice and "ad hoc" mentoring. We were told that there was no formal training other than the annual attendance of the defence lawyers at a criminal law conference, nor was there a policy requiring new and less experienced lawyers to junior. From the comments of most interviewees, it appeared that training was not a significant part of the Director's role in the office. This was indeed confirmed by the Director who advised that he provided new lawyers with information regarding "the basics" in procedures when they first started in the office. The Director acknowledged that there is a lack of training and advised that it is because the office is understaffed.

We learned that one of the important roles of the Director was the assignment of cases to either the staff lawyers, reservists or, in rare circumstances, private defence counsel. We were told by the Director that he made decisions regarding the assignment of cases by considering a number of factors. If a client requested a particular lawyer, he would try to assign that counsel. Otherwise he would review the file and assign it to a lawyer that he considered to be experienced and capable enough to conduct the file. Defence counsel advised that they were generally assigned files by having them left on their desks. We asked whether the Director discussed the files with counsel before they were assigned and we were advised that he usually did not do so. While it appears that the Director has all of the information he needs to assign files, we have been advised that there are some lawyers in the office feeling quite overwhelmed by work and are still being given files while others advise that they could certainly be taking on more files. We are further advised that at least one reservist has not been assigned much work in recent months and he would be available to take some cases.

The Director advised that he works on appeals. He has appeared on two occasions before the Court Martial Appeal Court of Canada between 2005 and 2008 and otherwise prepares legal opinions pursuant to the Q R & Os[12] for the Appeals Committee, which is a body that considers requests for legal representation by the DCS before the CMAC.[13]

Our impression was that the Director was less focused on his people and more focused on the reformation of the court martial system. When we identified that lack of training for junior and inexperienced lawyers was problematic, the Director acknowledged the issue and advised that he was not able to provide the necessary training because the office was understaffed. He also acknowledged that some of his junior officers were tired and discouraged but he did not identify any action taken by him to address the concerns. We were provided with anecdotal evidence by a number of people that this has contributed to the turnover in the office and is a factor that contributes to the reluctance of lawyers to request a posting to DCS.

In the civilian legal aid system in Ontario, the Directors of staff offices are the heart of the office. They are senior defence lawyers who carry a full caseload as well as the responsibility for the administration of their offices. They are responsible for the professional development of their staff and must deal with human resources issues such as performance evaluations, leave, benefits etc. They are also responsible for managing a budget, ensuring bills are paid, accounts are submitted and dockets are entered and accurate. In addition, they must review and approve or deny authorization requests for disbursements on files. They are also responsible for the assignment of files, which, in a three lawyer office could exceed three hundred per year. In our opinion, their administrative duties are comparable to those of the Director of DCS.

In addition to carrying a caseload and looking after the administration of the office, the directors in the civilian staff offices play a central role in training and mentoring the staff lawyers and support staff. They provide staff with guidance and direction on how to conduct files and they have staff junior on files where it is appropriate to do so. They convene regular staff meetings and monitor caseload and they assign cases for the most part through a consultative process.

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[12] S. 101.20(2)(h) which sets out the "provision of legal counsel to a person on an appeal or an application for leave to appeal under section 230 or 245 of the National Defence Act with the approval of the Appeal Committee established under article 101.21 (Appeal Committee)"

[13] QR&O supra, s. 101.21

In our view the role of the Director in the DCS should be much more than administrative. Based on our experience in the civilian system and based on the feedback from our interviews, in our view, the role of Director of DCS needs to be a high level leadership role. At present, it is not viewed this way by the participants in the court martial system, including many defence counsel. There appear to be a number of different reasons for this perception, including the organizational structure of the office. That issue will be discussed more fully in the section entitled "Organizational Structure of the DCS."

In our view, the Director of DCS should be an experienced defence lawyer who takes on a caseload and provides mentoring and advice to junior lawyers and acts as a sounding board for more experienced counsel. A similar view was expressed in the External Review of the CMPS.[14] In order to be effective, the Director should be in a position to discuss trial preparation and tactics with his staff and needs to keep his skills up in order to do that effectively. In our observation, section 249.19 of the National Defence Act specifically contemplates this and requires that the Director of DCS provides direct services to clients. The section specifically states the following:

"249.19 The Director of Defence Counsel Services provides [emphasis mine], and supervises and directs the provision of, legal services prescribed in regulations made by the Governor in Council to persons who are liable to be charged, dealt with and tried under the Code of Service Discipline."

One of the most significant roles of the Director of the DCS should be to attract, develop and retain defence counsel. He should have a long term vision which should include identifying the most talented lawyers in the JAG branch and keeping them by creating an energizing work environment where staff receive excellent training and mentoring.

While the Director should play a significant role in the development of his staff, he too should engage in professional development. We understand that the Director attends conferences on substantive areas of criminal law as well as courses in budgeting and administration. He does not regularly participate in extensive management training or high level leadership courses. We were provided with information that such courses would be available to him, but there was no requirement or active encouragement to take such courses. It was our observation that perhaps because of the focus on the independence of the DCS from the chain of command, the Director and the office were largely unsupported by the JAG branch other than financially. We were advised by the Director that he is not subject to a performance evaluation thus he would not be considered for promotion. In our view, the organization has a responsibility to develop its leaders and that should be done regardless of the independence of the DCS.

While the Director advised that he participates on some committees, he does not appear to have much influence on policy or legislative development. It was the view of some participants in the military justice system that the Director's rank is an issue in this regard. While rank may well be a legitimate issue, in our view it should not be a bar to participating in high level meetings and discussions regarding policies and reforms to the court martial system. The Director should play an active role is addressing the systemic problems associated with the court martial system. He should play a proactive role in advancing reforms to the court martial system including recommendations for legislative change. He should participate in all forums where such a mandate is possible regardless of his rank.

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[14] Andrejs Berzins and Malcolm Lindsay, Bronson Consulting, "External Review of the Canadian Military Prosecution Service (2008)" p.75

4.1.2 Recommendations Regarding the Role of the Director

It is our recommendation that the Director carry a caseload for the reasons set out above. In order to be an effective leader, the Director needs to be a role model for his staff. Part of the Director's responsibility is to develop his staff by mentoring them and instructing them in trial preparation and tactics. In our view, in order to do that, he must keep up his skills by taking a caseload. Doing so will make him a more central and integral part of the office. Our recommendation is that the Director participates in the regular rotation of duty phone from time to time. This would set a good example for the junior officers and it would lessen the burden of that task on them. It would also allow the Director to stay in touch with the practical realities faced by both his staff lawyers as well as the clients they serve.

We recommend that the Director implement a formal orientation and mentoring policy and program which will be outlined in more detail in the section entitled "Selection, Training and Mentoring of Staff".

We further recommend that the Director should play a significant mentoring role to his junior officers and provide them with guidance and advice on conducting their trials. In our experience, one of the keys to attracting and retaining staff counsel is to be a leader whom staff want to work for. A positive mentoring relationship with staff will contribute to their development and will engage them in both the work they do as well as in the office.

We recommend that the Director assign cases by meeting weekly with his staff lawyers and the reservists to discuss new files and how best to assign them. While we appreciate that the Director must try to assign a file to the lawyer of a client's choice, we are of the view that factors such as a lawyer's caseload and the possible impact on delay should be taken into consideration. The discussion at these weekly meetings should focus on the caseload and expertise of each lawyer as well as his/her ability to act on the file expeditiously.

We recommend that the defence counsel be authorized to incur common disbursements on files without having to obtain formal authorization from the Director. A review of the Legal Aid Ontario Tariff and Billing Handbook[15] relating to disbursements may provide some assistance on the development of policies in this regard.

We recommend that when the Director is absent or otherwise unavailable, he delegate his authority to someone else in the office to act in his stead.

We recommend that the Director convene weekly meetings with his junior officers and support staff to discuss cases and their progress. This could be done at the same weekly meeting regarding the assignment of cases. We are cognizant of the fact that counsel have busy work schedules and responsibilities in court and suggest that such meetings be convened at a regular time and day first thing in the morning once per week. One meeting per month should include the reservists. Reservists and staff lawyers, who are away from the office on the date of meetings, could participate by telephone conference or via a web-based conferencing tool.

We recommend that the Director be provided with support for his professional development as a lawyer manager. The Canadian School of Public Service has a number of professional development courses that focus on management and leadership which should be canvassed. A course called "Leadership, Reflections in Action" may be appropriate.

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[15] Online: http://www.legalaid.on.ca/en/info/pdf/Tariff_Manual.pdf, Chapters 5 and 6

We further recommend that the Director have a 360 performance review every two years, which would include anonymous feedback from his staff, reservists and other colleagues. This practice is common in the public service and is an effective way to develop high functioning leaders.

4.2 TELEPHONE ADVICE

4.2.1 Observations

Our interviews revealed that there were a number of differences between the DCS and the civilian staff offices. In the civilian legal aid system in Ontario, the staff lawyers at the Criminal Law Offices do not provide telephone advice. Conversely, the DCS lawyers in fact take over one thousand four hundred (1,400) calls per year. In 2006 they took one thousand five hundred and one (1,501) calls. Of those calls, one thousand three hundred and eighty nine (1,389) calls came from within Canada and one hundred and twelve (112) calls came from outside of Canada. [16] We were advised by interviewees that the duty phone took a great deal of time and energy away from working on the caseload. We were advised that while some calls come from Canadian Forces members facing charges relating to service offences, the majority of calls coming to the duty phone were of an administrative nature, requesting information on grievance procedures, release etc. While there were some calls from Canadian Forces members requiring advice on electing a summary trial versus a court martial, these did not represent the majority. The interviewees advised that they received calls from the military police from time to time to "check if the phone was working" – these calls could be in the middle of the night. A significant number of calls were from members being charged with impaired driving. We were told that most impaired driving charges are dealt with in the civilian system and a few counsel did not feel that they had the experience and expertise on such matters to properly advise clients. The lawyers who took the phone were of the view that there appeared to be no understanding by the callers that the duty phone was being handled by someone after work hours. We were told that the calls to the duty phone come at all times of day and night and have been identified by the lawyers as being extremely disruptive both to their work and personal lives. While the Annual Report 2006-2007 of the Director of Defence Counsel Services suggested that the amount of time dedicated to the duty phone for the reporting period was 375 hours[17], the cost to the productivity of the DCS lawyers is estimated to be quite high. The interviewees described how fairly constant interruptions resulted in an inability to focus their undivided attention on file work and resulted in lost time. The duty phone was in fact identified by more than one interviewee as a morale killer.

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[16] Lieutenant-Colonel Jean-Marie Dugas, Annual Report 2006-2007 of the Director of Defence Counsel Services, Annex D to the Annual report of the Judge Advocate General 2006-2007 p. 97, Online: http://www.forces.gc.ca/jag/publications/defence/DDCS-DSAD-AR2006-2007-eng.pdf

[17] Lieutenant-Colonel Jean-Marie Dugas, Annual Report 2006-2007 of the Director of Defence Counsel Services, Annex D to the Annual Report of the Judge Advocate General 2006-2007 p. 97

Online: http://www.forces.gc.ca/jag/publications/defence/DDCS-DSAD-AR2006-2007-eng.pdf

In canvassing solutions to the issues surrounding the duty phone we had an opportunity to speak with the support staff to discuss their possible role with respect to the phone. We learned that the administrative assistant (CR-5) could in fact be trained to screen calls and could fit the task into his work load. This is discussed in considerably more detail under the section entitled "Functions of Support Staff".

4.2.2 Recommendations Regarding the Duty Phone

We recommend that a well advertised, easily accessible and highly visible Frequently Asked Questions (FAQs) website for Canadian Forces members be developed to address the types of administrative questions being directed to the duty phone, to reduce the number and frequency of those types of calls. While some of the information regarding these types of questions is located in different sections of the JAG website, there does not appear to be a central and easily accessible location for FAQ's.

We further recommend that the administrative assistant (CR 5) or the paralegal be trained to screen all calls that come to the duty phone and to respond to those inquiries that are of an administrative nature. All calls that come to the phone during working hours ought to be diverted from the lawyers unless they specifically require legal advice.

