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Chair

The Honourable Maxime Bernier

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● (1530)

[*Translation*]

The Chair (Hon. Maxime Bernier (Beauce, CPC)): Good afternoon, everyone, and welcome to the 49th meeting of the Standing Committee on National Defence. Pursuant to the order of reference of Monday, December 6, 2010, today we are studying Bill C-41, An Act to amend the National Defence Act and to make consequential amendments to other Acts. I would like to welcome our witnesses, Michael Spratt and Constance Baran-Gerez, from the Criminal Lawyers' Association of Ontario.

[*English*]

Thank you for being with us.

Before giving you the floor, I will give the floor right now to Monsieur Bachand.

[*Translation*]

Mr. Bachand, you may now speak to one of your motions.

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

I've consulted my colleagues on this motion, which concerns the stoning of young men and women in Afghanistan. Yesterday I was pleased to see that my colleagues on the follow-up committee on Afghanistan supported it.

Today I am therefore tabling the motion before the committee so that we can put it to a vote. Originally, members of the Committee on the Status of Women saw absolutely unbearable scenes of stoning on YouTube.

I approached the various critics around this table and no one objected to this motion. I'm asking my colleagues to join with me in defending these young men and women who are the victims of this absolutely barbaric practice of stoning in Afghanistan.

The Chair: Could you read your motion for the record?

Mr. Claude Bachand: Yes, certainly. It reads as follows:

> That the Committee condemn the stoning of young women and men in Afghanistan and call on the government to take the necessary action to put an end to these stonings as soon as possible and that it be reported to the House at the earliest opportunity.

The Chair: Thank you. Do we have unanimous consent? Do committee members approve the motion? Yes? Very well.

(The motion is carried unanimously)

The Chair: Thank you, Mr. Bachand.

I'll now give the floor to the Criminal Lawyer's Association of Ontario.

[*English*]

Mr. Spratt, you have the floor for 10 minutes.

Mr. Michael Spratt (Director, Criminal Lawyers' Association): Thank you very much, Mr. Chair.

Perhaps I'll start by introducing myself and my colleague. My name's Michael Spratt. I'm a criminal lawyer and a director with the Criminal Lawyers' Association. To my right is Constance Baran-Gerez. She is also a criminal lawyer, a member of the Criminal Lawyers' Association, and certified by the Law Society of Upper Canada as a specialist in the practice of criminal law.

As I said, we're here representing the Criminal Lawyers' Association, or the CLA. The CLA is a non-profit organization of over 1,000 members from Ontario and across Canada. Our mandate is to educate, promote, and represent our membership on issues relating to criminal and constitutional law. The CLA is routinely consulted by parliamentary committees, such as this honourable committee, to share our views on new legislation, and we're pleased to be here doing that today.

The CLA is in favour of legislation that strengthens recognition of charter values and procedural fairness. As I said, we're here to present our perspective on this bill today. What we're going to be presenting is the perspective of criminal lawyers. I haven't been in the military and I don't do much military work. I expect the committee will hear from members with that perspective.

To put our comments into perspective, there may be different considerations in criminal courts than in the military context, but I can start off by saying that I'm pleased to say that in general the CLA is very pleased by the language and the new clauses in this bill. They seem to strengthen procedural fairness and adopt many of the recommendations in the Lamer report. I'm going to leave it to Constance to tell the committee all the good things that you're doing, and at the end of Constance telling you everything that we like about the bill, I'll end on the very pleasant note of telling you a few things that perhaps from our perspective could be strengthened in the bill.

Having said that, I'll turn the floor over to Constance, and she'll use the majority of the time to tell you what we think is positive here.

● (1535)

Ms. Constance Baran-Gerez (Criminal Lawyers' Association of Ontario): On behalf of the Criminal Lawyers' Association, Mr. Spratt and I are pleased to urge support for the amendments to this legislation in the bill. There are a number of amendments that promote an expeditious and fair response to service offences, all the while respecting the Canadian Charter of Rights and Freedoms, and I'd like to draw the committee's attention to certain of those.

Clause 41, in particular, dealing with the independence of military judiciary, as evidenced by the security of tenure until retirement or removal for cause, is seen as a positive step.

Clauses 35 and 36, on the introduction of a six-month limitation period for the laying of a charge to be tried by summary trial, is an improvement over the existing legislation, which did not have a six-month limitation period. That new amendment mirrors subsection 786(2) of the Criminal Code of Canada, and is one that we support.

