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LEGISLATIVE SUMMARY

Bill C-77:
An Act to amend the National Defence Act and to make related and consequential amendments to other Acts

Publication No. 42-1-C77-E
12 October 2018
Revised 13 March 2019

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Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-77
(Legislative Summary)

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Ce document est également publié en français.

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1 BACKGROUND

Bill C-77, An Act to amend the National Defence Act and to make related and consequential amendments to other Acts,[1] was introduced in the House of Commons on 10 May 2018 by the Minister of National Defence, the Honourable Harjit Sajjan. **Following second reading on 15 October 2018, the bill was referred to the House of Commons Standing Committee on National Defence, which reported the bill back to the House of Commons with several amendments on 3 December 2018. The amendments were primarily corrections or clarifications to wording that did not change the substance of the bill.[2] The bill received third reading in the House of Commons on 28 February 2019.**

An important purpose of the bill is to give victims of service offences the rights enshrined in the civilian criminal justice system by the *Canadian Victims Bill of Rights* in 2015.[3] Bill C-77 contains many of the changes proposed in Bill C-71, An Act to amend the National Defence Act and the Criminal Code (short title: Victims Rights in the Military Justice System Act), which died on the *Order Paper* when Parliament was dissolved in August 2015 for the 42nd general election.[4]

Bill C-77 enacts a statutory "Declaration of Victims Rights" (DVR) within the *National Defence Act* (NDA). It gives victims of service offences, defined as offences found in the NDA (other than service infractions), or in the *Criminal Code*[5] or in any other Act of Parliament that are committed by a person subject to the Code of Service Discipline (CSD),[6] rights to information, protection, participation and restitution that substantially mirror the rights afforded to victims in the *Canadian Victims Bill of Rights*.

Bill C-77 also makes a series of procedural changes to the CSD mostly related to the implementation of the DVR. It replaces the term "summary trial" with "summary hearing" throughout the NDA and limits the application of the newly created summary hearing process to a new category of "service infractions" that will consist of minor infractions created by regulation. The distinction between a "service offence" and a "service infraction" is important because the rights set out in the DVR apply only to victims of service offences. Lastly, Bill C-77 provides for the acknowledgment of the harm done to the victims and to the community as a sentencing objective and, as a new principle of sentencing for the military justice system, that particular attention should be given to the circumstances of Aboriginal offenders.

It is important to note that several provisions of a previous bill, Bill C-15, An Act to amend the National Defence Act and to make consequential amendments to other Acts (short title: *Strengthening Military Justice in the Defence of Canada Act*), were not in force when Bill C-77 was drafted. These provisions did not come into force until 1 September 2018.[7] Therefore, the actual wording of certain sections that would

become law upon the coming into force of Bill C-77 is found in related amendments at the end of the bill, instead of in the core portion of the bill.

1.1 Interaction Between Bill C-77 and the *Canadian Victims Bill of Rights*

Pursuant to section 18(3) of *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts* (short title: *Victims Bill of Rights Act*),[8] the *Canadian Victims Bill of Rights* does not apply to service offences that are investigated or proceeded with under the NDA. In an address to the House of Commons in April 2014, the Honourable Peter MacKay, then minister of Justice, explained that this exclusion was warranted owing to the special nature of Canada's military justice system:

> [T]here are particular challenges to extending this bill of rights into the military culture and into their system, particularly for summary trials. By that I mean that we have disciplinary tribunals that are administered by the chain of command. This system carries out the vast majority of proceedings within the Canadian military justice system, and this victims bill of rights would not be immediately applicable to it upon final adoption by the House.[9]

At that time, Mr. MacKay also informed the House of Commons of his government's intention to introduce another bill to incorporate the rights set out in the *Canadian Victims Bill of Rights* into the military justice system and commended the work of the Judge Advocate General (JAG) in this area.[10] Bill C-71, introduced in the 41st Parliament, was the result of this work, which is reflected in Bill C-77. As will be seen in the following sections, Bill C-77 creates a new category of offences – "service infractions" – prescribed in regulations, and limits summary hearings to cases involving only these infractions. It follows that victims of service infractions are not entitled to the same rights as victims of service offences.

1.2 The Military Justice System: A Parallel System of Justice Separate from the Civilian Criminal Justice System

The military justice system is subject to the same constitutional framework as the civilian criminal justice system, with which it shares many of the same underlying principles of justice.[11] However, it is different with respect to proceedings, procedural safeguards, offences and sentencing. According to Gilles Létourneau, former judge of the Court Martial Appeal Court (CMAC) of Canada, an accused in the military justice system is denied certain rights to which an accused in the civilian justice system is entitled.[12]

The CSD, set out in Part III of the NDA, is the legislative basis of the military justice system. It identifies those individuals who are subject to it, both in Canada and abroad;[13] sets out offences that are specific to the military, such as misconduct in the presence of an enemy and absence without leave,[14] specifying the nature of and sanctions for these offences; and incorporates into military law all offences punishable under the *Criminal Code* or any other Act of Parliament.[15] The CSD also establishes who has the authority to arrest and hold those individuals subject to it, service tribunals, and processes for the review and appeal of findings and sentences issued by

these tribunals.[16] Service tribunals have jurisdiction over all service offences, except for certain offences committed in Canada: murder, manslaughter and child abduction.[17]

Currently, the military justice system has a two-tiered tribunal structure consisting of a court martial system and a summary trial system (which Bill C-77 proposes to change to a summary hearings system).[18] These two types of tribunals are distinct in a number of ways.[19] Essentially, summary trials deal with relatively minor service offences. This type of trial, the one most commonly used, allows commanding officers to react quickly to misconduct by applying disciplinary measures to maintain unit effectiveness and discipline. A court martial, however, is for more serious service offences. It is a more formal court presided over by military judges. Compared with a summary trial, the court martial affords the accused more procedural safeguards, such as the right to legal counsel. The procedures for the disposition of charges before both types of service tribunals are set out in the *Queen's Regulations and Orders* (QR&O), which are regulations authorized by the NDA.

The Supreme Court of Canada has ruled twice, in 1980[20] and in 1992,[21] on the validity of the military justice system. In *R. v. Généreux*, the Supreme Court made the following remarks:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military.[22]

This view is shared by the JAG, who wrote the following in his 2014–2015 annual report:

> The ability of the CAF [Canadian Armed Forces] to operate effectively depends on the ability of its leadership to instill and maintain discipline. This particular need for discipline in the CAF is the *raison d'être* of the military justice system. Indeed, while training and leadership are central to the maintenance of discipline, the chain of command must also have a legal mechanism that it can employ to investigate and sanction disciplinary breaches that require a formal, fair, and prompt response.[23]

2 DESCRIPTION AND ANALYSIS

2.1 Purpose of the Code of Service Discipline (Clauses 4 and 63)

Bill C-77 sets out the purpose of the CSD in the NDA. According to new section 55(1) of the NDA, the purpose of the CSD "is to maintain the discipline, efficiency and morale of the Canadian Forces."

2.2 Purpose and Principle of Sentencing by Courts Martial (Clauses 63(21) and 63(23))

Sections 203.1 to 203.4 of the NDA currently provide the fundamental purpose of sentencing by service tribunals as well as various principles of sentencing to be achieved by imposing sentences. Clauses 63(21) and 63(23) of Bill C-77 amend the fundamental purpose of sentencing as well as some of the sentencing principles. These amendments are intended mainly to reflect the new terminology, but also to acknowledge the harm done to the victim and to the community, to promote a sense of responsibility in offenders, and to provide that particular attention should be given to the circumstances of Aboriginal offenders. The fundamental purpose of sentencing is identical to the purpose of the CSD.

2.3 Definition of "Victim" (Clause 2(3))

Clause 2(3) adds a new definition of "victim" to section 2(1) of the NDA.

According to the new definition, any individual against whom a service offence has been committed, or is alleged to have been committed, and who has suffered, or is alleged to have suffered, physical or emotional harm, property damage or economic loss as a result of the commission or alleged commission of the offence, is considered a victim under the NDA. Persons other than the immediate victim who have suffered physical or emotional harm, property damage or economic loss as a result of the commission or alleged commission of the offence are also considered victims for the purposes of applying the rights provided by the new DVR, as well as by sections 202.201 (victim impact statements at hearings in cases where the accused person is unfit to stand trial or is not criminally responsible on account of mental disorder), 203.6 (victim impact statements at sentencing) and 203.7 (obligation of the court martial to inquire of the prosecutor whether the victim had the opportunity to file a victim impact statement) of the NDA.

The proposed definition of "victim" is consistent with the definitions set out in the *Canadian Victims Bill of Rights* and section 2 of the *Criminal Code*, as amended subsequent to the entry into force in July 2015 of the *Victims Bill of Rights Act*. Moreover, similarly to the definitions set out in these statutes, a conviction is not required before an individual is deemed to be a victim.

2.4 Individuals Who May Act on a Victim's Behalf (Clause 2(4))

Under new section 2(1.1) of the NDA (as amended by clause 2(4) and the coordinating amendments set out in clauses 65(10) and 65(11)), if the victim is dead or is incapable, other than for military operational reasons, of acting on his or her own behalf, the following other individuals may exercise the victim's rights under the DVR:

- the victim's spouse or common-law partner;
- a relative or dependant of the victim;
- an individual who has custody, or is responsible for the care or support, of the victim; and
- an individual who has custody, or is responsible for the care or support, of a dependant of the victim.

