Report of the Third Independent Review Authority to the Minister of National Defence

Pursuant to subsection 273.601(1)
of the *National Defence Act*, RSC 1985, c N-5

The Honourable Morris J. Fish, C.C., Q.C.

April 30, 2021

INTRODUCTION

I

Canada's system of military justice is deeply rooted in the fertile medium of necessity, tradition and history.

Of necessity, it differs in important respects from its civilian counterpart. By tradition, and as a matter of commitment, it has remained loyal to its distinct characteristics – and correspondingly resistant to external oversight, civilian influence, and proposed reforms that would impact the chain of command. As for its history, Canada's military justice system has always been separate from our civilian system of justice and it embraces that historical fact.

These deep roots are solidly embedded and, in some respects, stubbornly entrenched. But our military justice system must nonetheless conform with evolving social values and contemporary legal norms. It has partly for that reason been made subject by Parliament to external scrutiny, at fixed intervals, by an Independent Review Authority.[1] As the Supreme Court of Canada noted in *Stillman,* these independent reviews facilitate the continuing evolution of our military justice system by "*ensuring the system is rigorously scrutinized, analyzed, and refined at regular intervals*".[2]

I am the Third Independent Review Authority.[3] My mandate has required me to "*rigorously scrutinize and analyze*" the structure and operation of Canada's military justice system writ large,[4] and I have sought to do so with due regard to its distinct needs and objectives. More particularly, I have borne in mind the changing nature of Canada's military missions, foreign and domestic; the evolving gender and ethnic composition of the Canadian Armed Forces ("**CAF**"); and the impact of modern technology on disciplinary and judicial proceedings.

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1 Pursuant to section 273.601 of the *National Defence Act*, RSC 1985, c N-5.

2 *R v Stillman*, 2019 SCC 40 ("***Stillman***") at para 53.

3 The Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada, was the First Independent Review Authority and his report was delivered in 2003. The Honourable Patrick J. LeSage, former Chief Justice of Ontario's Superior Court of Justice, was the Second Independent Review Authority and his report was delivered in 2011.

4 Subsection 273.601(1) enumerates the provisions of the *National Defence Act*, "*and their operation*", to be reviewed. My mandate is to review statutory and regulatory provisions, and administrative policies and practices, relating to the military justice system in the broadest sense – including the Code of Service Discipline, military tribunals, summary trials and courts martial, prosecution and defence counsel services, the military police and the Canadian Forces National Investigation Service, police oversight, the military grievance process, the Ombudsman for the Department of National Defence and the Canadian Forces, and much more.

Elsewhere in my Report I comment on the efficacy and utility of independent reviews of this sort. And I shall have something to say as well about the constraints my review has been subject to – some unavoidable, others unwarranted. But I think it best to begin instead by setting out the principal principles governing this review.

First, the rule of law is a fundamental principle of justice in Canada. Equality before the law is one of its essential components. This means that the same laws apply – and apply equally – to everyone in Canada. Exceptions to the law's equal treatment of everyone in Canada must be rationally connected to a valid objective. And, as a matter of principle, they should curtail protected rights and freedoms no more than necessary to pursue or achieve that objective.

A separate system of military justice is demonstrably justified by the military's need to maintain discipline, efficiency and morale. Fostering these requirements is a valid legislative objective. It follows that Canada's system of military justice may subject members of the armed forces to a standard of conduct and to limitations on due process foreign to civilian law.

To respect the rule of law, however, these departures from the civilian legal system should be reasonable, proportionate and rationally connected to the maintenance of discipline, efficiency and morale in the CAF.

Dealing in *Moriarity*[5] with contested provisions of the *National Defence Act*, Justice Cromwell of the Supreme Court of Canada put the matter this way:

> [The purpose of the challenged provisions] is to maintain discipline, efficiency and morale in the military. *The real question, as I see it, is whether there is a rational connection between that purpose and the effects of the challenged provisions*.[6]

Several decisions of the Supreme Court of Canada, before and since *Moriarity*,[7] have considered the limitations in the military justice system on substantive rights and procedural safeguards that apply in civilian proceedings. These cases all deal with the constitutional validity of various elements of Canada's military justice system. They mainly concern matters of jurisdiction and establish that military status is alone sufficient, as a matter of constitutional law, to justify limitations by the military justice system on the rights enjoyed by an accused in proceedings before civilian courts. Cumulatively considered, they establish the *minimum constitutional requirements* and not desirable limits on *fairness and due process* in the military justice system.

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5 *R v Moriarity*, 2015 SCC 55 ("***Moriarity***").

6 *Ibid* at para 46 (emphasis added).

7 Including the oft-cited cases of *R v Généreux*, [1992] 1 SCR 259 ("***Généreux***") and *Stillman*, *supra* note 2.

My recommendations, on the other hand, are not concerned with the minimum constitutional requirements set out in *Généreux*, *Moriarity* and *Stillman*. They *assume jurisdiction* and focus on *how jurisdiction should be exercised,* as a matter of fair policy and sound principle.

More particularly, my recommendations focus on how Canada's military justice system, consistent with the CAF's need to maintain discipline, efficiency and morale, can exercise its unchallenged jurisdiction more fairly, more efficiently, more independently, without conflicts of interest – real or apparent – and with appropriate oversight.

Clémenceau notwithstanding,[8] I view Canada's military justice system as, above all, a *justice system*. If it were meant to completely replicate or "mirror" Canada's civilian justice system, it would be difficult to justify its distinct and separate existence. It has its own history, its own substantive and procedural rules, and its own defining characteristics and objectives. But every justice system, military or civilian, must be measured by the independence of its actors, the clarity of its prohibitions, the fairness and transparency of its proceedings, by how it treats offenders and victims, and by its adherence to universal principles of fundamental justice.

Like others among our allies, Canada's military justice system has evolved in each of these defining respects. But even bearing in mind the military's need to maintain discipline, efficiency, morale and operational capability, our military justice system can benefit from periodic review and further reform.

II

Members of the CAF accept danger to themselves in order to protect others at home and abroad. Canada owes them more than a minimally acceptable system of justice. They are entitled to "*a better system than merely that which cannot be constitutionally denied*".[9] As a matter of principle, Canada is morally obliged to provide it.

Progress has been made in this regard[10] but more needs to be done.

Unacceptable systemic delays are prevalent; training, notably of officers and members involved in disciplinary proceedings or grievances, needs to be improved; sexual misconduct and hateful conduct require more effective intervention; military judges, prosecutors, defence counsel and the military police need to be more independent of the

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8 Georges Clémenceau, twice Prime Minister of France in the early 1900s, is reputed to have said that "*Military justice is to justice what military music is to music*".

9 The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operations of Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, as required under section 96 of Statutes of Canada 1998, c 25 (September 3, 2003) ("**Lamer Report**") at 1, 21.

10 *Stillman*, *supra* note 2 at paras 42ff.

chain of command; and members of the CAF, junior members particularly, must be given more help in striving to perform their duties and seeking to exercise their rights under the military justice system that governs their lives.

CAF members cannot unionize or bargain collectively. They do not have employment contracts and do not have access to independent tribunals to defend their interests. When treated wrongly or unfairly, their principal means of redress is the CAF's grievance system – a *broken* grievance system, as we shall see below.

CAF members have no right to jury trials. And unless they choose trial by courts martial where that option is open to them, they will be tried summarily without legal representation. They are disadvantaged by the *Military Rules of Evidence*.[11] Upon conviction, their rights of appeal are narrower than in the civilian system; upon acquittal, they are subject to broader rights of appeal by the Minister of National Defence or counsel instructed by the Minister for that purpose.

As a matter of principle, I repeat, members of the CAF should not be deprived of legal rights and recourses available to civilians – and certainly not *for reasons unrelated to the military's operational requirements or maintenance of discipline, efficiency and morale*. And even where service members are justifiably deprived of civilian rights and recourses, the military system of justice should afford them alternative and effective rights of redress, fortified by independent and empowered oversight.

The military grievance system, in particular, has not done that for decades and it does not do so now. Chief Justice Lamer found "unacceptable" in 2003 the almost 800 grievances then outstanding, some for 10 or more years. The Acting Chief of the Defence Staff acknowledged very recently that the number of grievances at the Initial Authority and Final Authority levels "*is unacceptable, and does little to inspire trust in our sailors, soldiers, aviators, and special operators*".[12] The CAF, he added, "*must do better*".[13]

Indeed, it must: There were at least 1304 outstanding grievances in the CAF in mid-2020, almost equally divided between the Initial Authority and Final Authority levels. At least 200 were more than three years old, including 11 that dated back six to 10 years. As of February 21, 2021, the number of outstanding grievances had risen to 1350: 654 at the Initial Authority level, 696 at the Final Authority level.

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11 CRC c 1049.

12 *CDS Directive for CAF Grievance System Enhancement* (March 3, 2021) ("**CDS Directive**") at para 4.

13 *Ibid*.

Here again, the CAF is meeting neither its own objectives of discipline, efficiency and morale nor its special obligations to members. Its grievance system provides neither satisfactory nor timely redress. The CAF, I believe, is morally obliged to make up to its members for the risks they take and the rights they forego. It is bound to provide them with a better system of redress than its unacceptable grievance system now provides – nearly 20 years after its grievance system was found "*unacceptable*" by Chief Justice Lamer.

Delays of this sort undermine discipline, exemplify inefficiency and sap morale.

III

The hallmark of a healthy system of justice is the independence of its principal actors: judges, prosecutors, defence counsel and senior court administrators. They must be free *and appear to be free* to discharge their duties without regard to their own interests, without regard to the rank or status of the witnesses they hear, the litigants they represent, or the officers and members they judge. They must be free to act without concern that the manner in which they discharge their duties might please or displease anyone capable of influencing their promotions or careers.

In my view, increasing the independence of its actors would enhance Canada's military system of justice without harm of any sort to the discipline, efficiency or morale of the forces. My recommendations, if implemented at least in substance, would foster that CAF objective.

A healthy system of justice must reflect not only the evolving social values of society at large, and not only the evolving cultural attitudes of the CAF itself, but also the emerging shift in its ethnic and gender composition. It must also take into account any structural or operational requirements dictated by the changing nature of its foreign and domestic activities.

Technological advances that shorten distances virtually and facilitate travel-free courts martial and tribunal hearings must be considered as well. In some measure at least, they reduce historic obstacles to timely courts martial, to expeditious disciplinary proceedings and to prompt administrative interventions.

Shortened delays and increased efficiencies inevitably enhance morale and support the distinct objectives of a separate military system of justice.

My recommendations are meant to align with those objectives as well. They are meant to assure confidence in the system,– from within and without – by adding significant elements of fairness and due process to justice within the CAF.

I am persuaded that the current leadership of the CAF has the will to materially improve its deep-rooted system of justice. And I have endeavoured, with the benefit of its input and the guidance of my team, to help show the way. My findings and recommendations are set out in the chapters that follow, with a summary at the end.

IV

The day before my Report was due, the Minister of National Defence launched an independent, external review of sexual misconduct in the CAF and the Department of National Defence ("**DND**"). I am delighted that this review will be conducted by the Honourable Louise Arbour. I will be happy to assist Justice Arbour's review however I can.

And I am pleased to see that Justice Arbour's mandate provides for interim reports and recommendations. To the extent that she sees fit, this will enable Justice Arbour to benefit from the breadth and depth of my own review,[14] which for nearly six months heard extensive evidence from victims of sexual misconduct, from support groups, from other experts in the field and from officers and members of the CAF, past and present.

My review has confirmed the factual findings of the Honourable Marie Deschamps, who in 2015 completed her independent review on sexual misconduct in the CAF:[15] the nature, extent and human cost of sexual misconduct in the CAF remain as debilitating, as rampant and as destructive in 2021 as they were in 2015.

Unlike Justice Deschamps, who had a more restricted mandate, my review has focused on the military justice system and related aspects of sexual misconduct in the CAF. My recommendations nonetheless complement or reiterate Justice Deschamps's, in substance at least.

I hope that my Report will enable rapid implementation of the pressing reforms I recommend. I see no reason, for example, to delay removal of the present duty of victims to report their victimization to the chain of command, which impacts on their autonomy and, I have been told, risks their exposure to reprisals, ostracization and pressures to withdraw their complaint.

Nor is there any compelling reason to delay the provision of free and independent legal advice to victims. Or to continue to investigate and prosecute sexual offences in the

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14 The details are largely set out below, in the Chapters on "Mandate and Methodology" and "Sexual Misconduct".

15 External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces by the Honourable Marie Deschamps, C.C., Ad. E., External Review Authority (March 27, 2015) ("**Deschamps Report**").

military justice system without affording victims the rights that would protect them in proceedings before civilian courts for the same offences.[16]

Finally, I would urge the priority implementation of the *Declaration of Victims Rights* provided for in Bill C-77, which was adopted in 2019.[17]

The prompt adoption of these recommendations will help spare victims of sexual misconduct the inevitable harm to their health and careers that delayed implementation would cause.

Another fresh initiative, this one related to the CAF's broken grievance system, was also launched by the CAF during the latter part of my review. The details are set out below in my Chapter on "The Military Grievance Process". Some of my recommendations regarding the CAF's grievance system can likewise be implemented immediately. They would help to ensure the timely disposition of grievances and thus reduce the stress and anxiety of present and future grievors. Many have had to wait years – and will likely otherwise have to wait still longer – to have their grievances finally decided.

It is my fervent hope that the sexual misconduct and grievance initiatives launched by the DND and the CAF on the eve of my Report will not delay the implementation of the urgent reforms regarding both.

I recognize, of course, that some of my other recommendations will require legislative amendments. Others will need consideration by working groups or further study by the DND or the CAF. This neither requires nor justifies postponement of what can and should be done *now* for members of the CAF.

In short, I hope that my urgent recommendations will be implemented promptly and that all others will be considered with an appropriate degree of priority.

V

Following tradition, my Report is written in the first person singular. I take full responsibility, but not full credit, for its contents.

My Report is in fact the product of my team: Jean-Philippe Groleau, Senior Counsel; Guillaume Charlebois, Associate Counsel; and Morris Rosenberg, C.M., Consultant. Messrs. Groleau and Charlebois are both accomplished counsel with Davies Ward Phillips & Vineberg, a law firm with which I am associated as Jurist in Residence. Mr. Rosenberg has had a distinguished career in the federal public service, where he served, successively, as Deputy Minister of Justice, Health and Foreign Affairs. All three

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16 I refer here, of course, to sexual offences that can be tried in either system.

17 *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15.

have my unreserved gratitude. So too does Marie-Chantale Lantin, our administrative assistant.

In a sense, this Report belongs as well to dozens of Canadian and foreign experts who graciously shared their time, insights and experience with my team; to the CAF officers of all ranks who met with us alone and in groups; and to the many service members who joined us in 16 town hall meetings.

I am also indebted to senior officials in the DND, notably the Deputy Minister, Jody Thomas, and the Assistant Deputy Minister (Review Services), Julie Charron.

I owe a special word of thanks to the Judge Advocate General, Rear-Admiral Geneviève Bernatchez, and members of her office. I am grateful as well for the coordination and logistical support provided throughout by the members of the Independent Review Authority Secretariat, Marta B. Mulkins and Christopher French, and by the CAF officer who assisted them, Captain Jeffrey Pittman.

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TABLE OF ABBREVIATIONS

2018-2019 Summary Trial Survey	2018-2019 Summary Trial Stakeholder Survey Results, Annex E to the Judge Advocate General Annual Report 2019-2020
2018 OAG Administration of Justice Report	2018 Spring Reports of the Auditor General of Canada to the Parliament of Canada, Report 3 – Administration of Justice in the Canadian Armed Forces
2018 OAG Inappropriate Sexual Behaviour Report	2018 Fall Reports of the Auditor General of Canada to the Parliament of Canada, Report 5 – Inappropriate Sexual Behaviour – Canadian Armed Forces
Acting CDS	Acting Chief of the Defence Staff
ADM(RS)	Assistant Deputy Minister (Review Services)
AMC	Australian Military Court
AOCT	Assisting Officer Certification Training
Arar Inquiry	Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar
Attorney General	Attorney General of Canada
Bill C-15	*Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24
Bill C-25	*An Act to amend the National Defence Act and to make consequential amendments to other Acts*, SC 1998, c 35
Bill C-77	*An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15
CAF	Canadian Armed Forces

Campbell	*R v Campbell*, [1999] 1 RCS 565
CANFORGEN	Canadian Forces General Message
CCMS	Conflict and Complaint Management Services
CDS	Chief of the Defence Staff
CDS Directive	*CDS Directive for CAF Grievance System Enhancement* issued by the Acting Chief of the Defence Staff on March 3, 2021
CDS Order	Order issued by the Chief of the Defence Staff on October 2, 2019
CEA	*Canada Evidence Act*, RSC 1985, c C-5
***CEA* Schedule**	Schedule of the *Canada Evidence Act*, RSC 1985, c C-5
CFGA	Canadian Forces Grievance Authority
CF MP Gp	Canadian Forces Military Police Group
CFNIS	Canadian Forces National Investigation Service
CFPM	Canadian Forces Provost Marshal
Charter	*Canadian Charter of Rights and Freedoms*
CMA	Court Martial Administrator
CMAC	Court Martial Appeal Court of Canada
CMJ	Chief Military Judge
CMJ Rules	Rules made by the Chief Military Judge under section 165.3 of the *National Defence Act*, RSC 1985, c N-5

CMPS	Canadian Military Prosecution Service
CMRP	*Court Martial Rules of Practice*
Court Martial Comprehensive Review Report	Draft Interim Report – Court Martial Comprehensive Review (July 21, 2017)
CRCC	Civilian Review and Complaints Commission
Crépeau	*R v Crépeau*, 2020 CM 3007
CSD	Code of Service Discipline
CVBR	*Canadian Victims Bill of Rights*, SC 2015, c 13, s 2
D'Amico	*R v D'Amico*, 2020 CM 2002
DAOD	Defence Administrative Orders and Directives
DAOD 2017-1	DAOD 2017-1, Military Grievance Process (November 26, 2015)
DAOD 9005-1	DAOD 9005-1, Sexual Misconduct Response (November 18, 2020)
DCFGA	Director Canadian Forces Grievance Authority
DDCS	Director of Defence Counsel Services
DDCSIC	Director of Defence Counsel Services Inquiry Committee
DDMP	Deputy Director of Military Prosecutions
DDPC	Director Defence Programme Coordination
Deputy Minister	Deputy Minister of National Defence

Deschamps Report	External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces by the Honourable Marie Deschamps, C.C., Ad. E., External Review Authority (March 27, 2015)
Dickson Report	Report of the Special Advisory Group on Military Justice and Military Police Investigation Services to the Minister of National Defence (March 14, 1997)
Directorate of DCS	Directorate of Defence Counsel Services
DMP	Director of Military Prosecutions
DMPIC	Director of Military Prosecutions Inquiry Committee
DND	Department of National Defence
DOJ	Department of Justice Canada
DPP	Director of Public Prosecutions
DPP Act	*Director of Public Prosecutions Act*, SC 2006, c 9
DVR	*Declaration of Victims Rights*
Edwards	*R v Edwards*, 2020 CM 3006
F&Rs	Findings and recommendations
Fontaine	*R v Fontaine*, 2020 CM 3008
Garrick	*Garrick v Amnesty International Canada*, 2011 FC 1099
Généreux	*R v Généreux*, [1992] 1 SCR 259
ICCM	Integrated Conflict and Complaint Management

Implementation Status Report	Report as to the Implementation Status of Previous Recommendations
IRAs	Independent Review Authorities
IRA Secretariat	Independent Review Authority Secretariat of the Department of National Defence
Iredale	*R v Iredale*, 2020 CM 4011
JAG	Judge Advocate General
JAGIRST	Judge Advocate General Independent Review Support Team
JAIMS	Justice Administration and Information Management System
Lamer Report	The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operations of Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, as required under section 96 of Statutes of Canada 1998, c 25 (September 3, 2003)
LeSage Report	Report of the Second Independent Review Authority to the Honourable Peter G. MacKay, Minister of National Defence, by the Honourable Patrick J. LeSage, C.M., O.Ont., Q.C. (December 2011)
Levi-Gould	*R v Levi-Gould*, 2016 CM 4002
MacKay	*MacKay v The Queen*, [1980] 2 SCR 370
MGERC	Military Grievances External Review Committee
Minister	Minister of National Defence
Moriarity	*R v Moriarity*, [2015] 3 SCR 485

MPAP	Military Police Analytics Program
MPCC	Military Police Complaints Commission
MRE	*Military Rules of Evidence*, CRC c 1049
NDA	*National Defence Act*, RSC 1985, c N-5
NOI	Notice of intent to grieve
OCMJ	Office of the Chief Military Judge
ODDCS	Office of the Director of Defence Counsel Services
OFOVC	Office of the Federal Ombudsman for Victims of Crime
OFOVC Progress Report	Office of the Federal Ombudsman for Victims of Crime, "Progress Report: The Canadian Victims Bill of Rights" (November 2020)
OJAG	Office of the Judge Advocate General
Ombudsman	Ombudsman for the Department of National Defence and the Canadian Forces
PERs	Personnel evaluation reports
Pett	*R v Pett*, 2020 CM 4002
PMF	Military Justice System Performance Monitoring Framework
POCT	Presiding Officer Certification Training
PORT	Presiding Officer Re-Certification Training
PSO	Military Police Professional Standards office
PTPH	Plea and Trial Preparation Hearing (United Kingdom)

QR&O	*Queen's Regulations and Orders for the Canadian Forces*
RCMP	Royal Canadian Mounted Police
RCMP Act	*Royal Canadian Mounted Police Act*, RSC 1985, c R-10
RFIs	Requests for information
SMRC	Sexual Misconduct Response Centre
Somalia Inquiry Report	Dishonoured Legacy: The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia (June 1997)
Stillman	*R v Stillman*, 2019 SCC 40
Thurrott	*Thurrott v Canada (Attorney General)*, 2018 FC 577
Vavilov	*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
VCDS	Vice Chief of the Defence Staff
Wehmeier	*R v Wehmeier*, 2014 CMAC 5 (application for leave to appeal to the Supreme Court of Canada dismissed)

MANDATE AND METHODOLOGY

I. MANDATE

1. Subsection 273.601(1) of the *National Defence Act*[18] ("***NDA***") provides as follows:

> 273.601 (1) The Minister shall cause an independent review of the following provisions, and their operation, to be undertaken:
>
> (a) sections 18.3 to 18.6;
>
> (b) sections 29 to 29.28;
>
> (c) Parts III and IV; and
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> (d) sections 251, 251.2, 256, 270, 272, 273 to 273.5 and 302.

2. Section 273.601 of the *NDA* was implemented in response to the first recommendation of the First Independent Review Authority, retired Chief Justice of the Supreme Court of Canada Antonio Lamer. Chief Justice Lamer recommended "*that the requirement that there be an independent review by the Minister of National Defence*[19] *be amended to specifically require a review of the military justice system and the Canadian Forces grievance process. This requirement for a review should be entrenched in the National Defence Act*".[20]

3. Pursuant to his authority under section 273.601 of the *NDA*, the Minister of National Defence, the Honourable Harjit S. Sajjan ("**Minister**"), issued on November 5, 2020, a Ministerial Direction appointing me as the Third Independent Review Authority.[21] A copy of the Ministerial Direction is appended to this Report as **Schedule A**.

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18 RSC 1985, c N-5.

19 Subsection 96(1) of *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, SC 1998, c 35 ("**Bill C-25**") provided that "[t]*he Minister* [was to] *cause an independent review of the provisions and operations of this Act to be undertaken from time to time*". Subsection 96(1) of Bill C-25 defined the mandates of the First Independent Review Authority, in 2003, and Second Independent Review Authority, in 2011. I am the first independent review authority appointed pursuant to subsection 273.601(1) of the *NDA*.

20 Lamer Report, *supra* note 9 at 10.

21 Ministerial Direction, Schedule A at para 1.

4. The Ministerial Direction describes my mandate as follows:

> 2. The Third Independent Review Authority is to conduct an independent review pursuant to section 273.601 of the *NDA* and report the outcomes of this review directly to the Minister of National Defence. The provisions subject to review are enumerated in subsection 273.601(1) of the *NDA*.[22]

5. The provisions listed in subsection 273.601(1) of the *NDA* form the basic structure of the military justice system, the military grievance process and the regime for complaints about or by military police. But my mandate is not – and indeed could not be – strictly limited to those provisions: it necessarily includes "*their operation".*[23] And those provisions do not operate in a vacuum. Their operation is inseparable from that of other, non-listed provisions of the *NDA*, of the *Queen's Regulations and Orders for the Canadian Forces* ("***QR&O***") and of diverse other regulatory instruments including Defence Administrative Orders and Directives ("**DAOD**"); directives or policies by military justice actors, and Group Orders of the Canadian Forces Military Police Group.

6. Moreover, the existence of sound statutory and regulatory norms is essential but not sufficient to generate an appropriate system. The rules that govern the system must also be properly – and verifiably – understood and applied by the relevant actors and decision-makers. Understanding the operation of the provisions listed in subsection 273.601(1) of the *NDA* therefore requires a consideration of institutional practices, training initiatives, and available data. I have understood that all those elements are included in the scope of my review, and make recommendations accordingly in this Report.

II. METHODOLOGY

A. THIRD INDEPENDENT REVIEW AUTHORITY TEAM

7. I was assisted in my review by:

(a) Morris Rosenberg C.M. (B.A., LL.B., LL.M.), a former Deputy Minister of Justice (1998-2004), Health (2004-2010) and Foreign Affairs (2010-2013) with the Government of Canada, as my Consultant;

(b) Jean-Philippe Groleau (LL.B., LL.M.), a partner with the law firm of Davies Ward Phillips & Vineberg LLP, as my Senior Counsel; and

(c) Guillaume Charlebois (LL.B., LL.M.), an associate with the same law firm, as my Associate Counsel.

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22 *Ibid* at para 2.

23 Subsection 273.601(1) of the *NDA*.

B. RETAINER AND PRELIMINARY ANNOUNCEMENTS

8. I was formally retained on October 16, 2020, prior to the issuance of the Ministerial Direction on November 5, 2020. Pursuant to my contract with the Department of National Defence ("**DND**"), I was required to provide my Report no later than April 30, 2021.[24]

9. My review was publicly announced in a news release issued by the Minister on November 16, 2020 and appended to this Report as **Schedule B**. The news release encouraged "[p]*ersons who have an interest in the military justice system* […]*, military grievances, the Canadian Forces Provost Marshal and the Military Police Complaints Commission*" to provide written comments or submissions by January 8, 2021. A dedicated email address (review.authority@dwpv.com) was created by my counsel to allow any person to send information or documents directly to my team and in full confidentiality. That email address was provided in the news release.

10. Other communications to the same effect were issued in the same period by the DND or the Canadian Armed Forces ("**CAF**"):

    (a) A Canadian Forces General Message ("**CANFORGEN**") was posted on November 16, 2020 on the DND/CAF Intranet.[25]

    (b) In the following days, the Independent Review Authority Secretariat of the DND ("**IRA Secretariat**") sent out letters to external stakeholders and senior CAF officials to alert them to my review, to advise them that I may seek introductory discussions, and to encourage them to make submissions.

    (c) A dedicated webpage for my review went live on November 26, 2020.

    (d) A message was also posted on November 27, 2020 on the CAF's Facebook and Twitter accounts.

11. On November 27, 2020, I decided to issue my own news release to address any potential concern that I may not be acting at arms' length from the DND and the CAF. My news release was published in both official languages on Canada Newswire, and was picked up in articles published in various newspapers in both English and French. It included a detailed list of the matters subject to my review, a presentation of my team, a statement of our independence from the DND and the CAF, and a renewed call for submissions by "*any member of the public or of the Canadian Armed Forces*" by January 8, 2021. A copy of my news release is appended to this Report as **Schedule C**.

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24 As a result of subsection 273.601(2) of the *NDA*, the Minister must cause this Report to be laid before each House of Parliament by June 1, 2021.

25 CANFORGEN 149/20, *Independent Review*.

12. Finally, an announcement of my review and a call for submissions were published on December 16, 2020 in *The Maple Leaf* – the national, online source for stories about the DND and the CAF. A copy of the article is appended to this Report as **Schedule D**.

C. Educational Briefings on Military Justice Foundations

13. Like all members of my team, I am a civilian with no military experience. None of us have any prior or current affiliation with the DND or the CAF.

14. On October 27, 2020, I was provided with "Military Justice Reference Materials" by the IRA Secretariat. The list of those materials is appended to this Report as **Schedule E**. Over the course of my review, additional references were provided by the DND or CAF officials, external commentators and foreign experts with whom I met.

15. From November 3 to 13, 2020, my team and I took part in several multi-hour educational briefings on the foundations of the military justice system. Most of the sessions were given by legal officers from the Judge Advocate General Independent Review Support Team ("**JAGIRST**"). Two were given by the Canadian Forces Provost Marshal and the Director Canadian Forces Grievance Authority teams.

D. Interviews with Officials of the Department of National Defence and Canadian Armed Forces

16. From the first days of December 2020 to the end of March 2021, my team and I attended over 30 briefings or meetings with DND or CAF officials, as well as representatives of organizations involved in the military justice system, military grievance process and regime for complaints about or by military police. The officials and organizations I met with are listed in **Schedule F** of this Report.

17. I learned about the particular functions, roles and concerns of those officials and organizations. My team and I also asked many questions, including a significant number relating to potential areas of reform. Most of our questions were directly answered during the meetings. Those which required further study or more detailed answers were noted as requests for information ("**RFIs**") and answered subsequently in writing.

E. Implementation Status of Recommendations and Other Requests for Information

18. In considering my appointment, I asked what had become of the recommendations of Chief Justice Lamer and of those of the Second Independent Review Authority, retired Chief Justice of the Ontario Superior Court of Justice Patrick J. LeSage.[26] Once I was

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26 Report of the Second Independent Review Authority to the Honourable Peter G. MacKay, Minister of National Defence, by the Honourable Patrick J. LeSage, C.M., O.Ont., Q.C. (December 2011) ("**LeSage Report**").

appointed, I formally requested further details on the implementation status of previous recommendations from several independent, external or parliamentary committee reviews of the Canadian military justice system.

19. On November 4, 2020, my team provided the IRA Secretariat with the template for a Report as to the Implementation Status of Previous Recommendations ("**Implementation Status Report**"). The template listed the recommendations contained in reports ranging from the 1997 Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia[27] ("**Somalia Inquiry Report**") to the 2019 Report of the Standing Senate Committee on National Security and Defence on Sexual Harassment and Violence in the Canadian Armed Forces.[28] I enquired about the implementation status of each recommendation, as well as the means of implementation or the rationale for non-implementation or partial implementation.

20. When I made this request, I expected the information to be readily available within the DND or CAF. I believed that I would be provided with the details sought within a matter of days, or weeks at most. I was soon informed, however, that there had not been a systematic tracking of the implementation of prior review recommendations. I appreciate the significant efforts of DND and CAF officials to pull this information together during the ensuing months. From December 2020 onward, I was provided with partial answers on a rolling basis. The Implementation Status Report was finally completed in March 2021.[29]

21. The RFIs taken during briefings or meetings, and additional RFIs asked over the course of my review, were tracked by the IRA Secretariat. The answers were, for several months, slow in coming. By February 24, 2021, I had not received answers to the bulk of the RFIs (excluding iterations of the Implementation Status Report). At that time, I requested that all remaining information be sent by March 9, 2021, so that I would have a complete record on which to draft my Report. The DND and the CAF complied with my request for the vast majority of remaining RFIs.

22. I am grateful for the substantial efforts that were made by all to answer the RFIs. However, I am particularly appreciative of the assiduous efforts of the JAGIRST, who drafted close to 50 detailed papers, supported by helpful annexes, statistics and references, to answer those of my RFIs which were directed to the Office of the Judge Advocate General ("**OJAG**").

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

28 Sexual Harassment and Violence in the Canadian Armed Forces, Report of the Standing Senate Committee on National Security and Defence (May 2019).

29 In the meantime, Brigadier-General (retired) Kenneth Watkin, who was Judge Advocate General from 2006 to 2010, helpfully provided me with a detailed chart of his own making identifying the status of the 57 recommendations of Chief Justice Lamer pertaining to military justice. I am highly appreciative of the time he devoted to prepare this document.

F. INTERVIEWS WITH EXTERNAL COMMENTATORS AND FOREIGN EXPERTS

23. I did not limit my consultations to the briefings or meetings with the officials and organizations listed on Schedule F. On the contrary, to better understand the diversity of views which exist on the Canadian military justice system, and to compensate for our lack of military experience and initial lack of military law expertise, my team and I actively sought input from commentators external to the CAF, including lawyers, academics and retired members of the CAF. We contacted several of them even before receiving their written submissions, if any.

24. We also consulted eight military justice experts from other countries, including all of our Five Eyes partners, to learn about relevant military justice experiences in their jurisdictions.

25. From the first days of December 2020 to the end of March 2021, close to 40 meetings of this sort were organized, usually one or two hours in length each. The persons we met are listed in **Schedule G** of this Report, except for those who asked that their participation be held in confidence.

26. Several methods were used to identify the commentators whom we decided to contact to organize meetings. Some directly contacted my team or me. Others were suggested by observers of military justice or, as we progressed through our meetings, by other interviewees.[30] My team also reviewed academic and media articles on military justice published in recent years to identify frequent and prominent public commentators. Every effort was made to avoid echo chambers and, in this regard, Schedule G confirms that we have met persons with diverse and sometimes opposing views.

G. WRITTEN SUBMISSIONS

27. Several actors in the military justice system, military grievance process and regime for complaints about or by military police responded to my call for submissions. Written submissions and background, policy and issue papers were sent to me by the OJAG, the Canadian Military Prosecution Service, the Directorate of Defence Counsel Services, the Court Martial Administrator, the Chief Justice of the Court Martial Appeal Court of Canada, the Canadian Forces Military Police Group, the Military Police Complaints Commission, the Military Grievances External Review Committee, the Ombudsman for the Department of National Defence and the Canadian Forces, and the Sexual Misconduct Response Centre.

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30 While several individuals were helpful, I am particularly appreciative of the early assistance provided by Lieutenant-Colonel (retired) François Lareau, a former legal officer of the CAF who, on November 25, 2020, provided my team with a list of 43 individuals with whom I may be interested to meet. Lieutenant-Colonel Lareau also helped my team find the coordinates of certain retired members of the CAF who I wished to interview.

28. I also received written submissions from approximately 65 individuals, who are listed in **Schedule H** of this Report, except again for those who asked that their submissions be received in confidence.[31]

29. I am greatly appreciative of the comments, concerns and anecdotes raised or provided by all. While some submissions are specifically referred to, all submissions were considered in the preparation of this Report.

H. TOWN HALL MEETINGS WITH MEMBERS OF THE CANADIAN ARMED FORCES

30. My predecessors, Chief Justice Lamer and Chief Justice LeSage, visited several bases of the CAF and met members on those occasions. In contrast, my review was conducted in the midst of the global COVID-19 pandemic, and I regrettably could not do the same.

31. I nevertheless attempted to meet with as many members of the CAF as possible through virtual town hall meetings. There may in fact have been some advantages to this approach. For example, it allowed me to meet members of the CAF from smaller bases across Canada which I would likely not have been able to visit physically if my review had occurred under different circumstances. Virtual town hall meetings also permitted greater confidentiality than in-person meetings would have allowed, as the details required to connect could be sent only to specific invitees having expressed their interest and the admissions could be controlled by my team.

32. The CAF initially suggested that commanding officers identify town hall participants from their bases, wings and units. The coordinates of those participants would have been sent to my team to allow the organization of the meetings. I was concerned, however, that proceeding in this way could have a chilling effect on full and frank discussions. I enlisted the assistance of the chain of command to inform the members of the CAF of the upcoming meetings, but I requested that it refrain from directing any member to participate or not to participate.

33. On January 17, 2021, CANFORGEN 002/21, *Independent Review – Virtual Town Hall with CAF Members* was issued on the DND/CAF Intranet with the following content:

> 1. The Honourable Morris J. Fish, former Justice of the Supreme Court of Canada, has been appointed by the Minister of National Defence (MND) to conduct the third independent review (IRA3) of specified provisions of the *National Defence Act* (*NDA*) and their operation, pursuant to *NDA* section 273.601.

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31 Several of those written submissions were received later in my review. I invited the members of the CAF who participated in my town hall meetings, discussed below, to provide me with short written submissions if they felt that they had not been able to convey certain points during the meeting. All submissions of this sort were taken in confidence, in keeping with the confidentiality of my town hall meetings, and are therefore not listed in Schedule H of this Report.

2. Section 273.601 of the *NDA* can be consulted at the following hyperlink: A. https://laws-lois.justice.gc.ca/eng/acts/n-5/

3. The IRA3 will be engaging virtually, in full confidentiality and in both official languages, with CAF members, regular and primary reserve forces, across Canada who have comments about the subjects under review. The IRA3 will organize virtual town hall meetings with various groups of CAF members based on their rank, in order to encourage full and frank discussions. There will be a town hall meeting for junior non-commissioned members including Private/Sailor Third Class to MCpl/Master Sailor, a town hall meeting for CAF members from Sergeant/Petty Officer 2nd Class to Master Warrant Officer/Chief Petty Officer 2nd Class, a town hall meeting for junior officers and a town hall meeting for Lieutenant Colonels/Commanders and Majors/Lieutenant Commanders in a command team as well as their Chief Warrant Officers/Chief Petty Officer 1st Class (command teams). CAF members from ranks not included in these four groups can also contact the IRA3 who will determine where to best allocate them. These town hall meetings are expected to commence in February 2021.

4. CAF members who have an interest in the military justice system (including the code of service discipline), military grievances, the external review of military grievances, military policing, and the Military Police Complaints Commission and wish to participate in the town hall meetings are encouraged to contact the IRA3 at Davies Ward Phillips & Vineberg LLP, by mail to 1501 McGill College Suite 2600, Montreal, Quebec, H3A 3N9, by telephone at […], or by email at: review.authority(at)dwpv.com.

5. To facilitate the organization of these meetings, interested CAF members must contact the IRA3 no later than 28 January 2021.

6. CAF members who communicate with the IRA3 should only provide their name, their rank and their base/wing, and should refrain from providing their comments about the above-mentioned subject matters in writing, as these written submissions will not, save exception, be considered by the IRA3 at this point.

7. The IRA3 will contact those retained by them to participate in the town hall meetings via the IRA3's own confidential email address. The virtual meetings will be held on the IRA3's own platform on a fully confidential basis to foster open and transparent discussion. Overall themes and results of the discussion are expected to become public, however identities of individual participants shall remain confidential.[32]

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32 I was informed at the beginning of February 2021 that CANFORGEN 002/21 would likely not have been distributed to the civilian personnel of the Integrated Conflict and Complaint Management service ("**ICCM**"). On February 8, 2021, my team therefore sent an email to the distribution lists of all Conflict and Complaint Management Services centres located across Canada. The email invited the civilian or military members of the personnel of the ICCM having comments about the military

34. I received expressions of interest from more than 330 people. Everyone who contacted my team prior to the town hall meetings, even after the deadline of January 28, 2021, was invited to participate in one of them.[33]

35. As most people expressed their interest in meeting with me without knowing the date and time where their particular town hall meetings would be convened, not all those I invited were able to attend. My team and I made efforts, in so far as possible, to reschedule people who notified us of their conflicting commitments. In the end, we met with 234 people, as broken down below.

36. Once we began receiving the expressions of interest, we decided that we should meet separately with members of the military police, members of the OJAG and grievance analysts in order for the discussions in general town hall meetings to be full and frank, and for those in specific town hall meetings to be focused on the particular issues of those constituencies.

37. To encourage active participation, we limited the number of invitees for any town hall meeting to approximately 30 people.

38. In the end, we held 16 town hall meetings of 90 minutes each from February 16 to 26, 2021, namely:

    (a) three for junior non-commissioned members, attended by 20 members of the CAF;

    (b) four for senior non-commissioned officers, attended by 53 members of the CAF;

    (c) two for junior officers, attended by 35 members of the CAF;

    (d) five for senior officers below the rank of lieutenant-colonel and members of command teams, attended by 90 members of the CAF;

    (e) one attended by 12 members of the military police of all ranks;

    (f) one attended by 8 chief warrant officers of the OJAG; and

    (g) one attended by 16 grievance analysts or members of ICCM personnel.

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grievance process or suggestions for its improvement to express their interest in attending a town hall meeting. The town hall meeting was held on February 26, 2021.

33 By way of exception, some officers of the CAF of the rank of colonel or above were considered to be too high in rank, and were instead offered an individual meeting with my team and me.

III. IDENTIFICATION OF PRIORITIES FOR THE INDEPENDENT REVIEW AND LIMITATIONS

39. The provisions listed in subsection 273.601(1) represent most of the entire *NDA*. It is obvious that, in the limited timeframe I was allotted, it was impossible for my team or me to conduct a review of the operation of every single provision included in my mandate. Therefore, as Chief Justice Dickson before me, "[w]*hile, in some instances,* [I] *have commented on what may be considered to be technical matters,* [I] *have generally tried to concentrate on the larger issues, so as to provide direction and principles to guide future reform*".[34]

40. My team and I had to establish priorities for our independent review of the military justice system. We did so mindful of (a) the concerns which were presented to us, which we raised ourselves or which were otherwise discussed in our briefings and meetings; and (b) the written submissions and answers to RFIs received, including the information contained in the Implementation Status Report.

41. I should not be understood, as a result of not explicitly addressing in this Report certain provisions of the *NDA*, to be confirming that no concern exists about their operation. I may simply not have been alerted to issues regarding those provisions.

42. In areas in which I obtained a sufficient number of comments and submissions, I generally identify in this Report the concerns raised by the particular provisions at stake, as well as specific solutions to those concerns. Conversely, there are a number of areas for which I instead recommend that questions be put to working groups or reviewed by other military justice actors. I do so especially (a) where I was not presented with sufficient information to allow me to adopt a single solution within a range of acceptable outcomes; (b) where specific determinations involved wide policy ramifications, including issues of institutional design or "government machinery"; and (c) where I was otherwise of the view that my team and I did not have sufficient time, resources or subject-matter expertise to deal appropriately with a question.

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[34] Report of the Special Advisory Group on Military Justice and Military Police Investigation Services to the Minister of National Defence (March 14, 1997) ("**Dickson Report**") at 6. The Special Advisory Group was composed of the Right Honourable Brian Dickson, P.C., C.C., C.D. as Chairman and Lieutenant-General (retired) Charles H. Belzile, C.M.M., C.D. and J.W. Bud Bird as Members.

IV. TERMINOLOGY

43. In this Report:

(a) When referring to victims of service offences, I use the term "victim" (rather than "survivor" or analogous expressions) as victim is the term used in the *Declaration of Victims Rights* enacted by Bill C-77[35] and in the *Canadian Victims Bill of Rights*;[36]

(b) I use the term "participant" to refer to the individuals whom I met over the course of my review, whether in briefings or meetings with DND or CAF officials or organizations, in meetings with external commentators or foreign experts or in town hall meetings; and

(c) To refer to DND or CAF officials, I use the pronouns which reflect the genders of the current incumbents of positions.

35 *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 ("**Bill C-77**").

36 SC 2015, c 13, s 2.

CHAPTER 1 – THE MILITARY JUSTICE SYSTEM

I. THE INDEPENDENCE OF MILITARY JUSTICE ACTORS FROM THE CHAIN OF COMMAND

44. Enhanced independence of military justice actors from the chain of command has been at the heart of the evolution of the Canadian military justice system. The military justice system began as "*a command-centric disciplinary model that provided weak procedural safeguards*".[37] Historically, the chain of command maintained an important role in the military justice system. But over time, the actors involved in the investigation and adjudication of serious service offences were afforded an increased measure of independence from the chain of command.

45. The original intent was "*to ensure that the inherent conflicts that can occur between respect for the chain of command on the one hand, and impartial investigation and adjudication of service offences on the other, do not undermine the legitimacy of the whole military justice apparatus*".[38] The military justice system has made significant progress in its pursuit of that intended objective, but the objective has not yet been reached.

46. In my view, the military justice system must continue along the same path in its future evolution. The chain of command still needs to play an important role in the administration of military justice, particularly at the summary trial level. Where safeguards are lacking or insufficient, however, they need to be introduced or bolstered. As it currently stands, the military justice system needs better protection of the independence of its judges, courts, prosecutors, defence counsel and police.

A. MILITARY JUDGES

47. Until the 1990s, Canadian "military judges" were specially-trained members of the legal branch of the Canadian Armed Forces ("**CAF**") posted in the Chief Judge Advocate's Division of the Office of the Judge Advocate General ("**JAG**" and "**OJAG**"). They remained posted to this division for as long (or as short) as the JAG considered it appropriate. While posted, they would sometimes be appointed by the JAG to exercise the functions of a judge advocate[39] in courts martial. Between trials, they would perform other legal duties within the OJAG.

48. In *Généreux*,[40] the majority of the Supreme Court of Canada ruled that the status of judge advocates, combined with other features of the military justice system as it then stood,

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37 *Stillman*, *supra* note 2 at para 53.

38 Dickson Report, *supra* note 34 at 12.

39 The functions of a judge advocate were analogous to the functions of a civilian judge presiding a trial by judge and jury.

40 *Supra* note 7.

did not meet the minimum requirements of section 11(d) of the *Canadian Charter of Rights and Freedoms* ("***Charter***").[41]

49. The status of military judges has changed a great deal since then. They currently hold office during good behaviour until the age of 60 years[42] unless they are released earlier from the CAF at their request.[43] They may be removed by the Governor in Council only for cause and on the recommendation of the Military Judges Inquiry Committee, which is composed of three judges of the Court Martial Appeal Court of Canada ("**CMAC**").[44]

50. Military judges have been excluded from the OJAG and now belong to a separate unit of the CAF, the Office of the Chief Military Judge ("**CMJ**" and "**OCMJ**").[45] Their remuneration is subject to quadrennial review by the Military Judges Compensation Committee,[46] much like the remuneration of civilian judges is subject to judicial compensation commissions.

51. Other elements of the status of military judges have remained the same for decades. Military judges serve as officers of the CAF. While in office, they maintain the rank which they held at the time of their appointment.[47] They are subject to the Code of Service Discipline ("**CSD**"), they are required to comply with lawful orders, and they are subject to the general duties and responsibilities of officers.[48] Military judges are placed under the command of the CMJ and bound to perform any duties, other than judicial duties, "*that the Chief Military Judge may direct*", provided *"those other duties* [are not] *incompatible with their judicial duties*".[49]

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41 Section 11(d) of the *Charter* provides any person charged with an offence with the right to a "*fair and public hearing by an independent and impartial tribunal".*

42 The maximum age of retirement for officers and non-commissioned members of the CAF as per sections 15.17 and 15.31 of the *Queen's Regulations and Orders for the Canadian Forces* ("***QR&O***").

43 Subsection 165.21(4) of the *National Defence Act*, RSC 1985, c N-5 *(*"***NDA***").

44 Sections 165.21(3), 165.31 and 165.32 of the *NDA*.

45 Ministerial Organization Order 2000007 (February 7, 2000); Canadian Forces Organization Order 3763 (November 18, 2020).

46 Sections 165.33 to 165.37 of the *NDA*.

47 In accordance with section 165.25 of the *NDA*, the CMJ holds a rank that is not less than colonel. This rule does not apply to the other military judges. The four military judges currently appointed hold the rank of lieutenant-colonel or its naval equivalent of commander. Pursuant to sections 26.10 and 26.12 of the *QR&O*, military judges are not subject to personal reports or assessments if such documents are "*to be used in whole or in part to determine the training, posting or rate of pay of the officer, or whether the officer is qualified to be promoted,*" and their personnel evaluation report files cannot be placed before a promotion board.

48 Chapter 4 of the *QR&O*.

49 Subsection 165.23(2) of the *NDA* and section 4.091 of the *QR&O*. However, subsection 4.091(2) of the *QR&O* provides that "[t]*he Chief Military Judge shall not exercise the powers or jurisdiction of a commanding officer or an officer commanding a command in respect of any disciplinary matter or a grievance*".

i. Concerns Raised by the Military Status of Judges

52. By definition, judges are independent and impartial adjudicators. They are instructed to render decisions based solely on the merits of the cases brought before them, according to law and free from external interference. Substantive justice, fair process – and the appearance of justice – are essential components of the Canadian judicial systems, civilian *and* military.

53. It is insufficient for military judges to *actually* act independently and impartially. To maintain its legitimacy and public confidence, the military justice system must also, in so far as reasonably possible, satisfy the persons who appear before military judges that their cases will be decided in a fair, objective and unbiased manner, without improper considerations being taken into account.

54. During my review, I met all four military judges currently in office. I have no reason to doubt their *actual* independence and impartiality, and nothing in this Chapter should be understood as a criticism of them. But I believe, like several participants in my review, that the appearance of justice is prejudiced by the fact that military judges remain members of the CAF while holding office.

55. There are major concerns in this regard.

56. First, a good number of members of the CAF who attended my town hall meetings, most of them junior non-commissioned members, expressed the belief that military judges are generally more lenient towards accused officers of higher ranks.

57. Other concerns were that military judges may be reluctant to see high-ranking witnesses as lacking in credibility. Or, conversely, that complainants from lower ranks may be found less trustworthy. Or, that members of a panel who outrank the military judge may show less deference to the military judge's instructions. These are valid issues, however difficult to verify in practice.

58. Second, the fact that military judges are subject to the CSD puts them in a position of subordination which is inconsistent with the exercise of judicial duties. This dynamic could lead to concerns that military judges may improperly take into account the disciplinary consequences to which they may be exposed if they adjudicate cases in a certain way. Some members of the CAF were concerned that military judges could be tempted to "toe the party line" in sensitive cases where the legally-correct decision may go against the solution preferred by the military hierarchy.

59. These questions are not purely about optics. They have had practical consequences on the administration of military justice in recent years. The fact that military judges are subject to the CSD was brought to public attention in 2018, when charges were laid against the then CMJ, Colonel Mario Dutil. The Deputy Chief Military Judge was assigned

to the case and decided to recuse himself.[50] He subsequently decided not to assign any other military judge to preside over Colonel Dutil's court martial. This decision was upheld by the Federal Court.[51] A few days later, the charges against the CMJ were withdrawn.

60. By that time, however, they had generated a ripple effect. To fill a perceived gap in the *QR&O*, the Chief of the Defence Staff ("**CDS**") adopted an order ("**CDS Order**") designating the Deputy Vice Chief of Defence Staff as the officer authorized to act as a commanding officer for the purpose of disciplinary matters against military judges.[52]

61. On January 10, 2020, a military judge deciding an application for a stay of an unrelated court martial concluded that the CDS Order violated section 11(d) of the *Charter*. The judge ruled it did so by specifically targeting military judges and by imposing on them the disciplinary process driven by the chain of command, without due consideration to the judicial discipline scheme involving complaints to the Military Judges Inquiry Committee. The military judge declared the CDS Order to be of no force and effect, but he did not stay the court martial against the applicant.[53] A few weeks later, another military judge ordered the same remedy in a separate case.[54]

62. The CDS Order was not rescinded, and similar applications for stays of court martial proceedings were therefore filed in other cases. On August 14, 2020, a military judge concluded in *Edwards* and *Crépeau* that "*the public confidence* […] *could be undermined in relation to military judges' independence and impartiality in these circumstances, considering that the executive ha*[d] *not even considered taking any action to ensure the maintenance of the rule of law and to preserve the accused's right to a fair trial before an impartial and independent tribunal, despite courts martial decisions on this issue*".[55] That time, the court martial proceedings against the two accused were stayed. Additional stays of proceedings were subsequently ordered in *Fontaine* and *Iredale*.[56]

63. The CDS Order was suspended on September 15, 2020. However, applications for stays of court martial proceedings kept being made, based more generally on the applicability

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50 *R v Dutil*, 2019 CM 3003.

51 *Director of Military Prosecutions v Deputy Chief Military Judge*, 2020 FC 330.

52 The *QR&O* do not specify who, if not the CMJ, as explained in footnote 49, is to exercise the powers or jurisdiction of a commanding officer for the purpose of disciplinary matters against military judges. The first order of the CDS was adopted on January 19, 2018, a few days before the charges against the former CMJ were laid. This order was replaced by the CDS Order on October 2, 2019.

53 *R v Pett*, 2020 CM 4002 ("***Pett***").

54 *R v D'Amico*, 2020 CM 2002 ("***D'Amico***").

55 *R v Edwards*, 2020 CM 3006 ("***Edwards***") at para 70; *R v Crépeau*, 2020 CM 3007 ("***Crépeau***") at para 98.

56 *R v Fontaine*, 2020 CM 3008 ("***Fontaine***"); *R v Iredale*, 2020 CM 4011 ("***Iredale***").

of the military disciplinary process under the CSD to military judges. Some applications were granted, others were dismissed.[57]

64. The constitutionality of the status of military judges is now in the hands of the CMAC. On January 29, 2021, the CMAC heard the appeals against the stays of proceedings ordered in *Edwards*, *Crépeau*, *Fontaine* and *Iredale*. The appeals were taken under reserve. Other appeals are expected to be heard jointly at a later date.

65. I express no views on the constitutionality of the status of military judges. This issue is for the courts to decide. I have recounted the events that have unfolded since 2018 because they illustrate why the military status of judges may be *undesirable from a policy perspective*. My assessment is not contingent on the outcome of the constitutional challenges.

ii. Purpose of the Military Status of Judges

66. Why then do military judges remain members of the CAF while in office? As I understand it, their military status is designed to protect two aspects of the military justice system:

(a) First, it ensures that military judges understand the nature, necessity and requirements of military discipline, the nature of certain service offences as well as the context in which they may be committed.

(b) Second, it allows the court martial system to "*be portable and deployable, both across the national state and abroad".*[58] It ensures that the military justice system will be "*capable of holding trials in operational theatres at all levels in the spectrum of conflict, from peacetime to combat operations*", thereby protecting its flexibility.[59]

67. I have considered whether familiarity with military discipline, service offences and military life more generally is truly a requirement for military judges. Civilian judges often adjudicate questions in areas of the law of which they have no prior knowledge. It is incumbent on the parties to apprise them of the facts and the relevant provisions of law. The same principle should arguably apply in the military justice system, especially in general courts martial where a panel of five members of the CAF already has the specific role of "*bringing to bear upon the proceedings the military-specific concerns for discipline, efficiency and morale*".[60]

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57 *R v MacPherson and Chauhan and JL*, 2020 CM 2012; *R v Christmas*, 2020 CM 3009; *R v Proulx*, 2020 CM 4012; *R v Jacques*, 2020 CM 3010; *R v Cloutier*, 2020 CM 4013; *R v Pépin*, 2021 CM 3005.

58 Michael R Gibson, "International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity", (2008) 4:1 J of Intl L & Intl Relations 1 at 13-18.

59 *Ibid*.

60 *Stillman*, *supra* note 2 at para 66.

68. I discussed this question with several current or former military justice actors from Canada and from other Five Eyes countries, as well as external commentators. The overwhelming majority expressed the view that familiarity with military service, life and culture may not be strictly required, but nonetheless is an undeniable advantage for military judges and those who appear before them. I trust their cumulated experience in this regard.

69. I have more reservations regarding the portability, deployability and flexibility of the military justice system. I agree that a military justice system must retain at least the capacity of *exceptionally* operating in a theatre of operations. But a healthy dose of realism is required.

70. Since the coming into force of Bill C-25 in 1998, there have been very few courts martial outside Canada,[61] and not a single one conducted entirely in a theatre of operations,[62] despite early emphasis by a former JAG as to their importance in principle.[63] The authors of the Court Martial Comprehensive Review Report gathered anecdotal evidence that certain commanding officers "*would not want to hold a court martial in a theatre of operations*".[64] This is understandable. I was informed by the OJAG that the average duration of the courts martial held between 2013 and 2018 was 20 days. Given that "[t]*he commanding officer of the unit where* [a] *court martial is to be held is responsible for the provision of adequate accommodation, administration and personnel to the extent required to ensure that the court martial is conducted in a dignified and military manner*",[65] holding a court martial in theatre would likely prove disruptive to the military operations being conducted.

71. In my view, both these aspects of the military justice system can be adequately preserved without military judges remaining members of the CAF while in office.

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61 Most were held in elements of the CAF in Geilenkirchen, Germany (*R v Master Corporal DW Deans*, 2004 CM 1008; *R v Master Corporal JEM Lelièvre*, 2007 CM 1012; *R v Barber*, 2012 CM 1008) or in Colorado Springs, in the United States (*R v Master Seaman RJ Middlemiss*, 2009 CM 1003).

62 In one case, a court martial commenced in Gatineau (*R v Semrau*, 2010 CM 4010) and then reconvened in the Kandahar Airfield in Afghanistan to receive testimony (*R v Semrau*, 2010 CM 4015).

63 JAG Policy Directive 013/01, *General Instructions in Respect of Delay in the Court Martial Process* (March 30, 2001), online: <https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/jag/court-martial-process-delay.pdf> at para 10: "*Specifically, and due to the particular need for discipline to be seen to be enforced within operationally deployed units, particular emphasis must be placed on the conduct of courts martial in theatre where the breach of discipline occurs in theatre. This instruction is made recognizing that the current Canadian Forces policy of six month rotations, coupled with factors outside the control of either DMP or DDCS, will make in-theatre courts martial difficult in certain cases*".

64 Draft Interim Report – Court Martial Comprehensive Review (July 21, 2017) ("**Court Martial Comprehensive Review Report**") at 194.

65 Section 111.12 of the *QR&O*.

72. It is not necessary for them to have *military status* to be familiar with the realities of service. A *sufficient degree of military experience* ensures their understanding of such matters.

73. Nor do the portability, deployability and flexibility depend on the military status of judges. Military judges' conditions of appointment can include a requirement to act anywhere in the world, including in a theatre of operations. I have been warned that practical difficulties related to insurance and to the judges' status under international law could arise. But I have also been told by knowledgeable officials, including the Deputy Minister of National Defence (the "**Deputy Minister**"), that they could be resolved and were not a fundamental impediment to the civilianization of judges. By way of example, the judges of the Court Martial of the United Kingdom and the Court Martial of New Zealand are civilians. Yet, both courts may hold hearings overseas, and have done so. Perhaps even more importantly, the CMAC is composed of civilian judges and could currently be called to hold hearings in a theatre of operations.[66]

74. Moreover, today's information and communications technology also go a long way towards ensuring the portability, deployability and flexibility of the military justice system. In 2003, Chief Justice Lamer stated that "[a]*dvancements in modern technology have worked to reduce the travel requirements for the position of a military judge*".[67] The COVID-19 pandemic has made this reality inescapable. Most Canadian courts and tribunals have routinely been holding virtual hearings for months. While Chief Justice Lamer and Chief Justice LeSage travelled across Canada to visit military bases, my team and I met people located all across Canada and other countries solely by videoconference.

iii. Civilianization of Military Judges

75. During my review, the JAG recognized that Canada is at a juncture in history where the civilianization of military judges needs to be considered for the military justice system to maintain its legitimacy. I agree with her assessment. In my view, there is no better way of adequately safeguarding the independence and impartiality of military judges.

76. The appointment of civilian judges with a sufficient degree of military experience was likewise supported by the Deputy Minister and by virtually all senior members of the military hierarchy.[68] The overwhelming majority of the members of the CAF who attended

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66 Subsection 235(1) of the *NDA*: "*The Court Martial Appeal Court may sit and hear appeals at any place or places, and the Chief Justice of the Court shall arrange for sittings and hearings as may be required*".

67 Lamer Report, *supra* note 9 at 20.

68 It was supported by the former CDS (General Jonathan Vance), the current Acting Chief of the Defence Staff (and Commander of the Canadian Army at the time of my consultations with him), the Commanders of the Royal Canadian Navy and Royal Canadian Air Force, the Vice Chief of the

my town hall meetings confirmed that they would equally respect the decisions handed down by civilian judges with such qualifications.[69]

77. The civilianization of military judges would by no means be a revolutionary innovation. Military judges could well continue to be appointed from a pool of candidates having had long and successful careers in the CAF.[70] However, at the time of their appointment, they would need to be released from the CAF and to renounce their military rank. The *NDA* would also need to be amended to remove any jurisdiction which the military justice system may have over military judges, either as civilians or as former members of the CAF.

> **Recommendation #1. Military judges should cease to be members of the Canadian Armed Forces, and therefore become civilian. Members of the Canadian Armed Forces appointed by the Governor in Council as military judges should, at the time of their appointment, be released from the Canadian Armed Forces and renounce their military rank.**
>
> **The *National Defence Act* should be amended to provide that military judges are never subject to the Code of Service Discipline, and may never be charged, dealt with and tried under the Code of Service Discipline for service offences allegedly committed by them while formerly subject to the Code of Service Discipline, if applicable.**
>
> **Military judges' conditions of appointment should include a requirement to act anywhere in the world, including in a theatre of operations.**
>
> **Unless the context indicates otherwise, references to military judges in this Report include civilianized military judges.**

78. Military judges are currently appointed by the Governor in Council from a pool of barristers or advocates having at least 10 years' standing as a member of a provincial bar and 10 years of experience as an *officer* in the CAF.[71] The JAG has suggested that the second condition be broadened to allow the appointment of anyone having 10 years of experience as a *non-commissioned member* in the CAF. I also agree with this suggestion. In my view, these eligibility conditions will suffice to ensure that the appointees have a sufficient

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Defence Staff, the Commander Canadian Joint Operations Command and the Commander Canadian Special Operations Forces Command, among several others.

69 A few members of the CAF, mostly commanding officers at the unit level, opposed the proposed reform on the basis that civilian judges would have an insufficient understanding of the realities of military service. As I explained above, provided that military judges are appointed from a pool of candidates with a sufficient degree of military experience, this concern cannot carry much weight.

70 In particular, the current military judges could continue to hold office as civilianized military judges.

71 Subsection 165.21(1) of the *NDA*.

degree of military experience. The JAG and a number of former legal officers of the CAF have also told me that the Reserve Force includes several experienced lawyers and judges.

> **Recommendation #2. The *National Defence Act* should be amended to allow the Governor in Council to appoint to the position of military judge anyone who is a barrister or advocate of at least 10 years' standing at the bar of a province and who has been an officer or a non-commissioned member of the Canadian Armed Forces, including the Reserve Force, for at least 10 years.**

79. Finally, I believe that requiring military judges to retire once they attain the age of 60 years is overly restrictive. It may hinder the development of judicial expertise, which is already complicated by the low number of cases tried by courts martial. By comparison, while some provincial and territorial judges have a retirement age of 70 years, most civilian judges (including all federally-appointed judges) may remain in office until 75. The fact that military judges travel across Canada and may exceptionally need to sit abroad, potentially in a theatre of operations, is a relevant but not conclusive consideration.

80. I therefore recommend that the age of retirement of military judges be increased to 70 or 75 years. To leverage the expertise of military judges while acknowledging the exigencies of service, consideration should be given to allowing military judges to become supernumerary judges after a number of years in judicial office or once they attain a certain age.[72]

> **Recommendation #3. The age of retirement of military judges should be increased to 70 or 75 years. Consideration should be given to allowing military judges to become supernumerary judges after a number of years in judicial office or once they attain a certain age.**

B. MILITARY COURTS

i. The Recommendation of Chief Justice Lamer

81. The civilianization of military judges goes a long way towards safeguarding their impartiality and independence from the chain of command. But it is not in itself a complete solution. Military judges form part of courts martial. And as Chief Justice Lamer noted in his report, "*the independence of a tribunal is a matter of its status".*[73] He relied on *Généreux*, in which the majority of the Supreme Court of Canada wrote that "[t]*he status of a tribunal must guarantee not only its freedom from interference by the executive and*

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72 See, by analogy, sections 28 and 29 of the *Judges Act*, RSC 1985, c J-1.

73 Lamer Report, *supra* note 9 at 25-26.

legislative branches of government but also by any other external force, such as business or corporate interests or other pressure groups".[74]

82. Chief Justice Lamer observed that courts martial were individual (*ad hoc*) tribunals without any jurisdiction before they are convened by the Court Martial Administrator ("**CMA**"). He stated that, as a result, "*preliminary proceedings* [were] *problematic*".[75] He also noted that the *Court Martial Rules of Practice* ("***CMRP***") were a voluntary agreement entered into by the Director of Military Prosecutions ("**DMP**") and the Director of Defence Counsel Services ("**DDCS**"). In light of the authority of the JAG to issue general instructions to them, he believed that this situation "*created a reasonable apprehension of bias and interfer*[ed] *with one of the primary goals of Bill C-25, which was to set clear standards of institutional separation for the investigative and prosecutorial defence and judicial functions*".[76]

83. Chief Justice Lamer recommended the creation of a permanent military court of record pursuant to the authority granted to Parliament under section 101 of the *Constitution Act*, *1867*.[77]

84. This recommendation has not been implemented. The courts martial remain *ad hoc* judicial bodies. They do not exist until they are convened by the CMA and they are deemed to be dissolved when they terminate their proceedings.[78]

85. At the beginning of my review, I asked why the recommendation of Chief Justice Lamer was set aside. I was informed that a working group, the JAG Advisory Panel on Military Justice, met in 2003 and 2004 to consider the creation of the permanent military court, among other proposed reforms. According to the information I received, it "*identified some factors in coming to* [its] *view to retain the current court martial construct:* [a permanent military court] *would not automatically address* [Chief Justice Lamer's] *concerns; the court martial would be further separated from the* [Canadian Armed Forces] *and from the experience and conditions of service life;* [and] *many of the issues identified were addressed through a number of other measures within the court martial construct*".[79] I asked for further information but was not provided with any meaningful details.[80]

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74 *Ibid*, citing *Généreux*, *supra* note 7 at 283-284.

75 Lamer Report, *supra* note 9 at 26.

76 *Ibid*.

77 *Ibid* at 26-27.

78 Section 112.655 of the *QR&O*.

79 Report as to the Implementation Status of Previous Recommendations ("**Implementation Status Report**").

80 Answer to Request for Information #44 (OJAG): "*There were no records of reports of the JAG Advisory Panel on Military Justice, nor are there records of the discussions and decisions made by the JAG Advisory Panel, found after an extensive search in the Office of the JAG's record keeping system*". The OJAG added that "*original records pertaining to the JAG Advisory Panel are at Library*

ii. Concerns Raised by the *Ad Hoc* Status of Courts Martial

86. Some of Chief Justice Lamer's concerns were addressed. For example, section 187 of the *NDA* was amended to allow a military judge to hear and determine "*any question, matter or objection*" in respect of a charge "[a]*t any time after a charge has been preferred*", without having to wait for the court martial to be convened.

87. Also, following the Lamer Report, the CMJ can "*with the Governor in Council's approval and after consulting with a rules committee established under regulations made by the Governor in Council, make rules governing*" several aspects of practice and procedure at courts martial and in preliminary proceedings[81] ("**CMJ Rules**").

88. Despite these improvements, I believe that *ad hoc* courts martial continue both to lack institutional independence and to generate inefficiencies in the military justice system.

89. Courts martial remain dependent on commanding officers. The commanding officer of the unit where the court martial is to be held is responsible for providing adequate accommodation, administration and personnel.[82] The commanding officer must also ensure the appointment of an escort and of an officer of the court so "*that all administrative and domestic arrangements for the efficient functioning of the proceedings are effected*".[83] Given that a court martial ceases to exist once the trial ends, the commanding officer is, in addition, responsible for "*tak*[ing] *the necessary action to ensure that any sentence is carried out*".[84]

90. A certain degree of reliance by the tribunal on units of the CAF may be unavoidable, but such reliance should be reduced where possible without impairing the ability of the military justice system to foster discipline, efficiency and morale in the CAF.

91. Despite sections 165.3 and 187 of the *NDA*, in current practice, several pre-trial events only occur once a court martial has been convened and a military judge has been assigned to preside over it. The *CMRP*[85] state that preliminary applications may start after the completion of these steps. They also require that "[n]*otice* […] *be given at least three working days before the date requested for the hearing of the application*".[86]

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and Archives Canada" since 2015. By way of comment, I note that the OJAG had also advised Chief Justice LeSage that "*they were unable to share the product of this working group*" with him: LeSage Report, *supra* note 26 at 38.

81 Section 165.3 of the *NDA*.

82 Section 111.12 of the *QR&O*.

83 Sections 111.14 and 114.15 of the *QR&O*.

84 Paragraph 112.81(3)(a) of the *QR&O*.

85 Last amended on February 24, 2020.

86 Section 15 of the *CMRP*.

92. According to the Canadian Military Prosecution Service ("**CMPS**"), this "*does not provide sufficient lead time in order to permit most applications to be dealt with without leading to a postponement of the trial*".[87] The system does not rely on early case management conferences to solve this issue, because the *CMRP* do not provide for pre-trial conferences prior to the convening of the court martial.[88] The Auditor General of Canada found in its 2018 report that "[i]*t took an average of 5.5 months for the prosecutor and the defence counsel to hold a teleconference call with the Chief Military Judge*" simply to set the date of the trial.[89]

93. Unfortunately, amending the *CMRP* by enacting a set of new CMJ Rules is not a simple process. Draft CMJ Rules must first be prioritized by the Director Defence Programme Coordination ("**DDPC**"), an officer within the Chief of Programme division of the CAF.[90] For the submission to proceed to the Governor in Council, it must then be directed accordingly by the Director Corporate Submissions and Financial Arrangements of the Department of National Defence ("**DND**"). This process leads to the publication of the draft CMJ Rules in Part I of the *Canada Gazette*, to allow for public consultations. Once the consultation phase is complete, a second Governor in Council submission (and the entire process associated with it) is required to formally enact the CMJ Rules.

94. The delays caused by this process are not hypothetical. I was informed by Lieutenant-Colonel (retired) André Dufour, legal counsel to the OCMJ, that draft CMJ Rules were initially prepared and presented to representatives of the DND in 2018. The matter had not progressed by June 2020, when slight revisions to the draft became necessary and were ultimately made.

95. On June 11, 2020, Mr. Dufour wrote to the DDPC that the revised draft CMJ Rules would "*enhance the independence of military judges*" and were "*essential to military judges to enhance their capacity to manage the proceedings, make the litigant parties more accountable and overall reduce delays*".[91]

96. On September 10, 2020, Mr. Dufour was told by the DDPC that "[w]*e are putting this as "Priority A" for the second session of 2021 (i.e. July-December). It is* […] *15th in the priority list, so that means that our initial estimate would be that it would be seen by* [the Program

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87 CMPS Supplementary Submissions and Recommendations (February 12, 2021) ("**CMPS Submissions**") at para 2.

88 Sections 10 and 10.1 of the *CMRP*.

89 2018 Spring Reports of the Auditor General of Canada to the Parliament of Canada, Report 3 – Administration of Justice in the Canadian Armed Forces ("**2018 OAG Administration of Justice Report**") at para 3.25.

90 Like all other Governor in Council submissions in the CAF.

91 I was provided with the relevant email exchanges and am citing from them.

Management Board] *in September or October 2021*".[92] This is in the context of the *first* submission to the Governor in Council.

97. The fact that the OCMJ is a unit of the CAF has other impacts of this sort. For example, on December 23, 2019, the CMA was advised by a representative of the DND that, unlike the CMJ, she has no authority under Treasury Board policy to approve military judges' travel expenditures. This runs contrary to established practice since the creation of her position and is a problem because military judges are continuously required to travel in the course of their duties.

98. The CMA was advised that, while an exemption would be pursued, travel requests for judges would need to be submitted to the Minister of National Defence ("**Minister**") or Deputy Minister for approval. She was asked to prepare a travel plan to consolidate their known travels for courts martial and training in the ensuing months.

99. In a nutshell, courts martial and military judges continue to rely to a great extent on the internal mechanisms of the CAF and the DND for their administrative, regulatory and budgetary needs. Contrary to the Department of Justice Canada ("**DOJ**"), which is responsible for most federal matters connected with the administration of justice in Canada,[93] the CAF and the DND are in the business of operations. Therefore, they may not be able to adequately prioritize needs of courts martial and military judges or have the appropriate sensitivity to deal with some of the issues. The risk of executive interference with their institutional independence is clear.

iii. Establishment of a Permanent Military Court of Canada

100. In this light, the words of Chief Justice Lamer are as true today as they were in 2003: "*The most efficient way of dealing with the myriad of difficulties faced by military judges as they try to contort the current system of ad hoc courts martial into an independent judicial institution would be to create a permanent "Military Court" of Canada pursuant to the authority granted to Parliament under s. 101 of the Constitution Act, 1867*".[94]

101. Piecemeal reforms and quick fixes are not sufficient.

102. The creation of a permanent Military Court of Canada would properly locate courts martial within the judicial branch of government, instead of the executive branch. It would also grant courts martial and military judges more flexibility to manage their rules of court and

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92 *Ibid.* The email added: "*The prioritization for our second session is still flexible, as we will review the list again about 3-4 months before the session begins. At that time, the time estimate will be more exact than it is now. Happy to discuss further if required, or if you need us to increase its priority at the next review (Jan-Feb time) in order to get the file through* [the Program Management Board] *earlier in the session (thus closer to July than to December)*".

93 Paragraph 4(b) of the *Department of Justice Act*, RSC 1985, c J-2.

94 Lamer Report, *supra* note 9 at 26-27.

their own proceedings. For example, this continuous jurisdiction would facilitate the taking of pleas and the organization of case management conferences at the earliest opportunity after the preferral of charges.[95] I was assured by most military justice actors I met that court martial cases would be expedited.

103. This would be a significant gain. The military justice system justifies its separate existence on the basis of its ability to punish breaches of military discipline more quickly than the civilian justice system.[96] But as I will further explain in Part VI of this Chapter,[97] it is hardly evident that it has that ability in its present form.

104. The establishment of a permanent Military Court of Canada is supported by the Deputy Minister and the CMA. The JAG also offered it as one option for consideration in relation to the civilianization of military judges. Several commentators who I met over the course of my review, including former legal officers of the CAF, were also supportive of this proposal.

105. The Canadian military justice system has evolved in a manner similar to those of the United Kingdom, New Zealand and Australia.[98] Notably, both the United Kingdom and New Zealand established a permanent Court Martial in the last 15 years.

106. Australia also attempted to establish a permanent military court, the Australian Military Court ("**AMC**"). However, on August 26, 2009, the High Court of Australia decided in *Lane v Morrison*[99] that the AMC had been unconstitutional since its establishment on October 1, 2007. The *ad hoc* court martial system was revived shortly thereafter. Between 2010 and 2012, new bills were introduced in the Parliament of Australia to establish another permanent military court, the Military Court of Australia, but these bills died on the order paper. Australia therefore continues to convene its courts martial on an *ad hoc* basis.[100]

107. The constitutional defect of the AMC arose from the fact that the *Commonwealth of Australia Constitution Act* requires the federal courts exercising the judicial power of the Commonwealth to meet certain requirements of tenure, manner of appointment and security of remuneration of judges. The AMC was never intended to comply with such requirements[101] as the government's view was that the AMC was valid as an exercise of the defence power, rather than the judicial power. The High Court of Australia disagreed

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95 See below at paras 438 to 444, for further discussion of this question.

96 *Généreux*, *supra* note 7 at 293.

97 See below at paras 430ff.

98 Stephen S Strickey, "'Anglo-American' Military Justice Systems and the Wave of Civilianization: Will Discipline Survive?", (2013) 4:2 Cambridge Journal of International and Comparative Law 763.

99 [2009] HCA 29.

100 Strickey, *supra* note 98 at 777-778.

101 The judges of the AMC were judge advocates with military status appointed by the Minister for Defence for fixed five-year terms, with a possible renewal of five years.

and concluded that the AMC did, unconstitutionally, exercise the judicial power of the Commonwealth.

108. The JAG and some of her predecessors were concerned that a permanent Military Court of Canada could meet the fate of the AMC. I believe that this is unlikely. Beyond the fact that our Constitutions differ, the judges of a permanent Military Court of Canada would be provided with the hallmarks of judicial independence in all respects.

109. From a division of powers perspective, section 101 of the *Constitution Act, 1867* allows the Parliament of Canada to provide "*for the Establishment of any additional Courts for the better Administration of the Laws of Canada*". This power is granted "*notwithstanding anything in* [the] *Act*". This rule would protect the establishment of a permanent Military Court of Canada from claims of interference with the provincial legislatures' powers over the administration of justice.[102]

110. I concur entirely with Chief Justice Lamer's assessment:

> I have considered the question of whether or not the Parliament of Canada is able to validly create a permanent court that would overlap with the provincial criminal jurisdiction, given subsections 91(27) and 92(14) of the *Constitution Act, 1867*. It is my respectful belief, and that held by other esteemed jurists and academics alike, that section 101 of the *Constitution Act, 1867* grants to Parliament the authority to create a court supplementary to provincial superior courts notwithstanding the jurisdiction of provinces over the creation of criminal law courts. I would refer you also to the reasoned opinion I obtained from Dr. Alain-Robert Nadeau, Attorney and Doctor of Constitutional Law as found at Annex G in which my reasoning is confirmed. Dr. Nadeau states:
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> > Thus, like the Court Martial Appeal Court, the creation of a trial court martial, the jurisdiction of which would be confined to matters under the jurisdiction of Parliament for the purpose of deciding matters arising out of an offence committed under the National Defence Act and Canadian penal laws, would comply with these principles. In our opinion, the constitutionality of such court could not be questioned.
>
> The Court Martial Appeal Court was created by Parliament in 1959 and is a superior court of record identical in function and status to the provincial superior courts having final appellate jurisdiction in criminal matters. It is my belief, in agreement with that expressed above, that the creation of the Court Martial Appeal Court is further evidence that the Parliament of Canada would be validly working within the parameters established by the Constitution Act, 1867 should it choose to create a permanent Military Court and thereby at once increasing the

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102 Subsection 92(14) of the *Constitution Act*, *1867*. See, *inter alia*, *Attorney-General of Ontario v Attorney-General of Canada*, [1947] 1 DLR 801, 1947 CanLII 301(UK JCPC) at 813; *R v Reddick*, [1996] 112 CCC (3d) 491, 1996 CanLII 17940 (CMAC) at 498-499.

independence of the judiciary, and solving a multitude of difficulties currently plaguing the Office of the Chief Military Judge.[103]

111. From a *Charter* perspective, I have considered whether a service offence tried by a permanent Military Court of Canada comprised of civilianized military judges would qualify as "*an offence under military law tried before a military tribunal*" for which no right to trial by jury is guaranteed.[104] In my view, it would. The majority of the Supreme Court of Canada decided in *Stillman* that both elements of the military exception were to "*be read together as denoting the military justice system as a whole, as the French text makes clear*".[105]

112. The permanent Military Court of Canada would continue to form part of the military justice system. It would continue to have separate jurisdiction over the adjudication of service offences and special powers of punishment to that end. And it would keep distinct military characteristics, notably the requirement for military judges to have a sufficient degree of military experience; and the involvement of panels of five members of the CAF in the context of general courts martial.

113. In any event, these remote and unascertained constitutional risks must not stand in the way of the desirable evolution of the Canadian military justice system. If doubt remains, the Governor in Council could refer questions on the constitutionality of a proposed permanent Military Court of Canada to the Supreme Court of Canada.[106]

Recommendation #4. A permanent Military Court of Canada should be established as a superior court of record in accordance with section 101 of the *Constitution Act, 1867*. The Military Court of Canada should be enabled to sit at such times and at such places in Canada and abroad as it considers necessary or desirable for the proper conduct of its business. The Minister of Justice should have responsibility for the administrative and budgetary needs of the Military Court of Canada.

In this Report, unless the context indicates otherwise, references to military judges include the judges of the Military Court of Canada, and references to courts martial include the Military Court of Canada sitting as a court martial.

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103 Lamer Report, *supra* note 9 at 27-28.

104 Section 11(f) of the *Charter*: "*Any person charged with an offence has the right* […] *except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment".*

105 *Stillman*, *supra* note 2 at paras 31-33.

106 Section 53 of the *Supreme Court Act*, RSC 1985, c S-26.

114. Should the Military Court of Canada be established as a court in its own right? Or should it be a division of the Federal Court? Or should both the Military Court of Canada and the CMAC be continued respectively as the trial and appeal divisions of a unified Court Martial? Should the Military Court of Canada be included under the *Courts Administration Services Act*[107]? Should complaints against military judges continue to be directed to the Military Judges Inquiry Committee or should the Canadian Judicial Council assume disciplinary responsibilities for them? Should their remuneration be reviewed by the Judicial Compensation and Benefits Commission in the same manner as that of all federally-appointed judges? Should an address of the Senate and House of Commons to the Governor General of Canada be required for the removal of military judges?

115. I recommend that a working group be established to answer the constellation of questions around the establishment of a permanent Military Court of Canada and that it report to the Minister.

> **Recommendation #5. A working group should be established to identify the most effective framework for the creation of a permanent Military Court of Canada. The working group should include an independent authority, representatives from the Department of Justice Canada and representatives from the military justice system. The working group should report to the Minister of National Defence.**

116. In the interim, the concerns raised by the *ad hoc* status of courts martial should be mitigated to the greatest extent possible within the current construct of the military justice system. The CMA and JAG should consider reforms which may be desirable and recommend their implementation to the appropriate authorities.

> **Recommendation #6. The rules of practice and procedure of the Chief Military Judge under section 165.3 of the *National Defence Act* should be enacted by the Governor in Council as soon as possible. The Canadian Armed Forces and the Department of National Defence should prioritize their enactment to meet this objective.**
>
> **Pending the establishment of a permanent Military Court of Canada, the Court Martial Administrator and the Judge Advocate General should consider the reforms which may be desirable to mitigate the concerns raised by the *ad hoc* status of courts martial in so far as possible. They should recommend the implementation of these reforms to the appropriate authorities.**

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107 SC 2002, c 8.

C. MILITARY PROSECUTORS AND DEFENCE COUNSEL

117. In 1997, Chief Justice Dickson recommended the appointment of an independent director of prosecutions responsible to the JAG. He also recommended that "*whenever a Canadian Forces member is entitled to legal advice under the Code of Service Discipline, the Judge Advocate General* [should] *provide such advice in a manner that is independent of the Judge Advocate General's prosecution and judicial functions*".[108]

118. Combined with earlier recommendations of the Somalia Inquiry Report[109] and the impact of the Supreme Court of Canada's ruling in *Généreux*, his recommendations led to the creation of the positions of DMP and DDCS.

119. The DMP "*is responsible for the preferring of all charges to be tried by court martial and for the conduct of all prosecutions at courts martial.* [He] *also acts as counsel for the Minister in respect of appeals when instructed to do so*".[110]

120. The DDCS "*provides, and supervises and directs the provision of, legal services* […] *to persons who are liable to be charged, dealt with and tried under the Code of Service Discipline*".[111] The CAF has made the policy choice to provide all members of the CAF involved in the military justice system with either free legal advice or free counsel, depending on the circumstances. In particular, free legal counsel is provided to all accused persons whose files are referred to the DMP for potential prosecution and trial by court martial.[112]

121. The DMP and DDCS are the respective directors of the CMPS and Directorate of Defence Counsel Services ("**Directorate of DCS**"). The CMPS and Directorate of DCS are currently two divisions of the OJAG. The divisions are respectively staffed by military prosecutors and defence counsel.

122. Military prosecutors are not advocates for the chain of command. Rather, they play the same role as Crown attorneys in the civilian justice system. Justice Rand of the Supreme Court of Canada explained this role as follows:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of

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108 Dickson Report, *supra* note 34 at 31-33.

109 *Supra* note 27.

110 Section 165.11 of the *NDA*.

111 Section 249.19 of the *NDA*.

112 Section 101.11 of the *QR&O*. The accused may also choose to retain legal counsel at their own expense: section 109.04 of the *QR&O*.

> prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[113]

123. By contrast, military defence counsel are advocates for their clients, and only for them. They have a duty of loyalty which requires them to commit to their clients' cause and to avoid conflicting interests, including their own personal interest.[114] Canadian law recognizes, as a principle of fundamental justice, that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients' cause.[115] The words of Henry Brougham in his defence of Queen Caroline of Brunswick are often cited to describe the duties of defence counsel:

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.[116]

124. I have discussed earlier my concerns about the military status of judges, namely that military rank and potential career impacts could be improperly considered in the administration of military justice.[117] These concerns also exist for military prosecutors and defence counsel.

125. Neither should have to fear negative consequences for performing their duties, even if doing so may require them to act against the wishes of the military hierarchy. Military defence counsel and prosecutors therefore need to be sufficiently independent from the executive, which includes both the chain of command and the OJAG.

126. Safeguards already exist to protect the personal independence of the DMP and DDCS. But I believe such safeguards, while desirable, should be bolstered.

127. I also believe institutional checks and balances need to be introduced for the other military prosecutors and defence counsel. Currently, none exist to ensure their independence from the executive. The measures which protect their independence result solely from directions of the JAG to her Chief of Staff. They could easily be repealed or amended by

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113 *Boucher v The Queen*, [1955] SCR 16 at 23-24.

114 *R v Neil*, [2002] 3 SCR 631 at para 19.

115 *Canada (Attorney General) v Federation of Law Societies of Canada*, [2015] 1 SCR 401 at para 84: "*Subject to justification being established, it follows that the state cannot deprive someone of life, liberty or security of the person otherwise than in accordance with this principle*".

116 *Trial of Queen Caroline* (1821), by J Nightingale, vol II, The Defence, Part 1 at 8.

117 See above at paras 55ff.

any subsequent JAG absent statutory or regulatory provisions. In other words, these measures are tied to the personality and integrity of the individual JAG. That is not sufficient and should be rectified.

i. Services Provided by Military Defence Counsel

128. I was told by a number of military justice actors that military defence counsel often file many applications in defence of their client, including challenges based on the *Charter*. I was encouraged to recommend that there be mechanisms to control the expenditures of military defence counsel. This, I was told, would ensure that they focus only on applications with greater chances of success and, in particular, that they do not repeatedly raise identical constitutional challenges to the military justice system.

129. I fundamentally disagree with this submission.

130. Access to free legal counsel, regardless of income, is a benefit extended to the members of the CAF as a counterpart to the extraordinary duties that are imposed on them. Those extraordinary duties include the "unlimited liability" of CAF members, by which they may at any time be ordered into harm's way, potentially risking their lives.

131. The fact that military defence counsel can do the utmost to defend their clients without being required to consider "fiscal responsibility" as part of their decisions is part and parcel of the special benefit which Canada decided to grant to members of the CAF. I would only very reluctantly interfere with this fundamental *quid pro quo*. No satisfactory basis for a recommendation of this sort has been provided to me.

132. Military defence counsel must, of course, comply with the rules of ethics which apply to them as members of the bar of a province. Moreover, the DDCS is statutorily mandated to "*supervis*[e] *and direc*[t]" the provision of defence counsel services.[118] Accordingly, he must intervene if a military defence counsel of the Directorate of DCS files abusive, frivolous or vexatious proceedings or otherwise behaves inappropriately.

133. It is also worth noting that applications filed by military defence counsel have historically played an important role in the evolution of the military justice system. The Directorate of DCS has been involved in important constitutional cases which have triggered amendments to the *NDA*, as well as in challenges which have failed, but which nevertheless provided important clarifications on the jurisdiction of the military justice system.[119] Beyond furthering the interests of their particular clients, military defence counsel ensure the ongoing legitimacy of the military justice system.

134. Applications, including constitutional challenges, may be presented repeatedly only as a consequence of the current structure of the military justice system. Because courts martial

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118 Section 249.19 of the *NDA*.

119 See generally *Stillman*, *supra* note 2; *Moriarity*, *supra* note 5.

are not superior courts, they cannot issue general declarations of invalidity if a provision is found to be unconstitutional. Only the CMAC and the Supreme Court of Canada may do so in military cases. This will cease to be true if a permanent Military Court of Canada is established as a superior court of record.[120]

135. I also believe that the establishment of a permanent court will allow military judges to intervene more easily in respect of abusive, frivolous or vexatious proceedings, should any be filed by military defence counsel.

ii. Appointment, Tenure and Removal of the Director of Military Prosecutions and Director of Defence Counsel Services

136. The appointment and tenure of the DMP and DDCS are governed by the *NDA*. Both may be appointed from the officers of the CAF who are barristers or advocates with at least 10 years standing at the bar of a province.[121] They hold office during good behaviour for fixed, but renewable, terms of four years.[122]

137. Both the DMP and DDCS act "*under the general supervision*" of the JAG,[123] who is responsible for the "*superintendence of the administration of military justice in the Canadian Forces*".[124] While they are in office, their performance is not assessed and their files are not placed before a promotion board.[125] The DMP and DDCS may only be removed from office by the Minister for cause and on the recommendation of an inquiry committee.[126]

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120 See above at paras 100ff.

121 Subsections 165.1(1) and 249.18(1) of the *NDA*.

122 Subsections 165.1(2), 165.1(3), 249.18(2) and 249.18(3) of the *NDA*.

123 Subsections 165.17(1) and 249.2(1) of the *NDA*.

124 Subsection 9.2(1) of the *NDA*.

125 Section 26.10 of the *QR&O* provides that "[n]*o personal report, assessment or other document shall be completed in respect of* […] *the Director of Military Prosecutions or the Director of Defence Counsel services for the period during which they performed their duties if such a document is to be used in whole or in part to determine the training, posting or rate of pay of the officer, or whether the officer is qualified to be promoted*". For its part, section 26.12 of the *QR&O* provides that "[t]*he personnel evaluation report of* […] *the Director of Military Prosecutions or the Director of Defence Counsel Services shall not be placed before a promotion board*".

126 Sections 165.2 and 249.18(2) of the *NDA* and sections 101.13 to 101.15 of the *QR&O*. The Director of Military Prosecutions Inquiry Committee ("**DMPIC**") and the Director of Defence Counsel Services Inquiry Committee ("**DDCSIC**") are composed "*of members appointed by the Minister as follows: (a) one person who has been nominated by the Judge Advocate General and who is a barrister or advocate with at least 10 years' standing at the bar of a province but is not an officer or non-commissioned member;* [and] *(b) one person who has been nominated by the Chief of the Defence Staff and who is not a legal officer or a member of the military police*". The third member of the DMPIC is "*one person who has been nominated, subject to the consent of the appropriate Deputy Attorney General, by the members referred to in subparagraphs (a) and (b) and who is a federal or provincial Crown Attorney with at least 10 years' standing at the bar of a province*". For

138. The functions of the DMP are analogous to the functions of the Director of Public Prosecutions ("**DPP**") in the civilian justice system. It is therefore instructive to compare their appointment and tenure as well as the conditions governing their removal from office. The DPP is appointed by the Governor in Council, on the recommendation of the Attorney General of Canada ("**Attorney General**").[127] The DPP holds office during good behaviour for a single, non-renewable term of seven years.

139. Moreover, the DPP may only be removed by the Governor in Council for cause and with the support of a resolution from the House of Commons.[128] These conditions are "*important safeguard*[s] *that enabl*[e] *the DPP to resist any improper interference*" and ensure that the executive will unlikely attempt to remove the DPP *"absent clear incompetence, impropriety or disability*".[129]

140. I asked the OJAG to provide its comments on the current appointment and tenure conditions of the DMP and DDCS. The OJAG advised that it was in favour of maintaining the *status quo*. It first noted that the DMP and DDCS are "*not supervised by a political official*", contrary to the DPP, as "*the JAG is a senior Canadian Armed Forces officer and a non-partisan official appointed by Governor in Council*".[130]

141. The OJAG recognized that appointments for a longer term would have the desirable effect of fostering the development of experience and litigation skills within the CMPS and Directorate of DCS. But it noted practical difficulties which could arise from non-renewable terms of service:

> Individuals appointed as the DMP or the DDCS for a limited non-renewable term could encounter career related difficulties upon completion of their appointment. If the individual is a legal officer, there are limited positions, mostly advisory, which are available at their rank level within the Office of the JAG which they could return to. During the course of their appointment, they may need to exercise their duties in a manner that may sometimes not accord with the views of the chain of command. The knowledge that they would be expected to return to advising the chain of command after their appointments could introduce perceptual concerns relating to the decisions they make while holding these appointments. These considerations could also apply if the individual appointed as the DMP or the DDCS is an officer from another occupation (regular or reserve force) were they to return to their previous military occupation. It may be in some circumstances that the most appropriate course of action would be for the individual to retire from the

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the DDCSIC, that third member is "*one person who has been nominated by the members referred to in subparagraphs (a) and (b) and who is a barrister or advocate, with at least 10 years' standing at the bar of a province but is not a prosecutor with a federal or provincial prosecution service*".

127 Subsection 3(1) of the *Director of Public Prosecutions Act*, SC 2006, c 9 ("***DPP Act***").

128 Subsection 5(1) of the *DPP Act*.

129 Review of the Roles of the Minister of Justice and Attorney General of Canada by the Honourable A. Anne McLellan, P.C., O.C., A.O.E. (June 28, 2019) at 18.