We also recommend that the military police be instructed to refer all impaired driving calls to the local civilian duty counsel hotline (Brydges hotline). In our view, this is the proper forum in which to obtain advice as the counsel responding to those lines are experienced with impaired driving.

We recommend that a bilingual after-hours answering service be retained and trained to screen calls to minimize the number of calls a lawyer has to take after work hours and through the night.

If the above-noted changes are implemented, we recommend that a comprehensive communication about the changes to the duty phone be sent out to all Canadian Forces members. That communication should also make clear to members that the phone is taken by a lawyer after work hours, on evenings, nights and weekends.

4.3 TRAVEL

4.3.1 Observations

Travel was also identified as a major difference between the DCS and a civilian legal aid staff office. While some travel was required of the civilian staff lawyers, it was usually local and involved no more than a one to two hour drive. The DCS lawyers are required to travel on almost every court martial case they conduct. The reason for this is the nature of the court martial system. Court martials are usually convened at the military base where an alleged offence took place. The reason for this is both for convenience and for disciplinary purposes.[18] As most courts martial take place outside of Ottawa, the four DCS lawyers are required to travel to the location of the court martial in order to provide representation to the client. Usually, this requires the lawyer to travel two or three days in advance often including weekends, in order to meet with the client and with witnesses to prepare for trial. The court martial itself could take from three (3) days up to a week or more depending on whether there are pre-trial applications or whether the

[18] Andrejs Berzins and Malcolm Lindsay, Bronson Consulting, "External Review of the Canadian Military Prosecution Service (2008)" p. 65.

case is complex. Even a guilty plea could take up to two days to conduct. The result is that the lawyers are away from their homes and families for an extended period of time, at least once per month if not more.

4.3.2 Recommendations Regarding Travel:

We recommend that the DCS be regionalized. That concept will be discussed much more fully in section entitled "Regionalization" below.

We recommend that secure technology be implemented to allow the DCS lawyers to meet via webcam with their clients and indeed, with one another if they need to consult. Such technology could also be used to communicate with family when a lawyer is on the road. Technology such as Skype could be explored for the purpose.

4.4 FUNCTION OF SUPPORT STAFF

4.4.1 Observations

Another significant difference between the DCS and the civilian staff office relates to the function of support staff. The DCS lawyers advised that they operated very much as a one person operation having to do almost all of their own preparatory work on a file. When we asked what the administrative staff did in the office, we were advised by most interviewees that nobody really knew what their function was. We were told that the lawyers (staff and reservists) did not make regular use of support staff to organize disclosure, draft correspondence, make calls, photocopies, bind documents, appointments, travel arrangements, serve documents etc. All of this work was done by the lawyers themselves. The only resource that the lawyers used, were the services of a paralegal in the office whose main duty was research and some binding of documents. Some interviewees who had worked in both the DCS and the CMPS highlighted for us that as a lawyer with the CMPS, they had the resources of office support systems that made the work very manageable. We heard that the support staff at the CMPS were tasked with a number of file-related duties and made photocopies, did document preparation, made phone calls and set up appointments etc. As outlined above, in the civilian legal aid system, support staff, particularly the community legal worker, played a central and important role in file work and in direct services to clients.

When we explored the workload of the support staff in the DCS more fully, we learned that the support staff had a general understanding of their work but they did not really have set guidelines to define their work or their role in the office. The support staff advised that they would have no objection to providing support for the lawyers but they acknowledged that it was not clear to anyone if that was part of their responsibilities. It was felt that it would be important to have the respective roles clearly defined in order for the office to operate more efficiently.

The paralegal understood her role to be research and advised that she assisted the lawyers with binding documents from time to time. She is performing the work that she was trained to do, however a review of the paralegal's job description suggests that the paralegal's role was meant to be much more than a research position. That job description is attached as schedule B to this report. In our view, the position should be better developed and utilized.

The administrative assistant understood his function in the office to be case management. He was responsible for opening files and making sure that all of the documents and information that came into the office was tracked and directed to the appropriate person. He was also

responsible for tracking down client and witness information such as addresses and telephone numbers. The administrative assistant told us that he also kept track of the activities of the lawyers. At present this is done on an ad hoc basis on an existing excel spreadsheet. The administrative assistant advised that he is currently working on developing a better spreadsheet. He advised that he had been working in the DCS office for four (4) months and that he enjoyed the work but could certainly be taking on more responsibilities. He felt he could be of greater assistance to the lawyers.

We concluded that the administrative assistant (CR 5) could certainly take on more responsibilities. When the idea of having him trained to screen and respond to administrative inquiries coming to the duty phone was discussed as a possibility, we were advised that he would have no issue with being training to take the duty line during work hours. He certainly felt that he was capable and he could fit it into his workload.

The Clerk (CR 3) advised that she opens the mail and distributes it, orders supplies, looks after information technology (IT) issues, makes travel requests to the JAG, attends building user meetings for the Director, assists with binding and assists the administrative assistant to put together materials for the annual report. She also advised that when the CR-5 is not in the office, she answers the Director's telephone. She advised that she had enough work to keep her busy but could probably take on a little more work. She advised for instance, that in the past, she was responsible for making all travel arrangements for the lawyers directly (at present she simply sends a request to JAG). She advised that when she arranged travel herself, it was done immediately. The current method can result in a delay of two days up to one week. It is also inefficient if travel arrangements have to be changed on short notice.

Most of the support staff have only been in their positions a short time. The paralegal is actually a lawyer and in our opinion, is unlikely to remain in the DCS for any significant length of time. The administrative assistant impressed us a motivated individual who will need challenging work and development opportunities to be fulfilled in his position. It was our impression that he may stay in his position long term.

In our view, the office of the JAG should consider staffing the support staff positions with qualified military personnel. That would allow the Director to develop good people with military background who would remain in the position for three or four years which would address the issue of frequent staff turnover.

4.4.2 Recommendations Regarding the Role and Function of Support Staff

We recommend that when the next civilian employee leaves his/her employment at the DCS, that the position vacated be converted to a military position.

We recommend that the role of support in the office be clearly defined for everyone in the office and that all support staff at the DCS be trained and developed to assist all counsel in all aspects of the administration of client files including organizing disclosure, phone calls, correspondence, photocopies, document preparation, appointments, arranging for experts, travel etc.

As outlined in the recommendations regarding the duty phone, we recommend that the administrative assistant (CR 5) or the paralegal be trained to screen all calls that come to the duty phone and to respond to those inquiries that are of an administrative nature. All calls that come to the phone during working hours ought to be diverted from the lawyers unless the caller specifically requires legal advice.

We recommend that the support staff at DCS be sent to the Legal Aid Ontario Criminal Law Office in Brampton, Ontario to job shadow for a period of one week.

4.5 REQUIREMENT FOR MILITARY TRAINING

4.5.1 Observations

A notable difference between the DCS and a civilian legal aid staff services office is that the DCS lawyers are subject to military training. The DCS lawyers and Director, like all Canadian forces members, are required to engage in military training exercises on an annual basis.[19] These exercises include annual training as follows:

- two days of weapons training (C7 and pistol);
- one day of Gas Hut training; and
- Express Test (physical test). While it may only take 2 hours, the training required to meet the requirements could be demanding in terms of regular exercise and physical activity

In addition to this, the lawyers at DCS are required to attend continuing legal education and training related to law. The military training is obviously not a requirement for civilian staff lawyers but it does not appear to take up an inordinate amount of time. In our view, it would have a minimal impact on a lawyer's caseload. Other training and time off is quite comparable between the DCS lawyers and civilian staff lawyers. While the DCS lawyers are required to take continuing legal education course each year, so too are civilian lawyers and in comparing the DCS counsel with civilian legal aid staff lawyers, approximately the same number of days off are attributable for vacation, statutory holidays and sick days.

4.6 POSTINGS

4.6.1 Observations

The DCS lawyers, like all other Canadian Forces members are subject to postings at any given time, thus their time in any position is usually quite limited. The usual length of time for a posting such as DCS would be three to four years. The result is that many of the incoming counsel lack experience and leave just when they are developing expertise in litigation. This is not the case with civilian staff lawyer, most of whom make a career of criminal litigation. In the civilian system, there are many very experienced defence counsel serving clients.

In our view it is essential for a properly functioning military justice system to have highly skilled and experienced counsel both in the CMPS and the DCS. Members of the Canadian Forces need to trust and be proud of their military justice system. Experienced counsel will contribute to the smooth operation of the military justice system and bring it a great deal of respect and credibility among the Canadian Forces.

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[19] JAG policy Directive 036/06

We heard from a number of interviewees that they felt that the posting to DCS should be much longer, while others were of the view that a longer posting would lead to burnout and career stagnation. A surprisingly high number of interviewees indicated that they would consider defence work as a career if changes to the DCS office and to the system were made.

As indicated above, concerns were expressed by some interviewees that longer term postings in the present conditions would lead to burnout. This is largely because of the staffing, travel, lack of training and lack of meaningful assistance from support staff. We agree. That being said, we are of the view that if these issues are addressed, longer term postings would make sense.

If lawyers were well developed and trained and they could be posted to either the DCS or the CMPS for a period of five (5) years with an option to renew for an additional five (5) years, the level of experience in the system would increase and would be of significant benefit. The quality of representation in courts martial would increase and have a positive impact on the military justice system. The JAG may wish to think about creating a litigation career path for lawyers in the branch. We would not suggest that 5 years terms be implemented unless the above-noted issues were addressed. If the recommendations regarding the regionalization and reorganization of DCS are adopted, a "career path" could be an attractive option for lawyers.

Postings not only impact on the level of experience of counsel, they have also been identified as problematic in the assignment of cases. We were advised that if a lawyer is going to be posted in July he/she stops being assigned new files in approximately February of the same year. This means that the caseload for the remaining counsel is heavier than normal, or substantive work on a file is delayed until a new lawyer is able to take on a case.

4.6.2 Recommendations Regarding Postings

Our recommendations regarding postings are interdependent on one another. We would not suggest that they be implemented in isolation from one another.

We recommend that the length of time lawyers are posted to the DCS should be at least five (5) years with an "option to renew" at the end of a five (5) year term. This recommendation would be conditional on a regional structure which is discussed in detail in the section entitled "Regionalization" and on the restructuring of the DCS as recommended in the section entitled "Organizational Structure of the DCS".

We recommend that the Judge Advocate General create a litigation career path where lawyers could be posted to long term positions in either the CMPS or the CMPS.

We recommend that a lawyer with little to no experience in criminal law either be seconded to a reservist or private defence lawyer's office for a minimum of 1 year, or be posted to the CMPS for a period of at least three years before being posted to the DCS. Recommendations regarding secondment will be detailed in the section entitled "Selection, Training and Mentoring of Staff Lawyers".

We recommend that a lawyer being posted out of DCS continues to be assigned less serious files to work on until his/her departure. In our view, the client should be advised of the lawyer's impending departure and should be reassured that his/her file will be transferred to a new lawyer if the matter cannot be completed before the original lawyer leaves. In the civilian system lawyers leave their place of employment from time to time. When that occurs, a client's file is transferred to new counsel without interruption to the work.

4.7 DEPLOYMENT

4.7.1 Observations

Deployment is another aspect of military life that is absent in the civilian world. Military personnel are subject to deployment at any time and in fact, often times actively seek opportunities to deploy. Deployment obviously takes them away from their regular place of work for extended periods of time. This would create a significant void in an office such as the DCS thus our understanding is that requests to deploy have been denied for the most part. We further understand that there would be concerns that a deployment could result in a conflict of interest for counsel. For instance, it would not be appropriate for a DCS lawyer to deploy to advise the chain of command which could lead to the laying of charges against a member who might later become a client. We were advised however that there were numerous deployment opportunities which would not in fact involve advising the chain of command or give rise to a conflict of interest. In fact, JAG Policy Directive 036/36 contemplates deployment for lawyers in the JAG branch which would include the DCS. Many of the interviewees we spoke to stated that the inability to deploy had negative implications for the progression of one's military career. We were advised that this fact is one of the reasons a posting to DCS is not an attractive proposition.

