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Chair

The Honourable Maxime Bernier

Standing Committee on National Defence

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● (1535)

[*Translation*]

The Chair (Hon. Maxime Bernier (Beauce, CPC)): Good afternoon, everyone. Welcome to meeting No. 46 of the Standing Committee on National Defence. Pursuant to the order of reference of Monday, December 6, 2010, we are going to hear testimony from witnesses regarding Bill C-41.

[*English*]

We have witnesses with us. I want to thank the Honourable Peter MacKay for being with the committee.

I know, Peter, that Brigadier-General Bernard Blaise Cathcart is with you.

Thanks for being with us.

We'll start right now. You have 10 minutes, Minister. Thank you very much.

[*Translation*]

Hon. Peter MacKay (Minister of National Defence): Thank you very much, Mr. Chair.

As you said, I am joined by Brigadier-General Blaise Cathcart, justice advocate general of the Canadian Forces.

Mr. Chair and colleagues, thank you for giving us the opportunity to present Bill C-41.

[*English*]

I'm very pleased to be with you at the committee as you begin your examination of Bill C-41. This legislation is specifically aimed at strengthening the Canadian military justice system.

Let me begin by stating how much I appreciate the support that has already been expressed by members of the committee, by members of the opposition in particular, for Bill C-41, and the indication that has come from the committee regarding the willingness to consider this bill in a timely manner.

I say that because, as many of you will know, there is quite a history with this bill. It is coming back now for the third time, and this is a bill of some urgency and priority, I would suggest to you. The government's legislation is in response to the Lamer report. This is the third time, as I mentioned, the legislation has been introduced in response to that report. It was first introduced as Bill C-7, in April 2006. It subsequently died on the order paper. It was back as Bill C-45, a successor bill introduced in March 2008, which also died as a result of an election call. As members are now aware, this bill was introduced in June of 2010.

The Lamer report was tabled in Parliament in the year 2003 and followed an independent review of portions of the National Defence Act to be amended by Bill C-25. Chief Justice Lamer made numerous recommendations that were aimed at improving not only the military justice system but also the Canadian Forces grievance process as well as the military police complaints process.

He said, and I quote, “Canada has...a very sound and fair military justice framework in which Canadians can have trust and confidence”, and I believe this to be absolutely true. But of course that is not to say, as with any justice system, that it cannot be improved. The old adage about our justice system being a living tree equally applies to the military justice system. I see my friend from Beauséjour nodding in agreement. I'm sure that's an expression he heard at law school as well.

That's what the government is seeking to achieve with this legislation, Mr. Chair.

[*Translation*]

The bill reflects recent recommendations made by the Senate Committee on Legal and Constitutional Affairs after their study of Bill C-60. Bill C-60 was required to respond to the judgment of the Court Martial Appeal Court in the case the Crown versus Trépanier.

As you consider Bill C-41, I also believe it is important to keep in mind that the military justice system is a separate system of justice designed to promote the operational effectiveness of the Canadian Forces. This separate and distinct aspect was upheld by the Supreme Court of Canada in R. v. Généreux.

The military justice system contributes to the maintenance of discipline, efficiency and morale within our military. It reinforces the command structure of our military in support of both day-to-day and operational activities. Given the key role our military plays in protecting Canadians and advancing Canadian interests and values, ensuring that the National Defence Act keep pace with developments in the law and Canadian society is important.

[*English*]

Bill C-41 is a key step that is part of a process of continuous improvements—the classic living tree. And the bill has a number of key provisions that I'll touch on.

It will enhance the independence of military judges by providing them with security of tenure until the age of retirement. That is, of course, consistent with all members of the Canadian Forces. This is consistent with the tenure of judges in the Canadian civil justice system as well, Mr. Chair.

Bill C-41 also includes a statutory articulation of the principles of sentencing in the military justice system, which provides guidance in the sentencing process. This guidance parallels that provided in the Criminal Code, while taking into consideration the specifics of the military justice system.

One of the concerns expressed by some honourable members during the debate at second reading was that the sentencing of the military justice system might be unduly harsh in comparison to the civil system. It should be noted that Bill C-41 will provide statutory protection against undue harsh sentences being imposed by service tribunals. The bill in fact proposes that the principle of restraint will be followed in the sentencing system of the military justice system. This means that a determination should always be made as to what is the minimum sentence required to maintain discipline, efficiency, and morale within the military, and it requires that the sentence be imposed by the service tribunal.

This bill will also enhance the flexibility of sentencing by providing a greater ability to tailor a sentence to the particular circumstances of the offender and of the offence—also consistent with our civilian system—and by allowing for additional sentencing options, in effect modernizing the act in the form of absolute discharges, intermittent sentences, and restitution orders, all of which are now incorporated into the Criminal Code.

● (1540)

[*Translation*]

Bill C-41 also provides for the introduction of victim impact statements. This will permit individual victims of offences to more readily express themselves in the sentencing process at courts martial.

Together with enhanced provisions for restitution, Bill C-41 will therefore help ensure that victims of offences are not disadvantaged by having a particular case tried in the military justice system rather than in the civilian one.

[*English*]

I understand that during the debate at second reading there were also concerns raised regarding the fairness of the military justice system, particularly in relation to the summary trial system. In that regard, I would like to remind my colleagues that two of Canada's most eminent jurists, the late Chief Justice Brian Dickson and Antonio Lamer examined this system in significant detail. As you're aware, the Lamer report touches specifically on this. While making recommendations for refinement, both of these eminent jurists endorsed it, and they noted that the summary trial system strikes the necessary balance between meeting the unique disciplinary needs of the Canadian Forces and the needs to respect the rights of individual members of our military.

It should be noted, Mr. Chair, that Bill C-41 also includes provisions to improve the efficiency of the grievance and military police complaints process. For instance, it addresses the Canadian Forces grievance process with a view to making it more effective, transparent, and fair. The suggested amendments would require that grievances be treated as quickly as circumstances permit. They would also allow for a greater delegation of authority to the Chief of the Defence Staff in the treatment of grievances.

[*Translation*]

Finally, the bill will also establish the position of the Canadian Forces Provost Marshall in the National Defence Act, and specify the functions and responsibilities of the position , as well as make improvements to the fairness and efficiency of the military police complaints process.

[*English*]

In conclusion, Mr. Chair, just let me emphasize that a sound military justice system is absolutely key to our military, as it is in our society. It's key for the readiness, for the effectiveness, and it's key for the morale of the Canadian Forces themselves.

Our men and women in uniform, as you know, put their lives on the line in the service of our country. They need to know they can rely on a justice system that supports, protects, and enables them as they undertake the crucial tasks that we set forward. Canadians similarly need to know that their country's military system will treat those who serve fairly and in a way that corresponds to Canadian norms and values.

The proposed amendments ensure that the military justice system keeps pace with evolving legal standards in the Canadian criminal justice system and they reinforce the continued compliance of the military justice system with the Canadian Charter of Rights and Freedoms, while always preserving the system's capacity to meet essential military requirements.

Thank you very much, Mr. Chair and colleagues. I look forward to your questions.

[*Translation*]

Thank you.

The Chair: Thank you, Hon. Peter MacKay.

Now, I will give the floor to Mr. LeBlanc. I believe you are sharing your time with Mr. Wilfert.

Hon. Dominic LeBlanc (Beauséjour, Lib.): That's right. Thank you, Mr. Chair.

Thank you for your comments. Mr. Minister, I would like to start by congratulating you on your French proficiency. I know that the chair will be pleased that you could do it without needing the protection of Bill 101. Surely, you will admit that you have expressed yourself very well here, and I offer my sincere congratulations.

Hon. Peter MacKay: Thank you. You are right, Mr. LeBlanc.

[*English*]

Hon. Dominic LeBlanc: Minister, we agree. I certainly agree with a great deal of what you've said. I think the history of this bill compels it towards a serious but expeditious, or not unduly lengthy, study if we can agree on a number of principles and see them translated into the clauses.

I have two specific questions, Minister, through the chair.

The first is about the issue of summary trials. I think you've made the point well with respect to the two former chief justices of Canada having reviewed this. My concern is not necessarily with the procedural protections in a summary trial. It's about the consequences in terms of a criminal record.

Perhaps you could just assure us. I think it is the case, but I'd like to hear it from you, on the record, that if, for example, a summary trial were held for an offence that may not be in the Criminal Code of Canada, such as, for example, disobedience.... Maybe when you were prosecuting cases in the provincial court in Stellarton you would have liked to prosecute somebody for disobedience, but it doesn't exist in the civil criminal justice system. I wouldn't want to see somebody go through a summary trial, be found guilty of an offence for which there's no equivalent in the Criminal Code, and somehow end up with the equivalent of a criminal record or some ongoing thing that would perhaps follow that person into civilian life once he or she finished with the forces.