This new provision applies to the rights guaranteed by the DVR, as well as to the rights set out in certain sections of the NDA concerning the obligation to inform the victim of the acceptance of a plea (section 189.1), victim impact statements (sections 202.201, 203.6 and 203.7) and the obligation to consider making a restitution order against the offender (new section 203.81, as set out in clause 63(21)(l)).

Under this new provision, victims who are unable to act for themselves because of military operational reasons may request that a member of the CAF, appointed by the Chief of the Defence Staff or any officer authorized by the Chief of the Defence Staff, act on their behalf.

Under Bill C-77, the same individuals may act on a victim's behalf in the military justice setting as in the civilian criminal justice system, with the exception of a member of the CAF appointed in cases where the victim is unable to act on his or her own behalf for operational reasons.

New section 2(1.2) of the NDA provides that an individual is not a victim of a service offence and is not entitled to a victim's rights under the DVR if he or she is charged with or found guilty of that offence or is found, in relation to that offence, unfit to stand trial or not responsible on account of mental disorder.

2.5 Declaration of Victims Rights (Clause 7)

Clause 7 adds a new section, called the "Declaration of Victims Rights," to the CSD. The new section gives victims of service offences certain rights to information, protection, participation and restitution. These rights were granted to other crime victims in 2015 by the *Canadian Victims Bill of Rights*.

Under the new section 71.01 of the NDA which defines "military justice system" for the purpose of the DVR, the rights set out in the DVR apply only to victims of service offences. Victims of service infractions are not entitled to these rights.

2.5.1 Application and Exercise of Victims Rights (New Sections 71.14 to 71.15 of the NDA)

The DVR applies to a victim's interactions with the military justice system, beginning from the moment a service offence is reported until the end of the offender's sentence.[24] It also applies in cases where an accused who is found unfit to stand trial or not responsible on account of mental disorder is, in relation to the offence, under the jurisdiction of a court martial or a Review Board (when a finding of not criminally responsible by reason of mental disorder or unfit to stand trial has been rendered) (new section 71.14 of the NDA).

In order to exercise his or her rights set out in the DVR, the victim must be present in Canada or a Canadian citizen or a permanent resident within the meaning of section 2(1) of the *Immigration and Refugee Protection Act*[25] (new section 71.15(2) of the NDA). Therefore, a victim of a service offence committed abroad who does not meet one of these requirements is not entitled to exercise the rights set out in the DVR, regardless of whether the trial is conducted in Canada or in the country where the offence was committed.

Lastly, as with the *Canadian Victims Bill of Rights*, the rights set out in the DVR are primarily procedural (e.g., the victim's right to express his or her views during the proceedings and the right to information). These legislative provisions will not grant a victim status as a party to proceedings. Furthermore, these rights are to be exercised through the mechanisms provided by law (new section 71.15(1) of the NDA). In other words, the DVR, like the *Canadian Victims Bill of Rights*, does not appear to create free-standing enforceable rights. As discussed below, the DVR provides a complaints review mechanism for victims who feel that their rights have been violated, but no binding dispute resolution mechanism.

2.5.2 Designation of Liaison Officer (New Section 71.16 of the NDA)

Bill C-77 provides for the designation of a victim's liaison officer at the victim's request. Unless it is not possible to do so for operational reasons, the commanding officer (CO) is responsible for appointing a liaison officer to assist the victim by explaining the procedures regarding investigations, charges and convictions, and obtaining information requested by the victim and to which the victim is entitled (new section 71.16(3) of the NDA).

To the extent possible, the CO will appoint the officer or non-commissioned member requested by the victim to act as the liaison officer. In the event of the absence or incapacity of the appointed liaison officer, the CO must appoint another liaison officer, unless it is not possible to do so for operational reasons (new section 71.16(1) of the NDA).

This possibility of designating a liaison officer, which is not part of the *Canadian Victims Bill of Rights*, recognizes the distinct nature of the military justice system. The government's backgrounder for the bill states the following:

> Service offences can have diverse victims, including military members and their families and members of the broader civilian community. To many of these individuals, the military justice system can be unfamiliar and potentially intimidating. Therefore, to help ensure that victims are properly informed and positioned to access their rights, the proposed legislation provides for the appointment of a Victim Liaison Officer when a victim requests this appointment.[26]

2.5.3 Rules of Interpretation (New Sections 71.2, 71.17 to 71.19, 71.21 and 71.23 of the NDA)

Under new section 71.17 of the NDA, the rights and procedures set out in the DVR are to be construed and applied in a manner that is reasonable in the circumstances and not likely to interfere with the proper administration of military justice, ministerial discretion or discretion that may be exercised by any person or body authorized to release an offender into the community. The DVR is also not to be interpreted in a manner that could endanger an individual's life or safety or cause injury to international relations, national defence or national security.

The bill requires that, to the extent possible, every Act of Parliament – and every order, rule or regulation made under such an Act – is to be construed and applied in a manner that is compatible with the rights set out in the DVR (new section 71.18 of the NDA). This means that the rights set out in the DVR will influence the interpretation and application of other legislation. Where there is an inconsistency with another Act, the rights and processes provided for in the DVR are to prevail, except when the other law is paramount because it is quasi-constitutional, such as the *Canadian Bill of Rights*,[27] the *Canadian Human Rights Act*,[28] the *Official Languages Act*,[29] the *Access to Information Act*,[30] the *Privacy Act*,[31] or the *Canadian Victims Bill of Rights*,[32] and in respect of any orders, rules and regulations made under any of those Acts (new section 71.19 of the NDA).

In addition, identifying an individual as a victim of a service offence cannot result in any adverse inference against the accused (new section 71.2 of the NDA). As noted in section 2.2 above, the definition of "victim" does not require an accused to have been found guilty of the offence, as this would deny victims their rights during the investigation and prosecution stages of the offence. Consequently, section 71.2 states that the designation of a person as a victim – prior to a conviction – for the purposes of the DVR cannot be used against the accused during proceedings. The DVR also does not grant to, or remove from, the victim, any individual acting on their behalf, or his or her liaison officer, the status of a party, intervener or observer in the proceedings (new section 71.23 of the NDA).

Lastly, the DVR is not to be construed as permitting any individual to enter Canada, or to remain in Canada beyond the end of an authorized stay, or as delaying or preventing the enforcement of any removal or extradition proceedings (new section 71.21 of the NDA).

2.5.4 Rights Recognized in the Declaration of Victims Rights

2.5.4.1 Right to Information (New Sections 71.01 to 71.04 of the NDA)

New sections 71.02 to 71.04 of the NDA provide that the victim of a service offence has the right, on request, to information about:

- the military justice system and the role of victims in it;
- services and programs available for victims;
- the right to file a complaint;
- the status and outcome of the investigation into the offence;
- the location of proceedings in relation to the offence, when they will take place and their progress and outcome;
- the offender while in a service prison or detention barrack;
- the release of the offender from a service prison or detention barrack;
- hearings held by a court martial for the purpose of making a ruling relating to a person found unfit to stand trial or not responsible on account of mental disorder and the dispositions made at those hearings (e.g., whether to release the offender and under what conditions); and
- hearings held by a Review Board under section 202.25 of the NDA relating to a person found unfit to stand trial or not responsible on account of mental disorder and the dispositions made at those hearings.

The proposed amendments are nearly identical to those in the *Canadian Victims Bill of Rights*, except for the right to information about reviews under the *Corrections and Conditional Release Act* (CCRA) relating to the conditional release of federal offenders and the timing and conditions of any such release.[33] New section 71.01(b) of the NDA does not recognize the right of victims of service offences to information about the carrying-out of sentences (e.g., conditional release dates) in a federal penitentiary or provincial prison. However, pursuant to clause 61, some victims will be able to exercise their right to obtain such information by virtue of their rights under the CCRA.

2.5.4.2 Right to Protection (New Sections 71.05 to 71.09 of the NDA)

New section 71.05 of the NDA states that victims have the right to have their security considered by the “appropriate authorities” in the military justice system. The term “appropriate authorities” is not defined, although it likely includes the military police, prosecutors, military judges, COs of service prisons and detention barracks, and any individuals acting under such a command. Victims also have the right to have reasonable and necessary measures taken by the appropriate authorities to protect them from intimidation and retaliation (section 71.06 of the NDA). Like the *Canadian Victims Bill of Rights*, the bill does not describe the type or extent of assistance that could be provided.

Victims also have the right to have their privacy considered by the appropriate authorities in the military justice system (new section 71.07 of the NDA). Furthermore, victims have the right to request that their identity be protected if they are complainants in respect of a service offence or witnesses in proceedings relating to a service offence (new section 71.08 of the NDA). Such a request could be made before the case proceeds to a court martial or to a judge during the proceedings. The bill does not set out what forms of confidentiality are to be provided to protect an individual's identity.

As well, victims have the right to request testimonial aids (new section 71.09 of the NDA). The bill does not specify what testimonial aids could be authorized, although section 112.65 of the QR&O states that the judge may order that a witness's evidence be taken using any means that allow the witness to testify outside the courtroom and to engage in simultaneous visual and oral communication with the court, the prosecutor and the accused.[34] As well, the judge may permit the accused to appear by closed-circuit television or other means, as part of the procedures for hearings with respect to an accused who is declared unfit to stand trial or not responsible on account of mental disorder (see section 202.201(13) of the NDA).