The CLA is supportive of clauses 27 and 28, which, for the first time, limit the powers of arrest in matters deemed not to be serious offences. We also support clause 32 of the bill, an important clarification of the conditions necessary to warrant pretrial detention.

The CLA supports the addition of members of the military police as persons who are prohibited from serving as a member of a panel of a general court martial as found in clause 48, as justice must not only be done, but be seen to be done.

There is the introduction of a mechanism for resolving disputed facts that are relevant to the determination of a fair sentence. That mirrors the procedure found in criminal courts since the decision in 1982 by the Supreme Court of Canada in R. v. Gardiner that aggravating facts have to be proven beyond a reasonable doubt. That's found in the bill.

The introduction of a statement of purposes and principles of sentencing is something new to the National Defence Act. Clause 62 and following reflects, in the CLA's estimation, not only the unique purposes of promoting operational effectiveness of the CF, but also the values found in sections 718, 718.01, and 718.2 of the Criminal Code of Canada.

Finally, those amendments to which the CLA can lend its support include clauses 24, 64, and 65, which deal with additional penalties providing a more flexible range of punishments, including absolute discharges, intermittent sentences, the suspension of the passing of a sentence of custody, and restitution orders.

Those are the areas in the bill that the CLA can support. Mr. Spratt can now deal with some matters of concern.

● (1540)

Mr. Michael Spratt: The primary area of concern that the CLA has with the bill, and with the National Defence Act in particular, is the lack of consideration this bill gives to summary trials as they exist in the military.

Quite frankly, the summary trial regime, if it were in the criminal courts.... I'm fully cognizant of the fact that we're dealing with a very different system and a very different implementation of those rules, but from the criminal perspective, summary trials don't meet charter standards.

The commanding officer who presides over a summary trial is not a trained lawyer.

We have evidentiary concerns about the use of hearsay in admissible evidence.

One always has to remember that the penalties imposed for summary trials can be in the minor end, but can include a period of up to 30 days in custody and a deprivation of liberty.

The disclosure standards that exist in the current summary trial regime fall short of Stinchcombe and those that we see in the criminal court, leading to questions about full answer and defence.

Also, the right to counsel does not meet current charter standards.

The focus of summary trials on an expeditious hearing may be advantageous—and I'm sure the committee will hear evidence from the military perspective about why that may be—in the military, but it has to be recognized that it comes at the expense of procedural fairness.

It should be said that the reduction of the limitation period to six months is a step in the right direction as it comes to summary trials, and this bill could do a better job of embracing those sorts of positive steps.

In general, the appeal rights and the problems with records being kept—transcripts and a proper evidentiary record—are also problematic in regard to procedural fairness.

Clause 54 of this bill, dealing with trials in the absence of the accused, also presents a problem from the criminal perspective, and in our criminal courts would not meet the standards as set out by the charter. This is especially true when there's a period of custody or there can be a deprivation of liberty.

When I was thinking about it last night, I was thinking that for a traffic ticket when you have a fine, you have a right to be present. Those trials can proceed without an accused, but of course a $65 traffic ticket is much different from the deprivation of liberty. When we're dealing with potential consequences such as that, there should be a better record kept, and the charter would suggest that there should be a right of an accused to be present for the entirety of that hearing.

Those represent the major concerns. Some of them are maybe beyond the scope of this bill, but they are important considerations.

Overall, I think, when we look at this bill, we see that the majority of the Lamer recommendations are being implemented, which is a very positive step, and this is a step in the right direction. Perhaps, from our perspective, the step could be slightly greater.

Thank you.

[*Translation*]

The Chair: Thank you, Mr. Spratt.

I would like to remind members that we will have to go and vote and that we will therefore have to adjourn at 5:15 p.m., not at the time stated on the agenda, which is 5:30 p.m.

That said, I give the floor to Mr. LeBlanc.

[*English*]

Hon. Dominic LeBlanc (Beauséjour, Lib.): *Merci, monsieur le président*, and thank you very much to both of you for coming this afternoon and for your comments.

Mr. Spratt, you did it well. You talked about the things you like, and then you left some rather compelling and I think informative concerns to the end. You finished with a number of questions that would cause us to reflect.

The purpose of modernizing, after many years, the justice provisions around the National Defence Act has as one of its objectives, as I think everybody agrees, bringing it more into line with modern charter decisions, with Supreme Court precedents, and with the work of the late Chief Justice Lamer. We all, I think, share the view that this is the objective, and you've identified a number of areas where perhaps we've fallen a bit short of where we might want to go.