I'll just give you the second question, Minister, because it's also fairly straightforward.

It's about the evidence a court martial would use in determining the appropriate sentence. I agree with you on the sentencing principles. I think you're absolutely right about modernizing them and bringing them into line with Criminal Code sentencing principles. But I wanted to make sure that I didn't misunderstand the necessary evidentiary requirement for certain facts to be considered. At one point, I think it's in section 203.5, it talks about the court martial having to “be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence”. Then later on it talks about “beyond a reasonable doubt” as the obvious criminal standard. I just want to make sure that those standards aren't conflicting. I want to understand how they might work together.

● (1545)

Hon. Peter MacKay: Thank you very much, Monsieur LeBlanc.

[*Translation*]

Thank you for your question and your comments.

[*English*]

To answer your questions in sequence, you're right in terms of the intention that the summary offences that would be set out in a code of disciplinary matters for the military would not have application when it comes to a criminal record, if you will, outside of a military record. There are many codes of discipline that a Canadian soldier could potentially face that would never be found in a Criminal Code—for example, leaving their post, or being late, or having a uniform that was perhaps not seen to be in compliance. All of those things, while perhaps seen as mundane or perhaps not in need of discipline—although some parents, I'm sure, would take issue with my saying that—are in fact very important when it comes to the proper maintenance of discipline and order within the military. There is a litany of other examples I could give.

But clearly, being in violation of some of those summary offences under military law would in no way, shape, or form find its way into a person's criminal record, which could be later disclosed. There is an effort clearly in the legislation to delineate that which would be seen as a strictly military disciplinary-type summary offence as opposed to what might make its way into the more traditional system and result in a summary offence.

Coming from that point to your next question, with respect to how the evidentiary requirements would apply, the intention here again is to mirror the criminal justice system where appropriate, the standard of justice being proved beyond a reasonable doubt in these hearings depending on how the offender, if you will, elects to be tried. The evidentiary requirements are very much in keeping with the civilian system; that is to say there must be proof beyond a reasonable doubt, the evidentiary burden is borne by the crown—by the accuser, in traditional parlance—and similarly, the standard that must be met in order for it to get before a criminal tribunal is that balance of probabilities, and the other phrase, which I'm sure you're familiar with, is it in the public interest that these charges proceed? That standard also finds its way into consideration. Is there a public interest in pursuit?

Under the military standard it may be different, but it is given the same level of consideration in terms of pursuit of certain charges, whether they be summary or hybrid offences or whether they be more serious offences. It is not meant to be out of step, except where there are those specific military offences that wouldn't be found in the Canadian Criminal Code.

I believe that answers your question.

● (1550)

Hon. Dominic LeBlanc: Yes. Thank you very much.

The Chair: Mr. Wilfert, you have 30 seconds.

Hon. Bryon Wilfert (Richmond Hill, Lib.): Thank you, Mr. Chair. Thanks for all that time.

Minister, Judge Advocate General, I assume you've read the letter submitted to this committee by the Military Police Complaints Commission—

Hon. Peter MacKay: Correct.

Hon. Bryon Wilfert: —outlining their objections to the immediate implementation of clauses 101 and 117. I'm assuming... but I'll ask the question of whether or not you'd have any problem in delaying the implementation of these clauses to allow the commission to raise its current concerns with the military justice system in a timely manner—through you, Mr. Chairman.

Hon. Peter MacKay: None whatsoever, Mr. Chair. In fact, the member will know that for all intents and purposes we stayed clear of changes that would affect the Military Police Complaints Commission. Given the seizure that they have of certain issues, we did not want to have this legislation impact or in any way impugn that ongoing process. That's why they were excluded from this particular bill.

Hon. Bryon Wilfert: Thank you for having that on the record.

The Chair: We'll go to the next round.

[*Translation*]

Mr. Bachand, it is your turn.

Mr. Claude Bachand (Saint-Jean, BQ): Thank you, Mr. Chair.

I would like to welcome the minister and the JAG.

I have done a lot of reading on the discussion before us. We have a lot of questions to ask the minister and the JAG. I do not want to go into too many details with the minister, because I think that it is more important to touch on the general issues instead. One fact remains: more and more people believe that there is a large gap between military law and civilian law.

The Bloc Québécois truly understands that it is important that a code of discipline allow the military to have its own judges, its own lawyers, and so on. But an increasing number of people are saying that it would be wise to bring military law and civil law a little closer together. In that respect, in England, the European Court of Human Rights just put English military law in its place, saying that there was too much distance between military law and civil law. In our discussions and in what we have read, a number of examples show this great difference.

Does the minister feel that we should try to bring military law and civil law closer together? Does he think that military law is still compatible with the Canadian Charter of Rights and Freedoms and with the values of Canadians and Quebeckers, who approach this matter from a distance and don't understand why military law and civil law are different. There is a purpose to justice, but it isn't applied in the same way.

Could the minister please answer these two questions?

Hon. Peter MacKay: Thank you, Mr. Bachand.

You're right. We always need to keep the justice system up to date, not only for civil law, but for military law, as well. That is exactly the reasoning behind this bill. It's an opportunity to look at the application of the charter, for example, and make certain pragmatic changes to improve our justice system.

[*English*]

The use of victim impact statements was being brought to bear at a time when I was still practising law as a crown prosecutor in Nova Scotia, and I remember the profound impact this had on family members and victims themselves. This is a very profound example of where the military justice system can be improved by the application of that change, and there are other examples that, in very practical ways, I think, will improve the military justice system and put it more in line, as you suggested, with the civil system, to bring it into the new era and to ensure that some of these important modernizations that have already occurred in our criminal justice system will be equally applicable for those in the military and for those affected by military service.

Having said that we need to make these specific changes—the majority of which, I believe, are incorporated here, if memory serves me—we have accepted 94% of the recommendations of the Lamer report, or 83 of the 88 recommendations that were laid out in some detail, in whole or in part. But we still come back to the fundamental necessity of having a separate justice system for our military personnel, and those reasons that were set out by Justice Lamer as well as Justice Dickson speak to the operational effectiveness of the military.

They speak to the necessity for protecting a culture that is still very important when it comes to the discipline of our men and women in uniform—discipline, efficiency, morale, and respect for the rule of law within the military. Men like Laurie Hawn, who have served in uniform, will tell you that knowing those rules and regulations are set out in very clear terms is extremely important to the efficiency and the effectiveness of our men and women.

It also meets those disciplinary needs that are outside the current Criminal Code, outside the current disciplinary system, if you will, that applies for civilians like you and me. Military personnel live by a different standard, that is, they are expected, in many cases—to be very frank and blunt—to put their lives on the line and to do so in circumstances that have very high stakes for our country and for them personally, for their families, for their comrades in arms. This added responsibility of risk requires a certain cohesiveness. It requires a specific application of military justice.

All of this is incorporated in the reasons that were set out by Justice Lamer in the Généreux case, and it also speaks of the armed forces need for a system that can try offences both in the ordinary law and within their disciplinary code. It has that flexibility as well, as you're aware, where it can have application in the civil system.

I hope I have addressed your question. I know it was a two- or three-part question, but the short answer is yes, it's compatible with what we're seeing happening in the evolution of our civil system, but it's necessary, I would suggest now, for this legislation to proceed so that we can bring some of those modernizations into the military system as well.

● (1555)

[*Translation*]

Mr. Claude Bachand: Others need to be included in it, such as full answer and defence. For a summary trial, a person does not have the right to choose his or her counsel. An assisting officer is appointed by the commanding officer and is not bound by confidentiality. The commanding officer ensures that all the witnesses are present. When a person stands accused, he or she is not permitted to bring their own witnesses. It is the commanding officer who does all that.

The changes that need to be made are not so significant, but they should be made so that civil law and military law are more consistent with each other.

The Chair: Thank you, Mr. Bachand.

I will now give the floor to Mr. Harris.

[*English*]

Mr. Harris, you have the floor.

Mr. Jack Harris (St. John's East, NDP): Thank you, Chair.

Thank you, Minister, for joining us today.

I have to agree with you that there are some very positive aspects to this new bill, particularly ensuring that there's independence of the judiciary and the military, as there is in civilian life, the new sentencing opportunities to provide the same sorts of conditional and intermittent sentences that apply, and a whole series of welcome changes.