2.5.4.3 Right to Participation (New Sections 71.1, 71.11 and 203.6 to 203.72 of the NDA)

New section 71.1 of the NDA gives victims the right to express their views about decisions to be made by appropriate authorities that affect their rights under the DVR and to have those views considered. Victims also have the right to present a victim impact statement to the appropriate authorities in the military justice system and to have it considered (new section 71.11 of the NDA). Ultimately, these guarantees do not provide any assurance of a specific outcome, as is also the case in the civilian criminal justice system.

Section 203.6(1) of the NDA requires that, for the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged absolutely in respect of any offence, the court martial must consider the statement of any victim of the offence describing the physical or emotional harm done to him or her, or the property damage or economic loss he or she has suffered, as a result of the commission of the offence and the impact of the offence on the victim (clause 63(21)(h)).

Like the amendments made to the *Criminal Code* through the coming into force of the *Victims Bill of Rights Act*, new section 203.7(3) of the NDA allows victims to present their victim impact statement, as well as a photograph of themselves taken prior to the offence or to present their statement. The statement may also be presented outside the hearing room if this does not disrupt the proceedings (clause 63(21)(h)).

A victim can also present his or her statement by closed-circuit television if arrangements are made for the offender and the court martial to watch the presentation and if the offender can communicate with his or her lawyer while watching (new section 203.7(4) in clause 63(21)(h)).

New section 203.7(5) specifies that the court martial shall take into account the portions of the statement that describe the physical or emotional harm done to, or property damage or economic loss suffered by, the victim as a result of the commission of the alleged offence and any other information that it considers relevant to sentencing (clause 63(21)(h)).

Two additional sections of the NDA require the court martial to consider any statement made on behalf of a community describing the impact of the offence on the community (new section 203.72), as well as any statement made on behalf of the CAF on the military impact of the offence (new section 203.71 of the NDA in clause 63(21)(h)).

2.5.4.4 Right to Restitution (New Sections 71.12, 71.13, 203.81, 203.901, 203.902, 203.91 and 203.92 of the NDA)

New section 71.12 of the NDA grants victims the right to have the court martial consider making a restitution order against the offender. This does not mean that such an order must be granted, but rather that the court must consider the possibility.

A related amendment in clause 63(21)(l) of the bill adds section 203.81 to the NDA, which requires the court martial to consider making a restitution order whether the offender is convicted or discharged absolutely for the offence, mirroring the amendments made to the *Criminal Code* by the *Victims Bill of Rights Act*. The court martial must inquire with the prosecutor, as soon as feasible after a finding of guilty but before imposing a sentence or discharging the offender, whether the victim has been provided with an opportunity to indicate whether he or she is seeking restitution (new section 203.81(2) of the NDA).

An adjournment may be granted to permit victims to indicate whether they want restitution or to establish their losses if the court martial is satisfied that this would not interfere with the proper administration of justice. In cases in which a victim is seeking restitution and the court decides not to grant the order, reasons are to be given and stated in the record (new sections 203.81(3) and 203.81(5) of the NDA).

Pursuant to new section 203.901 of the NDA, the offender's financial means or ability to pay do not prevent a restitution order from being made. Under case law concerning restitution, although the offender's current and future means to pay is not determinative, the court must nonetheless take it into account when considering whether a restitution order is appropriate. The court must also consider the impact of restitution on the offender's rehabilitation.[35]

In making the order, the court must require the offender to pay the full amount by the date specified in the order or, if the court is of the opinion that the amount should be paid in instalments, the order must include a payment scheme (new section 203.902 of the NDA). An offender may be ordered to pay restitution to more than one person, in which case the order must specify the amounts to be paid to each person and the order of priority of payment (new section 203.91 of the NDA).

If the offender fails to pay the amount, the victim may have the restitution order entered as a civil court judgment enforceable against the offender, which allows

the victim to seek repayment through measures such as seizure or garnishment of the offender's funds (new sections 71.13 and 203.92 of the NDA).

2.5.5 Remedies (Complaints and Appeals) (New Sections 71.22, 71.24 and 71.25 of the NDA)

New section 71.22 of the NDA set out the remedies available to victims, who may file a complaint if they believe their rights have been infringed by an authority within the military justice system. Rules will be set out in regulations concerning the review of complaints, the power to make recommendations to remedy such infringements, and the obligation to notify victims of the findings of the complaint review body.

New sections 71.24 and 71.25 of the NDA specify that an infringement or denial of a right under the DVR does not in itself provide a right to appeal any decision or order made under the DVR or a cause of action. Moreover, it is not to be construed as affecting any other cause of action or right to damages.

2.5.6 Right of the Victim to Lay an Information to Restrict Communication From and the Movements of the Accused (Clause 16)

Under new section 147.6 of the NDA, if a victim fears that a person who is subject to the CSD will cause physical or emotional harm to the victim or to the victim's spouse, common-law partner or children, or cause damage to the victim's property, an information may be laid before a military judge seeking to restrict that individual's movements or communications with the victim and the victim's family.

The information may also be laid by another individual on the victim's behalf. If the military judge is satisfied on the evidence that there are reasonable grounds for the victim's fears, the judge may order that the person referred to in the information (who is subject to the CSD) abstain from communicating, directly or indirectly, with the victim, the victim's spouse, the victim's child or a person who has been cohabiting with the victim in a conjugal relationship for a period of at least one year.

Because of the importance of protecting victims from the accused during legal proceedings, if, for operational reasons, no military judge is available, a CO is authorized to make such an order. However, such decisions by commanding officers must be reviewed as soon as is feasible by a military judge. The procedure for laying such an information is prescribed by regulations.[36]

2.5.7 Victim's Safety and Security (Clause 18)

Sections 158 to 159.9 of the NDA set out the rules that apply following the arrest of an individual subject to the NDA.[37] Pursuant to section 158(1), the person under arrest must be released from custody as soon as possible unless there are reasonable grounds to believe that pre-trial custody is necessary, owing to the gravity of the offence alleged to have been committed or the need to establish the identity of the person under arrest, to secure or preserve evidence, to ensure that the person under

arrest will appear, to prevent the continuation or repetition of the alleged offence, or to ensure the safety of the person under arrest or any other person. Although the wording of current section 158(1)(f) appears to give consideration to the safety and security of the victim or victims of the offence by including the phrase “or any other person,” clause 18 makes this explicit by adding the words “any victim of the offence” before “or any other person.”

2.5.8 Consideration of Victim Safety and Security in Interim Release Decisions and the Right to Obtain a Copy of the Direction on Release from Custody (Clauses 19 and 23)

When the person under arrest is in pre-trial custody, the officer responsible for reviewing the person’s continued detention in custody (the custody review officer)[38] may attach conditions to his or her interim release (e.g., to remain under military authority or within a specific area) in accordance with section 158.6 of the NDA. Clause 19 specifies that, when directing that the person be released, with or without conditions, the custody review officer must indicate that he or she considered the safety and security of the victims in deciding to grant the interim release and to impose any conditions (new section 158.6(1.1) of the NDA). The proposed amendment in clause 19 also permits the victim to obtain a copy of the interim release order upon request (new section 158.6(1.2) of the NDA).

Similar amendments are made to section 159.7 of the NDA (clause 23). Therefore, in deciding whether to detain in custody or order the interim release of an individual, a military judge must consider the safety and security of the victim(s) before ordering the individual’s interim release (new section 159.7(2)). Like the amendments to section 158.6(3) of the NDA, new section 159.7(3) requires the military judge to provide a copy of the order to the victim upon request.

2.5.9 Restricting Communications from Individuals in Custody (Clauses 20 and 22)

When the person making the arrest decides to retain the arrested individual in custody, a custody review officer must conduct a custody review pursuant to section 158.2 of the NDA. If the custody review officer determines that there are no grounds to retain the individual in custody, the individual must be ordered released, with or without conditions. The custody review officer may impose a number of conditions on the release, including a direction to abstain from communicating with any witness or person specified in the order (section 158.6(1) of the NDA). Bill C-77 adds section 158.61 to the NDA, which allows the custody review officer to impose a similar condition when directing that the person be retained in custody. As is the case when this condition is imposed as a condition of release, the order to abstain applies to all direct and indirect communication.

Under section 159 of the NDA, the custody review officer must, as soon as practicable, have the individual brought before a military judge for a hearing to determine whether he or she is to be retained in custody or released. Under section 159.1 of the NDA, the judge must direct that the individual be released, unless counsel for the CAF or

an individual appointed by the custody review officer shows that retaining the person in custody is justified. Like the custody review officer, the military judge ordering the release of the person in custody may impose various release conditions (set out in section 158.6 of the NDA), including an order to abstain from communicating with any individual specified in the order. Bill C-77 adds section 159.31 to the NDA to allow a military judge to also direct that a person who is retained in custody abstain from communicating with any person specified in the order.[39]

2.6 Testimonial Aids for Witnesses in Proceedings Before a Military Judge (Clauses 7, 28 and 63(21))

According to new section 71.09 of the NDA, every victim has the right to request testimonial aids when appearing as a witness.

