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BY E-MAIL

May 14, 2021

Hon. Martine Turcotte, Chair
Hon. Margaret Bloodworth and **Hon. Peter Griffin**,
Commissioners
Judicial Compensation and Benefits Commission
8th Floor
99 Metcalfe Street
Ottawa, ON K1A 1E3

RE: Requested Documents

Dear Ms. Chairperson, Commissioner Bloodworth & Commissioner Griffin:

1. At the conclusion of the Quadrennial Commission hearing on May 11, 2021, Chairperson Turcotte requested the following.

   i. the "terms of reference" for the Third Independent Review of the *National Defence Act* ("*Fish Inquiry*")
   ii. submission made by the Court Martial Appeal Court of Canada ("CMACC").

2. The following are attached:

   - **TAB A:** Letter from National Defence Deputy Minister to Chief Justice Bell, dated October 22, 2020
   - **TAB B:** National Defence Ministerial Direction dated November 5, 2020 re *Fish Inquiry*
   - **TAB C:** Submission by CMACC, dated January 8, 2021.

Fish Inquiry

3. The National Defence Deputy Minister describes the purpose conducted pursuant to s. 273.601 of the *National Defence Act* as a "review of certain provisions of the NDA and their operation". The focus is squarely on the *National Defence Act* and not Part I of the *Judges Act*. **TAB A**.

National Defence Terms of Reference, Ministerial Direction

4. The "scope of the review" does not include reference to legislation beyond the four corners of the *National Defence Act*. The mandate is described by the Minister of National Defence:

> "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 273.061(1) of the *NDA*." **TAB B**.

5. Section 273.601 of the *National Defence Act* provides:

> **Review**
> 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
> (d) sections 251, 251.2, 256, 270, 272, 273 to 273.5 and 302.
>
> **Report to Parliament**
> (2) The Minister shall cause a report of a review to be laid before each House of Parliament within seven years after the day on which this section comes into force, and within every seven-year period after the tabling of a report under this subsection.
>
> **Amending legislation**
> (3) However, if an Act of Parliament amends this Act 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.

6. No statutory basis for review of judicial benefits. No specific authorization to address Part I of the *Judges Act*.

7. CMACC is described in Division 9 of Part III of the *National Defence Act*. As such, the *Fish Inquiry* is authorized to address some aspects affecting operational independence concerns raised by CMACC in the military law context.

8. While it is possible the *Fish Inquiry* may refer to some concerns raised by CMACC in the context of the *National Defence Act*, there is no specific authority to address ss. 28 or 31.1 of the *Judges Act*.

9. Concerns raised by CMACC before this Honourable Commission are hence only partially captured within the scope of review outlined in s. 273.601 of the *National Defence Act*.

CMACC Submission to the Fish Inquiry

10. Paras. 18-19 set out the concern that the combined application of the *National Defence Act* and the *Judges Act* leads to judicial independence concerns, both individual and institutional, requiring a legislative change to the *National Defence Act*. **TAB C**.

11. While CMACC has submitted some concerns to the *Fish Inquiry*, as legislative changes to the *National Defence Act* are requested, no recommendations were submitted re the *Judges Act*, including the effect of its structural concerns on judicial benefits. This Honourable Commission is the proper forum for examining these issues.

12. As Justice Scanlan expressed at the Hearings on Tuesday, May 11 , 2021, "So where is the proper forum I ask? And there may be a slight overlap between the two bodies, but I suggest to you that [the *Fish Inquiry*] has no authority within the *Judges Act*. And even if he was to make recommendations that should not exclude the jurisdiction of this Commission. This Commission is the right place, the right body to make recommendations that could very easily fix this problem."

Request

13. The *Fish Inquiry* may make recommendations (<u>only</u> to the Minister of National Defence) with respect to concerns pertaining to the *National Defence Act*. The Minister is fully within his rights to show the report to nobody, not to show to Cabinet colleagues; within his rights to place the report at the bottom of a deep drawer. Such is not the case with the Report from this Honourable Commission: constitutionally, lands on the Government's desk; constitutionally, has to be paid attention to; constitutionally, has to be dealt with. This Honourable Commission is Supreme Court-backed. The *Fish Inquiry* is not.