The thing that bothers me—and you did refer to it, and I'm sure you probably read or were told about the comments I made in my speech in the House—is the summary trial process. Notwithstanding the absence of serious comment by Justices Lamer and Dickson about these matters, it is pretty clear that in terms of the process, at least, the summary trials don't meet the test of the Charter of Rights and Freedoms in that there is a lack of rules of evidence, there is a lack of an independent tribunal—the commanding officer knows the accused and probably knows all of the witnesses—there's no transcript, and there's no real appeal, though there's a review process.

I frankly don't have a serious objection to that in the context of a military discipline. I think we accept the notion that in the military you have to maintain morale and discipline to have a cohesive fighting force for all the right reasons.

The problem I have when it comes to the fact of a criminal record...now some changes have been made here. The changes seem to be dependent upon the sentence. I know, and we all know, what the consequences of a criminal record can be to any individual, whether in civilian life or in trying to cross the border—and that is getting more and more problematic as time goes on. I think that's something I would want to avoid while you do have a procedure that doesn't meet the full test.

We've invited witnesses, or consideration of this legislation by people outside of this committee, with legal backgrounds and experience in defending people in court, bar associations and so on, and civil liberty associations to come to the committee and talk about this issue.

I guess I'm going to ask you this. Are you prepared to maintain an open mind with respect to that issue, notwithstanding, as I said, that Justice Dickson didn't raise it as a major issue? Are you prepared to consider what evidence we may hear and what recommendations we may make as a committee to perhaps insulate, if you will, our men and women in uniform from the consequences that shouldn't be there if their rights aren't fully respected under the Charter of Rights and Freedoms?

● (1600)

Hon. Peter MacKay: Thank you, Mr. Harris.

Mr. Chair, through you, the short answer is, yes, of course. The primary purpose of this legislation is to ensure fairness, first and foremost, and to not disproportionately have sentences affect military in a way that would be disproportionate to our criminal justice system.

Having said that, there is, as you've noted and others have acknowledged, a distinct code of discipline here that takes us outside of the norm in which normal criminal justice would have application because of this necessity, and expectation from soldiers. I'm given some comfort in this legislation wherein we have included language that speaks of ensuring that breaches of military discipline be dealt with in a speedy manner, and also that we've included language aimed at ensuring that the sentences that apply are not unduly harsh, that they do not have a disproportionate effect.

Mr. Harris, you made reference to the necessity for soldiers to travel, and I know that is of particular concern. If there is anything on their criminal record that would prevent them from deploying, this would have a severe impact on their career. So striking that balance is what we seek to do.

I am encouraged, as was noted, that we will hear from other members of bar associations, those within the military...and I know that the Judge Advocate General can speak to this as well in greater detail, as to how we walk that fine line when we are trying to have these sentencing principles apply, when we're trying to strike that important and necessary code of discipline and standards that are expected of the military above and beyond what would apply in our civilian system.

You know, the purpose and the principles of sentencing also have an aspect of general and specific deterrence, of which I know that you, having practised criminal law, are also aware. That accounts for some of the necessity with regard to transparency around these trials and disciplinary hearings. It also, of course, is based in the long-held traditions of the chain of command.

I am concerned about a previous reference that was made by my friend Mr. Bachand to a choice of counsel. Depending on the charge and the seriousness of the charge, I would suggest that there is still room for choice of counsel. In fact, some involved in the more serious charges choose to seek counsel outside of the military system. That has been the case in a number of recent matters that have been before the courts and before military tribunals.

I am open to the recommendations of this committee, of course, and I am open to further amendments, should you choose to bring them forward, as they pertain to this and other provisions of Bill C-41.

● (1605)

Mr. Jack Harris: I think I have room for one more short question.

You indicated that almost all of the recommendations of Lamer have been accepted. I think that's probably true, that they've been accepted in principle, but of course many of them have not been implemented. One of them is that the Chief of the Defence Staff be given the necessary financial authority to settle financial claims and grievances.

The grievances have been a particularly thorny issue in the military. The grievance procedure itself has been a source of great grievance for a lot of people, both the legal people trying to assist people and people trying to resolve grievances.

That hasn't been implemented. It's pretty important that somebody be able to say, “Okay, look, we'll settle this, we'll resolve this, we'll fix it”, and yet that authority hasn't been given.

Is there some reason why these things are being delayed? I know it does take time to do things, but these recommendations have been out since 2003.

The Chair: Short answer, Minister.

Hon. Peter MacKay: Yes.

Well, as you note, we've moved on 94% of the recommendations in part or in whole. Some of what you speak of is directly rooted in the legislation itself that we have now for the third time brought forward. As is the nature of minority parliaments, this legislation doesn't always make it to fruition.

Others of the recommendations can be implemented by the chain of command. We are looking at all those recommendations with a mind to improving our system, particularly around grievances. We've taken a bit of a hands-off approach with respect to the Military Police Complaints Commission and the grievance board, for reasons that you're aware of, on pain of being judged somehow to have interfered in ongoing matters or investigations.

But it's hoped that upon the conclusion of some of those matters, we'll be able to move hastily to implement some of these important improvements.

The Chair: Thank you very much.

I will give the floor to Mr. Braid.

Mr. Peter Braid (Kitchener—Waterloo, CPC): Thank you, Mr. Chair.

Thank you very much, Minister, for being here this afternoon. As a committee, we certainly appreciate the opportunity to study this bill, and we look forward to having it move through our legislative process as soon as is practicable.

Minister, both in your presentation and in a response to a previous question, you explained that, where possible, the military justice system should mirror the civilian system, and that where it makes sense, certain important features of the civilian system—pragmatic, positive features—should be reflected in the military justice system. But still, at the end of the day, it's important that we have a separate and distinct military justice system. Why is that important?

Hon. Peter MacKay: Thank you for the question and your work in this regard.

I think the best description of the necessity for these two parallel systems, with the ability to overlap and the flexibility to incorporate the best of both, is found in the decision that Mr. Justice Lamer has handed down in the Généreux case and that gave rise to some of the changes we're now contemplating. It really is rooted in the important matters of discipline, culture, efficiency, and contributing to the sense of morale, which is very important to military members and their families, and also in some of the fundamental principles of justice around fairness, around confidence that the justice system is working for members of the military.

Having that separate and distinct system I think reinforces that formula, if you will, that necessity for discipline, efficiency, and morale, but at the same time is taking the best of the existing criminal justice system and some of these important changes that we've talked about: the victim impact statements, the tenure of judges, and the modernization, if you will, of how the law is now applied and how it works in a courtroom or tribunal. This contributes to very fundamental and important issues of readiness and of the ability for the force to do what's expected of them.

To give them their separate system also allows for the continuation of these very distinct matters of discipline that apply to everything about military life: from the way they dress to the way they conduct themselves and to the way they interact with one another, the way they train, and the way they prepare. Readiness is a very important issue for our military, as we've seen, given the high tempo of operations in recent years, the expectation of what they do both at home and abroad, and how they conduct themselves while deployed.

All of this plays into and, I strongly suggest, reinforces the need for this separate military justice system that applies to them in their life, in their work, and in their daily interaction with others.

● (1610)

Mr. Peter Braid: Thank you.

You've mentioned this important feature of victim impact statements. Could you explain what enhancements you believe they will bring to the military justice system?

Hon. Peter MacKay: Well, the victim impact statements, just as in the civilian criminal justice system, at a practical level allow for the direct input of victims into the deliberations, into the final dispensation of sentencing. They allow the victim to put on the record and to have a voice about the impact this has had on them. It can be financial. It could be emotional. It could be physical, in the cases of assault. It allows them to express themselves in a way that currently, in our military justice system, at least, doesn't exist to the extent that it should and that it could. It doesn't have the same prominence that we now see in our civilian criminal code.

It allows that victim impact statement to be considered by the adjudicator when it comes to the final meting out of a sentence. It allows the military justice system to mirror, to the greatest extent possible, that same level of inclusiveness for victims. Our government has been very strident about the importance of victims' rights and I think it's no less important—it's certainly of identical importance—when it comes to our military justice system.

Mr. Peter Braid: With respect to the sentencing, then, how does the bill allow for greater flexibility in sentencing, and why is this important?

Hon. Peter MacKay: The sentencing provisions are improved or augmented by virtue of this bill. It's not just a victim impact statement; it's other ways in which, for example, intermittent sentences can be applied.

It's sentences such as those that we see in our criminal justice system that allow for combinations of time served plus a fine. It's for the inclusion of a broader range of sentencing options for a judge—restitution being made available as an option, which didn't previously exist.