In our view, allowing deployment would boost morale and broaden the experience of counsel. Deployment may also make a posting to the DCS much more attractive to potential candidates. The JAG branch and the military justice system could only benefit from having its members deploy.

4.7.2 Recommendations Regarding Deployment

We recommend that the DCS lawyers be permitted to deploy during their posting to DCS so long as the deployment is not for the purposes of advising the chain of command (as this could result in a conflict of interest);

In order to ensure that the office functions effectively in the absence of a lawyer on deployment, we suggest that two additional staff lawyer positions be created. We will outline the benefits of additional resources in the section entitled "Organizational Structure of the DCS".

4.8 EXTENDED ABSENCES OF DCS STAFF LAWYERS

4.8.1 Observations

Another key difference between DCS staff lawyers and civilian staff lawyers is the DCS staff lawyers can be away for extensive training and education. In fact from approximately August 2007 until June 2008, one lawyer was away for ten (10) months on French Language Training and another was away for one (1) year completing his Master's Thesis from approximately September 2007 until September 2008. Civilian lawyers are not typically away from their offices for such extensive periods of time. In our view, because of the nature of the work in the military, it is important to allow military personnel to have diverse training.

4.8.2 Recommendations Regarding Extended Absences of DCS Staff lawyers

The recommendation to add resources to the DCS, as set out above, would relieve the stress of managing such absences which we believe are reasonable and necessary. It would allow the Director to offer his staff education opportunities as well as deployment. In our view, this too would make the posting a more appealing one.

4.9 THE LEGAL AID ONTARIO TARIFF AND MANDATE

Another significant difference between DCS and the civilian legal aid staff offices is their mandate.

The mandate of Legal Aid Ontário is to "promote access to justice throughout Ontario for low-income individuals by means of providing consistently high quality legal aid services in a cost-effective and efficient manner." [20] Further, services must be provided within Legal Aid Ontario's funding envelope.[21] The mandate of the DCS is to "provide the legal services prescribed at QR&O art. 101.20(2) to persons subject to the Code of Service Discipline charged or liable to be charged under that Code." [22] There are two essential differences between the two mandates. First, legal aid's services are provided to the indigent and not to the public at large, whereas DCS provides services to the entire Canadian Forces membership who face charges under the Code of Service Discipline that are tried by court martial. Second, Legal Aid Ontario's services are subject to financial constraint. While the DCS is allocated a budget, its mandate does not appear to require financial constraint.

Lawyers who work for legal aid, either as staff counsel or as private defence lawyers, are governed by a tariff which sets time limits on the amount of preparation time a lawyer should be spending on a file[23]. The DCS is not subject to any limitations on the amount of preparation.

In order to understand the Legal Aid Ontario tariff and its function, it may be of some benefit to review the Legal Aid Ontario website.[24] Briefly, criminal legal aid services are delivered one of two ways subject to a client's financial qualification. Clients who face the probability of

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[20] Legal Aid Services Act 1998, S.O. c. 26 s.1

[21] Legal Aid Service Act, 1998, S.O. c. 26 s. 12(1)"The Corporation shall establish and administer a cost-effective and efficient system for providing high quality legal aid services within the financial resources available to the Corporation."

[22] Taken from the website of the Office of the Judge Advocate General

Online: http://www.forces.gc.ca/jag/justice/defence-defense-eng.asp

[23] Legal Aid Ontario Tariff Manual

Online: http://www.legalaid.on.ca/en/info/pdf/Tariff_Manual.pdf

[24] Online: http://www.legalaid.on.ca/en/about/

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incarceration if they are convicted of an offence, qualify for a certificate that they can take to a local lawyer or Legal Aid Ontario Criminal Law Office if one is in their jurisdiction. The certificate authorizes the defence of specific charges and imposes time limits on the preparation for each charge. These time limits vary depending on the seriousness of the charges.[25] The other service delivery model for clients involves duty counsel. Duty Counsel are staff lawyers that work at the courthouse and represent unrepresented litigants who qualify financial but who are no facing the probability of incarceration if convicted. Duty Counsel represents these clients on guilty pleas and sentencing and on bail hearings. They also engage in negotiations with the Crown to resolve matters on behalf of clients. In addition, they provide assistance in drug treatment court, mental health court and youth court. The limit to their mandate is that they are not to do trials other than in exceptional circumstances.

In determining what services to authorize a client on a legal aid certificate, Legal Aid Ontario is guided by the question "Would the reasonable client of modest means pay for [the suggested services]". This is called the "client of modest means" test.

It would not be appropriate for the DCS to be governed by the same tariff that governs legal aid. The many differences between the civilian and military justice system would not make that feasible. To begin with, Legal Aid Ontario has a restricted funding envelope and limits its provision of service to low income Ontarians. Quite appropriately, the DCS does not restrict their services to only those that cannot afford counsel. The members of the Canadian Forces are subject to the Code of Service Discipline which can result in charges and conviction for offences which are not found in the Criminal Code of Canada. For example, disobeying a lawful command or desertion. Moreover, the consequences associated with such offences can be severe as noted by Cattanach J. In the case of McKay v. Rippon [1978] 1 F.C. (T.D.)[26]:

"Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential esprit de corps, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion".

Because of these more stringent requirements of members of the military, in our view, it is appropriate for the services of DCS to be available to all members. In addition, it is our opinion that because of the risk to a military member of more significant consequences upon conviction, the time limits under the legal aid tariff would not be sufficient. Indeed, the private criminal defence bar practicing in Ontario, have long been critical of the inadequacy of the legal aid tariff.

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[25] Online : http://www.legalaid.on.ca/en/info/pdf/Tariff_Manual.pdf Chapter 3

[26] P. 235-236

[27] That being said, it is our view that guidelines ought to be set to manage the staff lawyer's time spent preparing a case.

4.9.1 Recommendations Regarding a Tariff

We concluded that because of the many significant differences between the military justice system and the civilian system, imposing a tariff such as the legal aid tariff in Ontario, would not be appropriate. That said, it is our view that the DCS needs to be accountable for its time and expense and that guidelines should be developed to assist counsel to manage the time they spend on a file to ensure it is appropriate and reasonable. We would expect that such guidelines would take into consideration the seriousness of an offence and the nature of the consequences to the accused. We recommend that the DCS purchase and employ time management software such as Amicus in order to appropriately track their time on a file.

While we agree that our military deserves the best, there must be reasonable limits. If a client is does not dispute the allegations giving rise to a charge and the punishment is going to be a relatively minor, it makes no sense to spend thousands of dollars in time and travel. It might be appropriate to be guided by the question "Would a member of the Canadian Forces of this rank expend these funds if he/she had to pay for the services himself/herself?"

5 SELECTION, MENTORING AND TRAINING OF DCS STAFF LAWYERS

5.1 OBSERVATIONS

The lawyers in the DCS are provided with some training in operational and administrative law and attend an annual criminal law conference every year. The reservists are not offered the same training opportunities, though we understand that they were in the past.

One of the major concerns expressed by participants in our interviews, including most defence counsel, was the inexperience of most of the lawyers in the system, including the DCS. Most of the staff lawyers (with the exception of two) we interviewed did not have extensive experience in criminal law.

We were advised that other than their annual attendance at a criminal law conference there is no structured professional development plan for the DCS lawyers regardless of their level of experience. We were told by more than one interviewee that lawyers with little or no criminal law experience did not junior on a case before conducting a court martial on their own. We were further advised that some of the participants in the military justice system were concerned about the level of inexperience of some counsel whom they felt should be supervised and much more closely monitored. Indeed, some of the defence lawyers themselves expressed this concern. The Director himself acknowledged that most lawyers that come to work for defence are inexperienced. He also acknowledged that there is a lack of training. He explained that this is due to the fact that the office is understaffed. We were advised that other than a brief meeting

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[27] Michael Trebilcock, "Report of the Legal Aid Review 2008" p.47

with the Director to discuss policy and procedure, the lawyers were assigned files without any in-depth discussion with the Director about the files. We understand that the lawyers were largely on their own to obtain their own mentoring on an ad hoc basis. We were concerned that in fact very junior counsel, some with no experience and lack of training, conducted their first courts martial on their own. In our view this left both the lawyers and the members of the Canadian Forces vulnerable. It is our suggestion that all lawyers joining the DCS be provided with formal orientation. Junior and/or inexperienced lawyers, should be provided with extensive mentoring/junioring in order to ensure that they can properly prepare and conduct a court martial.

At present there are some experienced staff lawyers working at DCS who would be a good resource for new lawyers. In addition, the DCS has a panel of reservist lawyers who are very experienced criminal defence counsel. We were impressed with their willingness to devote their time and energy to the development of the staff lawyers. We were advised however, that they have never been called upon to do so.

Anecdotal evidence from a number of interviewees suggested that one of the reasons that there are so many inexperienced lawyers at DCS is that candidates are chosen because of their French language skills and not because of their litigation skills. We were advised that the reason for this was because the duty phone required a bilingual person to answer it at all times. This was in fact confirmed by the Director. We heard that there are many good litigators in the JAG branch but many of them would not have the French language skills that are currently required for a posting. It was the view of many of the interviewees that good people were thus being overlooked. It was the view of a significant number of interviewees that while French language was an important component in the DCS, it should not be the first criterion in the selection of officers. We were advised by some interviewees that a few clients expressed concern that their Francophone lawyer might not have the English language skills to conduct the court martial. While we were told that this may have been a concern, to our knowledge, no client ever discharged his/her lawyer for that reason.

In our experience, government offices have staff with different language skills, some are unilingual English, others are French and some are bilingual. Indeed in the legal aid administration offices in Ottawa, the Ottawa Family Law Office and the Ottawa Criminal Law Office, there is a mix of language skills on staff to meet the needs of the clients. Those needs are in fact met despite the fact that not everyone on staff is bilingual.

In our view there are ways to ensure that French language services are provided without requiring every lawyer to be able to litigate in French. The statistics from the annual report show that approximately twenty five (25) percent of the clients require service in the French language. In our view this number does not justify the current hiring practice.

5.2 RECOMMENDATIONS REGARDING TRAINING, MENTORING AND PROFESSIONAL DEVELOPMENT

We recommend that the DCS develop a panel of mentors who are experienced in criminal defence work. The mentors can be staff lawyers, reservists or private defence counsel.

We recommend that the Director of DCS should develop and implement a formal orientation, training and mentoring program for in-coming counsel. As part of the training, the lawyers should be given a refresher course on the Rules of Evidence and should be taught basic principles of advocacy as well as basic criminal law and procedure.

We recommend that inexperienced lawyers be sent on secondments to work with either reservists, private counsel or criminal law staff legal aid offices, for a minimum of six months in order to learn how to properly conduct criminal defence work. The volume in those offices is high and would present a lawyer with a great learning opportunity. Upon his/her return to the office that lawyer should junior on at least one court martial before conducting one on his/her own.

We recommend that lawyers with some criminal law experience who may not require a secondment, be required to junior on at least four (4) courts martial before they conduct a court martial on their own. Once a lawyer is in a position to conduct a court martial on his/her own, a senior, more experienced counsel should supervise and attend at his/her first few courts martial.

We recommend that lawyers be required to have an ongoing relationship with mentors.

We recommend that postings be of a longer duration to allow counsel to learn and develop advocacy skills. This recommendation is set out in more detail under the section entitled "Postings".

We recommend that the primary criterion for selecting a lawyer to work at the DCS be litigation and advocacy skills and experience as well as a desire to do litigation work. It is our opinion that with the recommendation to have the duty phone screened by other bilingual personnel, it is not necessary for every lawyer posted to DCS to be bilingual. In our submission a good balance between litigation experience and French language skills should be achieved. It would be our recommendation that no more than three (3) staff lawyer positions be designated as bilingual.