130 Answer to Request for Information #6 (OJAG) at para 12.

> CAF upon completion of their appointment as the DMP or the DDCS. This is different than the circumstances faced by individuals who serve as the DPP, as there are substantially more career opportunities within the Department of Justice and wider Public Service.[131]

142. In my view, the fact that the DMP and DDCS "*may need to exercise their duties in a manner that may sometimes not accord with the views of the chain of command*"[132] is sufficient reason to reconsider the current renewability of their terms. As a matter of principle, the DMP and DDCS should, in performing their functions, give no consideration whatsoever to the possibility of their re-appointment by the Minister. This is particularly true in light of the Minister's interest in all matters prosecuted in the military justice system.

143. The current tenure of the DMP and DDCS does not achieve this objective. On the contrary, I was told by the DMP that the possibility of renewal makes them vulnerable to political pressures.

144. I have met both directors and I am confident that their individual personalities have allowed them to resist such pressures. But this result should be guaranteed by the institutional structure and not left to individual personalities and character traits. Placing the DMP and DDCS under the supervision of the JAG is an insufficient buffer as the JAG herself only holds office at pleasure.[133]

145. The mechanisms for the removal of the DMP or DDCS by the Minister also fail to protect their independence to a sufficient degree. The acceptable causes for removal provide substantial leeway to the DMPIC, DDCSIC and to the Minister.[134]

146. That is not a problem in itself. The problem is the lack of transparency. An inquiry committee's report is made available to the public only if the inquiry is itself held in public, which the Minister has discretion to decide.[135] A system in which removals would be subject to significant public attention would be preferable.

147. I therefore recommend that the appointment, tenure and removal conditions of the DMP and DDCS be amended to mirror those of the DPP. I acknowledge with respect the practical concerns of the JAG, but do not consider them obstacles to my recommendation.

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131 *Ibid* at para 18.

132 *Ibid*.

133 Subsection 9.1(2) of the *NDA*.

134 In accordance with subsection 101.15(6) of the *QR&O*, the acceptable causes for removal of the DMP or DDCS are (a) infirmity; (b) failure to satisfy the physical and medical fitness standards applicable to officers of the CAF; (c) misconduct; (d) failure in the due execution of their duties; or (e) positions incompatible with the due execution of their duties.

135 Subsections 101.15(5) and 101(7) of the *QR&O*.

148. I understand that most (and perhaps all) previous incumbents of the positions of DMP and DDCS have directly retired from the CAF during or at the end of their terms. Should future appointees choose not to retire, the possibility remains that they could be appointed as the JAG or as military judges.

> **Recommendation #7. The Director of Military Prosecutions and Director of Defence Counsel Services should be appointed by the Governor in Council, on the recommendation of the Minister of National Defence.**
>
> **The Director of Military Prosecutions and Director of Defence Counsel Services should hold office during good behaviour for a term of seven years, subject to removal by the Governor in Council at any time for cause with the support of a resolution of the House of Commons to that effect. They should not be eligible to be reappointed for a further term of office.**

iii. Authority of the Judge Advocate General to Issue Particular Instructions or Guidelines to the Director of Military Prosecutions

149. The JAG is authorized to issue "*general instructions or guidelines in writing*" regarding prosecutions or defence counsel services to the DMP and DDCS.[136] Such instructions or guidelines are available to the public.

150. The JAG may also issue to the DMP (but not to the DDCS) written instructions or guidelines with respect to particular prosecutions.[137] If this happens, the DMP must ensure that they are made available to the public, unless the DMP "*considers that it would not be in the best interests of the administration of military justice for any instruction or guideline, or any part of it, to be available to the public*".[138] Moreover, the JAG must provide the Minister with a copy of all instructions or guidelines issued to the DMP.[139]

151. Similar authority is granted to the Attorney General, who may issue written directives to the DPP with respect to the initiation or conduct of specific prosecutions.[140] All directives of this sort must be published in the *Canada Gazette*, but the Attorney General or the DPP may delay their publication until the completion of the specific prosecutions if either of them "*considers it to be in the interests of the administration of justice*".[141]

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136 Subsections 165.17(2), 249.2(2) and 249.2(3) of the *NDA*.

137 Subsection 165.17(3) of the *NDA*.

138 Subsections 165.17(4) and 165.17(5) of the *NDA*.

139 Subsection 165.17(6) of the *NDA*.

140 Subsection 10(1) of the *DPP Act*.

141 Section 11 of the *DPP Act*.

152. Chief Justice Lamer commented on the authority of the JAG to issue particular instructions or guidelines to the DMP. In his opinion, "*this power is in keeping with the role of the JAG as superintendent of the administration of the military justice system and does not adversely affect prosecutorial independence. Indeed, part of the superintendence function of the JAG must be to recognize the legitimate concerns of the chain of command in the disciplinary process*".[142]

153. According to the JAG, the authority to issue specific directives to the DMP is intended to allow rapid interventions to safeguard the legitimacy or stability of the military justice system (in rare cases). I have been informed that the CMPS has no record of particular instructions or guidelines having ever been given by the JAG to the DMP. This does not mean that the power could not be used more expansively by a future JAG having a broader view of what superintendence entails.

154. In my view, the existence of this power clearly limits the independence of the DMP. The fact that it exists for the DPP cannot, by itself, justify its existence within the military justice system. Important differences must be taken into account.

155. In the civilian system, the directives are given by a member of Cabinet who will be directly accountable to Parliament at the latest at "*the completion of the prosecution or any related prosecution*".[143] In the military justice system, where the need for independence is arguably made greater by the existence of a strong chain of command, particular instructions or guidelines may never be made public and are issued by an actor who is only indirectly – through the Minister – accountable to Parliament.

156. In my view, this power should be removed. The outgoing DMP shares this view. I believe that the legitimate concerns of the chain of command in the disciplinary process can adequately be conveyed to the DMP without the existence of this power. Those concerns could be discussed with the DMP just as they would currently be discussed with the JAG. Discussions of this sort could lead the DMP to voluntarily reconsider positions taken by the CMPS. A general directive of the JAG could instruct the DMP to give due consideration to the concerns of an accused's chain of command.

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142 Lamer Report, *supra* note 9 at 14.

143 Section 11 of the *DPP Act*.

157. If the decision is made not to remove the power entirely, it should, at a minimum, be exercised by the Minister, subject to the conditions found in the *DPP Act*. This would ensure the appropriate public transparency of the instructions given to the DMP.

> **Recommendation #8. Subsections 165.17(3) to 165.17(6) of the *National Defence Act* should be repealed.**
>
> **If a power to issue directives in respect of a particular prosecution is to remain, this power should, at a minimum, be granted to the Minister of National Defence personally and not the Judge Advocate General. Any directive issued to the Director of Military Prosecutions should be required to be in writing and to be published in the *Canada Gazette*. The Minister of National Defence or the Director of Military Prosecutions should be authorized to direct that the publication be delayed at the latest until the completion of the prosecution or any related prosecution if either considers this delay to be in the interests of the administration of military justice.**

158. In its submissions, the OJAG also recommended that the *NDA* be amended:

(a) "*to require that the DMP notify the JAG in a timely manner, of any issues of strategic relevance to the administration of military justice that arise in the performance of the DMP's duties, akin to the notices that the DPP is required to give to the* [Attorney General] *under section 13 of the DPP Act*";[144] and

(b) to require the DMP "*to notify the JAG when instructed to act for the* [Minister as counsel in respect of appeals]*, and to provide the JAG with a summary of any advice provided in this regard*".[145]

159. I believe it is unnecessary for me to make such recommendations. The first proposed requirement could adequately be enacted in a general instruction or directive of the JAG to the DMP. The concerns which underlie the second proposed requirement can also be addressed through the institutional relationships which exist between the Minister, the JAG and the DMP. In particular, the JAG may already discuss such concerns with the Minister in her capacity as his legal adviser in matters relating to military law.[146]

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144 Office of the Judge Advocate General Policy Paper #1, Submission for the Third Independent Review Authority, "The Relationship Between the Judge Advocate General and the Director of Military Prosecutions and the Director of Defence Counsel Services: Independence and Oversight" (January 8, 2021) at paras 22-26, 30.

145 *Ibid* at paras 27-30.

146 Section 9.1 of the *NDA*.

iv. Independence of Military Prosecutors and Defence Counsel

160. Most military prosecutors and defence counsel, apart from the DMP and DDCS, are legal officers of the CAF who are temporarily posted to the CMPS and to the Directorate of DCS as part of their career path.[147] As such, they remain at all times within the command of the JAG, and their duties are determined by or under the JAG's authority.[148] The JAG can assign legal officers to the CMPS or the Directorate of DCS or remove them. The JAG can also assess their performance while they act as military prosecutors or defence counsel, including for the purpose of their eventual promotion. If a promotion happens, it is made "*in accordance with orders and instructions issued by the Chief of the Defence Staff*" and subject to the approval of "*such officer as the Chief of the Defence Staff may designate*".[149]

161. This poses clear risks to the independence of legal officers posted to the CMPS or the Directorate of DCS. The risks are particularly acute for military defence counsel who are required, on a daily basis, to take positions which may be adverse to those taken by the chain of command.[150]

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147 The Directorate of DCS may also occasionally rely on the services of civilian defence counsel. Subsection 249.21(1) of the *NDA* provides that "[t]*he Director of Defence Counsel Services may be assisted by persons who are barristers or advocates with standing at the bar of a province*" (emphasis added). The pool is therefore not limited to officers of the CAF.

148 Subsections 4.081(2) and 4.081(4) of the *QR&O*.

149 Sections 11.01 and 12.01 of the *QR&O*.

150 The Directorate of DCS was set up further to the recommendations of the Defence Counsel Study Team's Report on the Provision of Defence Counsel Services in the Canadian Forces (August 15, 1997). It is worth noting that the authors of this report had anticipated many shortcomings of the current construct. They stated that an essential requirement for an independent defence counsel system was that the system "*be, and be seen by Canadian Forces (CF) members as, independent and acting at all times in their best interests*" (at iii). This involved that defence counsel be "*free of inappropriate organizational influences that could create, or reasonably be seen to create, a conflict of interest between the defence of the individual client and the counsel's personal interests in maintaining a beneficial relationship with the organization or its hierarchy*" (at iv). They recommended, among other things, that (a) "*an Office of Military Defence Counsel (OMDC) be established in the National Defence Act*" (recommendation 3); (b) "*the OMDC be funded by a budget that constitutes a separate line item in the National Defence budget and that the budget provide funding for all defence counsel related services*" (recommendation 4); (c) "*the National Defence Act be amended to provide that the Judge Advocate General is responsible for the provision of legal officers to the OMDC and administrative support to the OMDC as well as the development and issuance of general guidelines as to the structure and policies of the OMDC, but that the Judge Advocate General is not permitted to provide guidance or interfere in any way with the defence of individual cases*" (recommendation 7); (d) "*the terms of the legal officers assigned to the OMDC be established by regulation at three years; such terms to be modified in individual cases only at the written request of the legal officer, at the commencement of retirement leave, on the officer's acceptance of promotion, for misconduct, or for incapacity*" (recommendation 11); (e) "*legal officers assigned to the OMDC be required to perform only those duties assigned by the head of the OMDC*" (recommendation 14); (f) "*legal officers assigned to the OMDC be subject only to the OMDC chain of command in the performance of their duties, not the Canadian Forces or*

162. I have no doubt that most defence counsel *actually* act independently of the chain of command. But unfortunately I have heard anecdotal evidence of some being reluctant to make certain applications or to vigorously cross-examine high-ranking witnesses, particularly as the time for their promotion approaches. I have also been told, and have myself observed in town hall meetings, that some members of the CAF have concerns that military defence counsel may not effectively represent their interests at trial due to their own military affiliation.

163. I hasten to add that none of my comments should be understood as a criticism of the current JAG, Rear-Admiral Geneviève Bernatchez, or as a suggestion of improper interference on her part. Quite the opposite: the DMP, the DDCS and several other CAF and DND officials with whom I have met spoke highly, and with one voice, of her respect for the independence of the various actors of the military justice system. My team and I were also very impressed by her integrity and objectivity.

164. As reassuring as this may have been to us, it was also cause for concern. Personalities come and go, especially in the military which is characterized by temporary postings. I have, for example, heard of a former incumbent refusing to appoint new defence counsel to the Directorate of DCS until they would reduce the number of applications filed at courts martial.

165. And in early 2017, a former DDCS reported to the Assistant Deputy Minister (Review Services) that in the last years, he had "*effectively* [been] *shut out of knowing which legal officers had expressed a desire to come to DCS".*[151] He stated that this "*ha*[d] *the potential to severely influence the competence level within the organization as others unilaterally select who will come*".[152] Again, the integrity of the military justice system cannot depend on the respective personalities of the JAG, DMP and DDCS. Structural safeguards need to be implemented.

Judge Advocate General chain of command" (recommendation 15); and (g) "*legal officers in the OMDC, other than the head, have performance evaluation reports written and reviewed only by superior officers in the OMDC*" (recommendation 17).

151 Submission of the Director of Defence Counsel Services to the Assistant Deputy Minister (Review Services) (February 13, 2017), Annex Y to the Court Martial Comprehensive Review Report, *supra* note 64 ("**DDCS 2017 Submission to ADM(RS)**") at para 25.

152 *Ibid*.

166. In my view, the first and necessary step to providing military prosecutors and defence counsel with sufficient independence from the executive is to expressly recognize their distinct roles in regulations.

> **Recommendation #9. Specific provisions should be enacted in the *Queen's Regulations and Orders for the Canadian Forces* in respect of military prosecutors and military defence counsel. These provisions should expressly state that:**
>
> **(a) military prosecutors are local ministers of justice and have broader responsibilities to the military justice system and to the accused;**
>
> **(b) military defence counsel are advocates to their clients and have a duty of loyalty which requires them to commit fully to their clients' cause; and**
>
> **(c) military prosecutors and defence counsel may need to exercise their duties in a manner that may sometimes not accord with the views of the chain of command or of the Judge Advocate General.**

167. An amendment to the *NDA* is also required to clarify the meaning of the JAG's "*superintendence of the administration of military justice in the Canadian Forces".*[153] This amendment is intended to avoid interpretations which could prove prejudicial to the independence of military prosecutors and defence counsel. The *2018-2021 Office of the JAG Strategic Direction*[154] already recognizes that the mission of the OJAG includes "*to superintend the administration of military justice in the Canadian Armed Forces while respecting the independent roles of each statutory actor within the military justice system*".[155] But this is a minimum. The precise meaning of the superintendence of the JAG may depend on the policy choices made in response to my recommendations below.

> **Recommendation #10. Section 9.2 of the *National Defence Act* should be amended to clarify the meaning of the Judge Advocate General's "*superintendence of the administration of military justice in the Canadian Forces*". At a minimum, the *National Defence Act* should expressly provide that the superintendence must respect the independence of military prosecutors, military defence counsel and other statutory actors within the military justice system.**

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153 Subsection 9.2(1) of the *NDA*.

154 Online: <https://www.canada.ca/en/department-national-defence/corporate/organizational-structure/judge-advocate-general/2018-2021-office-of-the-jag-strategic-direction.html>.

155 *Ibid.*

168. The concerns described above were raised by the Auditor General in his 2018 report.[156] In response, the OJAG adopted a number of policy directions to provide the DMP and DDCS with more autonomy to manage their personnel.

169. Among these measures was a commitment to keep legal officers in prosecution and defence counsel positions for a minimum of five years. The JAG also provided the DMP and DDCS with complete authority and responsibility to approve the evaluation of prosecutors and defence counsel. The JAG, the DMP and the DDCS are of the view that such practices must be entrenched. I agree with their position and add some recommendations to address other concerns mentioned above.

> **Recommendation #11. The *Queen's Regulations and Orders for the Canadian Forces* should expressly provide that:**
>
> **(a) the Director of Military Prosecutions and Director of Defence Counsel Services must be informed of legal officers' interest in being posted to their respective divisions, and consulted by the Judge Advocate General about postings;**
>
> **(b) legal officers will normally be posted to the Canadian Military Prosecution Service or Directorate of Defence Counsel Services for a minimum term of five years;**
>
> **(c) legal officers posted to the Canadian Military Prosecution Service or Directorate of Defence Counsel Services are under the exclusive command of the Director of Military Prosecutions or Director of Defence Counsel Services, as the case may be, for all purposes, including the determination of their duties, disciplinary matters against them and performance assessments.**

156 2018 OAG Administration of Justice Report, *supra* note 89 at paras 3.83-3.86.

170. Various commentators invited me to consider further reforms, such as:

(a) civilianizing the positions of DMP and DDCS, or military prosecutors and defence counsel more generally;[157]

(b) having the Directorate of DCS rely principally on members of the Reserve Force who practice law in their civilian lives;[158] or

(c) establishing an Office of the Director of Defence Counsel Services ("**ODDCS**") as an independent unit, separate from the OJAG and responsible for its own budget and resources. This was recommended both by the DDCS and by the JAG, who stated her belief that the Directorate of DCS should not even continue to be under the general supervision of the JAG. The Deputy Minister also had a positive view of this proposed change.

171. The benefits sought to be achieved are easily understood. Civilianizing the positions of DMP and DDCS, or military prosecutors and defence counsel more generally, would provide them with entire independence from the chain of command. Having the Directorate of DCS rely on reservist legal practitioners would ensure that defence counsel would be less involved in the OJAG environment, but nevertheless have some degree of familiarity with the military. An independent ODDCS would provide substantially greater institutional independence to military defence counsel.

172. However, I am concerned that the proposed reforms may also have unintended drawbacks. For example, contrary to military judges, military prosecutors and defence counsel will not hold office until their retirement from the CAF, and may well wish to return to the OJAG at some point in their career. Requiring them to forego their military status could substantially reduce the pool of interested applicants from the OJAG. This could deprive the CMPS and the Directorate of DCS of applicants with considerable military experience, which I have accepted is an advantage in the military justice system.[159]

173. Moreover, an independent ODDCS would constitute a small unit of the CAF. I am concerned that it may, on its own, have difficulties securing a sufficient budget as well as administrative and human resources. The OJAG could need to continue to provide some administrative support. Furthermore, if defence counsel remain military, most of them will

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157 In the United Kingdom, the Director of Service Prosecutions is fully independent from the chain of command and acts under the superintendence of the Attorney General. The Service Prosecuting Authority, which he heads, relies both on civilian prosecutors and on military prosecutors from the British Army, the Royal Navy and the Royal Air Force. The current Director of Service Prosecutions and his predecessors were all civilians at the time of their appointment, but are not required to be.

158 In Australia, the Director, Defence Counsel Services has the responsibility of coordinating and managing the provision of legal assistance within the military justice system. I was told that most defence counsel are reservist legal practitioners who accept to act in matters on an *ad hoc* basis. As such, they are not permanently assigned to Defence Counsel Services.

159 See above at paras 67-68.

likely be former legal officers of the OJAG. When they leave the ODDCS, they likely will wish to reintegrate into the OJAG to serve in some other capacity. If this is how things unfold, it would defeat the benefits of institutional "separation". Establishing a distinct military litigation career path for prosecutors and defence counsel could be a promising solution, but would likely entail important changes to legal officers' current progression within the OJAG.

174. I believe a working group should fully weigh the benefits and drawbacks of these proposed reforms.

> **Recommendation #12. A working group should be established to consider further reforms aimed at enhancing the independence of military prosecutors and defence counsel. The working group should include an independent authority, as well as the Judge Advocate General, the Director of Military Prosecutions and the Director of Defence Counsel Services or their representatives. The reforms considered should, at a minimum, include:**
>
> **(a) the full or partial civilianization of the positions of Director of Military Prosecutions and Director of Defence Counsel Services, or military prosecutors and defence counsel more generally;**
>
> **(b) increased reliance by the Directorate of Defence Counsel Services on members of the Reserve Force who are legal practitioners;**
>
> **(c) the establishment of an Office of the Director of Defence Counsel Services as an independent unit, separate from the Office of the Judge Advocate General and not subject to its general supervision; and**
>
> **(d) the establishment of a distinct career path for military prosecutors and military defence counsel, potentially including special mechanisms for their promotion.**

D. MILITARY POLICE

175. Members of the military police play an important role in enabling the military justice system to achieve its objectives of fostering the discipline, effectiveness and morale of members of the CAF. The independence and professionalism of the military police, and confidence of CAF members in its performance, are important factors in achieving these objectives.

176. Members of the military police have a multifaceted role. They are first members of the CAF with operational military duties. They are simultaneously members of the military police who "*provide professional policing, security and detention services to the CAF and*

DND globally, across the full spectrum of military operations".[160] As such, they are responsible for traffic enforcement, emergency response, investigation into criminal and service offences, crime prevention, community relations programs, and several other roles.[161]

177. The importance of the independence of the military police from the executive, or the chain of command, cannot be understated. In *Campbell*,[162] the Supreme Court of Canada decided that in terms of their law enforcement activities "*police are independent of the control of the executive government*".[163] The Court recognized that police independence is a constitutional principle which "*underpins the rule of law*".[164]

178. All members of the military police belong to the Canadian Forces Military Police Group. The Canadian Forces Provost Marshal ("**CFPM**") heads this group. The CFPM:

(a) is "*an officer who has been a member of the military police for at least 10 years*" and who "*holds a rank that is not less than colonel*";[165]

(b) "*holds office during good behaviour for a term not exceeding four years*", which may be renewed, but may be removed by the CDS for cause, on the recommendation of an inquiry committee;[166]

(c) "*acts under the general supervision of the Vice Chief of the Defence Staff*"[167] ("**VCDS**"), who may issue both general or particular instructions or guidelines to the CFPM.

179. Until 2011, most members of the military police were subject to the chain of command in whichever division of the CAF they were posted.[168] In 2011, the CDS directed that all members of the military police be brought under the full command of the CFPM while conducting policing duties and functions. Members of the military police remain subject

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160 Military Police – Overview Document Prepared for the Independent Review Team (December 9, 2020) ("**Military Police Overview Document**") at 3.

161 *Ibid* at 5-6. The other roles include providing close protection to VIPs during a deployed operation, the provision of security to aircraft, crews and passengers, the provision of custody and detention of CAF members in Canada and during operations and the detention of non-CAF persons, such as enemy combatants. They also provide security support to Canadian embassies and consulates.

162 *R v Campbell*, [1999] 1 RCS 565 ("***Campbell***").

163 *Ibid* at para 29. See also *R v Wellwood*, 2017 CMAC 4 at paras 92-103.

164 *Campbell*, *supra* note 162 at para 29.

165 Subsections 18.3(1) and 18.3(2) of the *NDA*.

166 Subsection 18.3(3) of the *NDA*.

167 Subsections 18.5(1) and 18.5(2) of the *NDA*.

168 Kent Roach, "Police Independence and the Military Police", (2011) 49:1 Osgoode Hall Law Journal 117 at 139.

to lawful orders of the chain of command in the context of their other duties and functions.[169]

180. In my view, the independence of the military police from the chain of command in the context of their policing duties and functions can be bolstered in a number of ways.

i. Appointment, Tenure, Removal and Title of the Canadian Forces Provost Marshal

181. The JAG suggested that the independence of the CFPM from the chain of command could be reinforced by amending the appointment, tenure and removal conditions of the CFPM. The CFPM would be appointed and removable by the Governor in Council, not the CDS, and made accountable to the Minister, not the VCDS, in the performance of his duties and functions.[170] In practice, the tenure of the CFPM would therefore reflect the tenure of the Commissioner of the Royal Canadian Mounted Police. I believe that this outcome is desirable.

> **Recommendation #13. Section 18.3 of the *National Defence Act* should be amended to provide that the Canadian Forces Provost Marshal be appointed by the Governor in Council and hold office during pleasure. The Chief of the Defence Staff should accordingly have no authority to remove the Canadian Forces Provost Marshal.**
>
> **The Canadian Forces Provost Marshal should be responsible to the Minister of National Defence in the performance of his duties and functions. References to the Vice Chief of the Defence Staff in section 18.5 of the *National Defence Act* should consequently be replaced by references to the Minister of National Defence. Moreover, section 18.6 of the *National Defence Act* should be amended to provide that the Canadian Forces Provost Marshal report annually to the Minister of National Defence on the activities of the Canadian Forces Provost Marshal and the military police during the year.**

182. In its submissions, the Canadian Forces Military Police Group has also suggested that the title of the CFPM be changed to Provost Marshal General. This would be in keeping with other senior specialist designations in the CAF, such as the Surgeon General, the Chaplain General and the JAG. The military police asserts that the change of title would (a) ensure that it is understood that the holder of this position is the senior law enforcement officer within the CAF; and (b) reinforce the independence of the CFPM from

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169 Concept of Operations, Military Police Command and Control (C2) (January 7, 2011) at para 11.

170 The Commissioner of the Royal Canadian Mounted Police holds office during pleasure following appointment by the Governor in Council: subsection 5(1) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10.

the chain of command in policing matters. Other CAF and DND officials, including the JAG, were in favour of this change.

183. I have been informed that Director Generals in the CAF usually rank as generals. In a hierarchical institution like the military, future incumbents of the CFPM position holding a rank of colonel[171] may not receive the recognition and deference to which their law enforcement functions entitle them. I therefore recommend that the CFPM at least hold the rank of brigadier-general or its naval equivalent of commodore. In light of the reasons put forward by the military police, I am also supportive of the proposed change of title. However, I am of the view that these changes should not be viewed as substitutes for the more substantive changes recommended above, which are essential to safeguard military police independence.

Recommendation #14. The *National Defence Act* should be amended to restyle the Canadian Forces Provost Marshal as the Provost Marshal General and to provide that the Canadian Forces Provost Marshal holds a rank that is not less than brigadier-general.

ii. Authority to Issue Particular Instructions or Guidelines to the Canadian Forces Provost Marshal

184. Bill C-15[172] added subsection 18.5(3) to the *NDA* in 2013. It provides that the VCDS "*may issue instructions or guidelines in writing in respect of a particular investigation*". The CFPM must ensure that such instructions or guidelines are available to the public, but may decide against making them public if he "*considers that it would not be in the best interests of the administration of justice for the instruction or guideline, or a part of it, to be available to the public*".[173] I am informed that no particular instructions or guidelines have been issued to date.

185. Prior to this amendment, it was deemed inappropriate for the VCDS to issue directions regarding particular military police investigations. The 1998 *Accountability Framework* signed by the VCDS and CFPM of the day confirmed the authority of the VCDS to "*give orders and general direction to the CFPM to ensure professional and effective delivery of policing services*", but stipulated that "*the VCDS* [would] *not direct the CFPM with respect to specific military police operational decisions of an investigative nature*".[174] It also provided that "*the VCDS* [would] *have no direct involvement in individual ongoing investigations but* [would] *receive information from the CFPM to all necessary*

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171 I note that the current CFPM holds a rank of brigadier-general.

172 *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24 ("**Bill C-15**").

173 Subsections 18.5(4) and 18.5(5) of the *NDA*.

174 The citations were provided by the Military Police Complaints Commission ("**MPCC**"): Military Police Complaints Commission Submissions to the Independent Review Authority (January 7, 2021) ("**MPCC Submissions**") at para 151.

management decision making".[175] The CFPM had discretion to determine the information which would be shared with the VCDS.

186. Subsection 18.5(3) of the *NDA* was controversial when it was enacted. It was justified by the government of the day on the basis that it would allow the VCDS to provide the military police with information needed when its members would be operating in zones of armed conflict. Opposition members took issue with this rationale during the parliamentary debates on Bill C-15. They argued that military police do not go into live fire zones to conduct investigations. In any event, they noted that the wording of the provision is much broader than would be necessary to address this specific situation. Various amendments were unsuccessfully proposed.[176]

187. I am skeptical of this rationale. I do not believe any particular authority is required to provide members of the military police with information they need to assess risks to their safety, in the unlikely event they would choose to investigate in a battlefield situation.

188. In my view, subsection 18.5(3) of the *NDA* significantly encroaches on police independence. The threat posed by this provision is even greater than the threat from the authority of the JAG to issue particular directives to the DMP. This power of the VCDS (or the equivalent power which would be transferred to the Minister if Recommendation #13[177] is implemented) may prevent the constitution of *any* evidentiary record to begin with. I agree with the following submission of the MPCC:

> The authority conferred upon the VCDS is specifically and exclusively aimed at the heart of military policing duties, i.e., the investigation of offences. The fact that Military Police members have a dual role as police officers and as soldiers does not diminish the applicability of the legal principle of police independence to the Military Police when conducting law enforcement investigations. If it were otherwise, then questions must be raised as to why Parliament created the interference complaint mechanism in the 1998 *National Defence Act* amendments that established the Commission.[178]

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175 *Ibid*.

176 House of Commons Debates, Vol 146, No 226, 1st Sess, 41st Parl, March 1, 2013 at 15022-15040; House of Commons Debates, Vol 146, No 243, 1st Sess, 41st Parl, April 30, 2013 at 16065, 16612; Debates of the Senate, Vol 148, No 160, 1st Sess, 41st Parl, May 7, 2013 at 3865-3866; Debates of the Senate, Vol 148, No 163, 1st Sess, 41st Parl, May 21, 2013 at 3949; Debates of the Senate, Vol 148, No 173, 1st Sess, 41st Parl, June 12, 2013 at 4240-4241; Debates of the Senate, Vol 148, No 174, 1st Sess, 41st Parl, June 13, 2013 at 4261-4263.

177 See above at para 181.

178 MPCC Submissions, *supra* note 174 at para 154.

189. The CFPM, the MPCC, the JAG and a number of other people I consulted called for the repeal of this provision.[179] Both the CFPM and Professor Kent Roach also recommended that there be some codification of police independence in the *NDA*. I agree with their submissions.

> **Recommendation #15. Subsections 18.5(3) to 18.5(5) of the *National Defence Act* should be repealed.**
>
> **For greater clarity, section 18.5 of the *National Defence Act* should be amended to provide that the general supervision and authority of the Vice Chief of the Defence Staff (or of the Minister of National Defence if Recommendation #13 is implemented) to issue general instructions or guidelines do not include a power to give directions regarding specific law enforcement decisions in individual cases.**

iii. Standing to Make Interference Complaints

190. Subsection 250.19(1) of the *NDA* provides that "[a]*ny member of the military police who conducts or supervises a military police investigation, or who has done so, and who believes on reasonable grounds that any officer or non-commissioned member or any senior official of the Department has improperly interfered with the investigation may make a complaint about that person*" to the MPCC.

191. In 2011, Chief Justice LeSage adopted a submission of the MPCC and recommended that the standing to make an interference complaint be extended "*to include persons seconded to* [military police] *positions*".[180] He also recommended that subsection 250.19(1) of the *NDA* be amended "*to include improper interference with a policing duty or function*".[181] I was informed that the CFPM agreed with my predecessor's recommendations in this regard. Nonetheless, they have not yet been implemented.

192. Circumstances may arise where a member of the military police is aware of interference with a policing duty or function but chooses not to make a complaint. A number of commentators argued that police independence could be reinforced by broadening the standing to make a complaint to include any officer or non-commissioned member. This is the standing which currently applies for complaints about the conduct of members of the military police.[182]

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179 For an in-depth analysis of this question, see Roach, *supra* note 168 at 142-147.

180 LeSage Report, *supra* note 26 at 69.

181 *Ibid*.

182 Subsection 250.18(1) of the *NDA*.

193. I agree with their submissions. The public interest will be better served if every person informed of interference with the military police has a right to complain to the MPCC. The Chairperson of the MPCC already has the power to direct that no investigation be started or that an investigation be ended if "*the complaint is frivolous, vexatious or made in bad faith*".[183]

> **Recommendation #16. Subsection 250.19(1) of the *National Defence Act* should be amended to provide that "[a]*ny person, including any officer or non-commissioned member, who believes on reasonable grounds that any officer or non-commissioned member or any senior official of the Department has improperly interfered with a policing duty or function*" may make an interference complaint to the Military Police Complaints Commission.**

II. MILITARY JURISDICTION OVER CIVIL OFFENCES

194. Many acts or omissions are not prohibited by law in the civilian world, but nevertheless constitute service offences when committed by persons subject to the Code of Service Discipline ("**CSD**"), notably members of the Canadian Armed Forces ("**CAF**").[184] Disobedience of a lawful command,[185] absence without leave,[186] desertion,[187] and drunkenness[188] are offences of this sort. They can only be prosecuted before military courts and tribunals. Accordingly, neither the military police nor prosecutors need to determine in which system to proceed.

195. A vast array of other offences ("**civil offences**") are, however, subject to the concurrent jurisdiction of the civilian and military justice systems. Subject to considerations I will explain later, the military police and prosecutors may in those cases decide in which system to proceed.

196. Subsection 130(1) of the *NDA* incorporates as a service offence any "*act or omission* […] *punishable under Part VII, the Criminal Code or any other Act of Parliament*". It does not

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183 Paragraph 250.35(2)(a) of the *NDA*.

184 The persons subject to the CSD are listed in subsection 60(1) of the *National Defence Act*, RSC 1985, c N-5 ("***NDA***"). This list must be read in conjunction with the clarifications contained in sections 60 to 65 and in Chapter 102 of the *Queen's Regulations and Orders for the Canadian Forces* ("***QR&O***"). The persons subject to the CSD include (a) all members of the Regular Force of the CAF, at all times; (b) all members of the Special Force of the CAF, at all times; (c) all members of the Reserve Force of the CAF, in prescribed circumstances only; and (d) other persons, including civilians, in prescribed circumstances only. For further discussion of the limited application of the CSD to members of the Reserve Force, see below at paras 257-260.

185 Section 83 of the *NDA*.

186 Section 90 of the *NDA*.

187 Section 88 of the *NDA*.

188 Section 97 of the *NDA*.

matter whether the prohibited act or omission occurred in Canada[189] or abroad, provided that it would have been punishable if it had occurred in Canada.[190] Provincial penal offences are not subject to subsection 130(1) and cannot be tried by service tribunals.

197. The service offences incorporated by subsection 130(1) and the underlying civil offences have the same essential elements,[191] but the civilian justice system has jurisdiction[192] over the latter and the military justice system has jurisdiction over the former. Any civil offence incorporated as a service offence may be tried by court martial, except that murder, manslaughter and child abduction, if committed in Canada, must be tried by civilian courts.[193] Only a handful of civil offences may be tried by summary trial[194] and the accused even then can elect trial by court martial.[195] In recent years, summary trials for civil offences have been exceedingly rare.[196]

198. Concurrent jurisdiction means that the same offence can be tried before a military *or* a civilian tribunal. But it cannot be tried by both. An accused who is tried and acquitted of an offence in either system, or convicted and punished or discharged, cannot be tried again in the other system for the same offence or for any other substantially similar offence arising out of the same facts.[197]

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189 Paragraph 130(1)(a) of the *NDA*.

190 Paragraph 130(1)(b) of the *NDA*.

191 *Moriarity*, *supra* note 5 at para 7.

192 The civilian justice system has jurisdiction over offences committed abroad by persons subject to the CSD as a result of section 273 of the *NDA*, which contains an exceptional grant of extraterritorial jurisdiction.

193 Section 70 of the *NDA*. As per the annexes of the relevant annual reports of the Judge Advocate General ("**JAG**"), the numbers of charges under subsection 130(1) tried by courts martial per year are the following: (a) 48 of 161 charges (29.8%) for 2015-2016; (b) 46 of 147 charges (31.3%) for 2016-2017; (c) 86 of 204 charges (42.2%) for 2017-2018; (d) 25 of 113 charges (22.1%) for 2018-2019; and (e) 23 of 132 charges (17.4%) for 2019-2020.

194 Under sections 108.07(3) and 108.125 of the *QR&O*, the only civil offences which may be tried as service offences in summary trials by commanding officers or superior commanders are the offences prescribed in sections 129 (offences relating to public or peace officer), 266 (assault), 267 (assault with a weapon or causing bodily harm), 270 (assaulting a peace officer), 334 (theft, where the value of what is stolen does not exceed five thousand dollars), 335 (taking motor vehicle or vessel without consent), 430 (mischief) and 437 (false alarm of fire) of the *Criminal Code*, RSC 1985, c C-46, as well as the offence of possession of substance prescribed in subsection 4(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. As a result of paragraph 108.10(2)(c) of the *QR&O*, no civil offence may be tried in a summary trial by a delegated officer.

195 Subsection 108.17(1) of the *QR&O*.

196 As per the annexes of the relevant annual reports of the JAG, the numbers of charges under subsection 130(1) tried by summary trials per year are the following: (a) 11 of 1140 charges (1.0%) for 2015-2016; (b) 17 of 911 charges (1.9%) for 2016-2017; (c) 18 of 853 charges (2.1%) for 2017-2018; (d) 8 of 836 charges (1.0%) for 2018-2019; and (e) 1 of 722 charges (0.1%) for 2019-2020.

197 Subsection 66(1) of the *NDA*.

A. MILITARY JURISDICTION OVER CIVIL OFFENCES COMMITTED ABROAD

199. No one I consulted opposed the extension of military jurisdiction to civil offences committed abroad by persons subject to the CSD, and with good reason. When Canada deploys military members and civilians abroad, it does so with the consent of the host country. A Status of Forces Agreement normally determines whether Canada or the host state will exercise primary jurisdiction over offences committed by the deployed Canadian nationals. The availability of military jurisdiction enables Canada, in its negotiations with foreign states, to secure primary jurisdiction over its deployed nationals, thereby ensuring that they will be treated fairly and in accordance with Canadian law. And it ensures that effective control will be exercised over persons whose conduct could engage Canada's responsibility under international law.

200. While the civilian justice system also has jurisdiction over offences committed abroad by persons subject to the CSD, practical impediments will often hinder the exercise of that jurisdiction.[198]

B. MILITARY JURISDICTION OVER CIVIL OFFENCES COMMITTED IN CANADA

201. A more contentious issue between the people I consulted is the extension, under paragraph 130(1)(a) of the *NDA*, of military jurisdiction over civil offences committed in Canada by persons subject to the CSD. As explained below, some take issue with the very existence of military jurisdiction over civil offences. Others take issue with its breadth. Indeed, paragraph 130(1)(a) currently knows no contextual limitations. It is a service offence for anyone subject to the CSD to commit a civil offence, even in circumstances entirely unrelated to military duties or military service. A member of the Regular Force who steals a book from a bookshop off-base, while on leave and in civilian clothes, can still be court-martialled or summarily tried by his or her commanding officer for that offence.

202. The constitutionality of paragraph 130(1)(a), as it applies to members of the CAF, is now beyond dispute. It has twice in recent years been upheld by the Supreme Court of Canada. In 2015, the Court decided unanimously in *Moriarity*[199] that paragraph 130(1)(a) was not constitutionally overbroad. It found that prosecution in the military justice system of members of the CAF charged with civil offences remained "rationally connected" to the purpose of maintaining the discipline, efficiency and morale of the military in all circumstances. "*Criminal or fraudulent conduct*", Justice Cromwell stated, "*even when committed in circumstances that are not directly related to military duties, may have an impact on the standard of discipline, efficiency and morale*".[200] Subsequently, in 2019, the majority of the Supreme Court held in *Stillman* that service offences under paragraph

198 See Gibson, *supra* note 58 at 30.

199 *Supra* note 5.

200 *Ibid* at para 52.

130(1)(a) are proper "*offence*[s] *under military law*" for which no constitutional right to trial by jury is guaranteed by the *Canadian Charter of Rights and Freedoms* ("***Charter***"),[201] even when the accused's military status is the only connection between the commission of the offence and the CAF.

203. I again emphasize here that the constitutionality of a statutory provision establishes its legality *but not its desirability*. Constitutionality is in this context an essential but minimum requirement. It is not determinative of the provision's fairness, soundness or policy wisdom, which are my concerns on this review.

204. The decision to try a civil offence by court martial has important repercussions for the accused. A few examples will illustrate the point. The accused will be deprived of the benefits of a preliminary inquiry and a trial by judge and jury, which the accused normally enjoys in the civilian justice system. Juries are widely perceived as bulwarks of due process. In a court martial, the accused will instead be judged either by a military judge alone, or by a military judge and a panel of five members of the CAF. As the Supreme Court of Canada stated in *Stillman*, "*a panel is not a jury*".[202] It is not an equivalent constitutional safeguard. Nor does it provide functionally equivalent protection:

> Important differences distinguish one from the other. For example, while a jury consists of 12 individuals, a panel consists of only five, thereby lowering the threshold for a finding of guilt. And, while jurors are drawn from the community at large, panel members are drawn from the military community only. Thus, the community embodied by a panel is a particular one. Further, and while juries are not designed to reflect any sort of hierarchy between the accused and the jurors, the composition of panels varies with the rank of the accused, and the system is designed to include a certain number of the accused's superiors. In this way, panel members are not all "peers" of the accused in the sense of being of equal rank. Finally, panel members are broadly permitted to take judicial notice of "all matters of general service knowledge", whereas jurors enjoy no such broad authorization.[203]

205. In a court martial, the accused will also be subject to trial and sentencing procedures which differ in many respects from the procedures of a civilian criminal court. If convicted, the accused is subject to a narrower and less flexible range of sanctions.[204] Military tribunals can impose sanctions that have no civilian counterparts, including dismissal with disgrace from Her Majesty's service, reduction in rank and reprimands. If convicted, the accused has narrower rights of appeal than in the civilian system; if acquitted, the accused

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201 Section 11(f) of the *Charter*: "*Any person charged with an offence has the right* […] *except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment".*

202 *Stillman*, *supra* note 2 at para 68.

203 *Ibid* (references omitted).

204 See Part III(C) of this Chapter, below at paras 299-306.

is subject to broader rights of appeal by the Minister of National Defence ("**Minister**") – rights of appeal unavailable to the Crown in the civilian system of justice.[205]

206. A decision to try a civil offence as a service offence also has important consequences for the community at large and for victims of the offence. The community is deprived "*of the chance to participate in the prosecution of serious criminal offences*".[206] More importantly, victims are deprived of rights guaranteed to them since 2015 by the *Canadian Victims Bill of Rights*, which does not apply to service offences investigated or prosecuted under the *NDA*.[207] A corresponding *Declaration of Victims Rights* for the military justice system was included in Bill C-77,[208] adopted by Parliament on June 21, 2019. But I have been advised that it may not be implemented for at least several years and I have been given no firm or even target date for its implementation. Even if Bill C-77 was to fully come into force sooner, it would fail to provide victims with rights and protections available to them in the civilian justice system.[209] In this regard as in others, the military justice system has failed to keep up with ongoing improvements to the civilian justice system.[210]

i. Proposed Removal of Military Jurisdiction

207. Some commentators argue that paragraph 130(1)(a) of the *NDA* should be repealed in light of the above concerns and the permanent availability of a civilian justice system in Canada. Several European and Scandinavian states, including important NATO allies of Canada, try all civil offences committed by their military personnel in peacetime in their civilian justice system, with or without particular rules or procedures to account for the accused's military status.[211]

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205 See Part IV(E) of this Chapter, below at paras 479-482.

206 *Stillman*, *supra* note 2 at paras 139-140.

207 Subsection 18(3) of the *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2.

208 *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 ("**Bill C-77**").

209 See Part II(B) of Chapter 2, below at paras 514-517.

210 See Part IV of Chapter 5, below at paras 746-752.

211 A helpful comparative study is contained in Chapter 5 of the Court Martial Comprehensive Review Report, *supra* note 64. In 2006, the Special Rapporteur of the United Nations Sub-Commission on the Promotion and Protection of Human Rights, supported by the Office of the High Commissioner for Human Rights and the International Commission of Jurists, issued *Draft Principles Governing the Administration of Justice through Military Tribunals*, 62nd Sess, UN Doc E/CN.4/2006/58 (13 January 2006). Principle No 8 provides that "[t]*he jurisdiction of military courts should be limited to offences of a strictly military nature committed by military personnel. Military courts may try persons treated as military personnel for infractions strictly related to their military status".* The intention of the Special Rapporteur was that civil offences committed by military personnel should be excluded from the jurisdiction of military courts. An analogous view was reiterated by the Special Rapporteur on the Independence of Judges and Lawyers in a report submitted to the United Nations General Assembly in 2013: *Report of the Special Rapporteur on the Independence of Judges and Lawyers,* 68th Sess, UN Doc A/68/285 (7 August 2013). In her report, the Special Rapporteur suggested that "[o]*rdinary criminal offences committed by military personnel should be tried in ordinary courts,*

a. Legitimacy Concerns

208. Proponents of this view usually question the *legitimacy* of trying civil offences in the military justice system. This stems, understandably, from a belief that everyone who commits a civil offence should be treated equally by the law, regardless of status or occupation. It also stems from a concern that service tribunals may not offer the same quality of justice to those tried before them. In this regard, I can do no better than cite the dissent of former Chief Justice Laskin in *MacKay*:

> In my opinion, it is fundamental that when a person, any person, whatever his or her status or occupation, is charged with an offence under the ordinary criminal law and is to be tried under that law and in accordance with its prescriptions, he or she is entitled to be tried before a court of justice, separate from the prosecution and free from any suspicion of influence of or dependency on others. There is nothing in such a case, where the person charged is in the armed forces, that calls for any special knowledge or special skill of a superior officer, as would be the case if a strictly service or discipline offence, relating to military activity, was involved.[212]

209. I share the values and concerns that underlie this view. If the current military justice system remained as it was in 1980, when *MacKay* was decided, I might well have recommended that the military jurisdiction over civil offences committed in Canada by persons subject to the CSD be entirely removed.

210. Fortunately, the military justice system has evolved substantially since 1980. Canada could have chosen to maintain its traditionally command-centric military justice system and to restrict its jurisdiction. Instead, it chose to improve its military justice system by increasing the independence of key actors and by adopting procedural safeguards present in the civilian justice system. Other jurisdictions, including the United Kingdom, New Zealand and Australia, enacted similar reforms.

211. While the Canadian military justice system has evolved notably since 1980, deficiencies remain. As discussed earlier in this Report, the independence of its key actors – military judges, prosecutors, defence counsel and members of the military police – needs to be further strengthened.[213] Other flaws, also identified in this Report, need to be remedied. My interviews with senior officials in the Department of National Defence ("**DND**"), with the CAF leadership and with the JAG have persuaded me that they recognize the need to strengthen the military justice system and are genuinely committed to pursuing that goal. My recommendations aim to show the way. I am confident they will be seriously considered and implemented where appropriate.

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unless regular courts are unable to exercise jurisdiction owing to the particular circumstances in which the crime was committed (i.e. exclusively in cases of crimes committed outside the territory of the state" (at para 99).

212 *MacKay v The Queen*, [1980] 2 SCR 370 ("***MacKay***") at 380.

213 See generally Part I of this Chapter, above at paras 44ff.

212. I am therefore not prepared to recommend the removal of military jurisdiction over civil offences committed in Canada on the basis of illegitimacy.

b. Efficiency Concerns

213. Another argument against removal of military jurisdiction over civil offences is that it could, at least in theory, impair the military justice system's ability to meet the disciplinary needs of the CAF. The purpose of the military justice system is not merely to supplement the civilian justice system where the latter cannot exercise its jurisdiction practically and effectively. Its distinct purpose is "*to deal with matters that pertain directly to the discipline, efficiency and morale of the military".*[214] Such matters arise constantly, both in Canada and abroad. They sometimes involve the commission in Canada of civil offences by persons subject to the CSD. Those offences may often need to be "*punished more severely than would be the case if a civilian engaged in such conduct*"[215] and, for that reason alone, "[r]*ecourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular needs of the military*".[216]

214. But it is hardly evident that the military justice system, in its present form, is in fact achieving its disciplinary objectives. I have been presented with no convincing evidence that civil offences constituting breaches of military discipline are dealt with more speedily than they would be in the civilian justice system, beset as it is with its own delays.[217] Nor have I been presented with convincing evidence that serious civil offences subject to prosecution in either system will be punished more severely in the military justice system.

215. If this is indeed so, efficiency concerns alone could therefore justify the removal of military jurisdiction over civil offences committed in Canada. There is preliminary data tending to show that the cost of a court martial may significantly exceed the cost of a criminal trial in the civilian justice system.[218] If so, and if the military and civilian justice systems are "*both capable of achieving substantially similar and acceptable public order and welfare purposes*", it may be argued, as the authors of the Court Martial Comprehensive Review Report did, that "*the current body of service offences is inefficient because it permits ordinary civilian offences to be tried in a system that is* […] *more costly than a suitable alternative".*[219] But they added this caveat:

> That being said, if a disciplinary effect were being achieved through the prosecution of ordinary civilian offences (as, for instance, in the cases of military members stealing from or assaulting other military members) within the court

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214 *Généreux*, *supra* note 7 at 293.

215 *Ibid*.

216 *Ibid*. See also *Stillman*, *supra* note 2 at paras 100-101.

217 See below at para 432.

218 Court Martial Comprehensive Review Report, *supra* note 64 at 217-218. I have not independently confirmed the validity of the data used by the authors of this report.

219 *Ibid.*

> martial system, and this effect could not be achieved through prosecutions in the civilian criminal justice system, then this efficiency analysis would need to change to account for the added disciplinary benefit that could – in theory – justice the extra costs of a court martial prosecution. […][220]

216. Several of my recommendations are designed to enable the military justice system to meet its disciplinary objectives, while continuing to guarantee due process to everyone tried by service tribunals. As mentioned earlier, I am confident that my recommendations will be seriously considered and implemented if accepted. I am not prepared to recommend the removal of military jurisdiction over civil offences committed in Canada on inefficiency grounds. I will, however, recommend that military prosecutors and members of the military police collect, retain and centralize data on the civil offences committed by persons subject to the CSD charged in either the military or civilian justice systems.[221] This will enable future reviewers of the military justice system to conduct more thorough assessments of how well the military justice system is meeting its disciplinary objectives.

217. I am also of the view that the removal of military jurisdiction over civil offences committed in Canada could risk creating an unwarranted void or "impunity gap". Several CAF officials, including the JAG, the Director of Military Prosecutions ("**DMP**"), Colonel Bruce MacGregor, and the commanding officer of the Canadian Forces National Investigation Service ("**CFNIS**"), have advised me that the civil offences tried in the military justice system are often less serious than similar offences tried in the civilian justice system. They indicated that many civil offences tried in the military justice system would not lead to prosecution in the civilian justice system. In addition, the DMP informed me that civilian prosecution services are usually content not to have to deal with civil offences committed by members of the CAF given their own case loads and the high cost of calling witnesses, including members of the military police who, as a result of their successive postings, may be spread across Canada or deployed abroad by the time of trial. The DMP provided me with anecdotal evidence to support his assertions.

218. For these reasons, I believe that recommending the removal of military jurisdiction over civil offences committed in Canada by persons subject to the CSD would, in the present context, go too far. The judgment of the Supreme Court in *Stillman* nevertheless includes a clear recognition that despite the *existence* of military jurisdiction, it may be inappropriate to *exercise* military jurisdiction in certain cases.[222] It is manifestly essential to ensure, in so far as one can, that military jurisdiction be exercised only in appropriate cases.

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220 *Ibid.*

221 See below at para 235.

222 *Stillman*, *supra* note 2 at paras 102-103, 160-182.

ii. Proposed Exclusion of Other Civil Offences from Military Jurisdiction

219. As noted above, the offences of murder, manslaughter and child abduction, if committed in Canada, can only be tried by civilian courts.[223] Some commentators have suggested that other civil offences should be added to that list. In particular, many people I consulted, including members of the CAF who attended town hall meetings with me, suggested that sexual assault should in no circumstances be tried in the military justice system.[224] It was also recommended that any offence committed in Canada and punishable by imprisonment for five years or more, for which an accused would be guaranteed the right to trial by jury in the civilian justice system, should be excluded from military jurisdiction.

220. In my view, however, the past and anticipated bolstering of the military justice system, the disciplinary needs of the CAF and the risk of creating an "impunity gap" all militate against a recommendation that additional civil offences be excluded from military jurisdiction.

C. Exercise of Military Jurisdiction in Appropriate Cases

i. The Current State of Affairs

221. The exercise of military jurisdiction over civil offences committed in Canada is currently governed by group orders and directives that guide the exercise of discretion by members of the military police and military prosecutors. In appropriate cases, they exercise that discretion in cooperation with the local civilian authorities.

222. The Military Police Group Orders provide an extensive list of factors to be considered by members of the military police when deciding whether to investigate or to continue to investigate a complaint. These factors relate to the mandate of the military police, the resources needed to investigate the complaint, expediency and "solvability"[225] concerns and to CAF-specific issues, such as "*impact on unit morale and cohesion*", "*whether the rank or position of subject makes it important to pursue*", "*military exigency*" and "*prejudice to good order or discipline*".[226]

223. These factors will in some cases lead to the conclusion that the civilian police authorities are better placed to investigate a complaint. For example, the commanding officer of the CFNIS has informed me that a complaint of a sexual assault committed off-base by a

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223 Section 70 of the *NDA*.

224 For further discussion of this question, see Part II(B) of Chapter 2, below at paras 514-517.

225 In this context, the solvability refers to the extent to which a case has the capacity of being solved.

226 CF MP Gp Order 2-340.1, *Investigative Discretion and Investigative Assessments*, **Schedule I** of this Report, at para 3.

member of the CAF against a civilian victim would typically be referred to the civilian police authorities for investigation.[227]

224. If a military police investigation leads to a decision to lay charges or to recommend that charges be laid, the Military Police Group Orders provide that "*the military justice system shall be considered as having primacy when choosing to proceed through either the civilian court system or the military justice system*".[228] If the investigation is conducted by the CFNIS,[229] a standard operating procedure states that investigators may be authorized by the commanding officer of the CFNIS to lay charges in the civilian justice system in "*exceptional situations*".[230]

225. As an exception to such general primacy of the military justice system, the Military Police Group Orders provide that domestic violence, child assault and impaired driving offences committed in Canada "*will normally proceed within the civil justice system*".[231] I am informed by the commander of the CFNIS that these exceptions are motivated by the existence in the civilian justice system of specialized resources for dealing with those matters.

226. A person with the authority to lay charges who wishes to lay a charge for an alleged offence under paragraph 130(1)(a) must obtain pre-charge legal advice.[232] This advice is provided by military prosecutors "*respecting all charges proposed by the CFNIS*" and for "*charges proposed by unit charge layers that must exclusively be tried by court martial*".[233]

227. A directive issued by the DMP highlights the process which military prosecutors giving pre-charge legal advice must follow, and the factors they must consider, to determine if the charges should proceed in the military or civilian justice system. The military prosecutor is instructed to carefully consider all relevant factors, including:

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227 See also CF MP Gp HQ – DPM Policy, Police Policy Advisory 11/2015, *Investigation of Criminal Sexual Offences*, **Schedule J** of this Report, at paras 3, 6.

228 CF MP Gp Order 2-300, *Law Enforcement Operations – General*, **Schedule K** of this Report, at para 11; CF MP Gp Order 2-363, *Laying Criminal and Service Charges*, **Schedule L** of this Report, at para 10.

229 For further explanation of the mandate of the CFNIS, see below at para 309.

230 CFNIS Standard Operating Procedure, Chapter 2, Police Operations, 238, *Charge-Laying*, **Schedule M** of this Report, at para 39.

231 CF MP Gp Order 2-300, *Law Enforcement Operations – General*, Schedule K of this Report, at para 14.

232 Section 107.03 of the *QR&O*.

233 DMP Policy Directive 002/00, *Pre-Charge Screening* (September 1, 2018), online: <https://www.canada.ca/content/dam/dnd-mdn/documents/legal-juridique/policies-directives/dmp-dpm-policy-directive-002-00-pre-charge-screening-verification-prealable-accusation.pdf>, at para 4.

- the degree of military interest in the case, as reflected by factors such as the place where the offence was alleged to occur, or whether the accused was on duty at the time of the alleged offence;
- the degree of civilian community interest in the case;
- the views of the victim;
- whether the accused, the victim, or both are members of the CAF;
- whether the matter was investigated by military or civilian personnel;
- the views of the investigative agency;
- geographic considerations such as the current location of necessary witnesses;
- jurisdictional considerations where, for example, the offence was allegedly committed abroad;
- post-conviction consequences; and
- the views of the Commanding Officer, as expressed through the unit legal advisor, with respect to unit disciplinary interests.[234]

228. To make this determination, the assigned military prosecutor "*may communicate directly with civilian authorities having concurrent jurisdiction, either before or after a charge is laid*", but always after consulting the appropriate Deputy Director of Military Prosecutions ("**DDMP**").[235] "*Where consensus is not achieved by consultation between the Prosecutor, civilian authorities and unit legal advisor*", it is up to the appropriate DDMP to "*continue the consultation process to resolve the matter*".[236] No further conflict resolution mechanism is prescribed.

229. Any charge laid in the military justice system which is to be tried by court martial will be referred to the DMP. The DMP then assigns a military prosecutor to conduct a post-charge review and to determine whether to "prefer" the charge. No accused may be tried by court martial unless the charges against him or her have been preferred.[237]

230. The DMP has issued another directive to guide this post-charge legal advice process. This directive is nearly identical to the pre-charge screening directive for the determination of whether charges should proceed in the military or civilian justice system. Both directives refer to the same factors.[238]

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234 *Ibid* at para 23.

235 *Ibid* at para 22.

236 *Ibid* at para 24.

237 Section 165 of the *NDA*.

238 DMP Policy Directive 003/00, *Post-Charge Review* (September 1, 2018), online: <https://www.canada.ca/content/dam/dnd-mdn/migration/assets/FORCES_Internet/docs/en/about-policies-standards-legal/dmp-dpm-policy-directive-003-00-post-charge-review-revision-post-accusation.pdf> at paras 25-32. Similar rules are contained in DMP Policy Directive 004/00, *Sexual Misconduct Offences* (December 15, 2017) at paras 17-26, and DMP Policy Directive 007/00, *Responding to Victims' Needs* (December 15, 2017) at paras 10-13.

231. The majority of the Supreme Court of Canada stated in *Stillman* that "*Crown counsel advised the Court during oral argument that, to his knowledge, there has not been a single instance in which military prosecutors and civilian prosecutors could not agree on which system should handle a particular matter. This speaks to the cooperation and mutual respect between prosecutorial authorities in these two systems*".[239]

232. This fact was reiterated by the DMP during my meeting with him. I was also informed that the DMP is a member of the Federal/Provincial/Territorial Heads of Prosecutions Committee, which meets at least twice each year. I understand that the DMP's membership in this committee allows for the development of cooperative working relationships with the civilian heads of prosecutions. The DMP advised me that, in practice, the military and civilian prosecution services are not engaged in a continuous struggle to secure jurisdiction over matters. Informal phone calls suffice to resolve the very rare issues that may arise.

233. To better understand the practical results of the current policy, I asked the Office of the JAG ("**OJAG**") for a breakdown of the civil offences tried by courts martial and by summary trials over the past few years. I also asked whether, in its view, such offences had a military connection other than the status of the accused. Unfortunately, the OJAG advised me that "[p]*ractically, there is* [no] *extant information that directly answers this query. The information that could bear on any inquiry as to nexus is widely dispersed in unit disciplinary registries in defence establishments across the country, and abroad and in military police reports*".[240] It nevertheless provided me with information taken from the records of disciplinary proceedings or statements of particulars of the offences tried by summary trial or by court martial from 2016 to 2020.

234. According to the information provided, most of the civil offences tried by the military justice system during this period had a military connection beyond the status of the accused. For example, in some cases the offence was committed abroad, on a defence establishment or in military housing, or involved military victims or CAF property. For the remainder of the civil offences, the information provided was ultimately too skeletal to lend itself to informed analysis. In addition, it is likely that a substantial portion of the offences tried from 2016 to 2020 were investigated and charged in the midst of the uncertainty surrounding the outcome of the *Stillman* case. Therefore, it is not clear that past determinations of whether to proceed in the civilian or military justice systems would accurately predict the future approach to this issue.

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239 *Stillman*, *supra* note 2 at para 103.

240 Answer to Request for Information #36 (OJAG).

235. To allow subsequent reviewers to properly assess how the existing criteria for determining jurisdiction are being applied, I recommend that military prosecutors and members of the military police collect, retain and centralize data on the civil offences committed by persons subject to the CSD charged in either the military or civilian justice systems (subject, in the latter case, to the CAF being informed).

> **Recommendation #17. The Canadian Forces Military Police Group and Canadian Military Prosecution Service should collect, retain and centralize data on the civil offences committed by persons subject to the Code of Service Discipline charged in either the military or civilian justice systems. The data should, at a minimum, include the number of civil offences allegedly committed by persons subject to the Code of Service Discipline which formed the basis of charges, the nature of such offences, the rationale for the determination of which system the charges were proceeded in, the time elapsed between the complaint and the completion of the trial and the outcomes of the charges, including the punishments imposed if any.**

236. Although I have been told the current processes seem to have operated smoothly to date, I still have some concerns, even without the data described above.

ii. Criticisms of the Current State of Affairs

a. Insufficient Independence of Decision-Makers

237. First, as noted by the dissent in *Stillman*, the decision to determine whether to proceed in the military or civilian justice system is currently exercised by members of the military police and military prosecutors who do not enjoy the same guarantees of independence as their civilian counterparts.[241] This may lead to an uneven and/or biased application of the criteria in the Military Police Group Orders and directives issued by the DMP.

238. This is not a purely hypothetical concern. Members of the military police who participated in a town hall meeting with me shared anecdotal evidence that domestic violence offences committed between members of the CAF (which should generally be referred to the civilian justice system in accordance with the Military Police Group Orders) had sometimes been minimized as quarrels and disturbances.[242] In the result, they were classified as offences over which the military justice system enjoys exclusive jurisdiction.

239. Certain commentators have suggested that the criteria to determine whether a civil offence will be tried in the military justice system should be listed in the *NDA* or enforced by the courts. I am not convinced that this would be appropriate in the context of a court martial system which is already criticized for its delays. I agree that an enforceable

241 *Stillman*, *supra* note 2 at para 173.

242 Section 86 of the *NDA*.

"military nexus" test would risk becoming the subject of pre-trial jurisdictional applications in an important number of cases, thereby "*causing military courts to engage in an unwieldy and unhelpful threshold inquiry that distracts from the merits*".[243]

240. In my view, the solution to this concern is to bolster the independence of members of the military police and military prosecutors. I am not concerned about giving discretion to decision-makers who are sufficiently independent from the chain of command. Several recommendations contained in this Report are aimed at achieving this objective.[244] However, I am not prepared to recommend, in addition, that the discretion to determine the appropriate jurisdiction in which to pursue a civil offence committed by persons subject to the CSD be controlled by the courts.

b. Substance and Transparency of the Policy Criteria

241. My main concern with the factors specified in the Military Police Group Orders and directives issued by the DMP is that they are extremely broad and offer little clarity about the proper outcome in any given case. They also lack transparency given that (a) the factors to be considered by members of the military police and military prosecutors do not require them to work in a coordinated way; and (b) the Military Police Group Orders are not easily accessible to the public, unlike the directives issued by the DMP. This lack of transparency can easily be remedied.

> **Recommendation #18. The Canadian Forces Provost Marshal and Director of Military Prosecutions should coordinate the approaches of military prosecutors and members of the military police to the exercise of military jurisdiction over civil offences committed by persons subject to the Code of Service Discipline. The Canadian Forces Provost Marshal should also make the portions of the Military Police Group Orders on the exercise of military or civilian jurisdiction over such offences easily accessible to the public.**

242. As to the substance of the policy criteria themselves, I believe that a simple list of factors is insufficient guidance in light of the important consequences which the exercise of military jurisdiction entails.[245] I recommend that the members of the military police and military prosecutors commit to clear principles and presumptions. Such principles and presumptions would certainly remain general and be subject to exceptions. Courts should not have the power to review how authorities made their decision on where to proceed with charges. However, I believe such principles and presumptions would increase consistency and predictability in choices of jurisdiction and make them less dependent on the particular personalities of members of the military police or military prosecutors.

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243 *Stillman*, *supra* note 2 at para 99.

244 See Parts I(C) and I(D) of this Chapter, above at paras 117ff.

245 See above at paras 204-206.

Consistency and predictability are particularly desirable in light of the high turnover rates which, due to the nature of military postings, characterize occupations in the CAF.

243. The United Kingdom offers a useful comparative example. A protocol on the exercise of jurisdiction over alleged civil offences committed by a person subject to service law in England and Wales, entered into by the Director of Service Prosecutions, the Director of Public Prosecutions and the Ministry of Defence, contains clear principles and presumptions on the exercise of their concurrent jurisdiction. This protocol states that "[t]*he overriding principle is the requirement of fair and efficient justice*",[246] which is to be determined on the basis of factors such as the existence of linked cases, the availability of witnesses, the presence of a strong service disciplinary context, the need to have regard to the maintenance of discipline as one of the statutory purposes of sentencing and the appropriateness of the sentencing powers available in the civilian and military justice systems.[247] Importantly, the England and Wales Prosecution Protocol clearly indicates that offences alleged against members of the military should normally be dealt with in the civilian justice system if they "*affect the person or property of civilians*" or involve civilian co-accused, but should normally be dealt with in the military justice system in other situations.[248]

244. In the Canadian context, I believe the optimal solution would be for the DMP, the Director of Public Prosecutions and the provincial and territorial heads of prosecutions to reach a common understanding of the criteria to guide the determination of whether to pursue civil offences committed by persons subject to the CSD in the military or civilian justice systems. To the greatest extent possible, the military police and other Canadian police forces should also be involved in this endeavour.[249] I recognize, however, that this solution may pose practical challenges due to the sheer number of parties which would need to be involved. Even if no multilateral understanding is attempted or reached,

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246 Protocol on the Exercise of Criminal Jurisdiction in England and Wales Between the Director of Service Prosecutions and the Director of Public Prosecutions and the Ministry of Defence (November 29, 2016), **Schedule N** of this Report (the "**England and Wales Prosecution Protocol**") at para 2.2. I understand that a protocol between the Association of Chief Police Officers, the Ministry of Defence Police and the Service Police also exists to determine which police force will assume responsibility for the investigation of an alleged offence in situations where there is concurrent jurisdiction in England and Wales. The signatories to the England and Wales Prosecution Protocol agreed "*to draw* [the] *protocol to the attention of police forces and* [to] *seek the agreement of those forces to bear in mind the principles contained in* [the protocol and, where any issue arises as to appropriate jurisdiction,] *to consult other interested police forces as early as possible, as well as th*e [Crown Prosecution Service] *or* [Service Prosecuting Authority] *as appropriate, in order to ascertain the most appropriate jurisdiction in which the suspect should be charged*": *Ibid* at para 1.5.

247 *Ibid* at para 2.4.

248 *Ibid* at para 2.2.

249 The federal, provincial and territorial authorities already participate in a robust network of committees and forums in which they may exchange their views and ideas on the administration of justice within their respective jurisdictions. It would likely be possible to establish a working group on the exercise of military jurisdiction within one of such committees and forums.

however, nothing stops the DMP and Canadian Forces Provost Marshal from unilaterally defining, in clear language, the principles and presumptions described above.

245. I will not attempt to exhaustively define such principles and presumptions. Due consideration should, of course, be given to the example provided by the England and Wales Prosecution Protocol. Another important principle for pursuing the case in the military justice system could be whether the offence has sufficient connection to the discipline, efficiency and morale of the CAF to justify the important repercussions on the accused, the victims and on the community at large. Presumptions could be drawn based on the military or civilian status of the victims or of the property involved in an offence, as in England and Wales. They could also be based on the nature of the offences and circumstances of their commission, taking into account the respective expertise and resources of the military and civilian justice systems, as well as the greater public confidence which may be enjoyed by the civilian justice system for dealing with particular offences.

246. I wish to stress, however, that it is important to avoid the conclusion that *any* civil offence committed by a member of the CAF will have sufficient disciplinary aspects to justify proceeding in the military justice system. When Bill C-77 is fully implemented, section 55(2) of the *NDA* will provide that "*the behaviour of persons who are subject to the Code of Service Discipline relates to the discipline, efficiency and morale of the Canadian Forces even when those persons are not on duty, in uniform or on a defence establishment*". However, the relevant question for determining where to proceed ought not to be the simple existence of a relationship to the discipline, efficiency and morale of the CAF. Rather, it must consider the intensity of that relationship, and the proportionality of the consequences that will flow from the determination of jurisdiction.

247. It is also important to recognize that the civilian justice system is not *entirely* unable to assist in upholding the discipline, efficiency and morale of the CAF. Civilian courts are not prohibited from considering an accused's military status in determining an appropriate sentence. Moreover, the decisions reached by a civilian court are public and may be publicized in an accused's unit to achieve a deterrent effect on other members.

> **Recommendation #19. The Director of Military Prosecutions and Canadian Forces Provost Marshal should commit the Canadian Military Prosecution Service and the Canadian Forces Military Police Group to clear principles and presumptions to determine whether civil offences committed by persons subject to the Code of Service Discipline will be investigated and prosecuted in the civilian justice system or in the military justice system. Preferably, appropriate criteria would emerge from a multilateral understanding reached between the Director of Military Prosecutions, the Director of Public Prosecutions and the provincial and territorial heads of prosecutions, in consultation with the Canadian Forces Military Police Group and civilian police forces. However, the failure to attempt or to reach a**

multilateral understanding should not prevent the Director of Military Prosecutions and the Canadian Forces Provost Marshal from unilaterally refining the current criteria.

iii. Lack of a Conflict Resolution Mechanism

248. Another concern I have with the factors in the Military Police Group Orders and directives issued by the DMP is that they provide no satisfactory mechanism to resolve a jurisdictional conflict between the military and civilian authorities. The current solution if no consensus is reached is to continue consultations until it is.

249. As discussed above, I have been told that no disagreements have arisen in the past. I do not expect recurring jurisdictional conflicts to emerge in the future if clear principles and presumptions are implemented. This does not, however, preclude the need for a conflict resolution mechanism in the unlikely event of a jurisdictional conflict.

250. In England and Wales, in case of a disagreement on the exercise of jurisdiction, the Director of Public Prosecutions has the final decision, in keeping with the "*established principle that where there are overlapping civilian and Service jurisdictions and authorities* […]*, the civilian jurisdictions and authorities have precedence*".[250]

251. The principle of civilian jurisdictions taking precedence over military jurisdictions is not unknown to Canadian law. During the consideration of the *National Defence Act* by the House of Commons in 1950, the Honourable Brooke Claxton, then Minister of National Defence, explained that the domestic military jurisdiction over civil offences was required "*to take care of the case where the civil court does not act or cannot act*".[251] Minister Claxton further explained that the civil authorities would enjoy supremacy over the military authorities in all cases where the civil authorities could act and were willing to act. As he explained, "[t]*he civil authority is always supreme".*[252]

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250 England and Wales Prosecution Protocol, *supra* note 246 at paras 2.1, 2.3.

251 House of Commons Debates, Vol IV, 2nd Sess, 21st Parl, 1950 at 3320.

252 *Ibid*. The supremacy of the civil authorities to which Minister Claxton refers was largely safeguarded by the fact that any offence tried in the military justice system could subsequently be retried in the civilian justice system, regardless of the outcome of the court martial or summary trial. The converse was not true. If a civilian court had already tried an offence, a person subject to the CSD could not be retried in the military justice system for the same offence or for any included offence. This rule came to an end with the advent of the *Charter* and, in particular, of the constitutional right to protection against double jeopardy which section 11(h) guarantees to any person charged with an offence. The relevant provisions of the *NDA* were amended in 1985 by the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, SC 1985, c 26. Section 66(1) of the *NDA* now provides persons subject to the CSD with a bilateral protection against double jeopardy. While desirable, this bilateral protection removed an important practical check against the expansion of military jurisdiction. No similar check can today be found in the *NDA*.

252. In my view, the same principle continues to prevail. In fact, it is evident in several aspects of the modern Canadian military. The Chief of the Defence Staff acts "*under the direction of the Minister*"[253] and must issue or have issued "*all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister*".[254] The CAF are "*organized by or under the authority of the Minister*".[255] The outcomes of summary trials can be judicially reviewed by civilian courts. The verdicts and sentences imposed at courts martial can be appealed to the Court Martial Appeal Court of Canada ("**CMAC**") and to the Supreme Court of Canada, both civilian courts. Any administrative or operational decision taken by the CAF is ultimately subject to the control of civilian authorities through the adoption of statutes, ministerial accountability or judicial review.

253. The same principle of the civilian system taking precedence over the military system should apply when there are jurisdictional conflicts. This is entirely consistent with the military justice system's status as an exceptional system of justice. None of this detracts from the qualification of the military justice system as a "*full partner in administering justice alongside the civilian justice system*".[256]

> **Recommendation #20. In the unlikely event of a conflict between civilian authorities and military authorities over the exercise of jurisdiction over civil offences committed by persons subject to the Code of Service Discipline, the civilian jurisdiction and authorities should have precedence.**

D. Exercise of Military Jurisdiction against Civilians, Former Members and Young Offenders

254. Certain commentators consulted during my review have taken issue with (a) the existence of military jurisdiction over civil offences committed by civilians in certain circumstances;[257] (b) the continued existence of military jurisdiction over persons who have since the alleged service offence ceased to be subject to the CSD;[258] and (c) the possibility of exercising military jurisdiction over young offenders who would, in the civilian justice system, benefit from the protections of the *Youth Criminal Justice Act*.[259]

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253 Subsection 18(1) of the *NDA*.

254 Subsection 18(2) of the *NDA*.

255 Subsection 17(1) of the *NDA*. See also Jean-Bruno Cloutier, "L'utilisation de l'article 129 de la Loi sur la défense nationale dans le système de justice militaire canadien", (2004) 35 *Revue de droit de l'Université de Sherbrooke* 1 at 13.

256 *Stillman*, *supra* note 2 at para 20.

257 Paragraphs 60(1)(f) to 60(1)(j) of the *NDA*.

258 Section 69 of the *NDA*.

259 SC 2002, c 1. Youth between the ages of 16 and 18 can enroll in limited capacities in the CAF, with parental consent. Accompanying young dependents could also be subject to the CSD.

255. I have not received sufficient submissions to properly assess the prevalence of these situations and the potential consequences of these proposed reforms. At a minimum, further thought should be given to these issues and clear principles and presumptions should be formulated to deal with them. Guidance could, for example, be taken from the *Wehmeier* decision in which the CMAC terminated court martial proceedings against an accompanying civilian on finding, under section 7 of the *Charter*, that "*the prosecution of the respondent in the military justice system* [was] *arbitrary because it* [lacked] *any connection with the objectives sought to be achieved by making accompanying civilians subject to the CSD*".[260] The CMAC stressed that the issue to be resolved in each case was "*not whether the respondent should be prosecuted at all but whether the interest in having him tried in the military justice system is proportional to his loss of rights when tried in that system*".[261]

256. In making the following minimal recommendation, I should not be taken to disagree with proposed reforms which would be more substantial if a more thorough review determines they are desirable.

> **Recommendation #21. A working group should be established to conduct a review of the exercise of military jurisdiction over civil offences committed by young offenders and by civilians subject to the Code of Service Discipline and of the exercise of continuing military jurisdiction. The working group should consider the need for reform of the current jurisdictional rules and, if such need exists, make recommendations on the means of reform. The working group should include an independent authority, representatives from the Department of Justice Canada and representatives from the military justice system.**
>
> **In the interim, clear principles and presumptions should be formulated for such exercises of military jurisdiction.**

257. Another issue is in pressing need of further consideration by the CAF. It has to do with the military justice system's ability to discipline members of the Reserve Force. Currently, the members of the Reserve Force are subject to the CSD in limited circumstances only, such as when they are undergoing drill or training, in uniform, on duty or on active service.[262] As a result, I understand that there are important obstacles to holding some reservists accountable for conduct which is contrary to the values and ethics of the CAF

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260 *R v Wehmeier*, 2014 CMAC 5 (application for leave to appeal to the Supreme Court of Canada dismissed) ("***Wehmeier***") at para 58.

261 *Ibid* at para 61.

262 Paragraph 60(1)(c) of the *NDA*.

and which reflects very badly on the institution, but in which such reservists engage in their own time.

258. The issue is particularly acute when reservists engage in sexual misconduct or hateful conduct. Such behaviours cannot be prosecuted in the civilian justice system unless they reach the high thresholds of the criminal offences of sexual assault and hate speech, which they often do not. They can only be prosecuted in the military justice system if they are committed by a person subject to the CSD. Administrative remedial measures may to a certain extent be available against reservists who engage in such conduct. However, such measures are poor substitutes for disciplinary action.[263]

259. This issue has been brought to my attention by several CAF officials who I met during my review, including the commanders of the Canadian Army, Royal Canadian Navy and Royal Canadian Air Force, the Chief Reserves and Employer Support and commanding officers who attending town hall meetings with me. All agree that the CAF needs to be able to hold the members of its Reserve Force to at least certain key standards of conduct at all times.

260. No simple solution was offered. On the one hand, there are valid reasons not to extend the applicability of the *whole* set of service offences to members of the Reserve Force at all times. Some service offences could unduly interfere with the personal freedom or other professional occupations of members of the Reserve Force. On the other hand, I am wary of devising alternative solutions which could have important policy repercussions without the benefit of submissions and information. I therefore recommend that this concern be the subject of a separate review.

> **Recommendation #22. A working group should be established to conduct a review of the challenges created by the limited application of the Code of Service Discipline to members of the Reserve Force. The working group should consider the necessity for the Canadian Armed Forces of being able to hold the members of its Reserve Force to its key standards of conduct at all times, especially for sexual misconduct and hateful conduct. The working group should make recommendations on means of reform to achieve this objective.**

263 See Part V(F) of this Chapter, below at paras 418ff.

III. SERVICE OFFENCES AND PUNISHMENTS

261. Division 2 of Part III of the *National Defence Act*[264] ("***NDA***") details the service offences which persons subject to the Code of Service Discipline ("**CSD**") can be charged or dealt with and tried in the military justice system.

262. Several service offences are specific to the military context ("**purely military offences**").[265] Disobedience of a lawful command,[266] absence without leave,[267] desertion,[268] and drunkenness[269] are offences of this type. However, acts or omissions of persons subject to the CSD punishable under the federal laws of Canada[270] ("**civil offences**") or under the laws applicable in any place outside Canada where they have been committed[271] ("**foreign offences**") also constitute service offences.

263. The *NDA* also prescribes the punishments which may be imposed for all service offences. Some punishments, like imprisonment and fines, are equivalent to those available for criminal offences in the civilian justice system. Others are specific to the Canadian Armed Forces ("**CAF**"), although similar to sanctions available in other disciplinary regimes ("**military punishments**"). The military punishments include dismissal from Her Majesty's service (with or without disgrace), detention,[272] reduction in rank, forfeiture of seniority, severe reprimands, reprimands, confinement to ship or barracks, extra work and drill and stoppage of leave.[273]

264. I have some concerns about the current body of service offences which, in my view, is incoherent in many ways. A coherent structure is important to ensure the predictability of the law. A particular conduct should entail identifiable consequences with a fair degree of certainty. For example, the nature of the service offence which an accused is charged with determines (a) whether a summary trial may be held and the possibility for the

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264 RSC 1985, c N-5.

265 Sections 73 to 128 of the *NDA.*

266 Section 83 of the *NDA*.

267 Section 90 of the *NDA*.

268 Section 88 of the *NDA*.

269 Section 97 of the *NDA*.

270 Section 130 of the *NDA*.

271 Section 132 of the *NDA*.

272 Detention is distinct from imprisonment. Note A to section 104.09 of the *Queen's Regulations and Orders for the Canadian Forces* ("***QR&O***") explains that, "[i]*n keeping with its disciplinary nature, the punishment of detention seeks to rehabilitate service detainees, by re-instilling in them the habit of obedience in a structured military setting, through a regime of training that emphasizes the institutional values and skills that distinguish the Canadian Forces member from other members of society.* […] *Once the sentence of detention has been served, the member will normally be returned to his or her unit without any lasting effect on his or her career*".

273 Sections 139(1) and 146 of the *NDA* and section 104.13 of the *QR&O*.

accused to elect trial by court martial;[274] (b) the criteria for pre-trial custody;[275] (c) the applicability of certain processes, such as those which allow forensic DNA analysis and the identification, by fingerprints or otherwise, of accused persons and offenders;[276] and (d) the punishments available on conviction, including the particulars orders that may be made, such as orders to comply with the *Sex Offender Information Registration Act*.[277] As well, the possibility that discretionary decisions by particular actors in the system can make the consequences of a particular conduct more or less serious should be minimized.

265. I make certain recommendations to improve the coherence of service offences in the *NDA*. However, my recommendations are not a substitute for a thorough review by military justice experts of the general adequacy of the current body of service offences.

266. I also have concerns about the meaning and effect of certain military punishments, which do not appear to be well understood, even by the military justice actors who deal with them on a daily basis.

A. COHERENCE OF THE BODY OF SERVICE OFFENCES

i. Parties to Offences, Attempts and Conspiracies

267. Sections 72, 128 and 129(3) of the *NDA* identify who may be parties to service offences as well as attempts and conspiracies to commit service offences. They differ in many ways from the equivalent civilian rules, contained in sections 21 to 24 and 463 to 465 of the *Criminal Code*.[278] Three examples suffice to illustrate the problems which may arise as a result of these differences.

268. The first example is in relation to attempts. In the military justice system, an attempt to commit a purely military offence is an "*act, conduct, disorder or neglect to the prejudice of good order and discipline*".[279] Those are punishable by dismissal with disgrace from Her Majesty's service or less punishment, which includes imprisonment for less than two years.[280] The Canadian Military Prosecution Service ("**CMPS**") rightly pointed out "*the bizarre result that, in a significant number of cases, the maximum punishment available for an attempt* [is] *greater than for the actual offence*".[281] For example, a person who absents himself or herself without leave is liable to imprisonment for less than two years

274 Sections 108.07, 108.125 and 108.17(1) of the *QR&O*.

275 Sections 153 ("*designated offence*"), 158.4 and 159.3 of the *NDA*.

276 Divisions 6.1 and 6.2 of Part III of the *NDA*

277 SC 2004, c 10. Division 8.1 of Part III of the *NDA*.

278 RSC 1985, c C-46.

279 Subsection 129(3) of the *NDA*. In limited cases, attempts can also be charged under other provisions of the *NDA*: note G to section 103.01 of the *QR&O*.

280 Sections 129(1) and 139 of the *NDA*.

281 CMPS Submissions, *supra* note 87 at para 12(b).

or to less punishment,[282] but a person who unsuccessfully attempts to do so is, in addition, liable to dismissal with disgrace from Her Majesty's service.

269. The second example concerns conspiracies. Under section 128 of the *NDA*, a conspiracy to commit "*any offence under the Code of Service Discipline*" is an offence subject to a maximum punishment of imprisonment for seven years. Here also, the maximum punishment for the conspiracy often significantly exceeds the maximum punishment for the *actual commission* of a service offence.

270. This section also makes it a service offence to conspire in the commission of civil and foreign offences. Let us consider, for example, the case of a person subject to the CSD conspiring to commit the *Criminal Code* offence of public incitement of hatred. If the charge in the military justice system is for the *Criminal Code* offence of conspiracy for public incitement of hatred, the person will be liable to imprisonment for *two* years or less.[283] But if the charge is for the *service* offence of conspiracy for public incitement of hatred, the person will instead be liable to imprisonment for *seven* years or less.[284]

271. The solution adopted in the civilian justice system is more tailored to the circumstances. With limited exceptions, attempts to commit indictable offences are punishable by a lesser punishment than the actual commission of the offence, most often "*one-half of the longest term to which a person who is guilty of* [the] *offence is liable*".[285] For conspiracies for indictable offences, they are generally punishable by "*the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable*".[286]

272. The third and final example relates to the act of counselling or procuring offences. In the military justice system, a person who "*counsels or procures any person to commit*" a service offence is a party to that offence.[287] The person who counselled is not guilty of the offence counselled unless it is *actually* committed. If it is not, the counsellor may nonetheless be charged under subsection 129(1) of the *NDA* for having engaged in conduct prejudicial to good order and discipline.[288] That distinct service offence, as mentioned above, is always punishable by dismissal with disgrace from Her Majesty's service or by less punishment, including imprisonment for less than two years.[289]

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282 Subsection 90(1) of the *NDA*.

283 Paragraphs 319(1)(a) and 465(1)(c) of the *Criminal Code* and paragraph 130(2)(b) of the *NDA*.

284 This situation is expressly recognized in note E to section 103.595 of the *QR&O*: "*In view of the minimum and maximum punishments which are mandatory or permissive under the other Canadian or foreign law, careful consideration should be given to these aspects before it is decided to lay a charge under section 130 or 132 rather than section 128*".

285 Section 463 of the *Criminal Code*.

286 Paragraph 465(1)(c) of the *Criminal Code*.

287 Paragraph 72(1)(d) of the *NDA*.

288 Note E to section 103.01 of the *QR&O*.

289 Sections 129(1), 129(3) and 139 of the *NDA*.

273. The solution in the *Criminal Code* is preferable. First, the *Criminal Code* makes the person who counselled a party to (a) the offence counselled, "*notwithstanding that the offence was committed in a way different from that which was counselled*";[290] or (b) "*every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling*".[291] Second, if the indictable offence counselled is not committed, the person is liable to the punishment which could be imposed for an attempt.[292]

274. I recommend that the rules contained in sections 21 to 24 and 463 to 465 of the *Criminal Code* be reproduced, as appropriate, in the *NDA*. The rules of the *NDA*, as modified, should not apply to civil or foreign offences incorporated as service offences under subsections 130(1) or 132(1). For those, the civil or foreign rules governing the offences at issue can already be relied upon, and duplication could create risks of divergent outcomes for the same conduct based on discretionary decisions of the persons authorized to lay charges.

> **Recommendation #23. Sections 72 and 128 of the *National Defence Act* should be amended to mirror, as appropriate, sections 21 to 24 and 463 to 465 of the *Criminal Code*. Subsection 129(3) and the reference to section 72 in subsection 129(2) of the *National Defence Act* should be repealed. The rules of the *National Defence Act* on the identification of parties to offences as well as attempts and conspiracies to commit offences should not apply to service offences under subsections 130(1) or 132(1) of the *National Defence Act*.**

ii. Section 129 of the *National Defence Act*

275. Subsection 129(1) of the *NDA* provides that "[a]*ny act, conduct, disorder or neglect to the prejudice of good order and discipline*" constitutes a service offence. Pursuant to subsection 129(2), this prohibition extends to any contravention of the *NDA*, of "*regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof*", or of "*any general, garrison, unit, station, standing, local or other orders*". But it is not limited to those situations.[293]

276. Subsection 129(1) of the *NDA* punishes conduct going against "the standards of the day" in military conduct and ethics.[294] The accused may, in several cases, be convicted of conduct which is not specifically prohibited anywhere.

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290 Subsection 22(1) of the *Criminal Code*.
291 Subsection 22(2) of the *Criminal Code*.
292 Section 464 of the *Criminal Code*.
293 Subsection 129(4) of the *NDA*.
294 Cloutier, *supra* note 255 at 7.

277. The Court Martial Appeal Court of Canada ("**CMAC**") confirmed on two occasions that subsection 129(1) of the *NDA* is not so vague as to be unconstitutional, provided that the required particulars are properly provided to a person charged under that section.[295] Nonetheless, the prohibition remains extremely vague.[296] Its vagueness is compounded by differences in the French and English versions[297] and by the judicial interpretation which has been made of it.

278. Indeed, the CMAC recently decided that no evidence of *actual* prejudicial effects on good order and discipline needs to be introduced by the prosecution. "*If the conduct tends to or is likely to adversely affect discipline, then it is prejudicial to good order and discipline*".[298] And the triers of facts can infer prejudice from the circumstances by applying their military experience and general service knowledge. They err by failing to use such inferential reasoning in circumstances where it is possible to do so.[299]

279. Some commentators have called for the repeal of subsection 129(1). I disagree with their view. I believe that the necessity to maintain the discipline, efficiency and morale of the CAF justifies the existence, in the military justice system, of a power to sanction conduct shown to be prejudicial to good order and discipline, even if such conduct is not otherwise prohibited by the *NDA*.[300]

280. But I agree that there is something wrong with the current use of that power. In order to make the law clear and predictable, subsection 129(1) should only be a residual power, used when no other service offence exists to prohibit a specific behaviour. But year after year, it is among the two service offences most commonly adjudicated by service tribunals.[301] This is hardly reconcilable with the notion of a residual power. I therefore

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295 *R v Lunn*, [1993] CMAJ No 7; *R v Jones*, 2002 CMAC 11 at para 12.

296 One of the military prosecutors who briefed my team on behalf of the CMPS described subsection 129(1) of the *NDA* as the most complicated offence known to the law. Chief Justices Lamer and LeSage both recommended that section 129 of the *NDA* be amended to clarify the requisite elements of an offence thereunder: Lamer Report, *supra* note 9 at 67-69; LeSage Report, *supra* note 26 at 18-20. I have been informed that their recommendations were not implemented because "[t]*here has been no judicial determination or recommendation, at either the trial or appellant level, that s. 129 requires statutory amendment*": Implementation Status Report, *supra* note 79.

297 The CMPS has noted, for example, that the word "*disorder*" in the English version of subsection 129(1) of the *NDA* has no equivalent in its French version: CMPS Submissions, *supra* note 87 at para 12(a).

298 *R v Golzari*, 2017 CMAC 3 at paras 74-81.

299 *R v Bannister*, 2019 CMAC 2 at paras 65-69.

300 See also Cloutier, *supra* note 255 at 59.

301 Answer to Request for Information #36 (OJAG). The numbers of charges under subsection 129(1) tried by service tribunals per year are the following: (a) 361 of 1301 charges (35.6%) for 2015-2016; (b) 176 of 1058 charges (16.6%) for 2016-2017; (c) 285 of 1057 charges (26.7%) for 2017-2018; (d) 325 of 949 charges (34.2%) for 2018-2019; and (e) 304 of 854 charges (35.6%) for 2019-2020. The other service offence most commonly adjudicated by service tribunals is absence without leave (subsection 90(1) of the *NDA*).

recommend that new service offences be created, and that the scope of section 129 be limited.

a. Creation of New Service Offences

281. Sexual misconduct is currently prohibited under subsection 129(1). Indeed, where it does not amount to sexual assault under the *Criminal Code*, sexual misconduct is not directly prohibited by the *NDA*. Rather, the prohibition is contained in a Defence Administrative Order and Directive ("**DAOD**").[302] Sexual misconduct can form the basis of a service offence because contravening a DAOD is deemed by subsection 129(2) to constitute conduct prejudicial to good order and discipline. The same logic applies to hateful conduct, prohibited by another DAOD.[303]

282. Therefore, the same offence currently punishes serious misconduct such as sexual misconduct and hateful conduct on the one hand, and minor misdemeanours such as failure to have properly shaved or made one's bed on the other hand. This obviously trivializes the serious misconduct. Concluding otherwise disregards the "*social legibility and the expressive and norm setting function that a legal system is intended to serve*".[304]

283. From the perspective of CAF members' ability to adapt their behaviour to the applicable rules, a clear statutory prohibition is also preferable to a prohibition contained in a massive and constantly-changing body of regulatory and administrative measures.

284. In my view, new service offences should be enacted whenever it is necessary to clearly denounce specific conduct as unacceptable. In addition to providing transparency and setting clear norms for acceptable behavior, this solution would allow Parliament to tailor the application of military justice processes and the punishments deemed appropriate to the specific offences enacted.

285. Sexual misconduct and hateful conduct should certainly be enacted as distinct service offences at this time. But the CAF should also review the charges brought under

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302 DAOD 9005-1, *Sexual Misconduct Response* (November 18, 2020), online: <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/defence-administrative-orders-directives/9000-series/9005/9005-1-sexual-misconduct-response.html#introduction> at para 4.5. Sexual misconduct is defined therein as "[c]*onduct of a sexual nature that causes or could cause harm to others, and that the person knew or ought reasonably to have known could cause harm*": *Ibid* at para 2.

303 DAOD 5019-0, *Conduct and Performance Deficiencies* (July 10, 2020), online: <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/defence-administrative-orders-directives/5000-series/5019/5019-0-conduct-and-performance-deficiencies.html> at para 3.5.

304 Elaine Craig, "An Examination of How the Canadian Military's Legal System Responds to Sexual Assault", (2020) 43:1 Dalhousie Law Journal 63 at 87.

subsection 129(1) on an ongoing basis, paying attention to emerging trends in order to be able to request the enactment of new service offences as appropriate.

286. The Directorate of Defence Counsel Services ("**Directorate of DCS**") suggested that subsection 129(2) should be re-enacted as a self-standing service offence.[305] The military prosecutors who briefed my team were also in agreement with this recommendation.

> **Recommendation #24. The *National Defence Act* should be amended to add distinct service offences for sexual misconduct and hateful conduct.**
>
> **Paragraph 129(2)(a) of the *National Defence Act* should be amended by excluding provisions creating service offences from its operation. Subsection 129(2) of the *National Defence Act* should then be re-enacted as a distinct, self-standing service offence. The new service offence should not describe a prohibited contravention as "*an act, conduct, disorder or neglect to the prejudice of good order and discipline*".**

287. The Directorate of DCS also suggested a service offence for mistreatment of detainees. Chief Justice LeSage, for his part, suggested distinct service offences for negligent discharge of a firearm.[306] There may be other examples. I have not identified all types of conduct that warrant the creation of new service offences. As I will discuss below, this endeavour needs to be completed elsewhere.

b. Scope of Subsection 129(1) of the *National Defence Act*

288. The creation of new service offences will have a limited impact if charges under subsection 129(1) of the *NDA* can be laid for conduct specifically prohibited by other service offences.