Moreover, as noted earlier, a victim can present his or her statement by closed-circuit television if arrangements have been made for the offender and the court martial to watch the presentation and if the offender can communicate with his lawyer while watching (new sections 183.2 and 203.7(4) of the NDA).

2.6.1 Exclusion of the Public from Proceedings Before a Military Judge (Clause 63(24))

Bill C-77 amends section 180 of the NDA, which sets out the presumption that courts martial are held in open court and the circumstances under which a military judge may order the exclusion of the public from the courtroom. The amended section states that not only court martial proceedings, but also other listed proceedings before a military judge (for example, a request for an order to abstain from communicating), are presumed to be held in public (new section 180(1)).[40]

Section 180(2) is amended to state that an order to exclude the public from all or part of the proceedings, or that a witness testify behind a screen or another device, may be made by the judge on the application of the prosecutor, a witness or the judge him or herself (not the accused). The current provision provides only for orders that the public be excluded and does not state who can make the application.[41]

Currently, section 180 of the NDA does not include factors to be used in determining whether the public should be excluded. New section 180(3) introduces factors that must be considered by the military judge in deciding whether excluding the public would be in the interest of the proper administration of military justice, such as encouraging reporting of service offences and safeguarding the interests of witnesses under the age of 18. The military judge is also given discretion to consider relevant factors that are not listed (clause 63(24) of the bill).

This provision differs in some respects from the equivalent section 486 of the *Criminal Code*, which allows not only for the public to be excluded but also for specific members of the public to be excluded from all or part of the proceedings.

As with section 486 of the *Criminal Code*, no adverse inference may be drawn from a decision to grant, or not to grant, an order to exclude the public. The military judge must provide reasons if an order to exclude the public is not granted and the charge is in relation to certain *Criminal Code* offences, mostly of a sexual nature or relating to trafficking in persons (new section 180(5)).[42]

2.6.2 Production of Third-Party Records to the Accused in Sexual Offence Cases (Clause 27)

Clause 27 adds provisions to the NDA outlining the procedure for the disclosure of third-party records in proceedings before a military judge. Currently, the NDA is silent on the matter. The new provisions are almost identical to those included in the *Criminal Code*, as amended by the *Victims Bill of Rights Act*.

"Third-party records" are records that contain personal information about the victim or other witnesses for which there is a reasonable expectation of privacy and that are in the possession of someone other than the prosecutor or the defence.[43] Such records include medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, as well as personal journals and diaries. Records containing personal information, the production or disclosure of which is protected by federal or provincial legislation, are also part of the definition, whereas records made by persons responsible for investigating or prosecuting the service offence are not (new section 180.01 of the NDA).

In criminal prosecutions, although the prosecutor has an obligation to disclose investigative files to the accused, third parties in possession of records do not have the same obligation. The *Criminal Code* provides a two-stage procedure for the disclosure of personal information records: the first stage involves a determination as to whether the records ought to be produced to the court, and the second stage involves a determination as to whether the judge will order that the records be disclosed to the accused.[44]

Although the right to make full answer and defence under sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* is a core principle of fundamental justice, in the context of the production of records in sexual offence cases it does not automatically entitle the accused to gain access to information contained in the private records of complainants and witnesses. The courts assess the scope of the right to make full answer and defence in the particular circumstances of each case in light of the need to balance this right with the privacy and equality rights of complainants and witnesses.[45]

Bill C-77 introduces a similar regime into the NDA for courts martial. The main differences between the victim records provisions in the *Criminal Code* and Bill C-77 are outlined in sections 2.6.2.1 to 2.6.2.4 of this Legislative Summary.

2.6.2.1 The Offences for Which a Complainant or Witness's Records May Not Be Disclosed

New section 180.02(1) of the NDA lists the types of offences (the qualifying offences) for which complainants' records held by a third party may not be disclosed to an accused who is being court-martialled, except in accordance with the procedure

in new sections 180.03 to 180.08. The qualifying offences include sexual assaults, sexual offences involving children, incest, prostitution, indecent acts and other sex-related offences. The bill also includes all historical sexual offences under the *Criminal Code* that would have constituted a qualifying offence if they had occurred on or after the coming into force of the new definition. New section 180.02 is quite similar, although not identical, to the equivalent *Criminal Code* provision.

New sections 180.02(2) and 180.02(3) make the following clarifications:

- If the record is in the possession or control of the prosecutor, he or she must notify the accused of this fact without disclosing the content of the record.
- The complainant or witness may waive the application of the third-party record sections (i.e., allow the prosecutor to provide the record to the accused).

2.6.2.2 The Application for Disclosure

The application for disclosure must be in writing and identify the record, who has possession or control of that record, and the grounds for its disclosure. The accused must establish that the record is "likely relevant" to an issue at trial or to the competence of a witness to testify (new section 180.03(2) of the NDA). New section 180.03(3) lists a number of assertions that are not sufficient on their own to establish that the record is likely relevant, such as the fact that it relates to medical treatment or therapy, to the subject matter of the proceedings, or to the witness's credibility.

New section 180.03(4) of the NDA requires that an application for the production of third-party records be served on the prosecutor, the person who has possession or control of the record, and the complainant, witness or other person to whom, to the knowledge of the accused, the record relates. These parties must be served at least 14 days before the hearing of the application. The military judge retains his or her discretion to allow the application to be made after that time if it would be in the interests of military justice to do so and may, at any time, order that the application be served on any person to whom the record relates (new section 180.03(5) of the NDA).

2.6.2.3 The Process

A hearing to determine whether to order disclosure to the military judge is to take place in private (new section 180.04(1) of the NDA). Hearings held "in private" have been defined as those at which all of the parties are present, but from which the public is excluded.[46]

The person who possesses or controls the record, the complainant or witness, and any other person to whom the record relates may appear and make submissions, without being required to testify (new section 180.04(2) of the NDA). As soon as is feasible, the military judge must inform those who are entitled to appear of their right to counsel (new section 180.04(3) of the NDA).

New section 180.05 outlines the requirements and factors for the military judge to consider in deciding whether the record should be produced for review. The military judge may order production of the record in the following circumstances:

- The application was made in accordance with sections 180.03(2) to 180.03(5), which include form, content and service requirements.
- The accused establishes that the record is likely relevant to an issue at trial or to the competence of a witness to testify.
- The production of the record is necessary in the interests of military justice.

In deciding whether a record should be produced, the military judge is required by new section 180.05(2) to consider the positive and negative effects of the decision on the accused's right to make full answer and defence and on the right to privacy, personal security and equality of the person to whom the record relates. It outlines eight factors that must be taken into consideration, including the extent to which the record is necessary for the accused's defence and whether its production would be based on a discriminatory belief or bias.

If the military judge decides that the record should be produced for review by the judge, the review must take place in the absence of the parties. A hearing in private may be held if it will assist in the determination of whether the record should be disclosed to the accused (new section 180.06 of the NDA).

New section 180.07 outlines the factors the military judge must consider in determining whether to disclose all or part of the record to the accused, as well as conditions that may be attached to any such order. If the military judge is satisfied that the record is likely relevant to an issue at trial or to the competence of a witness and that its production is necessary in the interests of military justice, he or she *may* order that the record be provided to the accused (new section 180.07(1)). The considerations and factors to be applied are the same as those outlined in new section 180.05(2) dealing with whether a record should be produced for the judge's review. If the military judge orders that the record be produced, conditions may be imposed to protect the interests of military justice and the privacy, personal security and equality interests of the person to whom the record relates. New section 180.07(3) provides a non-exhaustive list of possible conditions.

If a record is provided to the accused, the military judge must direct that a copy also be provided to the prosecutor, unless this would not be in the interests of military justice (new section 180.07(4)). Such records cannot be used in other disciplinary, criminal, civil or administrative proceedings (new section 180.07(5) of the NDA).

New section 180.08 of the NDA requires a military judge to provide written reasons for his or her decision to order or not to order production of the record.

2.6.2.4 Offences Related to Third Party Records

Bill C-77 adds new section 303 to the NDA that makes it a summary conviction offence to publish, broadcast or transmit:

- the contents of an application for disclosure of third-party records;
- evidence taken, information given, or submissions made at a third-party records hearing; or

- the determination of a military judge regarding an order to disclose third-party records and the reasons for the decision, unless authorized by the military judge.

2.6.3 Support Persons for Witnesses (Clause 28)

Clause 28 introduces provisions into the NDA to allow certain witnesses to have a support person present while testifying in proceedings before a military judge. The provisions are almost identical to those in the *Criminal Code*.

New section 183.1 of the NDA provides that, in certain cases, a support person may be present and close to the witness when he or she testifies. If the witness is under the age of 18 years or has a mental or physical disability, the military judge *must* make the order under this section, as requested by the prosecutor or the witness, unless he or she is of the opinion that the order would interfere with the proper administration of justice (new section 183.1(1) of the NDA).

For other witnesses, the judge can authorize a support person to be present and close to the witness when he or she testifies, if the military judge is of the opinion that such an order would facilitate the giving of a full and candid account or otherwise serve the proper administration of justice (new section 183.1(2) of the NDA). The request for a support person may be made by the prosecutor or the witness in question. New section 183.1(3) outlines the factors to be considered, such as the age of the witness and whether the order is needed for the security or protection of the witness.