6 ACCOUNTABILITY

6.1 OBSERVATIONS

Bill C-25 created the position of Director of Defence Counsel Services in order to make certain that members of the Canadian Forces who came into contact with the military justice system were afforded legal representation and advice which would be completely independent from the chain of command. Such independence is critical to ensure that a Canadian Forces member is treated fairly and that defence lawyers can represent the member as he/she sees fit while adhering to the various rules of professional conduct, without any hint of influence from the chain of command.

While independence is absolutely required in order for Canadian Forces members to be properly represented, in our opinion, it has led to a lack of accountability in the offices of the DCS. We are not suggesting that the office has acted improperly in the course of carrying out its work; our observation however, was that the lack of structure in the office and the manner in which it operates could leave the office vulnerable to criticism regarding its accountability. For example, the perception of some of the interviewees, including some defence counsel, was that the DCS's agenda was to reform the military justice system rather than to represent individual clients. It was the view of some interviewees, including defence counsel, that at times this agenda took priority over a client's needs. We were advised of one situation where a client was not aware that his case had been appealed to the Supreme Court of Canada for instance. While law reform is a critical component of the work of any lawyer, it should not be undertaken at the expense of a client. We were assured by most DCS defence counsel that all clients were properly advised regarding the manner in which counsel proposed to conduct their cases and we have no reason

to believe that this is not so in most cases. We are simply suggesting that appropriate oversight would be an added measure to ensure all cases are being conducted properly.

Another example of the failing of the current system is that the Director of DCS does not have an evaluation or performance appraisal on an annual basis. The result for him is that he is not evaluated for promotion. Moreover, his professional development is stagnated. A separate but related concern is that subordinates do not have a mechanism to complain should they have any concerns about the Director. This violates principles of accountability.

While both the DCS and the DMP act under the general supervision and report annually to the Judge Advocate General, there is no oversight of DCS operations other than by the Director. This is not the case for the DMP to whom the Judge Advocate General may issue instructions and guidelines in respect of a particular prosecution (see sections 165.17 and 249.18 of the NDA).

Accountability in the military justice system was at the fore in 1997 when the Special Advisory Group on Military Justice and Military Police Investigations was convened. In fact the Military Police Complaints Commission website sets out the following regard the findings of the Special Advisory Group:

"Among its other findings, the 1997 report of the Special Advisory Group on Military Justice and Military Police Investigations pointed to the need for a mechanism that would bring greater public accountability to the military justice system. Chaired by the late Brian Dickson, former Chief Justice of the Supreme Court of Canada, and a veteran of World War II, the Advisory Group said that:

If an individual citizen ~~complains~~complaints to a civilian police force about improper conduct of its personnel, there is an expectation of and a right to a response. The situation should be no different in the military context... An independent review capability is essential to ensure confidence and respect for the military justice system.

This independent review capability is now provided by the Military Police Complaints Commission, which commenced operations on December 1, 1999".

Accountability is important to any system of justice and the civilian legal aid system in Ontario is no exception. Legal Aid Ontario is both independent and accountable for its expenditure of public funds. [28] It is managed by a Board of Directors and governed by section 5 of the Legal Aid Services Act 1998, S.O. 998 c. 26. [29] The clinics funded by Legal Aid Ontario are also

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[28] Legal Aid Services Act, 1998 S.O. 1998, c. 26 at section 3(4) sets out that "The Corporation shall be independent from, but accountable to, the Government of Ontario as set out in this Act".

[29] Legal Aid Services Act,1998, S.O. 1998, c. 26

Board of directors
5. (1) The affairs of the Corporation shall be governed and managed by its board of directors.

Composition (2) The board of directors of the Corporation shall be composed of persons appointed by the Lieutenant Governor in Council as follows:

1. One person, who shall be the chair of the board, selected by the Attorney General from a list of persons recommended by a committee comprised of the Attorney General or a person designated by him or her, the Treasurer of the Law Society or a person designated by him or her and a third party agreed upon by the Attorney General and the Treasurer of the Law Society or persons designated by them.2. Five persons selected by the Attorney General from a list of persons recommended by the Law Society. 3. Five persons recommended by the Attorney General.

governed by a Board of Directors in order to ensure accountability. In our view a similar system of governance would be appropriate for the DCS.

6.2 RECOMMENDATIONS REGARDING ACCOUNTABILITY

We recommend that the DCS be governed by a Board of Directors.

We further recommend that the composition of the Board of Directors include military personnel that do not provide legal advice to the chain of command in any capacity.

We recommend that the function of the Board should be to oversee the operation of the DCS and to review its activities monthly. Further, the Board should direct policies to be implemented in DCS and should be responsible for evaluating the performance of the Director on an annual basis. The Board meetings should be attended by both the Director and by a representative of the staff lawyers and reservists. Minutes should be taken at each meeting and should be made public.

7 DELAY

7.1 OBSERVATIONS

Section 162 of the National Defence Act requires that charges under the Code of Service Discipline be dealt with expeditiously.[30] Moreover, the Charter of Rights and Freedoms[31] also provides at section 11 (b), that an accused has a right to be tried within a reasonable time.[32]

Efficiency in any justice system is a fundamental right of an accused, and it is also arguably necessary to maintain public confidence in the system. In the case of Askov,[33] Cory J. outlined the reasons for this. While the following paragraph is lengthy, it best captures the reasons that efficiency is a fundamental element to justice. Cory J. said:

"Although the primary aim of s. 11(b) is the protection of the individual's rights and the provision of fundamental justice for the accused, nonetheless there is, in my view, at least by inference, a community or societal interest implicit in s. 11(b). That community interest has a dual dimension. First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Second, those individuals on trial must be

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Non-voting member
(3) The president of the Corporation shall be a non-voting member of the board.

[31] Part 1, *Constitution Act*, 1892.

[32] National Defence Act R.S., 1985, c. N-5 s.162 "Charges laid under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit".

[33] *R. v. Askov*, [1990] 2 S.C.R. 1199

treated fairly and justly. Speedy trials strengthen both those aspects of the community interest. A trial held within a reasonable time must benefit the individual accused as the prejudice which results from criminal proceedings is bound to be minimized. If the accused is in custody, the custodial time awaiting trial will be kept to a minimum. If the accused is at liberty on bail and subject to conditions, then the curtailments on the liberty of the accused will be kept to a minimum. From the point of view of the community interest, in those cases where the accused is detained in custody awaiting trial, society will benefit by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law. If the accused is released on bail and subsequently found guilty, the frustration felt by the community on seeing an unpunished wrongdoer in their midst for an extended period of time will be relieved.

There are as well important practical benefits which flow from a quick resolution of the charges. There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time, but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employer; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost. Witnesses too are concerned that their evidence be taken as quickly as possible. Testifying is often thought to be an ordeal. It is something that weighs on the minds of witnesses and is a source of worry and frustration for them until they have given their testimony.

It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal trials take place within a reasonable time. From a wider point of view, it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law.

The failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures. When a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated. It is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the supra, lengthy and unreasonable delays."

We heard from interviewees that accused in the military justice system face all of the same stressors and restraint on liberty as those in the civilian system and face additional career impacts. A member might be subject to release from the Canadian Forces even before being found guilty of the alleged offence. Even if not faced with consequences as serious as release, an accused's career progression would likely be affected as he/she would not be able to deploy or otherwise engage in activities toward promotion.

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Delay also inevitably affects discipline. Former Chief Justice Lamer acknowledged the need for promptness in the military justice system in R. v. Genereux [34] in his following comments:

"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..."

As part of our mandate, we were asked to review the issue of delay and whether or not it was contributed to by the DCS. The issue of delay in the court martial system was explored in considerable detail in the External Review of the CMPS. In 2007, the mean time from the date of the offence to final disposition at a court martial was 593 days. In the year 2006, that number was 650 days.[35] The conclusions of that report were that the delays in the court martial system were predominantly attributable to the process leading up to the preferral of charges. The report was critical of delays at the investigation stage and at the stage where charges were dealt with by CMPS. That report revealed that one of the major contributing factors to delay was the late timing of disclosure. It was not uncommon for disclosure to be provided only when charges were preferred. The mean time from the time of preferral of a charge, to date of final disposition was about six and one half (6.5) months.

One of the complaints we heard in our interviews was that by the time disclosure was received by defence counsel, the prosecutors were already fully prepared and ready to proceed. This in fact was confirmed by lawyers that either worked as prosecutors presently or had done so in the past. Thus while it can be said that the length of time between the date of preferral or receipt of disclosure until the court martial, may be attributable to defence counsel, the practice by some prosecutors of delivering disclosure after the prosecution is essentially "ready to go" is unfair.

We were advised by some defence counsel that since the External Review of the CMPS, disclosure in some instances was being sent to them earlier in the process than previously, however, it is still received quite late for the most part. All interviewees were of the view that disclosure at the earliest stage possible would be of significant benefit. It was felt that early disclosure, even before charges were preferred would allow the defence counsel to negotiate with the prosecution and perhaps avert the laying of unnecessary charges.

We heard from defence lawyers that there were a number of reasons courts martial were scheduled so many months from the date they received the file. First, the lawyer needs to review the disclosure and contact the client. The review of disclosure, even for a relatively simply case or minor charge, is most often an onerous task. We were advised that even in a very minor fact situation, sometimes multiple charges are laid where it may not be necessary to do so. One example that was given was a case of drunkenness which resulted in a number of additional charges because of the individual's behavior. When this occurs, it yields voluminous disclosure which most often includes video-taped statements of numerous witnesses. It is not a matter of reviewing a brief synopsis of the offence, or a few will say statements. Experienced defence counsel who worked in private defence practice felt that the "over" charging of accused and the attenuate volumes of disclosure were attributable to inexperienced investigators and prosecutors. Since the issue of the experience of prosecutors and investigators was reviewed in

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[34][1992] S.C.R. 259, p.30

[35] Andrejs Berzins and Malcolm Lindsay, Bronson Consulting, "External Review of the Canadian Military Prosecution Service (2008)" p. 10.

the External Review of the CMPS and recommendations were made, they will not be addressed in this report.

We were told that once disclosure is reviewed, the client must be contacted. While this may seem to be a relatively simple task, the client in often times elsewhere in the country and not always easy to locate. Because of the length of time between the offence and the preferral of charges, clients and witnesses may no longer be where the offence was committed. Members may be posted or released making it a challenge to contact them. Once the client is eventually contacted, it takes time to interview him/her as well as the witnesses. Initial interviews usually take place by telephone but may sometimes require a lawyer to fly out in person, in advance of the trial. In addition of course, the lawyer needs to prepare for trial. If the case requires a psychiatrist to testify, obtaining approval for and contacting such experts can be a time-consuming undertaking. If the expert needs to evaluate or interview a client that invariably takes time as well. Some lawyers felt that this total process could take three (3) to 6 (six) months depending on the circumstances. A number of the lawyers we interviewed were of the view that some of the less experienced counsel were uncomfortable setting quick trial dates and gave themselves more time to prepare than was really necessary.

Our interviews revealed that the manner in which files are being distributed, may be contributing to delay. None of the interviewees could identify a system or consistent manner in which files were distributed. Most of the interviewees advised that most of the time, the files simply showed up on their desks, or in the case of reservists, that a call was placed to them. When the Director was asked about how he distributed files, he confirmed that there was no set system. He advised that where a member requested a specific counsel he would assign that lawyer, as required by the Queens Regulations and Orders[36] and otherwise, he would assign the more serious files to more experienced counsel. It did not appear from our conversations that any regard was given to whether a particular assignment of counsel would result in delay for a client. We learned from a number of different sources that some of the busier counsel were being assigned cases despite their unavailability until the Fall or Winter of 2009 while other counsel had a lighter load and advised that they could take more work. We were also advised that some reservists had not been asked to take on new files in some months. When we pressed interviewees on the issue of workload and whether or not they had discussions with the Director in this respect, we were advised that the working relationship with the Director was such that they would not feel comfortable questioning his decisions on file allocation.