289. In theory, subsection 129(5) of the *NDA* already prohibits this practice by stating that "[n]*o person may be charged under this section with any offence for which special provision is made in sections 73 to 128* […]". However, this provision has serious flaws. It immediately counteracts the prohibition by adding that "[…] *the conviction of a person so charged is not invalid by reason only of the charge being in contravention of this subsection unless it appears that an injustice has been done to the person charged by reason of the contravention*".[307] Moreover, the prohibition in subsection 129(5) does not extend to civil

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305 See also Cloutier, *supra* note 255 at 84-87.

306 LeSage Report, *supra* note 26 at 19-20.

307 Subsection 129(5) of the *NDA*. Subsection 129(6) of the *NDA* states that "[t]*he responsibility of any officer for the contravention of subsection (5) is not affected by the validity of any conviction on the charge in contravention of that subsection*". In my view, in practice, charges against the officer having laid charges are unlikely to be laid or, if laid, to succeed at trial. Some notes to the *QR&O*

offences and foreign offences incorporated as service offences by subsections 130(1) and 132(1).[308]

290. I have been informed by both the Directorate of DCS and the CMPS that charges under subsection 129(1) are frequently laid as alternative charges. In my view, this is partly a result of the restrictive provisions of the *NDA* as to "cognate" offences.[309] When there is doubt that any other service offence charged has been committed, principal or alternative charges under subsection 129(1) are currently the only way to preserve the possibility of conviction for conduct prejudicial to good order and discipline.[310]

291. I understand that alternative charges under subsection 129(1) often result in plea deals where the accused pleads guilty to the charge under subsection 129(1) and the other charges, sometimes laid under the *Criminal Code*, are withdrawn or stayed by the prosecution.[311]

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also appear to encourage what is prohibited by subsection 129(5) of the NDA. For example, note A to section 103.01 of the *QR&O* states that "[a] *person who, while subject to the Code of Service Discipline, aids, abets or counsels another to commit a service offence, is guilty of committing that offence himself* […] *and may be charged with having committed that offence or under section 129 of the National Defence Act*".

308 Cloutier, *supra* note 255 at 53-54, 70.

309 While the *Criminal Code* states in general terms the circumstances in which an accused may be found guilty of offences other than the offence charged (subsection 662(1) of the *Criminal Code*), sections 133 to 138 of the *NDA* specifically enumerate the circumstances where this may happen in the military justice system. Note B to section 103.62 of the *QR&O* confirms that except in such circumstances, "*a service tribunal has no power to find a person guilty of any offence other than one with which he is actually charged*".

310 Note D to section 103.60 of the *QR&O* states that "[i]*f there is real doubt as to whether one of the other offences prescribed in the National Defence Act has been committed and the circumstances would justify a less serious charge under section 129 of the National Defence Act, the charge should be laid under this section*".

311 Professor Elaine Craig studied this problem in relation specifically to charges for sexual assault. She wrote that "[i]*n some cases it seems highly problematic that sexual assault charges were stayed in exchange for pleading guilty to a non-Criminal Code disciplinary offence like conduct to the prejudice of good order and discipline or disgraceful conduct.* […] *While cases of this nature were in the minority, that is occurs at all is concerning. Resolving more serious allegations of sexual assault through reliance on non-Criminal Code disciplinary charges seems highly unlikely to disrupt the widely held perception that the CAF does not respond adequately and justly to the sexualized violence prolific within its ranks*". Craig, *supra* note 304 at 81. I agree with her conclusions. I expect that the entry into force of subsections 189.1(7) to 189.1(12) of the *NDA*, enacted by *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 ("**Bill C-77**"), will go some way towards resolving this problem.

292. In my view, more can be done to ensure that charges under subsection 129(1) are only laid in circumstances where no other charges can be laid. I recommend that subsection 129(5) be amended to address the shortcomings identified above. I also recommend that conduct prejudicial to good order and discipline be recognized as a cognate offence in respect of any of the purely military offences, but not in respect of civil or foreign offences.

> **Recommendation #25. Subsection 129(5) of the *National Defence Act* should be amended to provide that "[n]*o person may be charged under this section with any offence for which special provision is made in sections 73 to 128, 130 or 132*", without further caveat. Subsection 129(6) of the *National Defence Act* should accordingly be repealed.**
>
> **A subsection should be added to section 137 of the *National Defence Act.* It should provide that a person charged with a service offence other than an offence under subsections 130(1) or 132(1) may, if neither the complete commission of the offence nor an attempt to commit the offence are proved, be found guilty of an offence under subsection 129(1) provided that the evidence establish an act, conduct, disorder or neglect to the prejudice of good order and discipline.**

293. In practice, if my recommendations are implemented, military judges or presiding officers will, at trial, need to be satisfied on the basis of the evidence and submissions that an accused cannot be convicted under other service offences prior to entering a verdict of guilty under subsection 129(1) of the *NDA*. For their part, military prosecutors will need to give serious consideration to whether other service offences are disclosed by the evidence before agreeing to a plea of guilty under subsection 129(1).

294. The availability of subsection 129(1) as a cognate offence will hopefully avoid frequent reliance on charges under this provision. If so, it will allow future reviewers to have a clear view of the conduct which truly falls within the residual scope of subsection 129(1) and to make recommendations accordingly.

B. Adequacy of Other Service Offences

295. A number of other concerns were brought to my attention in relation to service offences. For example, I was told by the Directorate of DCS that many of them use terminology which is now obsolete in light of the evolution of the international law of war.

296. There was also a concern that conduct prohibited by the *Criminal Code* may be either "undercharged" or "overcharged" as purely military offences. I have attempted to address this concern in respect of subsection 129(1), but it exists more generally. For example, Professor Elaine Craig has noted that sexual assault at times results in convictions for

cruel or disgraceful conduct,[312] a purely military offence punishable by a maximum of five years of imprisonment.[313] Conversely, Colonel (retired) Michel Drapeau noted that some purely military offences appear duplicative of *Criminal Code* offences, but establish higher maximum punishments.[314]

297. Some submissions were made by the Office of the Judge Advocate General ("**OJAG**") about the service offence of maiming or injuring oneself enacted in paragraph 98(c) of the *NDA*.[315] The repeal of this paragraph is currently proposed by a private member's bill in the House of Commons.[316] The OJAG recommends that the service offence be kept, but that the notes to section 103.31 of the *QR&O* be amended to "*confirm that self-injurious conduct related to mental illness is excluded from the scope of intent and application of the provision*".[317]

298. These recommendations require expertise in the international law of war, an extensive comparison of the current body of purely military offences and the *Criminal Code*, and an in-depth understanding of the context in which service offences considered as problematic could be committed. Recommendations of this sort are best left to the military justice actors whose experience would allow them to make informed decisions in this regard.

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312 Craig, *supra* note 304 at 77-81.

313 Section 93 of the *NDA*.

314 Submissions of Colonel (retired) Michel Drapeau (January 5, 2021) ("**Drapeau Submissions**") at 6. In my view, this is not necessarily inappropriate. The Supreme Court of Canada recognized that "[b]*reaches 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*": *Généreux*, *supra* note 7 at 293. It follows that duplicative offences with higher maximum punishments may, in some cases, be acceptable in the military justice system. But a review should be conducted to ensure that their separate existence and conditions are justified.

315 Paragraph 98(c) of the *NDA* provides that "[e]*very person who* […] *wilfully maims or injures himself or any other person who is a member of any of Her Majesty's Forces or of any forces cooperating therewith, whether at the instance of that person or not, with intent thereby to render himself or that other person unfit for service, or causes himself to be maimed or injured by any person with intent thereby to render himself unfit for service, is guilty of an offence*".

316 Bill C-203, *An Act to amend the National Defence Act (maiming or injuring self or another)*.

317 Office of the Judge Advocate General Policy Paper #2, Submission for the Third Independent Review Authority, "Paragraph 98(c) of the *National Defence Act*. Malingering or Maiming Oneself" (January 8, 2021) at para 20.

Recommendation #26. In the performance of her superintendence of the administration of military justice in the Canadian Armed Forces, the Judge Advocate General should collaborate with the Canadian Military Prosecution Service and the Directorate of Defence Counsel Services to conduct regular reviews of the service offences contained in the *National Defence Act*.

Such reviews should aim to (a) identify obsolete or duplicative service offences; (b) assess the desirability of enacting new service offences; and (c) consider the amendments which would be necessary or desirable. The results of these reviews should be used to request the enactment by Parliament of appropriate amendments to the *National Defence Act*.

C. PUNISHMENTS

i. Range of Available Punishments

299. Chief Justice Lamer recommended "*a comprehensive review of the sentencing provisions of the National Defence Act with a view to providing for a more flexible range of punishments and sanctions, as is available under the civilian criminal justice system*".[318] Chief Justice LeSage made the same recommendation.[319]

300. Their recommendations were implemented. Among other things, Bill C-15[320] introduced intermittent sentences,[321] absolute discharges,[322] restitution orders[323] and suspended imprisonment or detention[324] in the *NDA*. However, some commentators took issue with the fact that probation, conditional discharges and conditional sentences of imprisonment were not, at the same time, made available in the military justice system.

301. As a general principle, I agree that the punishments that judges may impose in civilian courts should be available in the military justice system as well. Some have noted that there are currently no probation officers in the CAF to enforce the conditions of probation orders, discharges or custodial sentences. I do not believe this to be a valid objection. As I was told by Commander Mike Madden, a former legal officer of the CAF and one of the

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318 Lamer Report, *supra* note 9 at 65-66.

319 LeSage Report, *supra* note 26 at 26.

320 *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24 ("**Bill C-15**").

321 Section 148 of the *NDA*.

322 Section 203.8 of the *NDA*.

323 Sections 203.9 to 203.94 and 249.25 of the *NDA*.

324 Sections 215 to 215.3 of the *NDA*.

authors of the Court Martial Comprehensive Review Report,[325] the control of the CAF over its members is already all-encompassing.

> **Recommendation #27. In the performance of her superintendence of the administration of military justice in the Canadian Armed Forces, the Judge Advocate General should give consideration to making probation, conditional discharges and conditional sentences of imprisonment available options in the military justice system.**

ii. Meaning and Effect of Certain Military Punishments

302. My most serious concern about the available punishments relates to the meaning and effect of the military punishments of forfeiture of seniority, severe reprimand and reprimand. Both the CMPS and Colonel Drapeau[326] told me that those punishments had no practical consequences. In particular, the CMPS made the following submission:

> Some punishments have lost their meaning and no longer have any identifiable effect beyond the fact that they hold a place in the scale of punishments. For example, while there may have been a time where forfeiture of seniority had a financial and career impact, this is no longer true. It has no known tangible effect. Severe reprimand and reprimand appear to only be symbolic, and without any real distinction. A review should be conducted in order to either attach tangible effects to each of these punishments or they should simply be abolished.[327]

303. The issue is not novel. Chief Justice Lamer reported that, in the course of his review, "*many members* [had] *raised the issue as to whether a real distinction exists between the punishments of reprimand and severe reprimand and whether these punishments should be retained*".[328] He recommended that additional guidance on their use be provided.

304. His recommendation was not implemented. I was informed that "*a working group was created in the autumn of 2018 by the* [Canadian Armed Forces Chief Warrant Officer] *with the help of the* [Judge Advocate General Chief Warrant Officer] *to define reprimand and severe reprimand".*[329] While some preliminary work was done, the task subsequently fell down in the priority list and was not pursued.

305. It has been almost twenty years since Chief Justice Lamer made this recommendation. It has obviously not been given the priority it deserves. It is important that the meaning and effect of severe reprimand and reprimand be clarified in the *QR&O*. This is especially true

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325 *Supra* note 64.

326 Drapeau Submissions, *supra* note 314 at 6.

327 CMPS Submissions, *supra* note 87 at para 8.

328 Lamer Report, *supra* note 9 at 66-67.

329 Implementation Status Report, *supra* note 79.

given that these sanctions will be available both in courts martial for service offences and in summary hearings for service infractions once Bill C-77 comes into force.[330]

306. It does not appear complicated to describe the practical consequences of severe reprimands and reprimands. I understand that the officers of the CAF who participated in two summary trial working groups in 2016 "*ultimately reached near consensus that severe reprimands and reprimands should have essentially two effects: they should prolong the period before which a person can be considered for promotion, and they should prolong the period before which a person is eligible to receive a Canadian Forces Decoration (CD) and other distinguished service honours*".[331]

> **Recommendation #28. The *Queen's Regulations and Orders for the Canadian Forces* should, prior to the entry into force of *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15, be amended to clarify and distinguish the practical effects of severe reprimands and reprimands.**
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> **If practical effects can be attached to the punishment of forfeiture of seniority, they should be clarified in the *Queen's Regulations and Orders for the Canadian Forces*. If not, this punishment should be abolished.**

IV. FROM THE DISCIPLINARY INVESTIGATION TO THE LAYING, REFERRAL AND PRE-TRIAL DISPOSAL OF CHARGES

A. DISCIPLINARY INVESTIGATIONS

307. Disciplinary investigations in the Canadian Armed Forces ("**CAF**") are conducted where "*a complaint is made or where there are other reasons to believe that a service offence may have been committed*".[332] Their purpose is "*to determine whether there are sufficient grounds to justify the laying of a charge*" by, at a minimum, collecting "*all reasonably available evidence bearing on the guilt or innocence of the person who is the subject of the investigation*".[333]

308. Disciplinary investigations can either be conducted by the military police or as unit disciplinary investigations.

309. The specialized investigative arm of the military police, known as the Canadian Forces National Investigation Service ("**CFNIS**"), has a right of first refusal over the investigation

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330 See the future section 162.7 of the *NDA*, enacted by section 25 of Bill C-77.

331 Draft reports of Summary Trial Working Groups I and II.

332 Subsection 106.02(1) of the *Queen's Regulations and Orders for the Canadian Forces* ("***QR&O***").

333 Section 106.03 of the *QR&O*.

of serious offences and sensitive offences, including criminal sexual offences. Except in the case of criminal sexual offences,[334] the CFNIS may however defer its investigative responsibility to the local non-CFNIS military police (often referred to as the uniformed military police) when the commander of the CFNIS considers it appropriate to do so. Even where the investigative responsibility is not deferred, the uniformed military police may be requested to assist the CFNIS in investigations.[335]

310. All other service offences are investigated either by the uniformed military police or by the units, without any clear delineation of tasks. As a matter of tradition and service practice, units normally assume responsibility for investigations into minor breaches of discipline, such as when no right to elect trial by court martial would arise. The uniformed military police typically investigates matters which are somewhere between a unit disciplinary investigation and a CFNIS investigation in seriousness.[336]

i. Unit Disciplinary Investigations

311. I was told by some members of the CAF that there was a lack of oversight over unit disciplinary investigations and that they are therefore open to abuse by officers in positions of authority. Others said members assigned to those investigations lack sufficient training. Some commanding officers felt that unit disciplinary investigations are unduly cumbersome and should not be required where minor disciplinary misconduct is alleged, while others assured me that most of them could usually be finalized within a matter of days, if not hours.[337]

312. These limited and conflicting observations warrant neither firm conclusions nor precise recommendations. I think it best to instead leave it to the Judge Advocate General ("**JAG**")

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334 CF MP Gp HQ – DPM Policy, Police Policy Advisory 11/2015, *Investigation of Criminal Sexual Offences* (July 20, 2015), Schedule J of this Report, at para 3. "*Criminal sexual offences*" include, but are not limited to, the civil offences of sexual assault, sexual interference, invitation to sexual touching, and sexual exploitation.

335 CF MP Gp Order 2-381, *Canadian Forces National Investigation Service Jurisdiction*, **Schedule O** of this Report, at paras 14-15. A serious offence is defined as "*an indictable criminal or similar Code of Service Discipline offence involving a crime against a person, or a high-value and complex property or fraud offence*": *Ibid* at para 2. A sensitive offence is defined as "*an offence that has the potential to reach across provincial or national boundaries or that involves elements of more than one Canadian Forces (CF) command, even if the allegation is not inherently serious, or that, due to the nature of the allegation or the identity, rank, or status of the person(s) implicated, could have a strategic or national impact*": *Ibid* at para 2.

336 Military Police – Collection of Issue Papers Prepared for the Independent Review Team (January 8, 2021) ("**Military Police Issue Papers**") at 12-13.

337 2018 OAG Administration of Justice Report, *supra* note 89 at para 3.21: "*Of the 117 summary trial cases we examined, 99 were investigated solely by the military units.* […] *On average, the units completed the investigation within 1.5 weeks*".

to assess the basis and prevalence of these concerns in discharging her statutory duty of superintendence over the administration of military justice.[338]

ii. Military Police Investigations

313. An important concern for both the CFNIS and the uniformed military police was investigative delay.

314. Delays in investigations have been considered before – more than once. In 2011, Chief Justice LeSage recommended that "[t]*he target for completion of investigations in straightforward cases should be one month*".[339] In the spring of 2018, the Auditor General of Canada examined a number of investigations conducted by the military police and found that the vast majority had exceeded the military police's own policy time standard of 30 days, with no written justifications.[340] A few months later, in her Evaluation of Military Police Services, the Assistant Deputy Minister (Review Services) recommended that the Canadian Forces Provost Marshal ("**CFPM**") "*monitor the investigation time as a performance indicator of the Military Police Services Program to support decision-makers*".[341]

315. The Military Police Group Orders have been amended in the wake of the 2018 report of the Auditor General. The policy time standard of 30 days has been repealed. The Group Orders now specify that "[i]*n general, investigations must be conducted as quickly and efficiently as possible, without compromising their thoroughness or integrity*".[342] The reasons for all delays must be recorded in the military police files, particularly where "*there has been or will be no meaningful investigative activity for 30 days*".[343] A Military Police Analytics Program ("**MPAP**") was created in the summer of 2019 to track the compliance of members of the military police with these Group Orders. I was told by the CFPM that "[t]*he MPAP has led the* [military police group] *to an average of over 98% compliance over the last six months of 2020 (to date), and has effectively eliminated files exceeding 60 days without an apparent update*".[344]

316. These measures are still in their infancy. They appear to have so far yielded positive results, but the data currently available is insufficient to assess their likelihood of success in reducing investigative delay in the longer term. I recommend that the CFPM, in future reports, provide data on the length of military police investigations. If this data indicates that problems of delays in investigations persist or re-emerge, the CFPM should re-

338 Section 9.2 of the *NDA*.

339 LeSage Report, *supra* note 26 at 15.

340 2018 OAG Administration of Justice Report, *supra* note 89 at paras 3.22, 3.24.

341 Assistant Deputy Minister (Review Services), Evaluation of Military Police Services, June 2018 at 14.

342 CF MP Gp Order 2-500, *Investigation Management*, **Schedule P** of this Report, at para 25.

343 *Ibid* at paras 26-27.

344 Implementation Status Report, *supra* note 79.

assess the effectiveness of the measures implemented in 2018 and 2019 and consider the implementation of additional reforms.

> **Recommendation #29. The Canadian Forces Provost Marshal, in his annual reports, should provide data on the length of military police investigations. If this data indicates that problems of delays in investigations persist or re-emerge, the Canadian Forces Provost Marshal should re-assess the effectiveness of the measures implemented in 2018 and 2019 and consider the implementation of additional reforms.**

B. SEARCH WARRANTS

317. It may be necessary, during a disciplinary investigation, to conduct a search. Searches normally require prior authorization in the form of a search warrant.[345]

318. The *NDA* currently provides for the issuance of search warrants only by commanding officers.[346] However, I have been informed by the Canadian Military Prosecution Service ("**CMPS**") that there is a general reluctance, particularly on the part of CFNIS investigators, to rely on commanding officer search warrants. In fact, members of the military police have in recent years been specifically instructed to use commanding officer search warrants only "*in those very rare situations where a Criminal Code warrant cannot be obtained due to the unavailability of a civilian judicial authority*", that is, primarily, "*where the item to be searched for and seized lies outside the territorial jurisdiction of Canada*".[347] Members of the military police who nevertheless consider obtaining a commanding officer search warrant within Canada are instructed to consult their chain of command as well as a unit legal advisor before doing so.

319. The investigators' reluctance to rely on commanding officer search warrants is understandable. There is a risk that the commanding officer search warrant regime may fail to meet the constitutional requirements of section 8 of the *Canadian Charter of Rights and Freedoms* ("***Charter***"),[348] at least in circumstances where a search warrant can reasonably be obtained from a civilian justice of the peace. Nevertheless, I agree with the CMPS that it is inappropriate to force the investigators to rely on the civilian justice system where military judges could easily, in my view, assume the function of issuing warrants.

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345 Section 273.2 of the *NDA* and section 106.04 of the *QR&O*.

346 Sections 273.3 to 273.5 of the *NDA* and sections 106.05 to 106.07 of the *QR&O*.

347 CF MP Gp Order 2-370.4, *Commanding Officer Search Warrants*, **Schedule Q** of this Report, at paras 2-3. This Military Police Group Order constitutes the implementation of Recommendation #4 of the LeSage Report, *supra* note 26 at 16.

348 By analogy, see *R v Levi-Gould*, 2016 CM 4002 ("***Levi-Gould***"), further discussed below at para 330.

Recommendation #30. The *National Defence Act* should be amended to allow military judges to issue search warrants in disciplinary investigations, and permit the issuance of commanding officer search warrants only where a warrant cannot be reasonably obtained in a timely manner either from a military judge or from a civilian justice of the peace.

C. ARRESTS

i. Arrests Without Warrant of Canadian Armed Forces Members

320. Any member of the CAF may arrest without warrant a person subject to the Code of Service Discipline ("**CSD**") who has committed, is found committing, is believed on reasonable grounds to have committed or is charged with having committed a service offence.[349] Members of the military police have the broadest powers in this regard as they may arrest without warrant any person subject to the CSD, regardless of that person's rank or status.[350] By comparison, the powers of officers and non-commissioned members to arrest without warrant are limited in most cases by their respective ranks.[351]

321. As a result of a recommendation of Chief Justice Lamer,[352] Bill C-15[353] limited the powers of arrest without warrant of all CAF members. For offences other than serious offences,[354] it imposed a duty not to arrest a person (or to order the arrest) without warrant in specified circumstances.[355] This duty is modelled on the duty imposed on peace officers by subsection 495(2) of the *Criminal Code*.

322. Still, the duty not to arrest a person without warrant applies to a smaller set of offences than under the *Criminal Code*. A peace officer's duty not to arrest without warrant extends to several indictable offences, to all hybrid offences[356] and to all summary conviction

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349 Sections 154 to 156 of the *NDA*.

350 Section 156 of the *NDA*.

351 Subsections 155(1) and 155(2) of the *NDA*.

352 Lamer Report, *supra* note 9 at 49-50. Chief Justice Lamer referenced judicial decisions which held that the limitations on arrest without warrant powers contained in subsection 495(2) of the *Criminal Code*, RSC 1985, c C-46 are minimum constitutional requirements (*R v Gauthier*, [1998] CMAJ No 4; *Delude v The Queen*, (2000) 192 DLR (4th) 714 (FCA)).

353 *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24 ("**Bill C-15**").

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

355 Subsection 155(2.1) of the *NDA*.

356 A hybrid offence is an offence for which a person may, in the civilian justice system, be prosecuted by indictment or for which the person is punishable on summary conviction.

offences. A CAF member's duty not to arrest without warrant only extends to indictable or summary conviction offences punishable by imprisonment for less than five years.

323. In my view, the military duty not to arrest without warrant should be expanded to prevent the unnecessary arrest, for example, of anyone whose arrest is not in the public interest and who is likely to appear voluntarily before a service tribunal. More particularly, I recommend that the duty not to arrest without warrant apply to all service offences, except designated offences.[357]

> **Recommendation #31. In subsections 155(2.1) and 156(2) of the *National Defence Act*, the words "*for an offence that is not a serious offence*" should be replaced by the words "*for an offence that is not a designated offence*".**

ii. Arrests Without Warrant of Civilians

324. The military justice system has jurisdiction over civilians in specified circumstances.[358] Moreover, a person having allegedly committed a service offence while subject to the CSD may be charged, dealt with and tried at any time thereafter for the alleged offence, regardless of whether the person remains subject to the CSD.

325. Two sections of the *NDA* provide for powers to arrest without warrant persons subject to the CSD other than CAF members.

326. First, members of the military police can arrest without warrant, "*any person who is subject to the Code of Service Discipline*".[359] It is unclear whether they can also arrest persons formerly subject to the CSD for past alleged offences. This should be clarified.

> **Recommendation #32. Paragraph 156(1)(a) of the *National Defence Act* should be amended to clarify that members of the military police may, subject to their duty not to arrest without warrant in specified circumstances, arrest without warrant any person who is subject to the Code of Service Discipline, or any person who was subject to the Code of Service Discipline at the time of the alleged commission by that person of a service offence.**

327. Second, under subsection 155(3) of the *NDA*, persons designated by commanding officers can arrest without warrant "[e]*very person who is not an officer or non-*

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357 Section 153 of the *NDA*. Designated offences include murder, attempted murder and conspiracy for murder, criminal organization offences and terrorism offences.

358 Paragraphs 60(1)(f) to 60(1)(j) of the *NDA*.

359 Paragraph 156(1)(a) of the *NDA*.

commissioned member but who was subject to the Code of Service Discipline at the time of the alleged commission by that person of a service offence".

328. Under subsection 494(1) of the *Criminal Code*, civilians may only be arrested without warrant by other civilians if they are found committing an indictable offence,[360] or if they have committed a criminal offence and attempt to flee. The power to arrest without warrant civilians and former members of the CAF subject to the CSD is justified in analogous circumstances. Otherwise, members of the CAF should have no broader powers to arrest them without warrant than that of any civilian in Canada.[361]

> **Recommendation #33. Subsection 155(3) of the *National Defence Act* should be replaced by a provision allowing officers or non-commissioned members of the Canadian Armed Forces, in the circumstances stated below, to arrest without warrant any person who is subject to the Code of Service Discipline, other than an officer or non-commissioned member, or any person who was subject to the Code of Service Discipline at the time of the alleged commission by that person of a service offence.**
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> **This power to arrest without warrant should only exist where someone (a) is found committing a serious offence; or (b) is believed on reasonable grounds to have committed a service offence, and is escaping from and freshly pursued by anyone who has lawful authority to make an arrest.**

iii. Arrest Warrants

329. All other arrests are required to be authorized by the prior issuance of an arrest warrant. Once more, the *NDA* provides, at subsection 157(1), for the issuance of arrest warrants only by commanding officers or by delegated officers.

330. Subsection 157(1) of the *NDA* faced challenges under sections 7 and 8 of the *Charter* in *Levi-Gould,* where a military judge found that, in certain circumstances, "*a commanding officer* […], *regardless of training, ethics or good intentions, is so involved in the investigatory functions performed by his closest advisors in his team that he or she cannot act in a judicial capacity when authorizing an arrest warrant*".[362]

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360 Under subsection 494(2) of the *Criminal Code*, owners or possessors of property and the persons authorized by them may also, in specified circumstances, arrest a person without a warrant if they find him or her committing a criminal offence on or in relation to that property.

361 Section 494 of the *Criminal Code*.

362 *Levi-Gould*, *supra* note 348 at paras 23-32.

331. Once Bill C-77[363] comes into force, it will impose a duty on commanding officers and delegated officers not to issue warrants "*for the arrest of any person who is a member of, serving with, or attached or seconded to the same unit of the Canadian Forces as the officer*".[364] This limitation will be an improvement, but an insufficient one in my view.

332. As a matter of policy, a person subject to the CSD should generally be entitled to have the issuance of an arrest warrant considered by a person who is truly neutral and detached from the leadership of the CAF. I see no principled reason not to allow military judges to assume the function of issuing warrants in most situations. The powers of commanding officers and delegated officers could remain available, but limited to the rare cases where judicial warrants could not be reasonably obtained in a timely manner.

> **Recommendation #34. The *National Defence Act* should be amended to allow military judges to issue arrest warrants for persons triable under the Code of Service Discipline, and permit the issuance of commanding officer or delegated officer arrest warrants only where a warrant cannot be reasonably obtained in a timely manner from a military judge.**

333. I would have been interested as well in reviewing the practical application of the arrest powers contained in the *NDA*. In fact, I asked to be provided with demographic data on arrests and pre-trial custody, including information relating to the particular communities (visible minorities, ethnical or cultural groups, sexual orientation etc.) with which the persons arrested or detained identified. I was told that no centralized data of this sort currently exists, and that the military police could only provide limited data, which would need validation prior to publication.

334. I understand that both the CFPM and the Office of the JAG ("**OJAG**") are taking steps to improve the availability of data on arrests. The MPAP is expected to address the current data limitations experienced by the military police, and the OJAG is participating in the development of the Justice Administration and Information Management System ("**JAIMS**").[365] I am told that, once implemented, the JAIMS will capture the dates of arrests and the length of any pre-trial custody. I am told as well that it will be linked to the CAF's human resource management system, which contains demographic information.

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363 *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 ("**Bill C-77**").

364 Section 17 of Bill C-77.

365 The JAIMS is further described in Part VI(A) of this Chapter, below at para 435.

335. In this light, I recommend that data and assessments on arrests and pre-trial custody be included by the CFPM and the JAG in their future annual reports. This will allow future reviewers of the military justice system to assess the practical implementation of the arrest and pre-trial custody regime. If such data and assessments reveal any concern of a systemic nature, the CFPM and the JAG should consider and implement solutions *without waiting for the next independent review*.

> **Recommendation #35. The Canadian Forces Provost Marshal and the Judge Advocate General should provide in their future annual reports data and assessments on arrests and pre-trial custody. The data should, at a minimum, include the number of arrests, the status of the persons making the arrest and the persons under arrest, the nature of the alleged service offences, the length of custody, and information pertaining to the particular communities with which the persons arrested or detained identified.**

D. PRE-TRIAL CUSTODY

336. I have several concerns about the pre-trial custody process as it currently stands. The process strikes me as overly burdensome and creates unwarranted delays for persons in custody. If a person is arrested and placed in custody (or "**detained**"), up to 24 hours can elapse before a report of custody is delivered to a custody review officer.[366] A further 24 hours can elapse before the custody review officer decides whether to detain or release the person, with or without conditions.[367]

337. A person cannot be released with conditions before the custody review officer receives the custody report. A person may thus remain detained solely to have release conditions determined by the custody review officer. Members of the military police should instead be authorized to release a person on an undertaking to comply with conditions. Peace officers in the civilian justice system have that authority.[368] Both the person released with conditions and the CAF should have the right to submit an application to a military judge for the review of the conditions set by a member of the military police.[369] They should subsequently have an appeal to the Court Martial Appeal Court of Canada.[370]

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366 Subsection 158.1(1) of the *NDA*. Unless it is impractical, the custody review officer will be the commanding officer of the person in custody or an officer designated by that commanding officer to that end (section 153 of the *NDA*).

367 Subsections 158.2(1) and 158.6(1) of the *NDA*.

368 Sections 498(1)(c), 499(b), 501 and 503(1.1)(b) of the *Criminal Code*.

369 See, by analogy, subsection 158.7(1) of the *NDA*.

370 See, by analogy, section 159.9 of the *NDA*.

Recommendation #36. Members of the military police who arrest persons subject to the Code of Service Discipline, with or without a warrant, or in whose custody persons under arrest have been committed, should have the authority to release the persons arrested if they give an undertaking, unless the persons are charged with a designated offence. The permissible conditions of an undertaking should be developed in light of the current content of section 158.6 of the *National Defence Act* and section 501 of the *Criminal Code*.

338. However, even if this recommendation is implemented, a person arrested and detained may face undue delays and unnecessary burdens. Pending a decision by the custody review officer, arrested persons may now remain in custody for up to 48 hours without being brought before a judge – even when a judge is available.[371] In the civilian system, a person in custody must be taken before a justice "*without unreasonable delay and in any event*" "*within a period of 24 hours*", if a justice is available, or "*as soon as possible*", if a justice is not available within that period.[372]

339. There is no reason why persons in custody in the military justice system should not be brought as well before a military judge within a period of 24 hours, without first having to undergo the custody review process. The custody review officer should be relied on only when no military judge is readily available within a period of 24 hours.

340. Finally, during my team's educational briefings on military justice foundations, a legal officer from the OJAG expressed concern that persons in custody were at an increased risk of inadvertently providing self-incriminating evidence during the custody review process. This is because persons in custody must be given an opportunity to make representations for their release. Such representations, if any, must be attached to the report of custody delivered to the custody review officer.[373] In practice, persons in custody are therefore, in every case, asked whether they wish to make representations on their release. The risk they will inadvertently incriminate themselves in the process is obvious.

341. I asked the OJAG whether representations of persons in custody had been used against them at trial and whether the JAG was satisfied that the current regime is satisfactory. The OJAG provided no data in response, but recognized that a person's representations could open the door to the possibility of making self-incriminating statements. It also stated that it was "*satisfied that there are adequate safeguards within the legislative framework for the military justice system against the risk of self-incrimination in pre-trial custody, and the subsequent use of improperly elicited statements*".[374] The principal safeguards relied on by the OJAG were the detained person's right to call a lawyer of the

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371 Subsection 158.2(1) of the NDA.

372 Subsections 503(1) and 503(1.1) of the *Criminal Code*.

373 Section 158.1 of the *NDA*.

374 Answer to Requests for Information #24-25 (OJAG).

Directorate of Defence Counsel Services to obtain free legal advice, the right to elect trial by court martial in several cases, and the rules of evidence governing the reception of evidence at court martial.

342. These are desirable but insufficient safeguards. At a minimum, detained persons should be specifically instructed that any statements they make while in custody, including representations for their release, can be introduced in evidence against them at their trial. Moreover, I believe that the pre-trial custody process would be made fairer if detained persons were brought as soon as possible before a military judge to make their representations concerning their release with the benefit of legal counsel appointed by the Director of Defence Counsel Services.

Recommendation #37. A person committed to service custody should be brought before a military judge without unreasonable delay, and in any event within a period of 24 hours after arrest, if a military judge is available. Persons in custody should not be asked to make representations on their release from custody if they can be brought before a military judge within this period.

If no military judge is available within 24 hours after the arrest, the current pre-trial custody process should continue, but persons retained in custody should be specifically instructed that any statements they make while in custody, including representations for their release, can be introduced in evidence against them at their trial, and brought before a military judge as soon as practicable.

E. LAYING OF CHARGES

343. The laying of a charge commences the proceedings against a person who is alleged to have committed a service offence.[375] Since the coming into force of Bill C-15, subsection 161(2) of the *NDA* states that "[a] *charge shall be laid as expeditiously as the circumstances permit against a person who is retained in custody or released from custody with conditions*". Charges for service offences may only be laid by a commanding officer, by an officer authorized by a commanding officer to lay charges or by a member of the CFNIS.[376] If the disciplinary investigation has been conducted by members of the uniformed military police, they may submit their charging recommendations to the accused's commanding officer or to the person laying charges, but they may not lay charges themselves. In contrast, members of the uniformed military police may, as peace officers, lay criminal charges in the civilian justice system.[377]

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375 Subsection 161(1) of the *NDA*.

376 Section 107.02 of the *QR&O*.

377 Paragraph 2(g) of the *Criminal Code*.

344. A person who lays charges is instructed to obtain pre-charge legal advice for all charges, except those alleging a service offence committed less than six months earlier and for which there is no right to elect trial by court martial.[378]

345. Once charges are laid, they are referred to the commanding officer of the accused person, to the commanding officer of the base, unit or element in which the accused was present when the charges were laid or to a delegated officer.[379] Importantly, the officer to whom charges have been referred has discretion not to proceed (or to recommend not to proceed) with the charges.[380] This is called the pre-trial disposal of charges.

346. Where no pre-trial disposal of the charges occurs, charges may be tried by summary trial in certain cases. In all other cases, the charges will be referred to a referral authority.[381] This is called the referral of charges. The officer deciding on the pre-trial disposal or referral of charges is instructed to obtain post-charge legal advice for substantially the same charges on which pre-trial legal advice was given.[382]

347. The referral authority must refer the charges to the Director of Military Prosecutions ("**DMP**") "*with any recommendations regarding* [their] *disposal that the* [referral authority] *considers appropriate*".[383] It may also direct the commanding officer or superior commander who referred the charges to try the charges by summary trial in cases which allow it.[384]

i. Duty to Lay Charges Expeditiously

348. Subsection 161(2) of the *NDA* implements a recommendation of Chief Justice Lamer.[385] He referred to the existence of paragraph 505(b) of the *Criminal Code*, which requires that an information be laid in the civilian justice system as soon as practicable after a person under arrest has been released by a peace officer. This applies whether the release was made with an undertaking to comply with conditions or on the simple issuance of an appearance notice. Chief Justice Lamer could "*find no military justification as to why the military justice system should differ from the civilian criminal justice system*

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378 Section 107.03 of the *QR&O*.

379 Section 161.1 of the *NDA* and paragraph 107.09(1)(a) of the *QR&O*.

380 Paragraphs 107.09(2)(b) and 107.09(3)(b) of the *QR&O*.

381 Paragraphs 163.1(1)(b) and 164.1(1)(b) of the *NDA* and sections 108.19 and 108.195 of the *QR&O*. In accordance with section 109.02 of the *QR&O*, the referral authorities are the Chief of the Defence Staff and any officer having the powers of an officer commanding a command.

382 Section 107.11 of the *QR&O*. The officer must also obtain post-charge legal advice if the service offence is alleged to have been committed more than one year before the day on which a summary trial would commence.

383 Subsection 162.2(1) of the *NDA*.

384 Subsection 164.2(2) of the *NDA*.

385 Lamer Report, *supra* note 9 at 50-51.

in this regard".[386] However, he did not recommend there be a duty to lay charges as expeditiously as the circumstances permit against persons released from custody without conditions.

349. In my view, the application of subsection 161(2) of the *NDA* remains too narrow. The duty should apply to charges against persons released from custody without conditions, especially given the military justice system's particular need for a speedy enforcement of military discipline, which in turn requires speedy disposition of charges.

> **Recommendation #38. Subsection 161(2) of the *National Defence Act* should be amended to require that a charge be laid as expeditiously as the circumstances permit against any person, whether retained in custody or released from custody with or without conditions.**
>
> **Section 107.031 of the *Queen's Regulations and Orders for the Canadian Forces* should be amended to require any such person to be notified in writing, as soon as possible, of a decision not to lay charges against him or her.**

ii. Authority of the Uniformed Military Police to Lay Charges

350. The CFPM, among others, has recommended that all members of the military police, rather than only those assigned to investigative duties with the CFNIS, be granted the authority to lay charges for service offences. Two main sets of justifications were provided.

351. First, there was a concern that some commanding officers or authorized charging officers may not be acting impartially in deciding whether, and which, charges are to be laid against members of their units. Numerous participants in my town hall meetings provided anecdotes to substantiate this concern.

352. I heard about charging recommendations of members of the uniformed military police being rejected – even for serious offences – on the basis of extraneous and irrelevant considerations, such as the performance of the accused in the unit, a wish to give the accused "another chance" or to avoid compromising the accused's career, or even the commanding officer's reluctance to draw attention to the maintenance of discipline (or lack of discipline) under the officer's command.

353. The arbitrariness of the charging decisions based on such considerations is particularly apparent where several CAF members from different units are involved in a single offence or in offences against one another (such as a mutual assault). Members of the military

386 *Ibid.*

police told me of cases which potentially resulted in an injustice when only some of the guilty CAF members involved in an incident were charged by their commanding officers.

354. I also heard about serious offences being charged as less serious offences, either because of the extraneous and irrelevant considerations discussed above or to ensure summary trial jurisdiction by avoiding the rules governing election for trial by court martial.[387]

355. A member of the military police recounted one instance where a member of the CAF had assaulted a fellow policeman, attempted to disarm him and uttered threats to kill a third member of the military police sent in as reinforcement. But the attacker was only charged with service offences of drunkenness and quarrels and disturbances – and promoted a few weeks after a summary trial. Another member of the military police told me about a hate-motivated aggravated assault which left the victim in need of facial reconstruction, but the alleged perpetrator was only charged with service offences of drunkenness, abuse of a subordinate and conduct prejudicial to good order and discipline.

356. These episodes raise serious concerns. In light of the constitutional and statutory protection against double jeopardy, charging less serious offences may ultimately result in serious *Criminal Code* offences being entirely ignored or going unpunished. Failing to charge or "undercharging" offences may also be a significant obstacle faced by the military justice system in its efforts to deter the commission of serious offences. Anecdotes such as these call into question a foundational principle frequently invoked by the CAF – that civil offences constituting breaches of military discipline must be punished more severely than the same offences committed by civilians. And they raise doubts whether the principle invoked is systematically applied in practice.

357. The second justification in support of giving members of the uniformed military police the authority to lay charges is more practical. Currently, the requirement to turn over the results of an investigation to the chain of command creates unwarranted delays highlighted by the Auditor General in its 2018 report.[388]

358. Despite its disadvantages, few suggest that the authority of a unit's chain of command to lay charges should be removed entirely. I am satisfied that this authority is needed. But granting the uniformed military police authority to also lay charges would not affect the chain of command's own authority to do so. It would simply make the system more

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387 See Part V(A) of this Chapter, below at paras 381-382.

388 2018 OAG Administration of Justice Report, *supra* note 89 at paras 3.44-3.46: "*We examined 18 summary trial cases that the Military Police investigated. After having received the summary of the investigation, the commanding officers, or legal officers, requested more information from the Military Police in several of these cases before they made their decisions. This contributed to delays. In 5 of these cases, this added, on average, an extra three weeks to the process. In 2 other cases, it added 5 and 10 months to the process, respectively*".

efficient and less susceptible to the fear and risk of bias or arbitrary decisions by a unit's chain of command.

359. In his 1997 report, which is the source and handbook of the modern military justice system, Chief Justice Dickson recognized that "*for matters that are sensitive or of serious criminal nature,* […] *in order to ensure complete transparency of the process,* […] *the investigative body*", which became the CFNIS, should "*be vested with the authority to lay charges*".[389] Almost 25 years later, the time is now right to extend the same rule, on the same basis, to all service offences investigated either by the CFNIS or by the uniformed military police. I am advised by the CFPM that the military police has the capacity to make the adjustments in training, policy, procedures and resources necessary to enable the uniformed military police to responsibly take on the authority to lay charges for service offences.[390]

> **Recommendation #39. The words "*assigned to investigative duties with the Canadian Forces National Investigation Service*" in section 107.02 of the *Queen's Regulations and Orders for the Canadian Forces* should be repealed to allow all members of the military police to lay charges. This recommendation should come into force once the Canadian Forces Provost Marshal has put in place the necessary resources, training, policy and procedures to allow all members of the military police to carry out this new function.**

360. If the members of the uniformed military police are granted the authority to lay charges, they will need to obtain pre- and post-charge legal advice, as explained.[391] The Military Justice Division of the OJAG already includes a Directorate of Canadian Forces Provost Marshal Legal Services. However, I was informed by the CFPM that the legal advisors posted to this directorate are not mandated to provide legal advice with respect to particular investigations. To the extent legal advice is needed by the uniformed military police, it is currently provided by local legal officers, who also advise other units of the CAF.

361. In my view, pre- and post-charge legal advice to the uniformed military police would best be provided by legal advisors embedded within the Canadian Forces Military Police Group. Reliance on internal advisors rather than local legal officers would favour the development of internal expertise and lead to a greater consistency in charging decisions.

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389 Dickson Report, *supra* note 34 at 46.

390 Military Police Issue Papers, *supra* note 336 at 12-13.

391 See above at paras 344-346.

Recommendation #40. Legal advice for charges laid by members of the military police, other than those assigned to investigative duties with the Canadian Forces National Investigation Service, should be provided by legal advisors embedded in the Canadian Forces Military Police Group (in consultation with military prosecutors, as appropriate).

F. Referral and Pre-Trial Disposal of Charges

362. Once charges are laid, they are referred to the commanding officer of the accused or to other specified officers, who can decide not to proceed (or to recommend not to proceed) with the charges. If charges laid by the CFNIS are not proceeded with by the chain of command, the CFNIS has an exceptional right to insist that they nevertheless be referred to the DMP.[392]

363. Like many others participants in my review, the JAG stated that the chain of command's power to decide not to proceed with charges laid by the CFNIS could be perceived as an attempt to exercise undue influence over military justice decisions. The JAG suggested that charges laid by the CFNIS should be directly referred to the DMP, without the intervention of the accused's chain of command or of a referral authority. I fully endorse the JAG's suggestion.

Recommendation #41. Charges laid by members of the military police assigned to investigative duties with the Canadian Forces National Investigation Service should be referred directly to the Director of Military Prosecutions, without the intervention of the accused's chain of command.

364. As mentioned earlier, concern about the impartiality of commanding officers in making charging decisions relating to members of their units is one reason to grant authority to lay charges to all members of the military police. It follows logically, one would think, that commanding officers should no longer have discretion not to proceed with the charges laid by *any member* of the military police.

365. However, the solution for charges laid by members of the CFNIS cannot immediately be applied to charges laid by the uniformed military police. Indeed, the service offences investigated by the uniformed military police are typically less serious and may well be triable by summary trial, in which case the accused's chain of command will need to be notified of the charges.

366. This is a temporary problem. Once Bill C-77 comes into force, charges laid for service offences (as opposed to service infractions) will only be triable by court martial. Subsection 161.1(1) of the *NDA* will be amended to provide that charges of service

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392 Subsection 163.1(3) of the *NDA* and section 107.12 of the *QR&O*.

offences "*must be referred, in accordance with regulations made by the Governor in Council, to the Director of Military Prosecutions*".[393] It will then be possible to apply the recommendation for charges laid by members of the CFNIS to charges laid by members of the uniformed military police.

367. Until then, a unit's chain of command should be required to refer to the DMP charges laid by members of the uniformed military police for which it declines to proceed with summary trials. The only charges which would not be referred to the DMP in this context are charges for minor disciplinary misconduct for which no right to elect trial by court martial exists.[394] I am less concerned with the ability of commanding officers to decide whether or not a summary trial is needed for such charges.

> **Recommendation #42. Charges laid by members of the military police, other than those assigned to investigative duties with the Canadian Forces National Investigation Service, should continue to be referred first to the units' chains of command. The units' chains of command should, however, refer to the Director of Military Prosecutions all such charges for which they do not proceed by summary trial, except those which relate to service offences for which no right to elect trial by court martial exists.**
>
> **Once *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 comes into force, all charges for service offences laid by members of the military police should be referred directly to the Director of Military Prosecutions, without the intervention of the accused's chain of command.**

368. The remaining question relates to the process by which all charges may be referred to the DMP. The problem here is that the referral process can be quite lengthy. The Auditor General's 2018 report states that "[a]*fter charges were laid, the commanding officers and their superiors took 2 months, on average, to refer charges to the Director of Military Prosecutions*".[395] According to the Military Justice System Time Standards developed by the OJAG following this report, the maximum time which officers should now take to refer charges to a referral authority is 14 days. The maximum time the referral authority should subsequently take to refer the charges to the DMP is 30 days.[396] In light of these delays,

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393 Section 24 of Bill C-77. The regulations invoked in this section are currently being prepared, and it remains unclear whether the referral process will continue to include a referral authority.

394 See Part V(A) of this Chapter, below at paras 381-382.

395 2018 OAG Administration of Justice Report, *supra* note 89 at para 3.25.

396 JAG Annual Report 2019-2020, Annex G.

the JAG has suggested that charges that would currently be referred to a referral authority be referred directly to the DMP instead. I agree with this suggestion as well.

> **Recommendation #43. All charges which are currently referred to a referral authority should be referred directly to the Director of Military Prosecutions, without the intermediation of a referral authority. The charges referred to the Director of Military Prosecutions should be accompanied by any recommendation regarding their disposal that the units' chains of command consider appropriate, if any.**

V. SUMMARY TRIALS

369. The military justice system tries cases by courts martial or by summary trials. Whether a case will be tried by court martial or summary trial depends on the rank of the accused, the nature and seriousness of the service offence and, in many cases, the election of the accused.

370. Summary trials "*allo*[w] *for relatively minor service offences to be tried and disposed of quickly at the unit level*".[397] They are presided over by members of the chain of command ("**presiding officers**").[398] In most cases, the presiding officers are the commanding officers of the accused or delegated officers within their command. Presiding officers are neither lawyers nor judges, but they receive special training and certification by the JAG.

371. Proceedings at summary trial differ considerably from proceedings before courts martial. The accused has no right to counsel,[399] but is entitled to the assistance of "*an officer or, in exceptional circumstances, a non-commissioned member above the rank of sergeant*"[400] ("**assisting officers**"). There is no prosecutor. The presiding officer calls the evidence against the accused, who may introduce evidence for the defence. The *Military Rules of Evidence*[401] do not apply.[402] To find the accused guilty and pass sentence, the

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397 Judge Advocate General ("**JAG**") Annual Report 2019-2020 at 18.

398 A presiding officer can be a superior commander, a commanding officer or a person under the commanding officer's command to whom the commanding officer has delegated powers to try an accused person by summary trial: subsections 163(1), 163(4) and 164(1) of the *National Defence Act*, RSC 1985, c N-5 ("***NDA***").

399 However, the presiding officer has the discretion to permit representation by legal counsel on a case-by-case basis: notes B and C of section 108.14 of the *Queen's Regulations and Orders for the Canadian Forces* ("***QR&O***").

400 Subsection 108.14(1) of the *QR&O*. Subsection 108.14(3) of the *QR&O* provides that "[t]*he accused person may request that a particular person be appointed as the assisting officer and the request shall be complied with if* […] *the exigencies of the service permit; and* […] *the person requested is willing to act in that capacity*".

401 CRC c 1049 ("***MRE***").

402 Subsection 108.21(1) of the *QR&O*. Subsections 108.21(2) and 108.21(3) of the *QR&O* provide that a presiding officer "*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 and,*

presiding officer must be satisfied that the evidence proves the accused guilty beyond a reasonable doubt.[403]

372. The powers of punishment of presiding officers are also more limited than the powers of military judges at courts martial.[404] Presiding officers cannot order that the accused be dismissed from Her Majesty's service or imprisoned, but they can impose other significant sanctions. For example, presiding officers who are commanding officers can order the detention of the accused for a period not exceeding thirty days, a reduction of rank by one rank, or the imposition of a fine not exceeding the accused's basic pay for one month.[405] And some convictions at summary trials result in criminal records.[406]

373. Various concerns about summary trials were brought to my attention by external commentators and by several members of the Canadian Armed Forces ("**CAF**") who attended my town hall meetings. Most concerns related to the presiding officers' independence and impartiality, the sufficiency of their training or the extent of their understanding of the applicable rules. Another concern was that presiding officers have unfettered access to legal advisers from the Office of the JAG ("**OJAG**") during summary trials, which was perceived by many members of the CAF as unfair to the unrepresented accused.[407] Assisting officers were often described as having insufficient training, resources or available time to properly perform their functions, despite their best intentions and efforts. Finally, some commanding officers were of the view that summary trials have become increasingly complicated and time-consuming.[408]

374. In their current form, summary trials do not offer "*a fair and public hearing by an independent and impartial tribunal*" as guaranteed by section 11(d) of the *Canadian Charter of Rights and Freedoms* ("***Charter***"). Presiding officers lack independence from the chain of command and may have had past encounters with the accused, since they generally belong to the same unit. The relevant question, which the courts have not

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where applicable, imposing an appropriate sentence," provided that the presiding officer "*shall only give it the weight that is warranted by its reliability*".

403 Section 108.20 of the *QR&O*.

404 JAG Annual Report 2019-2020 at 18.

405 Subsection 163(3) of the *NDA*.

406 Section 249.27 of the *NDA*.

407 However, many members of the CAF appeared to be unaware of their right to obtain from the Directorate of Defence Counsel Services ("**Directorate of DCS**") free "*legal advice of a general nature* […] *on matters relating to summary trials*": paragraph 101.11(1)(d) of the *QR&O*.

408 This concern may be applicable to *some* summary trials. For example, for 2019-2020, there were 84 summary trials, on a total of 483, for which more than 180 days elapsed from the alleged service offence to the conclusion of the summary trial: JAG Annual Report 2019-2020 at 29. However, the timeliness concern does not appear to be *generally* borne out by the facts. From 2015-2016 to 2019-2020, the average number of days from the laying of a charge to the conclusion of the summary trial oscillated between 15 and 25 days: *Ibid* at 29.

answered,[409] is whether the limits imposed by the summary trial process on the constitutional rights of the accused can be justified.[410] Previous independent reviews of the military justice system concluded that "*the summary trial process is likely to survive a court challenge as to its constitutional validity*".[411] But authors have expressed a contrary view.[412] I do not find it necessary to resolve the constitutional issue. The mentioned concerns justify several recommendations on grounds of sound public policy, regardless of what the *Charter* may minimally mandate.

375. Before I explain my recommendations, I must acknowledge the peculiar timing of this Report with respect to summary trials. Once Bill C-77[413] fully comes into force, summary trials will be replaced by "summary hearings". Summary hearings will resemble summary trials, but they will be stripped of the penal and criminal aspects which currently trigger the protection of section 11(d) of the *Charter.*

376. To punish minor disciplinary breaches, new "service infractions", triable only by summary hearings, will be enacted. Presiding officers will lose their power to impose detention for a period not exceeding thirty days,[414] and no criminal records will result from summary hearings. Also, all charges for service offences will be heard exclusively by courts martial.

377. The summary hearing process will be simplified by removing the usual safeguards of criminal law from its operation. The applicable standard of evidence will become the balance of probabilities,[415] and it will be possible to compel the accused to testify.

378. I have been advised that the summary hearing process may not be implemented for several years and I have been given no firm or even target date for its implementation.

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409 A constitutional challenge of the summary trial process was attempted in *Thurrott v Canada (Attorney General)*, 2018 FC 577 ("***Thurrott***"). It was dismissed because the applicant had neither served the requisite notice of constitutional question, nor adduced a proper evidentiary record: *Thurrott* at paras 33-34. The Federal Court also stated in *obiter dictum* that the applicant had not established that his rights under sections 7, 11(d) and 12 of the *Charter* were engaged, as his sole punishment was a fine of $1000: *Thurrott* at paras 38-42.

410 Section 1 of the *Charter* provides that "[t]*he Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".*

411 Dickson Report #1 at 54; LeSage Report, *supra* note 26 at 12.

412 For a recent and detailed analysis, see Pascal Lévesque, *Frontline Justice: The Evolution and Reform of Summary Trials in the Canadian Armed Forces* (Montreal: McGill-Queen's University Press, 2020).

413 *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 ("**Bill C-77**").

414 Section 162.7 of the *NDA* will provide that "[t]*he following sanctions may be imposed in respect of a service infraction* […]*: (a) reduction in rank; (b) severe reprimand; (c) reprimand; (d) deprivation of pay, and of any allowance prescribed in regulations made by the Governor in Council, for not more than 18 days; and (e) minor sanctions prescribed in regulations made by the Governor in Council*". The regulations are currently being developed.

415 Section 163.1 of the *NDA*, enacted by section 25 of Bill C-77.

Moreover, once the relevant provisions of Bill C-77 are implemented, the summary trial process will still continue to apply to all charges laid before their coming into force.[416] Therefore, I believe recommendations are still pertinent.

379. My recommendations are aimed at addressing the current shortcomings of the summary trial process, but there are sound policy reasons to continue to apply most of them in the context of summary hearings, as I will explain below.

380. Specifically, my recommendations concern the accused's election for trial by court martial, the confidentiality of the discussions between the accused and the assisting officers, the training of presiding and assisting officers as well as the review of summary trials proceedings.

A. ACCUSED'S ELECTION TO BE TRIED BY COURT MARTIAL

381. Normally, "*an accused person who is triable by summary trial has the right to elect to be tried by court martial*".[417] Before commencing a summary trial, the presiding officer must cause the accused "*to be informed of that right and given a reasonable period of time, that shall be in any case not less than 24 hours, to* […] *decide whether to elect to be tried by court martial; and consult legal counsel*[418] *with respect to the election*".[419] By the time the accused is asked to make an election, the accused must have received disclosure of the evidence from the presiding officer.[420]

382. The exceptions are as follows: A person triable by summary trial charged with insubordinate behaviour,[421] quarrels and disturbances,[422] absence without leave,[423] drunkenness[424] or, in certain cases, conduct to the prejudice of good order and discipline[425] cannot elect to be tried by court martial if the presiding officer "*concludes that*

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416 Section 66 of Bill C-77.

417 Sections 162.1 and 162.2 of the *NDA*.

418 The Directorate of DCS provides free "*legal advice to an accused person with respect to the making of an election to be tried by court martial*": paragraph 101.11(1)(g) of the *QR&O*. Alternatively, the accused may also call civilian counsel at their cost.

419 Subsection 108.17(2) of the *QR&O*.

420 Subsection 108.15(1) of the *QR&O* provides that the disclosure must include "*any information that (a) is to be relied on as evidence at the summary trial; or (b) tends to show that the accused person did not commit the offence charged".* Paragraph 108.15(2)(a) of the *QR&O* also prescribes that "[t]*he information shall be made available in sufficient time to permit the accused person to consider it* […] *in making an election*".

421 Section 85 of the *NDA*.

422 Section 86 of the *NDA*.

423 Section 90 of the *NDA*.

424 Section 97 of the *NDA*.

425 Section 129 of the *NDA*. However, the right to elect to be tried by court martial arises if the service offence does not relate to "*military training, maintenance of personal equipment, quarters or work space, or dress and deportment*": paragraph 108.17(1)(a) of the *QR&O*.

a punishment of detention, reduction in rank or a fine in excess of 25 per cent of monthly basic pay would not be warranted if the accused person were found guilty of the offence".[426] From 2015-2016 to 2019-2020, non-electable offences represented 72.4 per cent of all service offences tried at summary trials.[427]

383. Several aspects of the disclosure and election processes at the unit level limit military defence counsel's ability to provide proper legal advice on an election.[428] At this stage, legal advice is provided by telephone. Therefore, military defence counsel do not have access to the disclosure materials and must rely on general information given to them by the accused or their assisting officer. This can present challenges. For example, assisting officers often do not have legal knowledge and may consequently misunderstand or misinterpret the information disclosed. Alternatively, they may omit important aspects of the case.

384. Moreover, military defence counsel have to take into account that "*the charges quite regularly change through the referral process and, if the charges don't change, the particulars do*".[429] If they advise an accused to elect trial by court martial, the Director of Military Prosecutions may pursue charges of greater seriousness than those initially faced at the summary trial level.

385. Once Bill C-77 comes into force, this problem will disappear as the accused will no longer have to make an election. In the meantime, military defence counsel's access to the disclosure should be enhanced. Their legal expertise will allow them to properly understand the information and materials disclosed and to anticipate the additional charges that are at risk of being preferred at courts martial.

386. In all but exceptional cases, the disclosure should be provided in electronic format to the accused and to the assisting officer. If the accused wishes to obtain legal advice from the Directorate of DCS, the disclosure should also be provided to military defence counsel.

387. The minimum delay of 24 hours to consult legal counsel and decide on the election appears overly restrictive. I have been informed that it may be extended. To avoid excessive reliance on discretion in this regard, I recommend that an extended delay be prescribed directly in the *QR&O*.

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426 Section 108.17 of the *QR&O*.

427 JAG Annual Report 2019-2020 at 25.

428 Based on interviews with the Directorate of DCS.

429 DDCS 2017 Submission to ADM(RS), *supra* note 151 at para 17.

Recommendation #44. The information prescribed by subsection 108.15(1) of the *Queen's Regulations and Orders for the Canadian Forces* should be provided in electronic format in all but exceptional cases, having regard to the nature of the information and to the exigencies of the service.

If the accused decides to consult military defence counsel, the Directorate of Defence Counsel Services should also be provided with a copy of, or given access to, this information.

Subsection 108.17(2) of the *Queen's Regulations and Orders for the Canadian Forces* should be amended to provide that the reasonable period of time given to the accused to make an election should in no case be less than 48 hours from the time the accused, the assisting officer and military defence counsel, if applicable, have been provided with a copy of, or given access to, this information.

B. CONFIDENTIALITY OF THE DISCUSSIONS BETWEEN THE ACCUSED AND THE ASSISTING OFFICERS

388. In 2003, Chief Justice Lamer made the following recommendation:

> I recommend that amendments to the *National Defence Act* and the *Queen's Regulations and Orders*, as necessary, be made to provide a greater measure of confidentiality between an assisting officer and an accused person. These amendments would address the issue of the compellability of the assisting officers in other proceedings under the *National Defence Act*, and would impose a duty of non-disclosure on the assisting officer in respect of his or her communications with the accused, except in the limited circumstances required by public policy.[430]

389. His recommendation was not implemented. Currently, the confidentiality of communications between an assisting officer and an accused person is protected neither by statute nor by regulations. The only "measure" which exists consists of a paragraph in the Military Justice at the Summary Trial Level manual which states that "[t]*he integrity of the assisting officer's role and the effectiveness of the summary trial process could be adversely affected if an assisting officer is required to disclose communications with an accused*".[431] Therefore, "*the communications between an assisting officer and the*

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430 Lamer Report, *supra* note 9 at 62-63.

431 Canadian Defence Academy, Military Justice at the Summary Trial Level, version 2.2 (updated January 12, 2011), online: <https://www.canada.ca/content/dam/dnd-mdn/documents/legal-juridique/manuals-manuels/Military-Justice-Summary-Trial-Level-2018v2.pdf> at 9-8.

accused should, for policy reasons, be treated in a manner similar to communications between a lawyer and their client".[432]

390. But the manual also recognizes that "[a]*t law, an assisting officer could be required to reveal the contents of communications overheard between a lawyer and the accused*".[433] It acknowledges that there may be cases in which consideration will be given to "*requiring an assisting officer to disclose communications between an assisting officer and an accused*".[434] A loose exhortation in a non-binding manual is clearly insufficient protection. I see no reason not to renew Chief Justice Lamer's important recommendation.

> **Recommendation #45. Amendments to the *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces*, as necessary, should be made to provide a greater measure of confidentiality between an assisting officer and an accused person. These amendments should address the issue of the compellability of the assisting officers in other proceedings under the *National Defence Act*, and should impose a duty of non-disclosure on the assisting officer in respect of communications with the accused, except in the limited circumstances required by public policy.**

391. This recommendation will remain applicable in the context of summary hearings, provided that assisting officers continue to be assigned to persons charged with service infractions. The importance of the confidentiality of their communications may in fact become even greater, because persons tried by summary hearings will remain liable to be court-martialled for service offences arising out of the facts that gave rise to service infractions.[435]

C. TRAINING OF PRESIDING OFFICERS

392. Presiding officers are required before assuming their duties to "*be trained in the administration of the Code of Service Discipline in accordance with a curriculum established by the Judge Advocate General",* and "*certified by the Judge Advocate General as qualified to perform their duties in the administration of the Code of Service Discipline*".[436] The Presiding Officer Certification Training ("**POCT**") has been established for this purpose. Success in the POCT leads to a certification which remains valid for five

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432 *Ibid*.

433 *Ibid*.

434 *Ibid*.

435 Subsection 162.6(2) of the *NDA*, enacted by section 25 of Bill C-77, will provide that "[i]*f a summary hearing has been conducted in respect of a service infraction that a person is alleged to have committed, the person may be charged, dealt with and tried in respect of an offence arising from the same facts, regardless of whether or not the person was found to have committed the service infraction*".

436 Section 101.07 of the *QR&O*.

years. After that time, presiding officers are required to renew their credentials by following the Presiding Officer Re-Certification Training ("**PORT**"), an online course. Update trainings may also be required from time to time.[437]

393. The POCT provides comprehensive training. I am generally satisfied with the breadth of its contents. However, its comprehensive nature is also a cause for concern. Some of the participants in my review suggested that the POCT covers so much ground that it may be hard for most trainees to meaningfully retain the information conveyed to them. While the POCT includes references to the actions to be taken by presiding officers in particular scenarios, it does not include practical exercises, such as moot summary trials, where observers could assess whether presiding officers effectively implement what they have learned. In my view, it would be desirable to include practical exercises of this sort in the POCT. Whether they should be included in the PORT is a more difficult question. The desirability of practical exercises in this context may, for example, depend on the number of summary trials actually conducted by a presiding officer in the preceding five years.[438] I believe the question is best left to be resolved by the JAG.

> **Recommendation #46. Practical exercises, such as moot summary trials, should be included in the curriculum of the Presiding Officer Certification Training.**
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> **In the performance of her superintendence over the administration of military justice in the Canadian Forces, the Judge Advocate General should consider the desirability of including practical exercises in the curriculum of the Presiding Officer Re-Certification Training.**

D. Training of Assisting Officers

394. In their reports on the military justice system, Chief Justice Dickson, Chief Justice Lamer and Chief Justice LeSage all made comments in relation to the insufficiency of assisting officers' training.[439] Chief Justice Lamer recommended that "*immediately after being asked to act as an assisting officer, the Canadian Forces member be given a standardized package of material* […] *and then be required to pass a test on the material before being*

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437 For example, an update training was required when the *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24 ("**Bill C-15**") came into force, introducing a number of substantial changes to the military justice system.

438 A recent study conducted as part of the OJAG's Military Justice Stakeholder Engagement Project surveyed 412 summary trial processes that occurred between April 1, 2018 and March 31, 2019. The results reveal that the vast majority of the units surveyed held only one or two summary trials during this period: 2018-2019 Summary Trial Stakeholder Survey Results, Annex E to the JAG Annual Report 2019-2020 ("**2018-2019 Summary Trial Survey**"), at 8.

439 Dickson Report, *supra* note 34 at 63; Lamer Report, *supra* note 9 at 59-61; LeSage Report, *supra* note 26 at 22-24.

entitled to act as assisting officer".[440] Chief Justice LeSage recommended that there "*be a certification requirement for assisting officers similar to that of presiding officers. The training process of assisting officers ought to include in-person instruction, mock trials, and job shadowing of more experienced assisting officers".*[441]

395. Their recommendations were not implemented. I was informed by the OJAG that "[t]*here is no requirement that a member appointed as an assisting officer pass a standardized test prior to executing their duties in this role*".[442] The assisting officers may, at their discretion, have access to two training manuals in the performance of their functions, the Comprehensive Assisting Officer Training Manual and the Guide for Accused and Assisting Officers.

396. A significant number of participants in my review remained of the view that assisting officers have insufficient training, resources or available time to properly perform their functions, despite their best intentions and efforts. The 2018-2019 Summary Trial Survey lends support to this observation. Some assisting officers "*reported that they did not feel as though they had adequate knowledge or experience to complete their tasks"* or "*felt unprepared to be involved in the process*".[443] Several assisting officers recommended a formal training course or "*a course which* [would] *allo*[w] *them the opportunity to run through some of the required tasks and duties in advance of taking on the position*".[444] A total of 21 per cent of the accused surveyed "*disagreed*" or "*strongly disagreed*" "*with the statement that their Assisting Officer had been helpful throughout the process*".[445]

397. When I asked the OJAG to provide the rationale for the non-implementation of my predecessors' recommendations, it took the following position:

> While enhanced training for assisting officers is desirable, the imposition of a requirement to review a package of material and undergo an examination following their appointment is not conducive to the objective that summary trials proceed swiftly. As assisting officers are chosen by the accused, the need to fulfill these requirements may constrain their ability [to] act, particularly in shorter time periods thus in practice risking limiting the accused's choice.[446]

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440 Lamer Report, *supra* note 9 at 61.

441 LeSage Report, *supra* note 26 at 24.

442 Implementation Status Report, *supra* note 79.

443 2018-2019 Summary Trial Survey, *supra* note 438 at 15.

444 *Ibid.*

445 *Ibid*.

446 Implementation Status Report, *supra* note 79.

398. In my view, these reasons are insufficient to justify maintaining the *status quo* in relation to the assisting officers' training. According to the 2018-2019 Summary Trial Survey, a specific assisting officer is requested only in approximately 19 per cent of the cases.[447]

399. I recommend that a formal Assisting Officer Certification Training ("**AOCT**") be developed and lead to a renewable certification, in much the same way as the POCT. The AOCT should include practical exercises, such as moot summary trials. Each unit of the CAF should establish a roster of assisting officers who have successfully completed the AOCT. The accused should be invited to select their assisting officers from this roster. They should however maintain the right to request the appointment of other persons after having been informed of their lack of training and certification. Efforts should nonetheless be made to offer the AOCT to non-roster appointees in all circumstances where doing so would not be inconsistent with the prompt restoration of discipline at the unit level. Finally, the CAF should ensure that assisting officers are provided with sufficient time, in light of their other duties, to adequately prepare the defence of the accused at summary trials.

> **Recommendation #47. A formal Assisting Officer Certification Training should be developed and lead to a renewable certification, in much the same way as the Presiding Officer Certification Training. The course should include practical exercises, such as moot summary trials.**
>
> **Each unit of the Canadian Armed Forces should establish a roster of assisting officers who have successfully completed the Assisting Officer Certification Training. The accused should be invited to select their assisting officers from this roster. They should however maintain the right to request the appointment of other persons after having been informed of their lack of training and certification. Efforts should nonetheless be made to offer the Assisting Officer Certification Training to non-roster appointees in all circumstances where doing so would not be inconsistent with the prompt restoration of discipline at the unit level.**
>
> **The Canadian Armed Forces should ensure that assisting officers are provided with sufficient time, in light of their other duties, to adequately prepare the defence of the accused at summary trials.**

447 2018-2019 Summary Trial Survey, *supra* note 438 at 14.

E. REVIEW OF SUMMARY TRIALS

i. Overview

400. Presiding officers are trained, and expected, to provide reasons for their findings and for the punishments imposed by them at summary trials. However, there is no requirement that such reasons be made in writing.[448] The only requirement on presiding officers is to "*complete Part 6 of the Record of Disciplinary Proceedings*",[449] which I reproduce below:[450]

Part - Partie 6 - Summary trial - Procès sommaire (QR&O - ORFC article 108.20)

Summary trial conducted by a: / Procès sommaire présidé par un :	☐ Delegated officer / Officier délégué	☐ Commanding officer / Commandant	☐ Superior commander / Commandant supérieur

★ **Findings - Verdicts :**

Not guilty of charges nos.: / Non coupable des accusations n° :	Guilty of charges nos.: / Coupable des accusations n° :
Guilty of related, less serious or attempted offences on charges nos.: / Coupable des infractions de même nature, moins graves ou de tentative à l'égard des accusations n° :	Proceedings stayed in respect of alternate charges nos.: / Suspension d'instance ordonnée à l'égard des accusations subsidiaires n° :

☐ **Absolute discharge - Absolution inconditionnelle**

★★ **Sentence :**

Officer presiding at the summary trial - Officier présidant le procès sommaire

Name - Nom	Rank - Grade	Position - Fonction	Signature	Date (dj-mm-yyaa)

401. The outcomes of summary trials can currently be reviewed in four separate ways.

402. First, "*an officer or non-commissioned member found guilty of a service offence at a summary trial may request a review authority to* […] *set aside the finding of guilty on the ground that it is unjust; and* […] *alter the sentence on the ground that it is unjust or too severe*".[451] All review authorities are members of the chain of command.[452] Requests for

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448 Lévesque, *supra*, note 412 at 51.

449 Paragraph 108.42(1)(a) of the *QR&O*.

450 Section 107.07 of the *QR&O*.

451 Subsection 108.45(1) of the *QR&O*. More precisely, under sections 249.11 to 249.15 of the *NDA*, a review authority may quash any finding of guilty (which is not equivalent to an acquittal), substitute a new finding for any finding of guilty, substitute a new punishment for any punishment or mitigate, commute or remit any or all of the punishments.

452 Subsection 108.45(2) of the *QR&O* provides that "*(a) the review authority for a summary trial by delegated officer is the commanding officer of the unit; (b) the review authority for a summary trial by a commanding officer is the next superior officer to whom the commanding officer of the unit is responsible in matters of discipline; and (c) the review authority for a summary trial by a superior commander is the next superior officer to whom the superior commander is responsible in matters of discipline*".

review must be made "*within 14 days of the termination of the summary trial*".[453] Presiding officers can provide their "*comments concerning the request to the review authority*",[454] and the members requesting the review can make representations about the presiding officers' comments.[455]

403. Second, the OJAG conducts, of its own initiative, a monthly review of all records of disciplinary proceedings, including the outcomes of requests for review, placed[456] on unit registries in the preceding month. As a result of the review, a legal officer may "*advise the commanding officer and any other appropriate service authority concerning any errors on the face of the record or non-compliance with procedural requirements*".[457]

404. Third, "[w]*hile* [the two foregoing] *processes are designed to deal with most review cases*", other review authorities within the chain of command "*may also act on their own initiative in individual cases*".[458] These review authorities include the Chief of the Defence Staff, officers commanding a command, officers commanding a formation and commanding officers.[459]

405. Finally, members of the CAF may, at their own cost, seek judicial review of the outcomes of a summary trial by filing an application with the Federal Court. Judicial review is not equivalent to an appeal.[460] It is a discretionary remedy which the courts grant only sparsely, particularly in highly specialized areas of the law.

ii. Recording of Summary Trials

406. I believe that the failure to require presiding officers' reasons to be made in writing precludes an effective review in many circumstances. I understand that presiding officers may provide their comments to a review authority when a CAF member requests the review of a summary trial, but this is not a satisfactory solution. On the contrary, it creates

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453 In addition, the Chief of the Defence Staff is a review authority in respect of findings of guilty made and punishments imposed by presiding officers: subsection 249(3) of the *NDA*. I have been informed, however, that the Chief of the Defence Staff is a permanent review authority. As such, requests for review which are addressed to him or her are not subject to the time limit of 14 days.

454 Subsection 108.45(6) of the *QR&O*.

455 Subsection 108.45(7) of the *QR&O*.

456 Subsections 107.14(4) to 107.14(7) of the *QR&O*.

457 Subsections 107.15(2) of the *QR&O*.

458 Note B to section 116.02 of the *QR&O*.

459 Subsection 116.02(2) of the *QR&O*. Subsection 116.02(3) of the *QR&O* provides that commanding officers may only act in such capacity when the offender is under their command and the summary trial was not conducted by a superior commander.

460 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("***Vavilov***").

a risk that presiding officers will inappropriately "bootstrap" their original decision and bolster their reasons once notified of a request for review.[461]

407. Presiding officers should be required to provide written reasons for their findings of guilt and for the punishments imposed at summary trials. Moreover, to enable review authorities to understand what transpired during summary trials (in the interest of both the accused and the presiding officers), presiding officers should also be required to videotape or, at a minimum, to record the audio of summary trials. Recordings could be transcribed whenever a transcript is necessary for the purpose of a review. For obvious reasons, this recommendation applies equally to summary hearings.

> **Recommendation #48. Presiding officers should be required to provide written reasons for their findings that a member of the Canadian Armed Forces has committed a service offence and for the punishments imposed at summary trials.**
>
> **Presiding officers should, as a general rule, be required to videotape or, at a minimum, to record the audio of summary trials. The recordings should be accessible to members of the Canadian Armed Forces who may request the review of summary trial proceedings and need to rely on the recordings or have them transcribed for this purpose.**

iii. Right to Appeal from a Summary Trial

408. I believe the review options currently available to CAF members fail to adequately protect their rights. Beyond the limited circumstances in which judicial review may be granted, CAF members who have been tried by summary trials have no access to a reviewer who is impartial and independent from the chain of command.

409. Justice should be made more accessible to them. They should be entitled to have the outcomes of summary trials reviewed on appeal by independent and impartial military judges,[462] with free legal representation by military defence counsel. The benefits of a right to appeal would, for the reasons mentioned in Part I of this Chapter, be increased by the establishment of a permanent Military Court of Canada staffed by civilian judges with a sufficient degree of military experience.[463] Both recommendations, nevertheless,

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461 *Ontario (Energy Board) v Ontario Power Generation*, [2015] 2 SCR 147 at paras 63-72.

462 The creation of a right to appeal from a summary trial will require amendments to the *NDA*. On an interim basis, consideration could however be given to designing a scheme for review by military judges by way of amendments to the *QR&O* qualifying military judges as review authorities: subsection 249(3) of the *NDA* and future subsection 163.6(1) of the *NDA*, enacted by section 25 of Bill C-77.

463 See above at paras 52ff.

are separate and failing to implement one should not necessarily mean a rejection of the other.

410. A right to appeal would address the concerns that have been discussed about presiding officers' independence, impartiality and competence by guaranteeing the existence of a remedy against violations of due process or significant errors. Appeals would have collateral benefits as well. They would increase the caseload of military judges, prosecutors and defence counsel, thus facilitating the development of their expertise. They would also lead to a greater consistency between the findings and punishments imposed between different summary trials, and between summary trials and courts martial.

411. The United Kingdom and New Zealand have successfully instituted appeals from summary trials. In both countries, service personnel have an unfettered right of appeal to a permanent Summary Appeal Court. They are entitled to legal representation and to the benefit of legal aid in appeals. In the Summary Appeal Court of the United Kingdom, appeals are heard *de novo* by panels composed of a civilian judge advocate (a judge of the Court Martial) and two lay service members. In the Summary Appeal Court of New Zealand, in contrast, military judges sit alone and apply standards of appellate review.[464]

412. An appeal system can be implemented in Canada without defeating the purpose of the summary trial system to "*provide prompt but fair justice in respect of minor service offences*".[465] A requirement to obtain leave to appeal from a military judge will ensure that appellate review is limited to the appropriate cases. There is no reason to believe that the creation of a right to appeal will result in a disruptively high number of appeals.[466]

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464 For example, paragraph 132(1)(a) of the *Armed Forces Discipline Act 1971*, 1971 No 53 provides that: "*The Summary Appeal Court must, on an appeal against a finding that a person is guilty of an offence, (a) allow the appeal if it considers that (i) the finding of the disciplinary officer should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or (ii) the finding of the disciplinary officer involves a wrong decision on a question of law; or (iii) there was, on any ground, a miscarriage of justice; or (iv) the summary trial was a nullity; and (b) dismiss the appeal in any other case*".

465 JAG Annual Report 2019-2020 at 29.

466 I have repeatedly been told that several members of the CAF charged with service offences recognize having committed them or, even if they don't, want the summary trial process to be completed as soon as possible. Those CAF members are unlikely to file appeals, except in the most egregious cases. By way of example, between 2015-2016 and 2019-2020, the yearly percentage of summary trials reviewed by review authorities oscillated between 3.8 per cent and 5.8 per cent: JAG Annual Report 2019-2020 at 27. These statistics are illuminating, particularly in light of the conclusions of the 2018-2019 Summary Trial Survey that 51 per cent of the surveyed accused felt that the summary trial process was "*unfair*", and that 48 per cent of them "*felt they had been sentenced unfairly*": 2018-2019 Summary Trial Survey, *supra* note 438 at 12, 16-17.

413. To streamline the appellate process, appeals should generally be made on the record constituted at trial, with the usual standards of appellate review.[467] The recordings of summary trials should be used or transcribed as appropriate. The military judge granting leave to appeal should nevertheless be entitled to order that an appeal be heard and determined by way of trial *de novo*. This possibility exists in the civilian justice system for appeals in respect of summary convictions. Subsection 822(4) of the *Criminal Code*[468] provides that the appeal court may, on application, order an appeal by way of trial *de novo* if "*because of the condition of the record of the trial in the summary conviction court or for any other reason*", it "*is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a trial de novo*".

414. To prevent an appeal from being launched simply to delay punishment, the sentence imposed at a summary trial should be enforced notwithstanding the appeal, unless a military judge suspends it on the application of the appellant.

415. Finally, communications and information technology should be used to assemble the appeal record and to allow appeals to be argued without requiring military prosecutors, defence counsel and judges to travel across Canada or abroad.

416. There are many questions regarding the creation of a right to appeal from summary trials, such as the timelines and procedural requirements for appeals, the precise roles of military prosecutors and defence counsel, the powers of military judges and the possibility of further appeals to the Court Martial Appeal Court of Canada. These questions should be considered by the same working group established to identify the most effective framework for the creation of a permanent Military Court of Canada.

> **Recommendation #49. Members of the Canadian Armed Forces tried by summary trials and convicted of a service offence should be entitled to appeal their conviction and/or any punishment imposed to a military judge, with leave.**
>
> **The punishments imposed at summary trial should be enforced notwithstanding the appeal, unless suspended by a military judge on the application of the appellant.**
>
> **The appellant should be offered legal counsel from the Directorate of Defence Counsel Services for the purposes of (a) the applications for leave and suspension of the punishments imposed at summary trial; and (b) the appeal, if leave is granted.**

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467 A military judge would determine whether a presiding officer has erred by reference to the special rules applicable at summary trials. For example, the admissibility of evidence should be determined in appeal on the basis of the rules described *supra*, in note 402, and not by reference to the *MRE* or to other statutory or common law rules of evidence.

468 RSC 1985, c C-46.

The working group established to identify the most effective framework for the creation of a permanent Military Court of Canada or a similarly constituted working group should identify the most effective framework for the creation of appeals from summary trials. The working group should report to the Minister of National Defence.

417. Once the summary hearing system is implemented, these recommendations will continue to be justified, for the above reasons. Independence, impartiality, due process and consistency of sentencing are not important only in the context of criminal law: they are important in any disciplinary context. The outcomes of both courts martial and summary hearings must be proportionate to the objectives of both systems. This is particularly true given that it will be possible for the same facts to result in both service infractions and service offences, with several punishments being available both at courts martial and at summary hearings.

F. Reliance on Administrative Remedial Measures

418. I believe it is important to comment in closing on commanding officers' potential reliance on administrative remedial measures as substitutes for disciplinary proceedings. Chief Justice Lamer made the following comment, which Chief Justice LeSage reiterated in its entirety:

> I do have concerns that one result of the perception that summary trials and courts martial take significant periods of time is the temptation for commanding officers to turn to administrative sanctions as a quick means to restore discipline. Administrative measures should not be seen as substitutes for disciplinary action. The use of long-term administrative measures, such as recorded warnings and counselling and probation, in such a manner is particularly worrying as they remain permanently on the member's file.[469]

419. There is no doubt that administrative remedial measures are poor substitutes for disciplinary action. In addition to the reasons of the previous independent review authorities, which I endorse, administrative measures are also protected by privacy requirements. Therefore, they simply cannot achieve the same deterrent effects as publicly-held summary trials or courts martial. Nor can they be expected to contribute to the restoration of unit discipline to the same extent.

420. Several participants in my review, including members of the CAF of all ranks, mentioned that some commanding officers continue to rely on administrative remedial measures as disciplinary tools. Some participants alluded as well to the occasional use of informal,

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469 Lamer Report, *supra* note 9 at 71; LeSage Report, *supra* note 26 at 26.

non-judicial means of discipline such as the assignment of extra duties to alleged offenders.

421. I understand that aberrations of this sort are caused by the relevant commanding officers' discontent with the length and perceived complexity of the summary trial process. Bill C-77 is partly meant to respond to their concerns. The OJAG told me that one of the underlying policy rationales of the summary hearing process was "[t]*o address concern regarding the procedural complexity involved with the processes at summary trial and ensure that units have at their disposal an appropriate mechanism that they will use to handle disciplinary breaches at the unit level*".[470]

422. In this context, I emphasize that allowing a right to appeal from summary trials is *not* meant to lead to the introduction of further procedural safeguards at trial, such as additional legal advice or longer or more thorough investigations. It is meant to complete the system as it currently exists by ensuring that the members of the CAF have an adequate remedy where the existing processes fail to result in acceptable outcomes.

423. I have attempted to design the recommended appeals to minimize their interference with the maintenance of discipline at the unit level. And I hope that appeals will not dissuade commanding officers from exercising their summary trial powers (or future summary hearing powers).

VI. COURTS MARTIAL

424. As I mentioned previously, the military justice system tries cases by summary trials or by courts martial. Any person subject to the Code of Service Discipline ("**CSD**") can be tried by court martial for any service offence.[471] From 2015-2016 to 2019-2020, there were 54 courts martial per year on average, and they represented 8.1 per cent of all trials in the military justice system over the period.[472]

425. Courts martial are "*designed to deal with more serious offences and* [have] *powers of punishment up to and including imprisonment for life*".[473] Proceedings at court martial are in some ways akin to proceedings before criminal courts: the court is presided over by a military judge, a military prosecutor represents the Crown, the accused is entitled to legal representation by defence counsel, the proceedings are adversarial, and detailed rules of evidence apply. But several differences exist, either as a reflection of the unique purposes and constraints of the military justice system, or as a result of it having ignored or rejected reforms of the civilian justice system.

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470 Answer to Request for Information #41 (OJAG).

471 Sections 166 and 173 of the *National Defence Act*, RSC 1985, c N-5 ("***NDA***").

472 Judge Advocate General ("**JAG**") Annual Report 2019-2020 at 22, 30.

473 *Ibid* at 20.

426. Two types of courts martial can be convened. A general court martial "*is composed of a military judge and a panel of five members*" of the Canadian Armed Forces ("**CAF**").[474] The panel decides all questions of fact and determines the innocence or guilt of the accused.[475] The military judge determines all questions of law or of mixed law and fact and imposes sentences.[476] By comparison, a standing court martial is composed of a military judge alone.[477]

427. Court martial decisions can be appealed to the Court Martial Appeal Court of Canada ("**CMAC**"). The CMAC is a superior court of record[478] composed of civilian judges cross-appointed by the Governor in Council from the judges of the Federal Court of Appeal, the Federal Court or provincial and territorial superior courts of criminal jurisdiction.[479] Some judgments of the CMAC can be appealed to the Supreme Court of Canada.[480]

428. Delay is the main concern which was brought to my attention in relation to the court martial system. Minimizing delay in the court martial system is of paramount importance because addressing breaches of military discipline promptly is essential to maintaining the discipline, efficiency and morale of the military. I have already recommended a number of changes to address the problem of delay in the court martial system, including establishing a permanent Military Court of Canada,[481] granting members of the uniformed military police the authority to lay charges for service offences[482] and removing referral authorities from the operation of the referral process.[483] Additional recommendations with the same objective appear below.

429. My other recommendations concern the *Military Rules of Evidence*[484] ("***MRE***"); the composition, constitution and decisions of general court martial panels; the sentencing process; the rights of appeal to the CMAC and the composition of the CMAC.

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474 Subsection 167(1) of the *NDA*.
475 Subsection 192(1) of the *NDA*.
476 Sections 191 and 193 of the *NDA*.
477 Section 174 of the *NDA*.
478 Subsection 236(1) of the *NDA*.
479 Subsections 234(1) and 234(2) of the *NDA.*
480 Subsections 245(1) and 245(2) of the *NDA.*
481 See Part I(B) of this Chapter, above at paras 81ff.
482 See Part IV(E) of this Chapter, above at paras 350ff.
483 See Part IV(F) of this Chapter, above at paras 362ff.
484 CRC c 1049.

A. DELAY IN THE COURT MARTIAL SYSTEM

i. Overview

430. The distinct purpose of the military justice system is "*to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military*".[485] In *Généreux*, Chief Justice Lamer wrote that "*the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily* […]".[486] Less than two years ago, the majority of the Supreme Court of Canada reiterated in *Stillman* that "*responding swiftly to misconduct within the military*" enhances "*discipline, efficiency, and morale in the military*".[487]

431. Accordingly, the *NDA* provides that "[c]*harges laid under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit*".[488] Summary trials are completed significantly faster than most criminal trials in the civilian justice system.

432. However, the same cannot be said of courts martial. I was informed by the Office of the JAG ("**OJAG**") that, from 2013-2014 to 2017-2018,[489] the average time to dispose of a charge at court martial was 384 days from the laying of the charge to the completion of the trial.[490] The OJAG stated that, by comparison, "*Statistics Canada data from 2018/2019 identifies a median elapsed time of almost five months (139 days) to process a case in the adult criminal courts of the* [civilian justice system] *from a person's first court appearance to the completion of their case*".[491]

433. The comparison is complicated by differences in processes, methodological differences in the available data and regional variance in the civilian justice system. But the data suggests that, as a general rule, trials by court martial currently take longer than most comparable trials in the civilian justice system. The analyses conducted by the authors of

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485 *Généreux*, *supra* note 7 at 293.

486 *Ibid*.

487 *Stillman*, *supra* note 2 at para 104.

488 Section 162 of the *NDA*.

489 The data for 2018-2019 and 2019-2020 is less representative, because it is affected by special delays having resulted or resulting from constitutional challenges to paragraph 130(1)(a) of the *NDA* (resolved in *Stillman*, *supra* note 2) and to the independence and impartiality of military judges (see above at paras 61-63).

490 Answer to Requests for Information #39-40 (OJAG) at para 13.

491 *Ibid* at para 14.

the Court Martial Comprehensive Review Report in 2017[492] and by the Auditor General of Canada in 2018 support this conclusion.[493]

434. The Auditor General of Canada recommended that:

(a) "[t]*he Canadian Armed Forces* […] *review its military justice processes to identify the causes of delays and to implement corrective measures to reduce them*";[494]

(b) "[t]*he Canadian Armed Forces* […] *define and communicate time standards for every phase of the military justice process and ensure there is a process for tracking and enforcing them*";[495]

(c) "[t]*he Canadian Armed Forces* […] *put in place a case management system that contains the information needed to monitor and manage the progress and completion of military justice cases*";[496] and

(d) "[t]*he Office of the Judge Advocate General and the Canadian Armed Forces* […] *regularly assess the efficiency and effectiveness of the administration of the military justice system and correct any identified weaknesses*".[497]

ii. Initiatives of the Canadian Armed Forces

435. In response to these recommendations, the OJAG established the Military Justice System Time Standards. They indicate that a maximum of 18 months should elapse between the laying of charges and the completion of a court martial.[498] The OJAG also participated to two additional initiatives of the CAF and Department of National Defence ("**DND**"):

(a) In collaboration with the OJAG, the Assistant Deputy Minister (Information Management) designed the Justice Administration and Information Management

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492 Court Martial Comprehensive Review Report, *supra* note 64 at 195: "*The CMCRT notes that, based upon data compiled by the DMP with respect to fiscal year 2016-2017, courts martial currently take, on average, 434 days from the date charges are laid to the completion of a court martial.* […] *This total time period of 434 days is substantially longer than the 180 days that consulted CAF leaders view as being the maximum delay that can be experienced between an incident and resolution before the proceedings lose all relevance for the promotion of military discipline. It is also substantially longer than the median length of time of 112 days (from first appearance to completion of the trial) that it takes to dispose of criminal cases by trials in Canada's civilian criminal justice system".*

493 2018 OAG Administration of Justice Report, *supra* note 89 at paras 3.25-3.28: "*The average time to complete the 20* [court martial] *cases* [which were studied] *was 17.7 months after charges were laid, and 9 cases took more than 18 months to complete*".

494 *Ibid* at para 3.31.

495 *Ibid* at paras 3.42-3.43.

496 *Ibid* at para 3.70.

497 *Ibid* at para 3.76.

498 JAG Annual Report 2019-2020, Annex G.

System ("**JAIMS**"). The JAIMS is an electronic case management tool and database expected to "*track military justice files from the reporting of an alleged offence, through to investigation, charge-laying, trial disposition, and review in both the summary trial and court martial processes*".[499] The Military Justice System Time Standards will be "*incorporated into JAIMS, ensuring that users are prompted to provide a justification in the event a time standard has not been met*".[500] The JAIMS will also have interoperability with the case management system of the Canadian Military Prosecution Service ("**CMPS**") launched on June 1, 2018.[501]

(b) The OJAG was also involved in the development of a Military Justice System Performance Monitoring Framework ("**PMF**"). The PMF "*ultimately aims to enhance the effectiveness, efficiency, and legitimacy of the military justice system*" by measuring its global performance, as well as its individual components' performance, against the broad objectives of the military justice system.[502] The PMF will be integrated into the JAIMS and source much of its data from it.[503]

436. These initiatives are promising. However, I am troubled by the time required to implement them. The JAIMS was initially expected to be "*piloted beginning in January 2019 and* […] *launched in September 2019*".[504] Having enquired about its status, I was told in March 2021 that the "*core functionality*" of the JAIMS had so far only been launched to certain units in 4th Canadian Division Support Base Petawawa, and that "[t]*he development and testing of more advanced functionality*" were currently ongoing.[505] In particular, I understand that the features of the JAIMS which relate to the court martial system are not yet operational. I understand that the development and rollout of the JAIMS have been complicated by the COVID-19 pandemic.[506] But I recommend that every effort be made to achieve full implementation and operation of the JAIMS and the PMF as soon as possible.

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499 JAG Annual Report 2019-2020 at 52.

500 *Ibid* at 52-53.

501 Director of Military Prosecutions ("**DMP**") Annual Report 2019-2020, Annex C to JAG Annual Report 2019-2020, at 33.

502 JAG Annual Report 2019-2020 at 57-58.

503 *Ibid.*

504 2018 OAG Administration of Justice Report, *supra* note 89 at paras 3.31, 3.43.

505 Answer to Request for Information #42 (OJAG).

506 JAG Annual Report 2019-2020 at 53: "*Due to the COVID-19 pandemic and Operation LASER restrictions, development and the continued rollout has been delayed. Once the pandemic restrictions are eased, development will resume, and the rollout of JAIMS will continue in a measured and responsible manner across the Canadian Armed Forces*".