14. The *Fish Inquiry* clearly does not have jurisdiction to address the effect of judicial independence concerns raised herein on judicial benefits. While there may be some minimal overlap between the military jurisdiction of the *Fish Inquiry* and the judicial jurisdiction of this Honourable Commission, this does not and should not exclude the jurisdiction of this Honourable Commission as regards judicial matters.

Yours very truly,

Eugene Meehan Q.C.

Supreme Advocacy LLP

per Eugene Meehan, Q.C. &
Cory Giordano

cc. Chief Justice Bell
Justice Scanlan
CMACC

National Defence
Deputy Minister

National Defence Headquarters
Ottawa, Ontario
K1A 0K2

Défense nationale
Sous-ministre

Quartier général de la Défense nationale
Ottawa, (Ontario)
K1A 0K2

22 October 2020

The Honourable B. Richard Bell
Chief Justice
Court Martial Appeal Court of Canada
Ottawa, Ontario
K1A 0H9

Dear Chief Justice Bell,

As you are aware, section 273.601 of the *National Defence Act* (NDA) requires the Minister of National Defence (MND) to cause an independent review of certain provisions of the NDA and their operation. Under subsection 273.601(2) of the NDA, the next report of review is expected to be tabled in Parliament by June 2021. This will be the third such independent review. This third review (IR3) is to commence in late October, 2020.

The provisions subject to review are listed in subsection 273.601(1) of the NDA, and include those relating to military justice (including the Code of Service Discipline), the Canadian Forces grievance process, the Military Grievances External Review Committee, the Canadian Forces Provost Marshal, and the Military Police Complaints Commission.

The importance of independent reviews in the ongoing development of the military justice system was recently recognized by the Supreme Court of Canada in *R. v. Stillman*: "[t]he continuing evolution of [the military justice] system is facilitated by the periodic independent reviews mandated by s. 273.601 of the NDA, ensuring the system is rigorously scrutinized, analyzed, and refined at regular intervals."

The first independent review was completed by the late Right Honourable Antonio Lamer, retired Chief Justice of Canada, in 2003. Former Chief Justice Lamer's report made 88 recommendations: 57 pertaining to military justice, 14 regarding the Canadian Forces Provost Marshal and the Military Police Complaints Commission, and 17 concerning the Canadian Forces grievance process.

The second independent review was completed by the Honourable Patrick LeSage, retired Chief Justice of the Ontario Superior Court of Justice, in 2011. Former Chief Justice LeSage's report included 55 recommendations: 35 pertaining to military justice,

three specific to Military Police, six regarding the Military Police Complaints Commission, and 13 concerning the Canadian Forces grievance process.

In previous reviews, Independent Review Authorities (IRA)s met with, and as appropriate, sought the views of a variety of stakeholders, including the Office of the Chief Military Judge, during the course of their review. Accordingly, the next IRA may wish to seek a similar provision of views in the course of this review for IR3. Therefore there may be a comparable opportunity for such meetings over the course of this review.

Once the Minister of National Defence has signed the Ministerial Direction for the IR3, it will be forwarded to you for information. As with the past two independent reviews, the IR3 may result in significant legislative, regulatory, and/or policy changes. Should you have any questions on the conduct of the review process please contact Ms. Marta Mulkins, the Executive Director of the Departmental Litigation Oversight team of DND at Marta.Mulkins2@forces.gc.ca.

Sincerely,

Jody Thomas
Deputy Minister

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

DIRECTIVE MINISTÉRIELLE – TROISIÈME EXAMEN INDÉPENDANT

Préambule

L'article 273.601 de la *Loi sur la défense nationale* requiert que le ministre fasse procéder à un examen indépendant des dispositions ci-après et de leur application :

a) les articles 18.3 à 18.6;

b) les articles 29 à 29.28;

c) les parties III et IV;

d) les articles 251, 251.2, 256, 270, 272, 273 à 273.5 et 302.

Il s'agira du premier examen indépendant à procéder conformément à cette disposition.