Another practice at the DCS that may account in part for delay in the system, is the Director's management of staff lawyers who are going to be posted. The Director advised that he stops assigning these counsel files once he becomes aware that they are to be posted. He advises that this means that for six (6) to eight (8) months every year, he cannot assign the caseload to a full complement of counsel.

A further circumstance that may have contributed to the delay is the management of the DCS budget. In an attempt to stay within the parameters of the budget, the Director sometimes assigned himself files toward the end of a budget year in order to avoid opening the file until the new budget year. However, the Director advised that this practice has been discontinued and that in the last twelve months, managing the budget has become smoother because there is recognition by the JAG branch that the DCS is "answering a charge" and has no control over the

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[36]Q.R. & O. Section 101.22(5) Where the accused has requested the services of a particular legal officer, the Director of Defence Counsel Services shall endeavor to have that officer made available for that purpose. If the particular officer requested by the accused is not available, the Director shall ensure that another legal officer is made available.

number or types of cases that are sent to the office on an annual basis. It is certainly likely that a case that requires travel to Afghanistan or Europe will be much more costly than a case in Ottawa. If the DCS requires surplus funds, the JAG has been fair in allocating additional monies. The Office of the Jag advises that DCS has been given the budget it requested from one year to the next.

One more factor that may be causing delay is travel. We have covered the issue in detail under the sections entitled "Travel", but it bears repeating. Most interviewees advised that conducting a court martial for even relatively minor charges could take them away from their families for a week. Statistical evidence from the Court Martial Administrator revealed that most courts martial were two (2) or three (3) days in length last year. The anticipated length this year will be longer because of the number of Charter motions being brought by defence counsel. We were told that even if a matter lasts only two days, counsel is often away from home for a full week because he/she must attend at the location of the court martial to interview and prepare the client and witnesses. In addition, he/she usually requires a day or two to travel to and from the court martial. Most interviewees advised that because of this, they tried to schedule only two (2) courts martial per month. This concern was addressed in more detail under the section entitled "Travel" and is touched upon in the section entitled "Regionalization".

7.2 RECOMMENDATIONS REGARDING DELAY

In our view, the right to disclosure arises at the time that the accused is charged. We recommend that complete disclosure be provided as soon as possible after a charge is laid; it should not be delayed until after the charge is preferred. If the client does not have a private lawyer, the disclosure package should be sent to the DCS. The benefit of early disclosure would be to allow defence counsel to commence negotiations with the prosecution before charges are preferred and perhaps influencing either the nature of the charges to be preferred or the disposal of the matter.

We recommend that the Director have weekly meetings with staff lawyers and reservists to discuss cases including caseload and the allocation of new files. While the Director has to be mindful of section 101.22 of the QR & O's, the section only requires him to make an effort to assign a client his lawyer of choice. New files should be allocated in accordance with a lawyer's availability to conduct a trial within three (3) to four (4) months unless the file is such that a more experienced lawyer is required.

We recommend that the Director's practice of assigning cases to himself in order to delay the opening of a file until the next budget year be discontinued. As our mandate did not extend to considering whether the DCS budget was being properly managed, we are not in a position to comment in this respect.

We recommend that the Director assign cases to lawyers despite the fact that they are to be posted. There is no reason that a lawyer cannot do the ground work to prepare a case for trial and have the trial conducted by someone else. In the United Kingdom, solicitors prepare files for barristers as a matter of course. A well prepared trial file could easily be assumed by an experienced staff or reservist lawyer, even on short notice.

8 ISOLATION OF THE DCS FROM THE REST OF THE JAG BRANCH

8.1 OBSERVATIONS

While the requirement for DCS to be independent may contribute to the isolation of the DCS from the rest of the JAG branch, most interviewees felt that the reason for the isolation ran deeper. The interviewees, almost without exception, were of the view that the DCS was not a well respected part of the JAG branch. We heard from almost all interviewees, including lawyers that worked for the prosecution at some point in their career, that there was a negative attitude toward the DCS within the JAG branch. We heard from some interviewees that working at the DCS was considered to be a "dead end job" or a even a "career ender" if one stayed in it too long. More than one lawyer was warned by even very senior officers to be careful about what he/she did while at DCS because it would reflect on him/her when he/she returned to the branch.

We experienced some of the negative attitude toward the DCS in some direct interviews and in other conversations in passing with people we did not interview directly. There was a sense that some of the participants in the military justice system felt that the DCS was acting inappropriately by bringing endless motions or applications. There was also condescension about the manner in which they were representing accused. Some remarks were made to us so casually that we suspect they are part of some of the everyday conversations between colleagues that could indeed colour someone's opinion of the DCS.

It was our perception that some of the participants in the military justice system saw the DCS lawyers as an obstacle to military discipline and to the maintenance of the status quo in the operation of the system. Our observation was that some participants in the justice system did not appear to understand the important and critical role of the defence in the military justice system. In order for the system to be fair and proper it must be subject to challenge and scrutiny. The DCS is in place to do just that. The purpose of the office is to defend clients and to ensure that they are treated fairly. In the course of our interviews with the DCS lawyers, we had an opportunity to ask some challenging questions about how they were conducting cases. While we were concerned about some aspects of the DCS office, we were satisfied that counsel generally acting appropriately and in the best interests of their clients.

It was the view of many of the participants that the DCS was perceived as much less important and less respected in the branch that the CMPS. Interviewees pointed to the rank of the Director of DCS and to the lack of resources in the office as compared to the CMPS, as evidence of that. The DCS is a much smaller unit than the prosecution and the position of the Director is that of Lieutenant Colonel. The position of the Director of CMPS is that of a Colonel. That issue will be discussed in more detail in the section entitled "The Organizational Structure of DCS".

Many of the participants in the interviews also provided anecdotal evidence that military honours and commendations have not generally been bestowed on lawyers while they worked in DCS. We heard from a number of different sources that the decision in Trepanier was not well received by the JAG branch. We were told in fact that the prosecutors were congratulated for their work on the case and the DCS were not acknowledged. In our view, the case should have been celebrated as an improvement to the fairness of the system.

8.2 RECOMMENDATION ON THE ISOLATION OF DCS FROM JAG

We recommend that the DCS as well as the CMPS be showcased an as important and integral part of a fair and just military justice system. Their efforts should be recognized by the JAG Branch in some of the ceremonies that take place where honours are bestowed upon members who conduct their work with distinction. In our observation there is no reason not to hand out at least one commendation to a deserving member of the CMPS and the DCS at the annual Christmas party each year.

We recommend that the rank of the Director of DCS should be the same as the rank of Director of CMPS. That recommendation will be explored in more detail under the section entitled "The Organizational Structure of DCS".

We recommend that all lawyers who wish to work in litigation in the JAG branch should be required to work in both DCS and the CMPS.

9 TENSION BETWEEN THE DCS AND PROSECUTION

9.1 OBSERVATIONS

We heard from almost all of the interviewees that there was a considerable amount of animus between the DCS and the CMPS. Most interviewees advised that they had some good relationships with individual prosecutors or defence lawyers but all were aware of animosity at the "higher levels". When members of the CMPS were confronted about the alleged tension, they acknowledged that it existed but interestingly, the Director of DCS denied that there was animosity between him and the prosecution service.

The issue of animosity was brought to our attention by almost every interviewee. This fact combined with copies of some somewhat condescending emails that we were provided that emanated from within the DCS, satisfied us that in fact animosity exists.

To be clear, the animosity is not only one sided. Both sides bear some responsibility for it.

The DMPS and the DCS are part of an adversarial system and thus work in opposition to one another. The perception of the lawyers at the DCS is that the focus of the prosecution service is on discipline rather than on the administration of justice and this has resulted in considerable tension at times. While we have no doubt that the prosecutors in the DMPS conduct themselves in accordance with policies requiring them to ensure that the case against an accused has a reasonable prospect of conviction, our observation was that that was not part of their everyday language. Part of the work of the prosecutors involves screening charges to determine whether they should be proceeded with. Between April 2007 and March 2008, they considered 110 such charges and preferred 78.[37] Yet, it is notable that in many of our discussions with prosecutors, that part of their work was not generally discussed. We heard about the importance of the court martial system in enforcing military discipline and much less about its role in determining guilt or innocence and administering justice. Not unnaturally, military discipline is a mindset in the Canadian Forces and quite rightly so. A highly disciplined military is

[37] Captain (Navy) Holly MacDougall Annual Report 2007-2008 of the Director of Canadian Military Prosecutions, Annex C to the Annual Report of the Judge Advocate General 2007-2008 p. 80 - 81

essential for the protection of our country. Seeing to it that discipline is administered is arguably part of the prosecutor's very important role. That being said, the administration of justice and the policy regarding reasonable prospect of conviction needs to become part of the language of every day. That will ensure that the focus of the court martial system is balanced and may address the aforementioned perceptions of DCS counsel.

In our view, the level of animus between the DCS and the CMPS is extremely counterproductive ~~andboth~~and both organizations need to understand and respect their different roles without personalization..

9.2 RECOMMENDATIONS REGARDING THE TENSION BETWEEN DCS AND CMPS

We recommend that the Director and the CMPS meet to discuss their respective concerns and that they set up ground rules for moving forward. The ground rules ought to include mutual respect for the roles of each side, professional emails and regular meetings to discuss issues that arise on both sides.

We recommend that the measures regarding co-operation set out in the External Review of the CMPS[38] be implemented immediately. Those measures bear repeating in this report, we therefore reiterate that, in carrying out their respective functions, special effort be made by the leadership of the CMPS and DCS to place less emphasis on traditional adversarialism and more emphasis on co-operative case management.

We further recommend that the two Directors meet together with the staff at both the DCS and the CMPS as well as the Court Martial Administrator and the staff in the Military Judge's Office to set the tone for future more cooperative relationships.

We recommend that the CMPS and the DCS put on annual joint training for the development of their lawyers.

We suggest that consideration be given to moving the two entities closer to one another in order to allow positive and more cooperative relationships between the sides to develop.

10 ORGANIZATIONAL STRUCTURE OF THE DCS

10.1 OBSERVATIONS

The organizational structure of the DCS has been identified by many interviewees as one of the major factors that contribute to the negative perception of the DCS within the JAG branch.

One of the ~~lightening~~lightning rods for criticism is the fact that the Director of CMPS's position is ranked as a full Colonel and the Director of DCS is ranked as a Lieutenant Colonel. Most interviewees including some prosecutors were of the view that the message this sent to the rest of the branch was that DCS was not as important or well respected in the military justice system as the CMPS. Interviewees who had worked for both organizations confirmed that they have heard that sentiment expressed by Canadian Forces members. Most interviewees expressed

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[38] Andrejs Berzins and Malcolm Lindsay, Bronson Consulting, "External Review of the Canadian Military Prosecution Service (2008)" p. 60

that the inequality in rank was simply unfair. Whether right or wrong, a decision was made for the CMPS to be ranked as a Colonel, and there appears to be no justification for the DCS to be treated differently.

Aside from the perceived unfairness of the inequality in rank, we were advised that the Director was excluded from highest level meetings regarding the military justice system as his rank did not allow him to participate. As a full Colonel, the Director of CMPS is invited to those meetings. It was the Director's view that in the circumstances, the defence did not have an equal voice or a as significant an impact on military justice issues. In addition, we were told that the evaluation of the DCS staff lawyers suffered as a result of the Director's rank. We were told that the evaluations were discussed at the meeting that he could not attend by virtue of his rank. We were advised that it was at this final meeting that significant decisions were made regarding a member's career advancement. The Director felt that as he was not present to advocate for his staff, they were at a disadvantage.

There are four (4) lawyers at the DCS to handle the same number of court martial files as ten (10) prosecutors, eight (8) of whom are regionalized. When we questioned the imbalance in staffing we were told that the prosecutors were responsible for more than just prosecuting cases, they were also responsible for advising the chain of command and the National Investigation Service. Similarly, it is arguable that the DCS is responsible for much more than defending clients. They advise assisting officers and Canadian Forces members on a variety of issues. In so doing, they respond to between one thousand four hundred (1400) and one thousand five hundred (1500) requests for advice that come to the duty phone.