Recommendation #50. The Justice Administration and Information Management System and Military Justice System Performance Monitoring Framework should be developed and start operating in all elements of the Canadian Armed Forces as soon as possible. The Canadian Armed Forces and the Department of National Defence should prioritize their development to meet this objective.

437. Once the JAIMS and the PMF are fully implemented, the JAG should have a better view of the causes of systemic delays in the court martial system. She should then identify necessary reforms and recommend their implementation to the appropriate authorities, without waiting for the next independent review.

iii. Pleas of Guilty and Case Management

438. Currently, the accused is called on by a military judge to plead at the beginning of a court martial.[507] If the accused pleads not guilty to any of the charges, the trial immediately proceeds. If the accused pleads guilty to all charges, the military judge discharges the panel, if there is one, and proceeds to pass sentence.[508]

439. Section 191.1 of the *NDA* provides that an accused's plea of guilty may, "*on application*", be received by "*the military judge assigned to preside at the court martial*", "*at any time after a General Court Martial is convened but before the panel of the court martial assembles*". A preliminary plea of guilty of this sort may not be received by video conferencing, even if all parties consent.[509] Curiously, despite the fact that standing courts martial form the vast majority of courts martial,[510] no provision of the *NDA* explicitly deals with pleas of guilty in cases where standing courts martial are convened.[511] An explicit provision will be inserted once the remaining provisions of Bill C-77[512] come into force.[513]

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507 Subsection 112.05(6) of the *Queen's Regulations and Orders for the Canadian Forces* ("***QR&O***").

508 Subsection 112.05(8) of the *QR&O*.

509 Subsection 112.64(2) of the *QR&O*.

510 General courts martial represented (a) 7 of 47 courts martial for 2015-2016; (b) 4 of 56 courts martial for 2016-2017; (c) 5 of 62 courts martial for 2017-2018; (d) 5 of 51 courts martial for 2018-2019; and (e) 10 of 55 courts martial for 2019-2020: JAG Annual Report 2019-2020 at 30.

511 Section 187 of the *NDA* may have been intended to cover this question: "*At any time after a charge has been preferred but before the commencement of the trial, any question, matter or objection in respect of the charge may, on application, be heard and determined by a military judge or, if the court martial has been convened, the military judge assigned to preside at the court martial*".

512 *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 ("**Bill C-77**").

513 Sections 29 and 30 of Bill C-77 will repeal section 191.1 of the *NDA* and enact section 189.1 of the *NDA*: "*At any time after a court martial is convened but before the commencement of the trial, the military judge assigned to preside at the court martial may, on application, receive the accused person's plea of guilty in respect of any charge and, if there are no other charges remaining before the court martial to which pleas of not guilty have been recorded, determine the sentence".*

440. The current system is ill-designed to encourage the taking of pleas at the earliest opportunity. I see no reason to wait for the court martial to be convened, which may happen several months after the preferral of charges by the DMP.[514] Or to require the accused to proactively make an application. Or not to allow all military judges to receive a plea of guilty, whichever judge is assigned to the court martial. Or not to allow pleas of guilty by video conferencing.

441. The complexity of the current construct may explain the conclusion reached by the authors of the Court Martial Comprehensive Review Report that "*as the system currently stands, guilty pleas occur on the first day set down for trial, in the tribunal's convened location (one that often requires travel on the part of the military judge, court reporter, defence counsel, and military prosecutor), even if all parties know that the guilty plea is going to occur*".[515]

442. The military prosecutors who briefed my team informed me that, in the three most recent years where statistics as to guilty pleas were recorded (2013-2014 to 2015-2016), trials resolved entirely by guilty pleas amounted respectively to 64 per cent, 52 per cent and 67 per cent of all trials by court martial. Taking guilty pleas at the earliest opportunity would therefore help significantly to reduce delays in the court martial system.

443. The practice in the Court Martial of the United Kingdom is instructive, from the standpoint of comparative law. The Judge Advocate General of the Armed Forces issued a Practice Memorandum meant to "*to ensure that cases in the Court Martial are dealt with as expeditiously as possible*".[516] In most cases, a Plea and Trial Preparation Hearing ("**PTPH**") must be held "*within 28 days of the case papers being received at the Military Court Service*".[517] If defence advises, "*in advance of the PTPH, that the case is to proceed as a guilty plea, the PTPH can be replaced by a plea and sentence hearing*" in several cases.[518] "*If the defendant pleads not guilty, the judge, assisted by prosecution and defence legal representatives, will establish the issues in the case and a timetable will be set to ensure the case can be properly prepared for trial*".[519]

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514 2018 OAG Administration of Justice Report, *supra* note 89 at para 3.25: "*After the prosecutor decided to proceed to court martial, it took an average of 5.5 months for the prosecutor and the defence counsel to hold a teleconference call with the Chief Military Judge to set the date for the trial*". This date must be stated in the order convening a court martial: paragraph 111.02(2)(b) of the *QR&O*.

515 Court Martial Comprehensive Review Report, *supra* note 64 at 196.

516 Judge Advocate General of the Armed Forces (United Kingdom), "Better Case Management in the Court Martial. Practice Memorandum" (June 17, 2020), online: <https://www.judiciary.uk/wp-content/uploads/2020/08/Memorandum-3-BCM-final-1-1.pdf> at para 1.3.

517 *Ibid* at para 7.1

518 *Ibid* at para 7.2.

519 *Ibid* at para 1.3.

444. In my view, it would be highly beneficial to implement analogous practices in Canada, whether or not my recommendation to establish a permanent Military Court of Canada is implemented.[520]

> **Recommendation #51. Sections 189.1 and/or 191.1 of the *National Defence Act* should be amended to provide that an accused person's plea of guilty may be received by any military judge, at any time after a charge has been preferred but before the commencement of the trial.**
>
> **Subsection 112.64(2) of the *Queen's Regulations and Orders for the Canadian Forces* should be repealed.**
>
> **As a general rule, a pre-trial hearing should be convened within 28 days of the preferral of charges by the Director of Military Prosecutions. The accused should be called on to plead at that pre-trial hearing. The military judge and the parties should subsequently discuss case management.**

iv. Increased Use of Technology

445. Today's information and communications technology is not only instrumental in ensuring the future portability, deployability and flexibility of the military justice system. It can also greatly expedite proceedings by removing travel requirements.

446. I recommend that the *QR&O* be amended to allow increased use of technology to facilitate remote attendance by any person in court martial proceedings,[521] and to repeal provisions which unduly restrict its use. For example, under the current rules, the parties may only appear at preliminary proceedings by video conferencing if both the prosecution and the defence agree, and the military judge so orders.[522] The same rule applies to the appearance of witnesses by video conferencing.[523] In its submissions, the CMPS stated that "[p]*roper administration of military justice would be better served by leaving the*

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520 Better case management will incidentally address the concern of the CMPS that "[t]*he current timeline for the filing of pre-trial applications (3 days from an agreed date of hearing) does not provide sufficient lead time in order to permit most applications to be dealt with without leading to a postponement of the trial*": CMPS Supplementary Submissions and Recommendations (February 12, 2021) at para 2. See also section 15 of the Court Martial Rules of Practice.

521 Consideration should, in this context, be given to the provisions of *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, which served the same purpose in respect of criminal proceedings.

522 Subsection 112.64(1) of the *QR&O*.

523 Subsection 112.65(1) of the *QR&O*. However, see *R v Machtmes*, 2021 CM 2002, in which a military judge concluded that "*through the exercise of section 179 of the NDA and section 4 of the MRE a court martial may order the video link testimony of a witness located outside of Canada pursuant to section 714.2 of the Criminal Code*": *Ibid* at para 9.

discretion to authorize remote participation in the hands of the military judge".[524] I agree with this submission. If my recommendations to establish judicial search and arrest warrant regimes are implemented,[525] the *NDA* could be amended to allow telewarrants in this context. I should, of course, not be understood to have identified all circumstances in which increased use of technology would be beneficial.

> **Recommendation #52. The *National Defence Act* or the *Queen's Regulations and Orders for the Canadian Forces*, as appropriate, should be amended to allow increased use of technology to facilitate remote attendance by any person in court martial proceedings, and to repeal provisions which unduly restrict its use, including subsections 112.64(1) and 112.65(1) of the *Queen's Regulations and Orders for the Canadian Forces*.**
>
> **In the performance of her superintendence of the administration of military justice in the Canadian Forces, the Judge Advocate General should collaborate with the Office of the Chief Military Judge, the Canadian Military Prosecution Service and the Directorate of Defence Counsel Services to identify the desirable amendments.**

v. Preliminary Proceedings

447. Section 187 of the *NDA* provides that "[a]*t any time after a charge has been preferred but before the commencement of the trial, any question, matter or objection in respect of the charge may, on application, be heard and determined by a military judge or, if the court martial has been convened, the military judge assigned to preside at the court martial*". By contrast, the *Court Martial Rules of Practice* ("***CMRP***") do not allow preliminary applications prior to the convening of a court martial. They provide that "[a]*n application may be commenced at any time after a military judge has been assigned to preside and a court martial has been convened*".[526]

448. Chief Justice LeSage expressed the view that any military judge, not only the military judge assigned to a court martial, should have authority to hear and decide preliminary issues, even after the court martial has been convened. He recommended an amendment to section 187 of the *NDA* which was not implemented.[527] I agree with his recommendation.

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524 CMPS Submissions, *supra* note 87 at para 5.

525 See Parts IV(B) and IV(C) of this Chapter, above at paras 317-319 and 329-332.

526 Section 12 of the *CMRP*.

527 LeSage Report, *supra* note 26 at 39-41.

Recommendation #53. The words "*or, if the court martial has been convened, the military judge assigned to preside at the court martial*" should be repealed from section 187 of the *National Defence Act* to allow any military judge to hear and decide preliminary issues, even after the court martial has been convened.

449. The issue of evidence in preliminary proceedings was also brought to my attention. The CMPS informed me that section 182 of the *NDA* "*is applied, without distinction, to pre-trial applications and to the trial itself*".[528] Pursuant to this provision, courts martial may only receive statutory declarations (affidavits) as evidence of the facts stated in them if both parties agree. If not, the statutory declaration has no probative value, and the person making it is required to be examined in court, which clearly increases the length of hearings. The CMPS submitted that "[c]*onsideratio*[n] *should be given to allow evidence by affidavit in support of applications as the default mode of presentation of evidence, with an option for cross-examination*" of the person making the declaration by the other party.[529] I agree with this submission.

Recommendation #54. The *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces* should be amended to allow evidence in preliminary proceedings to be given by statutory declaration regardless of the opposing party's consent. The opposing party should have the right to cross-examine the person making the statutory declaration.

B. Military Rules of Evidence

450. Subsection 181(1) of the *NDA* provides that "[t]*he Governor in Council may make rules of evidence to be applicable at trials by court martial*". In August 1959, the Governor in Council exercised this power and adopted the *Military Rules of Evidence*. They were "*a codification of the normal evidentiary rules followed by Canadian criminal courts*" – *at the time* – and had the justifiable objective of simplifying the rules of evidence applicable at courts martial and making them more consistent.[530]

451. Unfortunately, the *MRE* were not kept abreast of the evolution of common law rules of evidence in Canada. They were amended only twice, in 1990 and 2001, and then again very slightly.[531] As a result, as the CMPS noted, "[t]*hey refer to positions and terminology*

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528 CMPS Submissions, *supra* note 87 at para 6.

529 *Ibid.*

530 Jerry ST Pitzul and John C Maguire, "A Perspective on Canada's Code of Service Discipline", (2002) 52 Air Force Law Review 1 at 7: "*Until 1959, Canadian Courts Martial were obliged to apply the rules of evidence then in force in the province in which the trial was being held. In trials conducted abroad, the rules of evidence which were applicable in the accused's home province were to be used".*

531 Answer to Request for Information #31 (OJAG).

that no longer [have] *any meaning*", and "[t]*here are multiple references to QR&O and NDA provisions that no longer correspond to what they were at the time the rules were issued*".[532] More importantly, they now deviate from common law rules of evidence in many respects. I have been informed that military judges rely on civilian rules either to fill the gaps of the *MRE* or, on occasion, because they are more favourable to the accused.

452. Chief Justice LeSage recommended in 2011 that "[t]*he Military Rules of Evidence should be superseded by the statutory and common law rules of evidence in the court martial system*".[533] The OJAG informed me that his recommendation was accepted in principle but not implemented because further study is required, 10 years later.[534] When I asked for details on the policy work which had already been done and on the nature and extent of the further study, I was told that a detailed search in available records had not revealed any additional information.[535]

453. I believe that the *MRE* have lost their *raison-d'être*. Military judges, prosecutors and defence counsel have sufficient expertise to apply the statutory and common law rules of evidence which apply in civilian courts. None of the participants in my review took issue with the repeal of the *MRE*, and several encouraged it.

Recommendation #55. The *Military Rules of Evidence* should be repealed and replaced in the court martial system by the statutory and common law rules of evidence.

C. General Courts Martial

i. Re-Elections for General Courts Martial

454. Sections 165.191 to 165.193 of the *NDA* identify the circumstances in which each type of court is convened:

(a) A standing court martial is mandatory for service offences (except civil offences) punishable by imprisonment for less than two years or less punishment, and for civil offences which are summary conviction offences.[536]

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532 CMPS Submissions, *supra* note 87 at para 7.

533 LeSage Report, *supra* note 26 at 45.

534 Implementation Status Report, *supra* note 79.

535 Answer to Request for Information #45 (OJAG). More precisely, the OJAG advised that "[o]*riginal records pertaining to JAG Advisory Panel are currently in storage awaiting their transfer to Library and Archives Canada in accordance with the Treasury Board's directive and policies record retention*," and that "[a]*n analysis of the files would be required to provide further information as to the policy work which was conducted in response to* [Chief Justice LeSage's] *recommendation*": *Ibid.*

536 Section 165.192 of the *NDA*.

(b) A general court martial must, as a general rule, be convened for all service offences punishable by imprisonment for life and for the civil offences which would, in the civilian justice system, fall within the exclusive jurisdiction of the superior courts of criminal jurisdiction.[537] In cases where a general court martial would otherwise be required, a standing court martial may instead be convened with the written consent of both the accused and the DMP.[538]

(c) In other circumstances, the "*accused person may choose to be tried by General Court Martial or Standing Court Martial*".[539] The accused make their elections after the charges have been preferred by the DMP. Subsequently, they "*may, not later than 30 days before the date set for the commencement of the trial, make a new choice once as of right*".[540] The written consent of the DMP is required for additional or late re-elections.[541]

455. An accused may therefore re-elect trial by general court martial 30 days before the commencement of the trial. This re-election prompts the Court Martial Administrator ("**CMA**") to constitute a panel. I was informed by the CMA that this delay is too short and "*difficult to comply with from an administrative perspective considering the detailed step-by-step process that the Court Martial Administrator must follow*",[542] which "*it normally takes a minimum of two months to complete*".[543] The CMA recommended that the minimum delay for the first re-election as of right be extended to 60 days before the date set for the commencement of the trial.[544] I agree with this recommendation, noting that the same delay applies to certain re-elections in the civilian justice system.[545]

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537 Section 469 of the *Criminal Code*, RSC 1985, c C-46.

538 Section 165.191 of the *NDA*.

539 Subsection 165.193(1) of the *NDA*.

540 Subsection 165.193(4) of the *NDA*.

541 Subsection 165.193(5) of the *NDA*.

542 Section 111.03 of the *QR&O*. See also CMA Policy 5203-3, *Procedure for Appointment of Members to a Court Martial Panel – General Court Martial*, online: <https://www.canada.ca/en/chief-military-judge/services/consult-legal-resources/procedure-appointment-members.html>.

543 Court Martial Administrator, Written Submissions to the Independent Review Authority – Third Review of the *National Defence Act* (January 6, 2021), Annex C at paras 1, 5.

544 *Ibid* at para 15.

545 Under subparagraph 561(1)(b)(i) of the *Criminal Code*, "[a]*n accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect,* […] *if the accused is charged with an offence for which they are not entitled to request a preliminary inquiry or if they did not request a preliminary inquiry under subsection 536(4),* […] *as of right, not later than 60 days before the day first appointed for the trial, another mode of trial other than trial by a provincial court judge*". Moreover, under subsection 561(2) of the *Criminal Code*, "[a]*n accused who elects to be tried by a provincial court judge may, not later than 60 days before the day first appointed for the trial, re-elect as of right another mode of trial*".

Recommendation #56. Subsection 165.193(4) of the *National Defence Act* should be amended to replace the words "*30 days*" by the words "*60 days*".

ii. Composition of General Court Martial Panels

456. Section 167 of the *NDA* describes the composition of a general court martial. It restricts the pool of eligible panel members depending on the rank of the accused:

> 167 (1) A General Court Martial is composed of a military judge and a panel of five members.
>
> (2) The senior member of the panel must be an officer of or above the rank of lieutenant-colonel.
>
> […]
>
> (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.
>
> (5) If the accused person is of the rank of colonel, 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 lieutenant-colonel.
>
> (6) If the accused person is an officer of or below the rank of lieutenant-colonel, the members of the panel other than the senior member must be of or above the rank of the accused person.
>
> (7) If the accused person is a non-commissioned member, the panel is composed of the senior member, one other officer and three non-commissioned members who are of or above both the rank of the accused person and the rank of sergeant.

457. Some have advocated for panel composition rules that do not depend on the rank of the accused. In 2009, for example, the Standing Senate Committee on Legal and Constitutional Affairs stated that "*absent a compelling rationale for retaining them,* [distinctions based on rank] *are contrary to the spirit of equality before the law embodied in section 15 of the Charter, and should therefore be eliminated*".[546]

458. I recognize the importance of providing equal justice to all members of the CAF. But formally equal treatment may not, in fact, lead to substantially equal justice. It is important to remember that the military justice system operates in a highly hierarchical institution. Panel members hold rank. This creates a risk that they may consider the accused's rank, the rank of complainants or witnesses, or the wishes of the military hierarchy in reaching

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546 Standing Senate Committee on Legal and Constitutional Affairs, *Equal Justice: Reforming Canada's System of Courts Martial* (May 2009) at 13.

their decisions. Unless the panel system is abolished, this concern is unavoidable. But it can be minimized in a number of ways.

459. To reduce the risk that panel members will inappropriately defer to the wishes of the chain of command, special care should be taken by military judges to ensure that panel members understand their role to act impartially and independently, regardless of other interests such as the chain of command's or their own. There must also exist structural protections to protect panel members from rewards or reprisals.[547]

460. These measures also address the risk that panel members will defer to accused of higher ranks. But the most effective way to minimize this risk is to reduce the circumstances in which members of lower rank than the accused are empanelled. This is the result achieved by subsections 167(6) and 167(7) of the *NDA* for accused who are non-commissioned members or officers of or below the rank of lieutenant-colonel.

a. General Courts Martial for Colonels and General Officers

461. Subsections 167(4) and 167(5) of the *NDA* take a different approach for accused who are colonels or general officers. Perhaps in recognition of the limited number of officers of the CAF of those ranks, the provisions allow them to be tried by up to four subordinates. Only one panel member has to be "*an officer of or above the rank of the accused person*".[548] Not only does this raise the potential of rank-based influence on panel members: it also creates significant problems in certain cases.

462. The JAG, Lieutenant-Colonel (retired) François Lareau, Lieutenant-Colonel (retired) Rory G. Fowler and other participants in my review have all raised concern over the fact that subsection 167(4) of the *NDA* does not allow the Chief of the Defence Staff ("**CDS**") to be tried by general court martial. The CDS is at all times the only active member of the Canadian Armed Forces holding the rank of general or admiral. The senior member of the panel can *never* be of or above the rank of the CDS.

463. If the accused is a lieutenant-general, a general court martial panel can *theoretically* be composed. There may nevertheless be significant *practical* difficulties. I have been informed that there are nine active lieutenant-generals or vice-admirals in the CAF. They routinely interact with each other, and other general officers, to discuss and decide matters related to the command, control and administration of the entire CAF. If one were

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547 For example, section 26.11 of the *QR&O* prescribes that "[t]*he performance of duty as a member of a panel of a General Court Martial shall not be considered or evaluated in the preparation of any personal report, assessment or other document used in whole or in part for the purpose of determining (a) whether a member is qualified to be promoted, or (b) the training, posting or rate of pay of a member*".

548 Subsections 167(4) and 167(5) of the *NDA*.

accused, others would likely be found not to have sufficient impartiality in respect of the accused. No general court martial panel could likely be formed.

464. The relevance of these gaps in the *NDA* is made obvious by the recent events. Media accounts report that the current CDS, now on leave, faces investigations for allegations of sexual misconduct not amounting to sexual assault.[549] Should he be charged, he would *only* be triable in the military justice system,[550] where he would have the right to elect trial by general court martial. If this happens, the military justice system may not be able to deliver justice.

465. A number of potential solutions exist which do not require abolishing the rank-based structure for panels altogether. First, the *NDA* could prescribe that the general officers of highest ranks only be triable by standing court martial. This solution would possibly be challenged on the basis of section 11(f) of the *Canadian Charter of Rights and Freedoms*, which "*contemplates that there be protection, to the extent possible, equivalent to the civilian jury system*".[551] Second, general court martial panels for those general officers could be *entirely* made up of other general officers, irrespective of rank. But this would still allow the most senior officers of the CAF to be judged by their subordinates and would not do away with the risk of rank-based influence.

466. A third solution was offered by the JAG. She suggested that general officers could, upon their retirement from the CAF, be placed on a roster of candidates for the general courts martial of active general officers. For example, this would allow a former CDS to be the senior member of the general court martial convened to try the serving CDS. The JAG stated that further policy analysis is required for this option.

467. In my view, this option safeguards both the accused's right to a general court martial and the military justice system's ability to deliver impartial and independent justice. To minimize the risk of rank-based influence, all officers of the CAF should as a general rule be judged by officers of or above their rank. The possibility of empanelling retired officers increases the number of eligible candidates and should ensure the applicability of this rule in most cases. Senior officers of the CAF should only be judged by subordinates if there is an insufficient number of eligible and non-objectionable active or retired officers of or above their ranks.

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549 See, e.g., Murrey Brewster, Ashley Burke and Kristen Everson, "Canada's top military commander steps aside following sexual misconduct claim" in *CBC News* (February 25, 2021), online: <https://www.cbc.ca/news/politics/mcdonald-misconduct-allegation-1.5927517>.

550 It is only possible to lay charges in the civilian justice system if the service offence corresponds to a civil offence, such as sexual assault.

551 *Stillman*, *supra* note 2 at para 79.

Recommendation #57. Subsections 167(4) and 167(5) of the *National Defence Act* should be amended to provide that, as a general rule, if the accused is of or above the rank of colonel, the members of the panel must be officers of or above the rank of the accused person.

If there is an insufficient number of eligible active officers, or if objections are allowed in respect of those who exist, the panel should be completed by retired officers of the Canadian Armed Forces having held the requisite ranks at the time of their retirement.

If there is also an insufficient number of eligible retired officers, or if objections are allowed in respect of those who exist, the panel should exceptionally be completed by active officers of the Canadian Armed Forces as little subordinate in rank to the accused as possible.

b. Joint Trials by General Court Martial

468. In its submissions, the OJAG stated that "[t]*he NDA permits joint trials,* [but] *since the law provides for different* [general court martial] *panel compositions for officers and non-commissioned members, situations can arise where officers and non-commissioned members facing charges arising out of the same or related circumstances must nevertheless be tried separately".*[552] It recommended that an exception be provided in the *NDA*, but recognized that further policy analysis was "*required to determine the exceptional panel composition mechanism, so that it effectively balances the interests of accused members*".[553]

469. I agree with this recommendation. Provided the rights of the accused are safeguarded, joint trials can improve the efficiency of the military justice system by avoiding separate trials on the same facts. They can also improve its legitimacy by ensuring a consistency of trial outcomes.

Recommendation #58. Section 167 of the *National Defence Act* should be amended to provide for the composition of the general court martial where joint accused are of different ranks.

The Judge Advocate General should identify the panel composition rules which will allow joint trials and assure due regard for the rights of each accused.

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552 Office of the Judge Advocate General Policy Paper #3, Submission for the Third Independent Review Authority, "General Court Martial Composition and Selection" (January 8, 2021) ("**OJAG Policy Paper #3**") at para 16.

553 *Ibid.*

iii. Objections to the Constitution of the General Court Martial

470. At the beginning of a general court martial, the prosecution and the accused may object to the constitution of the panel.[554] No grounds for objection are specified by the *NDA* or the *QR&O*. When there is an objection, witnesses may be called by either party or by the court.[555] The evidence is followed by the parties' argument.[556] The final decision is "*made by the other members of the panel, on the basis of a majority vote, with the members voting orally in succession beginning with the member lowest in rank*".[557]

471. In its submissions, the OJAG stated that partiality was not explicitly included as a ground of objection in the military justice system, in contrast to the civilian justice system.[558] It recommended that "*consideration* […] *be given to whether a challenge for cause on the ground of* [lack of] *impartiality, akin to paragraph 638(1)(b) of the Criminal Code, should be established in the military justice system*".[559]

472. I will not make this recommendation. Contrary to the *Criminal Code*,[560] the *NDA* and *QR&O* do not define an exhaustive list of grounds to challenge panel members. The inclusion of a specific ground of partiality is unnecessary and could result in confusion.

473. The OJAG also recommended that "[c]*onsideration* […] *be given to whether the decision-making authority to remove panel members for cause should shift from the panel members to the military judge*".[561] I agree with this recommendation, which mirrors the solution applied since 2019 in the civilian justice system.[562]

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554 Section 186 of the *NDA* and section 112.14 of the *QR&O*.

555 Subsection 112.14(2) of the *QR&O*.

556 Subsections 112.14(3) and 112.14(7)(a) of the *QR&O*.

557 Subsection 112.14(9) of the *QR&O*.

558 Paragraph 638(1)(b) of the *Criminal Code*. The OJAG also noted that "[n]*either the prosecution nor the defence has the ability to question panel members on their impartiality prior to raising an objection, something that is by contrast permitted under Criminal Code paragraph 638(1)(b)*": OJAG Policy Paper #3, *supra* note 552 at paras 12-13. This is not my understanding of the law applicable in the civilian justice system. "*In the end, there must exist a realistic potential for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed*": *R v Sherratt*, [1991] 1 SCR 509 at 536. If this potential is established, "*the trial judge is given a good deal of latitude in supervising the challenge process so as not unnecessarily to invade the privacy of potential jurors, or unnecessarily to prolong the trial*": *R v Spence*, [2005] 3 SCR 458 at paras 21-24. The same rules should apply in the military justice system.

559 OJAG Policy Paper #3, *supra* note 552 at paras 13, 17.

560 Subsection 638(2) of the *Criminal Code.*

561 OJAG Policy Paper #3, *supra* note 552 at paras 14, 17.

562 Subsection 640(1) of the *Criminal Code.*

Recommendation #59. Section 112.14 of the *Queen's Regulations and Orders for the Canadian Forces* should be amended to provide that an objection with respect to a member of the general court martial panel must be heard and determined by the military judge.

iv. Decisions of the General Court Martial Panel

474. Subsection 192(2) of the *NDA* provides that "[a] *decision of the panel in respect of a finding of guilty or not guilty, or unfitness to stand trial or of not responsible on account of mental disorder is determined by the unanimous vote of its members. A decision in respect of any other matter is determined by a majority vote".* In every case, the manner of voting remains the same. "*The members of a court martial panel* […] *vote orally in succession, beginning with the member lowest in rank*".[563]

475. In its submissions, the OJAG recommended that "[c]*onsideration* […] *be given to whether individual panel members should vote by anonymous ballot*", to reduce rank-based influence on panel members.[564] I agree with this recommendation. It is an example of the structural protections to protect panel members from rewards or reprisals to which I alluded earlier.[565]

Recommendation #60. Section 112.413 of the *Queen's Regulations and Orders for the Canadian Forces* should be amended to provide that the members of a general court martial panel vote by anonymous ballot.

D. Sentencing Process

476. A number of concerns about the adequacy of the punishments imposed by courts martial were brought to my attention. The majority of participants who addressed this issue, including members of the CAF, told me that the sentences were too lenient. I occasionally heard the opposite preoccupation, particularly with respect to non-violent, non-criminal sexual misconduct incidents. The Sexual Misconduct Response Centre ("**SMRC**") and Marie-Claude Gagnon, founder of "It's Just 700", told me that such incidents had sometimes been punished disproportionately severely, particularly in the first years of Operation HONOUR.

477. Once they come into force, the remaining provisions of Bill C-77 will introduce two additional tools on which military judges will be able to rely to determine the appropriate severity of a sentence. In addition to victim impact statements, which they are already

563 Section 112.413 of the *QR&O*.

564 OJAG Policy Paper #3, *supra* note 552 at paras 15, 17.

565 See above at para 459.

required to consider, military judges will also be required to consider military impact statements[566] and community impact statements.[567]

478. In its submissions, the SMRC suggested that pre-sentence reports could be an additional option to enhance the adequacy of the punishments imposed by military judges.[568] The authors of the Court Martial Comprehensive Review Report had also considered this possibility. Noting that there are no probation officers in the CAF, they had suggested that "*CAF social work officers could be trained to draft pre-sentence reports, or the existing resources within the civilian criminal justice system could be leveraged to implement pre-sentencing reports in the court martial system*".[569] I agree with the principle of the SMRC's recommendation.

> **Recommendation #61. The *National Defence Act* should be amended to allow military judges to require that pre-sentence reports relating to the accused be prepared for the purpose of assisting the court martial in imposing a sentence or in determining whether the accused should be discharged. The Canadian Armed Forces should identify the most effective framework for the implementation of a pre-sentence report regime.**

E. Rights of Appeal to the Court Martial Appeal Court of Canada

479. In their submissions, Colonel (retired) Michel Drapeau and Justice Gilles Létourneau argued that the rights of appeal against the verdicts of courts martial are tipped in favour of the Minister of National Defence ("**Minister**").

480. Persons found guilty by a criminal court in proceedings by indictment can appeal against their convictions on questions of law and, with leave, "*on any ground of appeal that involves a question of fact or a question of mixed law and fact*" or "*on any* [other] *ground*

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566 Subsection 203.71(1) of the *NDA*, enacted by paragraph 63(21)(h) of Bill C-77: "*When determining the sentence to be imposed on an offender or determining whether the offender should be discharged absolutely in respect of any service offence, the court martial shall consider any statement made on the behalf of the Canadian Forces describing the harm done to discipline, efficiency or morale as a result of the commission of the offence and the impact of the offence on discipline, efficiency or morale*".

567 Subsection 203.72(1) of the *NDA*, enacted by paragraph 63(21)(h) of Bill C-77: "*When determining the sentence to be imposed on an offender or determining whether the offender should be discharged absolutely in respect of any service offence, the court martial shall consider any statement made by an individual on a community's behalf, describing the harm or loss suffered by the community as a result of the commission of the offence and the impact of the offence on the community".*

568 See section 721 of the *Criminal Code*.

569 Court Martial Comprehensive Review Report, *supra* note 64 at 283-284.

of appeal […] *that appears to the court of appeal to be a sufficient ground of appeal*".[570] On the contrary, persons found guilty by a court martial can only appeal findings of guilty on the basis of their "*legality*",[571] which is "*deemed to relate either to questions of law alone or to questions of mixed law and fact*".[572] I see no reason which would justify that members of the CAF have narrower rights of appeal.[573]

> **Recommendation #62. In addition to their current rights of appeal, accused persons in court martial proceedings should have the right to appeal, with leave of the Court Martial Appeal Court of Canada or a judge thereof, any finding of guilty on (a) any ground of appeal that involves a question of fact; or (b) any ground of appeal that appears to the Court Martial Appeal Court of Canada to be a sufficient ground of appeal. The *National Defence Act* should be amended accordingly.**

481. Colonel Drapeau and Justice Létourneau also recommended that the right of the Minister (or of the counsel instructed by him for that purpose) to appeal findings of not guilty on the basis of questions of mixed law and fact should be repealed.[574] In the civilian justice system, the Crown can only appeal "*against a judgment or verdict of acquittal* […] *in proceedings by indictment on any ground of appeal that involves a question of law alone*".[575]

482. I am not convinced that the Minister's broader rights of appeal in the military justice system are unjustified. I believe that the distinct purposes of the military justice system and the risk of rank-based influence on general court martial panel members are sufficient justifications for allowing questions of mixed law and fact to be considered in appeals against acquittals. However, for a better protection of the accused, I recommend that the CMAC's leave be required for such questions.

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570 Paragraph 675(1)(a) of the *Criminal Code*. A "*certificate of the trial judge that the case is a proper case for appeal*" can be obtained instead of leave in respect of "*any ground of appeal that involves a question of fact or a question of mixed law and fact*": subparagraph 675(1)(a)(ii) of the *Criminal Code*.

571 Paragraph 230(b) of the *NDA*.

572 Section 228 of the *NDA*.

573 And no one has suggested that the accused's current right of appeal on questions of mixed law and fact should be modified.

574 Sections 228 and 230.1(b) of the *NDA*.

575 Subsection 676(1) of the *NDA*.

Recommendation #63. The *National Defence Act* should be amended to provide that the Minister, or counsel instructed by him for that purpose, has the right to appeal to the Court Martial Appeal Court of Canada in respect of any finding of not guilty at a court martial (a) on any ground of appeal that involves a question of law alone; or (b) on any ground of appeal that involves a question of mixed law and fact, with leave of the Court Martial Appeal Court of Canada or a judge thereof.

F. CONSTITUTION OF THE COURT MARTIAL APPEAL COURT OF CANADA

483. Subsection 234(2) of the *NDA* provides that "[t]*he judges of the Court Martial Appeal Court are* […] *not fewer than four judges of the Federal Court of Appeal or the Federal Court to be designated by the Governor in Council; and* […] *any additional judges of a superior court of criminal jurisdiction who are appointed by the Governor in Council*".

484. The CMAC is currently composed of the Chief Justice and 56 additional judges. The number of CMAC judges is significantly higher than the number of Federal Appeal Court judges.[576] It also appears disproportionate to the workload of the CMAC. I have been informed by the CMAC that over a period of 15 years (from January 1, 2005 to December 31, 2020), its judges sat a total of 76 days and rendered 79 judgments.

485. A number of participants in my review, including external commentators and officials of the CAF, have suggested that the number of CMAC judges could be reduced. I agree with this suggestion. A smaller roster of judges would ensure that each CMAC judge would have sufficient exposure to cases to become proficient in matters of military law and justice.

486. Any restructuring of the bench should, however, preserve a sufficient level of criminal law experience in the CMAC. Some Federal Court of Appeal or Federal Court judges may have criminal law experience, but most criminal law cases are adjudicated in superior courts of criminal jurisdiction and provincial and territorial courts of appeal.

Recommendation #64. The Court Martial Appeal Court of Canada should be composed of 10 to 20 judges with significant criminal law experience. A majority should be judges of a superior court of criminal jurisdiction or a provincial or territorial court of appeal. Section 234 of the *National Defence Act* should be amended accordingly.

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576 The Federal Appeal Court is currently composed of the Chief Justice, 12 additional judges and 4 supernumerary judges. See also Preston Jordan Lim, "Parliamentary Debate as a Driver of Military Justice Reform in Canada", (2020) Canadian Journal of Law and Society 1 at 17.

CHAPTER 2 – SEXUAL MISCONDUCT*

I. HISTORICAL CONTEXT

487. Sexual misconduct in the Canadian Armed Forces ("**CAF**") remains persistent, preoccupying and widespread – despite the CAF's repeated attempts to address the problem and to curb its prevalence. It has had a traumatic impact on the lives and careers of victims,[577] a corrosive effect on discipline and morale, and a marked tendency to undermine public confidence in the CAF's institutional capacity to solve the problem internally. It is plainly inimical as well to the CAF's intention, as a matter of policy, to "*focus on increasing diversity and gender balance*"[578] within its ranks.

488. The government has taken notice. Days before the deadline for delivery of my Report, the government announced in its Budget a major initiative to combat sexual misconduct in the CAF. It promised:

(a) to "*strengthen accountability mechanisms, promote culture change in the military, and provide a safe place for survivors to report misconduct and access the services they need*";

(b) to "*implement new external oversight mechanisms to bring greater independence to the processes of reporting and adjudicating sexual misconduct within the military*"; and

(c) to "*enhance internal support services to victims, including access to free, independent legal advice and enabling military members to access services without making a formal complaint*".[579]

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* The day before my Report was due, the Minister of National Defence launched an independent, external review of sexual misconduct in the Canadian Armed Forces and the Department of National Defence, to be conducted by my former colleague, the Honourable Louise Arbour. This Chapter was prepared before the Minister's announcement.

577 When referring to victims of service offences, I use the term "victim" (rather than "survivor" or analogous expressions) as victim is the term used in the *Declaration of Victims Rights* ("***DVR***") enacted by section 7 of *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 ("**Bill C-77**") and in the *Canadian Victims Bill of Rights*, SC 2015, c 13, s 2 ("***CVBR***").

578 Department of National Defence, "Defence Policy – Strong, Secure, Engaged" in *Defence 101 – Transition Binder 2020*, online: <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/transition-materials/defence-101/2020/03/defence-101/defence-policy.html>.

579 Her Majesty the Queen in Right of Canada, *Budget 2021 – A Recovery Plan for Jobs, Growth and Resilience* (April 19, 2021), online: <https://www.budget.gc.ca/2021/pdf/budget-2021-en.pdf> at 288-289.

489. Some will lament the belated implementation of these measures – many were recommended six years ago by my former colleague, the Honourable Marie Deschamps, in her watershed report.[580] I understand that sentiment, but prefer looking forward with optimism to looking backward with despair.

490. My recommendations in this Chapter were prepared before the government's Budget commitments were disclosed. Yet they are strikingly similar, which is not at all surprising since they speak largely to the same objectives: to make the military justice system more responsive to the welfare, security and health of CAF members; more protective of the autonomy of victims; and better equipped to monitor individual accountability and organizational compliance with the CAF's governing rules and stated objectives.

491. In formulating these recommendations, I have had the benefit of extensive and informative submissions by the Sexual Misconduct Response Centre ("**SMRC**") and by several experts on sexual misconduct in the military. I have learned much as well from my extensive discussions with senior officials of the Department of National Defence ("**DND**"); with the Judge Advocate General ("**JAG**"); with leading commanders of the CAF; and, notably during 16 virtual town hall meetings, with CAF members of all ranks. My recommendations thus rest on the solid foundation of expertise, both in military culture and in the problem of sexual misconduct. For that reason particularly, I hope the government, in implementing its Budget commitments, will attach appropriate weight to my recommendations.

492. In 2014, Justice Deschamps was appointed by the Chief of the Defence Staff ("**CDS**") as External Review Authority. Her mission was to "*examine CAF policies, procedures and programs in relation to sexual harassment and sexual assault, including the effectiveness with which these policies are currently being implemented*".[581] Curiously, however, Justice Deschamps was expressly prohibited from considering relevant aspects of the CAF's military justice system.[582]

493. Accordingly, and pursuant to my own mandate, I will focus in this Chapter on aspects of the military justice system that impact, directly and indirectly, on sexual misconduct in the CAF. Recent events, described below, underline the need to include in my Report sufficient background and specific recommendations concerning sexual misconduct in the CAF.

494. By way of background, I begin with an overview of three recent periods in the CAF's ongoing struggle with sexual misconduct. They all begin with disclosures by investigative journalists. The first two ended with important reforms to the military justice system; the third has just begun and its outcome remains promising but uncertain.

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580 Deschamps Report, *supra* note 15.

581 *Ibid* at i.

582 *Ibid* at 4.

495. The first period began in 1998, with the publication in *Maclean's Magazine* of three articles on the subject of sexual misconduct in the CAF.[583] *Maclean's* summarized its findings this way:

> *Maclean's* has interviewed 13 women who say they were the victims of sexual assault in the Canadian military—and that their cases may represent a pattern of sexual harassment and assault of Canada's servicewomen. Most of the incidents took place in the 1990s, after the military began its program of fully integrating women into the armed forces. And many of them reveal a systematic mishandling of sexual assault cases: investigations were perfunctory, the victims were not believed and often they—not the perpetrators—were punished by senior officers who either looked the other way or actively tried to impede investigations. […] The cases also reveal a culture—particularly in the navy and combat units—of unbridled promiscuity, where harassment is common, heavy drinking is a way of life, and women, who now account for 6,800 of the Canadian Forces' 60,513 members, are often little more than game for sexual predators.[584]

496. In response, high-ranking officers assured *Maclean's* that the CAF would have zero tolerance for conduct of this kind. The then Minister of National Defence ("**Minister**"), the Honourable Arthur Eggleton, told *Maclean's* that "*new initiatives, such as anti-harassment programs, a new military investigative unit and a grievance board that operates outside the chain of command, will help solve whatever problems exist*".[585] And Parliament introduced Bill C-25,[586] which included a legislative response to the disclosures.

497. Bill C-25 received Royal Assent in 1998. It incorporated several recommendations made in the Dickson Report[587] and the Somalia Inquiry Report.[588] Notably, Bill C-25 granted the CAF shared jurisdiction over the offence of sexual assault, enabling the CAF to rely on its own institutions and processes to confront the problem.

498. The second period, like the first, was the product of investigative journalism. In 2014, two magazines published detailed reports on sexual misconduct in the CAF. In the first,[589]

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583 Jane O'Hara et al, "Rape in the Military" in *Maclean's* (May 23, 1998), online: <https://www.macleans.ca/news/canada/rape-in-the-military/>;
Jane O'Hara et al, "Speaking Out on Sexual Assault in the Military" in *Maclean's* (June 1 1998), online: <https://www.macleans.ca/news/canada/speaking-out-on-sexual-assault-in-the-military/>;
Jane O'Hara et al, "Of Rape and Justice" in *Maclean's* (December 14, 1998), online: <https://www.macleans.ca/news/canada/of-rape-and-justice/>.

584 *Ibid* ("Rape in the Military").

585 *Ibid* ("Rape in the Military").

586 *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, SC 1998, c 35 ("**Bill C-25**").

587 *Supra* note 34.

588 *Supra* note 27.

589 Noémi Mercier and Alec Castonguay, "Crimes sexuels: le cancer qui ronge l'armée canadienne" in *L'actualité* (April 25, 2014), online: <https://lactualite.com/societe/crimes-sexuels-dans-larmee-2/>.

L'actualité headlined its report: "*Chaque jour, cinq personnes sont agressées sexuellement dans les Forces canadiennes*".[590] Two weeks later, *Maclean's* followed with a story that echoed its findings in 1998.[591]

499. Justice Deschamps was appointed several months after publication of the disclosures in *L'actualité* and *Maclean's*. Over a period of six months, she interviewed more than 700 individuals and here, in part, is what she found:

> [The] ERA's consultations revealed a sexualized environment in the CAF, particularly among recruits and non-commissioned members, characterized by the frequent use of swear words and highly degrading expressions that reference women's bodies, sexual jokes, innuendos, discriminatory comments with respect to the abilities of women, and unwelcome sexual touching. Cumulatively, such conduct creates an environment that is hostile to women and LGTBQ members, and is conducive to more serious incidents of sexual harassment and assault.[592]

500. Justice Deschamps recommended the creation of an independent center for accountability for sexual assault and harassment, which has since become the SMRC.

501. When the SMRC was established in 2015, it was only mandated to provide support to CAF members who were victims of sexual misconduct.[593] That same year, the CAF launched Operation HONOUR to confront its sexual misconduct problem. Three years later, the Auditor General of Canada described Operation HONOUR as "*a top-down, institution-wide military operation to eliminate inappropriate sexual behaviour*".[594] The Auditor General acknowledged that Operation HONOUR had "*increased awareness of*

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590 "*Every day, five persons are sexually assaulted in the Canadian Forces*" (my translation). The authors' estimate of five sexual assaults per day is based on the following reasoning : "*Selon les chiffres obtenus, depuis 2000, il y a en moyenne 178 plaintes pour agressions sexuelles par an dans les Forces canadiennes.* […] *Si on considère que moins d'une agression sexuelle sur 10 est divulguée aux autorités, comme l'estime Statistique Canada, on dénombrerait un total de 1 780 incidents par année dans les Forces. Cinq par jour*". Or, in English, "*The data shows that, since 2000, there are approximately 178 complaints of sexual assault per year in the Canadian Forces.* […] *Considering that less than one incident of sexual assault in 10 is reported, as estimated by Statistics Canada, there would be a total of 1,780 incidents per year in the Forces. Five per day*" (my translation).

591 Noémi Mercier and Alec Castonguay, "Our Military's Disgrace" in *Maclean's* (May 5, 2014), online: <https://www.macleans.ca/news/canada/our-militarys-disgrace/>.

592 Deschamps Report, *supra* note 15 at ii.

593 In August 2019, its mandate was expanded to add two additional responsibilities which were envisaged by the Deschamps Report: (a) provision of expert advice and guidance; and (b) monitoring of CAF progress in addressing sexual misconduct: SMRC Annual Report 2019-2020 at 4.

594 2018 Fall Reports of the Auditor General of Canada to the Parliament of Canada, Report 5 – Inappropriate Sexual Behaviour – Canadian Armed Forces ("**2018 OAG Inappropriate Sexual Behaviour Report**") at para 5.5.

inappropriate sexual behaviour within the Canadian Armed Forces",[595] but found that "*some members still did not feel safe and supported*",[596] that "*many victims also did not understand or have confidence in the complaint systems*" and that the duty to report actually "*discouraged some victims from coming forward*".[597]

502. In 2018, Statistics Canada conducted Surveys on Sexual Misconduct in the Canadian Armed Forces.[598] It found that, in the 12 months preceding the survey, approximately 900 members of the Regular Force reported being victims of sexual assault in the military workplace or in incidents involving CAF members. The prevalence among women was about four times that among men (4.3 per cent versus 1.1 per cent). The problem was not limited to the Regular Force, as approximately 600 members of the Reserve Force indicated that they had been sexually assaulted in the previous 12 months. The prevalence among women was six times that among men (7.0 per cent versus 1.2 per cent). The total number of alleged assaults was approximately 1,500. The estimate made by *L'actualité* in 2014 – 1,780 sexual assaults per year – was not far off.

503. According to the SMRC, "*very few of these cases were reported and even fewer resulted in charges that were tried in the military justice system*".[599] In fact, only 25 per cent of Regular Force members who were sexually assaulted stated that someone in authority found out about the incident, while 57 per cent said nobody in authority was aware. Reservists, for their part, indicated that 30 per cent of sexual assaults had been reported to someone in authority. Finally, 54 per cent of women and 40 per cent of men in the regular force agreed that inappropriate sexual behaviour is a problem in the CAF.

504. The third period of the CAF's struggle with sexual misconduct since 1998 began on February 2, 2021, when *Global News* reported allegations of inappropriate behaviour between a retired CDS and two female subordinates.[600] Three weeks later, another CDS

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595 *Ibid* at para 5.17.

596 *Ibid* at para 5.19

597 Ibid.

598 Statistics Canada, "Sexual Misconduct in the Canadian Armed Forces Regular Force, 2018" (May 22, 2019), online: <https://www150.statcan.gc.ca/n1/pub/85-603-x/85-603-x2019002-eng.htm>; Statistics Canada, "Sexual Misconduct in the Canadian Armed Forces Primary Reserve, 2018" (May 22, 2019), online: <https://www150.statcan.gc.ca/n1/pub/85-603-x/85-603-x2019001-eng.htm>. See also Department of National Defence, "Research, data and analysis on sexual misconduct" (February 26, 2021), online: <https://www.canada.ca/en/department-national-defence/services/benefits-military/conflict-misconduct/operation-honour/research-data-analysis.html>.

599 Sexual Misconduct Response Centre, "3rd Independent Review of the National Defence Act. Considerations related to Sexual Misconduct in the Canadian Armed Forces. SMRC Recommendations for Improving the Military Justice System Framework for Sexual Misconduct Cases" (January 2021) ("**SMRC Submissions**") at 3.

600 Mercedes Stephenson, Marc-André Cossette and Amanda Connolly, "Former top soldier Gen. Jonathan Vance facing allegations of inappropriate behaviour with female subordinates: sources"

stepped aside after several news outlets had contacted the DND to confirm that he was the subject of a sexual misconduct investigation.[601] And on March 31, 2021, the Chief of Military Personnel stepped aside as well, this time amid allegations of sexual assault on a subordinate female member.[602]

505. These allegations have created fresh pressure on the CAF and on the government to respond with urgency to the problem of sexual misconduct in the CAF. They have revived concern whether the CAF itself, and its military justice system in particular, are capable of dealing appropriately with conduct of this sort.

506. Meanwhile, on March 24, 2021, Lieutenant-General Wayne D. Eyre, now Acting Chief of the Defence Staff, publicly released a letter to all members of the CAF announcing the end of Operation HONOUR. He also announced that the CAF was ready to pivot towards greater external examination in order to deal with sexual misconduct and other problems, writing to all members:

> We will fully support and welcome an external review of our institution and its culture with the full realization that we do not have all the answers. We will embrace external recommendations, including an independent reporting chain.[603]

507. In like vein, several senior officers of the CAF assured me during my consultations that they were not opposed to relinquishing some of their responsibilities dealing with sexual misconduct if it would help to eradicate the problem.

II. MILITARY JURISDICTION OVER SEXUAL MISCONDUCT

A. SEXUAL MISCONDUCT OTHER THAN SEXUAL ASSAULT

508. Sexual misconduct is not a specific offence under the *National Defence Act*[604] ("***NDA***"). It is currently prohibited by the combined effect of subsections 129(1) and 129(2) of the *NDA*, which create an infraction for an "*act, conduct, disorder or neglect to the prejudice of good order and discipline*", and section 4.5 of DAOD 9005-1, *Sexual Misconduct*

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in *Global News* (February 2, 2021), online: <https://globalnews.ca/news/7614063/jonathan-vance-sexual-misconduct-operation-honour/>.

601 See, e.g., The Canadian Press, "Admiral Art McDonald steps aside as defence chief amid investigation" in *The Toronto Star* (February 24, 2021), online: <https://www.thestar.com/politics/2021/02/25/admiral-art-mcdonald-steps-aside-as-defence-chief-amid-investigation.html?rf>.

602 See, e.g., Sean Boynton, "Head of military personnel on indefinite leave amid sexual assault investigation" in *Global News* (March 31, 2021), online: <https://globalnews.ca/news/7732816/military%20edmundson%20sexual%20assault/>.

603 "March 24: Letter from the Acting Chief of the Defence Staff (A/CDS)" in *The Maple Leaf* (March 24, 2021), online: <https://www.canada.ca/en/department-national-defence/maple-leaf/defence/2021/03/march-24-acting-cds-letter.html>.

604 RSC 1985, c N-5.

Response[605] ("**DAOD 9005-1**"), which provides that "*CAF members are prohibited from engaging in sexual misconduct*". Sexual misconduct is defined as follows in DAOD 9005-1:

> Conduct of a sexual nature that causes or could cause harm to others, and that the person knew or ought reasonably to have known could cause harm, including:
>
> - actions or words that devalue others on the basis of their sex, sexuality, sexual orientation, gender identity or expression;
> - jokes of a sexual nature, sexual remarks, advances of a sexual nature or verbal abuse of a sexual nature in the workplace;
> - harassment of a sexual nature, including initiation rites of a sexual nature;
> - viewing, accessing, distributing or displaying sexually explicit material in the workplace; and
> - any *Criminal Code* offence of a sexual nature, including: […] sexual assault […][606]

509. No one I consulted took serious issue with the CAF maintaining jurisdiction over sexual misconduct that does not amount to sexual assault or another criminal offence. Trying these acts of sexual misconduct publicly in the CAF serves a deterrent purpose.

510. I would, however, add two comments on the investigation of this category of sexual misconduct. First, these investigations should be conducted by the military police and not by the units – except in the most minor cases and absent exceptional circumstances.[607] Unit disciplinary investigations do not present the hallmarks of independence required to reassure victims of sexual misconduct that no extraneous considerations, including protection of the chain of command,[608] will influence the course of the investigation.

511. Second, the *Declaration of Victims Rights*, much like the *Canadian Victims Bill of Rights*, is meant to provide victims of service offences rights to information, protection, participation and restitution. Though the *DVR* is not yet in force, I believe the military police should begin to receive specific training on the application of its principles to

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605 *Supra* note 302.

606 Section 2 of DAOD 9005-1.

607 Even in the most minor cases, unit disciplinary investigations should be conducted with some form of oversight by the military police.

608 Deschamps Report, *supra* note 15 at 32: "*Too many participants expressed the view that the chain of command is mostly interested in protecting itself from the negative effect of a complaint on the reputation of leaders in the unit, and is less concerned with protecting the well-being of complainants*".

investigations of sexual misconduct. The SMRC, with the help of the Canadian Forces Provost Marshal, should design this training.

> **Recommendation #65. Except in the most minor cases and absent exceptional circumstances, allegations of sexual misconduct should be investigated by the military police and not by the units.**

> **Recommendation #66. The military police should receive appropriate training on the application of the *Declaration of Victims Rights* to investigations of sexual misconduct, even before its entry into force. The Sexual Misconduct Response Centre, with the help of the Canadian Forces Provost Marshal, should design this training module.**

512. Once Bill C-77 comes into force, there will presumably be two categories of punishable sexual misconduct: sexual misconduct *offences* triable only by court martial, and sexual misconduct *infractions* triable only by summary hearings. The victims of sexual misconduct *infractions* will not benefit from the rights afforded in the *DVR*.[609] For the SMRC, this will create a hierarchy of victims:

> […] defining some offences of a sexual nature as service infractions and others as service offences will create a hierarchy of victims of sexual misconduct whereby those within the court martial system will have access to rights under *DVR* and those within the summary hearing system will not. In effect, the *DVR* will only apply to a small minority of sexual misconduct cases, thereby rendering the intent of the legislation inconsequential.[610]

513. I believe that the issue should be examined once Bill C-77 comes into force and there is actual experience with summary hearings.

> **Recommendation #67. In the performance of her superintendence of the administration of military justice in the Canadian Armed Forces, the Judge Advocate General should consider the desirability of extending the rights afforded to victims of service offences by the *Declaration of Victims Rights* to victims of service infractions, particularly victims of sexual misconduct.**

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609 Section 71.01 of the *NDA*, enacted by section 7 of Bill C-77.

610 SMRC Submissions, *supra* note 599 at 16.

B. SEXUAL ASSAULT

514. Several of the experts and CAF members I interviewed contended that the CAF should not have jurisdiction over sexual assaults.[611] Without expressing a decided opinion in this regard, one expert, Professor Elaine Craig, identified several reasons for prosecuting sexual assaults in the civilian system.[612] And she argued that if the CAF were to retain jurisdiction over sexual assaults, the *NDA* should be amended to track changes in the *Criminal Code* regarding sexual offences.

515. Upon reflection, I am not persuaded that Parliament should withdraw military jurisdiction over sexual assaults at this time. For one thing, in enacting Bill C-77 in the aftermath of the Deschamps Report, Parliament decided to afford victims the same rights in both military and civilian proceedings. Giving effect to that legislative choice requires implementation as soon as possible of the relevant provisions of Bill C-77.

516. In addition, some rights and protections afforded by the *Criminal Code* to victims and to persons accused of sexual offences are not included in the *NDA*. While I am informed that some at least are, in practice, applied at courts martial,[613] I think it preferable that *all* the rights and protections available in the civilian justice system be *expressly* incorporated into the *NDA*.

517. Finally, unless the victim consents, it would in my view be inappropriate for the military justice system to continue to investigate or prosecute alleged sexual assaults until it extends to all victims the protections afforded by the *DVR*. The civilian authorities should, in the intervening period, exercise their own investigative and prosecutorial jurisdiction over alleged sexual assaults.

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611 I will mostly refer to sexual assault in this chapter, but I should not be taken to exclude other criminal offences of a sexual nature: see sections 162, 162.1 and 271 of the *Criminal Code*.

612 See generally Craig, *supra* note 304. Her findings are summarised in the executive summary of her article: "*First, the conviction rate for the offence of sexual assault by courts martial is dramatically lower than the rate in Canada's civilian criminal courts. The difference between acquittal rates in sexual assault cases in these two systems appears to be even larger. Since Operation Honour was launched in 2015 only one soldier has been convicted of sexually assaulting a female member of the Canadian Armed Forces by Canada's military legal system. (One other conviction was overturned on appeal and is pending before the Supreme Court of Canada.) In addition, plea bargains in which accused individuals can avoid Criminal Code convictions by pleading guilty to military specific discipline offences like drunkenness, conduct to the prejudice of good order and discipline, and disgraceful conduct have been used in some cases involving aggressive sexual attacks. Sanctions for even these serious sexual attacks involved fines and reprimands. Last, the decisions of military judges in some cases suggest a critical failure to recognize the Canadian military's culture of hostility to women documented in the Deschamps Report*".

613 See, e.g., *R v Brooks*, [1999] CMAJ No 8 at paras 28-30 and *R v Tait*, 2021 CM 2009.

Recommendation #68. The *Declaration of Victims Rights* should be brought into force as soon as possible, ensuring that victims investigated or prosecuted under the *National Defence Act* will be entitled to substantially the same protections as the *Canadian Victims Bill of Rights* affords. Until the *Declaration of Victims Rights* comes into force, and unless the victim consents:

(a) sexual assaults should not be investigated or prosecuted under the *National Defence Act* and should instead be referred to civilian authorities; and

(b) there should also be a strong presumption against investigating and prosecuting under the *National Defence Act* other offences committed against a victim.

Moreover, the *National Defence Act* should be amended to expressly incorporate, in substance, the rights and protections afforded by the *Criminal Code* to victims and to persons accused of sexual offences.

518. In its progress report on the first five years of the *CVBR*, the Office of the Federal Ombudsman for Victims of Crime ("**OFOVC**") noted:

> There has been no consistent effort to implement the Act. Training opportunities for criminal justice officials have been limited, and there has been no public education effort to inform citizens of their rights. Thus, the situation of victims of crime has not fundamentally changed since it was passed. I believe the Act needs to be strengthened to require officials to uphold victims' rights in the criminal justice system and require institutions to measure and report on their compliance with the Act.[614]

519. The lessons learned from the implementation of the *CVBR* should be used to improve the implementation of the *DVR*.

Recommendation #69. The regulations implementing the *Declarations of Victims Rights*, or their associated policies, should:

(a) specify that victims are to be provided clear information about their rights under the *Declaration of Victims Rights*, including what information they are entitled to receive, who is responsible for providing it and when it should be provided;

(b) develop a complaint mechanism that is simple, accessible, robust,

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614 Office of the Federal Ombudsman for Victims of Crime, "Progress Report: The Canadian Victims Bill of Rights" (November 2020) ("**OFOVC Progress Report**") at 2.

and results in meaningful enforcement and accountability; and

(c) include a requirement for role-specific mandatory training for military justice actors on victims' issues (including the impact of trauma and how best to interact with victims), victims' rights and the actors' obligations under the *Declaration of Victims Rights*.

III. DUTY TO REPORT INCIDENTS OF SEXUAL MISCONDUCT

A. THE PROBLEM

520. The duty imposed on CAF members to report all incidents of sexual misconduct was identified as one of the critical areas for reform by most experts, public servants, victims and CAF members consulted during my review, including the Deputy Minister of National Defence ("**Deputy Minister**"), the JAG, the SMRC, Justice Deschamps, Professor Craig, Marie-Claude Gagnon, founder of "It's Just 700", and many town hall participants.

521. Every member of the CAF has a duty to "*report to the proper authority* [in the chain of command] *any infringement of the pertinent statutes, regulations, rules, orders and regulations governing the conduct of any person subject to the Code of Service Discipline*", unless the member is an officer who can "*deal adequately with the matter*".[615] In theory at least, victims of sexual misconduct, their confidants and witnesses of incidents are therefore obliged to report the incidents to their chain of command, lest they be charged with having failed to do so.[616]

522. The rationale for the duty to report incidents of sexual misconduct is clear: If the leadership of the CAF and its commanding officers are unaware of the incidents – and incidence – of sexual misconduct in its ranks, they cannot take steps to eradicate or even reduce its occurrence. They cannot apply informed strategies, nor deal with offenders swiftly and with appropriate severity.

523. The duty to report, however, has had unintended effects and caused undesirable results. It has "*forced victims to report when they were not ready or did not want to*".[617] It has "[raised] *concerns about negative consequences for the complainant's career, loss of privacy and confidentiality, fear of collateral charges, and a deep scepticism that the chain of command would respond sensitively and appropriately to the complaint*".[618] It "*impacts a victim's/survivor's autonomy over whether, when, and how to report their victimization, and whether and how to seek support and assistance following an incident*", and has left

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615 Sections 4.02(1)(e) (for an officer) and 5.01 (for a non-commissioned member) of the *Queen's Regulations and Orders for the Canadian Forces* ("***QR&O***").

616 Senior officers of the CAF, including the Director of Military Prosecutions, have, however, assured me that they would never charge a victim for failing to report an incident of sexual misconduct.

617 2018 OAG Inappropriate Sexual Behaviour Report, *supra* note 594 at para 5.71.

618 Deschamps Report, *supra* note 15 at 28.

victims "*at significant risk of further harm, as they are drawn into investigations before they are ready, or that they don't want*".[619] And I have heard anecdotal evidence that many victims who have been drawn into investigations and prosecutions do not remain in the CAF because of the impact on their health and their military careers.

524. I acknowledge that DAOD 9005-1, issued on November 18, 2020, improves the situation by providing more reporting options to victims.[620] However, all reporting authorities remain within the CAF, except for the civilian police, which poses other challenges.[621] This does not address the problem of mistrust in the institution identified in the Deschamps Report and the fear of reprisals or other negative consequences resulting from a report.[622]

B. PROPOSED SOLUTIONS

525. I was presented with two proposed solutions to the problem.

526. The first is to maintain the duty to report, but to provide that the duty is fulfilled when the report is made to the SMRC, which would become a "proper authority" to receive the report under the *QR&O*. A report to the SMRC could be "restricted", in the sense that it would not trigger a formal disciplinary investigation.

527. This was one of the solutions suggested by both Justice Deschamps[623] and the SMRC.[624] It would remove the matter from the chain of command and increase confidence in the system. Many senior officers of the CAF support this option. Some even told me they thought the SMRC was already authorized to receive reports. But this would still require victims, ready and willing or not, to share their experience with strangers.

528. A second solution is to simply eliminate the duty to report incidents of sexual misconduct. The SMRC would remain the primary recipient of reports of sexual misconduct. But the victims would retain full control over their fate and their narrative, an outcome consistent with the policy behind the *DVR*.

529. I believe that removing the duty to report for victims, their confidants and health and support professionals offers the best path to renewed confidence in the system. Some

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619 SMRC Submissions, *supra* note 599 at 4-5.

620 Section 5.12 of DAOD 9005-1.

621 When reporting to the police, the victim loses control over the process,

622 Beyond the fear of reprisals, a recent study found that "*most of the* [67] *participants felt some degree of dissatisfaction with the CAF response to these incidents, and with the level of care and/or support they had received overall*": Defence Research and Development Canada, "Experiences of CAF members affected by sexual misconduct: Perceptions of support" (February 2020), online: <https://www.canada.ca/en/department-national-defence/services/benefits-military/conflict-misconduct/operation-honour/research-data-analysis/op-honour-research-program/perceptions-support.html>.

623 Deschamps Report, *supra* note 15 (Recommendation #3).

624 SMRC Submissions, *supra* note 599 (Recommendation #2).

victims still perceive the SMRC as not fully independent from the chain of command. Strengthening the independence of the SMRC would increase victim confidence in the organization.[625] This should in turn give victims the needed confidence to disclose their experience to the SMRC.

530. This solution is supported by Justice Deschamps, by the Deputy Minister, by the JAG and by the SMRC. It is supported as well by experts in the field and by advocates of victims' rights who have considered this issue, including Professor Craig and Ms. Gagnon.

531. One question remains: Should the elimination of the duty to report apply only to victims, or should it apply as well to confidants and witnesses, including bystanders? I am satisfied that it should at least apply to confidants, lest victims be further isolated by fear of sharing their stories with persons they trust.

532. Removal of the duty to report for witnesses is a more complicated matter. For one thing, the duty to report for witnesses would help find and punish perpetrators. And removing it might foster a climate in which members remain passive in the face of misconduct. On the other hand, preserving the duty to report for witnesses might deprive victims of their autonomy, as they would often be drawn into the investigation process against their will. This is a complicated issue on which we did not have the benefit of many suggestions. I believe the issue is therefore best left to be considered and resolved by a separate working group.

533. The working group should also make recommendations on when the duty to report should be maintained, even if the victim objects. The SMRC has suggested that removal of the duty to report should not apply where there exists a "*risk of imminent harm, harm to children, national security*".[626]

534. The adoption of these exceptions could have important policy implications. Would they apply to victims or only to confidants, health and support professionals and witnesses? In what circumstances is a sexual misconduct incident likely to cause national security concerns? Would providing an exception where there are risks of ongoing or imminent harm not mean that the duty to report would remain applicable whenever the perpetrator is susceptible of offending again (which may turn out to be in most cases)? These are all questions that should also be addressed in depth by a specialized working group.

Recommendation #70. An exception to the duty to report incidents of sexual misconduct should be established for victims, their confidants and the health and support professionals consulted by them.

Their duty to report should be retained, however, where a failure to report would pose a clear and serious risk to an overriding interest,

625 See Part IV of this Chapter, below at paras 535ff.

626 SMRC Submissions, *supra* note 599 at 6.

which may include ongoing or imminent harm, harm to children and national security concerns. A working group should be established to properly identify these exceptional cases. The working group should include an independent authority and representatives of the Sexual Misconduct Response Centre, military victims' organizations and the military justice system.

The working group should also consider (a) the removal of the duty of witnesses to report incidents of sexual misconduct; and (b) requiring witnesses to report incidents of sexual misconduct to the Sexual Misconduct Response Centre only.

IV. PROTECTION AND SUPPORT FOR VICTIMS

535. Victims of sexual misconduct must be provided the support they need to report the misconduct when they are ready and inclined to do so, without fear that their well-being, careers or personal lives will be compromised. Strengthening the independence of the SMRC would attenuate these concerns. Providing free independent legal advice to victims would as well.

A. INDEPENDENCE OF THE SEXUAL MISCONDUCT RESPONSE CENTRE

536. I was informed by the Assistant Deputy Minister (Review Services) of National Defence that the Chief of Programme, who reports to the Vice Chief of the Defence Staff ("**VCDS**"), presents the budgetary requirements of the SMRC to the Deputy Minister. The fact that the VCDS can in this way influence the SMRC's resources means that the SMRC is not completely independent from the chain of command. Alternatives should be explored.

537. In addition, it was suggested to me that the SMRC is "too close" to the CAF. In light of my meetings with representatives of the SMRC, I do not share these concerns. But perceptions matter and I think an examination of the relationship between the SMRC and the CAF would assure victims that the SMRC is fully committed to tend to their well-being.

538. Finally, I was told that the SMRC, as an entity within the DND, must follow all departmental policies and processes prior to any public communication. This affects the perception of its independence. I believe that the credibility of the SMRC requires that it be able to speak publicly about its findings, without undergoing the policies and processes of the DND or the CAF.

Recommendation #71. The relationship between the Sexual Misconduct Response Centre, on one hand, and the Canadian Armed Forces and the Department of National Defence on the other, should be reviewed to ensure that the Sexual Misconduct Response Centre is afforded an appropriate level of independence from both. The review should be conducted by an independent authority.

B. POWERS AND MANDATE OF THE SEXUAL MISCONDUCT RESPONSE CENTRE

i. Provision of Free Independent Legal Advice to Victims

539. The SMRC recommended in its submissions that victims be provided with access to free independent legal advice. This would give them the same rights as CAF members tried by courts martial who are given access to free military defence counsel.[627] And as the SMRC notes, it is a solution that has been adopted in many provinces and in the United States Armed Forces.[628] The Director General of Professional Military Conduct – Operation HONOUR in fact recognized that this lack of legal assistance for victims constitutes a service provision gap.[629]

540. The provision of free independent – and therefore civilian – legal advice to victims should be the responsibility of the SMRC. This would increase its credibility as a helpful resource centre for victims who seek support and counsel, and in that way alleviate the problem of underreporting.

541. Moreover, embedding legal counsel in the SMRC would meaningfully assist victims of sexual misconduct and ultimately benefit the administration of military justice in the CAF. Victims would be secure in knowing that their statements to counsel are privileged. And counsel could help them navigate the complaint and investigation process and provide guidance in deciding to whom to report, should they wish to do so (chain of command, military police or civilian police). This would encourage more victims to engage the legal process, thereby improving the overall safety of CAF members everywhere. Finally, counsel could also inform victims about restorative justice options, if any.[630]

> **Recommendation #72. The Sexual Misconduct Response Centre should be tasked with implementing a program that provides free independent legal advice to victims of sexual misconduct, including advice on whether, how and where to report, and guidance throughout judicial processes. The civilian lawyers who will provide these services should receive adequate training in military law and the military justice system, in order to be capable of properly advising victims on all their options.**

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627 See Part I(C) of Chapter 1, above at paras 120ff.

628 SMRC Submissions, *supra* note 599 at 11-12.

629 *Ibid* at 11.

630 See Part V of this Chapter, below at paras 545ff.

ii. Power to Monitor Accountability

542. Since 2019, the SMRC has been tasked with "*monitoring CAF progress in addressing sexual misconduct*".[631] I am advised, however, that the SMRC cannot monitor CAF *accountability* for sexual misconduct incidents and how they are managed. It is thus unable to investigate indications of negative consequences for victims who did report or allegations that senior officers are routinely treated more leniently than CAF members of lower rank.

543. And I was told that the SMRC did not have access to all the information needed in the fulfillment of its mandate. For example, I was told that the SMRC does not have direct access to the Operation HONOUR Tracking and Analysis System.

544. This should be corrected. The SMRC should, like the OFOVC, have a clear mandate to investigate *systemic* issues that have a negative impact on victims of sexual misconduct and how the CAF manages them.[632] It should also be given access to the information it needs to fulfill this mandate.[633]

> **Recommendation #73. The Sexual Misconduct Response Centre should be given the mandate to monitor the adherence of the Canadian Armed Forces to sexual misconduct policies and to investigate systemic issues that have a negative impact on victims of sexual misconduct, including the Canadian Armed Forces' accountability.**
>
> **In fulfilling this mandate, the Sexual Misconduct Response Centre should have broad access to all the information it needs, including direct access to relevant databases such as the Operation HONOUR Tracking and Analysis System.**
>
> **The Sexual Misconduct Response Centre should report on impediments to this access in its annual report.**
>
> **If the Sexual Misconduct Response Centre continues to encounter difficulty accessing relevant information and data, Parliament should consider granting it the power to compel the production of evidence.**

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631 2018-2019 SMRC Annual Report at 4.

632 Paragraph 4(d) of the *Terms and Conditions of Employment of the Federal Ombudsman for Victims of Crime,* SOR/2007-54.

633 For example, the SMRC could be granted powers similar to those of the Military Grievances External Review Committee (section 29.21 of the *NDA*), modified as recommended in Part IV(H) of Chapter 4, below at para 682.

V. RESTORATIVE JUSTICE APPROACHES

545. The SMRC also made compelling arguments in favour of allowing for restorative justice approaches in the military justice system. The goal of restorative justice is "*to acknowledge the harm caused and promote a sense of responsibility in the offender; in some cases, it provides the opportunity for the victim and perpetrator to work in tandem toward accountability and restitution*".[634] This would, according to the SMRC, foster "*justice outcomes that better meet the needs of victims/survivors, perpetrators, and the organization*".[635]

546. In support of this proposal, the SMRC refers to instances of "*disproportionate sanctions* [that] *have the effect of making victims unwilling to report because they do not necessarily want the person who perpetrated against them to lose their job*".[636] These concerns are shared by victims, leaders of victim advocacy groups and CAF members, particularly in cases where sanctions are imposed on lower-ranked CAF members.

547. The SMRC also points to the fact that "[r]*estorative justice approaches have been part of the civilian criminal justice system for decades*", in Canada and abroad.[637] Indeed, the OFOVC recognized the strong contribution of this model of justice when it stated, in November 2020, that "[r]*esearch has found that restorative justice can benefit victims, offenders and public safety*", and added that "*besides providing redress, restorative justice can also provide victims with answers to some of their questions, which may reduce their fear and anxiety and promote healing*".[638]

548. This is not a novel field of interest for the SMRC. In its 2018-2019 annual report, the SMRC described the work it had done in developing a restorative justice model for the military justice system. In addition to laying out the principal characteristics of its model, the SMRC said that it would "*continue to assess the feasibility and validity of a restorative approach within the Canadian military context and to build the necessary partnerships to ensure that the model is expertly designed, implemented, and evaluated*".[639]

549. In its submissions to me, the SMRC did not report the conclusions of this assessment. It also suggested that some work remained to integrate restorative approaches in the military justice system:

> Currently, through the CAF/DND Sexual Misconduct Class Action Final Settlement Agreement (FSA), the SMRC is mandated to develop a Restorative Engagement Program to provide FSA class members the opportunity to share their sexual

634 SMRC Submissions, *supra* note 599 at 13.
635 *Ibid* at 12.
636 *Ibid* at 13.
637 *Ibid*.
638 OFOVC Progress Report, *supra* note 614 at 18-19.
639 2018-2019 SMRC Annual Report at 9.

> misconduct experiences with a senior DND or CAF representative, through a process facilitated by specially-trained civilian restorative practitioners. This work presents an opportunity for the CAF to learn and build from the FSA Restorative Engagement Program to embed formalized restorative approaches in the military justice system.[640]

550. In her 2018-2019 Annual Report, the JAG also referred to a work in progress:

> The Office of the JAG remains closely engaged with the Department of National Defence and the Canadian Armed Forces' efforts to enhance victim support in the military justice system. This includes examining how the restorative approaches of the Canadian Armed Forces can assist in creating a more supportive environment that respects the dignity of all employees and military members.[641]

551. During my meeting with Rear-Admiral Geneviève Bernatchez, the current JAG, she expressly supported the implementation of restorative justice initiatives in the military justice system.

552. These initiatives are encouraging. Given the respective expertise of the JAG and the SMRC on the military justice system and with the issue of sexual misconduct, I believe they are especially well-placed to jointly develop formalized restorative justice approaches that are best suited to the reality of the CAF and its justice system.

> **Recommendation #74. The Judge Advocate General and the Sexual Misconduct Response Centre should cooperate to make a joint proposal to the Minister of National Defence in respect of amendments to the *National Defence Act* which would allow for restorative justice approaches in the military justice system. They should also collaborate to develop a formalized restorative justice model that is adapted to the needs of victims and perpetrators and suited to the reality of the Canadian Armed Forces and its justice system.**

640 SMRC Submissions, *supra* note 599 at 13.

641 2018-2019 JAG Annual Report at v.

CHAPTER 3 – THE MILITARY POLICE COMPLAINTS COMMISSION

553. The Military Police Complaints Commission ("**MPCC**") was established pursuant to Bill C-25[642] in response to recommendations contained in the Somalia Inquiry Report[643] and Dickson Report.[644]

554. As Chief Justice Lamer noted in his report in 2003:

> Both reports highlighted the perceived conflict of interest to which military police are subject given that they are soldiers first, peace officers second. Due to this dual role, both reports noted the existence of a potential vulnerability to the influence of the chain of command that military police may feel when fulfilling policing duties in their unit.
>
> Support has been given to the military police through the creation of the MPCC, a quasi-judicial civilian oversight body and operating independently of the Department of National Defense and the Canadian forces. The MPCC was established to make the handling of complaints involving the military police more transparent and accessible, to discourage interference with military police investigations, and to ensure that both complainants and members of the military police are dealt with impartially and fairly.[645]

I. CHANGED CONTEXT FOR POLICING AND OVERSIGHT

555. The context within which police forces operate and the expectation for effective oversight have changed significantly since the MPCC was established in 1998. The public is much more aware of issues of police misconduct. There have been numerous high profile incidents in the United States and Canada, many of which were captured on cellphone video, raising questions about the behaviour of the police. Incidents of this sort lead to calls for reform both in police practices and in oversight.

556. The members of the military police have not been immune from this heightened scrutiny. Since the beginning of my review, there have been media reports and testimony before parliamentary committees of alleged victims of sexual misconduct and sexual assault in the Canadian Armed Forces ("**CAF**"). They have raised concerns about the conduct of military police investigators in dealing with sexual assaults.

557. A number of provinces have created more robust oversight mechanisms in response to allegations of police misconduct. In 2013, the Civilian Review and Complaints

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642 *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, SC 1998, c 35 ("**Bill C-25**").

643 *Supra* note 27.

644 *Supra* note 34.

645 Lamer Report, *supra* note 9 at 77.

Commission ("**CRCC**"), the civilian oversight body for the Royal Canadian Mounted Police ("**RCMP**") on which the MPCC was originally modeled, was given significant new powers to compel disclosure of information by Bill C-42.[646] These changes implemented a series of recommendations from the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar ("**Arar Inquiry**"). As a result, at both the federal and provincial levels, there are new, or significantly strengthened, independent police oversight bodies which surpass the strength of the MPCC in their oversight authority. In the September 2020 Speech from the Throne, the Government of Canada promised further strengthening of civilian police oversight.[647]

II. POWERS OF THE MILITARY POLICE COMPLAINTS COMMISSION

A. OVERVIEW

558. The MPCC has no remedial powers. It makes recommendations which are not binding on the CAF and the Department of National Defence ("**DND**").

559. The MPCC has the authority to investigate conduct complaints and interference complaints. It may also initiate public interest investigations and hold hearings. These functions are described here briefly.[648]

i. Conduct Complaints

560. Conduct complaints are initially the responsibility of the Canadian Forces Provost Marshal ("**CFPM**").[649] Those complaints can deal with everything from allegations of rude behaviour by members of the military police, to issues about the manner in which search warrants were executed, to allegations of illegal search and seizure, to complaints about the failure to investigate or about decisions to lay charges or to refuse to do so.

561. The MPCC is notified of all conduct complaints and monitors their handling by the Military Police Professional Standards office ("**PSO**") of the Canadian Forces Military Police Group. Where appropriate, consideration is given to informal resolution of the complaint.[650] Following the PSO investigation, a report is issued setting out the findings and action taken in respect of the complaint.[651]

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646 *Enhancing Royal Mounted Police Accountability Act*, SC 2013, c 18.

647 Governor General of Canada, "A Stronger and More Resilient Canada. Speech from the Throne to Open the Second Session of the Forty-Third Parliament of Canada" (September 23, 2020), online: <https://www.canada.ca/content/dam/pco-bcp/documents/pm/SFT_2020_EN_WEB.pdf>, at 28.

648 The description of the powers and functions of the MPCC are taken from the MPCC Submissions, *supra* note 174 at 9-11.

649 The power is delegated by the CFPM to the Deputy Commander Canadian Forces Military Police Group, with responsibility for the Military Police Professional Standards.

650 Section 250.27 of the *NDA*.

651 Section 250.29 of the *NDA*.

562. If the complainant is dissatisfied with the disposition of the complaint, a review by the MPCC may be requested.[652] The MPCC obtains and reviews the military police files and any material provided by the complainant. The MPCC has discretion to conduct further investigations and may do so by seeking additional records, interviewing witnesses, or both.[653]

563. Following its review, the MPCC issues an interim report setting out its findings and any recommendations in respect of the complaint.[654] This is accompanied by a supporting analysis of facts and relevant laws, policies or policing best practices. Recommendations for individuals commonly concern conduct improvements, training, and increased supervision. Institutional recommendations for the military police concern general training, the need for equipment or maintenance, and changes to procedures, policies or practices.

564. The interim report is sent to the CFPM, the Chief of the Defence Staff ("**CDS**") and the Minister of National Defence ("**Minister**"). The CFPM is required to provide the MPCC with a notice of action indicating any action that has or will be taken with regard to the complaint.[655] If the CFPM declines to act on a finding or recommendation of the MPCC, he must indicate his reasons.[656]

565. After considering the notice of action, the MPCC prepares and issues its final report.[657] This is provided to the same recipients as the interim report but also to the Deputy Minister of National Defence ("**Deputy Minister**"), the Judge Advocate General ("**JAG**"), the complainant and the subject of the complaint.

ii. Interference Complaints

566. The MPCC has the sole jurisdiction to investigate interference complaints. These are complaints by members of the military police[658] who conduct or supervise investigations that a member of the CAF or a senior DND official has improperly interfered with an investigation. Improper interference with an investigation is defined to include intimidation and abuse of authority.[659]

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652 Subsection 250.31(1) of the *NDA*.

653 Subsection 250.32(2) of the *NDA*.

654 Subsection 250.32(3) of the *NDA*.

655 Subsection 250.51(1) of the *NDA*.

656 Subsection 250.51(2) of the *NDA*.

657 Subsection 250.53(1) of the *NDA*.

658 However, I recommend in Part I(D) of Chapter 1 that the standing to make interference complaints be extended to any person, including any officer or non-commissioned member of the CAF. See Recommendation #16, above at paras 190-193.

659 Section 250.19 of the *NDA*.

567. In deciding such complaints, the MPCC has determined that interference may also include instances of direct intervention by a non-military-police member, encouraging individuals not to cooperate with an investigation, threatening people who cooperate with a police investigation, and leaking information concerning an investigation. The MPCC does not consider decisions and directions by a military police supervisor to constitute interference, provided that the supervisor acts in good faith and for a proper purpose.

568. The process for interference complaints is shorter than for conduct complaints. These go directly to the MPCC for disposition. Otherwise, interference complaints follow the same process as reviews of conduct complaints. The only difference is that the CDS or the Deputy Minister, rather than the CFPM, provides the notice of action in response to the interim report of the MPCC.

iii. Public Interest Investigations and Hearings

569. If it is in the public interest, the Chairperson of the MPCC may at any time initiate an investigation into a complaint about police conduct or interference in a police investigation. The Chairperson may cause a public investigation to be held even if the complainant withdraws the complaint.[660] If the Chairperson thinks it is warranted, a public hearing may be held.[661] Where a public interest hearing is called, the MPCC has the power to compel witnesses to attend, answer questions and produce documents and other material under their control. Otherwise, cooperation with the investigation is voluntary.[662]

570. In deciding whether to exercise this statutory discretion to initiate a public interest investigation or hearing, the Chairperson may consider a number of factors, including the following:

(a) Does the complaint involve allegations of serious misconduct?

(b) Do the issues have the potential to affect confidence in the military police or the complaints process?

(c) Does the complaint involve or raise questions about the integrity of senior DND or CAF officials, including senior members of the military police? And

(d) Are the issues of broader public concern or importance?

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660 Subsection 250.38(2) of the *NDA*.

661 Subsection 250.38(1) of the *NDA*.

662 Subsection 250.41(1) of the *NDA*.

B. PROPOSED REFORMS

571. The MPCC has identified several priority issues for reform. Before I discuss these, I think it is important to note that I had very few comments on the powers of the MPCC other than from the MPCC itself.

572. In its submissions, the MPCC has raised the concern that it has no ability within the Defence portfolio to advance its own legislative proposals, or even to argue for the implementation of recommendations of previous independent review authorities.

573. The recommendations in this chapter would benefit from a commitment to regular consultation that would allow the MPCC to engage with key actors within the DND and the CAF to discuss reforms affecting the MPCC or Part IV of the *NDA*, which establishes the regime for complaints about or by military police. These actors include the CFPM, the JAG and the Director of Military Prosecutions ("**DMP**").

> **Recommendation #75. There should be regular consultation between the Military Police Complaints Commission and key actors within the Department of National Defence and the Canadian Armed Forces prior to the tabling of legislation or the promulgation of regulations or policy changes affecting the Military Police Complaints Commission or Part IV of the *National Defence Act*.**

i. Documentary Disclosure Requirements

574. In its submission, the MPCC indicates that it can only compel the production of records in the case of a conduct inquiry or a public interest hearing. It recommends that it be given the power to compel production in the case of interference complaints and in public interest investigations.

575. Moreover, the MPCC suggests that the power to request disclosure apply to the CFPM, to the CAF and to the DND. The reason for this is that records relevant to a MPCC process are often not under the control of the CFPM.

576. As the Federal Court has stated in *Garrick v Amnesty International Canada* ("***Garrick***"), "[i]*f the Commission does not have full access to relevant documents, which are the lifeblood of an inquiry, there cannot be a full and independent investigation".*[663]

577. The investigative power sought by the MPCC was given to the CRCC in 2013. Subsection 45.39(1) of the *RCMP Act*[664] states that the CRCC "*is entitled to have access to any information under the control, or in the possession, of the Force that the Commission considers is relevant to the exercise of its powers, or the performance of its duties and*

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663 2011 FC 1099 ("***Garrick***") at para 96.

664 *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 ("***RCMP Act***")

functions" under the relevant parts of the *RCMP Act*. The MPCC considers this authority as a good model.

578. It appears reasonable to provide the MPCC with a consistent power to compel disclosure. As to who gets to decide relevance, I note the following passage from the above-noted decision in *Garrick*, with which I agree:

> [I]t is for the Commission, not for the government, to determine ultimately what documents are relevant to its inquiry. If it were otherwise, the Commission would be at the mercy of the body it is supposed to investigate. This was clearly not the intent of Parliament.[665]

Recommendation #76. The *National Defence Act* should be amended to require the Canadian Forces Provost Marshal, the Canadian Armed Forces and the Department of National Defence to disclose to the Military Police Complaints Commission any information under their control or in their possession which the Military Police Complaints Commission considers relevant to the performance of its mandate.

With respect to information which involves a claim of solicitor-client privilege, this recommendation is subject to the outcome of the discussions referred to in Recommendation #79.

ii. Subpoena Powers

579. Aside from being able to summon witnesses when conducting a public interest hearing, the MPCC has no authority to oblige people to give evidence. In all of its other processes, it is reliant on the goodwill of those with knowledge of complaints to cooperate voluntarily. It regularly sees members of the military police decline to be interviewed in respect of an investigation.

580. Again, Canada's other federal police oversight body, the CRCC, has since 2013 been given broad authority to summon witnesses.[666]

581. The provisions compelling testimony are accompanied by legal protections. For example, subsection 45.65(3) of the *RCMP Act* provides that evidence given, or a document or thing produced, by a witness who is compelled to produce it may only be used against the witness in perjury proceedings.

582. I recommend that the MPCC's powers to summon witnesses be extended, with appropriate protections, to all MPCC processes.

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665 *Ibid* at para 97.

666 Section 45.65 of the *RCMP Act*.

Recommendation #77. The *National Defence Act* should be amended to give the Military Police Complaints Commission the power to summon and enforce the attendance of witnesses before it and compel them to give oral or written evidence on oath. The Military Police Complaints Commission should also have the authority to require any person, regardless of whether that person is called to testify, to produce any documents or things that the Military Police Complaints Commission considers relevant for the full investigation, hearing and consideration of a complaint.

With respect to information which involves a claim of solicitor-client privilege, this recommendation is subject to the outcome of the discussions referred to in Recommendation #79.

iii. Access to Sensitive Information

583. The MPCC brief raises the concern that its inability to expeditiously access information that is considered sensitive or potentially injurious within the meaning of the *Canada Evidence Act*[667] ("***CEA***") hampers its ability to conduct timely processes in some cases.

584. At present, the MPCC is subject to the process set out at sections 38 to 38.16 of the *CEA*. These provisions require all participants in a proceeding to notify the Attorney General of Canada ("**Attorney General**") of the possible disclosure of information they believe is sensitive or potentially injurious. Such information may not be disclosed, but the Attorney General may authorize disclosure of all or part of the information, subject to any conditions he considers appropriate. While a party or a tribunal seeking access to such information may challenge the Attorney General's decision, this requires that the proceeding be delayed while the issue is litigated.

585. The MPCC had experience with this process during its public interest hearing into the treatment of Afghan detainees. The government took the position that the MPCC could only receive documents after they were vetted and redacted. In practice, this resulted in significant delays of many months before the MPCC could obtain documents required for the conduct of its hearings.

586. There is a more expeditious alternative. The MPCC recommends that it be added to the *Schedule of Designated Entities* ("***CEA* Schedule**") as provided for in paragraph 38.01(6)(d) and subsection 38.01(8) of the *CEA*. If the MPCC became a designated entity,

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667 RSC 1985, c C-5. "*Sensitive information*" is defined in section 38 of the *CEA* as "*information relating to international relations or national defence or national security that is in the possession of the Government of Canada, whether originating from inside or outside Canada, and is of a type that the Government of Canada is taking measures to safeguard*". "*Potentially injurious information*" is defined section 38 of the *CEA* as "*information of a type that, if it were disclosed to the public, could injure international relations or national defence or national security*".

the disclosure restrictions would not apply and the MPCC could receive the sensitive information in question. It would have the corresponding obligation to put in place stringent non-disclosure requirements. If and when the MPCC would consider it necessary to make sensitive information public, the mentioned safeguards of sections 38 to 38.16 of the *CEA* would apply and any disclosure would need to be negotiated or litigated with the Attorney General.

587. The MPCC considers that there would be significant advantages to being added to the *CEA* Schedule. This would narrow and possibly eliminate the scope of public information for which disclosure would need to be negotiated or litigated. Having access to the information early in its proceedings, the MPCC would acquire a more refined understanding as to what records are relevant to the resolution of the matter before it. In some cases, it may turn out to be unnecessary to refer to sensitive information in the report. In those cases, the MPCC's listing on the *CEA* Schedule would obviate the need for litigation altogether. In other cases, the MPCC could issue a provisional final report with some information redacted pending the results of litigation.

588. There are a number of factors that favour giving serious consideration to adding the MPCC to the *CEA* Schedule. First, MPCC processes may require access to sensitive or potentially injurious information. For example, a military police investigation into the conduct of the Canadian Special Forces Operations Command of the CAF could involve sensitive information. Second, the CRCC was added to the *CEA* Schedule in 2013, as a result of recommendations of the Arar Inquiry. And third, I believe that having earlier access to sensitive or potentially injurious information could result in more timely public interest hearings and would increase public confidence in the MPCC's ability to offer effective oversight of the military police.

589. Nevertheless, I think it is important to act with prudence on matters touching on national security. It would be important to ascertain the views of government officials responsible for national security policy. I therefore recommend that discussions be undertaken between the MPCC, the DND, the CAF, the Privy Council Office and the Department of Justice Canada to examine the merits of adding the MPCC to the *CEA* Schedule as well as the legislative requirements for doing so.

> **Recommendation #78. Discussions should be undertaken between the Military Police Complaints Commission, the Department of National Defence, the Canadian Armed Forces, the Privy Council Office and the Department of Justice Canada to examine the merits of adding the Military Police Complaints Commission to the schedule of the *Canada Evidence Act* as well as the legislative requirements for doing so.**

iv. Access to Solicitor-Client Privileged Information

590. In its submission, the MPCC takes the position that legal advice sought and provided to members of the military police is often relevant to the fair and effective resolution of complaints.[668] It suggests that it be provided access to solicitor-client privileged information where relevant to the determination of a complaint.

591. At present, the MPCC is unable to access such information from the CFPM, even though the CFPM has access to such information for the purposes of its initial determination of a conduct complaint.

592. The MPCC receives many complaints about actions taken or not taken with the benefit of legal advice: searches and seizures, arrests and the decision of whether or not to lay charges. The MPCC submits that it is not possible to fully and fairly explain charge-laying decisions by members of the military police without some knowledge of the pre-charge consultations between them and their legal advisers. For example, the inability for the MPCC to have access to legal advice does not permit the MPCC to confirm that a member of the military police provided an accurate description of the evidence to a prosecutor, or that the ensuing legal advice was properly considered.

593. Nor is it appropriate for the MPCC to simply substitute its own assessment of the grounds for a charging decision for that of members of the military police. A military police member's exercise of discretion should be reviewable on a standard of reasonableness, rather than correctness. Having followed legal advice does not operate as a complete defence to the consequences flowing from the decisions or actions of a military police member, but is certainly relevant to a consideration of their reasonableness.

594. The DMP raised concerns about providing the MPCC with access to legal advice provided by military prosecutors to the Canadian Forces National Investigation Service. He is aware of the desire of the MPCC to have access to this advice. However, the DMP is concerned that in order for military prosecutors to have full and frank discussions with members of the military police, their advice needs to be protected from disclosure. I understand from the submissions of the MPCC that the JAG also has concerns about providing privileged information to the MPCC.

595. According to the MPCC, there are also disagreements on the scope of what information is actually privileged. With a view to finding practical solutions, the MPCC has set up a joint working group with the CFPM's legal advisors on redactions to CFPM disclosures. The MPCC is of the view that the success of those efforts is largely dependent on the outlook of the particular legal officers advising the CFPM at any given time.

596. There have been numerous efforts over the years to resolve, or work around, the issue of solicitor-client privileged information in a way that would both respect the importance

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668 MPCC Submissions, *supra* note 174 at 20-25.

of the privilege and allow the MPCC to access the information for limited purposes in certain cases. The MPCC takes the view that, without a basic legislative right of access, these types of efforts can only bring limited relief to the problem.