This is dangerous, because I don't want to speak for the people who run the military justice system. I think they do a very good job with the instruments and the context that they're given, which is often a difficult context, such as an operational context in Afghanistan.

You said at the beginning that you recognize military justice has some different aspects from a typical criminal justice context in a civilian proceeding. That doesn't mean the rights of an accused person should be less respected. I wouldn't suggest that at all, and you certainly didn't, but how do you balance out what I think military commanders or those in an operation overseas, for example, would say is the necessity to maintain the cohesion of a unit, discipline, in a particular theatre, and requires this expeditious summary process for the less serious offences? How do you balance that with the right to make a full answer in defence and the right to counsel, all of which are very basic elementary principles of a criminal justice system in a civilian context?

In your view, can some amendments be made that would bring this legislation up to a higher standard, to which we might aspire, without compromising the clear need of the military to have that flexibility? Frankly, you've identified some troubling elements. If we want to try to amend this bill—and the minister and others were certainly open to thoughtful amendments that preserve the integrity of the bill—do you have any suggestions of how we could do that? I don't think it's realistic to import into the summary context the full protection that you have in a criminal proceeding for an indictable offence in a civilian context. That's not realistic. At the same time, it doesn't mean we should compromise procedural fairness and actual justice rights, let alone the charter rights, of somebody facing a serious sanction.

● (1545)

Mr. Michael Spratt: I would have two suggestions to put to the committee on that point.

The first is recognizing that the application of the National Defence Act can have a very wide scope. It can apply in various operational theatres but also on home soil during training. There might be room to treat those two different locales differently. For example, in an operational theatre it might be more justifiable to have more expeditious resolution to those summary complaints, whereas when one has the luxury of facilities at home and of being on Canadian soil, maybe different standards could be imposed. Certainly that's something that might be considered under section 1 when we're looking at whether there are charter violations and if they are indeed saved by section 1. That's something that can perhaps be recognized.

If there are going to be laxer standards—that may be loose language—in terms of the procedural fairness, one good way, in my opinion, to guard against that would be to strengthen the rights of appeal, to make sure there's a proper record, to make sure that if, because of that procedural unfairness, there is a breach of charter standards and an injustice done, that there's at least a record and a mechanism that, when time allows, would allow that mistake to be corrected.

Mrs. Constance Baran-Gerez: To that I would add removing the availability of custody with a deprivation of liberty as a penalty for summary trials. That would go a long way to ensuring a more fair approach to the process.

I understand that if I were considering imposing a restriction of liberty that the option, the election, is often given to the member, but if that punishment were taken away as an option as a punishment for a summary trial, then perhaps it might withstand charter scrutiny.

Hon. Dominic LeBlanc: So you as an accused person facing a summary trial would have, as certainty of law, the knowledge that if you elect to have that summary procedure—perhaps I'll use the civil analogy—you're not facing potential closed custody incarceration as a sentence, as a punishment.

Those are very good suggestions.

In terms of right to counsel, if you had to rank your concerns.... I think that the idea of the evidentiary record and strengthening appeal rights is a good one. I like the idea of limiting, perhaps, the sentencing element. You raised the right to custody, the right to disclosure.

● (1550)

Mr. Michael Spratt: It may be self-interest, but I'm of the opinion that having counsel present is one of the most important things one can do to strengthen access to justice and procedural fairness to make sure that any injustices are caught at the front end. I note that there are some provisions—for instance, the trial *in absentia* provisions—that allow the accused to have an advocate present. That can be strengthened. Especially when you're dealing with members of the military, you could perhaps legislate that counsel can be provided and paid for, because there's the economic reality members have to deal with as well. Having strong representation from counsel and guaranteed representation from counsel, perhaps if custody is on the table as a potential option, would go a long way to alleviating some of our concerns.

Hon. Dominic LeBlanc: The criminal defence bar in Kandahar may not offer much reassurance either.

Mr. Michael Spratt: Legal aid rates would need to be pretty high.

[*Translation*]

The Chair: Thank you, Mr. LeBlanc. Thank you, Mr. Spratt. I'll now give the floor to Mr. Bachand.

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

Welcome to our guests.

First, I would like to know what you know about military law. Is this the first time you've appeared before a committee to give your organization's opinion on military law? I wouldn't say that military law is complex, but everyone agrees that it is somewhat separate from civilian justice.

[*English*]

Mr. Michael Spratt: Yes, this is the first time I've appeared before this committee.