Witnesses cannot be support persons unless the judge is of the opinion that having a witness play this role is necessary for the proper administration of justice (new section 183.1(4)). The judge may order that the support person and witness not communicate with one another while the witness testifies. No adverse inference may be drawn from the decision to grant or not to grant an order for a support person (new sections 183.1(5) and 183.1(6) of the NDA).

2.6.4 Witness Testimony Outside of the Courtroom, or Behind a Screen or Other Device (Clause 28)

Section 112.33 of the QR&O provides for a witness to testify outside the courtroom or behind a screen if certain conditions are met. Section 112.33 allows this only for certain listed offences mostly of a sexual nature, and where a complainant or witness is either under the age of 18 at the time of trial or his or her testimony may be affected by mental or physical disability. In such cases, if the judge is of the opinion that such an order is necessary to obtain a full and candid account, an order *may* be granted for a complainant or witness to testify outside the courtroom in the presence of the prosecutor and counsel for the accused or behind a screen or other device so that he or she does not see the accused. Such an order may be granted only if the accused and the court can visually and orally follow the testimony and if both the prosecutor and the counsel for the accused can engage in simultaneous visual and oral communication with the court. The accused must also be able to communicate with counsel while following the testimony.

New section 183.2 of the NDA introduces provisions that are substantively equivalent to section 486.2 of the *Criminal Code*, which relates to testifying outside the courtroom or behind a screen or other device (clause 28). These new provisions would replace those in section 112.33 of the QR&O.

New section 183.2 expands the group of people who may testify outside the courtroom or behind a screen or other device. It *requires* such an order if requested by the prosecutor or the witness and the witness is under 18 or, because of physical or mental disability, may have difficulty testifying, unless it is the opinion of the judge that the order would interfere with the proper administration of military justice (new section 183.2(1)). Currently, the military judge may make such an order but is not obligated to do so.

The new section also *allows* the military judge to make such an order in relation to other witnesses to facilitate the giving of a full and candid account or if it would otherwise be in the interest of the proper administration of military justice (new section 183.2(2)). New section 183.2(3) outlines the same factors to be considered when deciding whether to make such an order as are listed in new section 183.1 regarding support persons, along with two additional factors: whether the order is needed to protect (1) an undercover peace officer or someone who is, has or will be acting covertly under the direction of a peace officer; or (2) the identity of a witness with national security or intelligence responsibilities. A military judge may order that a witness testify in the manner provided in section 183.2(2) – outside the courtroom or behind a screen – in order to determine whether an order under new section 183.2(2) should be granted (new section 183.2(4) of the NDA).

In order for testimony to be given from outside the courtroom, arrangements must be made for the accused, the military judge and the panel of a General Court Martial, if one is convened, to watch the testimony, and the accused must be permitted to communicate with counsel while watching (new section 183.2(5) of the NDA). No adverse inference may be drawn from a decision to grant or not to grant such an order (new section 183.2(6) of the NDA).

2.6.5 Cross-Examination of Witnesses by the Accused (Clause 28)

Clause 28 also adds provisions to the NDA to prevent a self-represented accused from cross-examining certain witnesses. In such cases, the military judge must direct the Director of Defence Counsel Services to provide counsel to conduct the cross-examination. The provisions are substantively the same as those found in section 486.3 of the *Criminal Code* and divide witnesses into three categories, as follows:

- Witness under age 18: Upon the application being made by the prosecutor, the military judge *must* make the requested order unless he or she is of the opinion that the proper administration of justice requires the accused to personally cross-examine the witness (new section 183.3(1) of the NDA).
- Certain offences: Upon the application being made by the prosecutor in proceedings for an offence of criminal harassment or sexual assault (sections 264 or 271 to 273 of the *Criminal Code*), the military judge *must* make

the order unless the proper administration of justice requires that the accused personally cross-examine the witness (new section 183.3(2) of the NDA).

- All other cases: Upon the application being made by the prosecutor, the court *may* make the requested order if it would facilitate the giving of a full and candid account by the witness of the acts complained of, or if it would be in the interest of the proper administration of justice (new section 183.3(3) of the NDA). In these cases, the factors to be considered are the same as those used in the equivalent *Criminal Code* provision and in deciding whether a support person is to be permitted under new section 183.1(3) (new section 183.3(4) of the NDA).

Note that a defence lawyer is generally provided without cost to CAF members when a charge is forwarded to a Referral Authority. This differs from the civil system, in which a lawyer is provided only when certain criteria, including low income, are satisfied.[47]

2.6.6 Non-disclosure of the Identity of Witnesses (Clause 28)

Clause 28 also creates a new type of court order *allowing* a military judge to direct that any information that could identify a witness not be disclosed in the course of the proceedings in respect of a service offence when such an order is in the interest of the proper administration of justice (new section 183.4 of the NDA). The provisions are substantively the same as those in section 486.1 of the *Criminal Code*, as introduced by the *Victims Bill of Rights Act*. Under this new measure, the identity of a witness would not be disclosed to the accused the defence lawyer or the general public.

In determining whether to make an order that the identity of a witness be protected, the judge must consider various factors, including the accused's right to a fair and public hearing, the witness's security and society's interest in encouraging the reporting of service offences and the participation of victims and witnesses. The military judge may also consider other relevant factors (new section 183.4(3) of the NDA).

The military judge may hold a hearing to determine whether the requested order should be made, and this hearing may be held in private (new section 183.4(2) of the NDA). No adverse inference may be drawn from the fact that such an order is or is not made (new section 183.4(4) of the NDA).

2.6.7 Publication Bans (Clauses 23 and 28)

New sections 183.5 and 183.6 add publication ban provisions to the NDA, as described in Table 1.[48] A publication ban is an order that the identity of a complainant or a witness (or information that could identify them) not be published, broadcasted or transmitted in any way. The provisions are almost identical to those in the *Criminal Code*.

Table 1 – Explanation of the Various Types of Publication Bans

Offence	Person to Whom the Information Relates	Mandatory or Discretionary Nature of the Order	Relevant Provision	Other Notes
Specified offences (mostly of a sexual nature)[a]	Witnesses 18 years of age or older	Discretionary	183.5(1)	
Specified offences (mostly of a sexual nature)[a]	Victims or any witness under age 18	Mandatory if application is made by victim, prosecutor or witness under age 18; otherwise, discretionary	183.5(1) and 183.5(2)	Military judge must inform the victim and any witness under age 18 of the right to make an application
Service offences other than specified offences	Victim under age 18	Mandatory if application is made by victim or prosecutor; otherwise, discretionary	183.5(3) and 183.5(4)	Military judge must inform victim under age 18 of the right to make an application
Child pornography (section 163.1 of the *Criminal Code*)	Witness under age 18 or person who is the subject of the child pornography	Mandatory	183.5(5)	
Any offence (where an order is not available under section 183.5)	Victim or witness of any age	Discretionary	183.6(1)	Military judge must be of the opinion that the order is in the interest of the proper administration of military justice
Specified offences relating to organized crime, terrorism and foreign entities	Military justice participant[b]	Discretionary	183.6(2)	Military judge must be of the opinion that the order is in the interest of the proper administration of military justice

Notes: a. Although the marginal note for section 183.5 says it introduces an "Order restricting publication – sexual offences," among the specified offences are some – abduction of minors, extortion and charging a criminal interest rate – that do not appear to be sexual in nature (sections 280, 281, 346 and 347 of the *Criminal Code*).

b. Bill C-77 defines "military justice system participant" in section 2 of the NDA. The term pertains to a person who plays a role in the administration of military justice, including the Minister of National Defence, the Judge Advocate General, various members of the military responsible for aspects of military justice, and witnesses.

Source: Table prepared by the authors using information obtained from sections 183.5 and 183.6 of Bill C-77, An Act to amend the National Defence Act and to make consequential amendments to other Acts, 1st Session, 42nd Parliament.

New section 183.6 governs publication bans in circumstances not covered by new section 183.5. The application must set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of military justice (new section 183.6(6)). A hearing may be held for the judge to decide whether to authorize a publication ban under new section 183.6; this hearing may be held in private (new section 183.6(7)). New section 183.6(8) outlines a number of factors that the military judge must consider in deciding whether to authorize a publication ban, such as fair trial rights and the risk of harm if the person's identity were disclosed. The judge may subject the order to conditions (new section 183.6(9)).

In contrast to the equivalent *Criminal Code* provision (section 486.5), which outlines the procedural requirements (in writing, notice, etc.), new section 183.6(5) states that the process to be used in the military justice system will be set out in regulations.

2.6.8 General Order for the Security of a Witness (Clause 28)

New section 183.7 of the NDA provides the authority for a military judge to make an order for the security of a witness on the application of the prosecutor, a witness or on his or her motion, other than an order that may be made under section 180 (exclusion of the public from proceedings). To grant such an order, the judge must be of the opinion that it is necessary to protect the security of any witness and is otherwise in the interest of the proper administration of military justice. The military judge must consider a number of factors, including the age of the witness and the right to a fair and public hearing, and any other factor he or she deems relevant.