So it is taking elements of the justice system that we see now enshrined in the Criminal Code, putting them into the National Defence Act, to allow for that both real and perceived parity in the systems when it comes to a judge's options, when it comes to the availability of sentencing options available for both offender and for the judge and prosecution.

Mr. Peter Braid: Some describe the military justice system as being two-tiered, with both summary trials as well as court martial proceedings.

Why is it essential that the system include both?

Hon. Peter MacKay: It has a lot to do with the flexibility of having this two-tier system that currently exists, with the tribunal structure, which allows for summary trials where most of the disciplinary-type matters that I talked about earlier are applied, and the more formal court martial system.

It's not to say that both can't impact on a person's career aspirations and career path, but the summary trial is by far the more common system that's applied. It's used in the vast majority of service tribunals, and it's used in playing this vital role of maintaining discipline and the operational effectiveness of the Canadian Forces.

I spoke earlier about how Chief Justices Brian Dickson and Antonio Lamer looked at the system and determined, and both commented that these recommendations for refinement are important for that whole range of issues—as far as credibility, as far as continuing the culture and the balance—and I think you can certainly take their assessment of the system and the two-tier system as quite substantial.

[*Translation*]

Thank you, Mr. Chair.

● (1615)

The Chair: Thank you, Mr. Minister.

[*English*]

Now I will give the floor to Mr. Wilfert, and I know you may share it with Mrs. Folco.

Hon. Bryon Wilfert: Chairman, if I could put my two questions on the table, and then ask Madam Folco to put hers on the table, then we could have all three answered at the same time.

I have two clarification questions, Mr. Chairman, through you to the minister. With regard to clause 20, which calls for what amounts to a temporary on-duty demotion for those CF members above the rank of private who are sentenced to detention, do you see this temporary on-duty detention having the potential for long-term interpersonal relationships in the chain of command? In other words, would it cause problems for NCOs who are forced to serve as a private for a period of time and then return to the position of authority following his or her sentence? Could it cause longer-term problems to the chain of command?

Secondly, Minister, under clause 40...just some clarification here. That would require a court martial to summon an accused member. The wording here is a little vague. I'm left with wondering whether this clause would legally require members to testify if called upon to do so, or does it simply require them to be present?

If Madam Folco could put her question in....

[*Translation*]

Ms. Raymonde Folco (Laval—Les Îles, Lib.): Thank you, Mr. Chair. Thank you, Mr. Wilfert.

Mr. Minister, I would like to refer to clause 45, which would give the minister power to request an inquiry into a military judge.

On one hand, the minister may request an inquiry. On the other, unless I'm mistaken, an inquiry committee apparently already has the power to hold this kind of an inquiry if a complaint has been presented before the committee. I'm wondering whether granting the minister this special power to request an inquiry is necessary. It seems redundant to me. I'm wondering about the independence of judges in this respect.

[*English*]

Hon. Peter MacKay: Let's never forget how judges get appointed. It's that awful business of politics and decision-making by ministers that results in judges becoming appointed. So I take your point that in this instance it may appear redundant, but there can be circumstances that arise where a minister I think should and could have the authority to have an investigation into a judge. I think it would be a rare occasion.

I think you'll find within this bill, Madam, that the powers of the Minister of National Defence are actually diminished. There are a number of clauses here that are aimed at curtailing, if not eliminating, the power of the minister within the justice system—appropriately so. But the power to order an investigation I don't see as interference. I see this as a rare opportunity where a minister might determine that something within the Department of National Defence, and within the justice system within the military, might merit an investigation. That's not to interfere in the outcome. It's not to interfere in the way in which the investigation were to occur. It would simply be to order an investigation. That would be my personal reflection on the matter.

With respect to clause 20 and clause 40, I think perhaps what I would suggest is that I can respond in more detail to the member's question, but clause 20, again, comes back to the issues of necessity for discipline, necessity for, in some cases, rehabilitation around the member in question. The ability to summons or to order attendance is not to necessitate testimony but to have the individual present in the court. This is also, I would suggest, similar to the powers that exist in our current Criminal Code to have an individual present and in the courtroom, and then the discretion exists to call that individual to give testimony, to provide testimony or evidence to the court, should the court decide so. But to have the ability to summons somebody is simply to have them attend. That is my interpretation.

● (1620)

Hon. Bryon Wilfert: Through you, Mr. Chairman, on clause 4, which allows the Vice Chief of the Defence Staff to issue direct orders to the provost marshal pertaining to ongoing investigations, can you just share with us, or certainly clarify, how this will affect judicial independence? What type of test will be used to determine whether any particular case merits this type of intervention? Will there be limits to this power? Finally, Mr. Minister, would the provost marshal be required to justify such orders?

The Chair: A short answer, Minister.

Hon. Peter MacKay: It is a rather complex and multi-part question. The short answer is that I believe there are very rare circumstances in which the Vice Chief of Defence Staff would intervene in this matter. However, the discretion is still there, based on the current legislation.

The second part of your question I guess is whether we are reviewing the circumstances in which it might occur. I suggest that this will be the subject of further examination by this committee. It would be appropriate to pose that question to the Judge Advocate General in the coming session, and future witnesses, to perhaps further weigh the appropriateness of when and where a Vice Chief of Defence Staff might make such an intervention and whether this would be deemed undue interference in the process, as opposed to, again, one of those circumstances, rare though it might be, where the intervention of the chain of command might be appropriate, based on the necessity to maintain order and discipline. Operational security, I suppose, might be another matter where there could be an intervention.

[*Translation*]

The Chair: Thank you, Mr. Minister.

[*English*]

Mr. Payne, you have the floor.

[*Translation*]

Mr. LaVar Payne (Medicine Hat, CPC): Thank you, Mr. Chair.

[*English*]

Thank you for attending today, Minister. It's good to see you here again.

Looking at this bill, it's certainly a really important opportunity to upgrade the military system, I believe. The information in here I think is going to be very positive to try to get it much closer to the civilian justice system.

One of the things that intrigued me, of course, was the concern in the Lamer report addressing security of tenure of judges until retirement. Can you maybe explain the necessity of this recommendation and how it's been incorporated into Bill C-41?

Hon. Peter MacKay: Again, this was a bit of an anomaly, Mr. Payne, in terms of how the military judges were out of step in terms of their tenure. After their appointment, they had to renew their tenure every five years.

There were concerns that were set out in the Lamer report specifically about their job security, for lack of a better word, and how this could potentially impact on them, a consideration around retirement age. To address the concerns that were there outlined in the report, to address concerns that I've had expressed to me about the job security and the fact that the tenure of military judges was out of step with the justice system, I think this amendment properly addresses that in a way that mirrors now our civil system and will enhance the perception of judicial independence, which was also a concern that was raised by members of this committee, and it was discussed in the House.

Judicial independence is very important. It's consistent with what we're trying to accomplish here. It's consistent with the tenure of judges in the Canadian civilian justice system. For all of those reasons, I think we have struck a proper balance with this amendment.

Mr. LaVar Payne: Thank you.

Also, during the course of debate in the House, several members of the opposition raised concerns regarding the harshness of sentencing in the military justice system. Could you maybe address some of that information and give clarification?

Hon. Peter MacKay: Yes. Again, you'll find that this is a legitimate concern. If you were to look at this through the lens of how civilians might see the necessity of certain types of behaviour, certain types of dress, certain types of activities that are undertaken by the military, they might question why our system of justice in the military is geared in such a fashion. Those questions are answered again in the necessity of how the military train, how they respond, how they accept a certain doctrine by virtue of joining the Canadian Forces.

It was again the subject of considerable deliberation by Justice Lamer in the Généreux case. He talked about the need to sometimes add quickly, to frequently instill what might be deemed a more severe punishment for what are more mundane breaches of codes of conduct. This is all about maintaining that high standard of discipline, readiness, and behaviour that is in line with being effective as a member of the military but never being out of step with basic principles of fairness. The word “harshness” was thrown around a little bit during the debate, I know.

Bill C-41 incorporates something else, which is the principle of restraint. It uses those words “principle of restraint” so that the military system doesn't go overboard in applying sentences or discipline when it comes to certain what are more summary types of offences. Again, I think the bill itself is aimed at providing statutory protection for unduly harsh sentences while also upholding that code of discipline, that code of conduct, expected of members of the military in the pursuit of their career and in the pursuit of their objectives.

● (1625)

The Chair: Thank you.

I will give the floor to Mr. Bachand.

[*Translation*]

Mr. Bachand, the floor is yours for five minutes.

Mr. Claude Bachand: Thank you, Mr. Chair.