The feedback from most of the participants in the military justice system including some who worked for both the DCS and the CMPS, was that the work at the DCS was more demanding than at the CMPS. The reasons for this included the duty phone, the travel, the minimal support and the caseload. The evidence is that most prosecutors work on four (4) or five (5) cases per year while DCS counsel work on ten (10) to twelve (12). We were advised that some of the prosecutors are in fact not very busy. We were told that the travel is also far less demanding for prosecutors who work out in the regions than for the DCS lawyers who are located centrally.

In our view, the DCS and the JAG branch could benefit significantly from the addition of two more staff lawyers. While it is our view that a regionalized, more efficient office with well trained lawyers might not need additional resources, in our opinion, there are some compelling reasons to consider it.

One of the issues identified and discussed in this report was the negative perception of a posting to DCS because it did not allow for deployment or participation in other military exercises that would contribute to a member's career progression. If there were additional resources in the office, it would be more manageable to allow for deployment. Additional resources would also allow junior and less experienced staff to be seconded as previously suggested and would also provide coverage if members participated in extensive training (such as French language training) for months at a time. Additional resources would also allow the Director to better balance his administrative responsibilities and to carry a caseload as recommended.

If the DCS was a career path, rather than a posting, additional resources would allow for members entering the organization to progress within it. This would make it a more attractive posting.

If the structure of the DCS was reorganized to allow for two additional staff lawyer positions, we would recommend that the two positions be for senior counsel, one of whom should be the Deputy Director.

10.2 RECOMMENDATIONS REGARDING THE ORGANIZATIONAL STRUCTURE OF DCS

We recommend that although the current rank of the Director of DCS is that of Lieutenant Colonel, there must be some opportunity for an individual who has demonstrated a very high level of competence in litigation, to remain in the position and attain the rank of Colonel.

We recommend that two new staff lawyer positions be created for the DCS. Those positions should be for senior and experienced counsel, one of whom would be a Deputy Director who could, if he/she demonstrated a very high level of competence, attain the rank of Lieutenant Colonel. The Deputy Director should be delegated similar authority to the Director so that he/she could ensure the office operates smoothly in the Director's absence.

We recommend that the no more than three (3) of the remaining positions be staffed by junior lawyers.

11 REGIONALIZATION

11.1 OBSERVATIONS

The issue of regionalization versus centralization was explored in detail with interviewees and the consensus was that in principle, regionalization would be preferable to centralization.

While the concept of regionalization was appealing to most people that were interviewed, there were two concerns that were raised as issues. First, there was some apprehension that regionalization might lead to isolation as there are only four (4) practicing lawyers in the DCS. At present the four (4) lawyers enjoy a very close relationship and collegiality and they support one another. There was some concern that this would be lost if the office regionalized. Most interviewees felt that regionalization would not be much different than the situation at present. We were advised that it is in fact rare for the four (4) lawyers to be in the office at the same time. We were told that most often at least two (2) lawyers were either "on the road", in court in Asticou or on annual leave or training. It was therefore not uncommon for one lawyer to be in the office alone. Most interviewees felt that there were measures that could be put in place to ensure that a regional office structure functioned effectively. The example of weekly teleconferences or web meetings was given as one example.

Another concern expressed by some interviewees related to the relative inexperience of most counsel at the DCS. It was felt that inexperienced counsel ought ~~not~~not to be operating on their own in a region without support. The concern was both for the clients and for counsel. It is our view that an inexperienced lawyer should not be posted to a region alone. It would be our hope that the recommendations in this report would be implemented with respect to the training and mentoring of DCS lawyers so that the DCS would not find itself with completely inexperienced people. That being said, as we have referred to in several other places in this report, we are recommending the addition of two (2) staff lawyer positions to the DCS. This recommendation was more fully explored in section entitled "Organizational Structure of the DCS". In our view the two positions should be for senior, experienced counsel. They could be posted to the busiest regions together with a junior lawyer. It would be our suggestion that regional offices be either co-located with reservist offices where possible, or otherwise, with private defence counsel. It is our view that a cost sharing arrangement with either a reservist or an experienced private defence lawyer would be of great benefit. In our experience members of the defence bar are supportive of one another and would no doubt be supportive of a DCS office.

What interviewees found most appealing about the concept of regionalization was that their requirement to travel would be significantly less demanding and they would be able to meet more easily with clients. It was noted by a number of counsel that they might be able to attend at interviews between clients and the investigators and they would be able to conduct bail hearings more quickly. It was also noted that the decrease in demand for travel would enable them to take on more client files. Many of the interviewees also felt that regionalization would allow them to develop positive and cooperative relationships with the local prosecutors which would invariably assist in the resolution of matters where appropriate.

11.2 RECOMMENDATIONS REGARDING REGIONALIZATION

It is recommended that the DCS be regionalized. These writers are of the view that two additional positions be added to the DCS and that a review of the volume of courts martial in various locations be conducted in order to determine the location of offices as well as the number of lawyers required to best serve the needs of Canadian Forces members. In such a review it would be important to take into consideration the location of the CMPS regional offices. In any event, we recommend that a Deputy Director be posted to Western Canada together with a junior and we suggest that the Director and one lawyer be assigned to the Ottawa area.

We recommend that the support staff be centralized and made available to all lawyers using technology. Communication can be by phone or by intranet and documents can be easily prepared and transferred from one office to the other.

It is suggested that in order to address the issues of isolation and support, the regional offices be collocated in a cost-sharing arrangement with reservists where possible, or private defence counsel.

It is recommended that all motions and applications be conducted centrally by the Director and the staff lawyer in Asticou. In our view there appears to be no need for those matters to be done "in the field". This recommendation would reduce the travel requirements for the Judges.

It is recommended that the staff counsel meet weekly be teleconference call as previously discussed and that they meet in person twice per year for a retreat.

12 ISOLATION OF RESERVISTS

12.1 OBSERVATIONS

One of the issues noted by a number of interviewees was the isolation of the reservists from the DCS. We heard that the reservists do not participate in the training offered to the staff lawyers and do not have much contact with them, other than by telephone. They rarely attend staff meetings or meet with the Director. This may be due to the fact that they are not often "on-site" and take a limited number of matters per year. There was also indication that there were budget considerations accounting for this. It was felt that the reservists had a great deal to offer. They are very experienced and respected private defence counsel who have been praised by many in the military justice system. They have knowledge and expertise that should be capitalized on by the DCS. They have offered that knowledge to the organization but they have never been taken up on the offer.

We were told that despite the distant relationship between the DCS and the reservists, it was not uncommon for some staff to contact reservists for advice regarding trial preparation and tactics. We were told that the reservists were happy to oblige and some of the reservists would be prepared to formally mentor junior staff.

12.2 RECOMMENDATIONS REGARDING THE ISOLATION OF RESERVISTS

We recommend that reservists be considered to be a more integral part of the team than they are at present.

We recommend that the reservists participate in regular staff meetings (perhaps once per month) with the staff lawyers and they be sent on training with them. There is much to be gained from regular contact. It would allow for both the staff and the reservists to get to know and share one another's skills and expertise as well as their recent experiences in courts martial.

We recommend that the reservists who are willing to do so, be part of a formal mentoring program for the junior and less experienced lawyers at the DCS.

We recommend that the reservists who are willing to do so, work with a seconded officer for a minimum of 6 months to teach the officer the basics of a criminal defence practice.

13 THE COURT

13.1 OBSERVATIONS

The court is staffed with four (4) judges who hear approximately seventy (70) courts martial per year. It is not a permanent court despite the recommendations of Former Chief Justice Lamer.[39] It was the view of a number of participants in the military justice system that the lack of permanence was an obstacle to the implementation of a number of efficiencies that are present in the civilian system. We heard from judges that they did not have the authority to make rules and to compel parties to attend preliminary proceedings that could narrow issues or assist parties to resolve. In fact, the current system does not even compel parties to attend court to set a date.

If a party wishes to set and date and the other party does not do so voluntarily, the Court Martial Administrator may fix a trial date on her own. This however, leads to adjournment requests. Therefore, the prosecution usually brings an application before the court to set a date if necessary. That is a cumbersome procedure. In our view, bill C-45 ought to be reintroduced to allow judges to make rules and to set up required court attendances such as set date or remand court and judicial pre-trials.

We were advised that the court martial system operated much more slowly than the civilian system and that even a guilty plea would often result in evidence having to be called and could take up to two days or more. Our review of the courts martial decisions and the statistics provided to us by the Court Martial Administrator, suggests that that is accurate. In the civilian

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[39] "The First Review by the Right Honourable Antonio Lamer P.C., C.C, D.C., of the provisions and operation of Bill C-25", 2003

system, a guilty plea could take as little as fifteen (15) minutes. In the civilian system, as a general rule, evidence is not called on a guilty plea.

We were advised that one of the reasons for the lengthier process in the military justice system was because a court has to be convened and a judge has to be sworn in at the beginning of each case. In the case of a plea, the court gives the accused a long and detailed explanation of his rights in relation to the plea and ascertains that he understands the consequences of the plea, before it is entered. A civilian defence lawyer who acted for an accused on a plea advised us that he was impressed with the degree of respect afforded to the accused in the circumstances. Such a process is absent in civilian courts.

While the respect of the accused is of extreme importance, most interviewees were of the view that the judges prolonged court appearances, in particular by hearing evidence on matters such as a plea. In reviewing the Military Rules of Evidence, we could see no reason for this practice. The perception of counsel (both prosecution and defence) was that the judges did not trust their word. It was our impression that this practice was actually steeped in military tradition rather than mistrust.

One of the obvious shortcomings of the current system is the absence of a first appearance or set date court or judicial pre-trials. These processes in the civilian judicial system are critical to the movement of a file through the system. Again, because of the inability of the court to make rules, these types of mechanisms cannot be imposed on parties.

Consideration of the permanence of the military court was not part of our mandate, thus we will not address that issue other than to suggest that the Minister may wish to have the issue reviewed again to follow-up on the review by Former Chief Justice Antonio Lamer in 2003.

13.2 RECOMMENDATIONS REGARDING THE COURT

We recommend that bill C-45 be re-tabled in order to allow the Chief Military Judge to make rules. If the legislation is passed, it is our suggestion that the rules require counsel to appear at a first appearance or "set date" court as well as at judicial pre-trial conferences.

It is our suggestion that in the meantime the Chief Military Judge convene a meeting with the Director of DCS and the Director of CMPS to try to implement "practices" that will be followed by counsel. Such practices may include attendance at a set date court that is convened every two weeks at the same time of day. Attendances should be early in the morning and counsel should be able to participate by telephone if they are out of town. In the event that counsel or reservists are not available on that day, one of the staff lawyers from the DCS office should attend with instructions from counsel. Another "practice" that could be implemented would be the convening of judicial pre-trials. Such pre-trials should be conducted by a judge, other than the trial judge, and should have as its goal, the narrowing of issues or resolution.

It is our recommendation that the Chief Military Judge, the Director of DCS and the Director of CMPS should meet monthly or bi-monthly to discuss systemic issues and other matters of mutual concern.

14 CHARTER MOTIONS

14.1 OBSERVATIONS

At present, a number of Charter motions are being filed in many of the cases coming before the court. The three motions are a challenge to perceived systemic unfairness to an accused. The first motion challenges the impartiality of Judges as they are subject to reappointment every five years. The issue was set out in former Chief Justice Lamer's review of Bill C-25 wherein the former Chief Justice expressed concern about the lack of tenure of the military judges. He stated the following:

"When setting up a court, renewable terms must be used with extreme caution. I shall not discuss here the difference between administrative tribunals and the courts as regards term appointments and renewable terms. The judicial decision-maker must be in the position to render a decision based solely on the merits of the case before him or her, according to law. More importantly, those appearing before a judicial decision-maker should, within reason, be satisfied that their case has been decided solely on its merits and according to law. Provisions governing renewal must be crafted with care to ensure that those subject to a judicial decision do not believe that a judge's desire to be renewed will influence his or her final decision."[40]

Another Charter motion challenges the composition of the panel. The composition of a panel for a General Court Martial is set out at section 167 of the National Defence Act as follows:

"167. (1) A General Court Martial is composed of a military judge and a panel of five members.