Comme pour le deuxième examen indépendant, effectué conformément à l'article 96 du chapitre 35 des Lois du Canada (1998), pour que l'examen des dispositions législatives et réglementaires, ainsi que des politiques et pratiques administratives soit efficace, il est préférable que l'examen soit effectué lorsque les dispositions, les politiques et les pratiques en question ont été mises en œuvre et qu'il existe des antécédents opérationnels adéquats sur lesquels fonder un examen.

La *Loi modifiant la Loi sur la défense nationale et apportant des modifications connexes et corrélatives à d'autres lois* (« la Loi »), anciennement le projet de loi C-77, apportera plusieurs modifications au code de discipline militaire, à la partie III de la *Loi sur la défense nationale.*

La Loi a reçu la sanction royale le 21 juin 2019. Certaines dispositions de la Loi sont entrées en vigueur lors de la sanction royale.

Les dispositions restantes de la Loi entreront en vigueur à une date ultérieure de même que les dispositions connexes modifiant les *Ordonnances et règlements royaux applicables aux Forces canadiennes*.

Afin de maximiser l'utilité du troisième examen indépendant, il faudrait qu'il soit axé sur les dispositions législatives et réglementaires, ainsi que sur les politiques et pratiques administratives qui ont déjà été mises en œuvre, et qui disposent d'antécédents opérationnels adéquats sur lesquels fonder un examen.

Nomination et portée de l'examen

1. Conformément à l'article 4 et à l'article 273.601 de la *Loi sur la défense nationale* (LDN), j'établis par la présente une autorité externe, appelée autorité de l'examen indépendant prévu à l'article 273.601 de la LDN (ci-après « l'autorité du troisième examen indépendant »), et je nomme l'honorable Morris J. Fish, résident à Montréal (Québec), à titre d'autorité du troisième examen indépendant.

2. L'autorité du troisième examen indépendant doit procéder à un examen indépendant conformément à l'article 273.601 de la LDN et faire rapport des résultats de cet examen directement au ministre de la Défense nationale. Les dispositions assujetties à l'examen sont énumérées au paragraphe 273.601(1) de la LDN.

Autorité et obligations

3. L'autorité du troisième examen indépendant peut :

   a. exercer ses fonctions au moment et à l'endroit au Canada que l'autorité du troisième examen indépendant juge opportuns; et

   b. adopter les procédures et méthodes qu'elle juge utiles à l'exercice de son mandat.

4. L'autorité du troisième examen indépendant peut consulter sans restriction, sous réserve des exigences et limitations des lois et règlements applicables :

   a. les employés du ministère de la Défense nationale;

   b. les officiers et militaires du rang des Force armées canadiennes;

   c. les membres et le personnel du Comité externe d'examen des griefs militaires;

   d. les membres et le personnel de la Commission d'examen des plaintes concernant la police militaire;

   e. l'Ombudsman du ministère de la Défense nationale et des Forces armées canadienne et son personnel; et

   f. tout document pertinent à l'examen que détient le ministère de la Défense nationale et les Forces armées canadiennes.

5. L'autorité du troisième examen indépendant doit avoir à sa disposition, ou peut retenir les services du personnel et des conseillers dont elle aura de besoin pour son examen,

aux taux de rémunération qui peuvent être approuvés conformément aux règlements et politiques du gouvernement du Canada.

6. L'autorité du troisième examen indépendant doit :

a. Présenter au ministre de la Défense nationale un rapport final de son examen dans les deux langues officielles. Le rapport doit pouvoir être divulgué au public et ne doit donc pas inclure d'informations soumises à la sécurité et à d'autres restrictions pertinentes, y compris celles imposées par les lois et règlements régissant les informations relatives à la défense nationale et à la sécurité nationale ainsi qu'à la protection de la vie privée ou protégées par le secret professionnel de l'avocat;

b. fournir un rapport final qui comprend la méthodologie de son examen, ses conclusions, analyses, limites et recommandations; et

c. remettre les dossiers et documents au bureau du ministre de la Défense nationale dès qu'il sera raisonnablement possible de le faire après la présentation du rapport final.

Signé à Ottawa, en Ontario, ce 05 jour de 11 2020.