Mr. Minister, I still have three questions for you. I invite you to take note of them; I will be pleased to hear your answer.

My first question deals with the fact that the chief of the defence staff is going to delegate his duties as final adjudicator in the grievance process. In my opinion, if he is allowed to delegate these final duties, it will put the chief of the defence staff out of the loop and he will not really know the status of the disputes. I would like to know what you think about this.

Here's my second question. The bill also sets out the obligation of carrying out independent reviews in the future. There is great deal of protest about the current grievance procedure. We are talking about future independent reviews. When are we going to make the most of the independent reviews on the grievance process, something I am particularly interested in?

My last question concerns the military judges who will now have the right to file a grievance themselves. To my knowledge, this is fairly new. I find that it is an infringement on a judge's judicial restraint. The equivalent does not exist in public or civil law. Is it not an infringement on a judge's judicial restraint if he has the right to file his own grievances to complain about how he is treated?

[*English*]

Hon. Peter MacKay: Thank you, Mr. Chair and Monsieur Bachand.

[*Translation*]

Thank you for your questions.

[*English*]

With respect to the grievance process and the amendments that are made as they pertain to certain grievances, again I would suggest that the chain of command operates quite differently when it comes to a comparable system, if you will, of justice. One analysis might be that it's similar to having prosecutors and junior prosecutors and people who work within the system where certain authorities can be delegated. That is very consistent with military life, military doctrine. You have ranks. You have authority that is sometimes delegated to junior officers and further through the chain.

I don't agree with your assessment that because this delegation might occur, somebody would be out of the loop or they wouldn't be aware of what was happening on the ground. I would suggest that most military, throughout the ranks, are very fastidious in ensuring they communicate clear instruction, that there is a clear expectation of what is to occur. Again, that is part of military life. This doctrine of delegated authority is found throughout the military, and the military justice system is no exception.

When it comes to future cases around grievance and the process of those grievances, some of what you have outlined in your question is found in specific amendments here. Others have been delayed, in large part because—again, for emphasis—we did not want to be seen to be imposing changes to the grievance process or the military police complaints process while certain important and sensitive cases were being considered. That isn't to say those changes will not be implemented in the future; it is not to suggest that they are not legitimate amendments to be considered.

I guess the short answer is that in due process, in due time, we'll move on some of these other recommendations and some of these other necessary amendments. We hope to be able to do this in addition to, not separate from, or in any way in parallel to.... We hope to be able to do these without any perception, real or otherwise, that we were trying to interfere with those ongoing deliberations.

On the subject of neutrality of judges, I couldn't agree more. This is an extremely important issue. The neutrality of judges, in any system, is one of those sacrosanct matters when it comes to the integrity of the process. Suggestions that may come from this committee, further amendments around the insulation, if you will, of the neutrality of judges, are very important to the overall functioning of the system. I look forward to those recommendations, and I look forward to the testimony of others who will be coming before this committee and who can comment further on that subject.

● (1630)

[*Translation*]

The Chair: Thank you very much, Mr. Minister.

Mr. Cathcart…

[*English*]

we'll be with you in five minutes.

[*Translation*]

I am going to suspend the proceedings for five minutes, and then we will resume the public meeting.

● (Pause) ●

● (1640)

The Chair: Good afternoon to our members and our witnesses. We are continuing the 46th meeting of the Standing Committee on National Defence.

[*English*]

I want to welcome Mr. Gleeson and Mr. Gibson, and also Mr. Blaise Cathcart. Thank you for being with us.

Now I will give the floor to Monsieur Bachand.

Mr. Wilfert, are you ready? Do you want to have the floor?

Hon. Bryon Wilfert: No, you finish.

[*Translation*]

The Chair: Mr. Bachand, you have the floor for seven minutes, and then it will be Mr. Wilfert's turn. Thank you.

Mr. Claude Bachand: Mr. Chair, I am pleased to be considered the spokesperson for Her Majesty's loyal opposition.

Hon. Dominic LeBlanc: "Loyal", yes, that's the word, proud Acadian that you are!

Mr. Claude Bachand: Good afternoon, Mr. Cathcart. I have a number of questions to ask you, but I can't ask all of them, given the time I am allowed. However, some of them are particularly important to me.

The minister made a distinction earlier about summary trials, in that the person who is on trial, the accused, does not have the right to consult a lawyer. Apparently, it's the commanding officer who assigns an assisting officer. He also summons the witnesses. He is not bound by the duty of confidentiality, to the rule of evidence. There is no official transcription; only the sentence and punishment are recorded. I will start with that.

Is what I just said true? Or are there subtle differences to be made?

BGen Bernard Blaise Cathcart (Judge Advocate General, Canadian Forces, Department of National Defence): Obviously, Mr. Chair, there are a lot of nuances in the act.

[*English*]

As you know, Mr. Bachand, from previous iterations on the summary trial process, I really urge the committee, and in fact all members of the public, to understand that there is a fundamental difference in the approach to justice from a military's perspective, and obviously not in consideration of things like rights and charter applications, where we're as vigilant as the civilian system. But in our own system, the fundamental purpose, the objective, is always to maintain discipline, both in times of peace and in times of war, so that soldiers, airmen, sailors always have that obedience to command. Within that structure we have the two systems, as you well know: summary trial and court martial system. The summary trial, by far, historically, even today is the most used of the systems, and I think that reflects many positive things.

Number one, it's a system that the chain of command and the troops, in fact, are most comfortable with. They understand it conceptually. They understand the reason for it and the consequences that flow out of that process, and because of that it has to be a system that is obviously fair, but efficient and operationally relevant. If we decide just to turn it into, as some jurisdictions do, for their own philosophical reasons, essentially another type of full-blown trial with all the same rights of having a judge, a prosecutor, a defending counsel, all those things, then I think at the end of the day you're not going to achieve that right balance between having a system that results in the troops understanding what discipline is about, but at the same time not hindering their rights or the fairness.

The minister has talked about the right to counsel. In fact, they are permitted to have counsel. It's a request; it's not automatic. And indeed if the counsel shows up, I've had experiences myself where if the counsel wishes to make complex legal arguments, without hesitation, I'm sure, a commanding officer, a presiding officer, at summary trial will push it up to a court martial, which is the proper forum for having legal arguments based on charter rights, etc.

● (1645)

[*Translation*]

Mr. Claude Bachand: Is it true that all witnesses in a summary trial, including the witnesses for the defence, are summoned by the assisting officer?

BGen Bernard Blaise Cathcart: Not exactly. The process is controlled by the commanding officer, the tribunal chair.

[*English*]

As you would expect in all the disciplinary matters, the commanding officer has to be in charge. Essentially, it's a process whereby the unit, often represented by folks like the company sergeant-major or the coxswain aboard a ship, will present the evidence, if you will, from the unit's perspective. But on the contrary, the accused has a right to request witnesses, unless it causes hardship. If you're in Afghanistan and you want to have a witness flown all the way over for your boots not being shined properly, there may be some discretion.

Mr. Claude Bachand: Okay. The accused requests, but it's not automatically awarded to the accused.

BGen Bernard Blaise Cathcart: Again, because the presiding officer in the unit has to maintain control, there are elements of discretion, but the experienced will see.... If you've had the occasion to attend a summary trial, you'll see in most cases the accused's requests are accommodated.

[*Translation*]

Mr. Claude Bachand: Is it true that there are no rules of evidence? Testimonies are often given, and a person isn't required to have evidence.

BGen Bernard Blaise Cathcart: No, not exactly. Ultimately, it's always a matter of evidence.

[*English*]

If the evidence comes from a witness, that's one source. If it comes from documents, that's another source. It's not always a question of testimony having to come through a witness. You can have reports, examples of written orders, that sort of thing, not that dissimilar from a court martial.

[*Translation*]

Mr. Claude Bachand: Is it also true that there are no appeals? In other words, if a verdict denies a soldier his or her freedom, for example, or a short prison sentence is imposed, that soldier can't appeal the commanding officer's decision?

BGen Bernard Blaise Cathcart: Not exactly. In legal terms, it's a matter of nuance. In the summary trial process, it's a matter of the type of review done by the chain of command.

[*English*]

So it's not an appeal, as we would expect from a court martial to an appeal court, as in the military court martial appeal court, but there are opportunities to have the sentence reviewed by a separate individual within the chain of command, who would also have access to separate legal advice from my office.

[*Translation*]

Mr. Claude Bachand: I saw that the act sets out additional options for determining the sentence. I saw a number of them, but I didn't see "conditional discharge and probation" in the number of additional options.

Can you tell me if it's in the bill that is before us today?