2.7 Pleas (Clauses 29 and 30)

Currently, section 191.1 of the NDA and various sections of the QR&O provide the procedure to be followed in relation to pleas. Section 191.1 is repealed by clause 30. New section 189.1 is introduced in its place and also addresses a number of issues currently dealt with in the QR&O. Bill C-77 makes the NDA provision relating to guilty pleas similar to the equivalent provision in the *Criminal Code* (section 606); there are some differences from the *Criminal Code*, although most are not substantive.

New section 189.1(1) states that, when called upon to plead, an accused may plead guilty or not guilty or may enter any other plea authorized by regulation (for example, not criminally responsible).[49] New section 189.1(1) permits a guilty plea after the commencement of the trial.[50] New section 189.1(2) permits the military judge assigned to preside at the court martial to receive the accused's guilty plea 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 – to determine the sentence once the court martial is convened but before the commencement of the trial. Unlike section 606(5) of the *Criminal Code*, which allows for closed-circuit television to be used or for counsel to appear instead of having the accused present for the plea, new section 189.1 does not allow a video link to be used for pleas in the military justice system.

The military judge may accept a guilty plea only if he or she is satisfied of the following:

- The plea is voluntary.
- The accused understands that he or she is admitting to the essential elements of the service offence.
- The accused understands the nature and consequences of the plea.
- The accused understands that the military judge is not bound by any agreement between the accused person and the prosecutor (new section 189.1(3)).[51]

However, a failure to fully inquire into the conditions listed above does not affect the validity of the plea (new section 189.1(4)).

If an accused refuses to enter a plea or does not answer, he or she is deemed to have made a plea of not guilty (new section 189.1(5)).[52] The military judge is afforded discretion to provide additional time to the accused to enter a plea, to prepare his or her defence or for other reasons (new section 189.1(6)). Where an accused pleads not guilty to a service offence but guilty to another service offence arising out of the same transaction, the military judge may, with the consent of the prosecutor, accept the guilty plea and find him or her not guilty of the other offence (new section 189.1(7)).[53]

If a military judge accepts a guilty plea for a "serious personal injury offence," he or she must ask the prosecutor whether reasonable steps have been taken to inform the victim or victims of any agreement entered into by the prosecutor and the accused person (new section 189.1(8)). New section 189.1(12) defines the term "serious personal injury offence." The definition includes a number of sexual offences found in the *Criminal Code*. It also includes a serious offence (defined as having a maximum penalty of five years' imprisonment) and a number of listed NDA offences in which one of the following conditions is met:

- There was use of or an attempt to use violence against another person.
- There was conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person.[54]

In relation to serious offences that are not serious *personal injury* offences, the judge must, after accepting a guilty plea, ask the prosecutor whether any victim had advised the prosecutor of a desire to be informed of any agreement entered into by the prosecutor and the accused person. If so, the judge then must ask whether reasonable steps were taken to inform the victim of the agreement (new section 189.1(9) of the NDA).

Where new section 189.1(8) or 189.1(9) applies and the victim was not informed of the agreement before the plea of guilty was accepted, a duty to inform the victim is imposed upon the prosecutor, who must, as soon as is feasible, take reasonable steps to inform the victim of the agreement and the acceptance of the plea (new section 189.1(10)). However, neither the failure of the military judge to inquire of the prosecutor, nor the failure of the prosecutor to take reasonable steps to inform the victim or victims of the agreement, affects the validity of the plea (new section 189.9(11)).

2.8 Consideration of the Victim's Safety and Security when Suspending Punishment (Clause 63(25))

Clause 63(25) of Bill C-77 amends section 215 of the NDA, the provision that allows for the suspension of a sentence of imprisonment or detention by the court martial or the Court Martial Appeal Court.[55] Bill C-77 provides that, where a punishment is suspended, the decision must include a statement that the court martial or the Court Martial Appeal Court, as the case may be, considered the safety and security of victims of the offence (new section 215(1.1)). In addition, if any victim so requests, he or she is to receive a copy of the decision (new section 215(1.2)).

2.9 Right to Appeal a Court Martial Decision (Clauses 37 and 38)

Section 230 of the NDA outlines the grounds on which a person subject to the CSD may appeal a finding of guilt by a court martial to the Court Martial Appeal Court. Clause 37 adds a new ground for appeal to enable a challenge of the legality of a decision *not to make* an order under new section 180.05(1) or *to make or not make* an order under new section 180.07(1), both in relation to the disclosure of third-party records. Similarly, clause 38 amends section 230.1 to give the prosecution the power to appeal a military judge's decision to make orders under the same two provisions.

2.10 New Summary Hearing System (Clauses 24 and 25)

Currently, as noted above, charges under the military justice system can be dealt with either by summary trial or by court martial. A summary trial is decided by the CO, a delegated officer (DO) or a superior commander (SC), generally involves less serious offences and has fewer procedural protections. A court martial is a trial presided over by a military judge. In the case of a general court martial, a panel of five members of the armed forces is added; this is similar to a jury in the civilian system.[56] Clause 25 amends Division 5 of the CSD, introducing a new category of service infractions that will consist of more minor infractions created by regulation and outlining the rules for service infraction summary hearings.

Bill C-77 repeals sections 162.1 and 162.2 of the NDA, which allow an accused person who could be tried by summary trial to choose to be court-martialled. As will be explained in more detail below, because Bill C-77 eliminates the possibility of pursuing a service offence by summary hearing, these provisions are no longer necessary.

Clause 24 replaces sections 160 to 161.1 of the NDA and outlines the process for the laying of a charge and the charge referral process in respect of service offences and service infractions. Both of these changes are explained in more detail below.

2.10.1 Service Infractions (Clause 25)

Bill C-77 limits the application of the summary hearing system to hearings for service infractions and requires all service offences to be dealt with by way of court martial. Service infractions will not be considered an offence under the NDA and will not result in a criminal record (new sections 162.4 and 162.5 of the NDA). Moreover, the victims' rights outlined above will not be available in the summary hearing system.

New section 162.6 of the NDA states that a person who has been tried in respect of an offence cannot be tried in respect of a service infraction arising from the same facts, regardless of whether he or she was found guilty of the offence. This applies whether the offence was tried by court martial, civil court or the court of another country. However, if a summary hearing has been conducted for a service infraction, the person can still be tried for an offence. New section 162.6(3) states that answers or statements given at summary hearings cannot be used in any disciplinary, criminal

or civil proceeding except in cases where the hearing or proceeding relates to an allegation that the person made the statement knowing it to be false.

2.10.1.1 Who Presides over a Summary Hearing and when the Summary Hearing Procedure Should Be Used (New Sections 162.93 to 162.95 and 163.2 to 163.4 of the NDA)

According to new section 162.95 of the NDA, if a charge alleging a service infraction is referred to a CO, the CO shall, taking into consideration the conditions outlined in amended section 163 (see below for more on that section):

- conduct a summary hearing;
- not proceed with the charge; or
- refer the charge in accordance with regulations to another CO, a SC or DO.

If the choice is made to refer the charge to a DO, the CO may delegate the power to conduct a summary hearing to any officer under his or her command, subject to regulations and to the extent considered appropriate (new section 162.94). New section 163.2 states that an SC, CO or DO to whom a charge under new section 162.95(c) or under new section 163.2 is referred has the same three options listed above.

Amended section 163(1) lists four conditions under which an SC, CO or DO may conduct a summary hearing, as follows:

- The person charged is at least one rank below the SC, CO or DO, **or is a non-commissioned member**.[57]
- The powers of the SC, CO or DO to impose a sanction are adequate in relation to the gravity of the facts giving rise to the charge. (This is described further in the next section.)
- There are no reasonable grounds to believe that the person is unfit to stand trial or, when the alleged infraction took place, was suffering from a mental disorder rendering him or her incapable of appreciating the nature and quality of the act or omission or that it was wrong.
- It would be appropriate, in the interests of discipline, efficiency and morale of the CAF to conduct the hearing.

That being said, under new section 163(2) of the NDA, an SC, CO or DO may not preside over a summary hearing if that person:

- carried out or directly supervised the investigation;
- issued a warrant under section 273.3 (for a search); or
- laid the charge or caused it to be laid.

However, the SC, CO or DO may conduct such a hearing if, having regard to all the circumstances, it is not practicable for any other SC, CO or DO to do so.

If it is decided that a charge should not proceed to summary hearing, this does not preclude such proceedings taking place later (new section 163.3). However, the trial must commence within six months after the day the infraction is alleged to have been committed (new section 163.4 of the NDA).

2.10.1.2 Sanctions for Service Infractions (New Sections 162.7 to 162.92 and 163.1 of the NDA)

New section 162.9 of the NDA outlines that the objectives of imposing sanctions for service infractions are as follows:

- the promotion of a habit of obedience to lawful commands and orders;
- the maintenance of public trust in the CAF as a disciplined armed force;
- the denunciation of undisciplined conduct;
- deterrence;
- rehabilitation; and
- the promotion of a sense of responsibility.

New sections 162.91 and 162.92 of the NDA outline principles that should inform the determination of an appropriate sanction for a service infraction:

- As a fundamental principle, sanctions must be proportionate to the gravity of the infraction and the degree of responsibility of the person in question.
- Aggravating or mitigating circumstances relating to the infraction or the person that committed it, including abuse of rank or position of trust or authority; motivation based on bias, prejudice or hate related to various groups, including gender identity or expression groups; or harm to a military operation or training should be taken into account.
- Similar sanctions should be imposed for infractions that are similar and committed in similar circumstances.
- The sanctions imposed should be the least severe required to maintain discipline, efficiency and morale.