L'honorable Harjit Sajjan
Ministre de la Défense nationale

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

January 8, 2021

The Honourable Morris J. Fish
c/o Mr. Jean-Philippe Groleau
Davies Ward Phillips & Vineberg LLP
1501 McGill College, Suite 2600
Montreal, Quebec
H3A 3N9

Honourable Fish,

RE: Third Independent Review of the *National Defence Act* - Submissions on behalf of the Court Martial Appeal Court of Canada

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As Chief Justice of the Court Martial Appeal Court of Canada, I wish to congratulate and commend you and your team for undertaking this Third Independent Review of the *National Defence Act*. I respectfully share with you the following comments and observations relevant to the scope and mandate of your Review.

The Court Martial Appeal Court of Canada was established pursuant to the *National Defence Act* in 1959 (see section 234(1)). It is an appellate court comprised of civilian judges and performs the function of a superior court of appellate criminal jurisdiction within the military justice system. It, along with the Supreme Court of Canada, plays a pivotal role in the military justice system by providing an independent and impartial appeal mechanism available to all parties.

The Court benefits from a pool of highly qualified judges appointed from trial and appellate courts across the country. Approximately a third of the Court Martial Appeal Court of Canada judges are from provincial or territorial superior courts (trial or appeal level) with significant criminal law expertise. The Court has no backlog and has a high number of judges that it can rely upon to hear and dispose of cases quickly and efficiently.

The provisions of Division 9 of Part III of the *National Defence Act* set out rights of appeal, the powers of the Court Martial Appeal Court of Canada and the appointment process for the judges of the Court.

I. Overview

1. Since the earliest days of organized military forces in post-Confederation Canada, a separate system of military justice has operated parallel to the civilian justice system. Tailored to the unique needs of the Armed Forces, this system's processes "assure the maintenance of discipline, efficiency and morale of the military". The safety and well-being of Canadians depends considerably upon the willingness and readiness of a force of men and women to defend against threats to the nation's security (*R. v. Moriarity*, 2015 SCC 55, *R. v. Stillman,* 2019 SCC 40, *R. v. Généreux*, [1992] 1 SCR 259).

2. The foundation of Canada's military justice system is the Code of Service Discipline contained in Part III of the *National Defence Act*. It is an essential ingredient of service life that defines the standard of conduct expected of military personnel and certain civilians. The categories of persons who are subject to the Code of Service Discipline are listed in section 60: officers and non-commissioned members of the regular or special forces, officers and non-commissioned members of the reserve force when the member is on active service, persons who accompany a unit of the Canadian forces while the unit is on service, and others (*R. v. Stillman*, 2019 SCC 40, *R. v. Généreux*, [1992] 1 SCR 259).

3. Special service tribunals, rather than the ordinary courts, have been given jurisdiction to try alleged breaches of the Code of Service Discipline. The Supreme Court of Canada has recognized that recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. The Code of Service Discipline would be less effective if the military did not have its own courts to enforce the code's terms (*R. v. Stillman*, 2019 SCC 40, *R. v. Généreux*, [1992] 1 SCR 259). A swift response to misconduct enhances discipline, efficiency, and morale in the military (see *Stillman* at para. 104). The only exceptions prohibit military from trying a person for the offences of murder, manslaughter and those under sections 280 to 283 of the *Criminal Code* if committed in Canada. There is no subject matter limitation for offences committed abroad.

4. Sentencing in the military justice system is guided by objectives that are unique to the military environment. These objectives are (a) "to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale"; and (b) "to contribute to respect for the law and the maintenance of a just, peaceful and safe society" (*R. v. Stillman*, 2019 SCC 40). These special sentencing objectives were recently considered by the Court Martial Appeal Court of Canada in *R. v. Darrigan,* 2020 CMAC 1.

II. Need for an expansive definition of the military justice system

5. There are two types of trial proceedings in the military justice system: summary trials and court martial proceedings.

a. A summary trial permits - as a general rule - a service offence to be tried at the unit level by a commanding officer, delegate of a commanding officer, or superior commander. Summary trial is the predominant form of proceedings for less serious offences.

b. Courts martial are formal military courts presided over by independent military judges. These courts are similar in nature to civilian criminal courts and are designed to deal with offences that are more serious in nature. There are two types of courts martial: (a) Standing Courts Martial presided over by a military judge sitting alone and (b) General Courts Martial which consist of a military judge and a panel of five members of the military.