597. This issue was addressed in the RCMP context. In 2013, the CRCC was given wide powers of access to information, including solicitor-client privileged information, in order to carry out its oversight role.[669] These powers apply, among other things, to the CRCC's police complaints mandate, on which the MPCC complaints regime is modeled. I am also aware that there are other legislative models that compel the production of solicitor-client privileged information, but provide that disclosure does not amount to a waiver of privilege.[670]

598. I am of the view that there is a strong argument to be made that the MPCC should have access to solicitor-client privileged information where it is relevant to the determination of a complaint. However, I am also mindful of the above-noted concerns that have been expressed by the DMP and the JAG.

599. I think it is important that further efforts be made to resolve this issue. These efforts should involve the MPCC, the CFPM, the JAG and the DMP. They should be preceded by analysis of the regime in place in the *RCMP Act* that allows the CRCC to have access to solicitor-client privileged information, including the safeguards that are provided for. Due consideration should be given to other regimes that compel the disclosure of solicitor-client privileged information and to the safeguards they contain. It would be helpful if external experts on the *RCMP Act* provisions and on the current state of police oversight powers were part of the discussion.

> **Recommendation #79. There should be discussions between the Military Police Complaints Commission, the Canadian Forces Provost Marshal, the Judge Advocate General and the Director of Military Prosecutions with a view to reaching agreement on the circumstances when the Military Police Complaints Commission should be given access to solicitor-client privileged information, with appropriate limits and safeguards to avoid waiver of the privilege. The discussions should examine options for consequential amendments to the *National Defence Act*. Due consideration should be given to other regimes that compel the disclosure of solicitor-client privileged information and to the safeguards they contain. Outside experts should be engaged in the discussions.**

669 Subsection 45.4(2) of the *RCMP Act*.

670 See, e.g., subsection 36(2.2) of the *Access to Information Act*, RSC 1985, c A-1 and subsection 89(3) of the Ontario *Legal Aid Services Act, 1998*, SO 1998, c 26.

v. Access to Personal Information Not Under the Control of the Canadian Forces Provost Marshal

600. This proposal aims to address a problem created by the fact that the CFPM and the Canadian Forces Military Police Group are not institutionally independent from the broader DND and CAF.

601. The CFPM is required to provide to the Chairperson of the MPCC all information and materials that are relevant to a conduct complaint.[671] I am informed that this includes personal information within the meaning of the *Privacy Act*.[672] However, information and records that are not scanned into the Canadian Forces Military Police Group's Security and Military Police Information System may be beyond the "control" of the CFPM for the purposes of the *Privacy Act*, because the CFPM does not control the broader DND and CAF information technology and management systems.

602. The DND and CAF, for their part, do not consider themselves bound by the CFPM's disclosure obligations under Part IV of the *NDA*. They accordingly feel bound to resist disclosure to the MPCC of records containing personal information, consistent with their obligations under the *Privacy Act*. It is also possible that records relevant to MPCC investigations involving members of the military police could be held by other departments[673] of the Government of Canada. As a result, the CFPM may not be able to disclose relevant military police information to the MPCC, even though it may be stored on government computer networks or devices.

603. In cases where non-military-police records have been unsuccessfully sought, the MPCC has been advised that access to such material would be possible if the MPCC had been designated as an investigative body for the purposes of paragraph 8(2)(e) of the *Privacy Act*. Under that provision, personal information may be disclosed to an investigative body specified in Schedule II of the *Privacy Regulations*[674] for the purpose of enforcing any law of Canada or a province or carrying out a lawful investigation, on a written request specifying the purpose and describing the information to be disclosed.

Recommendation #80. The Military Police Complaints Commission should be added to the list of designated investigative bodies in Schedule II of the *Privacy Regulations*.

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671 Paragraph 250.31(2)(b) of the *NDA.*

672 RSC 1985, c P-21.

673 Such as the Department of Foreign Affairs, Trade and Development in the case of overseas operations or the Department of Public Safety and Emergency Preparedness in the case of joint policing operations with the RCMP.

674 SOR/83-508.

vi. Time Limit for Requesting a Review

604. Pursuant to section 250.2 of the *NDA*, there is a time limit of one year (after the event giving rise to the complaint) for a person to make a conduct or interference complaint, which can be extended by the Chairperson of the MPCC when considered reasonable in the circumstances. However, there is no time limit for requesting a review of a conduct complaint following the CFPM's disposition.

605. The MPCC advocated for a time limit for requesting a review of the CFPM's disposition of a conduct complaint under section 250.31 of the *NDA*. This would be subject to the same Chairperson's discretion in respect of extensions.

606. Both Chief Justice Lamer and Chief Justice LeSage recommended time limits on requests for review: 60 and 90 days respectively. The *RCMP Act* imposes a 60-day time limit for requests for review to the CRCC. The MPCC recommends a 90-day time limitation. I endorse this option.

Recommendation #81. The *National Defence Act* should be amended to establish a 90-day time limit for requesting a review of a conduct complaint after it has been investigated by the Canadian Forces Provost Marshal.

vii. Time Limit for Providing a Notice of Action

607. Another stage of the process where timeliness is presently unregulated is the issuance of the notice of action in response to the interim report of the MPCC. The MPCC cannot proceed to its final report and conclude its process without having first considered the notice of action.

608. It is the CFPM who prepares the notice of action in the case of all conduct complaints, except where it is the CFPM who is the subject of the conduct complaint. In those cases and in most interference cases, it is the CDS who is responsible for the notice of action. Where the subject of an interference complaint is a senior civilian official of DND, the Deputy Minister is responsible for the notice of action. Finally, where the subject of an interference complaint is either the CDS or the Deputy Minister, the review of the MPCC Interim Report and the preparation of the notice of action falls to the Minister.

Recommendation #82. The *National Defence Act* should be amended to establish a 90-day time limit for the production of the notice of action, subject to extension by the Chairperson of the Military Police Complaints Commission. In the absence of a notice of action or application to extend within this time frame, the Military Police Complaints Commission should be authorized to proceed to issue its final report.

If Recommendation #13 is implemented and the Canadian Forces Provost Marshal becomes responsible to the Minister of National Defence in the performance of his duties and functions, the Minister and not the Chief of the Defence Staff should issue the notice of action where the Canadian Forces Provost Marshal is the subject of a complaint.

viii. Chairperson-Initiated Complaints

609. The MPCC believes that it has the implicit authority to initiate complaints on its own authority by the fact that "*any person*", pursuant to section 250.18 of the *NDA*, may file a conduct complaint. The MPCC seeks greater clarity on this matter and is requesting explicit authority to do so. This is consistent with the power available to the CRCC.[675]

610. An oversight body has a greater capacity to discern systemic problems than does an individual complainant. It is by means of a tribunal-initiated complaint that a wider policy or training issue can best be examined.

611. Chief Justice Lamer supported the notion that the Chairperson of the MPCC should be allowed to submit a conduct complaint for investigation by the CFPM where the Chairperson is satisfied that there are reasonable and probable grounds for such an investigation. He made his recommendation recognizing that while the authority to do so may already exist in the *NDA*, there has been some confusion, so clarification may be in order.[676]

Recommendation #83. The *National Defence Act* should be amended to make express provision for conduct complaints initiated by the Chairperson of the Military Police Complaints Commission. In the case of such complaints, the provisions of subsections 250.27(1) (informal resolution of complaints) and 250.28(2) (screening out of complaints that are frivolous or vexatious) of the *National Defence Act* should not apply.

ix. Authority to Remit Conduct Complaint Back to the CFPM for Further Investigation

612. Part IV of the *NDA* makes it clear that the CFPM has primary responsibility for dealing with conduct complaints. At the review stage the MPCC "*may investigate any matter relating to the complaint*".[677] The MPCC submits that the clear intent of the legislation is

675 Subsection 45.59(1) *RCMP Act*.

676 Lamer Report, *supra* note 9 at 80, footnote 96.

677 Subsection 250.32(2) of the *NDA*.

that, normally, the MPCC should be able to complete its review of a conduct complaint without conducting a *de novo* investigation.

613. The MPCC submits that, in practice, it is regularly obliged to carry out its own investigation to fill in gaps in the first instance review. The problem is often due to the PSO investigators taking a more restricted view of a complaint than the MPCC. The MPCC contends that at present, in the event of any such disagreement, its only option is to undertake its own investigation. This can lead to the MPCC taking on a significant investigatory role, with the attendant need for increased resources.

614. The MPCC recommends that it be granted the authority, at the review stage, to remit all or part of a conduct complaint back to the CFPM for further investigation. I believe that this matter would benefit from further consideration. If this is a regularly occurring problem, there should first be a discussion between the MPCC and the CFPM to understand the underlying reasons. Is it a question of fundamental disagreement on the nature of the scope of complaints? Is it a problem of inadequate resourcing for PSO investigations?

> **Recommendation #84. There should be an early opportunity for discussion between the Military Police Complaints Commission and the Canadian Forces Provost Marshal to agree on problem definition and on solutions regarding the Military Police Complaints Commission's contention that it is regularly obliged to carry out its own investigation to fill in gaps in the Canadian Forces Provost Marshal investigation. The option of providing authority to the Military Police Complaints Commission to remit a matter back to the Canadian Forces Provost Marshal for further investigation should be considered.**

x. Authority to Identify and Classify Complaints

615. The MPCC, in its submissions, requested the authority to identify and classify complaints. It is not always evident whether or not a particular communication constitutes a valid conduct or interference complaint. The *NDA* is silent on who should classify communications as valid complaints under Part IV of the *NDA*.

616. Differences of opinion between the PSO and the MPCC on the classification of complaints continue to arise, particularly as to what constitutes a policing duty or function. While a collaborative approach often resolves the issue, the MPCC takes the view that such fundamental matters should not be left to depend on the goodwill of individual incumbents of positions.

617. Both previous independent review authorities recommended that the CFPM be required to develop a framework for the determination of whether conduct complaints triggered the jurisdiction of the MPCC. Chief Justice Lamer took the view that a strict division between

complaints that trigger independent oversight and those that do not would be impossible. His solution was to have the CFPM draft a framework that would set out criteria to be applied by the CFPM to conduct complaints to determine whether or not the conduct complained of triggers the jurisdiction of the MPCC.[678] His recommendation was reiterated and adopted by Chief Justice LeSage.[679]

618. The MPCC takes strong issue with these recommendations. It believes they make no sense in the context of a complaints regime featuring external oversight. The notion that an overseen police service should determine the role of the oversight body raises at least the perception of a conflict of interest and is contrary to the very idea of independent oversight. The MPCC submits that it is the only logical candidate for this role, from the perspective of preserving the integrity of independent oversight.

619. The MPCC recommends that the *NDA* be amended to clarify that it is for the review body to determine whether a communication received by an authority mentioned in subsection 250.21(1) of the *NDA* constitutes a conduct or interference complaint for purposes of Part IV of the *NDA*.

620. In other Canadian jurisdictions, where the admissibility of a complaint, or the role of an external oversight body, hinges on how a complaint is characterized, it is uniformly the oversight body to whom the responsibility is assigned.[680]

621. I agree with the MPCC that it should not be the overseen police service alone that determines the role of the oversight body. The precedents cited above giving jurisdiction to the oversight body to determine the characterization of a complaint are instructive. Nevertheless, there are a number of stakeholders having an interest in the issue of classification who would need to be engaged in the design of such legislation. It appears to me that a number of design issues would need to be resolved. These include whether there would be a consultation requirement. Would there be a mandated process of dispute resolution? Would there be an appeal of a MPCC classification decision?

Recommendation #85. A working group should be established with representatives from the Military Police Complaints Commission, the Office of the Judge Advocate General and the Canadian Forces Provost Marshal to develop a process for the classification of complaints.

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678 Lamer Report, *supra* note 9 at 81-82.

679 LeSage Report, *supra* note 26 at 68-69.

680 See section 82 of the *Police Act*, RSBC 1996, c 367 (British Columbia); section 43 of the *Police Act, 1990*, SS 1990-91, c P-15.01 (Saskatchewan); section 59 of the *Police Services Act*, RSO 1990, c P-15, s.59 (see per new legislation, not yet in force: section 157 of the *Community Safety and Policing Act, 2019* (being Schedule 1 of the *Comprehensive Police Services Act, 2019,* SO 2019, c 1) (Ontario); sections 148 and 149 of the *Police Act*, CQLR c P-13 (Québec).

CHAPTER 4 – THE MILITARY GRIEVANCE PROCESS

I. OVERVIEW

622. Members of the Canadian Armed Forces ("**CAF**") have fewer means of redress than civilians in other organizations. They are not permitted to unionize or otherwise collectively negotiate their working conditions.[681] They do not have employment contracts. And when they believe they have been aggrieved by any decision, act or omission of the CAF, they do not have recourse to an independent tribunal.[682]

623. Their main recourse is the right to file an individual grievance, on virtually any subject,[683] with their chain of command.[684] Most grievances pertain to compensation and benefits, personnel evaluation reports ("**PERs**"), career management, conduct, terms of service, health care, education and training, messes and institutes, and recruitment and selection.[685]

624. The military grievance process is defined in sections 29 to 29.28 of the *NDA*, Chapter 7 of the *QR&O* and DAOD 2017-1, *Military Grievance Process*[686] ("**DAOD 2017-1**"). It can be summarized this way:

(a) Prior to submitting a grievance, CAF members can submit a notice of intent to grieve ("**NOI**") to their chain of command to seek resolution at the lowest possible

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681 Section 19.10 of the *Queen's Regulations and Orders for the Canadian Forces* ("***QR&O***") states that "[n]*o officer or non-commissioned member shall without authority: (a) combine with other members for the purpose of bringing about alterations in existing regulations for the Canadian Forces; (b) sign with other members memorials, petitions or applications relating to the Canadian Forces; or (c) obtain or solicit signatures for memorials, petitions or applications relating to the Canadian Forces*".

682 Military Grievances External Review Committee, "3rd Independent Review of the *National Defence Act*. Presented to the Honourable Justice Fish" (January 8, 2021) ("**MGERC Submissions**") at 4. Judicial review is an unsatisfactory remedy in many respects and falls short of the type of recourse a civilian would have in similar circumstances.

683 Exceptions are provided at paragraph 29(2) of the *National Defence Act*, RSC 1985, c N-5 ("***NDA***") and concern mostly decisions made by a court martial, board, commission, court or other tribunal and other matters prescribed in regulations.

684 Section 29 of the *NDA*.

685 According to the educational briefing provided by the Director Canadian Forces Grievance Authority ("**DCFGA**") to my team and me on November 13, 2020.

686 DAOD 2017-1, *Military Grievance Process* (November 26, 2015), online: https://www.canada.ca/en/department-national-defence/corporate/policies-standards/defence-administrative-orders-directives/2000-series/2017/2017-1-military-grievance-process.html>.

level. The NOI and the initiation of an informal resolution process do not suspend the timelines to submit a grievance.[687]

(b) CAF members are entitled to submit a grievance with their commanding officer within three months after the day on which they knew or ought reasonably to have known of the decision, act or omission that is the subject of the grievance.[688] The commanding officer, or the next superior officer who is responsible for dealing with the matter ("**Initial Authority**" or "**Initial Authorities**"), can, however, consider a grievance that is submitted after the expiration of the time limit if satisfied that it is in the interests of justice to do so.[689]

(c) The commanding officer of a CAF member who submits a NOI or a grievance is required to assign without delay an assisting member to assist the grievor.[690] The Conflict and Complaint Management Services ("**CCMS**") centres[691] can also help grievors submit, track, and resolve their grievances.[692]

(d) Commanding officers who receive a grievance must determine whether they can act as the Initial Authority. If the grievance relates to the decision, act or omission of the commanding officer or if the commanding officer cannot grant the redress sought by the grievor, the commanding officer cannot act as the Initial Authority. The matter must then be referred to the Canadian Forces Grievance Authority ("**CFGA**") for it to identify the appropriate Initial Authority. Initial Authorities can be at any level between Levels 1 and 4 in the CAF organizational chart.[693]

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687 Section 4.2 of DAOD 2017-1. However, the CDS Directive issued on March 3, 2021 by the Acting Chief of the Defence Staff ("**Acting CDS**"), *supra* note 12 and appended to this Report as **Schedule R**, provides that "[Initial Authorities] *shall consider it in the interests of justice to accept a grievance that was submitted beyond the time limit when the member has engaged* [Conflict and Complaint Management Services] *within the time limit*": *Ibid* at para 13(e).

688 Section 29 of the *NDA* and sections 7.06 and 7.08 of the *QR&O*.

689 Subsection 7.06(2) of the *QR&O*.

690 Section 7.07 of the *QR&O*.

691 The CCMS centres are the regional offices of a single agency called Integrated Conflict and Complaint Management ("**ICCM**").

692 Department of National Defence, "Integrated Conflict and Complaint Management (ICCM): What this service offers" (March 12, 2021), online: <https://www.canada.ca/en/department-national-defence/services/benefits-military/conflict-misconduct/integrated-conflict-complaint-management.html>.

693 Level 0 (L0) is the Chief of the Defence Staff ("**CDS**"); Level 1 (L1) authorities directly report to L0 (e.g. Commander of the Canadian Army); Level 2 (L2) authorities directly report to L1 authorities (e.g. division commanders); Level 3 (L3) authorities directly report to L2 authorities (e.g. brigade commanders) and Level 4 (L4) authorities directly report to L3 authorities (e.g. unit commanders or commanding officers).

(e) The Initial Authority is required to adjudicate the grievance within four months.[694] If the Initial Authority does not determine a grievance within the time limit, the grievor may request that the grievance be considered and determined by the Final Authority,[695] namely the CDS[696] or an "*officer directly responsible to the Chief of the Defence Staff*" to whom powers, duties or functions as Final Authority have been delegated by the CDS.[697] Until that request is made by the grievor, the Initial Authority remains seized of the grievance.

(f) If the grievance is granted by the Initial Authority, that ends the matter. If not, the grievor may, within 30 days of receiving the decision of the Initial Authority, request the Final Authority to consider and determine the grievance.[698] The Final Authority may also consider and determine a grievance that was submitted to the Initial Authority after the expiration of the time limit if satisfied it is in the interests of justice to do so.[699]

(g) The Final Authority must refer to the Military Grievances External Review Committee ("**MGERC**"), an independent administrative body, any grievance relating to certain matters, including deductions from pay and allowances, reversion to a lower rank or release from the CAF; policies relating to harassment or racist conduct; pay, allowances and other financial benefits; the entitlement to medical care or dental treatment.[700] The Final Authority may also refer any other grievance to the MGERC. The MGERC reviews military grievances and provides findings and recommendations ("**F&Rs**") to the Final Authority and the grievor.[701]

(h) The Final Authority is not subject to any time limit for adjudicating a grievance, and is not bound by any F&Rs of the MGERC.[702] However, the Final Authority "*shall provide reasons for his or her decision in respect of a grievance if* [the Final Authority] *does not act on a finding or recommendation of the* [MGERC]".[703] The Final Authority's decision is final and binding, subject to judicial review.[704]

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694 Subsection 7.15(1) of the *QR&O*.

695 Subsection 7.15(4) of the *QR&O*.

696 Section 29.11 of the *NDA*.

697 Section 29.14 of the *NDA*.

698 Subsections 7.18(1) and 7.18(2) of the *QR&O*.

699 Section 7.18(5) of the *QR&O*.

700 Section 29.12 of the *NDA* and section 7.21 of the *QR&O*.

701 *Ibid*.

702 Section 29.13 of the *NDA*.

703 Paragraph 29.13(2)(a) of the *NDA*. Reasons must also be provided where the grievance was submitted by a military judge: paragraph 29.13(2)(b) of the *NDA*.

704 Section 29.15 of the *NDA*.

(i) The Final Authority's power of redress is limited. For example, the Final Authority cannot reinstate (with pay and benefits) members who were improperly released,[705] use its authority to make *ex gratia* payments to compensate a CAF member for the apparent limitations in any government instrument (act, regulation, policy, etc.),[706] or settle claims against the Crown that arise in the context of a grievance.[707]

625. The rationale for leaving decisions regarding military grievances in the hands of the chain of command, I was told, is to allow it to exercise its leadership in all aspects of CAF members' lives. This shows the troops that the chain of command cares about the issues confronting them and, this, in turn, helps to ensure that CAF members remain willing to obey the lawful orders of their leaders. The CDS, in particular, is responsible for the welfare and morale of all members of the CAF and, it is said, therefore needs to be made aware of all grievances, directly or indirectly.[708]

II. THE MAIN PROBLEM: DELAYS

626. The major impediment to achieving these goals is the CAF's enduring problem with unacceptable delays in the military grievance process.

627. Bill C-25,[709] enacted in 1998, introduced the two-tiered grievance process currently in place (Initial Authority, then Final Authority and MGERC). As Chief Justice Lamer, the First Independent Review Authority, noted in his 2003 report, "[r]*educing delays relating to the redress of grievances was one of the major reasons behind the new grievance process established by Bill C-25*".[710] The reform largely failed, he concluded: "*there remain*[ed] *major problems with the grievance process. In particular, the grievance*

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705 Subsection 30(4) of the *NDA*, as currently in force.

706 *Stemmler v Canada (Attorney General),* 2016 FC 1299.

707 The MGERC Submissions, *supra* note 682, state that: "*In those cases where the CDS concludes that the grievor's request may amount to a claim against the Crown, the CDS often refers the grievor or the grievance file to the Director of Claims and Civil Litigation (DCCL), from the Department of Justice. The DCCL has the authority to settle claims for compensation on behalf of the DND and the Canadian Forces, in accordance with Treasury Board's Directive on Payments* […] *published under the Financial Administration Act. Being neither part of the CAF nor the CAF grievance system, the DCCL's determinations are not final and binding decisions of the type that may be judicially reviewed. The issue is that some grievors may be forced to seek redress through multiple processes even though the harm arose from a single set of circumstances. Imposing additional processes adds to delays in resolving grievances and effectively fragments the grievance process.*": *Ibid* at 7.

708 Pursuant to section 29.14 of the *NDA*, the CDS can delegate his powers to subordinate officers.

709 *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, SC 1998, c 35 ("**Bill C-25**").

710 Lamer Report, *supra* note 9 at 88.

process continue[d] *to suffer from unacceptable delays, it* [was] *overly bureaucratic and continue*[d] *to lack transparency*".[711]

628. Chief Justice Lamer made five recommendations which he called "*solutions*" for the problem of delays, particularly at the Final Authority level.[712] All but one relied on the CAF to handle the problem internally. All but that one were implemented, either partially or completely.[713]

629. The one recommendation that was not implemented was meant to hold the chain of command accountable, at both levels of the grievance process. Chief Justice Lamer recommended that "*there be a time limit of 12 months for a decision respecting a grievance from the date that a grievance is submitted to a commanding officer to the date of a decision by the Chief of Defence Staff or his delegate*".[714] He added that if "*the one year time limit is not met, subject to the exception for grievances that the Chief of Defence Staff must personally adjudicate, a grievor should be entitled to apply to the Federal Court*".[715] To this day, the Final Authority is not subject to time limits or independent oversight, other than judicial review.

630. Chief Justice LeSage, the Second Independent Review Authority, submitted his report in 2011. At the time of his report, most of the recommendations made by Chief Justice Lamer had still not been implemented. And the situation had not improved: "*Unfortunately, many of the same concerns were raised by CF members at the bases I visited in the summer of 2011 and also in the submissions forwarded to me, now eight years after the Lamer Report*".[716]

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711 *Ibid* at 93-94.

712 *Ibid* at 98-104 (recommendations #72 to 76).

713 The recommendations that were implemented, either fully or partially, are Recommendation #72 (authority to delegate Final Authority duties; implemented by the *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24 ("**Bill C-15**")); Recommendation #73 (task force to resolve grievances; implemented in 2014 through Operation RESOLUTION); Recommendation #75 (an obligation on the Final Authority to deal with grievances informally and expeditiously; implemented by Bill C-15); and Recommendation #76 (allocation of necessary resources; partially implemented).

714 Lamer Report, *supra* note 9 at 101-103 (Recommendation #74).

715 *Ibid.*

716 LeSage Report, *supra* note 26 at 53-54.

631. The solution advocated by the CAF was to cut down the timeline for the grievor to submit a grievance, and increase the time limit for the Initial Authority to respond from three to four months.[717] Chief Justice LeSage supported these solutions. However, he also reiterated the recommendation made by his predecessor of a one-year time limit, from beginning to end:

> There should be a time limit of one year for a decision respecting a grievance from the date the grievance is submitted to the date of a decision by the CDS or his delegate. I also recommend the grievor be regularly advised of the status of their grievance.[718]

632. This recommendation suffered the same fate as the identical recommendation by Chief Justice Lamer.

633. My review comes 18 years after the first independent review and 10 years after the second. Yet the situation has not improved. I have met many CAF members who have complained about the delays in the grievance process. The data is similarly disappointing. In a directive dated March 3, 2021, the Acting CDS acknowledged that the problem of delays had not been addressed effectively:

> 4. As of 1 February 2021, there were 654 grievances registered at the Initial Authority (IA) level and 696 grievances registered at the Final Authority (FA) level, for a total of 1350 grievances awaiting resolution across the CAF. Despite the challenges we all face as a result of operational demands, resource constraints and strategic threats like COVID-19, this is unacceptable, and does little to inspire the trust of our sailors, soldiers, and aviators. Collectively, we must do better. How we respond to this challenge can make or break our institutional credibility as well as our ability to re-build trust with those we lead.[719]

634. Despite the obligation of the Initial Authority to render decisions on grievances within four months, there has been an increase in the delays at this level over the past few years. Indeed, while the average delay was 200 days in 2017 (or approximately six months and a half), it was up to 267 days in 2019 (or approximately eight months and three-quarters), more than twice the prescribed time limit.

635. I was also informed of many cases that had remained at the Final Authority level for several years. In one case, a member of the CAF disagreed with his medical release. He filed a grievance in October 2009. The Initial Authority took two years to dismiss the grievance, in November 2011. The Final Authority took another two years to confirm the decision, in November 2013. The Federal Court was more expeditious. It heard the grievor's application for judicial review in October 2014 and quashed the Final Authority's

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717 *Ibid* at 54.

718 *Ibid* at 57.

719 CDS Directive, *supra* note 12 at para 4.

decision in December 2014. The matter was referred back to the CDS, who was ordered to take the necessary measures for "*the administrative review resulting in the applicant's release to be undertaken from the beginning by different stakeholders*".[720] Over six years later, the matter is still pending.[721]

636. This is just one example. I was informed of several other cases that were referred to the Final Authority between 2012 and 2015 and that are still not resolved in 2021. Some involve difficult questions of policy and fundamental rights. Others appear to be more straightforward and concern issues of career management and compensation and benefits. But regardless of the complexity of each case, the delays are difficult to justify.

III. CDS DIRECTIVE FOR CAF GRIEVANCE SYSTEM ENHANCEMENT

637. The CDS Directive was issued on March 3, 2021, two months before the submission of this Report. It recognizes the "*unacceptable*" delays in the grievance process and proposes yet another action plan to help remedy the problem. The CFGA admits that my review was responsible for the timing of the CDS Directive. It also admits that the delays affecting the grievance process have not been a priority over the past 10 years:

> It is acknowledged that the [CAF Grievance System] has only incrementally evolved since the last Independent Review in 2011. You might question why an action plan has only recently been formulated for implementation in the coming months just as the review was about to commence. The CDS makes decisions daily that speak to priority of effort. One only needs to reflect on the Deschamps Report as well as ongoing efforts regarding hateful conduct, workplace violence and victim's rights to understand the magnitude of the issues facing the CAF as it continues its commitment to reflect the society it represents. This said, the decision to make only incremental change to the [CAF Grievance System] following the 2011 review was to a certain extent risk management given the multitude of much more pressing institutional change required in other areas.[722]

638. To remedy this, the CDS Directive proposes to "*consider the reduction of adjudication timelines at the L3/L4 level from 120-days to 90-days*" if the Initial Authorities fail, after eight months, to adjudicate 60 per cent of their grievances within the four-month time limit.[723] It also suggests "*to afford L1* [Initial Authorities] *as well as* [Chief of Military Personnel] *L2s 180-days to render a decision*", instead of 120 days.[724]

639. Yet the CDS Directive also recognizes that "*an increase in* [Initial Authority] *adjudication timelines under a previous Independent Review of the NDA* [which was advocated by the

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720 *Bouchard v Canada (Attorney General)*, 2014 FC 1231 at para 74.

721 I was told, however, that the grievor was responsible for a delay of approximately two years.

722 CFGA Supplementary Information to the Independent Review ("**CFGA Supplementary Information**") at 7.

723 CDS Directive, *supra* note 12 at para 13(a).

724 *Ibid* at para 28.

CAF] *has ultimately resulted in a lower rate of compliance*".[725] It is thus difficult to imagine that a reduction of time limits for lower-level Initial Authorities, or an increased time limit for higher-level Initial Authorities, would achieve a different result. The main problem lies not with the length of the time limits, but with the lack of meaningful consequences resulting from their breach.

640. The CDS Directive also requires Initial Authorities at Levels 3 and 4 who exceed their time limits to advise their superiors.[726] I imagine, however, that senior officers are already well aware of the low compliance rates of their Initial Authority subordinates. Increasing transparency in the way suggested in the CDS Directive is worthy, but I doubt that it would significantly solve the delay issue.

641. At the Final Authority level, the CDS Directive refers to the "*creation of a small Tiger Team and the development of an expedited process for low risk files that will see decision letters cut from the traditional 6 to 22 pages down to 2 to 4*".[727] I understand that similar initiatives have been tried before, notably during Operation RESOLUTION, which sought to reduce the backlog of grievances at the Initial Authority level.[728] While it succeeded in reducing the backlog for some time, the backlog started accumulating again, leading to where we are today.[729]

642. The rest of the CDS Directive either repeats some elements of the grievance process provided for in the *QR&O* and DAOD 2017-1[730] or states aspirational goals.[731] It does not provide for any additional resources for resolving delays.[732] I am concerned whether the aspirational goals set out in the CDS Directive can be achieved without allocating additional resources.

643. The CDS Directive does, however, put forward two initiatives that are consistent with what I have heard from some of the CAF leadership, members of the CAF, grievance analysts, members of the personnel of CCMS centres and other experts. It provides for an off-ramp process for policy grievances and a streamlined process for grievances related to PERs. I will come back to these initiatives below.

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725 *Ibid* at para 13(a).

726 *Ibid* at para 13(c).

727 *Ibid* at para 21.

728 Implementation Status Report, *supra* note 79 at 66.

729 Contrary to previous initiatives, the "*expedited process for low risk files*" is intended to remain in place even after the backlog is resorbed. But I doubt its efficacy to resolve a problem which has plagued the grievance system for decades.

730 See, e.g., CDS Directive, *supra* note 12 at paras 13(e), (f).

731 *Ibid* at paras 9-12, 13(b), 14-20, 22-25.

732 *Ibid* at para 35.

IV. SOLUTIONS WITHIN THE CURRENT MILITARY GRIEVANCE PROCESS

A. NOTICE OF INTENT TO GRIEVE AND INFORMAL RESOLUTION

644. The NOI can be sent prior to the filing of a formal grievance. It seeks to ensure "*that every effort is to be made to resolve issues early, locally and informally, before they escalate to higher and more formal levels*".[733] If this works well, the use of the NOI can declutter the grievance process. This led Chief Justice LeSage to "*urge grievors to utilize and the chain of command to actively welcome and engage in* [the NOI] *as a practical tool in the early resolution of what could otherwise become a long and frustrating process*".[734]

645. A few issues have been raised with me about this process.

646. Grievance analysts[735] and members of the personnel of CCMS centres have told me that the chain of command does not always react to a NOI; that intermediaries between the grievor and the commanding officer often try to resolve a NOI without the commanding officer's knowledge, in order to "protect" their commanding officer; and that CCMS centres, which can provide guidance to CAF members, are not sufficiently used.[736] More importantly, they also suggested that the NOI should be mandatory.

647. I agree that making the NOI mandatory would provide significant advantages. It would allow the chain of command and the members of the personnel of CCMS centres to ensure that a matter is grievable; to set conditions for informal resolution; to trigger the early assignment of an assisting member; and to inform commanding officers of issues under their command without engaging the formal process. Making the NOI mandatory would also ensure that grievances are only used when there is "*no other process for redress*", which forms part of the very definition of a grievance.[737] Grievors should not be able to file a grievance about something that the chain of command is ready, willing and able to fix.

648. Finally, some members of the CAF told me they had already been involved in informal resolution processes for a long period of time when they learned that their 90-day delay

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733 Section 4.1 of DAOD 2017-1.

734 LeSage Report, *supra* note 26 at 56.

735 Who are responsible for advising the Initial Authorities and Final Authority with respect to the adjudication of grievances.

736 The CDS Directive, *supra* note 12 states at para 13(e): "*Leadership at all levels are strongly encouraged to promote the leveraging of regional Conflict and Complaint Management System (CCMS) centres by personnel considering a grievance prior to its submission. CCMS not only provide advice and informal resolution options, but are also able to leverage* [Chief of Military Personnel/Military Personnel Command's] *Directorate Administrative Response Centre (DARC) which has, on numerous occasions, provided policy clarity and options that resulted in no grievance submitted*".

737 Subsection 29(1) of the *NDA*.

for filing a grievance had lapsed.[738] This is not conducive to promoting the informal resolution of grievances and to instilling trust in the process.[739]

> **Recommendation #86. Members of the Canadian Armed Forces who intend to file a grievance should be required to submit a notice of intent to grieve. The notice of intent to grieve should be sent directly to the members' commanding officers, with a copy to the local Conflict and Complaint Management Services centre. The submission of a notice of intent to grieve should suspend the time limit within which a grievance must be submitted. The modalities of the suspension and resumption of delays should be determined by the Canadian Armed Forces, in consultation with the Integrated Conflict and Complaint Management. The *Queen's Regulations and Orders for the Canadian Forces* and DAOD 2017-1, *Military Grievance Process* should be amended accordingly.**

649. Another problem that was signalled to me was the fact that grievors are not provided with disclosure of all relevant information during the informal resolution processes. This could result in an imbalance in the information available to the two sides. This is not consistent with the object of the grievance process which, as Chief Justice Lamer stated, is to "*be approached by the grievor, the Canadian Forces, including the CDS and the Canadian Forces Grievance Authority ("CFGA"), as well as the Grievance Board in a cooperative manner*".[740]

650. Section 4.1 of DAOD-2017-1 provides "*that every effort is to be made to resolve issues early, locally and informally*". This should require the parties to participate in the process in good faith, to be transparent with each other, including regarding the information in their possession, and to cooperate actively in searching for a solution.

B. TRIAGE OF GRIEVANCES

651. Many high-ranking officers, members of the CAF and external commentators have indicated that a triage system should be implemented to initiate different processes for different categories of grievances (for example, grievances related to PERs, policy grievances, grievances pertaining to improper release, grievances of general interest, etc.).

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738 Note to section 4.2 of DAOD 2017-1: "*A NOI to grieve does not extend the time limit under QR&O paragraph 7.06(1), Time Limit to Submit Grievance, within which a grievance must be submitted by a CAF member*".

739 See also the direction contained in the CDS Directive, *supra* note 12, reproduced *supra* at note 687.

740 Lamer Report, *supra* note 9 at 87.

652. The CDS Directive puts in place an "off-ramp" initiative that would divert grievances "*whereby the grievor's only request for redress is that a* [Treasury Board] *policy be amended or interpreted contrary to the plain language of the article*" – as opposed to the policies' interpretation or application – outside of the grievance process, before or when they reach the Initial Authority.[741] That process would see grievances for which the Final Authority has no power of redress[742] flagged early and diverted to receive a policy analysis. A mandatory NOI would greatly help in that regard.

653. This initiative would achieve two important goals.

654. First, although grievances of this sort form less than 1 per cent of all grievances,[743] they are often complex. To divert them outside the grievance process would contribute to reducing the workload of the Initial Authorities and the Final Authority.

655. Second, and most important, this process would help identify systemic problems and injustices related to Treasury Board policies and other governmental instruments early on in the process. This would in turn allow the CDS to engage "*any implicated external departments to give weight to reforms*".[744]

C. Initial Authority Timelines and Consequences of Non-Compliance

656. If the Initial Authority fails to adjudicate grievances within the time limit, the grievors have a right to request that their grievance be determined by the Final Authority. This is a double-edged sword because the Final Authority itself is not subject to any time limit. As a result, many CAF members prefer to leave the matter in the hands of the Initial Authority. Others feel pressured to do so. And even when they are not, some feel compelled, when asked, to give more time to the Initial Authority, who, after all, is in their chain of command. These are valid concerns. I believe that more meaningful consequences should be imposed on Initial Authorities for failing to meet the time limit.

657. One solution would be to provide a deemed outcome: if the grievance is not adjudicated within the prescribed time limit of four months, the grievance would be deemed dismissed. The grievor would be notified and could then forward the grievance to the Final Authority. Systematic delays at the Initial Authority level would lead to an increased – and unnecessary – workload for the Final Authority. This could be a strong incentive for Initial Authorities to adjudicate promptly.

658. It could be argued, however, that there are cases that are not easily adjudicated within a four-month time period, whether "*due to the nature of the grievance or the exigencies of*

741 CDS Directive, *supra* note 12 at para 26.

742 See above at para 624(i). See also MGERC Submissions, *supra* note 682 at 6.

743 CDS Directive, *supra* note 12 at para 26.

744 *Ibid*.

the service".[745] This concern could be addressed by allowing the Initial Authority to ask an independent actor – the MGERC, for example – to extend the time limit.[746] Another option, which I prefer, would be to allow the Initial Authority to ask the grievor for an extension in writing, with a copy to the local CCMS centre in order for it to advise the grievor. This request would have to specify that the grievor is not obliged to consent and may not be the subject of reprisals of any kind for refusing to do so.

659. I believe that this solution provides the best balance between the interests of the grievors and those of the CAF: it promotes accountability and helps resolving the problem of delays at the Initial Authority level, while maintaining CAF leadership on the process.

> **Recommendation #87. The Initial Authority should be allowed to request an extension of its time limit from the grievor. The requests should state that the grievor is not obliged to consent and may not be the subject of reprisals of any kind for refusing to do so. They should be made in writing and sent directly to the grievor, with a copy to the local Conflict and Complaints Management Services centre.**
>
> **If an Initial Authority has not adjudicated a grievance or requested an extension from the grievor within the time limit to consider and determine the grievance, the grievance should be deemed to have been dismissed by the Initial Authority.**

660. There is another solution that could help with delays at the Initial Authority level. The *QR&O* provide for a single four-month timeline for the adjudication of all grievances at that level.[747] This is a long time, particularly for less complex grievances, which form the bulk of the workload.

661. Given that increasing the Initial Authority time limit from 60 days to 120 days has been counterproductive[748] and that Initial Authorities should now be able to ask grievors for an extension of their time limit, I would normally have suggested that the general time limit be reduced to 90 days.

662. However, the CDS Directive has proposed an interim plan: Initial Authorities at the Levels 3 and 4 have eight months to reach a compliance rate of at least 60 per cent, failing which the Acting CDS will consider reducing their time limit from 120 days to 90 days. I would have set the bar higher on the compliance rate, but I nevertheless commend this initiative. I would recommend, however, that the time limit be automatically set at 90 days in the

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745 Section 9.8 of DAOD 2017-1.

746 The reasons invoked could include the complexity of the case, the necessity of suspending the decision pending an investigation by the military police, the exigencies of the service, etc.

747 Subsection 7.15(1) of the *QR&O*.

748 See above at paras 631-636.

regulations if the prescribed compliance rate is not met, irrespective of the Initial Authority's level or identity.

> **Recommendation #88. If the Initial Authorities fail to meet the objective and timeline determined at paragraph 13(a) of the *CDS Directive for CAF Grievance System Enhancement* regarding their compliance rate with the time limits prescribed by subsection 7.15(2) of the *Queen's Regulations and Orders for the Canadian Forces* and section 9.8 of DAOD 2017-1, *Military Grievance Process*, these provisions should be amended to prescribe that an Initial Authority must consider and determine a grievance within 90 days of its receipt.**

663. I would also have been inclined to recommend a shorter time limit – 60 days – for grievances related to PERs, that are less complex and less time-consuming. However, the CDS Directive formulates another suggestion: "*The development of an alternate PER adjudication process outside of the* [CAF grievance process]. […] *Intent is to create a process that keeps the majority of PERs out of CFGA while still affording members procedural fairness, minimizing the perception of bias and giving members a voice*".[749]

664. This initiative is consistent with Chief Justice LeSage's recommendation that "[c]*onsideration* […] *be given to imposing a "fast track" process for dealing with grievances of PERs*".[750] In the design of the alternate adjudication process, much care will need to be taken, however, to ensure that the principles of fundamental justice are respected.

D. Final Authority Timelines and Consequences of Non-Compliance

665. The Final Authority does not have a time limit to adjudicate grievances. This is a problem that both my predecessors addressed by recommending the imposition of a time limit of one year from the date a grievance is submitted to a commanding officer to the date of a decision by the Final Authority.

666. I agree with my predecessors that a time limit should be imposed on the Final Authority. I also believe that there should be consequences for the failure to respect it.

667. It was suggested to me that the F&Rs of the MGERC should be deemed accepted if the Final Authority fails to abide by its time limit. I agree with that solution, particularly considering that the Final Authority agrees or partially agrees with the MGERC's F&Rs in 90 per cent of cases.[751]

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749 CDS Directive, *supra* note 12 at para 27.

750 LeSage Report, *supra* note 26 at 64.

751 I was informed by Christine Guérette, the Chairperson and Chief Executive Officer of the MGERC, that in 2020, the Final Authority made determinations on 126 grievance cases that had been referred to the MGERC for its F&Rs. Of these: (a) in 114 cases (90%), the Final Authority agreed

668. I also recommend that this deemed acceptance rule be applied after 90 days. Indeed, by the time the Final Authority has the F&Rs of the MGERC in hand, it should not take long to determine whether or not to accept them. In cases where they are not accepted, the Final Authority should remain bound to provide reasons.

> **Recommendation #89. The *National Defence Act*, the *Queen's Regulations and Orders for the Canadian Forces* and DAOD 2017-1, *Military Grievance Process* should be amended to prescribe that a Final Authority must consider and determine a grievance within 90 days of the receipt of the findings and recommendations of the Military Grievances External Review Committee.**
>
> **When the Final Authority fails to meet this time limit, the findings and recommendations of the Military Grievances External Review Committee should be deemed to constitute the decision of the Final Authority.**

669. But what about grievances which the MGERC does not review? The solution recommended by Chief Justice Lamer could be adopted: if the Final Authority time limit is not met, "*a grievor should be entitled to apply to the Federal Court*".[752] I prefer, however, to adopt another recommendation of the MGERC which would resolve the conundrum. The MGERC recommended that:

> the NDA and related regulations be amended to provide that all grievances forwarded to the FA, except those related to PER, be reviewed by the Committee prior to a final decision. This would ensure that all grievances at the FA level are subject to the same process and benefit from the Committee's external and independent advice. Essentially, it gives CAF members equal access to an impartial review. This would further augment confidence in the grievance system.[753]

670. I agree with this recommendation.[754] It is consistent with the principled approach mentioned by Chief Justice LeSage, which was "*to afford all grievors the opportunity to have their grievance reviewed by an external body*".[755]

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or partially agreed with the MGERC's F&Rs; (b) in seven cases, the Final Authority agreed that the grievor had been aggrieved, but found that it could not remedy the situation by implementing the MGERC's recommendations; and (c) in five cases, the Final Authority disagreed with the MGERC outright.

752 Lamer Report, *supra* note 9 at 101-103 (Recommendation #74).

753 MGERC Submissions, *supra* note 682 at 10.

754 I do not make a recommendation for grievances related to PERs in light of the ongoing development of an alternate adjudication process. See above at paras 663-664.

755 LeSage Report, *supra* note 26 at 55.

Recommendation #90. The *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces* should be amended to provide that all grievances referred to the Final Authority should be reviewed by the Military Grievances External Review Committee before the Final Authority considers and determines the grievance.

E. Electronic Filing, Tracking and Handling and Involvement of Local Conflict and Complaint Management Services Centres

671. I was advised by members of the CAF, grievance analysts and members of the personnel of CCMS centres that despite the progress made with the Integrated Complaint Registration and Tracking System, much of the grievance process has yet to be fully digitized. Neither grievances nor the information shared between the parties have to be submitted, tracked or transferred electronically. I understand that some of the military grievance process is still paper-based. This makes it harder for all involved to track grievance files in the system.

672. In 2021, I believe every effort should be made to have a fully-digitized system, particularly in the technologically-savvy CAF, which is so large and dispersed across the country and globe.

673. A fully-digitized electronic system would have many advantages. I was advised that the involvement of the local CCMS centres was uneven because their agents are not always informed of the submission of a NOI. CCMS agents are a great resource for grievors, their chain of command and the persons who are the subject of grievances. If CCMS agents were advised as soon as a NOI is filed, they could help members of the CAF resolve matters informally, prepare their grievances and navigate the formal grievance process. This would help articulate the complaints, filter out ill-founded and non-remediable grievances and bring clarity to the process. An electronic file would also help monitor compliance with time limits. I was told that consideration would have to be given to ensure that privacy requirements are complied with. These are practical problems which can be resolved.

Recommendation #91. The military grievance process should be fully digitized. Members of the Canadian Armed Forces should only submit their notice of intent to grieve and grievances electronically, directly to their commanding officer, with a copy to the local Conflict and Complaint Management Services centre.

All documents shared between a grievor, the Initial Authority and the Final Authority should be recorded in an electronic file to which the grievor, the commanding officer, the Initial Authority, the Final Authority and the local Conflict and Complaint Management Services centre should have access.

F. Training of Assisting Members, Support and Awareness

674. Many officers and non-commissioned members of the CAF, including senior leaders, as well as grievance analysts and members of the personnel of CCMS centres have told me that there should be better training for assisting members. Some recommended that this training be made mandatory and base its contents on the existing course for grievance analysts.

675. With the creation of the CCMS centres, I find myself asking whether assisting members still serve a useful purpose in the process. Is this a good use of their time, or should their role be assumed by specialized CCMS agents? I have not heard enough submissions about their respective roles to make a firm recommendation on this question.

> **Recommendation #92. The Canadian Armed Forces should examine the respective roles of assisting members and Conflict and Complaint Management Services agents to determine whether the former still serve a useful purpose in the military grievance process.**
>
> **If they do, a formal Assisting Member Certification Training should be developed and lead to a renewable certification. The course should include practical exercises.**
>
> **Each unit of the Canadian Armed Forces should establish a roster of assisting members who have successfully completed the Assisting Member Certification Training. Grievors should be invited to select their assisting members from this roster. They should, however, maintain the right to request the appointment of other persons after having been informed of their lack of training and certification. Efforts should nonetheless be made to offer the Assisting Member Certification Training to non-roster appointees where the circumstances allow it.**
>
> **The Canadian Armed Forces should ensure that assisting members are provided with sufficient time, in light of their other duties, to adequately assist grievors in the preparation of their grievance and throughout the process.**

676. It was also suggested that the training of all members of the CAF should include a component on the military grievance process. In particular, it was recommended that each posting season, each member be informed of the existence and functions of the CCMS centres. This is a valid suggestion considering that members of the CAF must exercise their right to grieve individually, without the assistance of a union.

Recommendation #93. A section on the military grievance process should be included in the training curriculum for Canadian Armed Forces recruits. It should include information on the matters which are grievable, the limits of the remedial powers of the Initial Authority and Final Authority, the procedure and timelines applicable to a grievance, and the rights of the grievor, both within and beyond the military grievance process (including judicial review).

Recommendation #94. The Conflict and Complaint Management Services centres should organize outreach activities each posting season to inform the members of the Canadian Armed Forces assigned to local units of their existence and functions.

G. REMEDIAL POWERS

677. The MGERC and others have indicated that the *NDA* does not provide the Final Authority with adequate remedial powers, including the power to grant financial relief as a remedy to a grievance. This problem was identified by Chief Justice Lamer and Chief Justice LeSage.[756]

678. I have already stated that the proposed off-ramp for grievances "*whereby the grievor's only request for redress is that a* [Treasury Board] *policy be amended or interpreted contrary to the plain language of the article*"[757] should allow the CDS to engage external departments in the pursuit of reforms. This may address by other means the question of whether the CDS should be able to authorize *ex gratia* payments to fill perceived gaps in government instruments. I also believe that whether the Final Authority should be provided with the authority to settle claims against the Crown falls somewhat outside the purview of my mandate.

679. However, the lack of authority to reinstate members who were improperly released is an issue that should be addressed immediately. Currently, subsection 30(4) of the *NDA* provides for reinstatement in cases related to the disciplinary system. The member of the CAF is then "*deemed for the purpose of this Act or any other Act not to have been so released or transferred*".

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756 Lamer Report, *supra* note 9 at 106 (Recommendation #81); LeSage Report, *supra* note 26 at 62-63 (Recommendation #44).

757 CDS Directive, *supra* note 12 at para 26.

680. In 2013, Bill C-15 introduced an amendment that would extend this power to administrative releases:

> 12 Subsection 30(4) of the Act is replaced by the following:
>
> Reinstatement
>
> (4) Subject to regulations made by the Governor in Council, the Chief of the Defence Staff may cancel the release or transfer of an officer or non-commissioned member if the officer or non-commissioned member consents and the Chief of the Defence Staff is satisfied that the release or transfer was improper.
>
> Deeming provision
>
> (5) An officer or non-commissioned member whose release or transfer is cancelled is, except as provided in regulations made by the Governor in Council, deemed for the purpose of this Act or any other Act not to have been released or transferred.

681. The amendments are still not in force. This is unfair to CAF members who may be improperly released. Worse, due to the *Statutes Repeal Act*,[758] the amendments could be repealed by operation of law in 2022. This should not be allowed to happen.

> **Recommendation #95. Section 12 of the *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24 should come into force without further delay.**

H. SUBPOENA POWERS

682. In its submissions, the MGERC indicated that under section 29.21 of the *NDA*, it cannot compel a third party to provide a document in its possession without holding a hearing. It states that this "*is neither practical nor efficient in light of the Committee's practice of conducting the vast majority of its grievance reviews through the consideration of written evidence, without holding a hearing*".[759] This was also a recommendation in the Lamer Report.[760] This is an anachronism that should be corrected.

> **Recommendation #96. Section 29.21 of the *National Defence Act* should be amended to allow the Military Grievances External Review Committee to compel the production of documents or things without the requirement to hold a hearing.**

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758 SC 2008, c 20.

759 MGERC Submissions, *supra* note 682 at 13.

760 Lamer Report, *supra* note 9 at 108-109 (Recommendation #87).

V. EPILOGUE: DISCUSSION ON A MORE MODERN APPROACH

683. Many instruments enshrine the fundamental right to have one's entitlements and obligations determined by an independent tribunal.[761] CAF members, however, do not now have that right regarding disputes relating to their working conditions.[762] Granting them that right would not interfere with the CAF's operational needs. It would enhance the trust and confidence of members in the fairness and impartiality of their main recourse against wrongful or unwarranted treatment. And that, it seems to me, would increase rather than impair the discipline and morale of the troops. As for efficiency, I need hardly repeat here that handling grievances internally has for decades resulted in unacceptable delays.

684. Most civilians would never accept their employers having final say over disputes concerning their compensation, benefits or termination.[763] There is no compelling reason for soldiers to do so. In the words of Chief Justice Lamer, dealing with the CAF grievance system in his report, "[s]*oldiers are not second class citizens*".[764]

685. The Deputy Minister of National Defence agrees with me that it is time to consider whether grievors should have recourse to an independent tribunal. Chief Justice LeSage, who has studied the CAF's grievance system[765] and is aware of its troubled history since, supports the idea as well. So does Brigadier-General (retired) Kenneth Watkin, a reputed author on military law and justice who was Judge Advocate General from 2006 to 2010, and other experts on military law whom I consulted.[766] Members of the CAF who attended my

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761 See, for example, paragraph 2(e) of the *Canadian Bill of Rights*, SC 1960, c 44; section 23 of the Québec *Charter of Human Rights and Freedoms*, CQLR c C-12; and article 10 of the *Universal Declaration of Human Rights*.

762 This is specifically acknowledged in section 8.20 of DAOD 2017-1: "*the right to a fair hearing by an impartial decision-maker does not mean that a grievor has a right to a judicially or institutionally independent decision-maker*". Judicial review is not a proper recourse. In most cases, it requires that the petitioner demonstrate that the Final Authority's decision does not fall "*within a range of possible, acceptable outcomes which are defensible in respect of the facts and law*": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47. See also *Vavilov*, *supra* note 460 at paras 99-142. Thus, even if the Federal Court is of the opinion that the decision is *incorrect*, it cannot intervene if the decision is *defensible* or bears the *hallmarks of reasonableness*. This is a very high threshold to meet, particularly for self-represented members of the CAF.

763 In most organizations, independent tribunals are charged with adjudicating grievances: Lamer Report, *supra* note 9 at 86. Unionized employees generally have a recourse to a labour arbitrator through their union. Non-unionized employees generally have a recourse to civil courts or administrative tribunals for disputes with their employer about their working conditions, including their release. One exception is the RCMP model, which is similar to the CAF. I understand, however, that this model will largely be abandoned with the negotiation of a collective agreement.

764 Lamer Report, *supra* note 9 at 86.

765 Notably as the Second Independent Review Authority.

766 Colonel (retired) Michel Drapeau recommended a *de novo* recourse to the Federal Court in some circumstances. Lieutenant-Colonel (retired) Rory G. Fowler suggested that the existence of a recourse to an independent tribunal would force the CAF to adjudicate grievances on a more timely

town hall meetings expressed the same sentiment.[767] Even the CFGA acknowledges the advantages of having an independent tribunal adjudicate grievances, although it contends that there would be disadvantages as well.[768] It recognizes that this would increase neutrality and decrease bias in the decision-making process. It also posits that this would "*free up military personnel from CFGA and L1/L2 grievance staff to support the other CAF capabilities*" and eliminate the risk of judicial review for Final Authority decisions.[769]

686. The Acting CDS and other senior officers, however, object to the concept of access to an independent tribunal. The CDS Directive argues that "*failure to afford our personnel a CAF-owned mechanism through which to provide recourse for its members calls into question our very status as a profession and undermines the very principles of command*".[770] I am unable to share this view.

687. First, recourse to an independent tribunal, except for the role of the Final Authority, is essentially compatible with the current grievance system of the CAF. It would relieve the CDS[771] of a time-consuming burden that the CDS has historically failed to discharge in a timely manner. And the creation of an independent tribunal would not prevent the CDS from receiving regular reports on the grievances of members and thus "keeping his finger on the pulse" of his troops as to the systemic issues they confront.

688. Second, the Acting CDS argues that the introduction of an independent tribunal would undermine the principle of command. In my respectful view, it would *underline* rather than *undermine* the principle of command by distinguishing between command as an instrument of obedience and command as an inappropriate substitute for impartiality and due process in resolving the grievances of CAF members.

689. Third, the Acting CDS argues that external oversight calls into question the CAF status as a profession. But the ability of a profession to self-regulate on matters of conduct and discipline, which is well-established, should not be conflated with the ability to adjudicate its members' rights and obligations with respect to working conditions.

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basis. Another former legal officer of the CAF recommended a recourse to a permanent military court for some grievances.

767 Other members of the CAF expressed the same opinion in confidentiality. A civilian grievance analyst also questioned the impartiality of the Initial Authorities and Final Authority. In a 2017 Your Say Survey, only 35 per cent said that they had confidence in the person acting as the Initial Authority, and 46 per cent said that they had confidence in the person acting as the Final Authority.

768 CFGA Supplementary Information, *supra* note 722 at 8-9. I have reviewed the disadvantages invoked and either disagree with them or conclude that they would be significantly outweighed by the benefits or an independent tribunal.

769 *Ibid*.

770 CDS Directive, *supra* note 12 at para 6.

771 As well as the officers directly responsible to him to whom he delegates his powers, including the Commanders of the Canadian Army, Royal Canadian Air Force and Royal Canadian Navy.

690. One solution would be to convert the MGERC into the Military Grievances Review Board. This new board would review decisions made by Initial Authorities, while the current Final Authorities would be free to make submissions whenever they wished. In this model, the leadership, experience and expertise developed by the Final Authorities and their staff would continue to contribute to the grievance process.[772]

691. The model would also free up some of the leadership's time to focus on resolving systemic issues and shape CAF policy. As Chief Justice Lamer stated, "[e]*xpecting the CDS to devote his time to catching up on grievances from the Grievance Board, in addition to defending Canada and meeting Canada's international commitments as regards Canada's contributions to international peace and security, makes no sense*".[773]

692. The MGERC is prepared to assume this role. It is independent, it exercises quasi-judicial functions and its only role and expertise is to review grievance files.[774] This solution is supported by the current Chairperson and Chief Executive Officer of the MGERC, Christine Guérette, and by the MGERC's Director General of Operations and General Counsel, Colonel (retired) Vihar Joshi. This was also the role that the MGERC was supposed to have before Bill C-25, when the then Minister of National Defence indicated that he would "[s]*eek amendments to the National Defence Act to create an independent review board as final arbiter in the grievance process and to streamline grievance procedures*".[775]

693. The creation of an independent board would thus seem to have many advantages. However, I did not have the benefit of many submissions on the matter. The fact that other Five Eyes countries have not yet adopted that solution also gives me pause. So does the fact that interesting alternatives were proposed.[776]

694. All things considered, I believe that a working group should be established to determine the appropriateness of creating recourse to an independent tribunal. The working group

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772 For example, they would be authorized to make submissions on how they would resolve the grievance. They would also be in a position to consent to the conclusions sought by the grievor or to make a settlement offer. In other words, from a practical perspective, they would still have the power to overturn the Initial Authorities' decision and to shape CAF policy.

773 Lamer Report, *supra* note 9 at 98.

774 In 20 years of existence, the MGERC has reviewed close to 3000 grievance files and issued close to 3000 F&Rs: MGERC Submissions, *supra* note 682 at 2.

775 Report to the Prime Minister on the Leadership and Management of the Canadian Forces by the Honourable M. Douglas Young, P.C., M.P. Minister of National Defence and Minister of Veterans Affairs (March 25, 1997) at 10.

776 One suggestion, which was made by the former Interim Chairperson of the MGERC and current Information Commissioner of Canada, Caroline Maynard, was to allow the MGERC to bring matters to judicial review on behalf of the grievor. Another would be to statutorily lower the threshold for judicial review of Final Authority decisions. And one could always revert to the recommendation made by Chief Justice Lamer to create a direct recourse to the Federal Court when the Final Authority fails to meet its time limit.

should also consider whether all grievances, or only certain categories,[777] should fall within the purview of that body. It should also determine the remedies that could be ordered by the tribunal, including the possibility of awarding damages,[778] which is not currently open to the Final Authority.[779]

Recommendation #97. A working group should be established to evaluate the appropriateness of providing grievors with recourse to an independent tribunal. The working group should consider whether all grievances, or only certain categories, should be subject to the jurisdiction of that tribunal. It should also consider the integration of this route in the current grievance process and the remedies available pursuant to that recourse. The working group should include an independent authority, representatives from the Military Grievances External Review Committee and representatives from the Canadian Armed Forces. The working group should report to the Minister of National Defence.

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777 Colonel (retired) Michel Drapeau recommended that the grievance process should only deal with issues of wrongful or denied promotions, postings, removal from command and release. A former legal officer of the CAF recommended that recourses be limited to matters which must be referred to the MGERC (section 7.21 of the *QR&O*) or to administrative action resulting in the forfeiture of or deductions from pay and allowances, reversion to a lower rank or release from the CAF (paragraph 7.21(a) of the *QR&O*).

778 In respect of the Federal Public Sector Labour Relations and Employment Board, see subsection 228(2) of the *Federal Public Sector Labour Relations Acts*, SC 2003, c 22, s 2. See also Federal Public Sector Labour Relations and Employment Board, "Labour Relations Procedural Guide" (January 2021), online: <https://pslreb-crtefp.gc.ca/en/resources/guides/lr-procedural-guide.html> at para 11(b).

779 MGERC Submissions, *supra* note 682 at 7.

CHAPTER 5 – OBSERVATIONS ON THE INDEPENDENT REVIEW PROCESS AND POLICY DEVELOPMENT IN THE MILITARY JUSTICE SYSTEM

I. THE INDEPENDENT REVIEW PROCESS: A STATUTORILY MANDATED REVIEW

695. Subsection 273.601(1) of the *National Defence Act*[780] ("***NDA***") requires the Minister of National Defence ("**Minister**") to cause an independent review to be undertaken of key provisions of the *NDA* and their operation. Subsection 273.601(2) requires the Minister to table a report of a review in each House of Parliament within seven years after the day on which section 273.601 comes into force, and every seven years thereafter. Section 273.601 came into force on June 1, 2014. Subsection 273.601(3) provides that if the *NDA* is amended based on an independent review, the next report shall be tabled within seven years after the day on which the amending Act is assented to.

A. TIME FRAME FOR THE REVIEW

696. One of the advantages of the review provided for in section 273.601 of the *NDA* is that it is a predictable event. It has been clear since the coming into force of this provision on June 1, 2014 that the report of the Third Independent Review Authority – the present Report – would have to be tabled by June 1, 2021.

697. I was appointed on October 16, 2020 and it was only a month later that various notices were published, informing internal and external stakeholders of the review and inviting their input.

698. The Chapter on "Mandate and Methodology" describes the impressive number of submissions I received and the large number of interviews and town hall meetings my team and I conducted with stakeholders in Canada and abroad. It indicates as well that the total time available for completion of the review, after its existence was made public, has been five-and-a-half months.

699. The breadth of the mandate set out in the *NDA* makes this a very ambitious time frame for conducting an extensive, in-depth review of this kind.

700. I believe that a longer period – at least nine months – should be provided for future independent review authorities ("**IRAs**"). The nine-month period should run from the completion of all preliminary steps (contract signing, publication of notices calling for submissions, etc.) to the submission of the report to the Minister. This will allow future

780 RSC 1985, c. N-5.

IRAs to begin their work immediately upon their appointment and provides a reasonable time to conduct the review.

Recommendation #98. The independent review process under section 273.601 of the *National Defence Act* should provide at least nine months to conduct the review and draft the report. This period should run from the completion of all preliminary steps to the submission of the report to the Minister of National Defence.

B. PREPARATION FOR THE REVIEW

701. It is important that the Department of National Defence ("**DND**") and the Canadian Armed Forces ("**CAF**") assemble certain baseline information necessary for IRAs to conduct their review.

702. This information should include an explanation of the implementation of recommendations from previous IRAs. Where these recommendations were implemented, there should be a clear explanation of how this was done, whether by statute, regulation, directive, policy statement, training initiative, or otherwise. Where a recommendation has not been implemented at all, or only partially implemented, the reasons should be clearly explained, and relevant materials should be gathered.

703. The same requirements should apply to recommendations made by other external or internal reviews relevant to the mandate of the IRAs. This would include relevant reports of the Auditor General of Canada, *ad hoc* external reviews like Justice Deschamps' review of sexual misconduct in the CAF,[781] and internal audits and program evaluations by the Assistant Deputy Minister (Review Services) ("**ADM(RS)**").

704. As I mentioned in the Chapter on "Mandate and Methodology", I was informed early in my review that there had not been a systematic tracking of the implementation status of prior review recommendations.[782] I note that a similar issue was raised by the Auditor General in his 2018 report on administration of justice in the CAF. The report noted that there had been inadequate responses to past reviews and that many actions set out in the responses to Chief Justice LeSage's recommendations had not been implemented.[783]

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781 *Supra* note 580.

782 See above at paras 18-20.

783 2018 OAG Administration of Justice Report, *supra* note 89 at paras 3.71-3.72.

705. The DND has, however, committed to having this information available at the beginning of future independent reviews.

> **Recommendation #99. The Department of National Defence should provide future independent review authorities, at the beginning of their reviews, with a report on the implementation status of recommendations from previous independent reviews under section 273.601 of the *National Defence Act* and other external or internal review exercises relevant to their mandate. Officials responsible for supporting future independent review authorities should work with the Assistant Deputy Minister (Review Services) to accomplish this.**

706. Before I leave the subject of accounting for the implementation of previous recommendations, I think it helpful to offer some specific comments on the issue of training.

707. Ensuring that actors in the military justice system understand their roles and responsibilities and carry them out properly is essential. That is why this Report contains several recommendations for training of personnel.[784]

708. It is one thing to make recommendations for specific training. It is quite another to ensure that the training is effective. In the case of training, it will not be sufficient to simply inform future IRAs whether or not my recommendations were implemented. The DND and the CAF should carry out a series of evaluations on each of the training modules: their design, the type of participation included (for example, computer-based or scenario-based), and the frequency and application of acquired skills and knowledge. These could be carried out by the ADM(RS), who has responsibility for program evaluation.

> **Recommendation #100. The Department of National Defence and the Canadian Armed Forces should carry out a series of evaluations on each of the training modules: their design, the type of participation included, and the frequency and application of acquired skills and knowledge. The results of these evaluations should be made available to future independent review authorities.**

709. It is also important for the IRAs to have access to relevant evidence about the operation of the military justice system and the military grievance process. There are several areas described elsewhere in this Report where I noted the unavailability of data on the

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784 See above at paras 359 (Recommendation #39), 392-393 (Recommendation #46), 394-399 (Recommendation #47), 511 (Recommendation #66), 518-519 (Recommendation #69), 539-541 (Recommendation #72), 674-675 (Recommendation #92) and 676 (Recommendation #93).

operation and performance of the military justice system.[785] The issue of inadequate information needed to oversee the military justice system was also raised by the Auditor General in 2018:

> We found that the Office of the Judge Advocate General did not have the information needed to oversee the military justice system. We also found that various stakeholders, notably the Military Police, the Canadian Military Prosecution Service, Defence Counsel Services, and the Office of the Judge Advocate General, had their own case tracking systems that did not capture all the needed information.[786]

710. I have mentioned earlier in this Report that, in response to the Auditor General's recommendations, the Justice Administration and Information Management System and the Military Justice System Performance Monitoring Framework were designed, but are not yet fully operational. I recommended that they be developed and start operating in all elements of the CAF as soon as possible.[787] I also noted the creation, in 2019, of the Military Police Analytics Program to track data on military police investigations.[788] These systems should facilitate the provision of relevant data to future IRAs.

> **Recommendation #101. Future independent review authorities should, prior to the start of the review period, be briefed on all relevant data on the performance and operation of the military justice system, the military grievance process and the regime for complaints about or by military police.**

C. REVIEW OF THE ROLE OF THE JUDGE ADVOCATE GENERAL

711. Section 273.601 of the *NDA* does not expressly include, as provisions to be reviewed by IRAs, sections 9 to 9.4 of the *NDA* which concern the Judge Advocate General ("**JAG**").

712. This review, however, necessarily concerns several responsibilities of the JAG, in particular her relationships with, and legal powers relative to, the Director of Military Prosecutions ("**DMP**") and the Director of Defence Counsel Services ("**DDCS**"). Moreover, the JAG has provided me with a number of helpful insights and suggestions related to the organization of the Office of the JAG ("**OJAG**") and possible reforms of the military justice system. My observations and recommendations on these matters are closely connected to the objective of reinforcing the independence of the prosecution and defence counsel

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785 See, e.g., above at paras 233-235 (Recommendation #17), 315-316 (Recommendation #29), 333-335 (Recommendation #35) and 432-437 (Recommendation #50).

786 2018 OAG Administration of Justice Report, *supra* note 89 at para 3.65.

787 See above at paras 432-437 (Recommendation #50).

788 See above at paras 315-316 (Recommendation #29).

functions in the military justice system.[789] I believe that it will be important to monitor the implementation of the reforms I recommend in these areas. This should be examined by future IRAs.

713. I also received several submissions urging me to conduct a substantial examination of the role of the JAG.

714. As currently constituted, the JAG has multiple responsibilities. These include:

(a) acting as legal adviser to the Governor General, the Minister, the DND and the CAF in matters relating to military law;[790]

(b) superintending the administration of military justice in the CAF;[791]

(c) conducting, or causing to be conducted, regular reviews of the administration of military justice;[792]

(d) supervising both the DMP and the DDCS;[793] and

(e) overseeing the Canadian Forces Legal Branch, which provides the JAG with the authority to manage the careers of all legal officers including their postings, appointments, and selection for training and performance evaluation.[794]

715. Some of the issues raised concern the relationship of the JAG to military prosecutors and defence counsel and whether the JAG's supervisory role of those functions impairs their independence. As mentioned above, my recommendations aim to address this concern.[795]

716. But among other issues: Should all of the JAG's current functions be vested in one person? Should the person responsible for the superintendence of the military justice system be a minister with direct accountability to Parliament? Is the same person responsible for overseeing the provision of advice on military law and the administration of military justice best placed to also conduct regular reviews of the military justice system?

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789 See Part I(C) of Chapter 1, above at paras 117ff.

790 Section 9.1 of the *NDA*.

791 Subsection 9.2(1) of the *NDA*.

792 Subsection 9.2(2) of the *NDA*.

793 Subsections 165(1) and 249.18(1) of the *NDA*.

794 Section 4.081 of the *Queen's Regulations and Orders for the Canadian Forces*.

795 See Part I(C) of Chapter 1, above at paras 117ff.

717. There are also practical management issues which should be considered. Given the demanding nature and wide range of the JAG's current responsibilities, would it not be advisable to appoint a senior deputy to the JAG to handle much of the day-to-day management, thereby enabling the JAG to devote more time to her strategic advisory role?

Recommendation #102. Subsection 273.601(1) of the *National Defence Act* should be amended to expressly include an examination of sections 9 to 9.4 of the *National Defence Act* concerning the roles and responsibilities of the Judge Advocate General.

D. Independent Reviews and Other Mechanisms of Military Justice Reform

718. The independent review process under section 273.601 of the *NDA* makes an important contribution to reforming the military justice system. But it is not the only method that serves this purpose. The *NDA* sets out at least one other review mechanism: subsection 9.2(2) of the *NDA* requires the JAG to conduct regular reviews of the administration of military justice.

719. The Auditor General, in its 2018 report, noted that the OJAG had not met its duty to carry out a sufficient number of the required regular reviews.[796] The DND and the OJAG promised in their response to "*undertake periodic and more formal reviews of the military justice system*".[797]

720. Subsection 9.2(2) of the *NDA* offers no guidance on the scope of these reviews. This is for the JAG to decide, depending on her view of those parts of the military justice system that are in need of examination. While independent reviews must remain independent, it would be helpful for future IRAs to be aware of any reviews recently undertaken by the JAG. This could help them establish their priorities, either by focusing less on issues that have been recently reviewed by the JAG or by focusing on the key concerns identified in the JAG's reviews.

721. The mandate of IRAs is very broad. It was not possible to do a detailed examination of every issue brought to my attention. In this Report, I identified some areas where it would be helpful for the JAG to conduct reviews under subsection 9.2(2) of the *NDA*.

722. One example of the possible use of the JAG's review power is found in Part III of Chapter 1 on "Service Offences and Punishments". There, I recommended that the JAG, the Canadian Military Prosecution Service and the Directorate of Defence Counsel Services collaborate to conduct regular reviews of the body of service offences contained

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796 2018 OAG Administration of Justice Report, *supra* note 89 at para 3.73.

797 *Ibid* at para 3.76.

in the *NDA*.[798] A second example is found in Chapter 2 on "Sexual Misconduct". There, I recommended that the JAG review the desirability of extending the rights afforded to victims of service offences in the *Declaration of Victims Rights* to victims of service infractions.[799]

II. EFFECTIVE INDEPENDENT OVERSIGHT AND REDRESS MECHANISMS

723. The independent review exercise itself revealed a cross-cutting theme that was not obvious when I began my review, but which emerged more clearly over the course of the ensuing months. That is the issue of oversight and redress mechanisms and how robust the powers of oversight bodies should be.

724. The challenge of creating effective redress mechanisms for the CAF has a long history. The Somalia Inquiry Report recommended the creation, by statute, of an Inspector General with broad powers of inspection and investigation.[800] The recommendation was not implemented. Instead, the DND created the Office of the Ombudsman for the Department of National Defence and the Canadian Forces ("**Ombudsman**"). This implemented a recommendation of the 1997 Dickson Report.[801]

725. The Office of the Ombudsman was created by ministerial directive.[802] It is not enshrined in legislation. The Ombudsman is intended to be independent of the CAF and reports directly to the Minister. However, the Ombudsman relies on the Deputy Minister of National Defence for financial and human resources issues. The Office is intended to be a neutral and independent investigator of issues brought by members of the Defence community, who have exhausted existing avenues of redress within the system.[803]

726. I received submissions from both outside the government and from the Office of the Ombudsman calling for stronger oversight and redress mechanisms. Colonel (retired) Michel Drapeau called for the appointment of a civilian Inspector General of the Armed Forces who would act as an adviser to the Minister and Parliament. The Ombudsman

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798 See above at paras 295-298 (Recommendation #26).

799 See above at paras 512-513 (Recommendation #67).

800 Somalia Inquiry Report, *supra* note 27 (Recommendations #40.36 to 40.38).

801 Dickson Report, *supra* note 34 at 82-83.

802 Ministerial Directives Respecting the Ombudsman for the Department of National Defence and the Canadian Forces, Annex A to DAOD 5047-1, *Office of the Ombudsman* (September 5, 2021), online: <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/defence-administrative-orders-directives/5000-series/5047/5047-1-office-of-the-ombudsman.html>.

803 Ombudsman for the Department of National Defence and the Canadian Forces, "The Case for a Permanent and Independent Ombudsman Office. The Defence Community Deserves No Less" (March 2017), online: <http://www.ombudsman.forces.gc.ca/assets/OMBUDSMAN_Internet/docs/en/governance_ministerresponseincl_nov-30-2017.pdf>.

advocated for greater structural independence for his office by enshrining it in the *NDA*. He also recommended that it be set up as a stand-alone agency, with the Ombudsman as deputy head, thus removing it from under the administration of the DND.

727. During the time I conducted my review, the issue of effective, independent oversight and redress assumed a much higher profile. It extends beyond the question of general redress mechanisms like an Inspector General or an Ombudsman.

728. It is no secret that the confidence of CAF members in their leadership has been shaken in recent months by allegations of sexual misconduct in the highest reaches of the military. A significant part of Chapter 2 on "Sexual Misconduct" addresses the need for more robust powers and a greater degree of independence for the Sexual Misconduct Response Centre ("**SMRC**").[804]

729. Chapter 3 on "The Military Police Complaints Commission" addresses the types of powers which are required by that entity to play an effective, independent role in overseeing the activities of the military police.[805]

730. Chapter 4 on "The Military Grievance Process" grapples with the issue of how to effectively address the decades-long problem of undue delays and backlogs and earn the trust and confidence of CAF members in the grievance process. It addresses the need to provide greater powers to the Military Grievances External Review Committee. It also asks whether it is time to reimagine the military grievance system by considering a Final Authority independent of the CAF, at least in some cases.[806]

731. In its 2021 Budget documents, the Government of Canada already committed to implementing new external oversight mechanisms to bring greater independence to the process of reporting and adjudicating sexual misconduct within the military.[807]

732. The issues addressed in my Report and the government's commitment to external oversight and independence in dealing with sexual misconduct involve many potential changes to oversight and redress mechanisms affecting the CAF. However, I believe there is another important issue that requires examination. While not a matter expressly included in my review, I suggest consideration be given to conducting an independent examination of the effectiveness of the Office of the Ombudsman. It could consider the oversight and redress models for the military in other democracies as well as best practices elsewhere in government. It should also consider the roles and responsibilities

804 See Part IV of Chapter 2, above at paras 535ff.

805 See Part II(B) of Chapter 3, above at paras 558ff.

806 See above at paras 622ff.

807 See above at para 488 and *supra* note 579.

of a general oversight organization in relation to the subject-specific organizations that I reviewed.

> **Recommendation #103. There should be an independent review of oversight and redress mechanisms for the Canadian Armed Forces.**
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> **The review should examine the operation of the Office of the Ombudsman for the Department of National Defence and the Canadian Forces, and whether additional measures are needed to reinforce its independence and effectiveness. The review should examine the experience of other democracies and best practices elsewhere in government. It should consider the roles and responsibilities of a general oversight organization in relation to subject-specific oversight organizations within the Defence portfolio.**

III. HATEFUL CONDUCT

733. My team and I debated whether we should address the issue of hateful conduct. I heard of several disturbing incidents of members of the CAF posting hateful, openly racist comments online. I heard of members being allowed to remain in the CAF despite belonging to white supremacist or other far right groups. I was also told about a brutal assault motivated by hate, where the perpetrator was not impeded in his career. Moreover, there have been regular reports in the media of hateful acts by members of the CAF.

734. There is no question that this is a serious problem that undermines public confidence in the military. It also affects the CAF's ability to achieve its objective of promoting diversity in the military. Nonetheless, I have concluded that a broad based review of the *NDA* was not an appropriate mechanism to address this issue. Moreover, my team and I received little hard data and had insufficient time to treat this important issue in a comprehensive manner.

735. I note that several initiatives have been undertaken recently to confront the problem of hateful conduct in the CAF. A provision of the *NDA* enacted by Bill C-77[808] allows service tribunals to take into account, when considering an appropriate sentence, evidence that "*the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor*".[809] This provision is already in force.

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808 *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 ("**Bill C-77**").

809 Paragraph 203.3(a)(ii) of the *NDA*.

736. As of July 10, 2020, the CAF modified DAOD 5019-0, *Conduct and Performance Deficiencies*[810] and issued a Canadian Forces General Message and military personnel instructions to specifically define and prohibit hateful conduct and to establish a detailed framework for intervention in cases of hateful conduct.[811]

737. The CAF has also established a Hateful Conduct Incident Tracking System that uses the Operation HONOUR Tracking and Analysis System and in which all hate incidents are to be reported or tracked. In October 2020, the CAF launched a survey to provide a snapshot of how often harassment, micro aggression, discrimination and hateful conduct occurred over the past year.

738. Finally, in December 2020, the Minister appointed a four-member advisory panel to investigate and report on incidents of hate and racism in the Canadian military. The advisory panel will report by December 31, 2021. The news release announcing the panel described its mandate as follows:

> As part of its mandate, the Advisory Panel will provide advice on how we can ensure […] that individuals who hold racist or white supremacist views are not allowed to enter into or remain in our organization. The Advisory Panel will be asked to identify the policies, process and practices that enable discriminatory behaviours and provide recommendations on how as an institution the Department of National Defence and the Canadian Armed Forces can eliminate them.[812]

739. This is a laudable initiative. However, I did not notice in its mandate specific reference to an assessment of how the military justice system and the Code of Service Discipline are addressing these issues. It will be important to ensure that the military justice aspects of this problem are addressed. This should include a review of training provided to military police to investigate hateful conduct. It should examine training for military prosecutors. It should examine the types of charges that are laid and whether they are commensurate to the seriousness of the issue. There should be an analysis of outcomes when these matters are tried before service tribunals. Are the sentences handed down adequate to achieve the objectives of effective punishment, denunciation and deterrence?

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810 *Supra* note 303.

811 CANFORGEN 090/20, *CAF Administrative Orders and Instructions on Hateful Conduct* (July 10, 2020), **Schedule S** of this Report; CF Mil Pers Instruction 01/20, *Hateful Conduct* (July 10, 2020), **Schedule T** of this Report.

812 Department of National Defence, "Minister of National Defence announce Advisory Panel on Systemic Racism, Discrimination with a focus on anti-Indigenous and anti-Black racism, LGBTQ2 Prejudice, Gender Bias and White Supremacy" (December 17, 2020), online: <https://www.canada.ca/en/department-national-defence/news/2020/12/minister-of-national-defence-announces-advisory-panel-on-systemic-racism-discrimination-lgbtq2-prejudice-gender-bias-and-white-supremacy.html>.

740. Moreover, there should be a review of the adequacy of the process by which administrative measures can be applied to CAF members who engage in hateful conduct, including the impediments to releasing them from the CAF in a timely manner.[813]

741. There should also be a review of the types of victim supports that are available. Here, there are similarities to the problem of sexual misconduct.[814] Should the duty to report be modified to be more sensitive to the needs of victims? Should there be a dedicated support centre like the SMRC to support victims of hateful conduct? Should victims be entitled to free, independent legal advice?

> **Recommendation #104. The Minister of National Defence and the Judge Advocate General should ensure that the role of the military justice system in combatting hateful conduct is examined. They should consider whether this is best accomplished through the Advisory Panel established in December 2020, through an independent review that would include in its mandate the role of the military justice system in combatting hateful conduct or in some other way.**

IV. THE POLICY-MAKING PROCESS IN THE MILITARY JUSTICE SYSTEM

742. I would also make several other observations on how to improve the timeliness and quality of reforms to the military justice system.

743. As I noted in the Introduction, there is no question that there is a need for a separate military justice system that responds to the unique requirements of the CAF. No system of justice can afford to remain static, lest it becomes less relevant to the evolving needs of the community it serves.

744. Reform must take into account a number of factors. These include an assessment of the changing needs of the CAF, given the shifting demographic composition of the military and challenges to which they give rise. Issues of sexual misconduct and hateful conduct are good examples of matters that were not examined in past independent reviews but have since become priorities for action. The evolving operational context of the CAF must also be taken into account. The same is true for the impact of new technologies. For example, the development of video conferencing may reduce the need for courts martial to physically take place in a theatre of operations. The emergence of social media creates new challenges to the ability to discipline hateful or misogynistic speech.

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813 As an example, I have been told that while commanding officers are required to consult the Director Military Careers Administration to obtain advice on appropriate remedial measures, they are not bound by the advice provided.

814 See Parts III, IV and V of Chapter 2, above at paras 520ff.

745. There should also be an ongoing exchange of information with other democratic countries, and especially with our Five Eyes allies, on how their military justice systems have evolved. There is need for caution in simply adopting reforms from other countries. Differences in culture, legal systems and operational requirements must be taken into account. Nevertheless, I found it very useful to have had an opportunity to speak with experts in military justice in all of our Five Eyes partners. Understanding the experience in the United Kingdom and New Zealand with the creation of independent and permanent military courts, and the reasons why a similar initiative failed in Australia, were very helpful to me in formulating recommendations on increasing the independence of military judges in Canada. My team and I also benefitted from learning about the experience of the United Kingdom and New Zealand with respect to their service members' rights to appeal from summary trials.

746. Reform must also take into account developments in the civilian justice system. An assessment must be made on whether such reforms are appropriate for adoption into the military justice system. A good example is the decision to include a *Declaration of Victims Rights* in Bill C-77. Its provisions largely mirror those of the *Canadian Victims Bill of Rights*[815] enacted in 2015. However, the military provisions were only enacted by Parliament in 2019 and are unlikely to come into force for a number of years. This deprives members of the CAF of the same protections that have been available to victims in the civilian system for years.

747. In my view, there are a few other areas that should be explored further with a view to improving the effectiveness of reform efforts.

748. First, I believe there should be a review of the adequacy of resources for military justice policy development. The Department of Justice Canada ("**DOJ**"), which is responsible for most policy development in the civilian justice system, has put in place a robust policy infrastructure. The DND and the CAF should also examine what is needed to deliver an effective program of ongoing policy development. This should include resources to maintain information management systems and to undertake regular reviews of the administration of justice, as recommended in the 2018 report of the Auditor General.

749. Second, I believe there needs to be improved collaboration with the DOJ on policy development. I understand, from speaking with the JAG and senior DOJ officials, that there is some interaction between the OJAG and the Criminal Law Policy Section at the DOJ. However, military justice is certainly not the priority mandate of those responsible for policy development in the DOJ.

750. Senior OJAG officials should undertake discussions with senior DOJ officials to strengthen this collaboration. The goal should be to improve the ability of the OJAG to be made aware, on a systematic basis, of areas for reform in the civilian system and to

815 SC 2015, c 13, s 2.

provide an earlier opportunity to consider whether and to what extent such initiatives should be adopted into the NDA. These discussions could also examine the opportunity to identify legislative strategies to accelerate the adoption of civilian justice reforms into the *NDA*, where appropriate.

751. Discussions between the OJAG and the DOJ could also examine the possibility of more personnel interchanges between the OJAG and the Criminal Law Policy Section at the DOJ so there is better mutual understanding of opportunities for collaboration.

752. On a similar note, the OJAG should, in cooperation with the DOJ and the Department of Public Safety and Emergency Preparedness, review its participation in federal-provincial-territorial working groups on the justice system. I understand that there is currently some participation in such groups, for example, by military prosecutors. Participating in working groups on issues like policing or family law should be considered as well.

Recommendation #105. There should be a review of the adequacy of resources for military justice policy development.

Recommendation #106. Senior officials of the Office of the Judge Advocate General should undertake discussions with senior officials of the Department of Justice Canada to improve information sharing and collaboration on policy initiatives.

Recommendation #107. The Office of the Judge Advocate General should, in cooperation with the Department of Justice Canada and the Department of Public Safety and Emergency Preparedness, review its participation in federal-provincial-territorial working groups on the justice system.

SUMMARY OF FINDINGS AND RECOMMENDATIONS

THE MILITARY JUSTICE SYSTEM

The Independence of Military Justice Actors from the Chain of Command

The military is a hierarchical institution *par excellence*. The concept of command is at the very heart of its structure, operations and ethos. But it was recognized decades ago that the chain of command cannot have absolute and unfettered discretion in matters of military justice. To ensure the legitimacy of the military justice system, institutional safeguards must afford the military justice actors sufficient independence from the chain of command.

As it currently stands, the military justice system needs better protection of the independence of its judges, courts, prosecutors, defence counsel and police.

The fact that military judges remain members of the Canadian Armed Forces ("**CAF**") while in office is detrimental to the appearance of justice. There are valid concerns that rank differences between the military judges and other participants in the proceedings may interfere with the proper administration of justice. Or that military judges may improperly take into account the potential impact of their decisions as CAF members subject to the Code of Service Discipline ("**CSD**").

I recommend that military judges cease to be members of the CAF and renounce their military rank at the time of their appointment. To ensure their familiarity with military discipline, service offences and military life more generally, they should however be required to have a sufficient degree of military experience. I believe that "civilianizing" military judges is compatible with the continued portability, deployability and flexibility of the military justice system, especially with the benefit of today's information and communications technology.

Civilianizing military judges helps to ensure their impartiality and independence from the chain of command. But as long as courts martial remain *ad hoc* judicial bodies, I believe they will continue to lack institutional independence. The significant reliance of courts martial and military judges on the internal mechanisms of the CAF and the Department of National Defence ("**DND**") for their administrative, regulatory and budgetary needs creates a clear risk of executive interference.

Like Chief Justice Lamer in 2003, I therefore recommend the establishment of a permanent Military Court of Canada as a superior court of record. I believe that the Canadian constitutional framework permits this. This change would properly locate courts martial within the judicial branch of government, instead of the executive branch. Significantly, a judicial body with permanent, continuing jurisdiction would provide increased flexibility to military judges and courts martial, potentially attenuating the perennial problem of delay in the court martial system.

The concerns that military rank and potential career impacts could be improperly considered in the administration of military justice also exist for military prosecutors and defence counsel. They too need to be sufficiently independent from the executive, which includes both the chain of command and the Office of the Judge Advocate General ("**JAG**" and "**OJAG**"). And their independence cannot be left to the strength of their personalities: it needs to be protected by structural safeguards.

Safeguards of this sort already exist to protect the personal independence of the Director of Military Prosecutions ("**DMP**") and Director of Defence Counsel Services ("**DDCS**"). But I believe these safeguards should be bolstered. I recommend that the appointment, tenure and removal conditions of the DMP and DDCS be amended to mirror those of the civilian Director of Public Prosecutions. I also recommend that the authority of the JAG to issue particular instructions or guidelines to the DMP be repealed entirely or, at a minimum, granted to the Minister of National Defence ("**Minister**") personally.

No institutional checks and balances currently exist to ensure the independence of the other military prosecutors and defence counsel from the executive. The measures which protect their independence result solely from directions of the JAG to her Chief of Staff, and could easily be repealed or amended by her successors absent statutory or regulatory provisions. This should be rectified.

I recommend that the *National Defence Act*[816] ("***NDA***") be amended to clarify that the JAG's superintendence over the administration of military justice in the CAF must respect the independence of military prosecutors, defence counsel and other statutory actors. Further, the *Queen's Regulations and Orders for the Canadian Forces* ("***QR&O***") should: entrench the "soft" measures currently in place concerning postings of military prosecutors and defence counsel; place them under the exclusive command of the DMP or DDCS, not the JAG, for all purposes; and expressly recognize their distinct roles. Additional reforms, such as full or partial civilianization, the establishment of a separate Office of the DDCS or the creation of a distinct career path, should be considered by a working group.

These recommendations are aimed at ensuring the impartial adjudication of serious service offences. But the integrity of the military justice system requires more: it also depends on the independence and professionalism of the military police, and confidence of CAF members in their performance. Police independence in the performance of law enforcement activities is a recognized constitutional principle.

In my view, the independence of the military police from the chain of command can be bolstered in a number of ways.

The appointment, tenure and removal conditions of the Canadian Forces Provost Marshal ("**CFPM**") should reflect those of the Commissioner of the Royal Canadian Mounted

816 RSC 1985, c N-5.

Police. The Chief of the Defence Staff ("**CDS**") should not have authority to appoint and remove the CFPM. The CFPM should also be responsible and accountable to the Minister, not to the Vice Chief of the Defence Staff ("**VCDS**"), in the performance of the CFPM's duties.

The authority of the VCDS to issue particular instructions or guidelines to the CFPM should also be repealed. This authority has been controversial since its enactment, and I do not believe that it is required to provide members of the military police with information they need to assess risks to their safety, as has been suggested by defenders of the power.

Finally, the ability to complain to the Military Police Complaints Commission ("**MPCC**") about improper CAF or DND interference in a military police investigation, currently restricted to members of the military police, should be extended to everyone. This will serve the public interest better by providing an avenue of complaint in cases where members of the military police are aware of improper interference but choose not to file a complaint.

Military Jurisdiction over Civil Offences

A vast array of offences, including all *Criminal Code*[817] offences ("**civil offences**"), are subject to the concurrent jurisdiction of the civilian and military justice systems. The military police and prosecutors may in those cases decide in which system to proceed. Moreover, the decision to try a civil offence in the military justice system has important repercussions for the accused, for the community at large and for victims.

Some commentators have advocated for the removal of military jurisdiction over civil offences committed in Canada or, alternatively, for its narrowing through mechanisms like excluding certain offences or a judicially-enforceable "military nexus" test. Supporters of these views usually question the legitimacy or the efficiency of trying civil offences in the military justice system.

Several of my recommendations are designed to strengthen the military justice system's legitimacy and to enable it to meet its need to maintain discipline, efficiency and morale. I am accordingly not prepared to recommend the removal or narrowing of military jurisdiction over civil offences committed in Canada on grounds of illegitimacy or inefficiency. The particular disciplinary needs of the CAF and the risk of creating an "impunity gap" for those offences over which the civilian justice system would not, *in practice*, exercise its jurisdiction militate against those solutions as well.

It is clear, however, that despite the *existence* of military jurisdiction, it may be inappropriate to *exercise* military jurisdiction in certain cases. My recommendations seek

817 RSC 1985, c C-46.

to ensure, in so far as one can, that military jurisdiction will be exercised only in appropriate cases.

The members of the military police and military prosecutors are already required to take certain factors into account in their decisions about jurisdiction. However, these factors are extremely broad, offer little clarity about the proper outcome in any given case, and lack transparency.

Members of the military police and military prosecutors should commit to clear and publicly accessible principles and presumptions to determine whether civil offences should be prosecuted in the military or civilian justice system. Preferably, appropriate criteria would emerge from a multilateral understanding between the military and civilian heads of prosecutions, in consultation with the military and civilian police forces. This would increase consistency and predictability in choices of jurisdiction and make them less dependent on the particular personalities of members of the military police or military prosecutors.

Another concern I have with the existing factors is that they provide no satisfactory mechanism to resolve a jurisdictional conflict between the military and civilian authorities. The current solution if no consensus is reached is to continue consultations until it is. I recommend that the civilian jurisdiction and authorities have precedence in the unlikely event of a jurisdictional conflict. In my view, the principle of civilian jurisdictions taking precedence over military jurisdictions is rooted in Canadian military history and continues to prevail.

Other important questions concerning military jurisdiction could not be fully assessed and resolved in the context of my review. They include military jurisdiction over young offenders, civilians and former members of the CAF. They also include the jurisdictional limitations which may impair the CAF's ability to hold some members of the Reserve Force accountable for conduct which is contrary to the values and ethics of the CAF, but in which they engage in their own time. I recommend that working groups be established to consider those questions.

Service Offences and Punishments

The *NDA* details the service offences which persons subject to the CSD can be charged or dealt with and tried in the military justice system. It also prescribes the punishments which may be imposed for all service offences, including some that are specific to the CAF, like forfeiture of seniority, severe reprimand, and reprimand.

I have some concerns about the current body of service offences which, in my view, is incoherent in many ways. A coherent structure is important to ensure the predictability of the law. A particular conduct should entail identifiable consequences with a fair degree of certainty. The possibility that discretionary decisions by particular actors in the system can make the consequences of a particular conduct more or less serious should be

minimized. My Report includes recommendations to improve the coherence of service offences in the *NDA*.