BGen Bernard Blaise Cathcart: No, probation is not directly an issue in the act. But…

[*English*]

we are considering it. It's a very complicated matter, particularly in issues where the accused may also be released simultaneously from the Canadian Forces. How to deal with the issue of probation once a person is transferred into the civilian system is very complex because of the different jurisdictions, both provincial and territorial. It is something that is under consideration, but, again, it's very nuanced but it's very complex, and we have not ruled it out.

[*Translation*]

Mr. Claude Bachand: I asked the minister a question about military judges who can file grievances. Do you share my opinion that it is an infringement on a judge's judicial restraint if a judge can take that kind of action?

BGen Bernard Blaise Cathcart: As for qualifications, military judges can't file grievances on just anything at all.

[*English*]

For example, any matters that directly relate to the judge's ability to dispense with justice and matters of independence would not be the subject of a grievance. However, again, to reinforce that, the military judges are still members of the military. They may, indeed, have matters that aren't relevant directly to their office or their ability to dispose of justice. They may wish to grieve. This gives them an option.

So in no way, shape, or form is it designed, either in reality or in perception, to place a burden on judges to say that the Chief of the Defence Staff can control their independence by the way he deals with their grievances. The grievances are designed on those occasions where they may have a legitimate issue that doesn't affect their independence, but would have no other recourse, frankly, because they are still members

[*Translation*]

…of the Canadian Forces.

Thank you.

● (1650)

The Chair: Thank you very much, Brigadier-General.

[*English*]

Now I will give the floor to Mr. Wilfert and Mr. LeBlanc.

Hon. Bryon Wilfert: Thank you.

First of all, through you, Mr. Chairman, I want to commend the work of the Judge Advocate General's office and the work you do. It's nice to see you back after our initial meeting.

Just one quick question, through you, Mr. Chairman. Under clause 59—I'm thinking more in places of theatre—will non-Canadians have a right to produce a victim impact statement, and what obligation is there for a court martial to inquire if a victim has been advised that he or she may prepare a victim impact statement in cases where there may be multiple victims?

BGen Bernard Blaise Cathcart: I'm going to ask my colleague, Colonel Gleeson, to address that detailed question.

Hon. Bryon Wilfert: Thank you.

Colonel Patrick K. Gleeson (Deputy Judge Advocate General, Military Justice and Administrative Law, Department of National Defence): I haven't flipped to it, Mr. Chair, but I understand clause 59 deals with mental disorder provisions and not necessarily victim impact statements. But with respect to the issue of victim impact statements, yes, any victim would be in a position to present a statement to a court martial under the process that will be developed for the VIS. The legislation will provide the framework by which victim impact statements will be available to courts martial and in fact impose an obligation on judges to receive them. There will be a regulatory framework behind it that fleshes out the details of it, and it will define victims, etc. But certainly nationality would not be a basis on which to deny a victim the opportunity to put forward a statement in that scheme.

Hon. Bryon Wilfert: Okay. Thank you, Colonel.

The Chair: We'll turn to Monsieur LeBlanc.

[*Translation*]

Hon. Dominic LeBlanc: Thank you, Mr. Chair.

[*English*]

Thanks, General, to you and your colleagues for your presence here and for the work you've done in preparing a terrific package of information on the bill.

I think clause 45 talks about military judges' inquiries, which would be similar to a process that might be undertaken under the Canadian Judicial Council with respect to the discipline of a military judge. This is not self-serving, because I don't aspire to be a military judge, and I'm very grateful that this particular provision doesn't apply to civilian courts, but I'm told that you're adding the requirement that a person must satisfy the applicable physical and medical fitness standards. Why would you conduct an inquiry into a judge who perhaps had a rough summer at the barbecue or ate too much or has trouble buttoning his uniform? I'm surprised that you would actually convene an inquiry into the obesity of somebody who might be sitting on a military court. I think many people would be relieved that this doesn't happen to apply to civilian courts, but I want to know why you're applying that to a military judge.

Don't hand that off to Pat.

BGen Bernard Blaise Cathcart: Thank you, Mr. Chair.

Pat's in good shape, so he's a supporter.

Obviously, I think the rationale lies again in that distinct aspect of being in the military. Military judges are still members of the military and as such are still required to meet all standards, fitness ones included, in terms of the ability to serve.

One of the comments you may have heard, Mr. Chair, not only in the context of military justice but also in administrative law, is something called the "universality of service principle", which basically means that every member of the Canadian Forces—us included, judges—has to be fit to meet minimum standards so that if they're in scenarios where they would have to perhaps lift heavy items, carry people on stretchers, they'd meet those standards.

If a judge for some reason didn't meet that, I think it would be difficult for the system to treat it the way it would with any other soldier and simply say, "Get in shape or you're gone." I think this provides an avenue where, if that were the case—and I'm speculating at the end of the day on how realistic that scenario would be—it would provide a mechanism by which the judge's fitness, which in this case could be the physical fitness, could be examined without the chain of command having direct interference and then the perception of infringing upon independence.

[*Translation*]

Hon. Dominic LeBlanc: Thank you.

The Chair: Thank you, Mr. LeBlanc.

I will now give the floor to Mr. Harris.

[*English*]

You have the floor.

Mr. Jack Harris: General Cathcart, I have a couple of questions. One has to do with the military provost marshal. The role of the provost marshal, as I understand it, is to act as a police force within the military to ensure that the laws are being obeyed. These would be the general laws of the forces but also the laws of war and other obligations of the Canadian Forces.

In that context, I wonder if you could discuss the aspect of the Vice Chief of the Defence Staff having the power to issue instructions in relation to the conduct of a particular investigation. I say that, of course, in the context of one of the things we've been concerning ourselves with over the last year or so, which is the question of the actions of the military police themselves. I realize that these are before tribunals now. It is just the whole notion that the Vice Chief of the Defence Staff could, in fact—you could call it interference—actually provide instructions with respect to the conduct of a particular investigation. It presumes that he could say that he doesn't want you investigating this or doesn't like the way you're investigating this. That seems to me to be, in the context of an expectation of the provost marshal, aside from you, as a JAG.... You can give advice, but you can't arrest anybody. Maybe you can. You're in the position of giving advice. The provost marshal's role is somewhat different. Yet the Vice Chief of the Defence Staff can, in fact, control those investigations.

Could you comment on that, generally? When do you see that the Vice Chief of the Defence Staff might use such powers in actual practice, and can you give examples?

● (1655)

BGen Bernard Blaise Cathcart: Thank you for that question, Mr. Harris. It's a great question, underlining again the uniqueness of the Canadian military justice system and the players within that system. I'd like to assist the committee and in fact the public in their general understanding.

The provost marshal and the military police are unique in Canadian society. You will find no other police force in Canada like the military police. The prime reason for that is they have two distinct roles that are often interlaced, but they are distinct roles.

One is they support the operational chain of command in matters like detainee handling, traffic control points, and other aspects, such as security, both at home in Canada and abroad on missions such as in Afghanistan.

The other major role, which their name implies, is that they are police. A big chunk of what they do is they conduct investigations, both the military police and the national investigation service. I'm sure committee members are aware of those.

I think it's fundamental to understand that. If you don't understand the context that they are, to use a good Latin term, *sui generis*, a unique organization, the concept of saying that they're only a police force and the concept of police independence and then potential interference, and you compare it to the RCMP or Ottawa police or Victoria police, or any other police force in Canada, it would not, in my opinion, be an accurate comparative. It is because of those very operational roles that the chain of command must play a role in the conduct of the provost marshal and, by extension, the MP's business.

What this particular new proposal is designed to do is actually to protect both the chain of command and the provost marshal in a very transparent way in those rare occasions where the chain of command, as represented solely, and I underline solely, by the Vice Chief of the Defence Staff, can issue directions in a specific investigation and can also issue general guidance. That's the first part of that new section. Frankly, those mirror my own roles and responsibilities, where I can give specific direction as well to the director of military prosecutions. The whole scheme is designed to make that process transparent so that there are no concerns from the public, members of the military, or the provost marshal himself that there is confusion about what he can do.

I can't speak for the vice chief, of course; they are their operators, but I could see an example where you might have, as in Afghanistan, an offence being committed and the provost marshal feeling obligated by law to investigate it. He would require the logistical assistance of the task force commander to get his investigators into the theatre of operation in order to conduct an investigation. At the same time, the chain of command is fighting a war in the very area where the NIS or the MP may wish to travel. In that case it would actually help the provost marshal publicly to say to the vice chief that he needs to go there and can he support it. The vice chief may, in looking at all the circumstances, say, "Sorry, not right at the moment. It's too dangerous. We're fighting a war." It gives both sides the full opportunity to look at the issue. Then if the vice chief does issue a specific instruction not to go, it's up to the provost marshal whether that direction is made public or not, as outlined. It is in the control of the provost marshal.