New section 162.93 specifies that indirect consequences of the finding that the person committed a service infraction or of the sanction resulting from it can also be taken into account in determining the sanction.

New section 162.7 outlines the sanctions that may be imposed for a service infraction. Listed from the most to least serious, these are:

- reduction of rank;
- severe reprimand;
- reprimand;
- deprivation of pay and allowances for not more than 18 days; and
- minor sanctions prescribed in regulations.

In contrast, service offences currently subject to summary trials may result in detention for up to 30 days if the trial is presided over by a CO (section 163(3) of the NDA).

Reduction of rank is applicable to officers above the rank of second lieutenant and to non-commissioned members above the rank of private, which are the lowest ranks, respectively, for officers and non-commissioned members (new section 162.8(1)).[58] Regulations will outline to what rank a person can be reduced, although commissioned officers cannot be reduced to a rank lower than commissioned rank (new section 162.8(2)).

Finally, the type of sanction available also depends on the level of the decision-maker presiding over the summary hearing (i.e., SC, CO or DO) (new section 163.1).

2.11 Referral of Service Offence and Service Infraction Charges (Clauses 24 to 26)

Because Bill C-77 prevents service offences from being subject to summary hearings, the bill also changes the rules regarding the referral of service offence and service infraction charges. New section 161.1 of the NDA establishes separate referral processes (to be outlined in regulations) for service offences and service infractions. After a person is charged with having committed a service offence, the charge must be referred to the Director of Military Prosecutions (DMP) in accordance with regulations, whereas charges relating to service infractions must be referred to a CO.[59] A CO can decide to not proceed with the charge or refer the charge to another CO, a superior commander or a delegated officer (new section 162.95).

Clause 26 replaces section 165.13 of the NDA, which currently allows the DMP to refer a charge for summary trial if he or she is satisfied that it should not proceed by court martial. This process is no longer needed, since service offences cannot be dealt with by summary hearing. New section 165.13 of the NDA requires instead that the DMP communicate, in writing, the decision and the reasons for not proceeding to the officer who referred the charge and to the CO of the accused.

2.12 Review Authority in Respect of Service Infraction (Clause 25)

New section 163.6 of the NDA establishes the review process in respect of a finding that a person has committed a service infraction and in respect of a sanction imposed by an officer who conducted the summary hearing. The review authorities are the Chief of the Defence Staff and any other military authorities prescribed in regulations (new section 163.6(1)). A review authority may act on its own initiative or on application of the person found to have committed the service infraction (new section 163.6(2)).

The review authority has the power to quash, completely or in part, a finding by an officer who conducted the summary hearing (new section 163.7(1)). If the finding is completely quashed and no other such finding was made at the summary hearing, every sanction imposed as a result of the finding is also quashed and a new summary hearing may be held as though no summary hearing had yet been held (new section 163.7(2)). If more than one finding has been made that a person had committed a service infraction and a review authority quashes one or more but not all of them, if a sanction imposed is in excess of any that may be imposed in respect of

the remaining findings or is, in the opinion of the reviewing authority, unduly severe, the review authority can substitute that sanction for a new sanction or sanctions that it considers appropriate (new section 163.7(3)).

The review authority also has the power to substitute a new finding for any finding that a person has committed a service infraction (new section 163.8(1)) if the original finding is in excess of a sanction that may be imposed in respect of the new finding or is considered to be unduly severe by the review authority (new section 163.8(2)). The new sanction cannot be higher in scale than the sanction imposed originally (new section 163.9(2)). The review authority also has the power to commute, mitigate or remit any or all of the sanctions imposed by an officer who conducted the summary hearing.

2.13 Petition for New Trial (Clause 41)

Clause 41 of Bill C-77 removes the possibility for the Governor in Council (in relation to a finding of guilt by a court martial) or the Chief of the Defence Staff (in relation to a finding of guilt arising from a summary trial) to review findings of guilt made and any punishment imposed by court martial or by persons presiding at summary trial (section 249 of the NDA). However, Bill C-77 retains the possibility of holding a new trial for cases dealt with by court martial, but only if new evidence is being discovered.

2.14 Amendments to the *Criminal Code* (Clause 47)

Clause 47 amends section 423.1(1)(b) of the *Criminal Code* to extend the application of the offence of intimidating a justice system participant to military justice system participants.

2.15 Transitional Provisions (Clauses 66 and 67)

Clause 66 provides that the NDA, as it read immediately before the coming into force of section 25 of Bill C-77, will apply to all proceedings against a person alleged to have committed a service offence that were commenced (which is defined as the moment the charge is laid) prior to the coming into force of the provisions governing summary hearings in new Division 5 of the NDA (clause 25 of the bill). Clause 67 provides that the new sentencing principles acknowledging the harm done to victims and to the **community** will not apply retroactively.

NOTES

1. Bill C-77, An Act to amend the National Defence Act and to make related and consequential amendments to other Acts, 1st Session, 42nd Parliament.

2 **House of Commons, Standing Committee on National Defence, *Thirteenth Report*, 1st Session, 42nd Parliament.**

3. *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s. 2.
4. Bill C-71, An Act to amend the National Defence Act and the Criminal Code, 2nd Session, 41st Parliament.
5. *Criminal Code* [Code], R.S.C. 1985, c. C-46.
6. *National Defence Act* [NDA], R.S.C. 1985, c. N-5, s. 2. The list of persons subject to the *Code of Service Discipline* [CSD] can be found in section 60 of the NDA.
7. Bill C-15: Strengthening Military Justice in the Defence of Canada Act, 1st Session, 41st Parliament (S.C. 2013, c. 24). More specifically, see sections 14, 24, 27, 35, 36, 50, 62 to 65, 69, 74 and 75. For more information on the Act, see Erin Shaw and Dominique Valiquet, *Legislative Summary of Bill C-15: An Act to amend the National Defence Act and to make consequential amendments to other Acts*, Publication no. 41-1-C15-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 2 May 2013. The amendments regarding sentencing respond to recommendations made by the Right Honourable Antonio Lamer in his independent review of Bill C-25. See Antonio Lamer, *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25,* An Act to amend the National Defence Act and to make consequential amendments to other Acts*, as required under section 96 of Statutes of Canada 1998, c. 35*, 3 September 2003.
8. *Victims Bill of Rights Act*, S.C. 2015, c. 13. For more information on that Act, see Lyne Casavant, Christine Morris and Julia Nicol, *Legislative Summary of Bill C-32: An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, Publication no. 41-2-C32-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 December 2014.
9. House of Commons, *Debates*, 2nd Session, 41st Parliament, 9 April 2014, 1635.
10. The Judge Advocate General [JAG] is the senior legal officer in the Canadian Armed Forces [CAF]. Pursuant to their mandate under the NDA, the JAG acts as the legal advisor to the Governor General, the Minister of National Defence [the Minister], the Department of National Defence and the CAF in all matters relating to military law. The JAG is also responsible for superintending the administration of military justice. Although the JAG is responsive to the chain of command for the provision of legal services within the CAF, it is to the Minister that the JAG is responsible for the performance of their duties. The JAG is accountable to Parliament through the Minister. The powers and functions of the JAG are set out in sections 9 to 10.1 of the *National Defence Act*. For more information, see National Defence and the Canadian Armed Forces, *Judge Advocate General*.
11. National Defence, *Annual Report of the Judge Advocate General 2014–2015*, p. 10.
12. Gilles Létourneau, *Introduction to Military Justice: An Overview of the Military Penal Justice System and its Evolution in Canada*, Wilson & Lafleur, Montréal, 2012.
13. Service tribunals have jurisdiction not only over CAF members, but also over civilians in certain circumstances, such as in the case of individuals accompanying deployed CAF units. Section 60 of the NDA sets out who is subject to the CSD and in what circumstances.
14. There is a wide range of specific military offences, such as mutiny, disobedience of lawful command, negligent performance of military duties and conduct to the prejudice of good order and discipline. These offences are set out in sections 72 to 133 of the NDA. However, conduct to the prejudice of good order and discipline, under section 129 of the NDA, is the single most common offence. This section is applied in the punishment of a number of behaviours, such as having hair that is too long, breaching the rules governing alcohol consumption, failing to handle a rifle safely and committing certain offences of a sexual nature. See National Defence, *Annual Report of the Judge Advocate General 2014–15*, p. 27.