Several of my recommendations relate to subsection 129(1) of the *NDA*, which provides that "[a]*ny act, conduct, disorder or neglect to the prejudice of good order and discipline*" constitutes a service offence. This prohibition is extremely vague, but I believe that its existence is justified by the necessity to maintain the discipline, efficiency and morale of the CAF. However, in order to make the law clear and predictable, subsection 129(1) should only be a residual power. This is not how that provision is currently used.

I therefore recommend the creation of new service offences for sexual misconduct, hateful conduct, and contravention of rules prejudicial to good order and discipline. I also recommend that the *NDA* be amended to limit the scope of subsection 129(1) to circumstances where no other service offence prohibits the alleged conduct of a person subject to the CSD.

My recommendations aim to improve the adequacy of the body of service offences, but they are not a substitute for a more comprehensive review. I recommend that the JAG collaborate with the military prosecutors and defence counsel to conduct regular reviews to update service offences, improve their coherence and identify the need for the enactment of new service offences, beyond those identified in my Report.

My most serious concern about the available punishments relates to the meaning and effect of the punishments of forfeiture of seniority, severe reprimand and reprimand. I have been told by military justice experts, internal and external to the CAF, that these sanctions currently have no identifiable effect. The *QR&O* should clarify their import. I also recommend that the JAG give consideration to making probation, conditional discharges and conditional sentences of imprisonment available options in the military justice system.

<u>From the Disciplinary Investigation to the Laying, Referral and Pre-Trial Disposal of Charges</u>

I heard a number of concerns about unit disciplinary investigations and military police investigations. None warrant firm conclusions or precise recommendations, except the issue of investigative delay in military police investigations. This longstanding concern has resulted in measures that are still in their infancy, and the data currently available is insufficient to assess their likelihood of success in the longer term.

I recommend that data on the length of military police investigations be publicly disclosed in the CFPM's annual reports and carefully tracked in order for the effectiveness of the measures to be assessed on an ongoing basis. Additional reforms should be implemented if the data indicates the persistence or re-emergence of improper investigative delay.

I recommend that *NDA* provisions governing search warrants, arrests with and without warrants and pre-trial custody be amended to eliminate, in so far as possible, existing differences from corresponding civilian provisions.

I recommend that search and arrest warrants be issued by military judges rather than commanding officers except where a judicial warrant cannot reasonably be obtained in a timely manner.

With the *Criminal Code* provisions as a model, I also recommend the enactment of various limitations and clarifications on the powers to arrest without warrant granted to members of the CAF and members of the military police.

I have several concerns about the pre-trial custody process as it currently stands. The process involves recourse to a military custody review officer first, before access to a military judge can be considered. This strikes me as overly burdensome and creates unwarranted delays for persons in custody. It is also likely to lead to inadvertent self-incriminating statements being made by detained persons.

In my view, the military pre-trial custody regime should be reformed. Just as in the civilian justice system, persons committed to service custody should be brought before a military judge without unreasonable delay, and in any event within 24 hours after arrest, if a military judge is available.

I also recommend a number of changes related to the laying, referral and pre-trial disposal of charges.

All members of the military police – not only those assigned to investigative duties with the Canadian Forces National Investigation Service ("**CFNIS**") – should have the authority to lay charges in the military justice system. This would make the system more efficient and less susceptible to the fear and risk of bias or arbitrary decisions by a unit's chain of command.

All charges laid in the military justice system are now referred to the commanding officer of the accused person or to another commanding or delegated officer. The officer to whom charges have been referred has the discretion not to proceed (or to recommend not to proceed) with the charges. For charges laid by the military police, this power could be perceived as an attempt to exercise undue influence over military justice decisions.

I therefore recommend that all charges laid by members of the CFNIS be referred directly to the DMP for prosecution at courts martial, without first being sent to the accused's chain of command. I also recommend that the units' chains of command be required to refer to the DMP all charges laid by members of the non-CFNIS military police for which they do not proceed by summary trial, except the most minor charges. Once the remaining

provisions of Bill C-77[818] come into force, summary trial jurisdiction at the unit level will cease to exist, and *all* service offence charges laid by the military police should then be referred directly to the DMP.

To expedite the administration of military justice, I also recommend that the referral process, by which charges are referred from units to the DMP for prosecution at courts martial, be streamlined by eliminating recourse to referral authorities as intermediaries.

Summary Trials

Various concerns about summary trials were brought to my attention by external commentators and by several members of CAF at my town hall meetings. Most concerns related to the presiding officers' independence and impartiality, the sufficiency of their training or the extent of their understanding of the applicable rules. Assisting officers were also often described as having insufficient training, resources or available time to properly perform their functions, despite their best intentions and efforts.

My Report comes at a peculiar time as far as summary trials are concerned. Once the remaining provisions of Bill C-77 come into force, summary trials will be replaced by summary hearings, with jurisdiction over non-criminal, non-penal service infractions yet to be enacted. Nevertheless, several years may elapse before the full implementation of Bill C-77, and summary trials will continue to be held in a transitional period thereafter. I believe recommendations are still pertinent. And while my recommendations are aimed at addressing the current shortcomings of the summary trial process, there are sound policy reasons to continue to apply most of them to summary hearings.

My main recommendation is to bolster the rights of CAF members convicted at summary trials. The review options currently available to them are inadequate. Beyond the limited circumstances in which judicial review may be granted, CAF members convicted at summary trials have no access to a reviewer who is impartial and independent from the chain of command.

I believe that members of the CAF, like members of the armed forces of the United Kingdom and New Zealand, should have the right to appeal the outcomes of summary trials to independent and impartial military judges. Appeals should require leave, and free legal representation by military defence counsel should be provided.

A right of appeal would address existing concerns about presiding officers' independence, impartiality and competence by providing a remedy against violations of due process or significant errors. Appeals would have collateral benefits as well. They would increase the caseload of military judges, prosecutors and defence counsel, thus facilitating the development of their expertise. They would also lead to a greater consistency of findings

818 *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 ("**Bill C-77**").

and punishments imposed by different summary trials, and by summary trials and courts martial.

An appeal system can be implemented without defeating the purpose of the summary trial system to provide prompt but fair justice in respect of minor service offences. I have identified basic elements of design to minimize the interference of appeals with the maintenance of discipline at the unit level.

To enable military judges or any other person called to review the outcomes of summary trials to do so effectively, I recommend that presiding officers be required to provide written reasons for their findings of guilt and for the punishments imposed at summary trials. I also recommend that they be required to videotape or, at a minimum, to record the audio of summary trials. Transcripts could be generated if and when necessary.

I make other recommendations of a procedural nature. The accused's right to elect trial by court martial needs to be reinforced. Military defence counsel's access to disclosure should be enhanced in order for them to be able to provide proper legal advice to the accused. A longer minimum delay should be provided to make an election: 48 hours from the time the accused, the assisting officer and military defence counsel, if applicable, have been given access to disclosure.

The training of presiding officers and assisting officers should also be improved. And the confidentiality of the exchanges between assisting officers and accused persons should be explicitly protected by the *NDA* or *QR&O*. The only "measure" which currently exists is a vague exhortation in a non-binding manual, which is clearly insufficient protection.

Courts Martial

Addressing breaches of military discipline promptly is essential to maintaining the discipline, efficiency and morale of the military. While it is clear that summary trials are more expeditious than most criminal trials in the civilian justice system, the same cannot be said of courts martial. The available data suggests that, as a general rule, trials by court martial currently take longer than comparable civilian trials.

In response to recent recommendations of the Auditor General of Canada, the OJAG established the Military Justice System Time Standards and participated in two additional initiatives of the CAF and DND: the Justice Administration and Information Management System ("**JAIMS**"), and the Military Justice System Performance Monitoring Framework ("**PMF**"). Limited components of the JAIMS were launched in certain units of the CAF in September 2019, but the features that relate to the court martial system are not yet operational. Every effort must be made to achieve full implementation and operation of the JAIMS and the PMF as soon as possible.

More can be done to minimize delay in the court martial system. Pleas of guilty should be taken, and case management should occur, at the earliest opportunity, not only once the

court martial has been convened, which may happen several months after charges are preferred by the DMP. The *QR&O* should be amended to allow increased use of technology and facilitate remote attendance by any person in court martial proceedings. More flexibility should also be provided in terms of preliminary proceedings.

Another significant concern for the military justice system is to ensure that any member of the CAF, regardless of rank, can be tried by general court martial. Currently, the composition rules for panels, which restrict the pool of eligible members depending on the rank of the accused, make it *legally* impossible for the CDS and *practically* impossible for any lieutenant-general or vice-admiral to be tried by general court martial. Should charges be laid against officers of these ranks, the military justice system may not be able to deliver justice.

Panel members hold rank. This creates a risk that they may consider the accused's rank, the rank of complainants or witnesses, or the wishes of the military hierarchy in reaching their decisions. To minimize the risk of rank-based influence, all officers of the CAF should as a general rule be judged by officers of or above their rank. How can this be done when the accused is among the highest general officers in Canada?

In my view, the solution is to allow the empanelment of retired officers. This increases the number of eligible candidates at the top of the hierarchy and should allow even general officers to be judged by officers of or above their rank. Senior officers of the CAF should only be judged by subordinates if there is an insufficient number of eligible active *or retired* officers of or above their ranks, or if objections are granted by a military judge about those who exist.

My Report includes recommendations of a procedural nature for the court martial system.

The *Military Rules of Evidence*[819] had justifiable objectives when they were enacted in 1959. But they have not kept abreast of the evolution of common law rules of evidence in Canada. They should now be repealed. They are outdated and have lost their *raison-d'être*, as military judges, prosecutors and defence counsel have sufficient expertise to apply the civilian rules of evidence, and are already doing so.

The rights of appeal of persons found guilty by courts martial are currently narrower than those of persons found guilty by a civilian court in proceedings by indictment. I recommend that the current rights be expanded. Conversely, the Minister, or counsel instructed by the Minister for that purpose, has broader rights of appeal against acquittals than those of the Crown in the civilian justice system. I am not convinced that those rights are unjustified, but leave should be required for appeals which would not be available in the civilian justice system.

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819 CRC c 1049.

The Court Martial Appeal Court of Canada ("**CMAC**") is currently composed of the Chief Justice and 56 additional judges. The CMAC has sat a total 76 days and rendered 79 judgments over a period of 15 years. A smaller roster of judges – 10 to 20 judges – would ensure that each CMAC judge would have sufficient exposure to cases to become proficient in matters of military law and justice.

To preserve a sufficient level of criminal law experience in the CMAC, a majority of its judges should be judges of superior courts of criminal jurisdiction or provincial or territorial courts of appeal, where most criminal law cases are decided, not judges of the Federal Court of Appeal or Federal Court.

SEXUAL MISCONDUCT*

Sexual misconduct in the CAF remains persistent, preoccupying and widespread – despite the CAF's repeated attempts to address the problem.

As mentioned above, the government has taken notice. Days before the deadline for delivery of my Report, the government announced in its Budget a major initiative to combat sexual misconduct in the CAF. It promised greater independence to the processes of reporting and adjudicating incidents of sexual misconduct within the military and enhanced support services to victims, including access to free, independent legal advice.

My recommendations were prepared before the Budget was released. Yet they speak largely to the same objectives: to make the military justice system more responsive to the welfare, security and health of CAF members; more protective of the autonomy of victims; and better equipped to monitor both individual accountability and organizational compliance with the CAF's governing rules and stated objectives.

In enacting Bill C-77 and its *Declaration of Victims Rights*, Parliament decided to afford victims involved in the military justice system the rights they would enjoy in civilian proceedings under the *Canadian Victims Bill of Rights*.[820] The relevant provisions of Bill C-77 should be brought into force as soon as possible. Until this is done, the military justice system should not investigate and prosecute alleged sexual assaults. The *NDA* should also be amended to incorporate, in substance, the various rights and protections afforded by the *Criminal Code* to victims and to persons accused of sexual offences.

CAF members have a duty to report all service offences to their chain of command. The duty to report is meant to allow the leadership of the CAF to take steps to eradicate or at least reduce the occurrence of sexual misconduct within its ranks. But it has unintended

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* The day before my Report was due, the Minister launched an independent, external review of sexual misconduct in the CAF and the DND, to be conducted by my former colleague, the Honourable Louise Arbour. This Chapter was prepared before the Minister's announcement.

820 SC 2015, c 13, s 2.

effects and causes undesirable results for victims. It impacts on their autonomy and, I have been told, risks their exposure to reprisals, ostracization and pressures to withdraw their complaint. The duty to report should be removed for victims of sexual misconduct, their confidants and the health and support professionals consulted by them. A working group should also consider the removal of the duty to report of witnesses of sexual misconduct.

Victims of sexual misconduct who nonetheless wish to report must be provided the support they need to do so – without fear of harm to their well-being, careers or personal lives.

Strengthening the independence of the Sexual Misconduct Response Centre ("**SMRC**") would help attenuate these concerns. Providing free, independent legal advice to victims would encourage more frequent engagement with the legal process, thereby protecting their own safety and that of other CAF members.

Restorative justice approaches have been part of the civilian criminal justice system for decades. They promote a sense of responsibility for the offenders, who acknowledge the harm caused to their victims. They also provide the opportunity for the victims and perpetrators to work in tandem toward accountability and restitution. This would, according to the SMRC, foster justice outcomes that better meet the needs of victims, offenders, and the CAF. I strongly support the introduction of restorative justice in the military justice context.

THE MILITARY POLICE COMPLAINTS COMMISSION

Public expectations about the robustness of police oversight have increased significantly since the MPCC was created in 1998. As a result, there are now new or significantly strengthened independent police oversight bodies at the federal level with respect to the Royal Canadian Mounted Police and in the provinces. These bodies surpass the MPCC in their oversight authority.

I recommend strengthening the MPCC's powers to access information, to enable it to more effectively play its role of independent oversight of the military police.

I recommend several procedural improvements to clarify timelines and make explicit the authority of the Chairperson of the MPCC to initiate complaints.

There are several issues that would benefit from further consideration. These include the process of the MPCC's access to sensitive information as defined by section 38 of the *Canada Evidence Act*,[821] a framework for access to solicitor-client privileged information relevant to the MPCC's mandate and the authority to identify and classify complaints. In these cases, I recommend discussions between the MPCC and appropriate members of

821 RSC 1985, c C-5.

the CAF and officials within the DND or other organizations within the Government of Canada.

Moreover, I note that it is important that the MPCC be consulted on legislative, regulatory and policy changes which affect its mandate and operations. I recommend that there be regular consultations between the MPCC and the relevant actors in the CAF and the DND on these matters.

THE MILITARY GRIEVANCE PROCESS

Members of the CAF have less control over their working conditions than most civilians. They are not permitted to unionize or otherwise bargain collectively. They do not have employment contracts. And when they believe they have been aggrieved by any decision, act or omission of the CAF, they do not have recourse to an independent tribunal.

Their main recourse is the right to file an individual grievance with their chain of command. The right to grieve follows a two-tier process that begins with a decision of an officer within the CAF member's chain of command (the "**Initial Authority**"), which may subsequently be challenged by referral to the CDS or an officer directly responsible to him (the "**Final Authority**"). In its adjudicative role, the Final Authority benefits from the recommendations of the Military Grievances External Review Committee ("**MGERC**"), an independent body.

The main problem with the current system concerns delays. For decades, the chain of command has failed to address grievances in a timely manner. I believe that is mostly because the Final Authority is not subjected to any time limit within which to adjudicate a grievance, despite recommendations to that effect by the two previous independent review authorities.

By the time the Final Authority has the recommendations of the MGERC in hand, it should not take more than three months to determine whether or not to accept them. If the Final Authority fails to adjudicate the grievance within this delay, then the findings and recommendations of the MGERC should be deemed to constitute the Final Authority's decision. I also recommend that the *NDA* be amended to provide a review by the MGERC of *all* grievances submitted to the Final Authority.

This should also help resolve the problem of delays at the Initial Authority. The Initial Authority has a four-month time limit to adjudicate a grievance, but it all too often exceeds it by a good margin. This gives grievors the right to ask that their file be referred to the Final Authority. In the current system, grievors find themselves in limbo: they can leave their grievance with the Initial Authority, hoping that it will be resolved more quickly than at the next level; or they can decide to refer their grievance to the Final Authority, who has no time limit. By imposing a time limit on the Final Authority, the Initial Authority is pressed to meet its own time limit and avoid overburdening the senior military hierarchy with grievances that could be solved at a lower level.

Other initiatives could help reduce delays. One is to impose a mandatory notice of intent to grieve. This would permit the early involvement of the Conflict & Complaint Management Services centres, which offer assistance to grievors and the chain of command; allow the prompt identification of non-grievable matters, including complaints asking for Treasury Board policies to be amended or interpreted contrary to their plain language, that should be dealt with elsewhere; and permit the informal resolution of certain matters at an early stage. Another initiative is to implement a fully-digitized grievance system. That would favour transparency and, as a result, accountability.

Another problem with the current grievance process is its lack of independence. The right to have one's entitlements and obligations determined by an independent tribunal is well established. That right does not exist in the CAF.

Providing members with recourse to an independent tribunal would ensure members of the CAF that their complaints about wrongful or unwarranted treatment will be dealt with fairly and impartially. That would increase rather than impair the discipline and morale of the troops. This solution would also relieve the CDS of a time-consuming burden, without depriving him of regular reports on the grievances of members that allow him to identify systemic issues confronted by his troops.

The Deputy Minister of National Defence, Chief Justice LeSage, the former independent review authority, and Brigadier-General (retired) Kenneth Watkin, a reputed author on military law and former JAG, all agree with me that it is time to consider whether grievors should have recourse to an independent tribunal. Other experts on military law whom I consulted and members of the CAF who attended my town hall meetings expressed the same sentiment. I therefore recommend that a working group, which should include an independent authority, be established to evaluate this option.

OBSERVATIONS ON THE INDEPENDENT REVIEW PROCESS AND POLICY DEVELOPMENT IN THE MILITARY JUSTICE SYSTEM

The experience of conducting the third independent review of the *NDA* has given me some insight into how to improve the process for the future. I make several recommendations on the need for more time to conduct such an extensive review and on the preliminary work that the DND and the CAF should undertake to ensure that the next independent review authority can hit the ground running.

The role of the JAG is integral to understanding the operation of the military justice system. I felt it was necessary to discuss certain aspects of the JAG's role in my review.

The provisions concerning the appointment and mandate of the JAG are not expressly mentioned in section 273.601 of the *NDA* among the provisions subject to an independent review. I recommend that those provisions be expressly included within the mandate of independent review authorities.

I discuss the role of other review mechanisms, and notably, the authority of the JAG in subsection 9.2(2) of the *NDA* to carry out regular reviews of the administration of military justice in the CAF. These reviews could complement the independent review process by either allowing it to focus less on issues that have been recently reviewed by the JAG or to concentrate on key concerns identified by the JAG.

I recommend two specific reviews on issues that it was not possible for me to adequately consider, either due to lack of sufficient information or lack of time. The first is a review of the Office of the Ombudsman for the Department of National Defence and the Canadian Forces. The second is an examination of the role of the military justice system in combatting hateful conduct.

Finally, I offer some observations on improvements to the policy-making process in the military justice system. These include the desirability of closer collaboration with the Department of Justice Canada. The objective is to ensure that military justice policy-makers are aware of proposals for reform in the civilian justice system. This would enable them to assess the appropriateness of similar reforms in the military justice system. This could help mitigate some of the delays in military justice reform, which has been brought to my attention as a longstanding challenge.

LIST OF RECOMMENDATIONS

Recommendation #1. Military judges should cease to be members of the Canadian Armed Forces, and therefore become civilian. Members of the Canadian Armed Forces appointed by the Governor in Council as military judges should, at the time of their appointment, be released from the Canadian Armed Forces and renounce their military rank.

The *National Defence Act* should be amended to provide that military judges are never subject to the Code of Service Discipline, and may never be charged, dealt with and tried under the Code of Service Discipline for service offences allegedly committed by them while formerly subject to the Code of Service Discipline, if applicable.

Military judges' conditions of appointment should include a requirement to act anywhere in the world, including in a theatre of operations.

Unless the context indicates otherwise, references to military judges in this Report include civilianized military judges.

Recommendation #2. The *National Defence Act* should be amended to allow the Governor in Council to appoint to the position of military judge anyone who is a barrister or advocate of at least 10 years' standing at the bar of a province and who has been an officer or a non-commissioned member of the Canadian Armed Forces, including the Reserve Force, for at least 10 years.

Recommendation #3. The age of retirement of military judges should be increased to 70 or 75 years. Consideration should be given to allowing military judges to become supernumerary judges after a number of years in judicial office or once they attain a certain age.

Recommendation #4. A permanent Military Court of Canada should be established as a superior court of record in accordance with section 101 of the *Constitution Act, 1867*. The Military Court of Canada should be enabled to sit at such times and at such places in Canada and abroad as it considers necessary or desirable for the proper conduct of its business. The Minister of Justice should have responsibility for the administrative and budgetary needs of the Military Court of Canada.

In this Report, unless the context indicates otherwise, references to military judges include the judges of the Military Court of Canada, and references to courts martial include the Military Court of Canada sitting as a court martial.

Recommendation #5. A working group should be established to identify the most effective framework for the creation of a permanent Military Court of Canada. The working group should include an independent authority, representatives from the Department of Justice Canada and representatives from the military justice system. The working group should report to the Minister of National Defence.

Recommendation #6. The rules of practice and procedure of the Chief Military Judge under section 165.3 of the *National Defence Act* should be enacted by the Governor in Council as soon as possible. The Canadian Armed Forces and the Department of National Defence should prioritize their enactment to meet this objective.

Pending the establishment of a permanent Military Court of Canada, the Court Martial Administrator and the Judge Advocate General should consider the reforms which may be desirable to mitigate the concerns raised by the *ad hoc* status of courts martial in so far as possible. They should recommend the implementation of these reforms to the appropriate authorities.

Recommendation #7. The Director of Military Prosecutions and Director of Defence Counsel Services should be appointed by the Governor in Council, on the recommendation of the Minister of National Defence.

The Director of Military Prosecutions and Director of Defence Counsel Services should hold office during good behaviour for a term of seven years, subject to removal by the Governor in Council at any time for cause with the support of a resolution of the House of Commons to that effect. They should not be eligible to be reappointed for a further term of office.

Recommendation #8. Subsections 165.17(3) to 165.17(6) of the *National Defence Act* should be repealed.

If a power to issue directives in respect of a particular prosecution is to remain, this power should, at a minimum, be granted to the Minister of National Defence personally and not the Judge Advocate General. Any directive issued to the Director of Military Prosecutions should be required to be in writing and to be published in the *Canada Gazette*. The Minister of National Defence or the Director of Military Prosecutions should be authorized to direct that the publication be delayed at the latest until the completion of the prosecution or any related prosecution if either considers this delay to be in the interests of the administration of military justice.

Recommendation #9. Specific provisions should be enacted in the *Queen's Regulations and Orders for the Canadian Forces* in respect of military prosecutors and military defence counsel. These provisions should expressly state that:

(a) military prosecutors are local ministers of justice and have broader responsibilities to the military justice system and to the accused;

(b) military defence counsel are advocates to their clients and have a duty of loyalty which requires them to commit fully to their clients' cause; and

(c) military prosecutors and defence counsel may need to exercise their duties in a manner that may sometimes not accord with the views of the chain of command or of the Judge Advocate General.

Recommendation #10. Section 9.2 of the *National Defence Act* should be amended to clarify the meaning of the Judge Advocate General's "*superintendence of the administration of military justice in the Canadian Forces*". At a minimum, the *National Defence Act* should expressly provide that the superintendence must respect the independence of military prosecutors, military defence counsel and other statutory actors within the military justice system.

Recommendation #11. The *Queen's Regulations and Orders for the Canadian Forces* should expressly provide that:

(a) the Director of Military Prosecutions and Director of Defence Counsel Services must be informed of legal officers' interest in being posted to their respective divisions, and consulted by the Judge Advocate General about postings;

(b) legal officers will normally be posted to the Canadian Military Prosecution Service or Directorate of Defence Counsel Services for a minimum term of five years;

(c) legal officers posted to the Canadian Military Prosecution Service or Directorate of Defence Counsel Services are under the exclusive command of the Director of Military Prosecutions or Director of Defence Counsel Services, as the case may be, for all purposes, including the determination of their duties, disciplinary matters against them and performance assessments.

Recommendation #12. A working group should be established to consider further reforms aimed at enhancing the independence of military prosecutors and defence counsel. The working group should include an independent authority, as well as the Judge Advocate General, the Director of Military Prosecutions and the Director of Defence Counsel Services or their representatives. The reforms considered should, at a minimum, include:

(a) the full or partial civilianization of the positions of Director of Military Prosecutions and Director of Defence Counsel Services, or military prosecutors and defence counsel more generally;

(b) increased reliance by the Directorate of Defence Counsel Services on members of the Reserve Force who are legal practitioners;

(c) the establishment of an Office of the Director of Defence Counsel Services as an independent unit, separate from the Office of the Judge Advocate General and not subject to its general supervision; and

(d) the establishment of a distinct career path for military prosecutors and military defence counsel, potentially including special mechanisms for their promotion.

Recommendation #13. Section 18.3 of the *National Defence Act* should be amended to provide that the Canadian Forces Provost Marshal be appointed by the Governor in Council and hold office during pleasure. The Chief of the Defence Staff should accordingly have no authority to remove the Canadian Forces Provost Marshal.

The Canadian Forces Provost Marshal should be responsible to the Minister of National Defence in the performance of his duties and functions. References to the Vice Chief of the Defence Staff in section 18.5 of the *National Defence Act* should consequently be replaced by references to the Minister of National Defence. Moreover, section 18.6 of the *National Defence Act* should be amended to provide that the Canadian Forces Provost Marshal report annually to the Minister of National Defence on the activities of the Canadian Forces Provost Marshal and the military police during the year.

Recommendation #14. The *National Defence Act* should be amended to restyle the Canadian Forces Provost Marshal as the Provost Marshal General and to provide that the Canadian Forces Provost Marshal holds a rank that is not less than brigadier-general.

Recommendation #15. Subsections 18.5(3) to 18.5(5) of the *National Defence Act* should be repealed.

For greater clarity, section 18.5 of the *National Defence Act* should be amended to provide that the general supervision and authority of the Vice Chief of the Defence Staff (or of the Minister of National Defence if Recommendation #13 is implemented) to issue general instructions or guidelines do not include a power to give directions regarding specific law enforcement decisions in individual cases.

Recommendation #16. Subsection 250.19(1) of the *National Defence Act* should be amended to provide that "[a]*ny person, including any officer or non-commissioned member, who believes on reasonable grounds that any officer or non-commissioned member or any senior official of the Department has improperly interfered with a policing duty or function*" may make an interference complaint to the Military Police Complaints Commission.

Recommendation #17. The Canadian Forces Military Police Group and Canadian Military Prosecution Service should collect, retain and centralize data on the civil offences committed by persons subject to the Code of Service Discipline charged in either the military or civilian justice systems. The data should, at a minimum, include the number of civil offences allegedly committed by persons subject to the Code of Service Discipline which formed the basis of charges, the nature of such offences, the rationale for the determination of which system the charges were proceeded in, the time elapsed between the complaint and the completion of the trial and the outcomes of the charges, including the punishments imposed if any.

Recommendation #18. The Canadian Forces Provost Marshal and Director of Military Prosecutions should coordinate the approaches of military prosecutors and members of the military police to the exercise of military jurisdiction over civil offences committed by persons subject to the Code of Service Discipline. The Canadian Forces Provost Marshal should also make the portions of the Military Police Group Orders on the exercise of military or civilian jurisdiction over such offences easily accessible to the public.

Recommendation #19. The Director of Military Prosecutions and Canadian Forces Provost Marshal should commit the Canadian Military Prosecution Service and the Canadian Forces Military Police Group to clear principles and presumptions to determine whether civil offences committed by persons subject to the Code of Service Discipline will be investigated and prosecuted in the civilian justice system or in the military justice system. Preferably, appropriate criteria would emerge from a multilateral understanding reached between the Director of Military Prosecutions, the Director of Public Prosecutions and the provincial and territorial heads of prosecutions, in consultation with the Canadian Forces Military Police Group and civilian police forces. However, the failure to attempt or to reach a multilateral understanding should not prevent the Director of Military Prosecutions and the Canadian Forces Provost Marshal from unilaterally refining the current criteria.

Recommendation #20. In the unlikely event of a conflict between civilian authorities and military authorities over the exercise of jurisdiction over civil offences committed by persons subject to the Code of Service Discipline, the civilian jurisdiction and authorities should have precedence.

Recommendation #21. A working group should be established to conduct a review of the exercise of military jurisdiction over civil offences committed by young offenders and by civilians subject to the Code of Service Discipline and of the exercise of continuing military jurisdiction. The working group should consider the need for reform of the current jurisdictional rules and, if such need exists, make recommendations on the means of reform. The working group should include an independent authority, representatives from the Department of Justice Canada and representatives from the military justice system.

In the interim, clear principles and presumptions should be formulated for such exercises of military jurisdiction.

Recommendation #22. A working group should be established to conduct a review of the challenges created by the limited application of the Code of Service Discipline to members of the Reserve Force. The working group should consider the necessity for the Canadian Armed Forces of being able to hold the members of its Reserve Force to its key standards of conduct at all times, especially for sexual misconduct and hateful conduct. The working group should make recommendations on means of reform to achieve this objective.

Recommendation #23. Sections 72 and 128 of the *National Defence Act* should be amended to mirror, as appropriate, sections 21 to 24 and 463 to 465 of the *Criminal Code*. Subsection 129(3) and the reference to section 72 in subsection 129(2) of the *National Defence Act* should be repealed. The rules of the *National Defence Act* on the identification of parties to offences as well as attempts and conspiracies to commit offences should not apply to service offences under subsections 130(1) or 132(1) of the *National Defence Act*.

Recommendation #24. The *National Defence Act* should be amended to add distinct service offences for sexual misconduct and hateful conduct.

Paragraph 129(2)(a) of the *National Defence Act* should be amended by excluding provisions creating service offences from its operation. Subsection 129(2) of the *National Defence Act* should then be re-enacted as a distinct, self-standing service offence. The new service offence should not describe a prohibited contravention as “an act, conduct, disorder or neglect to the prejudice of good order and discipline”.

Recommendation #25. Subsection 129(5) of the *National Defence Act* should be amended to provide that "[n]*o person may be charged under this section with any offence for which special provision is made in sections 73 to 128, 130 or 132*", without further caveat. Subsection 129(6) of the *National Defence Act* should accordingly be repealed.

A subsection should be added to section 137 of the *National Defence Act*. It should provide that a person charged with a service offence other than an offence under subsections 130(1) or 132(1) may, if neither the complete commission of the offence nor an attempt to commit the offence are proved, be found guilty of an offence under subsection 129(1) provided that the evidence establish an act, conduct, disorder or neglect to the prejudice of good order and discipline.

Recommendation #26. In the performance of her superintendence of the administration of military justice in the Canadian Armed Forces, the Judge Advocate General should collaborate with the Canadian Military Prosecution Service and the Directorate of Defence Counsel Services to conduct regular reviews of the service offences contained in the *National Defence Act*.

Such reviews should aim to (a) identify obsolete or duplicative service offences; (b) assess the desirability of enacting new service offences; and (c) consider the amendments which would be necessary or desirable. The results of these reviews should be used to request the enactment by Parliament of appropriate amendments to the *National Defence Act*.

Recommendation #27. In the performance of her superintendence of the administration of military justice in the Canadian Armed Forces, the Judge Advocate General should give consideration to making probation, conditional discharges and conditional sentences of imprisonment available options in the military justice system.

Recommendation #28. The *Queen's Regulations and Orders for the Canadian Forces* should, prior to the entry into force of *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15, be amended to clarify and distinguish the practical effects of severe reprimands and reprimands.

If practical effects can be attached to the punishment of forfeiture of seniority, they should be clarified in the *Queen's Regulations and Orders for the Canadian Forces*. If not, this punishment should be abolished.

Recommendation #29. The Canadian Forces Provost Marshal, in his annual reports, should provide data on the length of military police investigations. If this data indicates that problems of delays in investigations persist or re-emerge, the Canadian Forces Provost Marshal should re-assess the effectiveness of the measures implemented in 2018 and 2019 and consider the implementation of additional reforms.

Recommendation #30. The *National Defence Act* should be amended to allow military judges to issue search warrants in disciplinary investigations, and permit the issuance of commanding officer search warrants only where a warrant cannot be reasonably obtained in a timely manner either from a military judge or from a civilian justice of the peace.

Recommendation #31. In subsections 155(2.1) and 156(2) of the *National Defence Act*, the words "*for an offence that is not a serious offence*" should be replaced by the words "*for an offence that is not a designated offence*".

Recommendation #32. Paragraph 156(1)(a) of the *National Defence Act* should be amended to clarify that members of the military police may, subject to their duty not to arrest without warrant in specified circumstances, arrest without warrant any person who is subject to the Code of Service Discipline, or any person who was subject to the Code of Service Discipline at the time of the alleged commission by that person of a service offence.

Recommendation #33. Subsection 155(3) of the *National Defence Act* should be replaced by a provision allowing officers or non-commissioned members of the Canadian Armed Forces, in the circumstances stated below, to arrest without warrant any person who is subject to the Code of Service Discipline, other than an officer or non-commissioned member, or any person who was subject to the Code of Service Discipline at the time of the alleged commission by that person of a service offence.

This power to arrest without warrant should only exist where someone (a) is found committing a serious offence; or (b) is believed on reasonable grounds to have committed a service offence, and is escaping from and freshly pursued by anyone who has lawful authority to make an arrest.

Recommendation #34. The *National Defence Act* should be amended to allow military judges to issue arrest warrants for persons triable under the Code of Service Discipline, and permit the issuance of commanding officer or delegated officer arrest warrants only where a warrant cannot be reasonably obtained in a timely manner from a military judge.

Recommendation #35. The Canadian Forces Provost Marshal and the Judge Advocate General should provide in their future annual reports data and assessments on arrests and pre-trial custody. The data should, at a minimum, include the number of arrests, the status of the persons making the arrest and the persons under arrest, the nature of the alleged service offences, the length of custody, and information pertaining to the particular communities with which the persons arrested or detained identified.

Recommendation #36. Members of the military police who arrest persons subject to the Code of Service Discipline, with or without a warrant, or in whose custody persons under arrest have been committed, should have the authority to release the persons arrested if they give an undertaking, unless the persons are charged with a designated offence. The permissible conditions of an undertaking should be developed in light of the current content of section 158.6 of the *National Defence Act* and section 501 of the *Criminal Code*.

Recommendation #37. A person committed to service custody should be brought before a military judge without unreasonable delay, and in any event within a period of 24 hours after arrest, if a military judge is available. Persons in custody should not be asked to make representations on their release from custody if they can be brought before a military judge within this period.

If no military judge is available within 24 hours after the arrest, the current pre-trial custody process should continue, but persons retained in custody should be specifically instructed that any statements they make while in custody, including representations for their release, can be introduced in evidence against them at their trial, and brought before a military judge as soon as practicable.

Recommendation #38. Subsection 161(2) of the *National Defence Act* should be amended to require that a charge be laid as expeditiously as the circumstances permit against any person, whether retained in custody or released from custody with or without conditions.

Section 107.031 of the *Queen's Regulations and Orders for the Canadian Forces* should be amended to require any such person to be notified in writing, as soon as possible, of a decision not to lay charges against him or her.

Recommendation #39. The words "*assigned to investigative duties with the Canadian Forces National Investigation Service*" in section 107.02 of the *Queen's Regulations and Orders for the Canadian Forces* should be repealed to allow all members of the military police to lay charges. This recommendation should come into force once the Canadian Forces Provost Marshal has put in place the necessary resources, training, policy and procedures to allow all members of the military police to carry out this new function.

Recommendation #40. Legal advice for charges laid by members of the military police, other than those assigned to investigative duties with the Canadian Forces National Investigation Service, should be provided by legal advisors embedded in the Canadian Forces Military Police Group (in consultation with military prosecutors, as appropriate).

Recommendation #41. Charges laid by members of the military police assigned to investigative duties with the Canadian Forces National Investigation Service should be referred directly to the Director of Military Prosecutions, without the intervention of the accused's chain of command.

Recommendation #42. Charges laid by members of the military police, other than those assigned to investigative duties with the Canadian Forces National Investigation Service, should continue to be referred first to the units' chains of command. The units' chains of command should, however, refer to the Director of Military Prosecutions all such charges for which they do not proceed by summary trial, except those which relate to service offences for which no right to elect trial by court martial exists.

Once *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15 comes into force, all charges for service offences laid by members of the military police should be referred directly to the Director of Military Prosecutions, without the intervention of the accused's chain of command.

Recommendation #43. All charges which are currently referred to a referral authority should be referred directly to the Director of Military Prosecutions, without the intermediation of a referral authority. The charges referred to the Director of Military Prosecutions should be accompanied by any recommendation regarding their disposal that the units' chains of command consider appropriate, if any.

Recommendation #44. The information prescribed by subsection 108.15(1) of the *Queen's Regulations and Orders for the Canadian Forces* should be provided in electronic format in all but exceptional cases, having regard to the nature of the information and to the exigencies of the service.

If the accused decides to consult military defence counsel, the Directorate of Defence Counsel Services should also be provided with a copy of, or given access to, this information.

Subsection 108.17(2) of the *Queen's Regulations and Orders for the Canadian Forces* should be amended to provide that the reasonable period of time given to the accused to make an election should in no case be less than 48 hours from the time the accused, the assisting officer and military defence counsel, if applicable, have been provided with a copy of, or given access to, this information.

Recommendation #45. Amendments to the *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces*, as necessary, should be made to provide a greater measure of confidentiality between an assisting officer and an accused person. These amendments should address the issue of the compellability of the assisting officers in other proceedings under the *National Defence Act*, and should impose a duty of non-disclosure on the assisting officer in respect of communications with the accused, except in the limited circumstances required by public policy.

Recommendation #46. Practical exercises, such as moot summary trials, should be included in the curriculum of the Presiding Officer Certification Training.

In the performance of her superintendence over the administration of military justice in the Canadian Forces, the Judge Advocate General should consider the desirability of including practical exercises in the curriculum of the Presiding Officer Re-Certification Training.

Recommendation #47. A formal Assisting Officer Certification Training should be developed and lead to a renewable certification, in much the same way as the Presiding Officer Certification Training. The course should include practical exercises, such as moot summary trials.

Each unit of the Canadian Armed Forces should establish a roster of assisting officers who have successfully completed the Assisting Officer Certification Training. The accused should be invited to select their assisting officers from this roster. They should however maintain the right to request the appointment of other persons after having been informed of their lack of training and certification. Efforts should nonetheless be made to offer the Assisting Officer Certification Training to non-roster appointees in all circumstances where doing so would not be inconsistent with the prompt restoration of discipline at the unit level.

The Canadian Armed Forces should ensure that assisting officers are provided with sufficient time, in light of their other duties, to adequately prepare the defence of the accused at summary trials.

Recommendation #48. Presiding officers should be required to provide written reasons for their findings that a member of the Canadian Armed Forces has committed a service offence and for the punishments imposed at summary trials.

Presiding officers should, as a general rule, be required to videotape or, at a minimum, to record the audio of summary trials. The recordings should be accessible to members of the Canadian Armed Forces who may request the review of summary trial proceedings and need to rely on the recordings or have them transcribed for this purpose.

Recommendation #49. Members of the Canadian Armed Forces tried by summary trials and convicted of a service offence should be entitled to appeal their conviction and/or any punishment imposed to a military judge, with leave.

The punishments imposed at summary trial should be enforced notwithstanding the appeal, unless suspended by a military judge on the application of the appellant.

The appellant should be offered legal counsel from the Directorate of Defence Counsel Services for the purposes of (a) the applications for leave and suspension of the punishments imposed at summary trial; and (b) the appeal, if leave is granted.

The working group established to identify the most effective framework for the creation of a permanent Military Court of Canada or a similarly constituted working group should identify the most effective framework for the creation of appeals from summary trials. The working group should report to the Minister of National Defence.

Recommendation #50. The Justice Administration and Information Management System and Military Justice System Performance Monitoring Framework should be developed and start operating in all elements of the Canadian Armed Forces as soon as possible. The Canadian Armed Forces and the Department of National Defence should prioritize their development to meet this objective.

Recommendation #51. Sections 189.1 and/or 191.1 of the *National Defence Act* should be amended to provide that an accused person's plea of guilty may be received by any military judge, at any time after a charge has been preferred but before the commencement of the trial.

Subsection 112.64(2) of the *Queen's Regulations and Orders for the Canadian Forces* should be repealed.

As a general rule, a pre-trial hearing should be convened within 28 days of the preferral of charges by the Director of Military Prosecutions. The accused should be called on to plead at that pre-trial hearing. The military judge and the parties should subsequently discuss case management.

Recommendation #52. The *National Defence Act* or the *Queen's Regulations and Orders for the Canadian Forces*, as appropriate, should be amended to allow increased use of technology to facilitate remote attendance by any person in court martial proceedings, and to repeal provisions which unduly restrict its use, including subsections 112.64(1) and 112.65(1) of the *Queen's Regulations and Orders for the Canadian Forces*.

In the performance of her superintendence of the administration of military justice in the Canadian Forces, the Judge Advocate General should collaborate with the Office of the Chief Military Judge, the Canadian Military Prosecution Service and the Directorate of Defence Counsel Services to identify the desirable amendments.

Recommendation #53. The words "*or, if the court martial has been convened, the military judge assigned to preside at the court martial*" should be repealed from section 187 of the *National Defence Act* to allow any military judge to hear and decide preliminary issues, even after the court martial has been convened.

Recommendation #54. The *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces* should be amended to allow evidence in preliminary proceedings to be given by statutory declaration regardless of the opposing party's consent. The opposing party should have the right to cross-examine the person making the statutory declaration.

Recommendation #55. The *Military Rules of Evidence* should be repealed and replaced in the court martial system by the statutory and common law rules of evidence.

Recommendation #56. Subsection 165.193(4) of the *National Defence Act* should be amended to replace the words "*30 days*" by the words "*60 days*".

Recommendation #57. Subsections 167(4) and 167(5) of the *National Defence Act* should be amended to provide that, as a general rule, if the accused is of or above the rank of colonel, the members of the panel must be officers of or above the rank of the accused person.

If there is an insufficient number of eligible active officers, or if objections are allowed in respect of those who exist, the panel should be completed by retired officers of the Canadian Armed Forces having held the requisite ranks at the time of their retirement.

If there is also an insufficient number of eligible retired officers, or if objections are allowed in respect of those who exist, the panel should exceptionally be completed by active officers of the Canadian Armed Forces as little subordinate in rank to the accused as possible.

Recommendation #58. Section 167 of the *National Defence Act* should be amended to provide for the composition of the general court martial where joint accused are of different ranks.

The Judge Advocate General should identify the panel composition rules which will allow joint trials and assure due regard for the rights of each accused.

Recommendation #59. Section 112.14 of the *Queen's Regulations and Orders for the Canadian Forces* should be amended to provide that an objection with respect to a member of the general court martial panel must be heard and determined by the military judge.

Recommendation #60. Section 112.413 of the *Queen's Regulations and Orders for the Canadian Forces* should be amended to provide that the members of a general court martial panel vote by anonymous ballot.

Recommendation #61. The *National Defence Act* should be amended to allow military judges to require that pre-sentence reports relating to the accused be prepared for the purpose of assisting the court martial in imposing a sentence or in determining whether the accused should be discharged. The Canadian Armed Forces should identify the most effective framework for the implementation of a pre-sentence report regime.

Recommendation #62. In addition to their current rights of appeal, accused persons in court martial proceedings should have the right to appeal, with leave of the Court Martial Appeal Court of Canada or a judge thereof, any finding of guilty on (a) any ground of appeal that involves a question of fact; or (b) any ground of appeal that appears to the Court Martial Appeal Court of Canada to be a sufficient ground of appeal. The *National Defence Act* should be amended accordingly.

Recommendation #63. The *National Defence Act* should be amended to provide that the Minister, or counsel instructed by him for that purpose, has the right to appeal to the Court Martial Appeal Court of Canada in respect of any finding of not guilty at a court martial (a) on any ground of appeal that involves a question of law alone; or (b) on any ground of appeal that involves a question of mixed law and fact, with leave of the Court Martial Appeal Court of Canada or a judge thereof.

Recommendation #64. The Court Martial Appeal Court of Canada should be composed of 10 to 20 judges with significant criminal law experience. A majority should be judges of a superior court of criminal jurisdiction or a provincial or territorial court of appeal. Section 234 of the *National Defence Act* should be amended accordingly.

Recommendation #65. Except in the most minor cases and absent exceptional circumstances, allegations of sexual misconduct should be investigated by the military police and not by the units.

Recommendation #66. The military police should receive appropriate training on the application of the *Declaration of Victims Rights* to investigations of sexual misconduct, even before its entry into force. The Sexual Misconduct Response Centre, with the help of the Canadian Forces Provost Marshal, should design this training module.

Recommendation #67. In the performance of her superintendence of the administration of military justice in the Canadian Armed Forces, the Judge Advocate General should consider the desirability of extending the rights afforded to victims of service offences by the *Declaration of Victims Rights* to victims of service infractions, particularly victims of sexual misconduct.

Recommendation #68. The *Declaration of Victims Rights* should be brought into force as soon as possible, ensuring that victims investigated or prosecuted under the *National Defence Act* will be entitled to substantially the same protections as the *Canadian Victims Bill of Rights* affords. Until the *Declaration of Victims Rights* comes into force, and unless the victim consents:

(a) sexual assaults should not be investigated or prosecuted under the *National Defence Act* and should instead be referred to civilian authorities; and

(b) there should also be a strong presumption against investigating and prosecuting under the *National Defence Act* other offences committed against a victim.

Moreover, the *National Defence Act* should be amended to expressly incorporate, in substance, the rights and protections afforded by the *Criminal Code* to victims and to persons accused of sexual offences.

Recommendation #69. The regulations implementing the *Declarations of Victims Rights*, or their associated policies, should:

(a) specify that victims are to be provided clear information about their rights under the *Declaration of Victims Rights*, including what information they are entitled to receive, who is responsible for providing it and when it should be provided;

(b) develop a complaint mechanism that is simple, accessible, robust, and results in meaningful enforcement and accountability; and

(c) include a requirement for role specific mandatory training for military justice actors on victims' issues (including the impact of trauma and how best to interact with victims), victims' rights and the actors' obligations under the *Declaration of Victims Rights*.

Recommendation #70. An exception to the duty to report incidents of sexual misconduct should be established for victims, their confidants and the health and support professionals consulted by them.

Their duty to report should be retained, however, where a failure to report would pose a clear and serious risk to an overriding interest, which may include ongoing or imminent harm, harm to children and national security concerns. A working group should be established to properly identify these exceptional cases. The working group should include an independent authority and representatives of the Sexual Misconduct Response Centre, military victims' organizations and the military justice system.

The working group should also consider (a) the removal of the duty of witnesses to report incidents of sexual misconduct; and (b) requiring witnesses to report incidents of sexual misconduct to the Sexual Misconduct Response Centre only.

Recommendation #71. The relationship between the Sexual Misconduct Response Centre, on one hand, and the Canadian Armed Forces and the Department of National Defence on the other, should be reviewed to ensure that the Sexual Misconduct Response Centre is afforded an appropriate level of independence from both. The review should be conducted by an independent authority.

Recommendation #72. The Sexual Misconduct Response Centre should be tasked with implementing a program that provides free independent legal advice to victims of sexual misconduct, including advice on whether, how and where to report, and guidance throughout judicial processes. The civilian lawyers who will provide these services should receive adequate training in military law and the military justice system, in order to be capable of properly advising victims on all their options.

Recommendation #73. The Sexual Misconduct Response Centre should be given the mandate to monitor the adherence of the Canadian Armed Forces to sexual misconduct policies and to investigate systemic issues that have a negative impact on victims of sexual misconduct, including the Canadian Armed Forces' accountability.

In fulfilling this mandate, the Sexual Misconduct Response Centre should have broad access to all the information it needs, including direct access to relevant databases such as the Operation HONOUR Tracking and Analysis System.

The Sexual Misconduct Response Centre should report on impediments to this access in its annual report.

If the Sexual Misconduct Response Centre continues to encounter difficulty accessing relevant information and data, Parliament should consider granting it the power to compel the production of evidence.

Recommendation #74. The Judge Advocate General and the Sexual Misconduct Response Centre should cooperate to make a joint proposal to the Minister of National Defence in respect of amendments to the *National Defence Act* which would allow for restorative justice approaches in the military justice system. They should also collaborate to develop a formalized restorative justice model that is adapted to the needs of victims and perpetrators and suited to the reality of the Canadian Armed Forces and its justice system.

Recommendation #75. There should be regular consultation between the Military Police Complaints Commission and key actors within the Department of National Defence and the Canadian Armed Forces prior to the tabling of legislation or the promulgation of regulations or policy changes affecting the Military Police Complaints Commission or Part IV of the *National Defence Act*.

Recommendation #76. The *National Defence Act* should be amended to require the Canadian Forces Provost Marshal, the Canadian Armed Forces and the Department of National Defence to disclose to the Military Police Complaints Commission any information under their control or in their possession which the Military Police Complaints Commission considers relevant to the performance of its mandate.

With respect to information which involves a claim of solicitor-client privilege, this recommendation is subject to the outcome of the discussions referred to in Recommendation #79.

Recommendation #77. The *National Defence Act* should be amended to give the Military Police Complaints Commission the power to summon and enforce the attendance of witnesses before it and compel them to give oral or written evidence on oath. The Military Police Complaints Commission should also have the authority to require any person, regardless of whether that person is called to testify, to produce any documents or things that the Military Police Complaints Commission considers relevant for the full investigation, hearing and consideration of a complaint.

With respect to information which involves a claim of solicitor-client privilege, this recommendation is subject to the outcome of the discussions referred to in Recommendation #79.

Recommendation #78. Discussions should be undertaken between the Military Police Complaints Commission, the Department of National Defence, the Canadian Armed Forces, the Privy Council Office and the Department of Justice Canada to examine the merits of adding the Military Police Complaints Commission to the schedule of the *Canada Evidence Act* as well as the legislative requirements for doing so.

Recommendation #79. There should be discussions between the Military Police Complaints Commission, the Canadian Forces Provost Marshal, the Judge Advocate General and the Director of Military Prosecutions with a view to reaching agreement on the circumstances when the Military Police Complaints Commission should be given access to solicitor-client privileged information, with appropriate limits and safeguards to avoid waiver of the privilege. The discussions should examine options for consequential amendments to the *National Defence Act*. Due consideration should be given to other regimes that compel the disclosure of solicitor-client privileged information and to the safeguards they contain. Outside experts should be engaged in the discussions.

Recommendation #80. The Military Police Complaints Commission should be added to the list of designated investigative bodies in Schedule II of the *Privacy Regulations*.

Recommendation #81. The *National Defence Act* should be amended to establish a 90-day time limit for requesting a review of a conduct complaint after it has been investigated by the Canadian Forces Provost Marshal.

Recommendation #82. The *National Defence Act* should be amended to establish a 90-day time limit for the production of the notice of action, subject to extension by the Chairperson of the Military Police Complaints Commission. In the absence of a notice of action or application to extend within this time frame, the Military Police Complaints Commission should be authorized to proceed to issue its final report.

If Recommendation #13 is implemented and the Canadian Forces Provost Marshal becomes responsible to the Minister of National Defence in the performance of his duties and functions, the Minister and not the Chief of the Defence Staff should issue the notice of action where the Canadian Forces Provost Marshal is the subject of a complaint.

Recommendation #83. The *National Defence Act* should be amended to make express provision for conduct complaints initiated by the Chairperson of the Military Police Complaints Commission. In the case of such complaints, the provisions of subsections 250.27(1) (informal resolution of complaints) and 250.28(2) (screening out of complaints that are frivolous or vexatious) of the *National Defence Act* should not apply.

Recommendation #84. There should be an early opportunity for discussion between the Military Police Complaints Commission and the Canadian Forces Provost Marshal to agree on problem definition and on solutions regarding the Military Police Complaints Commission's contention that it is regularly obliged to carry out its own investigation to fill in gaps in the Canadian Forces Provost Marshal investigation. The option of providing authority to the Military Police Complaints Commission to remit a matter back to the Canadian Forces Provost Marshal for further investigation should be considered.

Recommendation #85. A working group should be established with representatives from the Military Police Complaints Commission, the Office of the Judge Advocate General and the Canadian Forces Provost Marshal to develop a process for the classification of complaints.

Recommendation #86. Members of the Canadian Armed Forces who intend to file a grievance should be required to submit a notice of intent to grieve. The notice of intent to grieve should be sent directly to the members' commanding officers, with a copy to the local Conflict and Complaint Management Services centre. The submission of a notice of intent to grieve should suspend the time limit within which a grievance must be submitted. The modalities of the suspension and resumption of delays should be determined by the Canadian Armed Forces, in consultation with the Integrated Conflict and Complaint Management. The *Queen's Regulations and Orders for the Canadian Forces* and DAOD 2017-1, *Military Grievance Process* should be amended accordingly.

Recommendation #87. The Initial Authority should be allowed to request an extension of its time limit from the grievor. The requests should state that the grievor is not obliged to consent and may not be the subject of reprisals of any kind for refusing to do so. They should be made in writing and sent directly to the grievor, with a copy to the local Conflict and Complaints Management Services centre.

If an Initial Authority has not adjudicated a grievance or requested an extension from the grievor within the time limit to consider and determine the grievance, the grievance should be deemed to have been dismissed by the Initial Authority.

Recommendation #88. If the Initial Authorities fail to meet the objective and timeline determined at paragraph 13(a) of the *CDS Directive for CAF Grievance System Enhancement* regarding their compliance rate with the time limits prescribed by subsection 7.15(2) of the *Queen's Regulations and Orders for the Canadian Forces* and section 9.8 of DAOD 2017-1, *Military Grievance Process*, these provisions should be amended to prescribe that an Initial Authority must consider and determine a grievance within 90 days of its receipt.

Recommendation #89. The *National Defence Act*, the *Queen's Regulations and Orders for the Canadian Forces* and DAOD 2017-1, *Military Grievance Process* should be amended to prescribe that a Final Authority must consider and determine a grievance within 90 days of the receipt of the findings and recommendations of the Military Grievances External Review Committee.

When the Final Authority fails to meet this time limit, the findings and recommendations of the Military Grievances External Review Committee should be deemed to constitute the decision of the Final Authority.

Recommendation #90. The *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces* should be amended to provide that all grievances referred to the Final Authority should be reviewed by the Military Grievances External Review Committee before the Final Authority considers and determines the grievance.

Recommendation #91. The military grievance process should be fully digitized. Members of the Canadian Armed Forces should only submit their notice of intent to grieve and grievances electronically, directly to their commanding officer, with a copy to the local Conflict and Complaint Management Services centre.

All documents shared between a grievor, the Initial Authority and the Final Authority should be recorded in an electronic file to which the grievor, the commanding officer, the Initial Authority, the Final Authority and the local Conflict and Complaint Management Services centre should have access.

Recommendation #92. The Canadian Armed Forces should examine the respective roles of assisting members and Conflict and Complaint Management Services agents to determine whether the former still serve a useful purpose in the military grievance process.

If they do, a formal Assisting Member Certification Training should be developed and lead to a renewable certification. The course should include practical exercises.

Each unit of the Canadian Armed Forces should establish a roster of assisting members who have successfully completed the Assisting Member Certification Training. Grievors should be invited to select their assisting members from this roster. They should, however, maintain the right to request the appointment of other persons after having been informed of their lack of training and certification. Efforts should nonetheless be made to offer the Assisting Member Certification Training to non-roster appointees where the circumstances allow it.

The Canadian Armed Forces should ensure that assisting members are provided with sufficient time, in light of their other duties, to adequately assist grievors in the preparation of their grievance and throughout the process.

Recommendation #93. A section on the military grievance process should be included in the training curriculum for Canadian Armed Forces recruits. It should include information on the matters which are grievable, the limits of the remedial powers of the Initial Authority and Final Authority, the procedure and timelines applicable to a grievance, and the rights of the grievor, both within and beyond the military grievance process (including judicial review).

Recommendation #94. The Conflict and Complaint Management Services centres should organize outreach activities each posting season to inform the members of the Canadian Armed Forces assigned to local units of their existence and functions.

Recommendation #95. Section 12 of the *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24 should come into force without further delay.

Recommendation #96. Section 29.21 of the *National Defence Act* should be amended to allow the Military Grievances External Review Committee to compel the production of documents or things without the requirement to hold a hearing.

Recommendation #97. A working group should be established to evaluate the appropriateness of providing grievors with recourse to an independent tribunal. The working group should consider whether all grievances, or only certain categories, should be subject to the jurisdiction of that tribunal. It should also consider the integration of this route in the current grievance process and the remedies available pursuant to that recourse. The working group should include an independent authority, representatives from the Military Grievances External Review Committee and representatives from the Canadian Armed Forces. The working group should report to the Minister of National Defence.

Recommendation #98. The independent review process under section 273.601 of the *National Defence Act* should provide at least nine months to conduct the review and draft the report. This period should run from the completion of all preliminary steps to the submission of the report to the Minister of National Defence.

Recommendation #99. The Department of National Defence should provide future independent review authorities, at the beginning of their reviews, with a report on the implementation status of recommendations from previous independent reviews under section 273.601 of the *National Defence Act* and other external or internal review exercises relevant to their mandate. Officials responsible for supporting future independent review authorities should work with the Assistant Deputy Minister (Review Services) to accomplish this.

Recommendation #100. The Department of National Defence and the Canadian Armed Forces should carry out a series of evaluations on each of the training modules: their design, the type of participation included, and the frequency and application of acquired skills and knowledge. The results of these evaluations should be made available to future independent review authorities.

Recommendation #101. Future independent review authorities should, prior to the start of the review period, be briefed on all relevant data on the performance and operation of the military justice system, the military grievance process and the regime for complaints about or by military police.

Recommendation #102. Subsection 273.601(1) of the *National Defence Act* should be amended to expressly include an examination of sections 9 to 9.4 of the *National Defence Act* concerning the roles and responsibilities of the Judge Advocate General.

Recommendation #103. There should be an independent review of oversight and redress mechanisms for the Canadian Armed Forces.

The review should examine the operation of the Office of the Ombudsman for the Department of National Defence and the Canadian Forces, and whether additional measures are needed to reinforce its independence and effectiveness. The review should examine the experience of other democracies and best practices elsewhere in government. It should consider the roles and responsibilities of a general oversight organization in relation to subject-specific oversight organizations within the Defence portfolio.

Recommendation #104. The Minister of National Defence and the Judge Advocate General should ensure that the role of the military justice system in combatting hateful conduct is examined. They should consider whether this is best accomplished through the Advisory Panel established in December 2020, through an independent review that would include in its mandate the role of the military justice system in combatting hateful conduct or in some other way.

Recommendation #105. There should be a review of the adequacy of resources for military justice policy development.

Recommendation #106. Senior officials of the Office of the Judge Advocate General should undertake discussions with senior officials of the Department of Justice Canada to improve information sharing and collaboration on policy initiatives.

Recommendation #107. The Office of the Judge Advocate General should, in cooperation with the Department of Justice Canada and the Department of Public Safety and Emergency Preparedness, review its participation in federal-provincial-territorial working groups on the justice system.

LIST OF SCHEDULES

Schedule A: Ministerial Direction issued on November 5, 2020 by the Honourable Harjit S. Sajjan, Minister of National Defence;

Schedule B: News release issued on November 16, 2020 by the Minister of National Defence;

Schedule C: News release issued on November 27, 2020 by the Third Independent Review Authority;

Schedule D: Article published on December 16, 2020 in *The Maple Leaf*;

Schedule E: List of "Military Justice References Materials" provided by the Independent Review Authority Secretariat on October 27, 2020;

Schedule F: List of Department of National Defence and Canadian Armed Forces officials and organizations met by the Third Independent Review Authority;

Schedule G: List of external commentators and foreign experts met by the Third Independent Review Authority;

Schedule H: List of individual authors of written submissions;

Schedule I: CF MP Gp Order 2-340.1, *Investigative Discretion and Investigative Assessments*;

Schedule J: CF MP Gp HQ – DPM Policy, Police Policy Advisory 11/2015, *Investigation of Criminal Sexual Offences*;

Schedule K: CF MP Gp Order 2-300, Law *Enforcement Operations – General*;

Schedule L: CF MP Gp Order 2-363, *Laying Criminal and Service Charges*;

Schedule M: CFNIS Standard Operating Procedure, Chapter 2, Police Operations, 238, *Charge-Laying*;

Schedule N: Protocol on the Exercise of Criminal Jurisdiction in England and Wales Between the Director of Service Prosecutions and the Director of Public Prosecutions and the Ministry of Defence (November 29, 2016);

Schedule O: CF MP Gp Order 2-381, *Canadian Forces National Investigation Service Jurisdiction*;

Schedule P: CF MP Gp Order 2-500, *Investigation Management*;

Schedule Q: CF MP Gp Order 2-370.4, *Commanding Officer Search Warrants*;

Schedule R: *CDS Directive for CAF Grievance System Enhancement* issued on March 3, 2021 by the Acting Chief of the Defence Staff;

Schedule S: CANFORGEN 090/20, *CAF Administrative Orders and Instructions on Hateful Conduct* (July 10, 2020);

Schedule T: CF Mil Pers Instruction 01/20, *Hateful Conduct* (July 10, 2020).

Schedule A

MINISTERIAL DIRECTION –
THIRD INDEPENDENT REVIEW

Preamble

Section 273.601 of the *National Defence Act* requires the Minister to cause an independent review of the following provisions, and their operation, to be undertaken:

a) sections 18.3 to 18.6;

b) sections 29 to 29.28;

c) Parts III and IV;

d) sections 251, 251.2, 256, 270, 272, 273 to 273.5 and 302.

This will be the first independent review to be conducted pursuant to this provision.

As with the second independent review, which was conducted pursuant to *Section 96 of Statutes of Canada 1998*, c.35, an effective review of statutory and regulatory provisions, and administrative policies and practices, may best be accomplished in circumstances where those statutory and regulatory provisions, and administrative policies and practices have been implemented, and there is an adequate operational record upon which to ground a review.

An Act to amend the National Defence Act and to make related and consequential amendments to other Acts ("the Act"), formerly Bill C-77, will make several changes to the Code of Service Discipline, set out at Part III of the *National Defence Act*.

Bill C-77 received Royal Assent on June 21, 2019. Some provisions of the Act came into force upon Royal Assent.

The remaining provisions of the Act will come into force at a later date along with a large number of amendments to the *Queen's Regulations and Orders for the Canadian Forces*.

In order to maximize the utility of the third independent review, the review might most effectively be accomplished by focusing on the statutory and regulatory provisions, and administrative policies and practices that have been implemented, and have an adequate operational record upon which to ground a review.

Appointment and scope of the review

1. Pursuant to section 4 and section 273.601 of the *National Defence Act* (*NDA*), I hereby establish an external authority, to be known as the *NDA* section 273.601 Independent Review Authority (hereinafter the "Third Independent Review Authority"), and I appoint the Honourable Morris J. Fish, residing at Montréal, Québec, as the Third Independent Review Authority.

2. The Third Independent Review Authority is to conduct an independent review pursuant to section 273.601 of the *NDA* and report the outcomes of this review directly to the Minister of National Defence. The provisions subject to review are enumerated in subsection 273.601(1) of the *NDA*.

Authority and obligations

3. The Third Independent Review Authority may:

   a. sit at such time and at such place in Canada as the Third Independent Review Authority may from time to time decide; and

   b. adopt such procedures and methods as it considers expedient for the proper discharge of the mandate.

4. The Third Independent Review Authority is granted, subject to the requirements and limitations of applicable laws and regulations, complete access to:

   a. the employees of the Department of National Defence;

   b. the officers and non-commissioned members of the Canadian Armed Forces;

   c. the members and staff of the Military Grievances External Review Committee;

   d. the members and staff of the Military Police Complaints Commission;

   e. the Ombudsman for the Department of National Defence and the Canadian Armed Forces and staff; and

   f. any information held by the Department of National Defence and the Canadian Armed Forces relevant to the review.

5. The Third Independent Review Authority shall be provided with or may engage the services of such staff and other advisors as it considers necessary to aid and assist in the review, at such rates of remuneration as may be approved pursuant to applicable Government of Canada regulations and policies.

6. The Third Independent Review Authority shall:

   a. Provide a final report of their review in both official languages to the Minister of National Defence. The report must be suitable for release to the public, and therefore must not include information properly subject to security and other relevant restrictions, including those imposed by laws and regulations governing information related to national defence and national security and to privacy, confidentiality and solicitor-client privilege;

   b. provide a final report that includes the methodology of their review, their findings, analyses, limitations, and recommendations; and

   c. deposit records and papers with the Office of the Minister of National Defence as soon as is reasonably possible after the filing of the final report.

Signed at Ottawa, Ontario, this 05 day of 11 2020.

The Honourable Harjit Sajjan
Minister of National Defence

Schedule B

Minister of National Defence appoints the Independent Review Authority to conduct the Third Independent Review of the National Defence Act

From: National Defence

News release

November 16, 2020 – Ottawa – National Defence / Canadian Armed Forces

The Honourable Harjit S. Sajjan, Minister of National Defence, has appointed the Honourable Morris J. Fish, former Justice of the Supreme Court of Canada, as the Independent Review Authority, to conduct an independent review of specified provisions of the *National Defence Act* (NDA) and their operation.

The NDA requires the Minister of National Defence (MND) to initiate an independent review of specified provisions of the Act and their operation, and to table a report of the review before Parliament.

The Department of National Defence (DND) and the Canadian Armed Forces (CAF) are committed to supporting this process in the interests of ensuring that the military justice system continues to be fair and effective. As the Third Independent Review Authority, the Honourable Morris J. Fish will have complete access to DND employees and CAF personnel, as well as the members and staff of the Military Grievances External Review Committee, the Military Police Complaints Commission, and the DND/CAF Ombudsman.

The Honourable Morris J. Fish served on the Québec Court of Appeal and on the Supreme Court of Canada. Justice Fish practiced law in Montreal and was called to the bars of Quebec, Prince Edward Island and Alberta and appointed Queen's Counsel. An adjunct professor in the Faculty of Law at McGill University, he also taught in the University of Ottawa and at the Université de Montréal. Justice Fish served as a consultant to the federal Department of Justice, to Revenue Canada and to the Law Reform Commission of Canada. He was special counsel to the Inquiry Commission into the Exercise of Trade-Union Freedom in Quebec's Construction Industry (Cliche Commission), as well as to the Security Intelligence Review Committee. Justice Fish received honorary Doctorates of Law from McGill University in 2001 and from Yeshiva University in 2009. He has also received numerous awards and medals and was appointed Companion of the Order of Canada in 2017. Justice Fish is now jurist in residence with a Canadian law firm.

Quotes

> "Efforts have been underway for some time to prepare for the next independent review. I am pleased to announce the Honourable Morris J. Fish as the Third Independent Review Authority. He will examine the military justice system and provide recommendations on how we can continue to evolve the system so it reflects current Canadian values."
>
> The Honourable Harjit S. Sajjan, Minister of National Defence

Quick facts

- The specified provisions under review include those relating to military justice (including the Code of Service Discipline), military grievances, the Canadian Forces Provost Marshal, and the Military Police Complaints Commission. In addition, the MND is required to table the report in Parliament within a specified timeline. The statutory deadline to table the next report is June 2021.
- Previous Independent Review Authorities have been the late Right Honourable Antonio Lamer, retired Chief Justice of Canada (report tabled in 2003), and the Honourable Patrick LeSage, retired Chief Justice of the Ontario Superior Court of Justice (report tabled in 2012).
- The role of independent reviews in the ongoing development of the military justice system was recently recognized by the Supreme Court as an important requirement to ensuring the system is rigorously scrutinized, analyzed, and refined at regular intervals.
- As with the past two reviews, the Third Independent Review is expected to provide thoughtful analysis that may contribute to legislative, regulatory, and/or policy changes.

Contacts

Persons who have an interest in the military justice system (including the Code of Service Discipline), military grievances, the Canadian Forces Provost Marshal, and the Military Police Complaints Commission are encouraged to provide comments to the Third Independent Review Authority. Inquiries and submissions should be addressed to Mr. Jean-Philippe Groleau at Davies Ward Phillips & Vineberg LLP, by mail to 1501 McGill College Suite 2600, Montréal, Quebec, H3A 3N9, by telephone at 514-841-6583, or by email at: review.authority@dwpv.com.

All submissions must be received by January 8, 2021. Persons making submissions should expect that their submissions will be made public, however the Independent Review Authority maintains discretion in this regard and may receive certain submissions in confidence.

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Date modified:
2020-11-16

Schedule C

Military Justice System: The Independent Review Authority Calls for Submissions

Français

NEWS PROVIDED BY
The Independent Review Authority →
Nov 27, 2020, 08:11 ET

MONTRÉAL, Nov. 27, 2020 /CNW Telbec/ - The Honourable Morris J. Fish, CC, QC, a retired Justice of the Supreme Court of Canada, has been appointed by The Honourable Harjit S. Sajjan, Minister of National Defence, as the third Independent Review Authority. As such, Justice Fish is tasked with conducting an independent review of the entire military justice system in Canada, embracing but not limited to the following matters:

- The content of the Code of Service Discipline and its application by military authorities, including :
    - the persons subject to the Code of Service Discipline;
    - the entire body of substantive service offences, including offences of a sexual nature and offences with racial motives;
    - the punishments prescribed to sanction service offences, including imprisonment and detention;
    - arrest and pre-trial custody;
    - summary trials by commanding officers or superior commanders, and their upcoming replacement by summary hearings;
    - trials by Court Martial, including the process for preferring charges, the conduct of preliminary proceedings and of the trials themselves, and the applicable laws of evidence;
    - the office and role of the Director of Military Prosecutions;
    - the office and role of the Director of Defence Counsel Services;
    - the office and role of the Chief Military Judge and of military judges;
    - sentencing;
    - appeals to the Court Martial Appeal Court and the Supreme Court of Canada;

- The military police, including:
    - the office and role of the Canadian Forces Provost Marshal;
    - inspections, searches and seizures, the conduct of investigations, training;
    - complaints about or by military police, including the role of the Military Police Complaints Commission; and

- The system of military grievances, including:
    - the manner and conditions of submitting grievances;
    - the handling of grievances by the Canadian Armed Forces;
    - the role of the Military Grievances External Review Committee; and
    - the roles of initial authorities and of the Chief of Defence Staff as final authority in the grievance process.

Justice Fish is assisted in his independent review by his Senior Counsel, Jean-Philippe Groleau, a partner at Davies Ward Phillips & Vineberg LLP; his Junior Counsel, Guillaume Charlebois, an associate at the same firm; and his Senior Consultant, Morris Rosenberg CM, a former deputy

minister of justice, of health and of foreign affairs with the government of Canada. Justice Fish and the members of his team are all independent of the Department of National Defence and the Canadian Armed Forces.

Justice Fish and his team invite any member of the public or of the Canadian Armed Forces who has an interest in the above-mentioned subjects particularly or in the military justice system in general to contact them at review.authority@dwpv.com. Anyone without easy access to the internet or to an email address can also contact Mr. Groleau at 514.841.6583. Justice Fish and his team are prepared, upon request and in the exercise of their discretion, to receive submissions in confidence from members of the public and members of the Canadian Armed Forces alike. Submissions may otherwise be made public. The deadline for submissions is January 8, 2021. Requests for an extension on exceptional grounds must be addressed to Mr. Groleau before January 8.

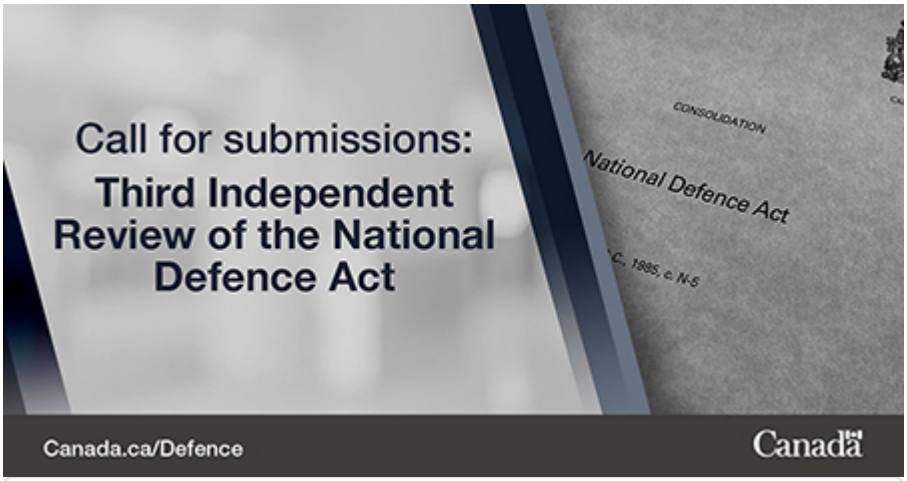
SOURCE The Independent Review Authority

For further information: Jean-Philippe Groleau, Senior Counsel to the Independent Review Authority, jpgroleau@dwpv.com, 514-841-6583

Schedule D

The Third Independent Review of the National Defence Act and Call for Submissions

December 16, 2020 - Defence Stories



▶ Caption

The Honourable Harjit S. Sajjan, Minister of National Defence (MND), announced on November 16 the appointment of the Honourable Morris J. Fish, former Justice of the Supreme Court of Canada, as the Independent Review Authority, to conduct an independent review of specified provisions of the *National Defence Act* (NDA) and their operation.

The specified provisions under review include those relating to military justice (including the Code of Service Discipline), military grievances, the Canadian Forces Provost Marshal, and the Military Police Complaints Commission.

The NDA requires the MND to initiate an independent review of specified provisions of the Act and their operation, and to table a report of the review before Parliament within a specified timeline. The statutory deadline to

table the next report is June 2021.

“Efforts have been underway for some time to prepare for the next independent review. I am pleased to announce the Honourable Morris J. Fish as the Third Independent Review Authority,” said Minister Sajjan. “He will examine the military justice system and provide recommendations on how we can continue to evolve the system so it reflects current Canadian values.”

Two previous independent reviews have been conducted, one by the late Right Honourable Antonio Lamer, former Chief Justice of Canada (report tabled in 2003), and the other by the Honourable Patrick LeSage, retired Chief Justice of the Ontario Superior Court of Justice (report tabled in 2012), under Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*.

The first independent review resulted in 88 recommendations made by former Chief Justice Lamer, the majority of which pertained to military justice. Most of the recommendations were accepted by the MND and were addressed by amendments to the NDA in Bill C-60, *An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another Act*, which, among other things, more closely aligned the mode of trial by court martial with the approach in the civilian criminal justice system; Bill C-16 *An Act to amend the National Defence Act (military judges)*, which dealt with the security of tenure of military judges; and Bill C-15, the *Strengthening Military Justice in the Defence of Canada Act*, which comprised the most significant amendments to the NDA since 1998, serving to further align the military justice system within the larger Canadian legal mosaic while taking into account the unique requirements of that system.

As a result of the second independent review, former Chief Justice LeSage's report included 55 recommendations, with nearly two-thirds of the recommendations dealing with the military justice system. He observed that significant progress had been made on the grievance process since the first independent review in 2003, and made a number of recommendations for further improvement. Former Chief Justice LeSage's recommendations are substantially reflected in Bill C-15 regulations which came into force in September 2018, and are also reflected within revised policies.

As with the past two reviews, the third independent review is expected to provide thoughtful analysis that may contribute to legislative, regulatory, and/or policy changes. The third independent review is now underway.

Persons who have an interest in the military justice system (including the Code of Service Discipline), military grievances, the Canadian Forces Provost Marshal, and the Military Police Complaints Commission are encouraged to provide comments to the Third Independent Review Authority. Inquiries and submissions should be addressed to Mr. Jean-Philippe Groleau at Davies Ward Phillips & Vineberg LLP, by mail to1501 McGill College Avenue, Suite 2600, Montreal, Quebec, H3A 3N9, by telephone at 514-841-6583, or by email at: review.authority@dwpv.com.

All submissions must be received by January 8, 2021. Persons making submissions should expect that their submissions will be made public, however the Independent Review Authority maintains discretion in this regard and may receive certain submissions in confidence.

Date modified:
2020-12-16

Schedule E

Military Justice Reference Material

Submitted to the Third Independent Review Authority from the Independent Review Secretariat

27 October 2020

Table of Contents – Reference Material for IRA

TAB	REFERENCE	WEBSITE
JURISPRUDENCE		
1	*R v Stillman*, 2019 SCC 40	https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17891/index.do
2	*R v Moriarity*, 2015 SCC 55	https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15628/index.do
3	*R v Gladue*, [1999] 1 S.C.R. 688	https://scc-csc.lexum.com/scc-csc/scc-csc/en/1695/1/document.do
4	*R v Généreux*, [1992] 1 S.C.R. 259	https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/836/index.do
5	*MacKay v The Queen*, [1980] 2 S.C.R. 370	https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5731/index.do?q=Mackay
6	*Canada (Director of Military Prosecutions) v Canada (Deputy Chief Military Judge)* 2020 FC 330	https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/462323/index.do
7	*Thurrott v Canada*, 2018 FC 577	https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/310996/index.do
8	*Canada (Director of Military Prosecutions) v Canada (Court Martial Administrator)*, 2006 FC 1532	https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/53353/index.do
9	*R v Golzari*, 2017 CMAC 3	https://decisions.cmac-cacm.ca/cmac-cacm/cmac-cacm/en/item/233426/index.do
10	*R v Leblanc*, 2011 CMAC 2	https://decisions.cmac-cacm.ca/cmac-cacm/cmac-cacm/en/item/7750/index.do
11	*R v Trépanier*, 2008 CMAC 3	https://decisions.cmac-cacm.ca/cmac-cacm/cmac-cacm/en/item/7787/index.do
12	*R v MacPherson and Chauhan and J.L.*, 2020 CM 2012	https://decisia.jmc-cmj.forces.gc.ca/jmc-cmj/cm/en/item/487489/index.do
13	*R v Iredale*, 2020 CM 4011	https://decisia.jmc-cmj.forces.gc.ca/jmc-cmj/cm/en/item/485130/index.do
14	*R c Fontaine*, 2020 CM 3008	https://decisia.jmc-cmj.forces.gc.ca/jmc-cmj/cm/en/item/485105/index.do

15	*R c Crépeau*, 2020 CM 3007	https://decisia.jmc-cmj.forces.gc.ca/jmc-cmj/cm/en/item/484499/index.do
16	*R v Edwards*, 2020 CM 3006	https://decisia.jmc-cmj.forces.gc.ca/jmc-cmj/cm/en/item/484020/index.do
17	*R v Bourque*, 2020 CM 2008	https://decisia.jmc-cmj.forces.gc.ca/jmc-cmj/cm/en/item/485670/index.do
18	*R v D'Amico,* 2020 CM 2002	https://decisia.jmc-cmj.forces.gc.ca/jmc-cmj/cm/en/item/481059/index.do
19	*R v Pett*, 2019 CM 4018	https://decisia.jmc-cmj.forces.gc.ca/jmc-cmj/cm/en/item/459682/index.do

TAB	REFERENCE	WEBSITE
LEGISLATION & REGULATIONS		
20	*National Defence Act*, R.S.C., 1985	https://laws-lois.justice.gc.ca/eng/acts/N-5/FullText.html
21	*Queens Regulations and Orders*, Volume I Administration	https://www.canada.ca/en/department-national-defence/corporate/policies-standards/queens-regulations-orders/vol-1-administration.html
22	*Queens Regulations and Orders*, Volume II Disciplinary	https://www.canada.ca/en/department-national-defence/corporate/policies-standards/queens-regulations-orders/vol-2-disciplinary.html
23	*Military Rules of Evidence*, C.R.C., c. 1049	https://laws-lois.justice.gc.ca/eng/regulations/C.R.C.,_c._1049/page-1.html
24	*Defence Controlled Access Area, Regulations* SOR-86-957	https://laws-lois.justice.gc.ca/eng/regulations/sor-86-957/index.html
25	*Inspection and Search Defence, Regulations* SOR-86-958	https://laws-lois.justice.gc.ca/eng/regulations/SOR-86-958/index.html

TAB	REFERENCE	WEBSITE
REPORTS & REVIEWS		
26a	Dishonoured Legacy, The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 1997, Executive Summary	http://publications.gc.ca/site/eng/9.700365/publication.html?wbdisable=true
26b	Dishonored Legacy, The Lessons of the Somalia Affair, Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, 1997, Vol III	http://publications.gc.ca/site/eng/9.700365/publication.html?wbdisable=true
27	Report of the Special Advisory Group on Military Justice and Military Police Investigation Services, 1997 (Dickson Report I)	
28	Report on the Quasi-Judicial Role of the Minister of National Defence, 1997 (Dickson Report II)	
29	Report of the Military Police Services Review Group, 1998 (Dickson Report III)	
30	The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35, 2003	
31	External Review of the Canadian Military Prosecution Service, 2008 (Bronson I)	
32	External Review of Defence Counsel Services, 2009 (Bronson II)	
33	Report of the Second Independent Review Authority to The Honourable Peter G. MacKay Minister of National Defence, 2011	
34	External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces, 2015 (Deschamps Report)	
35	Spring Reports of the Auditor General of Canada to the Parliament of Canada, Report 3 – Administration of Justice in the Canadian Armed Forces, 2018	https://www.oag-bvg.gc.ca/internet/English/parl_oag_201805_03_e_43035.html

36	Report 3, Administration of Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada, Report of the Standing Committee on Public Accounts, 2018 (PACP Report I)	https://www.ourcommons.ca/Content/Committee/421/PACP/Reports/RP10250898/pacprp56/pacprp56-e.pdf
37a	Government response to the Report of the Standing Committee on Public Accounts, entitled: Report 3, Administration of Military Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada, 2019	https://www.ourcommons.ca/content/Committee/421/PACP/GovResponse/RP10404910/421_PACP_Rpt56_GR/421_PACP_Rpt56_GR-e.pdf
37b	Update to the Standing Committee on Public Accounts on Report 3, Administration of Justice in the Canadian Armed Forces, of the 2018 Spring Reports of the Auditor General of Canada – Recommendation 6, 2020	https://www.ourcommons.ca/content/Committee/421/PACP/WebDoc/WD10776250/421_PACP_reldoc_PDF/DepartmentOfNationalDefence-Report3-AdministrationOfJustice-2018Spring-Rec6-e.pdf
38	Fall Reports of the Auditor General of Canada to the Parliament of Canada, Report 5 – Inappropriate Sexual Behaviour – Canadian Armed Forces, 2018	https://www.oag-bvg.gc.ca/internet/English/parl_oag_201811_05_e_43203.html
39	Report 5, Inappropriate Sexual Behaviour – Canadian Armed Forces, of the 2018 Fall Reports of the Auditor General of Canada, Report of the Standing Committee on Public Accounts, 2019	https://www.ourcommons.ca/Content/Committee/421/PACP/Reports/RP10371332/pacprp61/pacprp61-e.pdf
40a	Government response to the 61st report of the Standing Committee on Public Accounts, entitled: Report 5, Inappropriate Sexual Behaviour – Canadian Armed Forces, of the 2018 Fall Reports of the Auditor General of Canada, 2019	https://www.ourcommons.ca/content/Committee/421/PACP/GovResponse/RP10592581/421_PACP_Rpt61_GR/421_PACP_Rpt61_GR-e.pdf
40b	Response to the Standing Committee on Public Accounts' Report 5, Inappropriate Sexual Behaviour – Canadian Armed Forces, of the fall 2018 Reports of the Auditor General of Canada – Recommendation 2, 2020	https://www.ourcommons.ca/content/Committee/421/PACP/WebDoc/WD10733185/421_PACP_reldoc_PDF/Report5-InappropriateSexualBehaviour-Rec2-2018Fall-e.pdf
40c	Response to the Standing Committee on Public Accounts' Report 5, Inappropriate Sexual Behaviour – Canadian Armed Forces, of the fall 2018 Reports of the Auditor General of Canada – Recommendation 4, 2020	https://www.ourcommons.ca/content/Committee/421/PACP/WebDoc/WD10776251/421_PACP_reldoc_PDF/DepartmentOfNationalDefence-Report5-InapropriateSexualBehaviour-2018Fall-Rec4-e.pdf
41	Sexual Harassment and Violence in the Canadian Armed Forces, Report of the Standing Senate Committee on National Security and Defence, 2019	https://military-justice.ca/wp-content/uploads/2019/06/Canadian-Senate-Report-on-Sexual-Misconduct-in-the-CAF.pdf

TAB	REFERENCE	WEBSITE
JUDGE ADVOCATE GENERAL & OFFICE OF THE JUDGE ADVOCATE GENERAL REPORTS		
42	Judge Advocate General's Annual Report 2010-2011	https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2010-11.html
43	Judge Advocate General's Annual Report 2011-2012	https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2011-12.html
44	Judge Advocate General's Annual Report 2012-2013	https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2012-13.html
45	Judge Advocate General's Annual Report 2013-2014	https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2013-14.html
46	Judge Advocate General's Annual Report 2014-2015	https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2014-15.html
47	Judge Advocate General's Annual Report 2015-2016	https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2015-16.html
48	Judge Advocate General's Annual Report 2016-2017	https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2016-17.html
49	Judge Advocate General's Annual Report 2017-2018	https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2017-18.html

50	Judge Advocate General's Annual Report 2018-2019	https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2018-2019.html
--	Judge Advocate General's Annual Report 2019-2020	*To be provided once tabled in Parliament*
51	Draft internal report, Court Martial Comprehensive Review, 2017	https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/court-martial-comprehensive-review/interim-report-july-2017.html

Schedule F

DEPARTMENT OF NATIONAL DEFENCE AND CANADIAN ARMED FORCES OFFICIALS AND ORGANIZATIONS MET BY THE THIRD INDEPENDENT REVIEW AUTHORITY

Department of National Defence

The Honourable Harjit S. Sajjan, Minister of National Defence
Jody Thomas, Deputy Minister of National Defence
Julie Charron, Assistant Deputy Minister (Review Services)

Canadian Armed Forces

General Jonathan Vance, Chief of the Defence Staff *(met on December 4, 2020)*
Vice-Admiral Craig A. Baines, Commander Royal Canadian Navy
Lieutenant-General Christopher J. Coates, Commander Canadian Joint Operations Command
Lieutenant-General Wayne D. Eyre, Commander Canadian Army *(met on February 3, 2021)*
Vice-Admiral Haydn C. Edmundson, Commander Military Personnel Command
Lieutenant-General Alexander D. Meinzinger, Commander Royal Canadian Air Force
Lieutenant-General Michael N. Rouleau, Vice Chief of the Defence Staff
Rear-Admiral Geneviève Bernatchez, Judge Advocate General
Major-General D. Craig Aitchison, Commander Canadian Defence Academy
Major-General Peter Dawe, Commander Canadian Special Operations Forces Command
Major-General Roy Rob E. MacKenzie, Chief Reserves and Employer Support
Brigadier-General Andrew Atherton, Director General Professional Military Conduct – Operation HONOUR
Brigadier-General S.D. Bindon, Deputy Chief of Reserves and Employer Support
Commodore Angus Topshee, Commander Canadian Pacific Fleet
Colonel Krista L.A. Bouckaert, Director Canadian Forces Grievance Authority
Colonel Geneviève Lehoux, Director Military Careers Administration
Captain(N) Dan Manu-Popa, Director of Reserves

Canadian Military Prosecution Service

Colonel Bruce MacGregor, Director of Military Prosecutions
Lieutenant-Colonel Martin Raymond, Acting Director of Military Prosecutions
Lieutenant-Colonel Dylan Kerr, Deputy Director of Military Prosecutions
Lieutenant-Colonel Dominic Martin, Deputy Director of Military Prosecutions

Canadian Forces Military Police Group

Brigadier-General Simon Trudeau, Canadian Forces Provost Marshal
Lieutenant-Colonel Jean-Michel Cambron, Director – Legal Services, Canadian Forces Provost Marshal
Lieutenant-Colonel Eric Leblanc, Commander Canadian Forces National Investigation Service
Major Genevieve Therrien, Executive Assistant to the Canadian Forces Provost Marshal

Directorate of Defence Counsel Services

Colonel Jean-Bruno Cloutier, Director of Defence Counsel Services
Commander Mark Létourneau, Deputy Director of Defence Counsel Services

Court Martial Appeal Court of Canada

The Honourable B. Richard Bell, Chief Justice

Military Grievances External Review Committee

Christine Guérette, Chairperson and Chief Executive Officer
Dominic McAlea, Full-time Vice-Chairperson
François Malo, Part-time Vice-Chairperson
Vihar Joshi, Director General of Operations and General Counsel

Military Police Complaints Commission

Hilary C. McCormack, Chairperson
Julianne Dunbar, Senior General Counsel and Director General
Elsy Chakkalakal, General Counsel and Senior Director of Operations

Office of the Chief Military Judge

Lieutenant-Colonel Louis-Vincent d'Auteuil, Deputy Chief Military Judge
Commander Sandra M. Sukstorf, Military Judge
Commander J.B. Martin Pelletier, Military Judge
Commander Catherine Julie Deschênes, Military Judge
Simone Morrissey, Court Martial Administrator
André Dufour, Legal Counsel

Office of the National Defence and Canadian Forces Legal Advisor

Michael Sousa, National Defence and Canadian Forces Legal Advisor
Roland Legault, Deputy National Defence and Canadian Forces Legal Advisor
Meaghan Enright, Counsel and Special Advisor

Office of the Ombudsman for the Department of National Defence and the Canadian Forces

Gregory Lick, Ombudsman for the Department of National Defence and the Canadian Forces
Holly McManus, Director General Legal and General Counsel
Robyn Hynes, Director General Operations
Dania Hadi, Assistant to the Ombudsman for the Department of National Defence and the Canadian Forces

Sexual Misconduct Response Centre

Denise Preston, Executive Director
Chantal Ruel, Acting Director of Programs and Services
Elizabeth Cyr, Team Leader

Schedule G

EXTERNAL COMMENTATORS AND FOREIGN EXPERTS MET BY THE THIRD INDEPENDENT REVIEW AUTHORITY*

External Commentators

Yves Côté, former National Defence and Canadian Forces Legal Advisor and former Ombudsman for the Department of National Defence and the Canadian Forces
Major-General (retired) Blaise Cathcart, former Judge Advocate General
Elaine Craig, Associate Professor of Law at the Schulich School of Law
The Honourable Marie Deschamps, former justice of the Supreme Court of Canada, appointed as the External Review Authority
Major (retired) Tim Dunne, former military public affairs officers of the Canadian Armed Forces
Colonel (retired) Michel W. Drapeau, lawyer and Adjunct Professor at the University of Ottawa Faculty of Law – Common Law Section
Richard B.M. Fadden, former Deputy Minister of National Defence
Lieutenant-Colonel (retired) Rory F. Fowler, former legal officer of the Canadian Armed Forces
Martin Friedland, University Professor and James M. Tory Professor of Law Emeritus at the University of Toronto Faculty of Law
Colonel (retired) Delano K. Fullerton, former Director of Defence Counsel Services
Marie-Claude Gagnon, founder of "It's Just 700"
Bobbie Garnet Bees, former military dependent
The Honourable Patrick J. LeSage, former Chief Justice of the Ontario Superior Court of Justice, appointed as the Second Independent Review Authority
Justice Gilles Létourneau, former judge of the Federal Court of Appeal and Court Martial Appeal Court of Canada
Commander Mike Madden, former legal officer of the Canadian Armed Forces
Lynn Mahoney, counsel to the Second Independent Review Authority
Caroline Maynard, former Director General Operations and General Counsel and former Interim Chairperson and Chief Executive Officer of the Military Grievances External Review Committee
David McNairn, former legal officer of the Canadian Armed Forces and former Chair of the Military Law Section of the Canadian Bar Association
Jessica Miller, former member of the Canadian Armed Forces
Michael O'Rielly, former Director of Legislative Reform Initiative and former Director General of Workplace Responsibility Branch of the Royal Canadian Mounted Police
Lieutenant-Colonel (retired) Jean-Guy Perron, former Military Judge
The Honourable Mark Poland, justice of the Ontario Court of Justice

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* This list does not include the names of the participants who asked that their participation be taken in confidence.