Frankly, in that scenario, it actually gives the provost marshal a fairly strong defence if he was criticized by tribunals or other sources to say he has a duty to do this. He can say that he is unique and that he has an operational responsibility because they are a police force that regrettably has to do investigations in war zones, for example.

One last aspect, because you mentioned the word "interference", is not to forget that at the end of the day, if the provost marshal or any one of his folks under command feel they are actually being interfered with, they always have the option of going to the Military Police Complaints Commission and laying an interference complaint. That is another mechanism to hold everybody accountable, and it's transparent.

● (1700)

Mr. Jack Harris: You do hear, of course, that there is an investigation going on and the NIS is looking into it. Some of these take a long time. How does the public or Parliament know whether or not particular instructions have been given? You say it's up to the provost marshal to make it public or not. It's not automatically public that there have been instructions given in a specific case.

BGen Bernard Blaise Cathcart: No, it's not public because it gives the discretion to the provost marshal. Again, it's in a case where the provost marshal would feel that going public would hinder the investigation. Actually, it is another variation on his perception that his investigation may be interfered with if he makes the Vice Chief of the Defence Staff's direction public at this time. He can make it public subsequent to that, but if he decided right away that he wanted to make it public, there is nothing that could be done. That would be the course of action for the provost marshal. Otherwise, much like any other police force, frankly, when they're conducting investigations, there is no obligation to make all their details available to the public right away until the investigation moves along.

[*Translation*]

The Chair: Thank you very much, Brigadier-General.

[*English*]

Now I will give the floor to Mr. Boughen.

You have seven minutes.

Mr. Ray Boughen (Palliser, CPC): Thank you, Mr. Chair.

I'll be sharing my time with Mr. Hawn.

Let me add my voice to those of my colleagues, gentlemen, in welcoming you to the committee. It's very good of you to take some time to share with us your thoughts on this bill.

Under this bill, the composition of court martial panels would change, I understand. Could you perhaps walk us through the explanation as to why this modification is in place?

Col Patrick K. Gleeson: Thank you for that question.

Yes, Mr. Chair, there are changes in this bill to the court martial panel structure.

Essentially, for a quick walk-through of what will happen here, the first change the bill will provide for is a reduction in the rank of the senior member at court martial, currently at the colonel rank level, to lieutenant-colonel, as long as the accused is no higher in rank than a lieutenant-colonel.

That change is being proposed simply because of the resource implications imposed on the Canadian Forces in engaging colonels in every general court martial that is convened. When a general court martial is convened under the current scheme, a colonel needs to sit as the senior member of the panel. This will reduce the burden on the Canadian Forces and simply reflect the fact that a lot of these matters really don't need somebody at the colonel rank level to sit on them. It's a resourcing decision that is consistent with the interests of justice. That is what is going on there.

The other major change that is provided for in this piece of legislation is to essentially provide for a greater number of Canadian Forces members the opportunity to sit on the panel. We used to have a rank-based restriction with respect to panel membership. Nobody below the rank of captain could sit on a panel. At the NCM level, it was warrant officers and above who could sit. This bill will essentially allow anybody with three years' service in the military to sit on a panel, so long as they are not junior in rank to the accused person, the individual being tried by the court martial.

Again, that is responding to a recommendation that came out of the Senate, actually, in the context of a review they did, which was suggesting that we reduce rank distinctions in the panel context. We've looked at that and we think this is an appropriate way to try to address that issue while at the same time maintaining the integrity of the panel, which is there to perform a significantly different role from what you see in a jury downtown. We are not creating a panel of peers in the court martial system. We are creating a panel that has an understanding of military discipline and essentially is responsible for the maintenance of enforcement of discipline in the military.

Like everything else we do in this system, we try to strike that fine balance between making sure that the military interests are not undermined while at the same time we look at means to ensure the system is as fair as it possibly can be for the people who are subject to it.

● (1705)

Mr. Ray Boughen: Thank you, Colonel.

Thanks, Chair.

Hon. Laurie Hawn (Edmonton Centre, CPC): Thank you, gentlemen, for being here.

I'll just quickly follow up on a couple of things. We've talked a lot about fairness being a requirement in the military justice system, which obviously it is, but we haven't talked a lot about the fact that it needs to be quick as well. It needs to be fairly and quickly applied.

I'd like you to talk a little bit about that, General Cathcart, about the requirement for doing this quickly based on the unique requirements of the military. We can't have people tied up in a two-year or three-year process or more, like we sometimes see on civvy street.

BGen Bernard Blaise Cathcart: Thank you, Mr. Hawn, for that question.

Through the chair, absolutely. Once again, I can't emphasize enough the heart of military justice, which is the maintenance of discipline that keeps the CF running. You need a system that is fair but also efficient, and I'll use the term “quick”, but people don't want to misconstrue that to mean that rights are being trampled upon in any way, shape, or form. I know you don't mean that, Mr. Hawn, but people do get that impression sometimes.

You need a system that is quick, not only in terms of activities in Canada. We're a big force spread across the country, and we have a very mobile force. A lot of it is engaged in training activities. For instance, you can have people going to Gagetown in the summer or to Petawawa in the summer to do training for a matter of weeks, and if a breach of discipline occurs there, you want to be able to deal with it while the individual is still on the ground, for the individual's sake and also so the rest of the unit can see that justice is being done.

Similarly, it has to be portable and transportable, so that you can take it around the world, because our code of discipline follows our troops anywhere in the world. You need a system that will be efficient and quick so that, as you indicate, folks get their day. They get their say and then a decision is made, but at the end of the day, it's not designed to tie individuals up because we ultimately need them to do the support, the trades, and also, ultimately, the fighting in that regard.

You can't lose sight of the fairness piece in any of that. You don't want to overlook it just for the sole goal of being quick and efficient, but you find, as we said throughout this—we sound like broken records to some degree—that you are struggling to find that right balance. If you make it too much heavy on rights and bog it down with process and procedures, you'll never have many of the troops out available to do training and conducting operations.

Hon. Laurie Hawn: Whenever the military justice system dealt with me, it was fair and quick.

Just a little bit on training for a commanding officer or training for people.... I've done summary trials, and back in that day we had zero training. We had a JAG officer we could rely on, but we had zero training. That was raised as an issue by somebody at one of these sessions. Could you talk a little bit about the training that people in the process do receive now?

BGen Bernard Blaise Cathcart: Yes.

Starting from the fundamentals, first principles, that those trained to be presiding officers at summary trial are not judges, they are not lawyers, and the system is not designed to make them such, we have to be somewhat reasonable in making comparisons between folks who are legally and judicially trained versus those who are not. The value, the very essence, of the chain of command is that they understand the ethos and the requirements of morale and maintaining discipline, frankly, probably better than a lot of lawyers and judges do, and that's the reason they become the focal point. They don't receive formal training as in law school, go off to article and work in firms, etc., but they do get intensive training. From the moment everyone joins as recruits we are exposed to it, but certainly, to become a presiding officer, you have to go through training and a specific course that you must pass and then renew every five years to keep up to date on those skill sets. It is really just designed so that you're trained to recognize those issues of fairness, not to be an expert on constitutional or charter law. It is simply saying, “Wait a minute, that doesn't seem fair”, and that's the type of training we try to instill, both from a legal and an operational perspective.

● (1710)

The Chair: Thank you very much.

Mr. Wilfert, you have the floor.

Hon. Bryon Wilfert: I have just one question for the general.

On the composition of a court martial panel, this came to light after a court martial that received a lot of publicity a number of months ago. Should at least one member of the panel have combat experience when dealing with an incident that occurred in theatre?

BGen Bernard Blaise Cathcart: Yes, we've obviously heard that expressed by some in the public, some commentators. I think it's a bit of a misunderstanding. I don't want to speak for the commentators—they can defend themselves—but my perception is that they were perhaps equating it with kind of a jury, that only those who had fought the fights or were in those tough scenarios could truly sit in judgment.

Well, first of all, if you do compare it to a jury...which, as Colonel Gleeson has outlined, is not the exact same. The military panel is different. Even in a jury, when you say “peers”, it's not a reflection; if someone who's on trial is a doctor, the jury isn't all about doctors in order to understand the full context.