15. Under section 2 of the NDA, "[a] service offence means an offence under [the *National Defence Act*], the *Criminal Code* or any other Act of Parliament, committed by a person while subject to the Code of Service Discipline." The incorporation of offences under any Act of Parliament is provided for in section 130 of the NDA. On 19 September 2018, in *Beaudry v. R.*, the Court Martial Appeal Court of Canada struck down section 130(1)(a) of the NDA, "in its application to any civil offence for which the maximum sentence is five years or more, in accordance with subsection 52(1) of the *Constitution Act, 1982*," on the basis that the provision – which deems all *Criminal Code* offences committed in Canada by military members to be "service offences" – deprives military accused of their *Canadian Charter of Rights and Freedoms* right to trial by jury (section 11(f)). See *Beaudry v. R.* 2018 CMAC 4; and *Constitution Act, 1982*, being Schedule B to the *Canada Act*, 1982, c. 11 (U.K.), s. 52(1).
16. For more information on the CSD, see National Defence and the Canadian Armed Forces, *The Code of Service Discipline and Me*.
17. NDA, s. 70.
18. The military justice system is governed by the CSD and associated regulations, and by standard operating procedures. See *Queen's Regulations and Orders (QR&O)*; *Canadian Forces Administrative Orders (CFAOs)*; and *Defence Administrative Orders and Directives*.
19. For more information on the differences between the two types of service tribunals, see Létourneau (2012).
20. *MacKay v. The Queen*, [1980] 2 SCR 370.
21. *R. v. Généreux*, [1992] 1 SCR 259.
22. Ibid.
23. National Defence, *Annual Report of the Judge Advocate General 2014–2015*, p. 10.
24. Except for service convicts serving their sentence in a civilian correctional facility. New section 71.01 of the NDA defines the military justice system for the purpose of applying the rights set out in the Declaration of Victims Rights [DVR]. According to this definition, the military justice system does not include service prisoners incarcerated in a penitentiary or civil prison. As explained in section 2.5.4.1 of this Legislative Summary, in these cases victims of service offences still have the right to information through the rights set out in the *Corrections and Conditional Release Act* [CCRA]. See *Corrections and Conditional Release Act*, S.C. 1992, c. 20. For more information on amendments to the CCRA see section 2.4 in Casavant, Morris and Nicol (2014).
25. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
26. Government of Canada, "Enhancing Victims Rights in the Military Justice System: An Act to amend the National Defence Act and to make related and consequential amendments to other Acts," Backgrounder, 10 May 2018.
27. *Canadian Bill of Rights*, S.C. 1960, c. 44.
28. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.
29. *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).
30. *Access to Information Act*, R.S.C. 1985, c. A-1.
31. *Privacy Act*, R.S.C. 1985, c. P-21.
32. The coordinating amendment in clause 28 of Bill C-71 also amends section 22(2) of the *Canadian Victims Bill of Rights* to recognize the Declaration of Victims Rights in the NDA.
33. Section 8 of the *Canadian Victims Bill of Rights* provides that victims have the right, on request, to "information about reviews under the CCRA relating to the offender's conditional release and the timing and conditions of that release."

34. See QR&O, "112.65 – Appearance of Witnesses – Video Link," vol. II, c. 112.

35. *R. v. Fitzgibbon*, [1990] 1 SCR 1005; *R. v. Biegus*, 1999 CanLII 3815 (ON CA), paras. 15 and 21; *R. v. Yates*, 2002 BCCA 583 (CanLII), paras. 12, 15 and 17; and *R. v. Siemens*, 1999 CanLII 18651 (MB CA), para. 8.

36. An individual, including a victim, may invoke section 810(1) of the Code if the individual fears on reasonable grounds that another person

> (a) will cause personal injury to him or her or to his or her spouse or common-law partner or child or will damage his or her property; or
>
> (b) will commit an offence under section 162.1 (publication of an intimate image without consent).

The individual, or another person acting on his or her behalf, may lay an information before a justice of the peace to restrict communications between the accused and the individual, the individual's spouse or common-law partner, or the individual's child. If the justice is satisfied by the evidence adduced that the person on whose behalf the information was laid has reasonable grounds for the fear, the justice may order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for a period of not more than 12 months.

37. Although many of the provisions in sections 497 to 515 of the Code concerning arrest and pre-trial custody are also contained in the NDA, there are significant differences between the procedures applicable in the civilian criminal justice system and those in the military justice system. For more information on the differences between the two systems, see Gilles Létourneau and Michel Drapeau, *Military Justice in Action: Annotated National Defence Legislation*, 2nd ed., Carswell, Toronto, 2015.

38. The custody review officer is the commanding officer [CO] of the individual in custody or the officer designated by the CO or, in certain cases, the CO of the unit or element where the person is in custody (section 153 of the NDA).

39. This new provision is similar to section 515(12) of the Code, which allows a justice of the peace who orders that an accused be detained in custody to direct that the accused abstain from communicating, directly or indirectly, with any victim, witness or other person identified in the order, except in accordance with such conditions specified in the order as the justice considers necessary. The equivalent of the custody review officer in the civilian criminal justice system, the officer in charge, does not have the authority to restrict the communications of the person he or she decides to detain in custody under sections 498 and 499 of the Code, as is the case with the custody review officer in accordance with the amendment proposed by the bill under consideration (new section 158.61 of the NDA). The officer in charge may not order that the person detained in custody abstain from communicating with a victim, witness or other person. Only the justice of the peace may impose such conditions when ordering the detention of the accused in custody under section 515 of the Code. The Code provisions respecting judicial interim release and the imposition of conditions attached to an undertaking by an accused for judicial interim release, namely sections 499 and 512, were amended in 1999 with the passage of Bill C-79. See Bill C-79, An Act to amend the Criminal Code (victims of crime) and another Act in consequence, 1st Session, 36th Parliament (S.C. 1999, c. 25).

40. This rule applies to proceedings under new sections 147.6 (order to abstain from communication), 148, 158.7 (review of directions), 159 (pre-trial custody review), 187 (preliminary inquiries), 215.2 (hearings into breach of conditions) and 248.81 (breach of undertaking).

41. A military judge may order the exclusion of the public in the interests of public safety or public morals; for the maintenance of order or the proper administration of military justice; or to prevent injury to international relations, national defence or national security.

42. These are sections 151, 152, 153, 153.1, 155 or 159, 160(2), 160(3), 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 and 286.3 of the Code, which are all of a sexual nature or relate to the trafficking of persons.

43. Procedural protections for sexual assault victims are set out in Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, which received Royal Assent on 13 December 2018. Bill C-77 largely incorporates the Code's existing regime for the production of third-party records in sexual offence cases. However, it does not include any amendments tracking the changes Bill C-51 made to the Code's rape shield provisions, the proposed regime for admissibility of complainant's records in the hands of the accused, or the changes to the notice period for the production of third-party records regime. For more information about that Act, see Bill C-51, An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, 1st Session, 42nd Parliament (S.C. 2018, c. 29); and Lyne Casavant, Maxime Charron-Tousignant, Robin MacKay, Julia Nicol and Erin Shaw, *Legislative Summary of Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, Publication no. 42-1-C51-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 December 2018.

44. In 2012, the Standing Senate Committee on Legal and Constitutional Affairs [Senate Committee] conducted a statutory review of the Code provisions concerning the production of records in sexual offence proceedings. Although the Committee found that the records production scheme in the Code is balanced and appropriate and is generally working well, several areas were identified where changes to the provisions could provide greater specificity and improve the effectiveness and clarity of the legislation. See *Statutory Review on the Provisions and Operation of the* Act to amend the Criminal Code (production of records in sexual offence proceedings), Final Report, December 2012. Bill C-32 responded to some of the recommendations made by the Senate Committee in respect of the Code provisions concerning the production of records in sexual offence proceedings; most of those changes are reflected in the new provisions on third-party records being introduced into the NDA by Bill C-71.

45. *R. v. Mills*, [1999] 3 SCR 668, paras. 91 and 94.

46. *Toronto Star Newspapers Limited v. Canada*, 2007 FC 128, paras. 32–33.

47. National Defence and the Canadian Armed Forces, *Defence Counsel Services*.

48. Currently, military judges must rely on the common law for authority to issue a publication ban.

49. Currently, section 112.24 of the QR&O permits various pleas, including that the court lacks jurisdiction, that the charge has been dismissed, that the case has already been heard, that the accused is unfit to stand trial, and that the charge does not disclose a service offence.

50. This is currently allowed under section 112.26 of the QR&O.

51. This appears to be narrower than the current section 112.25(5) of the QR&O, which forbids the court from accepting a guilty plea in cases where the accused did not understand the nature or gravity of the charge, the accused disputes particulars of the charge sheet, or for any other reason in the interest of justice.

52. Section 112.05(6) of the QR&O currently addresses this issue.

53. Section 112.05(8) of the QR&O currently addresses this issue.

54. Section 25 of *An Act to amend the Criminal Code and the National Defence Act (mental disorder)* sets out the same definition of a "serious personal injury offence" as in clause 64(3) of Bill C-77, which states that, on the first day that those two clauses are both in force, the definition of a "serious personal injury offence" will move to the definition section of the NDA under section 2(1). See Bill C-14, An Act to amend the Criminal Code and the National Defence Act (mental disorder), 2nd Session, 41st Parliament (S.C. 2014, c. 6).

55. Note that this is not the same as a suspended sentence under the Code.

56. For further information about the differences between a court martial and a civilian trial and between a court martial and a summary trial, see Létourneau and Drapeau (2015), pp. 17–20.

57. As explained by the mover of the amendment in Committee, the proposed section 163(1)(a) was amended in Committee to clarify what occurs when there is no officer in charge and a non-commissioned member has to act in the absence of an officer. House of Commons, Standing Committee on National Defence, *Evidence*, 1st Session, 42nd Parliament, 27 November 2018.

58. Government of Canada, *Ranks and appointment*.

59. Subject to regulations, a CO can delegate his or her power to conduct a summary hearing to any officer under his or her command (new section 162.94 of the NDA).