Kent Roach, Professor of Law and Prichard-Wilson Chair of Law and Public Policy at the University of Toronto Faculty of Law
Captain (retired) Louis-Philippe Rouillard, Assistant Professor at the Royal Military College of Canada
Lieutenant-General (retired) Guy R. Thibault, former Vice Chief of the Defence Staff
Brigadier-General (retired) Kenneth Watkin, former Judge Advocate General
Laurie Wright, Senior Assistant Deputy Minister, Policy Sector, Department of Justice Canada

Foreign Experts

His Honour Judge Jeffrey Blackett, former Judge Advocate General of the Armed Forces (United Kingdom)
John Devereux, TC Beirne School of Law Professor of Common Law at the University of Queensland (Australia)
Eugene R. Fidell, Senior Research Scholar in Law at Yale Law School and former president of the National Institute of Military Justice (Washington, D.C.)
Commander Christopher Griggs, Royal New Zealand Naval Reserve
His Honour Judge Alan Large, Judge Advocate General of the Armed Forces (United Kingdom)
Jonathan Rees QC, Director of Service Prosecutions (United Kingdom)
Jan Peter Spijk, former Judge Advocate General of the Netherlands' Armed Forces and former and Honorary President of the International Society for Military Law
Lieutenant-Colonel Steven Taylor, Assistant Director Legal Training, Assistant Director Legal Services (Wellington Region) and Deputy Director Legal Services (Reserves), New Zealand Defence Force

Schedule H

INDIVIDUAL AUTHORS OF WRITTEN SUBMISSIONS*

Sergeant Shawn Abela
Colonel (retired) Tony Battista
Major (retired) John S. Beddows
Bobbie Garnet Bees
Major Scott Bissell
Captain (retired) Joshua Brighton
Lieutenant-Commander Nicolas Bruzzone
Catherine M. Christensen
Captain Barry-John Dickson
Major (retired) Tim Dunne
Eugene R. Fidell
Isabelle Fontaine
Eric Fortin
Lieutenant-Colonel (retired) Rory Fowler
Marie-Claude Gagnon
Petty Officer 2nd Class Kevin Gillis
Lieutenant-Commander Arthur Halpenny
Pascal Kassis
André Lafreniere
Lieutenant-Colonel (retired) François Lareau
Colonel (retired) Michel W. Drapeau
Preston Jordan Lim
Petty Officer 2nd Class Nicolas Major
Colonel Telah Morrison
Petty Officer 1st Class Louis-Philippe Nadon
Zachary Nicholson
Corporal Rodney Pearce
Lieutenant-Colonel Anthony Robb
Captain (retired) Louis-Philippe Rouillard
Major Joel Rubletz
Sheila Sanders
Lieutenant-Commander G. David Thompson
Captain Hannah Walker
Warrant Officer Chester Warner
Major Tyler Wentzell
Jean-Pierre White

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* This list does not include the names of the participants who asked that their submissions be received in confidence. Some participants included in this list indicated that they were active or retired members of the Canadian Armed Forces, but did not provide their rank: they are designated only by their names, as are civilian participants. Several written materials were also provided by the external commentators and foreign experts listed in Schedule G of this Report.

Schedule I

2-340.1 – INVESTIGATIVE DISCRETION AND INVESTIGATIVE ASSESSMENTS

GENERAL

1. MP operate within a complex environment and must take into account, among other things, the unique nature of the Canadian Armed Forces (CAF) and local community, federal and provincial legislation, policies, procedures and programs, resources and missions. These impact MP decision-making and police work and, therefore, discretion at the heart of the MP decision-making process. Care must be taken in placing any reliance upon evidence obtained by other investigations (including boards of inquiry, summary investigations, or other police services) that may displace the military police officer's exercise of his/her own investigative assessment. The factors and principles outlined in this document will assist the MP in exercising appropriate discretion in determining whether to investigate or continue to investigate a complaint.

2. This attachment refers to the process of applying and recording investigative discretion. For policies and procedures related to charge-laying discretion, refer to CF MP Gp Order **2-363**.

INITIATING OR CONTINUING AN INVESTIGATION

3. The following factors shall be considered when exercising investigative discretion:

a. **mandate**:

(1) MP jurisdiction (refer to CF MP Gp Order **2-110**);

(2) Canadian Forces National Investigation Service's (CFNIS) mandate (refer to CF MP Gp Order **2-381**);

(3) location of the offence;

(4) requirement for specialist skills; and

(5) nature of the complaint (trivial, vexatious, or made in bad faith).

b. **resources needed**:

(1) human resources;

(2) material resources; and

(3) other expenditures.

c. **expediency**:

(1) minor offence; and

(2) suspect interview requirement.

d. **solvability factors**:

(1) suspect(s) known;

(2) identifiable suspect vehicle or licence plate;

(3) identifiable suspect description;

(4) investigative leads known;

(5) witness to crime;

(6) physical evidence present;

(7) multiple occurrences with same *modus operandi* (serial offence); and

(8) military/public policy requires immediate action.

e. **CAF-specific factors**:

(1) impact on unit morale or cohesion;

(2) superior/subordinate relationship;

(3) whether the rank or position of subject makes it important to pursue;

(4) high monetary value of crime (public funds);

(5) military exigency;

(6) prejudice to good order and discipline; and

(7) alternative means of resolution available (administrative action, unit investigation, harassment policy).

DOCUMENTATION OF INVESTIGATIVE DISCRETION

4. All information concerning the complaint and the exercise of investigative discretion shall be documented in MP notebooks and the related General Occurrence (GO) report, including the rationale for suspending the investigation. CF MP Gp Order **2-126** sets out the policy and procedures for drafting a GO.

5. The MP Detachment commander, in consultation with higher MP headquarters, is authorized to decide if a complaint is trivial, frivolous, vexatious, or made in bad faith. Upon making such a decision, the local MP unit commander may direct that no further investigation be made or that an investigation be ended. Any decision made with regard to the exercise of investigative discretion shall be recorded in the MP notebook and the relevant General Occurrence report (GO).

INVESTIGATIVE ASSESSMENTS

6. In order to ensure investigative assessments are detailed and comprehensive, investigators are to record in detail the steps taken in reaching a conclusion about whether a complaint requires further investigation, the facts considered in reaching the conclusion, and the sources for those facts.

7. An investigative assessment may be as simple as one interview or a file search. The aim of this step is to determine whether there is enough substance to an allegation to conduct a full criminal investigation. In some cases, such as a murder, it may be readily evident that a serious criminal offence has occurred. In other cases, preliminary investigative steps may be required in order to determine whether or not there is sufficient evidence to suspect that a service or criminal offence has been

committed. The investigative benchmarks set out in CF MP Gp Order **2-381.1** shall be used to assess whether or not a complaint meets the criteria of a serious or sensitive offence.

8. Where a complex allegation or complaint has been received, investigators will carefully review the entire complaint and identify the distinct matters they understand to be the essence of the complaint or allegation. Where there is a question concerning any aspect of the complaint or what it is about, investigators will consult with the complainant/victim to verify their full understanding of the information provided as well as the matters the complainant understands to be under investigation.

9. An investigative assessment should include the following considerations:

a. whether the alleged incident falls with the definition of a serious and/or sensitive offence;

b. whether the alleged offence is assessed as trivial, frivolous, vexatious, or made in bad faith;

c. whether MP are involved in the alleged offence;

d. whether there are issues relating to conflict of interest;

e. the complexity of the investigation;

f. whether the reporting MP unit has the necessary resources to successfully investigate the allegations;

g. the ability of CFNIS to respond in a timely manner; and

h. the potential to reach across provincial or national boundaries or involve elements of more than one CF command.

10. In all cases, the investigative steps undertaken during the assessment, including the rationale and results of the investigative assessment, shall be recorded in the Security and Military Police Information System (SAMPIS) in an Investigative Activity (IA) text type. Particular care should be taken to record decisions to not take particular investigative steps as well.

Approval Authority: COS Readiness

OPI: J7 Policy

Issued: 08 Nov 16

Supersedes: MPPTP Chap 2, dated Dec 06
MPPTP Chap 2, Anx H, dated Feb 08
MPPTP Chap 2, Anx H, App 1, dated Feb 08
MPPTP Chap 6, Anx A, dated Oct 07

Schedule J

National Defence

Défense nationale

Canadian Forces Military Police Group Headquarters
2200 Walkley Road
Ottawa ON K1A 0K2

Quartier général du Groupe de la Police militaire des Forces canadiennes
2200, chemin Walkley
Ottawa (Ontario) K1A 0K2

2120-0 (Policy Coord)

20 July 2015

Distribution List (via email)

CF MP GP HQ – DPM POLICY
POLICE POLICY ADVISORY 11/2015

INVESTIGATION OF CRIMINAL SEXUAL OFFENCES

References: A. *Military Police Policies and Technical Procedures*, Chapter 7, Annex I

B. Police Policy Advisory 31/2006

C. Canadian Forces Military Police Group (CF MP Gp) Order 2-126
D. CF MP Gp Order 2-340
E. CF MP Gp Order 2-381

1. As a result of some of the findings in the External Review Authority (ERA) report into allegations of sexual misconduct within the Canadian Armed Forces (CAF), the Canadian Forces Military Police Group (CF MP Gp) has amended its policy with regard to the investigation of criminal sexual offences.

2. In accordance with (IAW) reference (Ref) B, the CF MP Gp will continue to receive and investigate all complaints of sexual offences, regardless if made by victims, witnesses, or third parties. Investigations will continue to be conducted regardless of the level of cooperation received from the victims.

3. Effective immediately, the following policy with regard to investigative responsibility of criminal sexual offences shall be adhered to by all members of the CF MP Gp:

2120-0 (Coord politiques)

Le juillet 2015

Liste de distribution (par courriel)

QG GP PM FC – GPA POLITIQUES
AVIS EN MATIÈRE DE POLITIQUE DE LA POLICE 11/2015

ENQUÊTES SUR LES INFRACTIONS CRIMINELLES À CARACTÈRE SEXUEL

Références : A. *Consignes et procédures techniques de la Police militaire*, chapitre 7, annexe I
B. Avis en matière de politique de la police 31/2006
C. Ordre 2-126 du Groupe de la Police militaire des Forces canadiennes (Gp PM FC)
D. Ordre 2-340 du Gp PM FC
E. Ordre 2-381 du Gp PM FC

1. Certaines des conclusions du rapport de l'autorité externe d'examen concernant les allégations d'inconduite sexuelle au sein des Forces armées canadiennes (FAC) ont poussé le Groupe de la Police militaire des Forces canadiennes (Gp PM FC) à modifier sa politique relative aux enquêtes sur les infractions criminelles à caractère sexuel.

2. Conformément à la réf. B, le Gp PM FC continuera à recevoir toutes les plaintes relatives aux infractions d'ordre sexuel et à enquêter sur celles-ci, qu'elles soient déposées par les victimes, les témoins ou une tierce partie. Les enquêtes se poursuivront, peu importe le niveau de collaboration manifesté par les victimes.

3. À compter de maintenant, la politique citée ci-après concernant la responsabilité des enquêtes sur les infractions criminelles à caractère sexuel doit être appliquée par tous les membres du Gp PM FC :

Canada

a. all allegations of criminal sexual offences made to the Military Police (MP), regardless of whether or not the alleged offence is believed to have occurred within MP jurisdiction, shall be relayed to the relevant regional Canadian Forces National Investigation Service (CFNIS) duty officer without delay;

b. upon receipt of the information, the CFNIS will determine whether a particular allegation should be referred to a civilian investigative body or investigated by the CFNIS, with due consideration given to the information available at the time;

c. all criminal sexual offences occurring on defence establishment property shall be investigated by members of the CFNIS;

d. in cases where the alleged sexual offence took place outside MP jurisdiction, the CFNIS will refer the matter to the appropriate civilian investigative body;

e. the CFNIS may not waive investigative responsibility for criminal sexual offences to local MP units;

f. local MP units shall continue to be responsible for the reception of initial complaints of criminal sexual offences; and

g. while not responsible for investigations, local MP units shall continue to provide first responder services until the CFNIS arrives on the scene. These services include protection of victims, preservation of evidence, provision of initial victim services and all other tasks as directed by the CFNIS. As soon as they arrive on the scene, CFNIS staff shall be fully accountable for the investigation and local MP units will only provide indirect support, when

a. toutes les allégations relatives aux infractions criminelles à caractère sexuel signalées à la police militaire (PM), peu importe si l'infraction présumée a été commise sur le territoire de compétence de la PM, doivent être transmises le plus tôt possible à l'officier de service du bureau régional compétent du Service national des enquêtes des Forces canadiennes (SNEFC);

b. dès qu'il aura reçu l'information, le SNEFC déterminera si l'allégation devrait être renvoyée à un organisme d'enquête civil ou faire l'objet d'une enquête par le SNEFC. Cette décision doit être prise en tenant compte de l'information disponible au moment de la réception de l'information;

c. toutes les infractions criminelles à caractère sexuel commises dans un établissement de défense doivent faire l'objet d'une enquête de la part du SNEFC;

d. dans les cas où la présumée infraction d'ordre sexuel a été commise hors du territoire de compétence de la PM, le SNEFC doit renvoyer l'affaire à l'organisme d'enquête civil compétent;

e. le SNEFC ne peut pas transférer la responsabilité de l'enquête sur les infractions criminelles à caractère sexuel aux unités de PM locales;

f. les unités de PM locales demeurent responsables de la réception des plaintes relatives aux infractions criminelles à caractère sexuel;

g. sans être responsables de l'enquête, les unités de PM locales demeurent tenues de fournir les services de réponse de première ligne jusqu'à l'arrivée du SNEFC sur les lieux. Ces services comprennent la protection des victimes, la conservation des éléments de preuve, la prestation des services initiaux aux victimes et toute autre tâche indiquée par le SNEFC. Dès son arrivée sur les lieux de l'enquête, le personnel du SNEFC assumera l'entière responsabilité de

applicable.

4. For the purposes of this policy, the term "criminal sexual offences" includes (but is not limited to) the criminal offences of sexual assault (levels 1 to 3), sexual interference, invitation to sexual touching, and sexual exploitation. "Criminal sexual offences" **does not include**:

a. harassment, including sexual harassment, as defined in Defence Administrative Orders and Directives 5012-0;

b. fraternization, pursuant to section 129 of the *National Defence Act* (Conduct to the Prejudice of Good Order and Discipline);

c. voyeuristic recording; or

d. the possession, distribution, or production of child pornography.

NOTE: Notwithstanding the exclusion of the offence types described above, these offence types may still fall within the CFNIS investigative mandate. See Ref E for further clarification and details.

5. MP shall continue to report by way of a shadow file any criminal sexual offence investigation conducted by a civilian police department where the subject is a member of the CAF. Shadow files are to be completed IAW Ref C by local MP units; however, in any case where civilian police request MP assistance in completing their investigation, the matter shall be referred to the CFNIS.

6. Investigations into criminal sexual offences shall be referred to the appropriate prosecution authority for the handling of criminal prosecution. Where the alleged offender is subject to the Code of Service Discipline, initial consultation shall be conducted with the appropriate regional military prosecutor (RMP). Subsequent action

l'enquête et les unités de PM locales ne lui fourniront qu'un soutien indirect, s'il y a lieu.

4. Aux fins de la présente politique, le terme « infraction criminelle à caractère sexuel » inclut (sans toutefois s'y limiter) les agressions sexuelles (niveaux 1 à 3), les contacts sexuels, l'incitation à des contacts sexuels et l'exploitation sexuelle. **Ne sont pas comprises** dans cette définition les infractions suivantes :

a. harcèlement, incluant le harcèlement sexuel, tel que défini dans les Directives et ordonnances administratives de la Défense 5012-0;

b. fraternisation, conformément à l'article 129 de la *Loi sur la défense nationale* (Conduite préjudiciable au bon ordre et à la discipline);

c. enregistrement voyeuriste;

d. possession, distribution ou production de matériel de pornographie juvénile.

NOTA : Même si les types d'infractions susmentionnés sont exclus de la définition du terme « infraction criminelle à caractère sexuel », ils peuvent relever du mandat d'enquête du SNEFC. Voir la réf. E pour obtenir plus de précisions sur le sujet.

5. La PM doit continuer à signaler, au moyen de dossiers parallèles, toutes les enquêtes sur les infractions criminelles à caractère sexuel menées par un service de police civil qui mettent en cause un membre des FAC. Les dossiers parallèles doivent être remplis par les unités de PM locales conformément à la réf. C; toutefois, dans tous les cas où la police civile sollicite l'aide de la PM pour mener une enquête à terme, l'affaire doit être renvoyée au SNEFC.

6. Les enquêtes sur les infractions criminelles à caractère sexuel doivent être portées à l'attention de l'autorité compétente responsable de la poursuite pour la conduite de la poursuite pénale. Dans les cas où le contrevenant présumé est justiciable du *Code de discipline militaire*, la consultation initiale doit être effectuée avec le procureur militaire

specific to the case may remain the responsibility of the RMP or may be transferred to the Crown prosecutor as circumstances dictate. Where the subject of the offence is civilian, the case shall be referred to the appropriate Crown prosecutor.

7. Refs D and E are being amended and will be published shortly.

8. This advisory is issued under the authority of the Commander of Canadian Forces Military Police Group and Canadian Forces Provost Marshal. Questions may be directed through the MP chain of command to the Senior Policy Coordinator, Captain Todd Barnes, at 613-993-9404.

Le grand prévôt adjoint – Politiques par intérim,

Major J.D.E. Bossé
Major
Acting Deputy Provost Marshal Policy

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DComd CF MP Gp
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DPM SR
OIC PS
CF MP Gp Legal Advisors
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MP Branch CWO

régional (PMR) compétent. La prise de mesures subséquentes concernant l'affaire demeure la responsabilité du PMR ou peut être confiée au procureur de la Couronne, selon les circonstances. Si la personne mise en cause est civile, l'affaire doit être renvoyée au procureur de la Couronne.

7. Les réf. D et E sont en cours de modification et seront publiées bientôt.

8. La publication du présent avis est autorisée par le commandant du Groupe de la Police militaire des Forces canadiennes et Grand prévôt des Forces canadiennes. Les questions peuvent être adressées au coordonnateur principal des politiques, le capitaine Todd Barnes, au 613-993-9404, suivant la chaîne de commandement de la PM.

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CmdtA Gp PM FC
CEM Gp PM FC
GPA Sél et Instr
GPA GR
GPA RS
O Resp NP
Conseillers juridiques du Gp PM FC
Adjuc Gp PM FC
Adjuc Branche PM

Schedule K

CF MP GP ORDER 2-300
LAW ENFORCEMENT OPERATIONS – GENERAL

APPLICATION

1. This order is applicable to all MP and MPO appointed under section 156 of the *National Defence Act* (NDA).

DEFINITIONS

2. For the purpose of this order, the following definitions shall apply:

a. **best police practices:** a “best practice” is a method or technique that has consistently shown results superior to those achieved via other means, and is consequently used as a benchmark. In addition, a "best" practice can evolve to become better as improvements are discovered. “Best police practices” are those endorsed by the Canadian Association of Chiefs of Police and accepted for use by the courts in Canada;

b. **contravention:** an offence under federal legislation is enacted by Parliament and designated as a such by regulation of the Governor in Council;

c. **defence establishment:** means any area or structure under the control of the Minister of National Defence (MND), and the materiel and other things situated in or on any such area or structure;

d. **MP frontline response unit:** unit responsible for uniform patrol, law enforcement, traffic offence enforcement, collision investigation, 911 response on base/in residential housing units (RHU), weapons vault/intrusion alarm response, active shooter response, etc.;

e. **off-duty:** the period of time when an MP/MPO is not formally scheduled to perform assigned or routine tasks, or other specific law enforcement duties. This term is generally used in context with those MP/MPO who are assigned to a patrol section at an MP unit; and

f. **sleeping duty:** the period of time when an MP/MPO is not formally scheduled to perform active patrol duty or other specific law enforcement duties, but shall remain immediately available to respond to any emergency call on the base/wing. This duty requires the MP/MPO to be physically on the base/wing.

GENERAL

3. The Military Police, like any other police service in Canada, requires robust policy to govern its domestic law enforcement and policing operations. Policy must not only be legally sound and technically correct, it must also reflect best police practices accepted by the courts and law enforcement communities throughout Canada. This order sets out the CF MP Gp’s general law enforcement policy.

4. The CF MP Gp is unique among policing services in Canada. Unlike all other municipal and provincial police services, or RCMP personnel assigned to “contract policing services” in provincial or municipal jurisdictions, the CF MP Gp does not fall within the authority of provincial police services acts. The CF MP Gp is at all times exclusively under the command and authority of the CF. MP also provide law enforcement and policing services outside of Canada during contingency and expeditionary operations and must deal with complex situations involving members of other militaries and citizens of

other nations. As such, MP law enforcement policy must be sufficiently broad so as to provide direction in virtually all topics related to policing, while not being so restrictive as to prevent MP from carrying out law enforcement duties and functions in accordance with local or provincial statutes or regulations. This order primarily relates to domestic law enforcement policing operations in Canada.

MP DUTIES

5. The standing duties of all MP include the following:

a. the maintenance or restoration of law and order;

b. the protection of persons;

c. the protection of property;

d. the arrest or custody of persons;

e. the apprehension of persons who have escaped from lawful custody or confinement; and

f. the powers and duties ascribed to a peace officer pursuant to applicable federal law and then ascribed at common law.

LAW ENFORCEMENT POLICY

6. MP law enforcement, security, and force protection functions are inseparable; however, the focus of this order is on general law enforcement policy. Issues unique to law enforcement and policing operations during an expeditionary setting are contained in CF MP Gp Order **2-405**.

7. Unless otherwise approved by the Commander CF MP Gp in circumstances where there may be local operational tempo and staffing constraints as indicated in paragraph 29 of this order, law enforcement/policing operations shall be conducted on a 24/7 basis and focus on the following:

a. enforcing the laws and regulations of Canada, including CF orders and directives in, on or about defence establishments. This includes:

(1) conducting routine patrols in support of security and crime prevention programs;

(2) maintaining law and order;

(3) providing traffic control and traffic enforcement services; and

(4) responding to complaints and requests for assistance; and

b. conducting and providing support to criminal investigations, including the provision of investigation and court coordination services in accordance with CF MP Gp orders, policies and procedures as well as local, provincial, and federal judicial authority. This includes:

(1) liaising with civilian police and other law enforcement agencies as well with multinational forces in theatres of operation on matters related to police and security;

(2) conducting investigations into alleged breaches of the Code of Service Discipline, alleged criminal offences, and other contraventions to federal regulations;

(3) providing court liaison; and

(4) providing and coordinating custodial detention services.

8. **CF MP Gp Order 2-300.1** sets out the procedures for planning uniformed law enforcement patrols in accordance with the policy set out in this order.

BEST POLICE PRACTICES

9. MP law enforcement operations shall be conducted in accordance with best policing practices in Canada. In the unlikely event that a best practice is in conflict with a legitimate military operational practice or requirement, CF MP Gp order or otherwise, lawful military command, the issue shall be reported immediately to CF MP Gp HQ [Deputy Provost Marshal Policy (DPM Pol)] for resolution. Where a conflict arises between this order and an otherwise, lawful military command, *Queen's Regulations and Orders for the Canadian Forces*, article 19.02 shall be followed.

PRIMACY OF THE MILITARY JUSTICE SYSTEM

10. When an accused is subject to the *Code of Service Discipline* (CSD), the alleged offence shall be investigated, reported on, and disposed of in accordance with the provisions of the CSD.

11. The fact that a civilian victim may be involved in a matter does not automatically require the case be referred to civilian court for resolution; however, certain circumstances do exist, such as in the case of alleged domestic violence, or the prosecution of impaired driving offences, where the recourse to the provincial court system is considered more appropriate, on a policy basis. The decision to refer an investigation for resolution before the civilian court shall only occur after consultation with the local MP unit commander, the commander of the unit to which the accused is posted or is currently attached, and the local legal advisor.

12. Certain *Criminal Code* offences, if committed in Canada by persons subject to the CSD, may not be dealt with by the military justice system. However, if a person subject to the CSD is alleged to have committed these offences while on deployment with the CF, the military justice system may take precedence. These offences are:

a. murder;

b. manslaughter; and

c. abduction related offences as indicated in sections 280 to 283 (inclusive) of the *Criminal Code*.

13. Notwithstanding the fact that a person may not be tried in the military justice system, whether due to the nature of the offence or, because they are not subject to the CSD, or for other reasons, there is no geographical limitation on the MP investigating a matter which pertains to DND or the CF.

EXCEPTIONS – MILITARY JUSTICE SYSTEM

14. The following offence types, if committed in Canada, will normally proceed within the civil justice system after consult with the local CF legal advisor (Deputy Judge Advocate or Regional Military Prosecutor, as appropriate) and informing the accused member's CO:

a. domestic violence;

b. child assault; and

c. impaired driving offences.

PROSECUTION OF CSD OFFENCES IN CIVIL COURTS

15. Some offences under the NDA are triable by civil courts (see NDA, Part VII). For several of these offences, CF members may be liable. However, pursuant to section 286(2) of the Act, where the complainant is another CF member, including MP, no charge shall be tried by a civil court without the written permission of the accused's CO. Where the CO declines to provide his or her permission, the charge may be dealt with in the military justice system.

THE *CONTRAVENTIONS ACT*

16. The *Contraventions Act* (Ref C) is federal legislation that provides a simplified procedure for the prosecution of certain federal regulatory offences. The Act provides that federal regulatory offences designated as "contraventions" may be prosecuted by means of an issued ticket/provincial offence notice (PON) or summons.

17. Ref C does not provide for the designation of provincial enforcement authorities nor does it create new categories of enforcement authorities for MP/MPO within provincial legislation. Section 2 of the Act lists the categories of persons who are "enforcement authorities" empowered to issue tickets/PON or summons. They are persons who are already empowered to enforce statutes and regulations. Their authority and the scope of their powers to enforce federal statutes and regulations are usually found in the legislation that creates the offence. In simple terms, the MP derives enforcement authority from the federal acts and regulations within Ref C, not from Ref C itself.

18. **Signatory provinces**: Those MP units located within signatory provinces shall apply the provisions of the *Contraventions Regulations* (Ref H), by using a provincial ticket/PON or summons, when charging pursuant to the GPTR, DCAAR and selected NDA offences. The following provinces are listed in the schedules of the *Application of Provincial Laws Regulations* (Ref I) since they have signed Ref C :

a. Province of Newfoundland;

b. Province of Nova Scotia;

c. Province of Prince Edward Island;

d. Province of New Brunswick;

e. Province of Quebec;

f. Province of Ontario;

g. Province of Manitoba; and

h. Province of British Columbia.

19. Ref H are the regulatory offences that flow from Ref C itself, and include set fines and authorized short-form wordings for each offence. Included in Ref H are offences pursuant to the following:

a. *Defence Controlled Access Area Regulations* (DCAAR). CF MP Gp Order **2-303** sets out the policy and procedures related to the laying of charges pursuant to the DCAAR;

b. *Government Property Traffic Regulations* (GPTR). CF MP Gp Order **2-330** sets out the policy and procedures for traffic enforcement including the laying of charges pursuant to the GPTR; and

c. selected offences drawn from the NDA. CF MP Gp Order **2-347** sets out the policy and procedures for enforcing these selected regulations drawn from the NDA.

20. **Recording issued PON/Summons in SAMPIS**: CF MP Gp Order **2-123** provides direction on the use of SAMPIS to record PON/Summons.

21. **Non-signatory provinces**: To confirm, the following provinces and territories are not signatories to Ref C and thus, not listed in the schedule of Ref I:

a. Province of Alberta;

b. Province of Saskatchewan;

c. Nunavut;

d. Yukon; and

e. Northern Territories.

22. For those MP units located within non-signatory provinces, the provisions and practices related to Ref C do not apply. Consequently, the following procedures shall apply when MP/MPO are required to lay a charge pursuant to the DCAAR, GPTR or NDA:

a. the offender will be issued an Appearance Notice (Criminal Code Form 9) without filling the section for fingerprinting under the *Identification of Criminals Act*;

b. an Information (Criminal Code Form 2) shall be filled and been sworn before a provincial Justice of the Peace or Judge (depending of the province) in order to lay the charges;

c. a GO will be completed as for any type of investigation as per CF MP Gp Order **2-126**;

d. the GO will be used as the provincial Crown Brief as per CF MP Gp Order **2-130**; and

e. disclosure to the crown attorney will be done as per CF MP Gp Order **2-150**.

23. Regardless of the crown attorney position, MP/MPO shall not issue a PON/summons in non-signatory provinces.

24. **Recognition of Military Police under provincial legislation**: Notwithstanding the fact that a province may purport to authorize the Military Police the authority to enforce provision contained within its legislation, the province lacks the constitutional authority to do so at law, given the division of powers between the federal and provincial governments pursuant to the Constitution Act of 1867. Consequently, MP/MPO are not entitled to enforce provincial legislation unless a federal authority specifically authorize MP/MPO to do so. Presently, no such federal authority has been issued. Therefore, under no circumstance are MP/MPO to lay a charge pursuant to provincial legislation unless specifically authorized in writing by the CFPM.

OFF-DUTY MP

25. MP retain their status as peace officers regardless if they are on-duty or off-duty as long as they would otherwise have the jurisdiction and the duty to act. Should MP be within the confines of a defence

establishment but outside of their normal scheduled working hours and come upon an offence being committed involving any person, their first action, short of preventing death or grievous injury, should be to notify the duty MP as soon as practicable. Off duty status in this respect does not preclude you from acting where appropriate and if safe to do so.

26. Direct intervention in violent or potentially dangerous situations by off-duty MP should only be as a last resort, having full regard for the safety of the public and themselves. Discretion shall be exercised given the circumstances at the time.

27. Off-duty MP/MPO shall not use their personal vehicle to apprehend an offender, nor shall any off-duty MP who has consumed alcohol or incapacitated (ie: short term effect of prescribed medication, etc) act in a law enforcement capacity.

28. CF MP Gp Order **2-110** sets out the policies and procedures related to MP jurisdiction. CF MP Gp Order **2-340** sets out MP investigation policy, including discretion.

29. Nothing in this order precludes an off-duty MP from obeying any lawful command, regardless if in relation to law enforcement activities or not.

OFFICIAL LANGUAGES – ACTIVE OFFER

30. Ref F provides that English and French are the official languages of Canada and aims to ensure equality of status as to their use in all federal institutions, particularly with respect to the administration of justice. Accordingly, section 27 of Ref F provides that wherever there is a duty with respect to communications and services in both official languages, the duty applies to both oral and written communications and any related documents or activities. Section 28, “Active offer”, provides that federal institutions that are required to provide services in either official language shall ensure that appropriate measures are taken to make it known that those services are available in either official language. Moreover, pursuant to section 34, employees of all federal institutions have the right to use either official language.

31. MP members shall provide an “active offer” to all subjects, complainants and witnesses at the earliest opportunity in all investigations initiated and subsequently conducted. For the purpose of this policy, earliest opportunity means at the beginning or initial stages (first communication) of an investigation. More precisely, MP shall provide an active offer upon initial contact with a subject, complainant or witness unless impracticable and due to exigent or emergency related circumstances. In doing so, MP members gain a better understanding of the resources required to complete the investigation in a professional and timely manner and can make an informed decision as to whom the case should most appropriately be assigned.

MINIMUM MANNING LEVEL

32. The minimum manning level for an MP frontline response unit is two armed MP/MPO geographically located on the base/wing and performing duties in occupational patrol dress (OPD) as per CF MP Gp Order **2-810**.

33. **Special Minimum Manning Level:** If an MP unit is not able to maintain the minimum manning level, the MP unit CO must seek approval from the MP Formation commander to adopt a temporary special minimum manning level. In such cases, the following shall occur:

a. the MP unit CO shall obtain approval in writing from the MP Formation Commander, through his or her chain of command. The MP Formation Commander shall assess all options available before approving the implementation of temporary special minimum manning level measures;

b. the CO of the MP unit shall advise the Base/Wing Commander of the situation both of the request made and the MP Formation Commander's response. The Base/Wing Commander shall be made aware of the schedule and associated impact on base operations (i.e. 911 response estimated timings, intrusion alarm response estimated timings, impacts upon active base patrolling, door security checks, etc.) and be notified that any issues are to be addressed directly to the MP Formation Commander;

c. during the daytime on week days:

(1) law enforcement/policing operations shall be provided as per paragraph 7 of this order;

(2) a minimum of two (2) armed MP/MPO in OPD shall be on the base/wing;

(3) a C8A3 patrol carbine shall be in marked vehicles used by MP/MPO on duty; and

(4) MP/MPO shall remain on duty for a minimum 12 hour shift;

d. during silent hours (weekends, evenings and nights):

(1) at least one (1) armed MP/MPO shall do the following:

(a) provide immediate response to calls such as 911, intrusion alarms, car accidents, etc.;

(b) wear the OPD and carry a service pistol and intermediate weapons as per CF MP Gp Order **2-810**;

(c) be on standby duty and have access to a marked patrol vehicle as per CF MP Gp Order **2-855**;

(d) ensure a C8A3 patrol carbine is not in the MP vehicle; and

(e) remain on duty for the 12-hour standby-duty period;

(2) at least one (1) armed MP/MPO shall do the following:

(a) provide backup response. The MP/MPO shall reside in an area from which a response to a Code 2 call can safely be made in no less than 15 minutes, as per CF MP Gp Order **2-855**;

(b) wear the OPD and carry a service pistol and intermediate weapons as per CF MP Gp Order **2-810**;

(c) stay at his/her residence (high readiness state) with a duty MP vehicle as per CF MP Gp Order **2-855** and a properly secured service weapon as per CF MP Gp Order **2-840**; and

(d) ensure a patrol carbine is not in the trunk of the MP vehicle as per CF MP Gp Order **2-855**;

(3) during silent hours, backup MP response may be provided by a civilian police force upon request if the MP unit has an approved memorandum of understanding in place as per CF MP Gp Order **2-160**;

(4) special events may require additional MP/MPO during silent hours (i.e. mess events, sports days, family days, etc.). In such cases, the MP unit shall provide an appropriate number of MP/MPO assigned to be on duty to potentially respond to requests for service;

e. if approved by the MP Formation Commander, the MP formation shall send a copy of the written approval to DPM Policy outlining the situation and a copy of the special schedule; and

f. DPM Policy shall be advised as soon the manning situation returns to normal.

Attachments: 2-300.1 Planning Law Enforcement Patrols

Approval Authority: COS

OPI: DPM Policy

Issued: 8 June 2015

Supersedes: CF MP Gp Order 2-300, dated 1 Apr 12
MPPTP, Chap 1, dated Feb 00
MPPTP, Chap 1, Anx C, dated Feb 00
MPPTP, Chap 5, dated Jun 09
PPA 06/09
PPA 03/05

References:
A. *National Defence Act*
B. *Criminal Code*
C. *Contraventions Act*
D. *Defence Controlled Access Area Regulations*
E. *Government Property Traffic Regulations*
F. *Official Languages Act*
G. MPCC 2007-027, dated 23 Dec 08
H. Contraventions Regulations (SOR/96-313)
I. Application of Provincial Laws Regulations SOR/96-312

Schedule L

CF MP GP ORDER 2-363
LAYING CRIMINAL AND SERVICE CHARGES

APPLICATION

1. This order applies to all MP and MPO assigned to law enforcement and policing duties anywhere in Canada or abroad.

DEFINITIONS

2. The following definitions shall apply to this order:

a. **charge:** a formal accusation that a person has committed either a criminal or service offence;

b. **criminal offence:** an offence under the *Criminal Code* (CC) or any other Act of Parliament creating such offences;

c. **service offence:** an offence under the *National Defence Act* (NDA) committed by a person subject to the *Code of Service Discipline* (CSD). A service offence may also include an offence under the CC or any other Act of Parliament or an offence under foreign law if committed in the place where the law is applicable;

d. **Crown prosecutor:** the attorney representing the Crown and responsible for prosecuting a matter in criminal court in Canada. Depending upon the jurisdiction, the Crown prosecutor may be referred to as a Crown attorney;

e. **regional military prosecutor (RMP):** a legal officer appointed to the Director Military Prosecutions for the purpose of prosecuting service charges and providing legal advice in a specific region; and

f. **reasonable belief:** a belief, which would lead any ordinary prudent and cautious person to the conclusion that the accused is probably guilty of the offence alleged.

GENERAL

3. All MP members employed in a policing function have the authority to lay a charge under the CC. Only MP employed within the Canadian Forces National Investigation Service (CFNIS) are authorized to lay NDA charges against persons subject to the CSD.

GROUNDS TO LAY A CHARGE

4. Any MP member laying a charge must have an actual reasonable belief that the accused has committed the alleged offence.

5. The test for whether grounds to charge exist has two elements: one subjective and the other objective. The subjective element is whether the member who proposes to lay the charge has an actual belief in the suspect's guilt. The objective element is whether a reasonable person in the position of the member who proposes to lay the charge would come to the conclusion that the accused was probably guilty of the offence alleged. Both elements must be present for there to be sufficient grounds to lay a charge.

DISCRETION

6. The exercise of discretion lies at the heart of the policing function. It is well recognized that successful policing depends on the exercise of discretion on how the law is enforced.

7. MP must consider issues such as fairness, justice, accountability, consistency and wider CF interests and expectations when deciding whether or not to lay a charge. By virtue of their appointment, all MP are accountable for such decisions. The decision shall not display arbitrary and inexplicable differences in the way that different people are treated by the MP. With every decision to lay a charge, the MP must act in accordance with statutes and policies and exercise their discretion fairly and without partiality or favor. The policy regarding the application of investigative discretion is set out in CF MP Gp Order 2-340.

NDA CHARGES

8. Unlike an MP assigned to CFNIS investigative duties, MP detachment members do not have charge laying authority for offences under the NDA. In circumstances where the MP have formed a reasonable belief that an individual has committed a service offence, they shall submit their findings in report format to the offender's commanding officer (CO) for disciplinary action, including charges, as deemed appropriate.

9. The report submitted to the CO must contain sufficient information to establish the elements of the offence for the anticipated charge(s). The MP report shall be compiled in accordance with the direction contained in CF MP Gp Order **2-126.**

10. The military justice system shall be considered as having primacy when choosing to proceed through either the civilian court system or the military justice system. CF MP Gp Order **2-300** explains the principle primacy of the military justice system and the cases where matters shall be forwarded to civilian courts for resolution.

11. A decision as to whether a charge should be laid through either the civilian court system or the military justice system should be made in consultation with the chain of command with advice from the local deputy judge advocate (DJA).

CRIMINAL CHARGES

12. The procedure to lay charges differs by province. In some provinces, a charge is laid when an information has been sworn in front of a justice of the peace or a judge. In other provinces, the information must be presented to the Crown prosecutor who lays the charge. MP/MPO must familiarize themselves with and follow the charge laying processes and procedures of their respective province in those cases where it would be appropriate to refer the matter for resolution to civilian authorities.

AN INFORMATION

13. An information (Form 2 of CC) is a formal document, sworn under oath and signed by a justice of the peace or a judge, alleging a specific adult or young offender committed a specific offence. When MP "lay charges", they swear that the alleged offence described in this document occurred. The original is retained with the court registry which brings the matter before the courts. All criminal charges start in a provincial court with an information.

14. There are four general purposes for an information, they are:

a. to commence proceedings against the accused;

b. to inform the accused about the specific allegation;

c. to indicate that the allegation has been sworn under oath before a justice of the peace or a judge; and

d. if the alleged offence is a summary conviction offence, to indicate that a formal charge was laid within the statutory six-month limitation period.

15. **An information must be laid as soon as is practicable after the offender's arrest and release and before the court date specified on the document.**

LEGAL ADVICE

16. Whether an investigation has been completed or not, MP shall not hesitate to seek legal advice from the applicable military or civilian prosecutors. Local DJA and regional military prosecutors are available for legal consultation on MP investigations relating to NDA offences. In appropriate circumstances, Crown attorneys could be contacted for legal advice on criminal offences but the DJA should be included in deference to the primacy of the military justice system. Ongoing liaison shall be conducted with a detachment's respective legal advisors and Crown attorneys.

Attachments: NIL

Approval Authority: COS

OPI: DPM Pol & Plans

Issued: 6 May 2015

Supersedes: **CF MP Gp Order 2-363, dated 14 Feb 2014**
MPPTP, Chap 2, Anx H, dated Feb 08
MPPTP, Chap 6, Anx A, dated Oct 07

References: A. *Criminal Code*, R.S.C., 1985, c. C-46
B. *National Defence Act,* R.S.C., 1985, c. N-5
C. QR&O, Chaps 106 and 107
D. B-GG-005-027/AF-011, *Military Justice at the Summary Trial Level*

Schedule M

CANADIAN FORCES NATIONAL INVESTIGATION SERVICE

STANDARD OPERATING PROCEDURE

CHAPTER 2

POLICE OPERATIONS

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CHARGE LAYING

References: A. CF MP Gp Order 2-300 – Law Enforcement Operations – General
B. CF MP Gp Orders 2-340 – Military Police Investigation Policy – General
C. CF MP Gp Order 2-340.1 – Investigative Discretion and Investigative Assessments
D. CF MP Gp Order 2-130 – Distribution of Military Police Investigation Case Files
E. CF MP Gp Order 2-363 – Laying Criminal and Service Charges
F. QR&O 102 – Disciplinary Jurisdiction
G. QR&O 103 – Service Offences
H. QR&O 106.02 – Investigation before Charge Laid
I. QR&O 107.015 – Meaning of "Charge"
J. QR&O 107.09 – Referral and Pre-Trial Disposal of Charge
K. QR&O 107.12 – Decision not to Proceed – Charges laid by National Investigation Service
L. QR&O 109.03 – Application to Referral Authority for Disposal of a Charge
M. CFNIS SOP 201 – Investigations – General

Aim

1. The purpose of this SOP is to outline the procedures to be followed by CFNIS investigators with respect to the laying of charges under the *National Defence Act* (*NDA*).

Definitions

2. The following definitions apply to this SOP:

   a. **service offence**: an offence under the *NDA*, the *Criminal Code* or any other Act of Parliament, committed by a person subject to the Code of Service Discipline (CSD). It may also include an offence under foreign law if committed in a place where the law is applicable by a person subject to the CSD; and

   b. **charge**: IAW ref I, a charge is a formal accusation that a person subject to the CSD has committed a service offence. A charge is laid when it is reduced

to writing in Part 1 (Charge Report) of the Record of Disciplinary Proceedings (RDP), which is the form CF 78, and signed by a person authorized to lay charges.

General

3. CFNIS investigators may lay charges under the *NDA* when they form reasonable grounds to believe the evidence gathered during the course of an investigation supports the elements of a service offence. Prior to laying a *NDA* charge, CFNIS investigators shall consult their Regional Military Prosecutor (RMP) who will review the evidence as part of the pre-charge screening process. Investigators should note that despite the elements of an offence being met, it is not always necessary to lay a charge and under some circumstances they may exercise their discretion and refer the matter back to a unit for administrative or disciplinary action. In such instances, the reason(s) must be clearly documented in SAMPIS and within the report cover letter.

4. IAW ref A, CFNIS investigators are to respect Military Police (MP) policy reflecting primacy of the Military Justice System when contemplating charging persons subject to the CSD.

Investigation before Charges Laid under the *NDA*

5. IAW ref H, where a complaint is made or when there are other reasons to believe that a service offence may have been committed, an investigation should normally be conducted as soon as practical.

6. Upon completion of the investigation, the lead investigator may form the grounds that an offence was committed and may be in a position to believe the subject(s) of the investigation committed an offence.

7. In some circumstances, the matter may be referred back to the subject's unit for resolution (administrative and/or disciplinary action) as deemed appropriate. In such instances, IAW ref D, CFNIS OCs are authorized to fully release all information acquired during the investigation (except standard exemptions such as Solicitor-Client Privileged information, 3rd party reports, victim personal details, etc).

> **Note**: IAW Ref D, the CO of the subject(s) shall receive a copy of the Military Police Investigation Case File (MPICF) with minimal exclusions. Where investigators have any questions regarding whether it is appropriate to redact certain information from their investigative file prior to providing it to the subject's CO for resolution, they shall consult their local RMP for advice.

Involvement of RMP and Pre-Charge Screening/Advice

8. A RMP has been appointed for each of the CFNIS regions to provide legal advice during the course of investigations and assist in the preparation of the RDP.

When investigators have legal questions, it is imperative they contact the RMP at the onset of an investigation and maintain communication until conclusion of the file.

9. Upon completion of a CFNIS investigation where charges are being considered, IAW QR&O 107.03, a pre-charge screening package will be submitted by the investigator to the RMP through the Regional WO/MWO and OC. The pre-charge screening package will consist of the following:

a. an electronic RMP Brief including a synopsis describing the facts supporting the elements of the offence of any proposed charges;

b. charges proposed by the investigator on an unsigned draft RDP form;

c. a property items list;

d. audio/video recordings of interviews; and

e. other items, as requested by the RMP.

10. The pre-charge screening package will also include a cover letter (see Annex A for template) signed by the OC or Regional WO/MWO and a completed 728 for tracking purposes.

11. The RMP should provide advice concerning the sufficiency of the evidence, whether or not in the circumstances a charge should be laid and, where a charge should be laid, the appropriate charge(s). The advice received from the RMP may be used by investigators to help determine if they have an actual belief that the suspect has committed the alleged offence and whether that belief is reasonable. A *reasonable belief* is a belief which would lead an ordinarily prudent and cautious person**,** placed in the charge layer's position, to the conclusion that the accused is "probably guilty" of the offence allegedly committed.

12. At this point, RMP will respond back to investigators with a Pre-Charge Form indicating one of the following responses:

a. Response 1: RMP concurs with the proposed charge(s) as is, and recommends investigators charge the individual;

b. Response 2: RMP concurs with the pre-charge screening, but not with the proposed charge(s). This may include the removal, addition or re-wording of a proposed charge;

c. Response 3: RMP does not concur with the pre-charge screening **at this point,** and have questions he/she feels require additional investigation prior to moving ahead. This could lead to additional investigational steps by investigators, allowing these questions to be answered so that

additional consideration of the investigative file can be made by investigators and, where appropriate, RMP to assess whether or not in the circumstances a charge should be laid; and

d. Response 4: RMP does not concur with the pre-charge screening and does not support/recommend the proposed charge(s) be laid, do not have any outstanding questions, and do not have any additional charge(s) to recommend. This could be due to the RMP's opinion of the sufficiency of the evidence, or consideration of the interest of the public in going forward with the charge(s), or the negative prospect of a conviction.

13. It is important to note that any comments offered by the RMP is considered "**Solicitor-Client Privileged"** information and shall not be disclosed by CFNIS under any circumstance.

Note: any exception to this paragraph will be at the discretion of the RMP.

14. If RMP provides an opinion through the Pre-Charge Form which differs from that of the investigator, and the investigator is not in agreement, the matter will be referred to CO CFNIS who will discuss with the Director of Military Prosecution (DMP) and provide a decision on the way ahead.

Drafting of the Charge

15. The accused has the right to request that the charge be laid in either official language. The CFNIS investigator laying a charge shall ensure the documentation (CF 78) is provided in the requested official language.

16. There are two components of the actual charge:

a. **Statement of the offence:** the offence is the one set out in the *NDA* (E.g. An act punishable under Section 85 of the *National Defence Act*, that is to say Insubordination).

b. **Statement of the particulars:** every statement of the particulars of an offence must include sufficient details to enable the accused to be reasonably informed of the offence alleged to have been committed and thereby able to properly defend the matter. A statement of the particulars of an offence should, when practical, include an allegation of the place, date and time of the alleged commission of the offence.

Media Release

17. Prior to serving the charge, CFNIS DCO will be advised and provided a draft media release to allow a media plan and Media Response Lines (MRL) to be prepared

in advance. A minimum of 5 days prior to serving the charge is required, if the situation allows.

Laying of Charges – Presence of Commanding Officer and Accused

18. It is recommended that the investigator responsible for the file be the individual who lays the charge and serves the charge on the accused. However, where circumstances prevent the investigator who lays the charge from serving the RDP on the accused, the investigator can make arrangements for the RDP to be served on the accused by an alternate CAF member. Where an alternate CAF member is selected, the investigator must ensure that all requirements related to serving a charge to an accused are coordinated.

19. The investigator serving the charge will make arrangements to serve the charge to the accused in the presence of the accused's Commanding Officer (CO) or designate. This can be coordinated by contacting the CO or Regimental Sergeant Major (RSM) of the accused's unit.

20. The CO of a member being charged will be provided the original RDP (CF 78). Under normal circumstances, the accused will be served a copy of the RDP in the presence of his/her CO or delegated representative. The accused will sign the original CF 78 acknowledging that he/she has been served the RDP.

21. It should be noted that the *NDA* does not require the presence or the signature of the accused for a charge to be considered "laid". In the event a RDP has been signed and the accused is not available (i.e. released or reserve member not on duty), the investigator may provide the member's CO the RDP and arrange for the accused to receive a copy of the RDP at a later date.

22. A RDP Statement of Service shall be compiled once the RDP has been served. Where an accused is charged with a designated offence (defined in section 196.26 of the *NDA*), it is imperative that the CO sign the section directing the member to attend a designated location for the purpose of fingerprinting and photography (pursuant to Section 196.27 *NDA*) as this is the only means of compelling the accused to do so. If the accused is not present at the time of RDP service, this document may be served to him/her at a later date.

Timeline Considerations

23. CFNIS investigators must be cognizant that the timeline for disposal of the charges commences once the RDP is signed; therefore, if there is a foreseeable delay in service of the RDP it should not be signed until arrangements are in place to do so. If the trial is not completed within 18 months following the charging of the subject, the defence can request a stay of proceedings based on a possible infringement of s. 11(b) of the *Canadian Charter of Rights and Freedoms* as outlined in *R v Jordan*, 2016 SCC 27.

24. Another thing to take into consideration is that a person who is charged with an offence that may proceed by Summary Trial cannot be tried by Summary Trial unless the charge is laid within six months of the alleged offence and the Summary Trial commences within 1 year after the day on which the service offence was alleged to have been committed. However, IAW QR&O 108.171, an accused can waive the limitation period in relation to both the six month period to lay a charge and the one year period to commence a Summary Trial.

Disclosure

25. The police and prosecution share a constitutional responsibility and ongoing obligation to disclose all information and material in their possession or control which is not privileged or clearly irrelevant to the accused, irrespective of whether the prosecution intends to introduce the material into evidence.

26. *R v Stinchcombe*, [1995] 1 SCR 754 reaffirmed that every accused has a constitutional right under section 7 of the *Canadian Charter of Rights and Freedoms* to be provided with disclosure of all relevant information under the control of the prosecuting authorities prior to the commencement of a trial. Furthermore, deliberate failure to disclose relevant information may constitute obstruction of justice and lead to criminal charges, although this duty to disclose is still subject to rules of privilege. Finally, the courts have decided (*R v McNeil*, 2009 SCC 3) that findings of serious misconduct by police officers involved in the investigation against an accused must be part of the disclosure package. In case of doubt as to whether information is relevant, the matter should be brought to the RMP who will make a decision concerning the relevance of the information.

> **Note**: at the time of drafting this SOP, the CF MP Gp did not have an existing order relating to proactive McNeil disclosure on the part of the MP. As such, investigators should consult RMP for all matters related to McNeil disclosure.

27. It is important to realize that the constitutional responsibility and standard for disclosure is the same whether or not a matter proceeds by Summary Trial or Court Martial, although the manner in which disclosure is effected at the Summary Trial level is different (accused is afforded access through his/her CO vice defense counsel being provided a full copy).

Investigation Packages – Summary Trial or Non-Electable Offences

28. When a charge is laid for an offence in which the accused has the ability to proceed summarily or for a non-electable summary offence, initial disclosure will consist of three copies of the CFNIS investigation to the accused's CO. Two non-redacted copies for the CO's use in the referral and pre-trial charge disposal processes, and one redacted copy provided to the accused who can seek the assistance of his/her Assisting Officer in reviewing the disclosure. This is the minimum standard and investigators must realize that they are required to inform the accused, either verbally or

in writing at the time he/she is charged, that he/she is entitled to access to all relevant information mentioned in the investigation, including written statements, audio/video recordings, real evidence, documents, police notes and any other relevant material related to the accusation(s). This redacted investigation package is necessary to afford the accused sufficient information to make an informed decision as to how he/she wishes to elect to be tried and/or prepare his/her defense at Summary Trial. However, this package must be redacted to ensure certain confidential or protected information, which may include personal information of persons involved such as witnesses and/or victims, is redacted in the interest of protecting such information and the privacy rights of certain persons.

> **Note**: Without limiting what may be considered for redaction in the copy of the CFNIS investigative file disclosed to the accused in the circumstances of this paragraph, the following is information that should be considered for redaction: Solicitor-Client Privileged information (required to be redacted), confidential informant information (required to be redacted), third party records, information related to ongoing investigations, confidential medical health information related to persons other than the accused, public interest privileged information, etc. Where information is to be redacted from a copy of the CFNIS investigative file disclosed to the accused, advice should be sought from the RMP who conducted the pre-charge review of the investigation.

> **Note**: Where, as a result of having the option to elect, an accused person elects to proceed by Court Martial or the CO and/or Superior Commander are of the opinion that a charge should be referred to a Referral Authority, the CO of the accused must, IAW QR&O 107.14, cause the first copy of the CFNIS investigative file to be placed on the Unit Registry. In addition, the referral application sent to the Referral Authority by the CO and/or the Superior Commander must, IAW QR&O 109.03, include the second copy of the CFNIS investigative file provided to the CO.

29. The three copies of the CFNIS investigation delivered to the accused's CO will be accompanied by a cover letter (see Annex B for template).

Investigation Packages Proceeding to Court Martial

30. When charges provide no option but to be handled through Court Martial, the CO of the accused must be provided two copies of the full investigation, accompanied by a cover letter (see Annex C for template) which must include a clear statement directing that the investigation package is for the CO's use only and may not be disclosed to the accused. Disclosure to the accused will be made by military prosecutors at a later date if the charge(s) proceed to Court Martial.

> **Note**: Without limiting what may be considered for redaction in the two copies of the CFNIS investigative file provided to the CO in the circumstances of this paragraph, the following is information that should be considered for redaction:

Solicitor-Client Privileged information (required to be redacted), confidential informant information (required to be redacted), third party records, information related to ongoing investigations, confidential medical health information related to persons other than the accused, public interest privileged information, etc. Where information is to be redacted from the two copies of the CFNIS investigative file provided to the CO, advice should be sought from the RMP who conducted the pre-charge review of the investigation.

31. Once a charge has been preferred following post-charge review, CFNIS investigators are required to provide DMP with sufficient copies of full electronic disclosure for the prosecution and each accused person(s).

32. Disclosure will be of a consistent standard although variances may be present depending upon each investigation. The general principle to be applied is that any material that will be relied upon by the prosecutor or that will assist the accused in making full answer and defense to the charges they face must be disclosed. To that end, the following items fall within the rules of disclosure and as such, the disclosure package must contain the following material:

a. a Cover Page, followed by a Table of Contents indexing all material. The index shall be linked to the relevant material for ease of access;

b. a copy of the RMP Brief related to the investigation;

c. a copy of all related MP report(s);

d. a copy of all recordings (audio/video) of all interview(s);

e. a copy of all MP notes;

f. a copy of all forensic reports;

g. a copy of all expert reports;

h. a copy of any transcripts of interviews that are in possession of the MP/CFNIS;

i. a copy of all information to obtain a search warrant, all search warrants, and other judicial authorizations obtained during the course of the investigation and copies of ongoing returns pursuant to such authorizations;

j. a copy of any other documents such as investigation plans or operational briefs generated during the course of the investigation;

k. information relevant to the credibility of witnesses that is known to the MP/CFNIS;

l. a copy of approved charges (RDP);

m. contact information for the accused and witnesses listed in the RMP Brief;

n. a copy of all documentation in the possession of the MP/CFNIS relating to any pre-trial custody of the accused;

o. a copy of all Board of Inquiry (BOI) reports or letters, a copy of summary investigation reports, a copy of civilian police investigative reports (note that release of civilian police reports must be IAW privacy laws applicable to the police service of jurisdiction), and a copy of any other reports in the possession of the MP/CFNIS relating to the incident from which the charge(s) arose;

p. a copy of all documentation in the possession of the MP/CFNIS relating to any pre-trial administrative/career actions taken in regards to the accused as a result of the incident which form the basis for the charge(s), including any and all email correspondence; and

q. McNeil Reports for each MP or CFNIS member actively involved with the file.

Disclosure Exclusions

33. CFNIS investigators will ensure RMP is aware of all exclusions as it is the prosecution's mandate to decide what will or will not be disclosed. In addition, where the disclosure to RMP includes information that CFNIS believes should not be disclosed, the lead investigator will bring this to the RMP's attention in writing. Such information may include privileged information, confidential medical health information, information with an elevated privacy value, or a public interest privilege at common law or IAW the *Canada Evidence Act*. Where the lead investigator has any questions IRT potential exclusions from disclosure, they must engage RMP.

34. Material that is of a nature that CFNIS initially determines that it cannot be reproduced or distributed to either the prosecution or defense will be brought to the attention of the RMP in writing. This information must be documented in a manner that will allow the prosecutor to inform the defense of the nature of the information not disclosed.

> **Note**: Such information may include material that is illegal to possess under Canadian Law, such as child pornography, or material having a high level of confidentiality or secrecy attached.

35. Once the RMP is notified in writing of any relevant material in the possession of the CFNIS which has not been disclosed, the RMP may determine that access to this material is required by prosecution and/or is required to be disclosed to defense in order to promote the administration of justice. In either circumstance, the CFNIS will request written confirmation from RMP of what material is to be provided and under what circumstances. Ultimately, the decision not to disclose relevant material in the possession of the CFNIS rests with the prosecution, not CFNIS. As such, after receiving written instructions from the prosecutor, the CFNIS will provide copies of all information collected during the course of an investigation to the prosecution and, if necessary, make recommendations as to what information should not be disclosed. CFNIS investigators shall not black out information but highlight the information they wish to withhold prior to providing it to the prosecution. However, if the prosecution decides to withhold information, the prosecution may direct investigators to black out portions of documents. In general, prosecutors should not black out information themselves as to do so creates a situation in which only they can explain in Court why the information was withheld.

Format of Disclosure

36. The format in which disclosure is to be provided has not been set in legislation. In order to minimize cost, every effort should be made to provide disclosure in an electronic format whenever possible. However, in cases where the defense argues that it does not have the technological capability to view the disclosure material, the investigator(s) will be required to provide everything in a non-electronic format.

After Charges are Laid

37. The accused's CO or Superior Officer will review the full CFNIS investigation and determine, based on its contents, whether or not they are willing to proceed by referring the charges to a Superior Commander.

38. A CO or Superior Commander who decides not to proceed with a charge laid by a CFNIS investigator shall communicate the decision in writing along with the reasons for the decision to the CFNIS as per ref K, whereby CFNIS may deal with the matter as per ref L.

Civilian Judicial System

39. Should jurisdictional limitations such as those described in Section 70 *NDA* or other exceptional situations arise, CO CFNIS may authorize investigators to lay charges utilizing the Civilian Judicial System. RMP should be consulted and the situation discussed. In these cases, following the laying of charges, the accused's chain of command shall be notified immediately that the member has been charged in civilian court and an MPIR reflecting the results of the full investigation shall be completed and distributed in an expedient manner.

Attachments:

Annex A – Template for cover letter for pre-charge screening package
Annex B – Template for cover letter for initial disclosure (Summary Trial or non electable offences)
Annex C – Template for cover letter for initial disclosure (Court Martial)

Schedule N

Protocol on the exercise of criminal jurisdiction in England and Wales

BETWEEN

The Director of Service Prosecutions

and

The Director of Public Prosecutions

and

The Ministry of Defence

1. Introduction and scope of this protocol

1.1. This document is intended as an agreement between the above signatories as to the principles governing the issue of concurrent jurisdiction where a criminal offence is alleged to have been committed by a person subject to Service law[1]. This document is intended to update and replace the Protocol on the exercise of criminal jurisdiction in England and Wales completed 26 September 2011[2]. The signatories to this protocol note that the Prosecutors Convention 2009 (updated 2012)[3] also includes useful guidance for cases where there are overlapping interests.

1.2. The Director of Public Prosecutions and Director of Service Prosecutions have concurrent powers to bring a charge with respect to any person subject to Service law in relation to alleged criminal conduct within England and Wales[4]. This protocol only deals with offences committed in England and Wales.

1.3. Cases which fall to be prosecuted within the Service jurisdiction may be dealt with by the Commanding Officer and/or the Court Martial ("Service proceedings"). The Commanding Officer may only deal with a very limited range of criminal offences. Under section 42 of the Armed Forces Act 2006 ("the 2006 Act") the Court Martial has jurisdiction with respect to any conduct:

a) that is punishable under the law of England and Wales, or

b) that, if done in England and Wales, would be so punishable.

1.4. Section 42 of the 2006 Act extended the jurisdiction of the Court Martial, which formerly could not deal with certain criminal offences such as murder, manslaughter and rape (if committed in the United Kingdom) but now has jurisdiction to do so.

1.5. It is recognised that in practice the effectiveness of this protocol and the appropriate determination of whether proceedings are to be brought within the civilian or Service jurisdiction depends in part on appropriate decisions being made as to which police force(s) (Home Office, Ministry of Defence or Service Police) undertake(s) the

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[1] "Subject to service law" is defined in sections 367 to 369 of the Armed Forces Act 2006 (the "2006 Act"). Broadly speaking, the term covers any member of Her Majesty's regular forces and any member of her reserve forces while on duty.

[2] The 2011 protocol updated and replaced the guiding principles set out in paragraphs 12.17 – 12.25 of Home Office Circular 35/1986.

[3] Available at https://www.gov.uk/the-prosecutors-convention-2009-updated-2012

[4] The power of the MoD is, strictly speaking, the power of the Commanding Officers to charge (explained in paragraph 1.3).

investigation. It is also recognised that agreement on the taking of these decisions is necessary, but it is not the subject of this protocol.[5] However, because there is no legal mechanism to transfer a case between jurisdictions after charge, it is extremely important that the case is allocated to the most appropriate prosecuting authority at the earliest stage in the proceedings[6]. Although it is usually the case that a police force will consult and pass cases to the aligned prosecuting authority for charge (for example Home Office police to the Crown Prosecution Service (CPS)), it is possible to transfer a case between jurisdictions before charge by going through a relevant police force. Therefore, the signatories agree to draw this protocol to the attention of police forces and will seek the agreement of those forces:

a) to bear in mind the principles contained in this document;

b) where any issue arises under this protocol as to appropriate jurisdiction, to consult other interested police forces as early as possible, as well as the CPS or SPA as appropriate, in order to ascertain the most appropriate jurisdiction in which the suspect should be charged.

1.6. The principles contained in this protocol have been approved by the Attorney General for England and Wales and by the Ministry of Justice.

2. Decision as to the most appropriate tribunal for proceedings

2.1. It is an established principle that where there are overlapping civilian and Service jurisdictions and authorities within England and Wales, the civilian jurisdictions and authorities have precedence, such that if there is an issue between either the Ministry of Defence or the Service Prosecuting Authority (SPA) and the CPS as to the application of paragraph 2.2 to the case, it will be for the Director of Public Prosecutions to decide whether a suspect who is subject to Service law should be charged and subsequently tried in the civilian or Service jurisdiction.

2.2 The overriding principle is the requirement of fair and efficient justice. Subject to that, the main principles which will be applied by the signatories to this protocol when considering the appropriate jurisdiction (Service or civilian) in which to charge and subsequently try a suspect who is subject to Service law are as follows:

a) offences alleged only against persons subject to Service law which affect the person or property of civilians[7] should normally be dealt with by a civilian court and not in Service proceedings;

b) offences alleged only against persons subject to Service law which do not affect the person or property of civilians should normally be dealt with in Service proceedings and not by a civilian court; and

c) offences alleged jointly against persons subject to Service law and civilians should normally be dealt with by a civilian court.[8]

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[5] The 2008 protocol between the Association of Chief Police Officers; the Ministry of Defence Police and the Service Police determines which police force will assume responsibly for the investigation of an alleged offence in situations where there is concurrent jurisdiction.

[6] The commencement of a second set of proceedings in the Service jurisdiction and the discontinuance of criminal proceedings in the civilian jurisdiction (and vice versa) would require careful consideration of the legal risks and procedural issues involved and therefore to be avoided if at all possible.

[7] A civilian is a person who is not a member of the armed forces.

[8] Service proceedings generally have no jurisdiction to try persons who are not subject to Service law for offences committed in England and Wales, although there are exceptions, such as former members of the armed forces for offences committed while in the armed forces.

2.3. Where there is an issue as to the appropriate jurisdiction in which to deal with a suspect who is subject to Service law, the Director of Public Prosecutions and the Director of Service Prosecutions should consult in relation to the appropriate jurisdiction to deal with the case, acknowledging that the final decision rests with the Director of Public Prosecutions. Either Director may consult the Attorney General to seek his view on the appropriate jurisdiction where either of them considers it appropriate to do so.

2.4. The overriding principle of fair and efficient justice allows the signatories to take into account other factors which may affect the application of the principles in paragraph 2.2 when considering the appropriate jurisdiction in which to charge and try a suspect subject to Service law. Examples of factors which the signatories may take into account could be:

a) where there are linked cases (for example, where an offence is linked to a series of other similar offences which have been or are being dealt with in either a Service or civilian context);

b) practical matters, such as the availability of witnesses to participate in the proceedings, or where the person charged is about to be sent overseas (in which case it may be more efficient for the case to be dealt with in the Service jurisdiction);

c) where there is a strong Service disciplinary context (for example, where an offence is more serious because of a Service factor, or where the location of the offence or the fact that the accused was on duty at the time makes it important for the disciplinary aspects of the misconduct to be fully understood and taken into account). This is linked to the related power of Service proceedings to have regard to the maintenance of discipline as one of the statutory purposes of sentencing – see section 237 of the 2006 Act;

d) the appropriateness of available sentencing powers (including powers in the 2006 Act of Service detention (which involves retraining), reduction in rank and dismissal, and the fact that certain orders e.g. under the Road Traffic Acts and Proceeds of Crime Act 2002 are only available to civilian courts).

3. Review of this protocol

3.1. The signatories will aim to review this protocol not later than two years from the date upon which it is signed.

Signatories

Andrew Cayley CMG QC
Director of Service Prosecutions

Dated 7 November 2016

Alison Saunders CB
Director of Public Prosecutions

Dated 11th November 2016

Signed on behalf of the Ministry of Defence

Mark Lancaster MP
Minister for Defence Personnel Welfare and Veterans

Dated 29/11/16

Schedule O

CF MP GP ORDER 2-381
CANADIAN FORCES NATIONAL INVESTIGATION SERVICE JURISDICTION

APPLICATION

1. This order applies to all members of the Canadian Forces Military Police Group (CF MP Gp) employed at a local Military Police (MP) unit or within the Canadian Forces National Investigation Service (CFNIS).

DEFINITIONS

2. For the purpose of this order, the following definitions apply:

   a. **serious offence**: an indictable criminal or similar *Code of Service Discipline* offence involving a crime against a person, or a high-value and complex property or fraud offence; and

   b. **sensitive offence**: an offence that has the potential to reach across provincial or national boundaries or that involves elements of more than one Canadian Forces (CF) command, even if the allegation is not inherently serious, or that, due to the nature of the allegation or the identity, rank, or status of the person(s) implicated, could have a strategic or national impact.

GENERAL

3. The purpose of this order is to set out the jurisdiction, mandate and procedures concerning the CFNIS and local MP units with regard to the investigation of serious and sensitive offences.

4. The CFNIS supports CF domestic and international operations by conducting investigations into alleged offences that are serious or sensitive in nature, and by providing the CF MP Gp with specialized investigative support services through the CFNIS Specialized Operations Section (SOS) and criminal intelligence support through the Military Police Criminal Intelligence Section (MPCIS).

5. Local MP units play an essential role in supporting the CFNIS in that they are often the first MP organization to learn of a potentially serious or sensitive offence and thus make the appropriate notifications to CFNIS duty personnel. Local MP units also provide invaluable support to ongoing CFNIS investigations and, in some cases, may even inherit responsibility for the investigation at the discretion of the CFNIS.

6. The CFNIS is an independent unit and its commanding officer (CO) reports directly to the Canadian Forces Provost Marshal (CFPM). The CFNIS shall be organized into regional offices (RO), each commanded by an officer commanding (OC). Each OC is responsible for the operation and administration of his/her respective RO.

7. The CFNIS investigative mandate includes the following:

   a. right of first refusal for all allegations of serious and/or sensitive offences, **except** for sexual offences. Investigative responsibility for sexual offences is set out in CF MP Gp Order **2-340**;

   b. the ability to waive investigative responsibility for a serious and/or sensitive offence to a local MP unit when, in the opinion of the CO CFNIS, it would be appropriate to do so;

c. when investigative responsibility is waived to a local MP unit, provision of continued support to the investigation through direct assistance or the provision of advice as requested; and

d. assumption of responsibility for an investigation already initiated by a local MP unit when it is determined that the offence is of a serious or sensitive nature, or upon the request of the MP chain of command responsible for the investigation.

INVESTIGATIVE BENCHMARKS – SERIOUS OR SENSITIVE OFFENCES

8. The investigative benchmarks set out in **2-381.1** shall be used to assess whether or not a complaint meets the criteria of a serious or sensitive offence.

CFNIS DUTY INVESTIGATOR CALL-OUT CAPABILITY

9. In order to facilitate rapid notification and investigator call-out, CO CFNIS shall:

a. ensure that each CFNIS RO provides 24/7 duty officer (DO) and duty investigator support for each local MP unit within its area of responsibility (AOR). CF MP Gp Order **1-120** establishes geographic AOR for all CFNIS RO; and

b. ensure that each local MP unit is provided with appropriate and up-to-date call-out protocols to reach the regional CFNIS DO.

NOTIFICATION OF SERIOUS OR SENSITIVE OFFENCE – LOCAL MP UNIT RESPONSIBILITIES

10. Upon receiving an allegation of a serious and/or sensitive offence at the local level, the local MP DO shall notify the regional CFNIS DO immediately. Specific procedures and responsibilities of the local MP are set out in **2-381.2**.

NOTIFICATION OF SERIOUS OR SENSITIVE OFFENCE – CFNIS RESPONSIBILITIES

11. Once advised of the serious and/or sensitive crime allegation, the applicable CFNIS DO will determine the level of CFNIS response and necessity of assigning a duty investigator to assist with the investigation, having full regard for the following factors:

a. extent of the seriousness of the allegation;

b. complexity of the investigation;

c. expertise required; and

d. investigative resources, including investigator ability and workload, available to both CFNIS and the local MP unit.

12. If for any reason the assumption of an investigation by the CFNIS proves problematic for a local MP unit commander, the matter shall be addressed through the environmental CF MP Gp chain of command for resolution between the appropriate commander and the CO of the CFNIS. Unresolved issues will be forwarded to the CFPM for a final decision.

13. The mere fact that an allegation falls within the threshold of a serious and/or sensitive offence does not necessarily mean that only CFNIS will conduct the investigation. The CFNIS DO may waive

investigative responsibility for a serious or sensitive offence to the reporting local MP unit if, in the opinion of the CFNIS DO, the investigation can be completed successfully at that level.

INTER-UNIT COOPERATION

14. Local MP units shall render all necessary assistance to CFNIS investigators as required. If the CFNIS elects to exercise its investigative mandate over an allegation of a serious and/or sensitive crime, the local MP unit commander is responsible to ensure that the following minimum investigative support is provided until handover with the CFNIS investigator occurs:

a. preservation and protection of the crime scene;

b. preservation and protection of evidence;

c. identification of witnesses; and

d. detention of suspect(s), if appropriate.

15. Whenever practicable, CFNIS investigators shall request the assistance of local MP in the conduct of investigations. This practice will assist in the development of local expertise and a deeper talent pool of investigators within the CF MP Gp, and the establishment of strong investigative partnerships. A request to utilize local MP to augment a CFNIS investigation must be formally made by the CFNIS chain of command to the applicable local MP unit.

CFNIS OPERATIONAL INVESTIGATIVE SUPPORT

16. CFNIS personnel may provide investigative support to deployed operations in one of three capacities:

a. through the short-term deployment of a high-readiness team of investigators into theatre, when no CFNIS personnel are already pre-positioned in theatre:

(1) CFNIS personnel deployed into theatre to conduct an investigation will remain under the operational command (OPCOM) of the CO CFNIS;

(2) the CO CFNIS is responsible for ensuring appropriate policies and procedures are in place to ensure a CFNIS high-readiness team is ready to deploy into an operational theatre at any time;

b. through CFNIS personnel force-generated as part of a task force (TF)/Canadian contingent unit when no deployed CFNIS section has been formed:

(1) these personnel will remain under the authority of the Task Force Provost Marshal (TFPM) in whatever role they have been assigned until such time that an incident that falls within the CFNIS mandate occurs in theatre;

(2) should an incident within the CFNIS mandate occur, the CFNIS personnel will be under the OPCOM of the CO CFNIS, will conduct the investigation under the authority of the CFNIS, and will revert to the authority of the TFPM when the investigation has been completed; or

c. deployed as part of a TF/Canadian contingent in a CFNIS deployed section. In this setting, CFNIS personnel will remain under the command of the CO CFNIS.

17. CO CFNIS and the Canadian Joint Operations Command (CJOC) Provost Marshal are responsible to ensure that an appropriate command and reporting relationship is formalized between the TF MP organization and the deployed CFNIS element.

18. Criminal or service offence investigations should not impede the operational mission of commanders. Notwithstanding the aforementioned, investigations must be completed in a credible, responsive, independent, and professional manner and in accordance with the policies and procedures set out in CF MP Gp orders. When there are concerns regarding the potential impact of a CFNIS investigation on operations, the senior CFNIS member in theatre shall seek advice from the TFPM or Contingent Provost Marshal.

19. When a deployed CFNIS section is established as part of a TF/Canadian contingent, a written CFNIS briefing protocol shall be established by the CFNIS Section Commander with the TF/Contingent Commander in order to ensure an appropriate flow of communications. This protocol will determine the mechanism for CFNIS briefings to the Commander and the TFPM or Contingent Provost Marshal.

20. CFNIS personnel who are deployed into an operational theatre to conduct specific investigations shall:

a. conduct all investigations in full compliance with the policies and procedures set out in CF MP Gp orders and CFNIS Standing Operating Procedures, while being sensitive to the need to minimize the impact on operations;

b. keep the TF/Contingent Commander informed of their investigations in keeping with the briefing protocol;

c. advise CFNIS Headquarters of any problems concerning operational effectiveness, which, in turn, will attempt to find an acceptable solution; and

d. in the event that a workable solution cannot be identified by CFNIS Headquarters, the CFPM will communicate with the TF/Contingent Commander on the matter.

Attachments: 2-381.1 Benchmarks – Serious and Sensitive Offences
2-381.2 CFNIS Call-Out: Procedures and Responsibilities

Approval Authority: COS

OPI: DPM Pol & Plans

Issued: 14 Aug 2015

Supersedes: CF MP Gp Order 2-381, dated 12 Dec 12
MPPTP, Chap 1, dated Feb 00
MPPTP, Chap 1, Anx C, dated Feb 00
MPPTP, Chap 2, Anx H, dated Feb 08
MPPTP, Chap 5, Anx H, Appx 4, dated Dec 03
MPPTP, Chap 6, dated Oct 07
MPPTP, Chap 6, Anx A, dated Oct 07
MPPTP, Chap 6, Anx C, dated Oct 07
PPB 02/05, dated Jul 05

Reference: NIL

Schedule P

2-500 - INVESTIGATION MANAGEMENT

GENERAL

1. Investigation management is the critical process of employing resources effectively and efficiently for the purpose of establishing if a criminal or service offence has been committed. The management of identified resources involves planning, organizing, leading, and controlling the actions of investigative resources for the purpose of achieving the stated goals of the investigation plan.

DEFINITIONS

2. The following definitions shall apply to this order:

   a. **quality control:** daily supervision of investigative activities in order to ensure a professional product at the outcome of an investigation. Quality control is an ongoing activity performed by all supervisory levels with investigative decisions recorded and tracked in the Security and Military Police Information System (SAMPIS) as part of the investigation; and

   b. **quality assurance:** review of the investigative process following the conclusion of an investigation in order to ensure all procedures were observed and lessons learned were identified so as to improve future investigations. Quality assurance is a management function that does not form part of the investigative case file, but rather is documented outside of SAMPIS as part of an internal audit function through the COS Readiness section.

PRINCIPLES OF INVESTIGATION MANAGEMENT

3. In keeping with MP traditions of excellence, professionalism, integrity, and transparency, the investigation management function is guided by the following principles:

   a. the *Canadian Charter of Rights and Freedoms* must be respected during all phases of the investigative process;

   b. all alleged offenders are presumed to be innocent until convicted by a competent judicial authority;

   c. all aspects of the investigative process must involve the lawful and reasonable use of police powers; and

   d. all police actions must be in compliance with applicable law, including the *National Defence Act* and the *Criminal Code* and in conformity with Canadian Forces Provost Marshall (CFPM) orders and directions, including CF MP Gp Orders.

PRINCIPLE PARTNERS OF THE INVESTIGATION MANAGEMENT PROCESS

4. Successful police investigations are achieved through the implementation of effective processes related to collaboration, cooperation, and communication in a team-based environment. The involvement of personnel will vary depending on the situational variables and the specific types of criminal conduct involved. All decisions related to the selection of personnel are a function of the investigation management process. Table 1 identifies the principle partners of the investigation management process.

Role	Job Title
Police Investigator	Military Police Patrol Member Military Police Lead Investigator Canadian Forces National Investigation Service Lead Investigator
First Level Supervisor	Patrol Shift In Charge Security Section In Charge Canadian Forces National Investigation Service Team Leader Major Case Management Lead Investigator
Second Level Supervisor	Police Operations Non-Commissioned Member Canadian Forces National Investigation Service Case Manager Major Case Management Case Manager
Quality Control	Crime Reader Company/Squadron/Unit Sergeant Major Canadian Forces National Investigation Service Regional Master Warrant Officer/Warrant Officer Canadian Forces National Investigation Service Operations Master Warrant Officer
Legal Advisor	1. A Canadian Armed Forces legal officer who is a member of the Office of the Judge Advocate General (including an Assistant Judge Advocate General, a Deputy Judge Advocate, a Regional Military Prosecutor, the Canadian Forces National Investigation Service Legal Advisor or the CFPM Legal Advisor); and 2. A civilian Crown Prosecutor, with carriage of a prosecution before the civil courts.
Specialty Support Services	Regional Criminal Intelligence Analyst Canadian Forces National Investigation Service Specialized Operations Section Scenes of Crime Officer Forensic Identification Technician Digital Imaging Technician Forensic Information Technology Specialist Royal Canadian Mounted Police Forensic Laboratory Services Forensic Accountant/Auditor Public Affairs/Media Relations Professional Administrative Support Professional Polygraph Examiner Canadian Forces National Counter Intelligence Unit

Final Approving Authority	Platoon/Flight/Detachment Commander (or Second in command on Commander's behalf) Regiment/Squadron/Unit Commanding Officer (or Deputy on Commanding Officer's behalf) Canadian Forces National Investigation Service Regional Office Officer Commanding (or Second in command on Officer Commanding's behalf) Canadian Forces National Investigation Service Commanding Officer (or Deputy on Commanding Officer's behalf)

Table 1 – *Principle partners of the investigation management process*

DEFINING THE ROLES OF THE PRINCIPLE PARTNERS

5. Given the wide variety of organizational structures within the CF MP Gp, commanders charged with supervising front-line operation units tasked with delivering law enforcement services to the Canadian armed Forces (CAF) must have the ability to manage assigned personnel depending on unique situational variables. As such, all commanders tasked with the responsibility of performing MP investigations shall develop appropriate terms of reference (TOR) for each employment position within their scope of authority. The TOR must clearly define roles, responsibilities, supervisory functions, and lines of authority.

6. In the event that a complex investigation task force is deemed necessary or in the case of major joint investigations with other law enforcement agencies, the Major Case Management (MCM) model must be observed. CF MP Gp Order **2-530** sets out the policy and procedures with regard to MCM.

INVESTIGATION MANAGEMENT INITIATION

7. Inherently, crimes are either *confrontations* or *discoveries. Confrontation* offences are those offences that involve direct contact between an offender and a victim. In such instances, the victim typically reports the circumstances of the incident directly to law enforcement. *Discovery* offences are those offences whereby the allegation is reported to law enforcement after the fact. In these instances, the alleged offence may be discovered and reported by a victim, a witness or a police officer. The manner in which an offence is reported to police has some bearing on the initial stages of the investigation management process.

8. For the purpose of this order, the investigation management process for *confrontation* offences commences following the immediate actions necessary to secure a crime scene and provide necessary medical care to victims. For *discovery* offences, the investigation management process commences upon the receipt of an allegation from a victim, a witness, or a police officer.

INITIAL FILE EVALUATION

9. All allegations where an offence has been committed must be dealt with appropriately and expeditiously; this does not mean all allegations can or should be investigated in an identical manner. Whether it is for a minor incident while on patrol or a major case within the Canadian Forces National Investigation Service (CFNIS), investigators and supervisors must first determine if there is a requirement to conduct an investigation. This is accomplished by performing a proper investigative assessment while exercising investigative discretion as set out in CF MP Gp Order **2-340.1**.

10. When it is decided to conduct an investigation, supervisors must ensure the appropriate investigator or investigators are assigned the tasking. Factors to consider are:

a. does the investigation require any special skills, abilities or qualifications, and do the assigned investigators have them or have access to them;

b. are the assigned investigators available for the duration of the investigation, i.e. are they scheduled for an extended course or training, are they scheduled for an extended period of leave, are they tasked with other priority matters and are they due to deploy on CAF operations or be away on temporary duty during the estimated time of the investigation; and

c. are any of the assigned investigators in any potential or actual conflict of interest. CF MP Gp Order **2-340** outlines the policy and procedures pertaining to conflict of interest.

11. Once a lead investigator is assigned, the immediate supervisor shall ensure the respective General Occurrence (GO) is appropriately annotated. The policy and procedures for assigning a lead investigator, creating a follow-up and managing the workflow within Security and Military Police Information System (SAMPIS) can be found in CF MP Gp Order **2-500.1**.

INVESTIGATIVE ASSISTANCE

12. MP and MPO are not expected to be experts in all investigative fields. Assistance from external and internal specialists may be necessary and consultation with different specialists is encouraged to obtain alternative points of view. Supervisors shall be familiar with the basic premise of each ongoing investigation. In consultation with the lead investigators, the supervisor is responsible to determine which, if any, investigative assistance is needed. Assistance may include, but is not limited to, human resource management, specialty support services and different resources on-scene.

13. As a minimum, the following factors should be considered when deciding to obtain specialty services from within or outside the Canadian Armed Forces / Department of National Defence:

a. urgency (time) of the specialty services required;

b. currency/competency of the persons holding the specialist qualification;

c. availability of equipment and personnel;

d. priority in investigations;

e. necessity; and

f. cost effectiveness.

INVESTIGATION PLANS

14. A thorough investigation plan is essential in ensuring the successful completion of an investigation. CF MP Gp Order **2-340.2** outlines the policy and procedures pertaining to investigation plans for both investigators and supervisors. Not only must supervisors ensure actions taken in regard to the investigation plans are annotated in the GO, they must also ensure reasons for actions not taken are articulated in the GO.

PRIORITIZATION OF INVESTIGATIONS

15. For MP organizations that are mandated to manage multiple ongoing investigations, it is necessary to prioritize investigations to enable supervisors to effectively and efficiently allocate personnel and institutional resources. In prioritizing investigations, supervisors should assess the relative importance of all applicable considerations in a given case and give each factor an appropriate weight in the decision making process. Any prioritization of investigations should be based on considerations that include, but are not limited, to the following list (not necessarily presented in the order of importance) of considerations:

a. does the investigation involve crimes against persons;

b. what effect does the offence have on CAF operations;

c. how severe is the offence;

d. is the investigation related to a judicial review process;

e. is there suspicion of organized crime involvement;

f. is there significant public interest;

g. how complex is the investigation;

h. is the offence related to weapons and/or explosives;

i. is the offence related to classified and/or designated material;

j. is the rank and/or position of the alleged offender of significance;

k. is the offence limited to crimes against property;

l. is there direction from higher MP authorities within the investigation manager's chain of command;

m. what is the anticipated timeline of the investigation; and

n. the limitation period of the offence.

16. Given the wide variety of organizational structures within the CF MP Gp, each MP unit commander having an obligation to provide MP investigative services shall develop a standard operating procedure (SOP) as per CF MP Gp Order **2-304.2** and issue appropriate orders for prioritizing investigations and empowering investigation supervisors with the ability to deploy personnel and institutional resources appropriately.

INVESTIGATIVE OVERSIGHT/RESPONSIBILITY

17. Investigators are individually responsible for the quality of investigations assigned to them and for the preparation of investigation reports. Investigations involving complex facts or allegations require active, informed and involved supervision. The final approving authority is ultimately responsible for the quality of the investigation; however, this does not negate the fact that supervisors at all levels have a duty to supervise the work of their subordinates, maintain full situational awareness of investigations their subordinates are conducting and offer advice and expertise as required.

18. Supervisors at all levels shall record their observations and comments in SAMPIS under the title "Supervisory Comments." These supervisory comments shall include detailed advice provided to investigators and have the secondary benefit of demonstrating the investigation has had supervisory oversight. Supervisory comments shall also include direction in regard to the conduct, speed, flow and direction of the investigation, including the reasons for those directions. In accordance with section 250.19 of the NDA, day-to-day advice, guidance and direction with regard to investigations is not considered interference.

19. Supervisors shall not directly amend or alter a GO created by a subordinate. When corrections to a GO are required, a "Follow-Up" as per CF MP Gp Order **2-510** shall be generated with the required corrections and/or actions identified in a text box attached to the specific follow-up. If work is required in a specific text box, the review status inside the header shall be set to open and the Date and By fields shall be updated. (NOTE: A text box created under a follow-up is not released as part of the report.)

20. If a circumstance arises where an investigation is led by an investigator with limited experience in the specific type of investigation being undertaken, the case manager assigned to the investigation must have a sufficient level of experience in such investigations to overcome the deficiency and provide technical direction to the investigator.

FILE HANDOVER

21. In cases where a new investigator assumes responsibility for an ongoing investigation, a full face-to-face briefing shall, when practicable, be conducted between the departing and incoming investigators. Less preferable is a briefing conducted via video conferencing followed by a telephone conference call. The details of the briefing (date, time, location, persons present, and manner of briefing at minimum) shall be recorded in an Administrative Activity text box (AA) in the SAMPIS investigative file. Reasons for not conducting a face-to-face briefing and for using alternate less preferable methods shall be included if applicable.

22. Prior to such briefing, the departing investigator shall conduct a detailed file review to ensure all documentation the new investigator may reasonably expect is readily accessible. The file review shall be recorded in an AA text box in the SAMPIS investigative file.

23. When special circumstances make the departing investigator unavailable, the briefing and/or file review shall be conducted by the departing investigator's direct supervisor. The reasons for the departing investigators unavailability shall be recorded in an AA text box in the SAMPIS investigative file.

NOTEBOOKS

24. CF MP Gp Order **2-301** sets out direction with regard to police notes and requires that all members of the CF MP Gp engaged in policing functions keep and maintain a police notebook to reflect their involvement and activities related to all police matters and investigations." This includes supervisors recording any direction they provide on an investigation.

TIMELINESS

25. In general, investigations must be conducted as quickly and efficiently as possible, without compromising their thoroughness or integrity.

26. It is acknowledged that some investigations by their nature are lengthy; however, it is imperative that every investigations be completed in as timely a fashion as possible. The reasons for any delays be recorded within the GO.

27. An Administrative Activity text type shall be completed by the investigator or appropriate supervisor anytime where there has been or will be no meaningful investigative activity for 30 days and the investigation is still on going.. This text box shall describe the reason for the delay, which could include, but is not limited to:

a. investigator absence due to leave, illness or temporary duty;

b. attempting to locate witnesses or arrange for interviews; or

c. awaiting the results of forensic testing.

28. Investigation timeline should be determined in concert between the supervisor and the investigator and should consider, among other things, the investigative priorities, the capabilities of the unit and the investigator's experience. It must take in consideration the period limitation of the offence determined by law. When the offence will likely be dealt with the summary trial, the supervisor and investigator have the responsibility to meet the deadlines prescribed by sect 108.05 of QR&O. In the event that the period limitation cannot be met, the supervisor or the investigator should contact the local JAG office and the subject's CO to reach an agreement on the time required to conclude the investigation.

QUALITY CONTROL

29. Quality control is an *ongoing* activity performed by all investigators and supervisors on a daily basis to ensure a consistent and high level of investigative service and to confirm that all investigations carried out are conducted with a high level of professionalism and in accordance with the law, standard police practices, regulations, orders and SOPs. Issues could be as simple as spelling errors and missing entities and as severe as the failure to carry out certain investigative steps. Through the course of one's duties, if a concern is observed, it shall be addressed appropriately at the lowest level, as early on in the investigation as possible.

30. MP commanders are responsible to enforce rules and regulations with regard to quality control and have the authority to supplement and or augment such rules, orders and direction as long as they are consistent with CF MP Gp Orders. Commanders should consider noting "lessons learned" and distributing them within their command.

QUALITY ASSURANCE

31. Quality assurance is the review of *concluded* investigations to ensure a consistent and high level of investigative service and to confirm all investigations carried out are conducted with a high level of professionalism and in accordance with the law, standard police practices, regulations, orders and SOPs. The COS Readiness section, specifically the Lessons Learned Officer, will assist to ensure there is no repetition of previous deficiencies.

32. A quality assurance review consists of a "pillar to post" review of all investigative activity, audio/video recordings (a minimum of complainant, victim and three witness interviews, if applicable), notes and evidence. A quality assurance checklist (**DND 2937**) can be found in the **MP Standardized Forms Webpage**.

33. Quality assurance is the responsibility of the MP chain of command. Each MP commander shall issue instructions regarding quality assurance procedures and identify who specifically conducts quality assurance within their organization.

Attachments: 2-500.1 Lead Investigator, Follow-up and Workflow

Approval authority: COS Readiness

OPI: J7 Policy

Issued: 5 Dec 18

Supersedes: CF MP Gp Order 2-500, dated 21 Nov 16

References: Arcaro, Gino. *Criminal Investigation: Forming Reasonable Grounds.* Fourth Edition. Scarborough: Nelson Thomson Learning, 2004.

Schedule Q

2-370.4 – COMMANDING OFFICER SEARCH WARRANTS

GENERAL

1. A Commanding Officer‘s (CO) warrant is a valid search warrant unless otherwise authorized by law. If no other authority exists for searching and seizing the item, i.e. consent, incident to arrest, consent, plain view etc, a CO’s warrant shall be used. and can authorize searches of:

a. quarters under the control of the Canadian Armed Forces (CAF) or the Department of National Defence (DND) and occupied for residential purposes by any person subject to the Code of Service Discipline (CSD) either alone or with that person’s dependents, as well as any locker or storage space located in these quarters and exclusively used by that person or those dependents for personal purposes; and

b. the personal or moveable property of any person subject to the CSD located in, or about any defence establishment, work for defence or material.

2. **Restriction**: A CO warrant shall only be used in those very rare situations where a Criminal Code warrant cannot be obtained due to the unavailability of a civilian judicial authority. MP shall ensure that the use of warrantless search power, i.e. consent search, plain view etc. is not applicable before resorting to a CO search warrant. This injunction will restrict the use of CO search warrants primarily to situations where the item to be searched for and seized lies outside the territorial jurisdiction of Canada. In all other cases, consideration should be given to waiting until a civilian judicial authority is available. Resort to the telewarrant system can also be made where waiting is not practical. Order 2-370.3 provides direction with respect to Criminal Code s. 487.1 telewarrants.

PROCEDURE

3. When MP contemplates seeking a CO search warrant within Canada, the unit legal advisor and the MP chain of command shall be consulted before the application to the CO is made.

4. A CO may conduct or directly supervise the investigation of any matter and may even draft the warrant. In such a case, another CO should issue the warrant for reasons of objectivity unless no other CO is readily available and the grounds for issuing the warrant are satisfied.

5. A CO, in their discretion, may issue a search warrant if satisfied by information on oath or solemn affirmation that there is in any quarters, lockers, storage spaces or personal or moveable property:

a. any thing on or in respect of which an offence against the *National Defence Act* (NDA) has or is believed on reasonable grounds to have been committed;

b. any thing that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence against the NDA; or

c. any thing that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against a person and for which a person may be arrested without a warrant.

6. A search warrant should be prepared in writing using Form A. When directed to a civilian peace officer, a search warrant should be prepared using Form B. Both forms can be found in the *Queen’s Regulations and Orders for the Canadian Forces* (QR&O) 106.07(1).

7. Prior to issuing a warrant, a CO must receive from MP a completed Information to Obtain (ITO) pursuant to QR&O, art 106.06(2). The ITO is a written, sworn or affirmed statement of the affiant . The ITO will state, at minimum,

a. describe the location to be searched;

b. the particular offence within s. 273.3(a), (b) or (c) of the National Defence Act;

c. a detailed recitation of the grounds upon which the CO's warrant is sought.

8. Search and seizure law is ever changing. Drafting of search warrants should only be conducted under the direct supervision of an experienced MP. Searches and seizures often see the intersection between a number of complex, legal issues including legal privilege, personal privacy, confidential informants/agents and property law. The primary emphasis for the drafting of any search warrant is that MP make "full, fair and frank" disclosure of the grounds for seeking the search warrant, including both exculpatory and inculpatory evidence in the statement. MP shall, whenever possible, consult with their legal advisor prior to seeking a CO warrant.