6. Too often, descriptions of the military justice system disregard the civilian oversight offered by the Court Martial Appeal Court of Canada, the Supreme Court of Canada, the Federal Court and superior courts of a Province or Territory.

7. The military justice system is not limited to military judges, the Judge Advocate General, summary trials, General Courts Martial and Standing Courts Martial. The Federal Court, superior courts of a Province, the Court Martial Appeal Court of Canada and the Supreme Court of Canada need also be considered participants in the "military justice system" as it is currently constituted:

a. the Court Martial Appeal Court of Canada has an unlimited territorial jurisdiction; it may hear cases in Canada or abroad. As previously mentioned, it essentially performs the function of a provincial superior court of appellate criminal jurisdiction. The individual or the Minister of National Defence (representing the Crown) may appeal from decisions rendered by courts martial. The Court Martial Appeal Court of Canada has powers of disposition similar to those of any civilian criminal appellate court. It may dismiss an appeal, set aside a conviction, order a new trial, substitute a finding of guilty on a charge other than the one for which an accused was found guilty at Court Martial, or substitute for any sentence imposed by a court martial by a sentence it considers fit. In addition, pursuant to subsection 165.31(1) of the *National Defence Act*, the Court Martial Appeal Court of Canada has jurisdiction to appoint a Military Judges Inquiry Committee to commence an inquiry in relation to a complaint filed against a military judge as to whether that judge should be removed from office.

b. The Supreme Court of Canada hears appeals from conviction, acquittal or sentence, as of right, where a judge of the Court Martial Appeal Court of Canada has dissented on a question of law. In all other cases, leave to appeal is required.

c. The Federal Court and superior courts in the Provinces and Territories possess the jurisdiction to hear judicial review applications from summary trials.

8. These civilian courts play an important role in the military justice system. They offer a civilian oversight of courts martial and summary trials' decision-makers and protect the right of the persons subject to the Code of Service Discipline to a fair hearing by a competent, independent and impartial tribunal.

III. Recommendations for Change

A. Increased utilisation of the military justice system

9. In my view, the military justice system is better equipped to deal with breaches of the Code of Service Discipline than are civilian criminal courts. This is particularly so with respect to allegations of sexual misconduct. Unlike the *Criminal Code*, the Code of Service Discipline contains a wide range of service offences that may be applied to the full spectrum of alleged sexual misconduct, including, but not limited to, sexual assault. Military prosecutors have more options available to them than civilian prosecutors, in relation to behaviour that falls short of sexual assault. For example, sexual harassment which might not meet the standard of criminal harassment may be prosecuted before courts martial as violating the prohibition against conduct contrary to good order and discipline (see, for example, *R. v. Renaud*, 2020 CMAC 5).

10. Despite the fact that the military justice system has better tools to deal with offences under the Code of Service Discipline and more flexibility in sentencing, the military courts are, in my view, underutilized. Prosecuting authorities often bring matters before the civilian courts rather than deferring to the specialized military courts. A useful line of inquiry would be to explore why that is the case, and what measures can be taken to ensure that the military justice system is utilized to the fullest extent possible, as was Parliament's intent in creating a national, uniform military justice system.

11. The civilian criminal justice system is already overburdened and faces significant pressures as a result of the *Jordan* decision which imposes rigorous timelines to prosecute offences. As pointed out by the Supreme Court of Canada in *Stillman* and *Généreux*, the military justice system is designed to meet the unique needs of the military with respect to discipline, efficiency, and morale.

12. Military personnel should benefit from certainty as to the justice system before which they will be required to appear, if charged. Similarly, they should not be subject to different prosecutorial standards and sentencing regimes depending upon the Province or Territory to which they are posted. By more fully utilizing the military justice system, service personnel will benefit from increasingly equal treatment under the law, regardless of where they are posted. That is to say, similar prosecution standards (those of the military prosecutors) will be applied, similar approaches by trial judges (military courts) will be applied and one body of law, that

developed by the Court Martial Appeal Court of Canada and the Supreme Court of Canada, will be applied. In my view, this "one body of law" is particularly relevant to sentencing.