Rank of senior member

(2) The senior member of the panel must be an officer of or above the rank of colonel.

Rank for trial of officer

(3) If the accused person is an officer, all of the members of the panel must be officers.

Ranks for trial of brigadier-general or above

(4) If the accused person is of or above the rank of brigadier-general, the senior member of the panel must be an officer of or above the rank of the accused person and the other members of the panel must be of or above the rank of colonel.

Rank for trial of colonel

(5) If the accused person is of the rank of colonel, all of the members of the panel, except the senior member, must be of or above the rank of lieutenant-colonel.

Rank for trial of lieutenant-colonel

(6) If the accused person is of the rank of lieutenant-colonel, at least two of the members of the panel must be of or above the rank of lieutenant-colonel.

Rank for trial of non-commissioned member

[40] "The First Review by the Right Honourable Antonio Lamer P.C., C.C, D.C., of the provisions and operation of Bill C-25", 2003, p. 29

(7) If the accused person is a non-commissioned member, two non-commissioned members who are of the rank of warrant officer or above must be appointed as members of the panel and the other three members must be officers.

R.S., 1985, c. N-5, s. 167; 1992, c. 16, s. 3; 1998, c. 35, s. 42.

Ineligibility to serve

168. None of the following persons may sit as a member of the panel of a General Court Martial:

(a) an officer or non-commissioned member who is a lawyer or notary;

(b) a witness for the prosecution or the accused person;

(c) the commanding officer of the accused person;

(d) an officer or non-commissioned member appointed for the purposes of section 156;

(e) an officer below the rank of captain;

(f) any person who, before the court martial, participated in any investigation respecting the matters on which a charge against the accused person is founded; or

(g) an officer or non-commissioned member of any armed force who is attached, seconded or on loan to the Canadian Forces."[41]

The Charter challenge to these provisions alleges that the selection of the panel as outline above violates an accused person's right to a fair and public hearing by an independent and impartial tribunal guaranteed by ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms and that these violations cannot be demonstrably justified under s. 1 of the Charter.

Yet another Charter motion is with respect to the range of sentences. Specifically, the types of sentences available on a finding of guilt at a court martial are quite limited in comparison with the civilian system. The motions in this respect submit that the limited range of punishments violates the Charter guaranteed rights of the applicant under sections 7, 11(d), and12 of the Charter.

Leaving aside the merit of the above-noted motions, the issue of the range of sentences has been identified by interviewees who work or have worked as either defence counsel or prosecutors or both, as an issue that contributes to delay. We have been advised that because the range of sentences is so narrow, it limits the possibility of resolution without a trial. If an accused had options such as conditional discharge, probation or even a conditional sentence, it was the opinion of most of the interviewees that more matters would result in a plea which could be done much more quickly than a trial.

While it is debatable whether these Charter motions need to be brought in all cases, we are of the view that the motions raise legitimate systemic issues that need to be either judicially determined, addressed by the office of the Judge Advocate General, or corrected through legislative amendments. That being said, we have concerns that clients may not be fully aware of the delay occasioned in their cases by these motions. When we raised these concerns we were assured by some interviewees that their clients were aware of the issues associated with

[41] R.S., 1985, c. N-5, s. 168; 1992, c. 16, s. 4; 1998, c. 35, s. 42.

the motions and instructed counsel to proceed with the motions nonetheless. Other interviewees felt that in fact clients were not necessarily properly advised. As our mandate did not extend to interviewing clients, we have no way of determining the level of client involvement in the decisions made on their files. The conflicting information received from various past and present defence counsel was sufficient to cause misgivings about the issue.

14.2 RECOMMENDATIONS REGARDING CHARTER MOTIONS

We recommend that clients be provided with an information sheet about the motions associated with their case and further, that the information sheet outline the issue of delay in relation to the said motions.

We recommend that the challenges to the system that arise out of the aforementioned motions ought to be expedited to the Court Martial Appeals Court for consideration.

We recommend that the systemic issues set out above should be reviewed and discussed with the Judge Advocate General by all parties including the DCS with a view to considering recommendations for legislative amendments.

We recommend monthly Bench and Bar meetings. These meetings should be convened for the purpose of discussing procedural problems and issues of mutual concern with a view to addressing and resolving them.

15 CONCLUSION

Our conclusion was that the while there were some similarities between the military justice system and the civilian justice system, there were also many notable differences. It is these differences that explain how such a small caseload can be difficult to manage at times.

In the civilian system, a person is charged immediately and is in first appearance court within a week or two. If the individual wanted to plead guilty he/she could do so at his/her first appearance. It is thus theoretically possible to have the matter dealt with in a few weeks. A lawyer in the civilian system could do two or three guilty pleas and a half day trial in one day. These efficiencies are impossible at this time in the military justice system. We have made numerous recommendations to improve the functioning of the system but the kind of efficiency possible in the civilian system is probably not attainable in the military justice system at present. We have outlined numerous reasons for that in our report.

One of the comments made by one of the interviewees was poignant. The individual said,

"Change is difficult to introduce and even more difficult to implement, you have to have something like the Somalia Inquiry before you start to change".

We hope this is untrue. We hope our review of the DCS provides some insight regarding the significant problems in the current system and that the participants in the military justice system have the will to make the system better.

SCHEDULE A

LIST OF INTERVIEWEES

The list of people we interviewed is as follows in no particular ordér:

1. Lt. Col. Jean-Marie Dugas
2. Major Edmond Thomas
3. Major Steve Turner
4. Peter Corey, Director of Criminal Operations, New Brunswick
5. Major Pascale Levesque
6. Chief Military Judge Col. Mario D'Util
7. Major Doug Baum
8. Major Ann Litowski
9. Brig. Gen. Ken Watkins, Judge Advocate
10. Lt. Col. Troy Sweet
11. Col. Michel Drapeau
12. Major Tony Tammuro
13. Major Laura Durbano
14. Major Benoit Tremblay
15. Military Judge Peter Lamont
16. Simone Morrissey
17. Major Shayna Leonard
18. Major Ben McMahon
19. Major Marie Lynn Trudel
20. Lt. Cdr. John McMunagle
21. Cpt. (Navy) Holly McDougall
22. Ryan Schiffer
23. Dianne St. Laurent
24. Manon Galipeau
25. Major Marc Letourneau
26. Lt. Col. Denis Couture

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SCHEDULE B

WORK DESCRIPTION

188789

Intermediate paralegal (Disciplinary and criminal Litigation)

Department/Agency:	**Department of National Defence**
Section:	
Division:	**Directorate of Defense Counsel Services**
Branch:	**Hull (Québec)**
Security clearance:	
Language requirements:	**Bilingual BBB/BBB**
Department use:	

Immediate supervisor: Director of Defence Counsel Services

Version: Draft

Classification:

Effective Date of Decision:

Model identifier:

Client-Service Results

Paralegal services for counsel representing persons subject to the Code of Service Discipline, DND and the CF and, when required, directly to client in Court Martial, Court Martial Appeal Court, Federal and Superior Court and also Supreme Court of Canada.

Key Activities

Under the guidance of counsel, analyses disciplinary and criminal law files in specific areas of law (such as position) and provides research on updated subject litigation to support services to counsel. This includes such activities as: assembling documentation and evidence, locating witnesses, providing to / receiving information from witnesses, carrying out factual research, conducting related legal research, carrying out on-site investigations, drafting legal documents for which precedents are available but must be adapted, providing information to clients on the litigation process, organizing case material, acting as Commissioner of Affidavits and Oaths, attending when required with counsel before the adjudicating body (such as various courts and tribunals, boards of inquiry, coroner's inquests, etc) and providing observations, summaries and advice to counsel.

Assist counsel in the preparation and conduct of mega and major litigation cases which include high profile and politically sensitive cases ("major cases"). Such cases are often obscure, involve many parties and clients, overwhelming amounts of documentation, unexplored areas of law, etc.. This mainly includes activities related to document management such as: assembling, organizing, reviewing, and summarizing documentation and evidence. Other activities may also include: carrying out factual research, drafting routine legal documents based on precedents, and acting as Commissioner of Affidavits and Oaths, attending with counsel before the adjudicating body (such as various courts, tribunals, boards of inquiry, coroner's inquests, etc.) and providing observations and summaries to counsel.

Under guidance provided by counsel, conducts legal research on specific legal issues relating to cases. This includes analyzing the issues, locating, analyzing and synthesizing related information and documentation (i.e. legislation, jurisprudence and related policy documents), and drafting legal memoranda for review by counsel.

Prepares drafts of administrative and legal reports including litigation reports, contingent liability reports, etc. for review by counsel.

Participates in the development, maintains and updates legal and administrative databases, as well as management information systems.

Provides guidance on procedure and basic legal research to the unit's junior paralegals and legal secretaries.

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SCHEDULE C
LIST OF RECOMMENDATIONS

(1) It is our recommendation that the Director carry a caseload. In order to be an effective leader, the Director needs to be a role model for his staff. Part of the Director's responsibility is to develop his staff by mentoring them and instructing them in trial preparation and tactics. In our view, in order to do that, he must keep up his skills by taking a caseload. Doing so will make him a more central and integral part of the office. Our recommendation is that the Director participate in the rotation of duty phone from time to time. This would set a good example for the junior officers and it would lessen the burden of that task on them. It would also allow the Director to stay in touch with the practical realities faced by both his staff lawyers as well as the clients they serve.

(2) We recommend that the Director implement a formal orientation and mentoring policy and program.

(3) We recommend that the Director should play a significant mentoring role to his junior officers and provide them with guidance and advice on conducting their trials. In our experience, one of the keys to attracting and retaining staff counsel is to be a leader whom staff want to work for. A positive mentoring relationship with staff will contribute to their development and will engage them in both the work they do as well as in the office.

(4) We recommend that the Director assign cases by meeting weekly with his staff lawyers and the reservists to discuss new files and how best to assign them. While we appreciate that the Director must try to assign a file to the lawyer of a client's choice, we are of the view that factors such as a lawyer's caseload and the possible impact on delay should be taken into consideration. The discussion at these weekly meetings should focus on the caseload and expertise of each lawyer as well as his/her ability to act on the file expeditiously.

(5) We recommend that defence counsel be authorized to incur common disbursements on file without having to obtain formal authorization from the Director. A review of the Legal Aid

Ontario Tariff and Billing Handbook[42] relating to disbursements may provide so assistance on the development of policies in this regard.

(6) We recommend that when the Director is absent or otherwise unavailable, he delegate his authority to someone else in the office to act in his stead.

(7) We recommend that the Director convene weekly meetings with his junior officers and support staff to discuss cases and their progress. This could be done at the same weekly meeting regarding the assignment of cases. We are cognizant of the fact that counsel have busy work schedules and responsibilities in court and suggest that such meetings be convened at a regular time and day first thing in the morning once per week. One meeting per month should include the reservists. Reservists and staff lawyers who are away from the office on the date of meetings, could participate by telephone conference or via a web-based conferencing tool.

(8) We recommend that the Director be provided with support for his professional development as a lawyer manager. The Canadian School of Public Service has a number of professional development courses that focus on management and leadership which should be canvassed. A course called "Leadership, Reflections in Action" may be appropriate;

(9) We further recommend that the Director have a 360 performance review every two years, which would include anonymous feedback from his staff, reservists and other colleagues. This practice is common in the public service and is an effective way to develop high functioning leaders.

(10) We recommend that a well advertised, easily accessible and highly visible Frequently Asked Questions (FAQs) website for Canadian Forces members be developed to address the types of administrative questions being directed to the duty phone, to reduce the number and frequency of those types of calls. While some of the information regarding these types of questions is located in different sections of the JAG website, there does not appear to be a central and easily accessible location for FAQ's.