9. Every CO authorized to receive an ITO for the purpose of issuing a search warrant has the authority to administer the oath or affirmation to the affiant.

10. The CO of an MP unit shall not issue search warrants.

EXECUTION OF CO SEARCH WARRANTS

11. Every person authorized to execute a search warrant may seize any thing mentioned in the search warrant and any thing that on reasonable grounds the person believes has been obtained by or has been used in the commission of an offence and shall carry as soon as practical any thing so seized before the CO who issued the search warrant.

12. The National Defence Act or the QR&O appears to have no equivalent to the Criminal Code of Canada s. 487.3 which denied public access to information arising from the execution of a search warrant. A publication ban includes disclosing the identities of specific offences and victim/witnesses and also protects the identities of justice participants and protects certain investigative techniques. In the absence of such sealing orders, MP should to seek the advice of their local legal advisor before seeking a CO warrant where these issues may be implicated. It may be that in the circumstances a conventional Criminal Code s. 487 warrant should be sought.

13. **Procedures:** The following must be adhered to when executing a CO search warrant:

a. **Briefing:** Preparation and planning for the execution of a search warrant shall include a briefing of all involved personnel on the restrictions concerning personal searches. This briefing shall be done via an operational order using the Situation Mission Execution Administration Command and Control (SMEAC) format and scanned in the Security and Military Police Information System (SAMPIS);

b. **Time:** A CO shall authorize a search warrant referred to in this section to be executed between 0800 and 2200 hours unless the CO is satisfied:

(1) there are reasonable grounds for its execution outside these times;

(2) the reasonable grounds are included in the ITO; and

(3) the warrant authorized a night time execution.

c. **Presentation:** It is the duty of MP to produce the warrant for the occupant or owner when requested;

d. **Entrance:** Before entering a premises to execute a Search Warrant, MP are required to:

(1) make a demand for entry unless there are reasonable grounds that by so doing it may expose the MP or any other person to imminent bodily harm or death, or result in the imminent loss or imminent destruction of evidence relating to the commission of an indictable offence. The QR&O makes no provision for a no-announcement entry authorization on a warrant. In circumstances where a no-announcement entry is needed, MP should consult with their legal advisor to determine if a warrant issued under the Criminal Code may be more appropiate;

(2) identify themselves as MP and peace officers;

(3) state the purpose for which entry is demanded;

(4) explain how the search will be conducted unless there are urgent circumstances which require immediate action;

(5) produce the warrant and allow the occupant or owner a reasonable amount of time to examine the document. If requested, give the occupant or owner a copy of the warrant;

(6) unless exigent circumstances exist, ensure at least two MP members are present during a search; and

(7) the detainee has upon arrest or detention the right to retain and instruct counsel without delay and to be informed of that right. The arrestee should be advised of his constitutional rights as soon as it is reasonably practical to do so and MP should facilitate the retaining counsel. The facilitating of this right may be deferred for security reasons or for investigative necessity.

USE OF FORCE

14. Pursuant to QR&O 106.08(2) and CF MP Gp Order **2-310**, MP and MPO authorized to execute a search warrant referred to in Chapter 106 of the QR&O may use such force, and to obtain such assistance, as they consider reasonably necessary to gain entry into the premises.

SAMPIS

15. All CO search warrant documentation, such as the QR&O Information to Obtain a Search Warrant form, approved CO search warrant form, and operational order, shall be scanned in SAMPIS using the SW text type as per CF MP Gp Order **2-126**.

16. The Search Warrant detail page shall also be completed as per **2-370.8**.

Attachments: NIL

Approval Authority: COS Readiness

OPI: J7 Policy

Issued: 27 Apr 16

Supersedes: NIL

References: QR&O, Vol II

Schedule R

Chief of the Defence Staff Chef d'état-major de la Défense

National Defence Headquarters
Ottawa, Ontario
K1A 0K2

Quartier général de la Défense nationale
Ottawa (Ontario)
K1A 0K2

3 March 2021

Distribution List

CDS DIRECTIVE FOR CAF GRIEVANCE SYSTEM ENHANCEMENT

References: A. Info Brief to VCDS 12 November 2020
B. Orientation Meeting DVCDS // DCFGA 28 October 2020
C. CAF ICRTS Grievance Portfolio, 1 October 2020
D. DAOD 2017 series, Military Grievance
E. CDS, Delegation of Powers, Duties and Functions as Final Authority in the Grievance Process 22 September 2020
F. CMP Directive for Grievance Administration and Coordination dated 21 Oct 2020
G. *National Defence Act*

BACKGROUND

1. The Canadian Armed Forces' (CAF) personnel management approaches are evolving in step with the sensibilities and expectations of all Canadians for respectful, fulfilling workplaces free of harassment, interpersonal and institutional conflicts. Our obligation to care for our people must remain paramount, and our support to and participation in the CAF grievance system is no exception. CAF leadership culture, and policy must continue to evolve, in particular where grievances are

Le 3 mars 2021

Liste de distribution

DIRECTIVE DU CEMD POUR L'AMÉLIORATION DU SYSTEME DE GRIEF DES FAC

Références : A. Compte rendu informatif au VCEMD 12 novembre 2020
B. Réunion d'orientation VCEMAD // DAGFCC.
C. SIGEP, Portefeuille de griefs FAC, 1er octobre 2020
D. DOAD 2017-0, série Griefs militaires
E. CEMD, Délégation des attributions à titre d'autorité de dernière instance en matière de griefs, 22 septembre 2020
F. Directive du CPM pour l'administration et la coordination des griefs en date du 21 octobre 2020
G. *Loi sur la défense nationale*

CONTEXTE

1. Les méthodes de gestion du personnel des Forces armées canadiennes (FAC) évoluent en fonction des sensibilités et des attentes de tous les canadiens et canadiennes, qui souhaitent des lieux de travail respectueux, épanouissants et libres de harcèlement, de conflits interpersonnels et institutionnels. Notre obligation de prendre soin de notre personnel doit rester primordiale, et notre soutien et notre participation au système de règlement des griefs de la FAC ne font

concerned, which will require that we help one another as we listen, learn, and act, with people firmly at the heart of our business.

pas exception à la règle. La culture de leadership des FAC, et nos politiques, doivent continuer d'évoluer, spécifiquement concernant les griefs. Ceci requerra que nous nous aidions les uns et les autres lorsque nous écoutons, apprenons et agissons avec les gens, nos membres, qui sont au cœur de nos activités.

INTEGRATED CONFLICT AND COMPLAINT MANAGEMENT (ICCM)

2. Now in its fourth year, the ICCM system is coming into its own, with grievances, harassment and charter challenges, service delivery through regional centres and training residing under one Director General to support the Defence Team. Its emphasis on a collaborative approach to managing conflict centred on self-help is allowing members to understand and embrace the importance of their individual efforts in participation, contribution and diligence and how these individual efforts contribute to the safety and well-being of all members in their working environments.

GESTION INTÉGRÉE DES CONFLITS ET DES PLAINTES (GICP)

2. Actuellement dans sa quatrième année, le système GICP prend son essor, avec des griefs, harcèlement et contestations de charte, la prestation de services à travers des centres régionaux et la formation relevant d'un seul directeur général pour soutenir l'équipe de défense. L'accent mis sur une approche collaborative de la gestion des conflits centrée sur l'auto-assistance permet aux membres de comprendre et d'accepter l'importance de leurs efforts individuels en matière de participation, de contribution et de diligence et la manière dont ces efforts individuels contribuent à la sécurité et au bien-être de tous les membres dans leur environnement de travail.

CANADIAN FORCES GRIEVANCE AUTHORITY (CFGA)

3. CFGA oversees the CAF grievance system and administers the submission of grievances by our members. Its value proposition lies in its identification of systemic gaps in DND/CAF policies, its contributions to the righting of wrongs, its capacity to achieve a judicious balance between the needs of members and service demands and its unique positioning as a direct communicator of my intent when it comes to the

AUTORITÉ DES GRIEFS DES FORCES CANADIENNES (AGFC)

3. L'AGFC supervise notre système de règlement des griefs des FAC et gère la présentation des griefs par nos membres. Sa proposition de valeur réside dans son identification des lacunes systémiques des politiques du MDN et des FAC, sa contribution au redressement des torts, sa capacité à atteindre un équilibre judicieux entre les besoins des membres et les demandes du service et son positionnement unique

adjudication of grievances and, at times, the influencing of antiquated policy.

en tant que communicateur direct de mes intentions lorsqu'il s'agit de statuer sur les griefs et, parfois, d'influencer une politique archaïque.

PROBLEM DEFINITION

DÉFINITION DU PROBLÈME

4. As of 1 February 2021, there were 654 grievances registered at the Initial Authority (IA) level and 696 grievances registered at the Final Authority (FA) level, for a total of 1350 grievances awaiting resolution across the CAF. Despite the challenges we all face as a result of operational demands, resource constraints and strategic threats like COVID-19, this is unacceptable, and does little to inspire the trust of our sailors, soldiers, and aviators. Collectively, we must do better. How we respond to this challenge can make or break our institutional credibility as well as our ability to re-build trust with those we lead.

4. Au 1 février 2021, il y avait 654 griefs enregistrés au niveau de l'autorité initiale (AI) et 696 griefs enregistrés au niveau de l'autorité de dernière instance (ADI), pour un total de 1350 griefs en attente de résolution dans l'ensemble des FAC. Malgré les défis auxquels nous faisons face, dues aux demandes opérationnelles, aux contraintes de ressource et aux menaces stratégiques tels que la COVID-19, c'est inacceptable, et cela ne contribue guère à inspirer confiance à nos marins, soldats, et aviateurs. Nous devons collectivement faire mieux. La façon dont nous répondrons à ce défi aura des conséquences, sois positive ou négative, sur notre crédibilité institutionnelle de même que sur notre habileté à reconstruire la confiance de ceux que nous dirigeons.

5. The recent launch of the third Independent Review of the National Defence Act (NDA), a review mandated by Parliament and ordered by the Minister of National Defence, aims to assess how effectively the NDA and its regulations are working with respect to the military justice, policing, and grievance systems.

5. Le lancement récent du troisième examen indépendant de la loi sur la défense nationale (LDN), un examen mandaté par le Parlement et ordonné par le ministre de la Défense nationale, vise à évaluer l'efficacité de la LDN et de ses règlements en ce qui concerne les systèmes de justice militaire, de police, et de règlement des griefs.

6. The CAF grievance system (CAFGS) needs attention to regain and maintain trust and credibility. This has led to a CAFGS review and action plan formulation spanning the short, mid-, and long-term. As with any system, the CAFGS must continuously evolve to not

6. Notre système de règlement des griefs des FAC (SGFAC) a besoin d'attention pour regagner et de maintenir la confiance et la crédibilité, ce qui a conduit à un examen du SGFAC et à la formulation d'un plan d'action couvrant le court, le moyen, et le long terme. Comme

only support the members it was designed to serve but to contribute to the CAF's professional autonomy where conflict and complaint management is concerned. This will take team-work and commitment by all to set into motion. The status quo could result in the removal of the grievance system from the CAF for execution by a civilian external, independent body. The failure to afford our personnel a CAF-owned mechanism through which to provide recourse for its members calls into question our very status as a profession and undermines the very principles of command.

tout système, le SGFAC doit continuellement évoluer non seulement pour soutenir les membres qu'il a été conçu pour servir, mais aussi pour contribuer à l'autonomie professionnelle des FAC en matière de gestion des conflits et des plaintes. Ceci nécessitera du travail d'équipe et de l'engagement de tous pour mettre en place. Le statu quo pourrait avoir pour effet que le système de griefs des FAC soit remis à un groupe civil, externe et indépendant. Une incapacité à fournir à notre personnel un mécanisme interne, par lequel les FAC offrent un recours à ses membres, remet en question notre statut en tant que profession et discrédite nos principes de commandement.

7. To this end, I have directed that an action plan – which includes both direction to Initial Authorities and planning guidance for mid- and long-term initiatives – be led and implemented by Director Canadian Forces Grievance Authority (DCFGA), with this document serving as the basis of the Director's authority to enact immediate change.

7. J'ai donc ordonné qu'un plan d'action - qui comprend à la fois des directives aux AI et des conseils de planification pour les initiatives à moyen et long terme - soit dirigé et mis en œuvre par le directeur de l'Autorité des griefs des Forces canadiennes (DAGFC), ce document servant de base à l'autorité du directeur pour mettre en œuvre des changements immédiats.

DESIRED EFFECTS

LES EFFETS SOUHAITÉS

8. At the strategic level, the aim of this reinvigoration of the CAFGS is to regain CAF grievance credibility both internally and externally. Operationally, the development and implementation of a sustainable CAFGS is key. This will include, as flagship initiatives, the investigation and implementation of an "off-ramp" for policy-centric grievances I do not have the authority to grant, as well as a PER contestation process outside of the CAFGS. Finally, at the tactical level, this refresh of the grievance system is aimed at increasing CAFGS credibility

8. Au niveau stratégique, l'objectif de cette relance du SGFAC est de redonner de la crédibilité aux griefs des FAC, tant sur le plan interne qu'externe. Sur le plan opérationnel, l'élaboration et la mise en œuvre d'un SGFAC durable sont essentielles. Ceci inclura, comme initiatives phares, l'examen et l'implémentation d'une « voie alternative » concernant les griefs pour lesquels je ne possède pas l'autorité de rendre une décision, de même qu'un processus pour contester les RAP à l'extérieur du SGFAC. Enfin, au niveau

with CAF personnel through timely yet fair and balanced adjudication.

tactique, cette actualisation du système de règlement des griefs vise à accroître la crédibilité du SGFAC auprès du personnel des FAC grâce à un processus décisionnel rapide mais juste et équilibré.

DIRECTION TO INITIAL AUTHORITIES

INSTRUCTIONS POUR LES AUTORITÉS INITIALES

9. **General**. In 2019, 1001 grievances were registered in comparison with 2018, which saw 1124 grievances registrations. This said, ICCM is beginning to observe a modest reduction in grievance registration. There has also been a noted increase in informal resolutions, with this attributed to the decrease in grievance registrations as a consequence of fewer issues escalating to formal mechanisms.

9. **Général**. En 2019, 1001 griefs ont été enregistrés par rapport à 2018, où 1124 griefs ont été enregistrés. Cela dit, la GICP commence à observer une modeste réduction de l'enregistrement des griefs. On note également une augmentation des résolutions informelles, ce qui est attribué à la diminution du nombre de griefs enregistrés en raison d'une réduction de problèmes qui sont passés aux mécanismes formels.

10. This decrease in formal grievance registration is expected to yield an improvement in the IA compliance rate for registering and processing grievances within prescribed timelines. With respect to compliance, IAs are mandated to render grievance decisions at their level within a 120-day window. When files extend past this marker, compliance percentages drop. IA compliancy remains steady at approximately 20% across CAF L1s. This marks a downward trend that has continued over the past several years, falling significantly short of an ultimate target of 80% and reinforcing the need for L1s to act.

10. Cette diminution de l'enregistrement officiel des griefs devrait entraîner une amélioration du taux de conformité de l'AI pour l'enregistrement et le traitement des griefs dans les délais prescrits. En ce qui concerne la conformité, les AI sont mandatées de rendre des décisions sur les griefs à leur niveau dans un délai de 120 jours. Lorsque les dossiers dépassent ce délai, les pourcentages de conformité diminuent. Le taux de conformité des AI reste stable à environ 20% dans les N1 des FAC. Cela marque une tendance à la baisse qui s'est poursuivie ces dernières années, tombant nettement en dessous de l'objectif final de 80% et renforçant la nécessité des N1 d'agir.

11. There is significant command value associated with the expedient processing of grievances by IAs. While ICCM continues to assist IAs through the provision of grievance analyst training, templates and guidance, compliance

11. Le traitement rapide des griefs par les AI présente une valeur de commandement importante. Bien que la GICP continue d'aider les AI en leur fournissant des formations, modèles et conseils d'analyse des griefs, la

ultimately comes down to IA engagement and prioritization.

conformité se résume en fin de compte à l'engagement des AI et à l'établissement de priorités.

12. The CAFGS is not designed for senior CAF leadership, though some may indeed leverage the system; rather, it is for those we lead to empower and give them a voice. This demands that we collectively "do better" through creative processes, chain of command engagement, risk assessment and mitigation, the leveraging of ICCM resources like the sixteen (16) Conflict and Complaint Management System (CCMS) centres across the country for informal resolution options and policy advice, and – most importantly – ownership where grievances are involved.

12. Le SGFAC n'est pas conçu pour les hauts responsables de la FAC, bien que certains puissent effectivement tirer parti du système ; il est plutôt destiné à ceux que nous dirigeons pour leur donner des moyens d'action et une voix. Cela exige que nous "fassions mieux" collectivement grâce à des processus créatifs, à l'engagement de la chaîne de commandement, à l'évaluation et à l'atténuation des risques, à la mise à profit des ressources de La GICP comme les seize (16) centres du système de gestion des conflits et des plaintes (SGCP) répartis dans tout le pays pour les options de résolution informelle et les conseils concernant les politiques, et - plus important encore - à la prise en charge lorsque des griefs sont en jeu.

13. All this said, I direct the following with respect to IAs from the L1 to L4 levels for immediate action:

13. Cela dit, je demande aux autorités compétentes des niveaux N1 à N4 de prendre des mesures immédiates :

a. **IA Adjudication Timelines**. Grievances will adhere to time limitations prescribed by regulations. However, an increase in IA adjudication timelines under a previous Independent Review of the NDA has ultimately resulted in a lower rate of compliance (decrease from 60-65% to 20%). Failing to respond to grievances in a timely manner leads to negative perceptions of CAF leadership, both internally by our sailors, soldiers and aviators and externally by Canadians. We need to fix this. IAs below the

a. **Délais d'adjudication de l'AI**. Les griefs respecteront les délais prescrits par les règlements. Toutefois, une augmentation des délais de décisions des AI dans le cadre d'un précédent examen indépendant de la LDN a finalement entraîné un taux de conformité plus faible (diminution de 60-65% à 20%). Le fait de ne pas répondre aux griefs en temps opportun entraîne une perception négative envers le leadership des FAC, tant à l'intérieur par nos marins, soldats et aviateurs qu'à l'extérieur par les canadiens et canadiennes. Nous devons faire mieux. Les IA dont le taux de

80% target, less Chief of Military Personnel (CMP) given its own backlog initiative set to commence in January 2021, will have 8-months to demonstrate at least a 60% compliance rate. While this is not a hard right shoulder, I do expect that leadership across the CAF demonstrate re-investment into the grievance system and that a concerted effort be made to improve IA compliance statistics. DCFGA will, on my behalf, engage L1 principles as required on a monthly basis to discuss compliance rates and possible solution space. Should IAs fail to heed this direction and not demonstrate commitment to getting their grievance house in order, I could consider the reduction of adjudication timelines at the L3/L4 level from 120-days to 90-days. A FRAGO would follow should this be required to clearly articulate implications. While increased compliance is the objective, I offer that caution must be exercised to ensure that we do not sacrifice quality of analysis and procedural fairness for speed; this would merely result in increased files pushed to the FA for adjudication, thus negating net gains. Effects desired include increased IA compliancy, decreased wait time for IA decisions, and increased trust in the CAFGS through timely responses to grievances.

conformité est inférieur à l'objectif de 80%, sauf pour le Chef du personnel militaire (CPM) étant donné sa propre initiative de redressement qui doit commencer en janvier 2021, auront huit mois pour démontrer une augmentation d'au moins 60% de leur taux de conformité. Bien que ceci ne soit pas « coulé dans le béton », je m'attends à ce que le leadership de toutes les FAC démontrent un engagement envers le système de griefs et qu'un effort concerté soit entrepris afin d'améliorer le taux de conformité au niveau des AI. Le DAGFC engagera, en mon nom, les chefs de N1 selon les besoins sur une base mensuelle pour discuter des taux de conformité et de l'espace de solution. Si l'un des AI ne respecte pas cette directive et ne démontre pas son engagement à mettre de l'ordre dans ses griefs, je pourrais considérer de faire passer les délais de prise de décision aux niveaux N3/N4 de 120 à 90 jours. Un OFRAG suivra pour clairement articuler les implications, si la situation l'exige. Bien qu'une augmentation du taux de conformité soit l'objectif, je vous préviens que cet objectif doit être atteint sans sacrifice à la qualité de l'analyse ou à l'équité procédurale au profit de la vitesse d'exécution; ceci résulterait simplement dans une augmentation de filières à l'ADI, donc un gain nul. Les effets souhaités sont notamment une plus grande conformité des AI, une réduction du temps d'attente pour les décisions des AI et une confiance accrue dans le SGFAC

en produisant des réponses aux griefs selon les délais prescrits.

b. **Grievance Re-prioritization and Resource Re-allocation**. The re-investment of effort and focus into the CAF grievance system is one of my priorities. It is important not only to deliver on our mandate to those we lead, but to re-gain and maintain institutional credibility in this regard. Understanding, however, the myriad demands for increasingly constrained resources, I expect commanders to re-allocate current resources to achieve articulated objectives.

b. **Nouvelle priorisation des griefs et réallocation des ressources**. Le réinvestissement d'effort et d'emphase dans le système de griefs des FAC est l'une de mes priorités. Non seulement il est important de livrer notre mandat envers ceux que nous menons mais nous devons aussi regagner et maintenir une crédibilité institutionnelle à cet égard. Ceci dit, bien que je comprenne qu'il y ait de nombreuses demandes et des ressources limitées, je m'attends à ce que les commandants réaffectent les ressources actuelles afin d'atteindre ces objectifs.

c. **Exceeding IA Adjudication Time Limits**. If IAs at the L3/L4 levels exceed their 120-day adjudication time limit, they must advise their higher headquarters (HQ) through their N1/G1/A1/J1 directed grievance POC via email. Effects desired include increased leader accountability and greater grievance status transparency and situational awareness across HQs.

c. **Dépassement des délais de décision de l'AI.** Si les AI de N3/N4 dépassent le délai de 120 jours pour rendre une décision, ils doivent informer, par courriel, leur quartier général (QG) supérieur par le biais de leur BPR de grief dirigé N1/G1/A1/J1. Les effets souhaités sont notamment une plus grande responsabilisation des chefs et une plus grande transparence du statut des griefs et une meilleure connaissance de la situation dans les QG.

d. **IA Grievance Reporting**. Due to ICRTS limitations, monthly grievance statistics are generated on a "push" basis by DGICCM to all L1 POCs. While this practice will continue, L1 HQs must provide effective oversight of subordinate formations, especially whereby

d. **Rapport sur les griefs de l'AI**. En raison des limites de le Système intégré de gestion et d'enregistrement des plaintes (SIGEP), les statistiques mensuelles sur les griefs sont générées sur une base "push" par le Directeur de la gestion intégrée des conflits et des plaintes

non-compliancy is deemed a trend. DCFGA will engage delinquent L1s as required. Effects desired again include increased leader accountability and greater grievance status transparency and situational awareness across HQs.

(DGGICP) à tous les BPR de N1. Bien que cette pratique se poursuive, les QG de N1 doivent assurer une surveillance efficace des formations subordonnées, en particulier lorsque la non-conformité est considérée comme une tendance. Le DAGFC engagera les N1 délinquants selon les besoins. Les effets souhaités comprennent à nouveau une plus grande responsabilité des chefs et une plus grande transparence sur le statut des griefs et une meilleure connaissance de la situation dans les QG.

e. **Pre-Grievance CCMS Consultation**. Leadership at all levels are strongly encouraged to promote the leveraging of regional Conflict and Complaint Management System (CCMS) centres by personnel considering a grievance prior to its submission. CCMS not only provide advice and informal resolution options, but are also able to leverage CMP/MPC's Directorate Administrative Response Centre (DARC) which has, on numerous occasions, provided policy clarity and options that resulted in no grievance submitted. While a grievor cannot be compelled to engage CCMS prior to making a grievance submission, CCMS are force multipliers in the informal resolution of conflict and complaints and the provision of policy guidance across the Defence Team, and their engagement by members who

e. **Consultation du SGCP avant le dépôt des griefs**. Les dirigeants à tous les niveaux sont fortement encouragés à promouvoir l'utilisation des centres régionaux du SGCP par le personnel qui envisage de soumettre un grief avant l'enregistrement de celui-ci. Les SGCP fournissent non seulement des conseils et des options de résolution informelles, mais sont également en mesure de tirer parti du Centre de réponse administrative de la direction (CRAD) du CPM et COMPERSMIL qui, à de nombreuses reprises, a fourni des précisions et des options concernant les politiques qui n'ont donné lieu à aucun grief. Bien qu'un plaignant ne puisse être contraint d'engager le SGCP avant de déposer un grief, les SGCP sont des multiplicateurs de force dans la résolution informelle des conflits et des plaintes et pour fournir des informations appropriées concernant nos

are considering submitting a grievance or who have submitted a Notice of Intent (NOI) to grieve should be encouraged by the chain of command. To promote the use of CCMS in resolving complaints prior to them becoming grievances, IAs shall consider it in the interests of justice to accept a grievance that was submitted beyond the time limit when the member has engaged CCMS within the time limit.

f. **Jurisdictional Reviews**. A redress authority may accept a grievance that was submitted after the expiration of the applicable time limit if they are satisfied, based on the reasons for the delay provided by the grievor, that it is in the interests of justice to consider and determine the grievance. If, in the opinion of the redress authority, the delay was caused by a circumstance which was unforeseen, unexpected or beyond the control of the grievor, and the grievance was submitted within a reasonable period of time after the circumstance occurred, the redress authority should normally be satisfied that it is in the interests of justice to consider the grievance. In particular at the L3/L4 level, commanding officers should remain as flexible as possible when it comes to grievances submitted outside of timelines.

politiques à l'ensemble de l'équipe de défense. Leur engagement par les membres qui envisagent de déposer un grief ou qui ont soumis une notification d'intention (NOI) de déposer un grief devrait être encouragé par la chaîne de commandement. Afin de promouvoir l'utilisation du SGCP pour résoudre les plaintes avant qu'elles ne deviennent des griefs, les AI doivent considérer qu'il est dans les intérêts de la justice d'accepter un grief qui a été soumis au-delà du délai lorsque le membre a engagé le SGCP dans le délai imparti.

f. **Examens juridictionnels.** Une autorité de grief peut accepter un grief qui a été soumis après l'expiration du délai applicable si elle est convaincue, sur la base des raisons du retard fournies par le plaignant, qu'il est dans les intérêts de la justice d'examiner et de trancher le grief. Si, de l'avis du décideur, le retard a été causé par un évènement imprévu, inattendu ou qui échappe au contrôle du plaignant, et que le grief a été soumis dans un délai raisonnable après la découverte de la circonstance, l'autorité de réparation devrait être normalement convaincue qu'il est dans l'intérêt de la justice d'examiner le grief. Particulièrement au niveau N3 / N4, les commandants devraient rester aussi flexibles que possible en ce qui concerne les griefs soumis hors délais. Une AI qui n'est pas convaincue qu'il est dans l'intérêt de la justice d'examiner un grief soumis après

An IA who is not satisfied that it is in the interests of justice to consider a grievance submitted after the expiration of the time limit must provide the grievor with reasons in writing, including notification that the grievor may request the forwarding of their grievance to the FA for consideration and determination. To shape IA jurisdiction decisions, very few grievances are rejected at the FA from a jurisdictional perspective in accordance with Federal Court guidance and with the best interests of our members at heart.

l'expiration du délai doit fournir au plaignant ses motifs par écrit, y compris un avis que le plaignant peut demander la transmission de son grief à l'ADI pour examen et détermination. Pour orienter les décisions juridictionnelles des AI, très peu de griefs sont rejetés au niveau de l'ADI, d'un point de vue juridictionnel, en ligne avec ce que fait la Cour Fédérale et avec l'intérêt de nos membres en tête.

g. **Implementation of Decisions**. Direction from a redress authority to a DND or CAF organization responsible for implementing a decision must be carried out within 60 days. An organization that cannot meet that requirement must notify the redress authority and the grievor in writing of the delay and the reason for it. DCFGA will continue to provide quarterly updates to me regarding implementation.

g. **Mise en œuvre des décisions**. Les directives d'une autorité de grief à une organisation du MDN ou des FAC chargée de mettre en œuvre une décision doivent être exécutées dans les 60 jours suivant la date de cette décision. Une organisation qui ne peut pas répondre à cette exigence doit informer l'autorité de grief concernée et le plaignant par écrit du retard et de la raison de celui-ci. Le DAGFC continuera de me fournir des mises à jour trimestrielles concernant la mise en œuvre.

14. The manner in which we address grievances – or not – can make or break CAF credibility and grievance professional autonomy moving forward. Leadership at all levels must make the adjudication of grievances a priority, as this contributes to the fostering of a supportive, healthy and respectful work environment whereby the holistic well-being of CAF members is paramount.

14. La manière dont nous traitons les griefs - ou non - peut faire avancer ou reculer la crédibilité de la FAC et l'autonomie professionnelle en matière de griefs. Les dirigeants à tous les niveaux doivent faire du traitement des griefs une priorité, car cela contribue à favoriser un environnement de travail positif, sain et respectueux dans lequel le bien-être global des membres des FAC est

primordial.

PLANNING GUIDANCE

15. Beyond my direction to IAs, effective immediately, there exist a number of CAFGS initiatives that – due to their complexity, implication of multiple key stakeholders, and legal advice requirements – demand time and space to collaboratively plan and execute. As a result, the following planning direction and guidance provides a framework within which DCFGA, the CFGA team and other L1s can plan and execute these initiatives on my behalf.

ORIENTATION DE LA PLANIFICATION

15. Au-delà de la direction que j'ai donnée aux AI, il existe un certain nombre d'initiatives au sein du SGFAC qui, en raison de leur complexité, de l'implication de multiples acteurs clés et des exigences en matière de conseil juridique, exigent du temps et de l'espace pour être planifiées et exécutées en collaboration. Par conséquent, les orientations et les conseils de planification suivants fournissent un cadre dans lequel le DAGFC, l'équipe du SGFAC et les autres N1 peuvent planifier et exécuter ces initiatives en mon nom.

EXECUTION

16. CDS Intent. My intent is to provide CAF members with a comprehensive and effective grievance management and adjudication system, to ensure that grievances are quickly and efficiently addressed within mandated timelines, and to better deliver on our mandate to deliver timely, well-reasoned and balanced decisions to our personnel. To achieve this intent, CFGA will lead the planning and implementation of a number of mid- to long-term initiatives designed to address FA and IA backlogs, stream-line current processes, set conditions for future support to CAFGS mission success.

EXÉCUTION

16. Intention du CEMD. Mon intention est de fournir aux membres des FAC un système complet et efficace de gestion et de décision des griefs, de veiller à ce que les griefs soient traités rapidement et efficacement dans les délais prescrits, et de mieux remplir notre mandat qui consiste à rendre des décisions opportunes, bien expliquées et équilibrées à notre personnel Pour atteindre cet objectif, l'AGFC dirigera la planification et la mise en œuvre d'un certain nombre d'initiatives à moyen et à long terme conçues pour traiter les filières en attente au niveau de l'ADI et de l'AI, rationaliser les processus actuels et établir les conditions du soutien futur au succès de la mission de l'AGFC.

17. Objectives

a. Establish a forum for the collaboration of grievance initiatives.

17. Objectifs

a. Établir un forum pour la collaboration et le partage des initiatives novatrices de règlement des griefs.

b. Reduce outstanding grievance backlog by no less than 50% (677 files) over the next 12-months.

c. Achieve and sustain an IA compliance rate of at least 80%.

d. Establish an FA grievance surge capability ISO IAs.

e. Address CFGA staff succession planning to enable long-term team stability.

18. Planning Authority. Under the auspices of DCFGA, who reports directly to myself, a collaborative working group will be established to address the achievement of articulated CAFGS objectives over the mid- to long-term.

19. Main Effort. The main effort is to increase the efficiency and effectiveness of grievance administration with the CAFGS, enabling the FA and IAs to adjudicate grievances fairly and consistently within the timeframes stipulated at reference (ref) E.

20. End State. The end-state will be achieved when the grievance backlog is resolved at the FA and IA levels, at least 80% of all grievances are processed within the mandated timelines, efficiency measures transition from “proof of concept” to sustained CAFGS practice, and the grievance system feeds more seamlessly into the policy development process.

b. Réduire le nombre des griefs irrésolus de pas moins de 50% (677 filières) au cours des 12 prochains mois.

c. Atteindre et maintenir un taux de conformité d'au moins 80% au niveau des AI.

d. Établir, au niveau de l'ADI, une capacité temporaire en support aux AI.

e. S'occuper de la planification de la relève du personnel de l'AGFC pour permettre une stabilité des équipes à long terme.

18. Autorité de planification. Sous les auspices de la DAGFC, qui se rapporte directement à moi, un groupe de travail collaboratif sera mis en place pour s'occuper de la réalisation des objectifs à moyen et long terme, comme articulés par celle-ci.

19. Effort principal. L'effort principal consiste à accroître l'efficacité et l'efficience de l'administration des griefs par le SGFAC, en permettant à l'ADI et aux AI de statuer sur les griefs de manière équitable et cohérente selon les délais stipulés à la référence (réf) E.

20. État final. L'état final sera atteint lorsque les griefs en attente ou en retard sera seront résolus aux niveaux de l'ADI et de l'AI, qu'au moins 80 % de tous les griefs seront traités dans les délais prescrits, que les mesures d'efficacité passeront de la "validation de principe" à une pratique soutenue par le SGFAC et que le système de griefs s'intégrera plus facilement dans le processus d'élaboration des politiques.

KEY INITIATIVE PLANNING GUIDANCE

21. **Reduce the FA and IA backlog**. Conditions-setting is currently on-going to address these significant backlogs. At the FA-level, this has meant the creation of a small Tiger Team and the development of an expedited process for low risk files that will see decision letters cut from the traditional 6 to 22 pages down to 2 to 4. The Tiger Team has commenced with the processing of low risk files via the expedited process.

22. Critical to the development of this expedited process for low risk files is that it is intended to transition from a backlog tool to a sustained practice at the FA and IA levels. This said, it is anticipated that this will occur over an 18-month period, with process refinement achieved through FA backlog efforts over the initial 6 months, with a paradigm shift and process integration at the CFGA level occurring at the 6-12 month mark, with lessons learned and business planning leveraged to institutionalize the expedited process across the CAFGS. Key to this initiative will be the triage of files that meet the criteria for the expedited process.

23. Envisioned end-state sees full operating capability being reached at Active Posting Season (APS) 22, with the delivery of a more agile and sustainable

ORIENTATIONS POUR LA PLANIFICATION DES INITIATIVES CLÉS

21. **Réduire le nombre de filières en attente ou en retard au niveau de l'ADI et de l'AI**. La définition de conditions est actuellement en cours pour traiter cette situation. Au niveau de l'ADI, cela s'est traduit par la création d'une petite équipe d'intervention et le développement d'un processus accéléré pour les dossiers à faible risque qui verra les lettres de décision passer des 6 à 22 pages traditionnelles à 2 à 4. Cette équipe d'intervention a commencé le processus de révision de dossiers moins risqués via un processus accéléré.

22. Le développement de ce processus accéléré pour les dossiers propices est essentiel, car il vise à passer d'un outil de gestion des retards à une pratique soutenue au niveau de l'ADI et des AI. Cela dit, il est prévu que cette transition se fasse sur une période de 18 mois, l'amélioration du processus étant réalisée grâce aux efforts de l'ADI en matière de traitement des dossiers en attente au cours des six premiers mois, un changement de paradigme et l'intégration du processus au niveau de l'AGFC se produisant entre six et douze mois, les leçons tirées et la planification des activités étant mises à profit pour institutionnaliser le processus accéléré dans l'ensemble du SGFAC. La clé de cette initiative sera le triage des dossiers qui répondent aux critères du processus accéléré.

23. L'état final envisagé voit la capacité opérationnelle totale être atteinte durant la période active des affectations (PAA) 2022, avec la mise en place d'un

grievance system whereby files are managed based on their complexity and not the order they arrived, focusing on delivering faster grants and well-considered denies.

système de griefs plus agile et plus durable dans lequel les dossiers sont gérés en fonction de leur complexité et non l'ordre dans lequel ils sont arrivés, en se concentrant sur des décisions rendues plus rapidement et bien réfléchies.

24. At the IA-level, noting that CMP accounts for over 60% of the backlog with 405 files, CMP released its directive for grievance administration and coordination at ref F. Led by the DARC, this directive lays out a plan to resolve CMP/MPC's grievance backlog, achieve an IA compliancy rate of at least 80%, support its subordinate formations in the resolution of their grievances, and support the determination of all CMP/MPC L1-based grievances. CMP's efforts are seen as complementary to those planned at the FA-level, and are truly reflective of owning the problem. Backlog efforts at the IA and FA levels will commence in Winter 2021.

24. Au niveau de l'AI, notant que CPM représente plus de 60% des retards l'arriéré avec 405 filières, le CPM a publié sa directive pour l'administration et la coordination des griefs à la réf F. Dirigée par la CRAD, cette directive établit un plan pour résoudre la situation des griefs au sein du CPM/COMPERSMIL, atteindre un taux de conformité de l'AI d'au moins 80%, soutenir ses formations subordonnées dans la résolution de leurs griefs, et soutenir la détermination de tous les griefs du CPM/COMPERSMIL basés sur le N1. Les efforts du CPM sont considérés comme complémentaires à ceux prévus au niveau de l'AI, et reflètent véritablement la prise en charge du problème. Les efforts pour résorber la situation au niveau de l'AI et de l'ADI commenceront durant l'hiver 2021.

25. **Achieve an IA compliance rate of not less than 80%**. Initiatives as per paragraph 13, sub-paragraphs (a) through (g).

25. **Atteindre un taux de conformité à l'AI pas moins de 80 %**. Initiatives selon le paragraphe 13, alinéas (a) à (g).

26. **Establish an "off-ramp" process for policy-centric grievances in concert with (ICW) CMP**. Many of the CAF's Compensation and Benefits (C&B) policies are approved by Treasury Board (TB). While I can review the application or interpretation of the policy, I cannot amend it, nor do I have any flexibility to interpret it in a way that was not intended. In short, I cannot grant any grievance whereby the grievor's only request for redress is that a TB policy be amended or interpreted contrary to the plain language

26. **Établir un processus de « voie alternative » pour les griefs axés sur les politiques en collaboration avec le CMP**. De nombreuses politiques des FAC en matière de rémunération et d'avantages sociaux sont approuvées par le Conseil du Trésor (CT). Bien que je puisse examiner l'application ou l'interprétation de la politique, je ne peux pas la modifier, et je n'ai pas non plus la possibilité de l'interpréter d'une manière qui n'était pas prévue. Bref, je ne peux pas apporter de « remède » à un grief

of the article. To address these specific files, CFGA is to work closely with CMP/MPC's DARC to develop a DARC-centric "off-ramp" process that will see these files flagged early and "diverted" from the grievance process to receive a policy centric analysis. Should a systemic policy issue be identified, CMP would be responsible to prepare a letter for my signature to any implicated external departments to give weight to reforms. While file numbers are small, accounting for less than 1% of all grievances at the FA, the financial implications are generally substantial. Ideally, my intent sees the implementation of this process across the CAFGS and, ideally, the FA will only very rarely see this type of grievance once we have properly communicated and executed the new process, diverting files before or at the time they reach the IA. **DCFGA supported; CMP and JAG supporting.**

pour lequel la seule réparation au plaignant serait est qu'une politique du CT soit modifiée ou interprétée de manière contraire au langage clair de l'article. Pour traiter ces dossiers spécifiques, l'AGFC va travailler en étroite collaboration avec le CRAD du CPM/COMPERSMIL pour développer un processus de « voie alternative » centré sur le CRAD qui permettra de repérer rapidement ces dossiers et de les "détourner" de la procédure de règlement des griefs pour qu'ils fassent l'objet d'une analyse centrée sur la politique. Si un problème systémique concernant une politique est identifié, le CPM serait responsable de préparer une lettre pour ma signature et adressée aux agences externes impliquées afin de donner du poids aux changements recherchés. Bien que le nombre de dossiers soit faible, représentant moins de 1 % de tous les griefs à l'ADI, les implications financières sont généralement importantes. Idéalement, mon intention est de voir la mise en œuvre de ce processus dans l'ensemble du SGFAC et, idéalement, l'ADI ne verra que très rarement ce type de grief une fois que nous aurons correctement communiqué et exécuté le nouveau processus, en détournant les dossiers avant ou au moment où ils parviennent à l'AI. **Le DAGFC est l'élément supporté; le CPM et le JAG supportent.**

27. **Investigate an alternate PER contestation process in concert with CMP**. While ref D has seen the delegation of PER FA to specified L2 Comds, PERs still account for 25% of annual grievances registered. This is significant, with the grievance process not lending itself to early, local and timely adjudication of these very personal files. The development of an alternate PER

27. **Étudier un processus alternatif de contestation des rapports d'appréciation du personnel RAP en concertation avec le CPM.** Bien que la réf D ait vu la délégation de l'ADI des RAP à des cmdt N2 spécifiques, les RAP représentent toujours 25% des griefs annuels enregistrés. Cela est significatif, car la procédure de règlement des griefs ne se prête pas à un règlement rapide,

adjudication process outside of the CAFGS as part of the PaCE implementation is to be investigated ICW CMP (DGMC). Intent is to create a process that keeps the majority of PERs out of CFGA while still affording members procedural fairness, minimizing the perception of bias and giving members a voice. DGMC and legal collaboration will be critical to driving this initiative forward. **CMP supported, DCFGA and JAG supporting.**

local et opportun de ces dossiers très personnels. Le développement d'une procédure de règlements des RAP en dehors du SGFAC dans le cadre de la mise en œuvre du Contrôle suivi des performances (PaCE) doit être étudié par le CPM – Directeur général - Carrières militaires (DGCM). L'intention est de créer un processus qui maintient la majorité des RAP hors du SGFAC tout en offrant aux membres une équité procédurale, en minimisant la perception de partialité et en donnant aux membres une voix. La DGCM et la collaboration juridique seront essentielles pour faire avancer cette initiative. **Le CPM est l'élément supporté, le DAGFC et le JAG supportent.**

28. **Staff a regulatory change to QR&O 7.15**. Ref G currently reflects a "one size fits all" 120-days for IA adjudication, regardless of IA level (L4 through L1). While grievances at the L3/L4 level may be time consuming, those at the L1/L2 levels tend to be highly complex, multi-faceted, generally policy-implicating, span L1s and requiring of legal review and/or advice. Acknowledging file complexity, and with a view to reducing the number of files referred to the FA without an IA decision having been rendered, a regulatory change to QR&O 7.15 will be sought to afford L1 IAs as well as CMP L2s 180-days to render a decision. **DCFGA supported, JAG supporting.**

28. **Effectuer une modification réglementaire de l'article 7.15 des Ordonnances et règlements royaux applicables aux Forces canadiennes (ORFC)**. La réf G reflète actuellement une "taille unique" de 120 jours pour les décisions au niveau de l'AI, quel que soit le niveau de l'AI (N4 à N1). Alors que les griefs au niveau N3/N4 peuvent prendre beaucoup de temps, ceux au niveau N1/N2 ont tendance à être plus complexes, à présenter de multiples facettes, à faire généralement intervenir des politiques, à s'étendre sur les N1 et à nécessiter un examen et/ou un avis juridique. Compte tenu de la complexité des dossiers, et en vue de réduire le nombre de dossiers renvoyés à l'ADI sans qu'une décision d'AI ait été rendue, une modification de l'article 7.15 des ORFC sera demandée pour accorder aux AI de niveau N1 et les N2 du CPM 180 jours pour rendre une décision. **Le DAGFC est l'élément supporté, le JAG supporte.**

GROUPINGS AND TASKS

29. Tasks

a. Common to All

(1) Implement direction to IAs at paragraph 13 effective immediately.

(2) BPT provide CAFGS Initiatives Working Group(s) (WGs) as requested.

b. DCFGA

(1) Continued execution of duties as an FA Delegated Authority on my behalf.

(2) Continue to provide CAFGS awareness and advice to VCDSO and CDSO.

(3) CAF lead for the planning, synchronization, implementation and management of CAFGS initiatives.

(4) CAF lead for CAFGS representation as part of the Independent Review of the NDA.

(5) Establish CAFGS Initiatives WG(s).

(6) Resolve FA backlog by not less than 40%

GROUPEMENTS ET TÂCHES

29. Tâches

a. Commun à tous

(1) À compter de maintenant, mettre en œuvre les directives dirigées aux AI, comme stipulé au paragraphe 13.

(2) Être prêt à fournir, sur demande, à (aux) groupe(s) de travail (GT) les initiatives du SGFAC.

b. DAGFC

(1) Poursuite de l'exécution de fonctions en tant qu'ADI Autorité déléguée en mon nom.

(2) Continuer de garder informé, et fournir des conseils au bureau du VCEMD et celui du CEMD concernant le SGFAC.

(3) En tant qu'agent principal des FAC, gérer la planification, la synchronisation, la mise en œuvre et la gestion des initiatives du SGFAC.

(4) En tant qu'agent principal des FAC, diriger la représentation du SGFAC dans le cadre de l'examen indépendant de la LDN.

(5) Établir des GT(s) des initiatives de la SGFAC.

(6) Résoudre le nombre de filières en attente au niveau de l'ADI

(278 files) in the next 12-months.

d'au moins 40% (278 filières) au cours des 12 prochains mois.

(7) Continue to provide CFGA support to L1/L2 HQs WRT grievance portfolio.

(7) Continuer à fournir le soutien de l'AGFC au portefeuille de griefs des QG N1/N2.

(8) Strengthen lines of communication (LoC) with L1 principles as well as N1/G1/A1/J1 staff.

(8) Renforcer les lignes de communication (LoC) avec les responsables des N1 ainsi qu'avec le personnel N1/G1/A1/J1.

(9) Initiate CFGA succession planning and surge capability planning.

(9) Planifier la relève du personnel de l'AGFC et la planification d'une capacité excédentaire.

(10) Conduct appropriate performance measurement, evaluation and modification activities.

(10) Mener des activités appropriées de mesure, d'évaluation et de modification des performances.

(11) Capture any new resource requirements and include in supplemental submissions.

(11) Saisir tout nouveau besoin de ressources et l'inclure dans les soumissions supplémentaires.

c. L1s

c. Les N1

(1) Reduce outstanding IA grievance backlogs by 40% total (262 files) over the next 12-months.

(1) Réduire le retard des griefs en attente de l'AI de 40 % (262 filières) au cours des 12 prochains mois.

(2) Achieve and sustain an IA compliance rate of at least 80%.

(2) Atteindre et maintenir un taux de conformité à l'AI d'au moins 80 %.

(3) Provide leadership to

(3) Assurer la direction aux

subordinate formations WRT grievance prioritization and resolution.

(4) N1/G1/A1/J1 inputs to DCFGA every 6-months regarding PER FA Delegation.

d. CMP

(1) Execution of the enhanced CMP Grievance Admin and Coord (Griev A&C) cell pilot over the next 12 months IAW ref F.

(2) Resolve CMP IA backlog by no less than 50% (203 files) over the next 12-months.

(3) Provide supporting fires from the DARC to DCFGA in the planning and implementation of CAFGS initiatives linked to an "off-ramp" for policy-centric files and leadership from DGMC for the development of a PER contestation process outside of the grievance system.

e. JAG

(1) Continued legal support to the FA and IAs in grievance determination.

formations subordonnées en ce qui concerne la priorisation et la résolution des griefs.

(4) N1/G1/A1/J1 contribue à la DAGFC tous les 6 mois concernant la délégation des RAP de l'ADI.

d. CPM

(1) Mettre en place la cellule pilote améliorée d'administration et de coordination (Admin & Coord des griefs) du CPM au cours des 12 prochains mois selon la réf F.

(2) Résoudre le nombre de griefs au niveau du CPM, en tant qu'AI, d'au moins 50% (203 filières) au cours des 12 prochains mois.

(3) Fournir l'aide nécessaire de la CRAD au DAGFC dans la planification et la mise en œuvre des initiatives du SGFAC liées à une « voie alternative » pour les dossiers centrés sur les politiques, ainsi que le leadership du DGCM pour le développement d'un processus de contestation des RAP en dehors du système de griefs.

e. JAG

(1) Soutien juridique continu à l'ADI et aux AI dans la détermination des griefs.

(2) Provide legal representation on CAFGS Initiative WG(s) to provide creative options to support initiative implementation while ensuring they respect legislation and legal frameworks.

(2) Fournir une représentation juridique au(x) groupe(s) de travail de l'initiative SGFAC afin de proposer des options créatives pour soutenir la mise en œuvre de l'initiative tout en veillant à ce qu'elles respectent la législation et les cadres juridiques.

COORDINATING INSTRUCTIONS

30. Key Timings

a. **1 December 2020** – CFGA backlog Tiger Team established and expedited file process developed for FA backlog ready for implementation NLT.

b. **15 January 2021** – FA and IA backlog resolution work to commence NLT.

c. **20 March 2021** – Key initiatives working groups to be established by initiative lead agencies.

d. **May 2021** – BB to VCDS regarding CAFGS initiatives progress.

e. **June 2021** – BB to myself regarding CAFGS initiatives prior to APS.

f. **June 2022** – end-state achieved.

INSTRUCTIONS DE COORDINATION

30. Les moments clés

a. **1er décembre 2020** - L'équipe d'intervention de l'AGFC est établie et a mis en place un processus accéléré de traitement des dossiers de l'ADI et prêt pour sa mise en œuvre.

b. **15 janvier 2021** – L'ADI et les AI travaillent à la résolution du retard accumulé pour commencer.

c. **20 mars 2021** – Des groupes de travail sur les initiatives clées seront mis en place.

d. **Mai 2021** - Compte rendu au VCEMD concernant les progrès des initiatives du SGFAC.

e. **Juin 2021** – Compte rendu à moi-même concernant les initiatives de la SGFAC avant la PAA.

f. **Juin 2022** - état final atteint.

31. Commander's Critical Information Requirements (CCIRs). The CCIRs listed below apply to this review through to APS 2022

a. Unforeseen events or newly discovered challenges that may prevent DCFGA from implementing desired CAFGS initiatives.

b. Major concerns with the roll-out of CAFGS initiatives that may need to be addressed with external partners by the VCDS or myself.

32. Reporting

a. DCFGA will report to the CDS and VCDS as required.

b. The CAFGS WG(s) leads will be accountable to DCFGA.

c. The CFGA Tiger Team will report to the Manager Compensation and Benefits Group (MCBG) and will be accountable to DCFGA.

33. Communications Plan. As the initiatives at paragraphs 21 through 28 are developed and ready for implementation, a supporting communications plan will be required. DGICCM's SSO PTC to support DCFGA in this regard.

31. Besoins essentiels du commandant en information (BECI). Les BECI énumérés ci-dessous s'appliquent à cette révision jusqu'à la PAA 2022

a. Des événements imprévus ou des défis nouvellement découverts qui peuvent empêcher le DAGFC de mettre en œuvre les initiatives souhaitées pour le SGFAC.

b. Des préoccupations majeures concernant le déploiement des initiatives du SGFAC qui pourraient devoir être abordées avec des partenaires externes par le VCEMD ou moi-même.

32. Rapports

a. Le DAGFC fera rapport au CEMD et au VCEMD selon les besoins.

b. Le(s) chef(s) de groupe(s) de travail du SGFAC sera(ont) responsable(s) devant le DAGFC.

c. L'équipe d'intervention de l'AGFC rendra compte au Gestionnaire Avantages et Bénéfices Grief (GABG) et sera responsable devant le DAGFC.

33. Plan de communication. Au fur et à mesure que les initiatives des paragraphes 21 à 28 seront développées et prêtes à être mises en œuvre, un plan de communication de soutien sera nécessaire. L'OEM principal PEC de la DGICP doit soutenir le DAGFC à cet égard.

34. IA Compliance Rate Calculation Methodology Amendment. As per Annex A. With a view to presenting IA compliance realities in the most accurate manner possible, the calculation methodology will change effective directive date of issue. New cases that are open cannot be considered as respecting "DAOD Compliance" until they have actually been closed because one of the principles of addressing grievances is based on date received at the IA. Thus the first column will no longer be part of the equation. Mathematically, the "Over 4-months" files will not be compliant, whether open or closed, and will form the basis of compliance calculations moving forward. While compliance rates will drop initially as a result, they will more accurately depict reality. A calculation supplemental, to include updated compliance rates by L1, is also included at Annex A.

34. Modification de la méthode de calcul du taux de conformité de l'AI. Conformément à l'annexe A. Afin de présenter les réalités de la conformité de l'AI de la manière la plus précise possible, la méthode de calcul changera la date d'entrée en vigueur de la directive. Les nouveaux dossiers ouverts ne peuvent pas être considérés comme respectant la « conformité aux DOAD » tant qu'ils n'ont pas été effectivement fermés, car l'un des principes du traitement des griefs est basé sur la date de réception à l'AI. Ainsi, la première colonne ne fera plus partie de l'équation. Mathématiquement, les dossiers "Plus de 4 mois" ne seront pas conformes, qu'ils soient ouverts ou fermés, et constitueront la base des calculs de conformité. Alors que les taux de conformité baisseront dans un premier temps, ils représenteront plus fidèlement la réalité. Un calcul supplémentaire, qui inclut les taux de conformité actualisés par N1, est également inclus dans l'annexe A.

SERVICE SUPPORT

SOUTIEN AUX SERVICES

35. Resourcing. As previously stated at paragraph 13(b), no new or additional resources are allocated for the execution of actions indicated in this order, as they are already part of existing mandates.

35. Ressources. Tel que mentionné au paragraphe 13(b), aucune ressource nouvelle ou supplémentaire n'est allouée pour l'exécution des actions indiquées dans cette directive, car elles font déjà partie de mandats existants.

COMMAND AND SIGNALS

COMMANDEMENT ET SIGNAUX

36. **Supported Organization**. VCDS Gp // DGICCM.

36. **Organisation soutenue.** Groupe du VCEMD // DGGICP.

37. **Supporting Organizations**. All L1s.

37. **Organisations de soutien**. Tous les N1.

38. **Direct Liaison Authority**. DCFGA has DirLAuth with CMP, JAG, and L1 N1/G1/A1/J1 staff.

38. **Autorité de liaison directe**. Le DAGFC a liaison directe autorisée (DirLAuth) avec le CPM, le JAG, et le

personnel de N1/G1/A1/J1 des N1.

39. **Point of Contact (POC).** Colonel Krista Bouckaert, DCFGA, 613-716-6277.

39. **Point de contact (PdC)**. Colonel Krista Bouckaert, DAGFC, 613-716-6277.

Le Chef d'état-major de la Défense par intérim

W.D. Eyre
Le lieutenant-général / Lieutenant-General
Acting Chief of the Defence Staff

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DEM EMIS

Information

SMA(AP)
SMA(RDDC)
SMA(GI)
SMA(Svcs Ex)
SMA(DIA)
SMA(Mat)
SMA(Pol)
SMA(RH-Civ)
SMA(Fin)
SMA(IE)
MND/FC CJ

Annex A
To CDS Directive for CAF Grievance System Enhancement

INITIAL AUTHORITY COMPLIANCE CALCULATION AMENDMENT

1. The new compliance rate calculation is as follows:

files CLOSED w/in 4-months
(TOTAL files - OPEN w/in 4-months)

2. Updated L1 IA compliance rates for February 2021 are as follows:

Annexe A
À le Directive du CEMD pour l'amélioration du système de grief des FAC

MODIFICATION DU CALCUL DE CONFORMITÉ DE L'AUTORITÉ INITIALE

1. Le nouveau calcul du taux de conformité est comme suit :

de dossiers FERMÉS à l'intérieur de 4-mois
(Total des dossiers – OUVERTS à l'intérieur de 4-mois)

2. La mise à jour des taux de conformité des AI de N1 pour février 2021 est comme suit:

CAF ICRTS Grievance Portfolio (1 February)						
Active files: 1350						
Grievances at FA: 696						
Grievances at IA: 654						
Level I	0 - 4 Months		4+ Months		Total	DAOD Compliance
	Open	Closed	Open	Closed		
ADM(FIN)	0	0	2	0	2	0%
ADM(IE)	0	1	7	3	11	9%
ADM(IM)	1	1	7	1	10	11%
ADM(MAT)	1	0	7	1	9	0%
ADM(PA)	1	0	0	1	2	0%
ADM(S&T)	0	0	0	0	0	100%
ADM(POL)	0	0	0	0	0	100%
ADM(HR-CM)	0	0	0	0	0	100%
ADM(RS)	0	0	0	0	0	100%
ADM(DIA)	0	0	0	0	0	100%
CFINTCOM	1	0	7	4	12	0%
CJOC	11	13	19	34	77	20%
CANSOFCOM	0	1	2	2	5	20%
JAG	0	0	1	1	2	0%
MILPERSCOM	146	99	269	305	809	15%
RCAF	22	14	29	23	88	21%
RCN	16	12	15	30	73	21%
CA	44	46	26	37	153	42%
SJS	1	0	1	1	3	0%
VCDS	13	9	15	38	75	15%
TOTAL IA	257	196	397	481	1331	18%

SIGEP Portefeuille de Griefs FAC (1 février)						
Dossiers actifs: 1350						
Griefs à l'ADI: 696						
Griefs à l'AI: 654						
Niveau I	0 – 4 Mois		4+ Mois		Total	Conformité à la DAOD
	Ouvert	Fermé	Ouvert	Fermé		
SMA(FIN)	0	0	2	0	2	0%
SMA(IE)	0	1	7	3	11	9%
SMA(IM)	1	1	7	1	10	11%
SMA(MAT)	1	0	7	1	9	0%
SMA(AP)	1	0	0	1	2	0%
SMA(S&T)	0	0	0	0	0	100%
SMA(POL)	0	0	0	0	0	100%
SMA(RH-CM)	0	0	0	0	0	100%
SMA(Svcs EX)	0	0	0	0	0	100%
SMA(DIA)	0	0	0	0	0	100%
COMRENFC	1	0	7	4	12	0%
COIC	11	13	19	34	77	20%
COMFOSCAN	0	1	2	2	5	20%
JAG	0	0	1	1	2	0%
COMPERSMIL	146	99	269	305	809	15%
ARC	22	14	29	23	88	21%
MRC	16	12	15	30	73	21%
ARMÉE C	44	46	26	37	153	42%
EMIS	1	0	1	1	3	0%
VCEMD	13	9	15	38	75	15%
TOTAL AI	257	196	397	481	1331	18%

Schedule S

CANFORGEN 090/20 CMP 045/20 102330Z JUL 20

CAF ADMINISTRATIVE ORDERS AND INSTRUCTIONS ON HATEFUL CONDUCT

UNCLASSIFIED

REFS: A. DAOD 5019-0, CONDUCT AND PERFORMANCE DEFICIENCIES
B. CF MIL PERS INSTRUCTION 01/20, HATEFUL CONDUCT
C. CFAO 19-43, RACIST CONDUCT
D. STRONG, SECURE, ENGAGED: CANADA S DEFENCE POLICY
E. CANADIAN HUMAN RIGHTS ACT
F. QUEEN S REGULATIONS AND ORDERS, ARTICLES 19.14, 19.36 AND 19.44
G. CANFORGEN 016/18 CMP 008/18 012210Z FEB 18, CDS DIRECTION ON PROFESSIONAL MILITARY CONDUCT
H. DAOD 5012-0, HARASSMENT PREVENTION AND RESOLUTION
I. DAOD - SERIES 5019, CONDUCT AND PERFORMANCE DEFICIENCIES
J. DAOD - SERIES 7023, DEFENCE ETHICS
K. THE DND AND CF CODE OF VALUES AND ETHICS
L. DUTY WITH HONOUR: THE PROFESSION OF ARMS IN CANADA
M. EXTERNAL REVIEW INTO SEXUAL MISCONDUCT AND SEXUAL HARASSMENT IN
THE CANADIAN ARMED FORCES, BY MARIE DESCHAMPS, EXTERNAL REVIEW AUTHORITY
N. CDS GUIDANCE TO COMMANDING OFFICERS AND THEIR LEADERSHIP TEAMS
O. CANFORGEN 121/19, DIRECTION AND GUIDANCE FOR TATTOOS
P. CANADIAN CHARTER OF RIGHTS AND FREEDOMS
Q. CDS STATEMENT ON EXTREMISM AND HATEFUL CONDUCT IN THE ARMED FORCES

1. THIS CANFORGEN IS ISSUED TO ADVISE MEMBERS OF THE CAF OF THE LATEST DAOD THAT HAS BEEN ISSUED OUTLINING WHAT HATEFUL CONDUCT IS AND YOUR RESPONSIBILITIES RELATED TO SUCH CONDUCT. AS PART OF THE SERIES OF CONDUCT RELATED DAODS THIS SPECIFIC ORDER, AND ASSOCIATED MILITARY PERSONNEL INSTRUCTION, WILL GUIDE EACH OF YOU IN YOUR BEHAVIOURS AND REQUIRED ACTIONS WHEN CONFRONTED WITH OR WITNESS TO SUCH CONDUCT. THIS IS A FOUNDATIONAL CONDUCT SPECIFIC DAOD THAT WILL ENABLE FUTURE ACTION TO ADDRESS THE SYSTEMIC RACISM AND DISCRIMINATION THAT HAVE PERMEATED OUR RANKS. YOU WILL HAVE TAKEN NOTE OF RECENT COMMUNICATIONS FROM THE CHIEF OF THE DEFENCE STAFF (CDS) AND DEPUTY MINISTER (DM) WITH REGARD TO THE ISSUE OF SYSTEMIC

RACISM IN THE ORGANIZATION AND YOU CAN EXPECT FUTURE SPECIFIC DIRECTION IN THIS REGARD

2. AS THE CHAMPION FOR VISIBLE MINORITIES, THE FUNCTIONAL AUTHORITY FOR DIVERSITY AND INCLUSION POLICY (DAOD 5516 SERIES), AND THE FUNCTIONAL AUTHORITY FOR THE CONDUCT AND PERFORMANCE DEFICIENCIES (DAOD 5019 SERIES), I WANT TO REITERATE THAT THERE IS NO PLACE IN THE CAF FOR DISCRIMINATION, RACISM OR HATEFUL CONDUCT. WHILE WE MAY NOT BE ABLE TO ACT ON BELIEFS THAT SOME INDIVIDUALS HAVE, WE CAN, USING THIS AND OTHER POLICY INSTRUMENTS, ACT ON BEHAVIOURS, AND WE WILL
3. THIS INITIAL POLICY RESPONSE TO HATEFUL CONDUCT IS A COMBINATION OF MODIFICATIONS TO DAOD 5019-0, CONDUCT AND PERFORMANCE DEFICIENCIES AT REF A, AND A NEW CF MIL PERS INSTRUCTION 01/20 HATEFUL CONDUCT AT REF B. CF MIL PERS INSTRUCTION 01/20 CANCELS REF C. YOU EACH SHOULD BE AWARE OF HOW THIS AFFECTS YOU AS MEMBERS OF THE CAF AND, IN PARTICULAR, LEADERS AND CHAINS OF COMMAND MUST INCORPORATE THIS NEW DIRECTION AND INSTRUCTION INTO YOUR RESPONSES TO SUCH CONDUCT. THE CDS HAS STATED ON SEVERAL OCCASIONS THAT HE WILL HOLD PEOPLE TO ACCOUNT WHEN THEY ACT IN AN INAPPROPRIATE WAY, CONSIDERING DUE PROCESS THROUGHOUT. THE CDS HAS ALSO MADE IT CLEAR THAT HE WILL HOLD LEADERSHIP TO ACCOUNT WHEN THEY DO NOT ACT AND ADDRESS THESE IMPORTANT ISSUES FULLY
4. DAOD 5019-0, CONDUCT AND PERFORMANCE DEFICIENCIES, INTRODUCES A CLEAR DEFINITION ON WHAT CONSTITUTES HATEFUL CONDUCT AND A PROHIBITION TO CAF MEMBERS TO ENGAGE IN HATEFUL CONDUCT. IN ADDITION TO THE NEW DEFINITION, THE POLICY REQUIREMENTS AND CONSEQUENCES, SECTIONS HAVE BEEN STRENGTHENED
5. THE CF MIL PERS INSTRUCTION 01/20 PROVIDES GUIDANCE TO COMMANDING OFFICERS AND THE CHAIN OF COMMAND IN ADDRESSING INCIDENTS OF HATEFUL CONDUCT AND PROVIDES FURTHER CLARIFICATION TO CAF MEMBERS AS TO WHAT CONSTITUTES HATEFUL CONDUCT
6. ALL COMMANDING OFFICERS MUST BE AWARE OF THEIR RESPONSIBILITIES TO ADDRESS HATEFUL CONDUCT. THEY MUST BE AWARE OF ALL MANAGEMENT TOOLS AND MECHANISMS ALREADY IN PLACE TO ADDRESS MISCONDUCT AS PROVIDED IN DAOD 5019-2 (ADMINISTRATIVE REVIEW), DAOD 5019-4 (REMEDIAL MEASURES). IN ADDITION, FOLLOWING ANY ALLEGATIONS OF A BREACH OF THE CODE OF SERVICE DISCIPLINE, ACTION CAN BE TAKEN IN THE MILITARY JUSTICE SYSTEM OR CIVILIAN CRIMINAL JUSTICE SYSTEM (AS APPROPRIATE) IN ACCORDANCE WITH APPLICABLE LAW INCLUDING THE NATIONAL DEFENCE ACT, CRIMINAL CODE OF CANADA, QR AND OS ALONG WITH RELATED ORDERS AND POLICIES
7. RECOGNIZING THAT INCIDENTS OF HATEFUL CONDUCT MAY BE COMPLEX, AND WHERE THE CO HAS DETERMINED, ON A BALANCE OF

PROBABILITIES, THAT A MEMBER HAS ENGAGED IN HATEFUL CONDUCT, THEY ARE TO CONSULT DMCA 2 AT (PLUS)(PLUS)DMCA 2 - 2 DACM(AT)CMP DMCA(AT)OTTAWA-HULL TO OBTAIN ADVICE ON APPROPRIATE REMEDIAL MEASURES OR TO DETERMINE IF A NOTICE OF INTENT TO RECOMMEND RELEASE IS WARRANTED. COMMANDING OFFICERS ARE TO ALSO CONSULT WITH THEIR LEGAL ADVISORS TO SEEK ADVICE ON WHETHER DISCIPLINARY ACTIONS WOULD APPLY

8. AS WE MOVE FORWARD, AN INCREASED FOCUS WILL BE ON TRAINING AND EDUCATION INCLUDING ALIGNMENT WITH KEY STRATEGIC DOCUMENTS LIKE DUTY WITH HONOUR AND THE DND CF CODE OF VALUES AND ETHICS
9. TRACKING AND MONITORING OF HATEFUL CONDUCT WILL BE DONE THROUGH THE HATEFUL CONDUCT INCIDENT TRACKING SYSTEM (HCITS) APPLICATION THAT WILL BE ACCESSIBLE THROUGH THE OPERATION HONOUR TRACKING AND ANALYSIS SYSTEM (OPHTAS)
10. CURRENT OPTHAS L1 REPRESENTATIVES WILL ALSO BE DESIGNATED AS HCITS REPRESENTATIVES. AS PART OF POLICY IMPLEMENTATION ACTIVITIES ADDITIONAL TRAINING WILL BE PROVIDED TO ENSURE THAT USERS ARE FAMILIAR WITH THE HCITS APPLICATION
11. THIS TYPE OF OVERSIGHT WILL BE KEY TO UNDERSTANDING THE SCOPE OF THIS BEHAVIOUR AND TO ENABLE ANALYSIS OVER TIME
12. TO LEARN MORE ABOUT HATEFUL CONDUCT AND HOW THE CAF IS ADDRESSING IT OR TO GET ADVICE ON DEALING WITH AN INCIDENT AND OTHER INFORMATION ON HOW AND WHERE TO ACCESS RESOURCES, SUPPORT, AND USEFUL TOOLS, VISIT HTTP://CMP-CPM.MIL.CA/EN/SUPPORT/HATEFUL-CONDUCT.PAGE
13. FOR ENQUIRIES RELATED TO THE INTERPRETATION OF THE HATEFUL CONDUCT POLICY RESPONSE CONTACT THE ARC AS FOLLOWS: (PLUS)CMP ARC - CRA CPM(AT)CMP DGMP(AT)OTTAWA-HULL OR CMPARC.CRACPM(AT)FORCES.GC.CA

Schedule T

CF Mil Pers Instruction 01/20 – Hateful Conduct

1. Identification

1.1 Date of Issue: 2020-07-10

1.2 Date of Last Modification: 2020-12-07

1.3 Application: This Canadian Forces Military Personnel Instruction (CF Mil Pers Instr) applies to officers and non-commissioned members (NCMs) of the Canadian Armed Forces (CAF) of the Regular Force at all times and the Reserve Force when subject to the Code of Service Discipline as per section 60 of the *National Defence Act*.

1.4 Supersessions:

- CFAO 19-43, *Racist Conduct;*
- CANFORGEN 046/16, *Racist Conduct.*

1.5 Approval Authority: Chief of Military Personnel (CMP)

1.6 Enquiries: Administrative Response Centre (ARC)

1.7 Table of Contents: This CF Mil Pers Instruction contains the following topics:

2. Definitions

2.1. Hate incident (*incident haineux***)**

Any allegation of hateful conduct that has been reported to, or documented by the chain of command.

2.2. Hateful conduct (*conduite haineuse***)**

Act or conduct, including the display or communication of words, symbols or images, by a CAF member, that they knew or ought reasonably to have known would constitute, encourage, justify or promote violence or hatred against a person or persons of an identifiable group, based on their national or ethnic origin, race, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics or disability. (Defence Terminology Bank record number 695993)

2.3 Harassment (*harcèlement*)

Improper conduct by an individual, that offends another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act* (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered). Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the individual. Harassment that is not related to grounds set out in the CHRA must be directed at an individual or at a group of which the individual is known by the harassing individual to be a member. (Defence Terminology Bank record number 19050)

2.4 Racism (*racisme*)

Prejudice, discrimination, or antagonism directed against a person or people on the basis of their membership in a particular racial or ethnic group, typically one that is a minority or marginalized.

3. Policy Direction

3.1 Context

Hateful conduct erodes human rights, the Canadian Military ethos, Canadian society's trust in the CAF as representatives of Canada on the world stage and brings discredit to the CAF as an institution. It also undermines CAF security, morale, discipline and cohesion.

3.2 Operating Principles

The CAF is committed to:

a. the ethical principle of respect for human dignity in accordance with the Canadian Military ethos as expressed in *Duty with Honour: Profession of Arms in Canada;*
b. respect for the principle of equality of all people in their relationships with each other, with members of the public, and with all those they come in contact with as set out in the *DND & CF Code of Values and Ethics*;
c. promoting diversity and inclusion in the CAF;
d. supporting all members in an effort to prevent and minimize occurrences of hateful conduct;
e. ensuring hate incidents are addressed as soon as possible through the use of the most appropriate means; and
f. establishing corporate monitoring and tracking of incidents for the purposes of data and analytics.

NOTE: This list is not exhaustive.

3.3 Purpose of Instruction

The purpose of this instruction is to eliminate hateful conduct in the CAF by:

a. clarifying what constitutes hateful conduct;
b. establishing clear expectations with respect to intervention; and
c. providing guidance on the required training and education to prevent, detect and respond to hateful conduct.

3.4 Intervention Framework

The chain of command is directed to take a proactive response to concerns of hateful conduct and does not need a written complaint to investigate any concerns. The framework includes three levels of institutional intervention which are as follows:

Primary Intervention - Prevent

- Providing relevant information through continued training and education to enable CAF members to recognize, avoid and prevent hateful conduct;

Secondary Intervention – Detect

- Identifying vulnerable and at-risk CAF members who are, or may be leaning towards a hateful ideology and, or are exhibiting troubling conduct which may indicate an escalation of conduct as identified in the hateful conduct spectrum (See *Annex A*); and
- Providing appropriate support, professional counselling, and remedial measures in order to promote reintegration in the CAF where applicable; and

Tertiary Intervention - Respond

- Identifying CAF members exhibiting alarming conduct which is or will imminently be hateful conduct; and

- Ensuring that appropriate actions are taken, including referrals to security services, law enforcement, investigation, administrative action, professional counselling and social reintegration efforts.

A fundamental goal at all stages of intervention is to re-establish a system of values that reflects the CAF and the operating principles set out in this instruction.

3.5 Standard of Conduct

Hateful conduct by CAF members is prohibited.

4. Hateful Conduct

4.1 Examples of Hateful Conduct

For greater certainty, hateful conduct includes but is not limited to the following:

a. Engaging in hate propaganda offences as set out in the *Criminal Code of Canada.* Such offences include:
    i. the public incitement of hatred under subsection 319(1) and the willful promotion of hatred under subsection 319(2); or
    ii. advocating or promoting genocide under subsection 318(1)*;*

b. Accessing information that promotes hate on the Defence Information Technology (IT) infrastructure, except as required for CAF work-related purposes;

c. Being a member or otherwise participating in the activities of any organization or group which is known, or ought to be known by the CAF member, to promote or encourage violence, or hatred against a person or any identifiable group, based on a prohibited ground of discrimination, such as:
    i. encouraging membership or participation in the group or organization;
    ii. making, publishing, distributing, displaying, sharing or issuing communications of the group or organization (e.g. including online);
    iii. donating or raising funds for the group or organization;
    iv. speaking or communicating on behalf of the group or organization;
    v. providing assistance in the form of goods, services, equipment or facilities to the group or organization;
    vi. transporting personnel or materiel on behalf of the group or organization;
    vii. displaying on a Defence establishment or in a public place any sign, emblem, symbol, tattoo or other paraphernalia representative of the group or organization;
    viii. attending meetings or rallies for the purpose of supporting the group or organization; and
    ix. running for or holding office in the group or organization.
d. Making statements, sharing or endorsing information verbally, in writing, or online; that promotes violence or hatred against a person or any identifiable group based on a prohibited ground of discrimination;
e. Acts of violence or intimidation stemming from hate against a person or any identifiable group based on a prohibited ground of discrimination; and
f. Displaying tattoos that communicate, constitute, encourage, justify or promote

violence or hatred against a person or any identifiable group based on a prohibited ground of discrimination.

4.2 Tattoos

According to CANFORGEN 121/19*, Direction and Guidance for Tattoos*, CAF members are prohibited to have or acquire a tattoo that they know or ought to know:

a. is connected to criminal activities;
b. promotes and/or expresses, on the basis of a prohibited ground of discrimination as defined in the *Canadian Human Rights Act* (CHRA), hatred, violence, discrimination or harassment; or
c. promotes and/or expresses racism, sexism, misogyny, xenophobia, homophobia, ableism, or sexually explicit material.

5. Enrolment

5.1 Refusal of Enrolment into the CAF

In accordance with QR&O article 6.01, *Qualifications for Enrolment*, a person must demonstrate good character in order to be eligible for enrolment into the CAF. Individuals who have been enrolled and subsequently after investigation, are found, on a balance of probabilities, to have previously engaged in conduct that meets the definition of hateful conduct or who have not disclosed information about their conviction of an offence motivated by hatred on the basis of a prohibited grounds of discrimination, may face corrective measures up to release. The appropriate measures will be assessed in accordance with DAOD 5019-4, *Remedial Measures*. Release will be considered after an administrative review (AR) is conducted in accordance with DAOD 5019-2, *Administrative Review*. If release is considered, the member may be released from service according QR&O Chapter 15, *Release*, under provision 15.21(1)(b), 15.22(1)(b), or 15.32(1)(b), as applicable.

NOTE: Serving CAF members will be subject to the same scrutiny on subsequent security clearance updates.

6. Education and Training

6.1 Education and Training

Awareness of the CAF's commitment to prevent and address hateful conduct requires education and training. All applicants for enrolment or re-enrolment must be informed that the CAF does not tolerate hateful conduct. Awareness training and activities on the CAF policy of the prohibition for hateful conduct must be provided to CAF members.

Commanding Officers (COs) or their delegates, must deliver hateful conduct training and education on an annual basis using training resources provided by the Director of the Defence Ethics Program. This training and education should aim to achieve the following objectives:

a. Increase awareness of what behaviours constitute hateful conduct and possible warning signs;

b. Promote discussion of any hateful conduct or conflict situations that may occur;
c. Promote positive behaviours that are in line with *Duty with Honour: the Profession of Arms in Canada*;
d. Instruct CAF members on their responsibilities under this instruction;
e. Identify ways of resolving conflicts where hateful conduct may be involved; and
f. How to access resources.

6.2 Information to be Provided to CAF Members

The CAF policy on hateful conduct must be clearly articulated to:

a. all applicants upon enrolment or re-enrolment in the CAF;
b. CAF members during recruit and basic officer training;
c. CAF members on occupation qualification training;
d. CAF members on leadership courses; and
e. CAF members pre-deployment and post-deployment.

7. Hate Incident Reporting

7.1 Reporting of hate incidents by CAF Members

To ensure that hate incidents are addressed in a timely manner, the chain of command must be made aware of hate incidents involving a CAF member, both Regular or Reserve. In accordance with QR&O article 19.56, *Report of Arrest by Civil Authority*, QR&O subparagraph 4.02(1)e, *General Responsibilities of Officers* and QR&O paragraph 5.01e, *General Responsibilities of Non-Commissioned Members*; every CAF member is required to report to the proper authority as applicable:

a. a hate incident of another CAF member whether performed individually or in association with a hate group; or
b. their own arrests by a civil authority.

The CAF member can comply with this requirement by reporting to:

a. the CAF member's CO through the chain of command;
b. the military police; or
c. Assistant Deputy Minister (Review Services) (ADM(RS)), Director Special Examinations and Inquiries.

An officer commanding a command must report hateful conduct, suspected or confirmed, in accordance with QR&O article 4.11, *Reports of Unusual Incidents.*

7.2 Notification to the Chain of Command

The chain of command may become aware of a hate incident through other means which include:

a. A recourse mechanism that considers whether a member has engaged in hateful conduct such as, an Application for Redress of Grievance or a Harassment complaint;
b. A direct observation;

c. A media report;
d. A report made by a member of the public;
e. By ADM(RS) during an investigation of wrongdoing; or
f. communication with civilian or military police officials.

NOTE: The CO or chain of command must ensure the hate incident is appropriately addressed irrespective of how it was reported.

7.3 Chain of Command Considerations

Upon becoming aware of a hate incident, the CO or an officer in the chain of command, must determine whether they can adequately deal with the matter, in accordance with QR&O article 4.02. If an officer determines that they cannot deal adequately with the matter, they are not to conduct an investigation until it is clear that all police with jurisdiction have declined to investigate. The determination of whether the CO or officer in the chain of command can adequately resolve the matter involves an exercise of discretion. It requires that an officer act in good faith in order to achieve the strategic intent of this policy. The CO or officer in the chain of command is encouraged to consult their legal advisors where the incident is complex. All relevant factors must be examined, including but not limited to the following:

a. safety concerns such as possible reprisals against the individual who reported the hate incident or the alleged victim of that hate incident;
b. the need to ensure the operational readiness and effectiveness of the CAF;
c. the safety of CAF members and the public;
d. the gravity of the hate incident identified;
e. the disciplinary interests of the respondent's unit; and
f. whether the resources are in place to implement the necessary measures.

NOTE: Where and when a unit disciplinary investigation is deemed necessary in accordance with article QR&O 106.02, *Investigation Before Charge Laid*, such an investigation may only be conducted once it is determined that all police with jurisdiction to investigate the matter have declined to investigate. Before proceeding to investigate, the Unit Legal Advisor shall be contacted.

Further, given the gravity of such incidents, the impacts on affected individuals and unit cohesion in accordance with article QR&O 101.09, *Relief from Performance of Military Duty – Pre and Post Trial*, the designated authority shall consider the relief from performance of military duty of a CAF member when the investigation is being conducted by police with jurisdiction to investigate. In so doing, the designated authority should consider relief of a member only after concluding that other administrative measures are inadequate in the circumstances. In determining whether to relieve a member, an authority must balance the public interest, including the effect on operational effectiveness and morale, with the interests of the member. A commanding officer must monitor each case to ensure that appropriate action is taken if there are changes in the circumstances upon which the decision to relieve a member was based.

In accordance with article QR&O 101.09, prior to determining whether to relieve an officer or non-commissioned member from the performance of military duty while an investigation is ongoing, the authority will provide the member with the following:

a. the reason why the decision to relieve the member from the performance of military duty is being considered; and

b. a reasonable opportunity to make representations.

The authority who relieves an officer or non-commissioned member from the performance of military duty will, within 24 hours of relieving the member from the performance of military duty, provide the member with written reasons for the decision.

7.4 Reprisals

QR&O article 19.15, *Prohibition of Reprisals*, prohibits the taking of reprisals against any person who has, in good faith, reported to a proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to the Code of Service Discipline, made a disclosure of wrongdoing or cooperated in an investigation carried out in respect of such a report or disclosure. The CO must investigate any reports of threatening, intimidating, ostracizing, or discriminatory behaviour taken in response to a hate incident report. Any CAF member participating in such behaviour will be subject to administrative or disciplinary action or both.

7.5 Action by the Canadian Forces Provost Marshal

The CO of the affected parties must be notified of any hate incident that has been reported to the local MP unit except where notifying the CO would present a real and significant risk to:

a. the integrity of the investigation; or
b. the safety and/or welfare of the parties involved.

Following a hate incident notification, the local MP unit must conduct an initial assessment and proceed to investigate if required. The local MP unit may obtain assistance from the Canadian Forces National Investigation Service (CFNIS).

8. Guiding Action

8.1 Action by a CO following a Hate Incident Notification

A CO must:

a. conduct an assessment to determine if the information provided by the report or notification of a hate incident is factual and accurate;
b. as required, consult their human resource advisor, adjutant or equivalent to obtain information concerning applicable military personnel policies, directives and resources;
c. consult their Unit Legal Advisor, as required, to obtain advice throughout the process;
d. ensure hate incidents are captured in the Hateful Conduct Incident Tracking System (HCITS) within 48 hours;
e. immediately submit to the Canadian Forces Integrated Command Centre (CFICC) and the Director Professional Military Conduct (Operation HONOUR) (DPMC-OpH) (Info to DMCA 2), a Significant Incident Report (SIR) as outlined in DAOD 2008-3, *Issue and Crisis Management*, when the hate incident involves the following:
    - acts by formation commanders, COs, and their chief petty officers 1st Class/chief warrant officers; or
    - a CAF member has been placed under custody or charges have been laid; or

- when there is potential for the nature of the situation to develop significant media interest and, or could cause discredit to the CAF; and
- a breach of this policy that prevents Commanders from achieving their mission.

f. consider any appropriate administrative action including, if necessary, temporarily relieving the accused perpetrator from the performance of military duty until the appropriate investigation or follow up has concluded. As a minimum Commanders shall consider relieving the member from supervisory, instructional or command positions, in order to ensure safety and security to the unit and to all other CAF members.

NOTE 1: Additional information on chain of command responsibilities is set out in regulation.

NOTE 2: The chain of command must follow the process set out in the policy governing the type of misconduct being examined. Where the hate incident involves a civilian, the CO should refer to DAOD 5016-0, *Standards of Civilian Conduct and Discipline*, and liaise with their Labour Relations Advisor for guidance.

8.2 Administrative Action and Disciplinary Action

When a determination is made that the hate incident meets the definition of hateful conduct, a spectrum of administrative and disciplinary actions may be taken against the member. Consultations may be required with legal, military police and career management subject-matter experts to determine the best approach. Where this approach involves secondary or tertiary intervention, all potential resources, both internal and external to the CAF should be explored. (for example, the Canadian Forces Health Services Group or the Chaplain General).

The CO may pursue one or more of the following options, as appropriate:

Options	CO Actions
Administrative Actions	▪ Initiate an AR under DAOD 5019-2*;* ▪ Issue remedial measures in accordance with DAOD 5019-4; and ▪ Where a CO recommends release, the file is to be forwarded to DMCA for completion of the AR. ▪ As context requires, forward the Commander's Critical Information Requirements (CCIR) to the Personnel Security Screening Officer (PSSO).
Disciplinary Actions	▪ Upon becoming aware of a hate incident, determine whether they can adequately deal with the matter, in accordance with QR&O article 4.02. ▪ If unable to deal adequately with the matter, contact the military police. ▪ If police with jurisdiction initiate an investigation of the hate incident, consider relief from performance of military duty for the CAF member in accordance with article QR&O 101.09, *Relief from Performance of Military Duty – Pre and Post Trial*. ▪ If all police with jurisdiction to investigate the matter have declined to investigate, conduct – if appropriate – a unit disciplinary investigation in accordance with article QR&O 106.02, *Investigation Before Charge Laid*, having first contacted the Unit Legal Advisor.

Criminal Investigation	▪ Contact the military police.

8.3 Service Tribunal or Civilian Court Proceeding

If a CAF member is charged with an offence with respect to a hate incident, the CO must obtain and keep on file as part of their investigation, upon the conclusion of the service tribunal or criminal court proceeding, the documents listed as follows:

If the CAF member is …	the CO must obtain …
• found guilty,	• Any documented order issued by the court which may include but are not limited to the following: ○ sentencing order or court transcript; ○ probation order, if any; ○ prohibition order, if any; and ○ certificate of conviction and conduct sheet (see QR&O article 19.61, *Certificate of Conviction*, and QR&O article 19.62, *Action Following Conviction by Civil Authority*).
• discharged or found not guilty,	• court transcript; and • the decision of the court.

8.4 Administrative Action – Post-Disciplinary Proceeding

If the member was found not guilty of a charge, was discharged, or charges were not proceeded with, a review of the facts of the case is still required by the chain of command to determine whether there is reliable evidence that establishes on a balance of probabilities that hateful conduct has occurred. A guilty finding is not required to recommend a release or impose other administrative actions.

Notwithstanding any other provision of DAOD 5019-2 or 5019-4 and in order to ensure consistent CAF-wide application of this instruction, the CO of any member convicted of an offence motivated by hate either by summary trial, court martial or criminal court—must consult DMCA 2, at, ++DMCA 2 - 2 DACM@CMP DMCA@Ottawa-Hull, to determine if a Notice of Intent (NOI) to recommend release should be issued by the unit CO. DMCA 2 will conduct an AR in accordance with DAOD 5019-2 if a NOI to recommend release is issued.

8.5 Privacy Considerations

The CAF must only collect personal information for which it has a demonstrable need. All parties involved in the handling of personal information related to hateful conduct must limit the discussion and dissemination of this information to those who have a need to know. If possible, personal information must be collected directly from the individual to whom it relates. All personal information collected, used, disclosed and retained by the CAF must be dealt with in accordance with the *Privacy Act*. Commands at all levels must treat information regarding hateful conduct in a discreet and sensitive manner and in accordance with the proper handling of personal information, in accordance with DAOD 1002-0, *Administration of the Privacy Act*.

9. Tracking Hateful Conduct

9.1 Tracking for NDHQ

To monitor and assess the effectiveness of initiatives, training and communications products to prevent and address hateful conduct in the CAF, hate incidents are to be reported and tracked. Subsequent tracking after the submission of the SIRs must use the HCITS. All hate incidents must be tracked irrespective of whether a SIR has been submitted. Once a hate incident has been concluded or resolved, the CO must ensure all records pertaining to the member's conduct, including the final decision, is distributed to the office responsible for the maintenance of that member's personnel record file. It is important that the CAF personnel record file accurately reflect the CAF member's service in relation to any disciplinary, criminal and administrative action related to hateful conduct. Additional information with respect to procedures for maintaining permanent records is set out in DAOD 5050-0, *Canadian Forces Personnel Records*.

10. Responsibilities

10.1 Responsibility Table

The following table identifies the authorities associated with this instruction:

The …	is or are responsible for …
Level one (L1) advisors and commanders of commands	▪ taking appropriate action in respect to non-compliance of the CO or unit in the implementation of this instruction; and ▪ ensuring that education and training in respect of hateful conduct is provided for occupation qualification training for CAF members.
Commander, Canadian Defence Academy	▪ ensuring that education and training in respect of hateful conduct is provided in common basic military qualification training and CAF common leadership programs for CAF members.
Canadian Forces Provost Marshal	▪ conducting an initial assessment of a hate incident reported to MP; ▪ when there is reason to believe that a service offence may have been committed, an investigation shall be conducted by MP or referred back to the unit for a Unit Disciplinary Investigation if more appropriate to the seriousness or gravity of the incident; ▪ notifying the CO of the subject of any MP investigation into hateful conduct unless the exceptions identified in paragraph 7.5 apply; ▪ upon request, providing the DMCA with all pertinent information (as appropriate) pertaining to a MP investigation which has not been provided by the IA of an AR.
Commander, Canadian Forces Recruiting Group	▪ informing CAF applicants who are processed by the Canadian Forces Recruiting Group prior to enrolment or re-enrolment in the CAF of the CAF policy on discrimination, harassment, professional conduct and hateful conduct; and ▪ ensuring that persons are aware of the requirement to remove any tattoo that would be prohibited under this instruction before enrolment set out in current tattoo direction and guidance (see References).

Comds responsible for Reserve Force recruiting	▪ informing applicants prior to enrolment in the CAF of the CAF policy on discrimination, harassment, professional conduct and hateful conduct; and ▪ ensuring that applicants are aware of the requirement to remove any tattoo that would be prohibited under this instruction before enrolment set out in current tattoo direction and guidance (see References).
Director General of Defence Security	▪ Reviewing the CCIR with respect to a hate incident as it relates to the member's loyalty and reliability; and ▪ Liaising with domestic personnel security agencies as required.
DMCA	▪ conducting ARs in accordance with DAOD 5019-2 for CAF members in respect to hateful conduct if the member's CO recommends release.
DMPPI	▪ maintaining, evaluating and updating this instruction; and ▪ reviewing of data provided to DMPPI on hateful conduct disclosed in charges tried by summary trial or court martial.
COs	▪ preventing hate incidents; ▪ taking immediate steps to gather facts and to address any hate incident report; ▪ reporting hate incidents through a centralized reporting mechanism; ▪ addressing hateful conduct; ▪ delivering education and training; ▪ promoting positive behaviours; and ▪ complying with this instruction.
CAF members	▪ complying with and promoting the awareness of this instruction; and ▪ reporting hate incidents.

11. References

11.1 Source References

- *Canadian Charter of Rights and Freedoms*
- *Criminal Code*
- *Canadian Human Rights Act*
- *National Defence Act*
- QR&O article 1.03, *Persons Subject to QR&O*
- QR&O article 1.04, *Words and Phrases – How Construed*
- QR&O article 4.02, *General Responsibilities of Officers*
- QR&O article 4.11, *Reports of Unusual Incidents*
- QR&O article 5.01, *General Responsibilities of Non-Commissioned Members*
- QR&O Chapter 6, *Enrolment and Re-engagement*
- QR&O article 15.01, *Release of Officers and Non-Commissioned Members*
- QR&O Chapter 19, *Conduct and Discipline*
- QR&O article 101.09, *Relief from Performance of Military Duty – Pre and Post Trial*
- QR&O Chapter 106, *Investigation of Service Offences*
- DAOD 1002-0, *Administration of the Privacy Act*
- DAOD 2008-3, *Issue and Crisis Management*

- DAOD 5002-1, *Enrolment*
- DAOD 5012-0, *Harassment Prevention and Resolution*
- DAOD 5016-0, *Standards of Civilian Conduct and Discipline*
- DAOD 5019-0, *Conduct and Performance Deficiencies*
- DAOD 5019-2, *Administrative Review*
- DAOD 5019-4, *Remedial Measures*
- DAOD 7024-0, *Disclosure of Wrongdoings in the Workplace*
- A-DH-265-000-AG-001, *Canadian Armed Forces Dress Instructions*
- *DND and CF Code of Value and Ethics*
- *Duty with Honour: the Profession of Arms in Canada*
- *CDS Guidance to Commanding Officers and their Leadership Teams*
- *National Defence Security Orders and Directives*
- CANFORGEN 121/19 CMP 068/19*, Direction and Guidance for Tattoos*

11.2 Related References

- *Privacy Act*
- *Employment Equity Act*
- *National Defence Act*
- QR&O Chapter 7, *Grievances*
- DAOD 5516-0, *Human Rights*
- DAOD 5516-4, *Restrictions of Duty*
- DAOD 6002-2, *Acceptable Use of the Internet, Defence Intranet, Computers and Other Information Systems*
- DAOD 7023-1, *Defence Ethics Programme*
- CANFORGEN 012/15 CMP 006/15, *CDS Designated Release Authorities*
- CANFORGEN 016/18 CMP 008/18 *, CDS Direction on Military Conduct*
- *CDS Designated Release Authorities – Regular Force*, 16 January 2015
- *CDS Designated Release Authorities – Reserve Force*, 16 January 2015
- Department of Justice Website, Bill C-75
- Canadian Forces Member Assistance Program

Annex A – Escalation of Conduct and Escalation of Response