



November 20, 2018

Via email: NDDN@parl.gc.ca

Stephen Fuhr, M.P.
Chair
Standing Committee on National Defence
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Fuhr:

Re: Bill C-77, *National Defence Act* amendments

The Canadian Bar Association's Military Law Section (CBA Section) is pleased to comment on Bill C-77, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*. We believe the new Declaration of Victims Rights is a positive step. While we recognize that the military justice system must evolve, given the scope of the transition to *summary hearings*, we recommend that this particular reform be deferred until Parliament undertakes a comprehensive study.

The CBA is a national association of over 36,000 lawyers, law students, notaries and law teachers. Among our primary objectives are improvements in the law and the administration of justice, and promoting the rule of law. The CBA Section consists of lawyers from across the country and comments on the military system of justice, operational law and civilian areas of practice that have unique implications for the military. To avoid a perceived or actual conflict of interest, CBA Section members who are also members of the Office of the Judge Advocate General make no comment on this submission.

Declaration of Victims Rights

Bill C-77 adds a Declaration of Victims Rights, integrating (and customizing) the *Canadian Victims Bill of Rights*¹ into the *National Defence Act (NDA)*.² The military justice system would mirror victims' rights in the *Criminal Code*³: the right to information, protection, participation and restitution. In particular, military judges would have powers to aid the testimony of complainants and witnesses.⁴

¹ SC 2015, c. 13, s 2

² RSC, 1985, c. N-5

³ RSC, 1985, c. C-46

⁴ C-77, s. 28 adding ss. 183.1 to 183.7 to the *NDA*.

The court martial system deals with offences often involving victims. It follows that these victims should be entitled to an analogous level of protection to victims in the civilian system.

Every effort should be made to ease the burden of victims and Bill C-77 is a positive step. Generally, it articulates specific rights of victims without adding procedural roadblocks for the court martial system.

The new Declaration of Victims Rights is to be “construed and applied in a manner that is reasonable in the circumstances and in a manner that is not likely to:

- 1) interfere with the proper administration of military justice;
- 2) interfere with ministerial discretion in respect of any service offence;
- 3) interfere with the discretion that may be exercised by any person or body authorized to release an accused person or offender into the community;
- 4) endanger the life or safety of any individual; or
- 5) cause injury to international relations, national defence or national security”⁵.

Given the military context, the CBA Section understands the legitimate purpose of these confines. We reiterate, however, the importance of protecting victims and trust that an appropriate balancing of challenging interests will be conducted when applying the Declaration of Victims Rights.

Victim’s Liaison Officer

Unique to the military regime, Bill C-77 creates a “victim’s liaison officer” to act as a point-of-contact between military judicial actors and victims throughout the proceedings. Given the particular context of the Canadian Armed Forces, particularly when victims are foreign nationals unaccustomed with Canadian legal proceedings, we support this role – but stress the importance of the victim’s liaison officers receiving appropriate training.

Victims’ Right to be Informed

The Declaration of Victims Rights would give victims the right to be informed about “the offender while they are in a service prison or detention barrack.”⁶ There is no equivalent in civilian justice. This raises concerns, because information about inmates – with the exception of the time of release – is normally considered personal information protected by the *Privacy Act*.⁷

Bill C-77 should clearly articulate the type of information made available to victims and whether the disclosure would be *as of right* or *discretionary*.⁸

Summary Hearings: Fundamental Changes to the Military Justice System

The military justice system has a two-tiered tribunal structure: court martial and summary trial. Courts martial are formal military courts where independent military judges preside. They are similar to civilian criminal courts, and try more serious offences than those at summary trial.⁹ Summary trials

⁵ C-77, s. 7 adding ss. 71.17-71.21 to the *NDA*.

⁶ C-77, s. 7 adding sub-par. 71.04(1)(a) to the *NDA*.

⁷ RSC, 1985, c. P-21.

⁸ For example, section 26 of the *Corrections and Conditional Release Act* recognizes that the victim’s right to information may, on occasion, yield to considerations such as the offender’s privacy and the safety of the public.

⁹ An Overview of Canada’s Military Justice System, National Defence ([online](#)).

are decided by a Commanding Officer, delegated officer or superior commander, and have fewer procedural protections.¹⁰

Under the current system, the accused has the right to be tried by a court martial rather than a summary trial, except where:

- (1) the charge is one of five minor service offences¹¹; and
- (2) the circumstances surrounding the offence are sufficiently minor in nature that the officer exercising summary trial jurisdiction concludes that a punishment of detention, reduction in rank or a fine in excess of 25% of the accused's monthly basic pay would not be warranted if the accused were found guilty.