I think what's key, underlying the panel philosophy, is an understanding of discipline. Whether it's army, navy, or air force is in many ways irrelevant, because the code of service discipline applies across the board. When you have individuals who may not have seen combat in a particular scenario.... They may have been captain of a ship, for instance, and seen combat in a naval context but not in an army. I think it would be, in my humble opinion, quite a stretch to simply say they're not competent to sit in judgment of someone who fought in a land war, for instance.

As long as they understand, at heart, what discipline really means, and understand the elements of the offence as explained by the trained judge who sits with them, then I think that is more than sufficient to give confidence that the system is working well.

Hon. Bryon Wilfert: Mr. Chairman, through you, it's an interesting response, because clearly that was an issue that was raised—namely, whether or not people could really empathize, given certain stressful situations in combat. I understand the discipline part. The issue simply was whether or not there was that empathy, and whether or not someone could be able to do that, or whether one person should be.

But I appreciate and consider your answer. Thank you.

That's all I have, Mr. Chair.

The Chair: Thank you, Mr. Wilfert.

I will give the floor to Ms. Gallant.

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): Thank you, Mr. Chairman, and through you to our witnesses.

Justice Lamer made 88 recommendations, yet in going through Bill C-41 we don't see all the recommendations put into statute.

Would you explain to the committee why it is we're not seeing all the recommendations in an actual proposed bill?

BGen Bernard Blaise Cathcart: Thank you, Ms. Gallant.

I don't want to go through all 88—one minute per each—but essentially the nature of the recommendations was such that some did require statutory changes. Those are the ones we're trying to deal with now through Bill C-41.

Others were handled by other means. Take policy, for instance; some of the policy decisions that were made were simple internal decisions to rewrite a policy, whether in the military justice world or in chain of command.

Another avenue was through regulatory changes, primarily the Queen's regulations and orders.

So in terms of the nature and scope of each type of recommendation made, you had to go through and decide, okay, in order to give effect to Mr. Justice Lamer's recommendation, what's the best tool to do so? And not in all cases were those determined to be legislative changes.

Mrs. Cheryl Gallant: Okay. So we have actually implemented the changes through the regulatory process in some cases.

BGen Bernard Blaise Cathcart: Correct.

My colleague was just reminding me that we have implemented 28 of the recommendations through means other than legislation. Some were tweaked in legislation, when you had the opportunity with Bill C-60, for instance, but the bulk of them were done through policy and regulatory changes.

Mrs. Cheryl Gallant: Okay.

Bill C-41 also makes reference to part-time judges. Would you tell the committee why that's important?

● (1715)

BGen Bernard Blaise Cathcart: Thanks. That's another very good question.

Yet again this underlines the uniqueness of military justice. As you're aware, our current judges.... We have four military judges who are appointed for tenure, or hopefully will be with the passing of this; right now they're appointed for five-year periods.

If for some reason the force suddenly expanded to, say, double its current size, or we were engaged in a much broader global campaign and we needed more judges to sit in courts martial, the only other solution would be simply to appoint more judges.

Then, when that “surge”, if I can use that term, were over, you might have expanded from four judges up to, say, 20 or 25 judges. Now you would have a lot of judges with not a lot more work to do.

The theory is that we would have the ability, through appointing reserve judges on a panel if required, to handle a surge when necessary. It would give an extra built-in judging capability. If we didn't need it, then of course those judges would still remain in their civilian capacity, working as judges. But if there were that surge, we could then turn them into military judges without then having to maintain them for the rest of their careers. In some cases, it could be many years, regrettably, when they wouldn't be that busy.

Mrs. Cheryl Gallant: Would you please explain the necessity of setting out the duties and functions of the Canadian Forces provost marshal in this bill?

BGen Bernard Blaise Cathcart: That's another great question. As many of the committee members know, the role is not currently outlined. Oddly, if you go to the section dealing with the Military Police Complaints Commission in the National Defence Act, it's really all about the provost marshal, how he and his folks conduct investigations, and their standards and complaints. So it seems rather odd, even in that simple context, that you have a lot of mention about this institution and person called provost marshal, yet the individual has not been formally recognized.

The theory was really to give the provost marshal the rightful place under legislation to outline the duties and responsibilities in legislation so they were clear and transparent. We're trying to highlight, as I mentioned to an earlier question, the truly unique structure of the military police—the operational and policing side.

Mrs. Cheryl Gallant: Bill C-41 requires future independent reviews of the military justice system, the military police complaints process, and the grievance process. Would you please elaborate on some of the key goals and logistics of these reviews?

LCol Michael R. Gibson (Director, Strategic Legal Analysis, Department of National Defence): Thank you.

Justice Lamer identified in his report the utility of having in statute a guaranteed prescribed mechanism for reviewing those provisions of the act. That is obviously meant to ensure that the system keeps pace with changes in the Canadian law generally and continues to meet the obligation to respect the rights of its members.

Putting those aspects in the actual act, as opposed to in Bill C-25, as they currently are, would elevate their visibility. Prescribing them with greater clarity would ensure that there was no doubt as to what the left and right of arc was, in terms of what should be reviewed. Prescribing an appropriate length of time or cycle for the review would enhance the utility of that review by ensuring there was an appropriate track record of actual practice to review, so when issues came before Parliament one could speak to them with that record of practice in mind.

The Chair: Thank you, Mr. Gibson.

[*Translation*]

I will now give the floor to Mr. Bachand.

Mr. Claude Bachand: Mr. Cathcart, can you explain to me how the document before us was produced? I know that Judge Lamer made recommendations. Some of them were implemented by regulation, others in the context of Bill C-60, and a number of other recommendations will be applied by passing Bill C-41. But who decided on the content of this bill? Was it you, as judge, or your predecessor, who said which changes had to be made and who then sent them to the Minister of National Defence, who gave his approval? How did this document end up before us today?

BGen Bernard Blaise Cathcart: Thank you for the question. It really is an excellent one and quite a logical one to ask within this discussion.

[*English*]

As with most aspects, there are policy holders within the CF and DND. In this case there are two main policy holders. One is military justice, which I oversee because I'm also the superintendent. So my office, with talented folks like Colonel Gibson and Colonel Gleeson, helps to formulate policy that is reviewed not only internally, but we try to reach out to people outside the community—civilian lawyers, the Canadian Bar Association—to get views on those changes. With things like MPCC and grievance, the Vice Chief of Defence Staff is a policy holder and goes through a similar process. Those recommendations are put forward. Ultimately, as you see, it's the minister who makes the decision on whether those are acceptable. He then goes forward, as he's done here today, to present them in the bill.

● (1720)

[*Translation*]

Mr. Claude Bachand: Do you think that, with Bill C-41, previous bills and the regulations, everything that Judge Lamer raised in his report is now law? Or do you think that other provisions still need to be made and other bills put forward to Parliament to cover all the recommendations?

Col Patrick K. Gleeson: Thank you for your question, Mr. Bachand.

[*English*]

That is a very good question. Bill C-41 implements a number of the Lamer recommendations, but as I mentioned earlier in the context of talking about victim impact statements, this is the statutory framework. Justice Lamer also made some recommendations that require a regulatory basis, and many of these recommendations need a regulatory backdrop in which to fully function. So there is still work to be done on the Lamer report once Bill C-41 receives royal assent. There will be a requirement to develop a number of regulations to support this scheme, and a good example of that is the victim impact statement scheme. It cannot operate based solely on the statutory framework out there; there has to be a regulatory framework behind it.

There is still a fair amount of work to be done. However, as the JAG mentioned earlier, 28 of those recommendations have already been put in force through regulations. Some of the summary trial recommendations, for example, have been into effect through regulatory change, and some of the evidentiary issues you raised have been put in force through regulatory change. So a mix of modalities and processes will get us there. This bill is key, because it is really the linchpin to put the rest of Lamer into force and into effect.

Until Bill C-41 receives royal assent, we are really at a standstill in this process.

[*Translation*]

Mr. Claude Bachand: Do you think that other bills, in addition to the acts or regulations, might be needed to cover all of Judge Lamer's recommendations?

Col Patrick K. Gleeson: That's another good question, and the answer is no. We don't need another bill to implement the recommendations in Judge Lamer's report.

Mr. Claude Bachand: Mr. Chair, how much time do I have left?

The Chair: You have 15 seconds.

Mr. Claude Bachand: So, I'll stop there.

Thank you.

The Chair: Thank you.

Thank you very much, Brigadier-General, Mr. Gibson and Mr. Gleeson for joining us this afternoon.

We will suspend the proceedings for two minutes to go in camera to discuss our committee's future plans. Thank you very much.

[*Proceedings continue in camera*]

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