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[42] Online: http://www.legalaid.on.ca/en/info/pdf/Tariff_Manual.pdf, Chapters 5 and 6

(11) We further recommend that the administrative assistant (CR 5) or the paralegal be trained to screen all calls that come to the duty phone and to respond to those inquiries that are of an administrative nature. All calls that come to the phone during working hours ought to be diverted from the lawyers unless they specifically require legal advice.

(12) We also recommend that the military police be instructed to refer all impaired driving calls to the local civilian duty counsel hotline (Brydges hotline). In our view, this is the proper forum in which to obtain advice as the counsel responding to those lines are experienced with impaired driving.

(13) We recommend that a bilingual after-hours answering service be retained and trained to screen calls to minimize the number of calls a lawyer has to take after work hours and through the night.

(14) If the above-noted changes are implemented, we recommend that a comprehensive communication about the changes to the duty phone be sent out to all Canadian Forces members. That communication should also make clear to members that the phone is taken by a lawyer after work hours, on evenings, nights and weekends.

(15) We recommend that the DCS be regionalized.

(16) We recommend that secure technology be implemented to allow the DCS lawyers to meet via webcam with their clients and indeed, with one another if they need to consult. Such technology could also be used to communicate with family when a lawyer is on the road. Technology such as Skype could be explored for the purpose.

(17) We recommend that when the next civilian employee leaves his/her employment at the DCS, that the position vacated be converted to a military position.

(18) We recommend that the role of support in the office be clearly defined for everyone in the office and that all support staff at the DCS be trained and developed to assist all counsel in all aspects of the administration of client files including organizing disclosure, phone calls, correspondence, photocopies, document preparation, appointments, arranging for experts, travel etc.

(19) We recommend that the support staff at DCS be sent to the Legal Aid Ontario Criminal Law Office in Brampton, Ontario to job shadow for a period of one week.

(20) We recommend that the length of time lawyers are posted to the DCS be at least five (5) years with an "option to renew" at the end of a five (5) year term. This recommendation would be conditional on a regional structure which is discussed in detail in the section entitled "Regionalization" and on the restructuring of the DCS as recommended in the section entitled "Organizational Structure of the DCS". We recommend that the Judge Advocate General create a litigation career path where lawyers could be posted to long term to positions in either the DCS or the CMPS. We recommend that a lawyer with little to no experience in criminal law either be seconded to a reservist or private defence lawyer's office for a minimum of 1 year, or be posted to the CMPS for a period of at least three years before being posted to the DCS. Recommendations regarding secondment are detailed in the section entitled "Selection, Training and Mentoring of Staff Lawyers".

(21) We recommend that a lawyer being posted out of DCS continues to be assigned less serious files to work on until his/her departure. In our view, the client should be advised of the lawyer's impending departure and should be reassured that his/her file will be transferred to a new lawyer if the matter cannot be completed before the original lawyer leaves. In the civilian system lawyers leave their place of employment from time to time. When that occurs, a client's file is transferred to new counsel without interruption to the work.

(22) We recommend that the DCS lawyers be permitted to deploy during their posting to DCS so long as the deployment is not for the purposes of advising the chain of command (as this could result in a conflict of interest);

(23) In order to ensure that the office functions effectively in the absence of a lawyer on deployment, we suggest that two additional staff lawyer positions be created. We outline the benefits of additional resources in the section entitled "Organizational Structure of the DCS".

(24) It is our view that the DCS needs to be accountable for its time and expense and that guidelines should be developed to assist counsel to manage the time they spend on a file to ensure it is appropriate and reasonable. We would expect that such guidelines would take into consideration the seriousness of an offence and the nature of the consequences to the accused.

(25) We recommend that the DCS develop a panel of mentors who are experienced in criminal defence work. The mentors could be staff lawyers, reservists or private defence counsel.

(26) We recommend that the Director of DCS should develop and implement a formal orientation, training and mentoring program for in-coming counsel. As part of the training, the lawyers should be given a refresher course on the Rules of Evidence and should be taught basic principles of advocacy as well as basic criminal law and procedure.

(27) We recommend that inexperienced lawyers be sent on secondments to work with either reservists, private counsel or criminal law staff legal aid offices, for a minimum of six months in order to learn how to properly conduct criminal defence work. The volume in those offices is high and would present a lawyer with a great learning opportunity. Upon his/her return to the office that lawyer should junior on at least one court martial before conducting one on his/her own.

(28) We recommend that lawyers with some criminal law experience who may not require a secondment, be required to junior on at least four (4) courts martial before they conduct a court martial on their own. Once a lawyer is in a position to conduct a court martial on his/her own, a senior, more experienced counsel should supervise and attend at his/her first few courts martial.

(29) We recommend that lawyers be required to have an ongoing relationship with mentors.

(30) We recommend that the primary criterion for selecting a lawyer to work at the DCS be litigation and advocacy skills and experience as well as a desire to do litigation work. It is our opinion that with the recommendation to have the duty phone screened by other bilingual personnel, it is not necessary for every lawyer posted to DCS to be bilingual. In our submission a good balance between litigation experience and French language skills should be achieved. It would our recommendation that no more than three (3) staff lawyer positions be designated as bilingual.

(31) We recommend that the DCS be governed by a Board of Directors.

(32) We further recommend that the composition of the Board of Directors include military personnel that do not provide legal advice to the chain of command in any capacity.

(33) We recommend that the function of the Board should be to oversee the operation of the DCS and to review its activities monthly. Further, the board should direct policies to be implemented in DCS and should be responsible for evaluating the performance of the Director on an annual basis. The Board meetings should be attended by both the Director and by a representative of the staff lawyers and reservists. Minutes should be taken at each meeting and should be made public.

(34) In our view, the right to disclosure arises at the time that the accused is charged. We recommend that complete disclosure be provided as soon as possible after a charge is laid; it should not be delayed until after the charge is preferred. If the client does not have a private lawyer, the disclosure package should be sent to the DCS. The benefit of early disclosure would be to allow defence counsel to commence negotiations with the prosecution before charges are preferred and perhaps influencing either the nature of the charges to be preferred or the disposal of the matter;

(35) We recommend that the Director have weekly meetings with staff lawyers and reservists to discuss cases including caseload and the allocation of new files. While the Director has to be mindful of section 101.22 of the QR & O's, the section only requires him to make an effort to assign a client his lawyer of choice. New files should be allocated in accordance with a lawyer's availability to conduct a trial within three (3) to four (4) months unless the file is such that a more experienced lawyer is required;

(36) We recommend that the Director's practice of assigning cases to himself in order to delay the opening of a file until the next budget year be discontinued. As our mandate did not extend to considering whether the DCS budget was being properly managed, we are not in a position to comment in this respect. If the budget is insufficient to ensure that there is no delay in the defence of clients, the issue should be addressed by the Director of DCS to the JAG;

(37) We recommend that the Director assign cases to lawyers despite the fact that they are to be posted. There is no reason that a lawyer cannot do the ground work to prepare a case for trial and have the trial conducted by someone else. In the United Kingdom, solicitors

prepare files for barristers as a matter of course. A well prepared trial file could easily be assumed by an experienced staff or reservist lawyer, even on short notice.

(38) We recommend that the DCS as well as the CMPS be showcased an as important and integral part of a fair and just military justice system. Their efforts should be recognized by the JAG Branch in some of the ceremonies that take place where honours are bestowed upon members who conduct their work with distinction. In our observation there is no reason not to hand out at least one commendation to a deserving member of the CMPS and the DCS at the annual Christmas party each year.

(39) We recommend that all lawyers who wish to work in litigation in the JAG branch should be required to work in both DCS and the CMPS.

(40) We recommend that the measures regarding co-operation set out in the External Review of the CMPS[43] be implemented immediately. Those measures bear repeating in this report, We therefore reiterate that, in carrying out their respective functions, special effort be made by the leadership of the CMPS and DCS to place less emphasis on traditional adversarialism and more emphasis on co-operative case management.

(41) We recommend that the two Directors meet together with the staff at both the DCS and the CMPS as well as the Court Martial Administrator and the staff in the Military Judge's Office to set the tone for future more cooperative relationships.

(42) We recommend that although the current rank of the Director of DCS is that of Lieutenant Colonel, there must be some opportunity for an individual who has demonstrated a very high level of competence in litigation, to remain in the position and attain the rank of Colonel.

(43) We recommend that two new staff lawyer positions be created for the DCS. Those positions should be for senior and experienced counsel, one of whom would be a Deputy Director who could, if he/she demonstrated a very high level of competence, attain the rank of Lieutenant Colonel. The Deputy Director should be delegated similar authority to the Director so that he/she could ensure the office operates smoothly in the Director's absence.

(44) We recommend that the no more than three (3) of the remaining positions be staffed by junior lawyers.

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[43] Andrejs Berzins and Malcolm Lindsay, Bronson Consulting, "External Review of the Canadian Military Prosecution Service (2008)" p. 60

(45) It is recommended that the DCS be regionalized. These writers are of the view that two additional positions be added to the DCS and that a review of the volume of courts martial in various locations be conducted done in order to determine the location of offices as well as the number of lawyers required to best serve the needs of Canadian Forces members. In such a review it would be important to take into consideration the location of the CMPS regional offices. In any event, we recommend that a Deputy Director be posted to Western Canada together with a junior and we suggest that the Director and one lawyer be assigned to the Ottawa area.

(46) We recommend that the support staff be centralized and made available to all lawyers using technology. Communication can be by phone or by intranet and documents can be easily prepared and transferred from one office to the other.

(47) It is suggested that in order to address the issues of isolation and support, the regional offices be collocated in a cost-sharing arrangement with reservists where possible, or private defence counsel.

(48) It is recommended that all motions and applications be conducted centrally by the Director and the staff lawyer in Asticou. In our view there appears to be no need for those matters to be done "in the field". This recommendation would reduce the travel requirements for the Judges.

(49) It is recommended that the staff counsel meet weekly be teleconference call and that they meet in person twice per year for a retreat.

(50) We recommend that reservists be considered to be a more integral part of the team than they are at present.

(51) We recommend that the reservists participate in regular staff meetings (perhaps once per month) with the staff lawyers and they be sent on training with them. There is much to be gained from regular contact. It would allow for both the staff and the reservists to get to know and share one another's skills and expertise as well as their recent experiences in courts martial.

(52) We recommend that the reservists who are willing to do so, be part of a formal mentoring program for the junior and less experienced lawyers at the DCS.

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(53) We recommend that the reservists who are willing to do so, work with a seconded officer for a minimum of 6 months to 1 year in order to teach the officer the basics of a criminal defence practice.

(54) We recommend that bill C-45 be re-tabled in order to allow court martial judges to make rules. If the legislation is passed, it is our suggestion that the court require counsel to appear at a first appearance or "set date" court as well as a judicial pre-trial.

(55) It is our suggestion that in the meantime the Chief Military Judge convene a meeting with the Director of DCS and the Director of CMPS to try to implement "practices" that will be followed by counsel. Such practices may include attendance at a set date court that is convened every two weeks at the same time of day. Attendances should be able to be by telephone for out of town counsel. In the event that counsel or reservists are not available on that day, one of the staff lawyers from the DCS office should attend with instructions from counsel. Another "practice" that could be implemented would be the convening of judicial pre-trials. Such pre-trials should be conducted by a judge, other than the trial judge, and should focus on the narrowing of issues or resolution.

(56) It is our recommendation that the Chief Military Judge, the Director of DCS and the Director of CMPS meet formally, once per month as a Bench and Bar Committee, to discuss systemic issues and other matters of mutual concern.

(57) We recommend that clients be provided with an information sheet about the motions associated with their case and further, that the information sheet address the issue of delay in relation to the said motions.

(58) We recommend that the challenges to the system that arise out of the aforementioned motions ought to be expedited to the Court Martial Appeals Court for consideration.

(59) We recommend that the systemic issues set out above should be reviewed and discussed with the Judge Advocate General by all parties including the DCS with a view to considering recommendations for legislative amendments.

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