In 2017-2018, there were 596 summary trials and 62 courts martial.¹²

Currently, offences tried by summary trial and court martial are "service offences". They are listed in the Code of Service Discipline (Part III of the *NDA*) expressly, or incorporated from the *Criminal Code*. There is concurrent jurisdiction between civilian criminal courts and courts martial for offences incorporated into the *NDA*. The scope of the court martial's jurisdiction over service offences, on the right to be tried by a jury, is before the Supreme Court of Canada.¹³

Bill C-77 would replace summary trials with *summary hearings* and introduce the concept of "service infractions". The burden of proof for summary hearings would be *balance of probabilities*, as opposed to the existing burden of *beyond a reasonable doubt* for summary trials. A conviction of a service infraction at a summary hearing would not preclude being tried by court martial for an offence arising from the same facts.¹⁴

The purported aim of the change is to reform summary trials into a non-penal, non-criminal summary hearing process for dealing with minor *service infractions*. More serious *service offences* would continue to be tried by court martial.

We understand that *service infractions* would: a) not be criminal offences; b) be punishable by one, or a combination of, sanctions; and c) be further defined in regulations. Sanctions would include "reduction in rank, reprimands, deprivation of pay, and other minor sanctions."¹⁵ The range of punishment for service infractions would be more limited than the current summary trial range of punishment.

The transition from summary trials to summary hearings is a fundamental change that would significantly alter the essence of the military justice system. The summary trial is the predominant

¹⁰ See *Queen's Regulations and Orders* (QR&O,) Chapter 108, [online](#), and National Defence, *Military Justice at the Summary Trial Level* 2.2, B-GG-005-027/AF-011, Updated, January 12th 2011, [online](#).

¹¹ The five minor offences are: insubordinate behaviour; quarrels and disturbances; absence without leave; drunkenness; and conduct to the prejudice of good order and discipline where the offence relates to military training, maintenance of personal equipment, quarters or work space, or dress and deportment. (JAG Annual Report for 2017-2018, p.14, [online](#).)

¹² JAG Annual Report for 2017-2018

¹³ *Beaudry v. R.* 2018 CMAC 4 (SCC 38308). Supreme Court of Canada has postponed hearing in *Stillman* (SCC 37701 [online](#)), to consider the Court Martial Appeal Court ruling in *Beaudry*.

¹⁴ Under the current system, a person cannot be tried by court martial for a matter that has been determined by summary trial (*autrefois acquit, autrefois convict*): s. 66 of the *NDA*.

¹⁵ Bill C-77 Departmental Backgrounder, May 10, 2018 [online](#). One sanction labelled *minor* is confinement to barracks, which can amount to a form of house arrest (i.e. penal sanction)

service tribunal used to maintain discipline at the unit level in the Canadian Armed Forces. Responsibility for the maintenance of discipline rests first and foremost with the chain of command. The lesser degree of constitutional protection for the accused at summary trials is balanced by the accused's right to choose to be tried by a court martial (in circumstances where the sanction contemplated meets a certain threshold). This choice of tribunal, one of the hallmarks of the military justice system, would disappear with Bill C-77.

A number of comprehensive reviews of the military justice system have been conducted since Bill C-25 amended the NDA in 1998. These reviews led to the changes in Bill C-15, which came fully into effect with the latest regulatory amendments in September 2018. None of those reviews indicated a need to reform the summary trial system. While the military justice system must evolve with Canadian law, a reform of this scope needs careful attention.

The CBA Section is concerned with the uncertainty surrounding summary hearings because its parameters will be set out in regulations, rather than the *NDA* (e.g. scope of service infractions and range of punishment/sanctions). With limited information available, we are concerned on how it may affect the chain of command, namely the unit commanding officer and the proper administration of discipline. We are also concerned that summary hearings would retain some penal aspects while diminishing the protection currently provided to the accused.

Further, this major overhaul of the military justice system has not been the subject of a recent comprehensive public review of the Code of Service Discipline and military law. Given the scope of the summary trial reform in Bill C-77 and recent developments (namely the Court Martial Appeal Court of Canada decision in *Beaudry*¹⁶ and proposed reforms to the *Criminal Code*¹⁷), we recommend that:

- 1) the transition to summary hearings contemplated in Bill C-77 be deferred; and
- 2) Parliament undertake a comprehensive study of the Canadian military justice system and proposed reforms to the existing summary trial system.

The CBA Section appreciates the opportunity to comment on Bill C-77 and trusts our comments are helpful.

Yours truly,

(original letter signed by Marc-André O'Rourke for Ashley P. Dunn)

Ashley P. Dunn
Chair, CBA Military Law Section

¹⁶ *Beaudry v. R.* 2018 CMAC 4, pending appeal to Supreme Court of Canada.

¹⁷ Such as Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*.