B. Appeals to military judges from summary discipline

13. In the same vein, considering the military court's and the Court Martial Appeal Court of Canada's expertise in military law and knowledge of the military culture, it would be consistent with the *raison d'être* of those courts for summary trial decisions to be appealed to a military judge. In my view, such an approach would be preferable to subjecting service members to the requirement to seek judicial review before the Federal Court or a superior court of a Province or Territory. Any further appeal should be to the Court Martial Appeal Court of Canada only on a question of law and with leave.

14. This proposed change to the procedure for appeals from summary trials would make justice more accessible to service personnel and permit the development of a cohesive body of law on such matters.

15. Considering the foregoing, an amendment to the *National Defence Act* to the effect that a summary trial decision may be appealed only to a military judge would be required. Similarly, an amendment permitting a further appeal on a question of law and with leave to the Court Martial Appeal Court of Canada would be required.

C. Restructuring of the Court Martial Appeal Court of Canada

16. The combined application of the *Judges Act* and the *National Defence Act* leads to an important concern pertaining to judicial independence, both individual and institutional. Pursuant to the *National Defence Act*, the Chief Justice of the Court Martial Appeal Court of Canada must be a judge of another superior court or one of the federal courts. He or she must fulfill both the duties of Chief Justice of the Court Martial Appeal Court of Canada and his or her duties as a judge of a superior or federal court.

17. It would appear that the position of Chief Justice of the Court Martial Appeal Court of Canada is not sufficiently insulated, from an institutional perspective, from the outside interference of his or her "other" court due to the structural inadequacies of the *Judges Act* and *National Defence Act.* Any incumbent of the position of Chief Justice of the Court Martial Appeal Court of Canada is potentially exposed to the directives of a Chief Justice of another court, thereby compromising his or her capacity to effectively carry out the independent functions of the Court Martial Appeal Court of Canada. This is an important concern of judicial independence that should be addressed.

18. The position of the Chief Justice of the Court Martial Appeal Court of Canada should be dedicated solely to that Court with the possibility of being designated *ex-officio* to another court. A legislative amendment to the *National Defence Act* would be required.

19. Additionally, I would point out that the *National Defence Act* does not permit the Court Martial Appeal Court of Canada to sit in panels of five or *en banc*. The ability to convene a panel of five judges is an essential requirement for any appellate court called upon to revisit an issue previously decided by it. The need for a legislative amendment to the *National Defence Act* allowing the Chief Justice to convene a panel of five can be best illustrated by the *Royes*, *Déry-Stillman* and *Beaudry* decisions in which the Court came to different conclusions regarding the constitutionality of section 130(1)(*a*) of the *National Defence Act*.

20. Finally, on the issue of restructuring the Court Martial Appeal Court of Canada, I would refer your Honour to relevant excerpts of the article penned by Preston Jordan Lim titled *Parliamentary Debate as a Driver of Military Justice Reform in Canada* at page 17 (copy attached). While not endorsing all of the views advanced by Mr. Lim in his article, I find his suggestions at page 17 in relation to the restructuring of the Court Martial Appeal Court of Canada to be insightful and helpful. The current structure, by which in excess of 50 judges are designated to the Court Martial Appeal Court of Canada from other superior and federal courts is cumbersome. Without expressing an opinion about what would be an ideal number of judges, I note that a smaller number of judges would allow for a more collegial appellate court capable of ensuring greater consistency in the decisions rendered by it. Any such reform must continue to ensure that the Court continues to benefit from the necessary expertise in criminal law and appellate experience.

Conclusion

Independent Reviews such as the present one have been instrumental in ensuring the efficiency, efficacy and fairness of the Canadian military justice system. The Review currently underway will, in turn, ensure the ongoing respect of Canadians for their military personnel and the military justice system. I thank you for undertaking this important role and for any consideration given to these submissions.

All of which is respectfully submitted this 8th day of January, 2021.

Yours truly,

B. Richard Bell
Chief Justice

Encl.