The membership of the CLA is quite varied. We do have members who practice in this area, so we have consulted some outside sources. This is why I said at the beginning of our presentation that we are not here representing ourselves as experts in this area. We are here to give you the perspective of counsel who deal with charter issues on a day-to-day basis in the criminal context and to perhaps offer you a perspective on how to import those into this context.

Undoubtedly you'll hear from people who are much more familiar with it than we are. They might present compelling arguments on how section 1 would operate and how that might save in the operational implementation of this, but it is our view, as an organization, that the charter is a very important document and that its values should really permeate all our legislation.

[*Translation*]

Mr. Claude Bachand: Constance, is this the first time for you as well?

[*English*]

Ms. Constance Baran-Gerez: It is. However, before I came to speak with you, I consulted with a serving member of the Canadian Forces who works in the JAG office with Defence Council Services. I also consulted with two retired majors, both of whom had acted as adjutants for their units. In that capacity, they both assisted their commanding officers in dealing with summary trials. Each of them had acted as assisting officer in at least six or seven summary trials, so they were familiar with it both from an operational standpoint in consulting with their COs and from being on the ground as assisting officers.

[*Translation*]

Mr. Claude Bachand: We currently hear it said that there is too big a gap between civil and military justice. Do you agree?

[*English*]

Ms. Constance Baran-Gerez: With regard only of the summary trial process—not the court martial process, which appears to have factored in such things as being a court of record, having a route of appeal and right to counsel, providing counsel for the members if they wish it, and having a lawyer as the presiding officer—it's the Criminal Lawyers' Association's position that it does not meet charter standards. However, we understand that there are other concerns, it being a unique organization.

● (1555)

[*Translation*]

Mr. Claude Bachand: Military members who are convicted at a summary trial may wind up with a criminal record. That happens relatively frequently. You didn't mention that situation, which is criticized by some. Are you familiar with this issue? I find it somewhat excessive for a person who has disobeyed or refused to obey a superior's orders to wind up with a criminal record. I think that punishment is disproportionate to the alleged offence.

[*English*]

Ms. Constance Baran-Gerez: I don't disagree. The question and the real difficulty is the definition of a criminal record. From the National Defence Act, the Criminal Records Act, the Identification of Criminals Act, and the Criminal Code of Canada, there's no understanding as to if or how the findings of guilt from a summary trial find their way onto what's known as CPIC. There's one amendment that we're pleased to support, found in clause 75, which now makes the five non-serious offences statutorily not criminal offences, which goes a long way. The member does not have to seek a pardon and that is, as far as we can determine, the import of that amendment.

It has to be read as well with the National Defence Act as it stands now. Section 196.26 is the list of designated offences for which fingerprints and photographs shall be taken. It may be of concern to the member that a conviction for something such as improper driving of vehicles may find its way onto a criminal record.

I find some comfort in section 196.29 of the National Defence Act, which says that fingerprints, photographs, and other measurements that are taken under section 196.27 shall be destroyed if that person is tried by summary trial, so it's only for those offences in which the matter proceeds to court martial, where, if there is a conviction, that becomes a criminal record for which the member has to then seek a pardon.

[*Translation*]

Mr. Claude Bachand: We've heard about another issue. There is a committee responsible for reviewing the compensation of military judges. However, the expenses of those judges are paid for by taxpayers, contrary, I believe, to what prevails in civilian society. In a similar context in Quebec, for example, Superior Court judges are paid a certain amount. It's not up to taxpayers to bear those costs. Are you aware of this issue? I'd like it if taxpayers no longer had to bear the cost of the Military Judges Compensation Committee.

[*English*]

Mr. Michael Spratt: With regard to the question of taxpayers paying for committees that examine military judges, one might also view it as money that can be well spent if it ensures that properly trained and—as this bill makes them—more independent people are appointed to that role. I don't think you can put a price on judicial independence and judicial competence. I suppose that's a political question that needs to be weighed. Is the taxpayer willing to bear that weight? However, it's our position that if that expense leads to a fairer trial, then it's well worth the money.

[*Translation*]

The Chair: Thank you, Mr. Bachand. Thank you, Mr. Spratt.

I'll now give the floor to Mr. Harris.

● (1600)

[*English*]

Mr. Jack Harris (St. John's East, NDP): Thank you, Chair, and I thank the witnesses for joining us today.

I'm glad to have a fresh set of eyes look at this legislation, and the fact that you haven't been military lawyers may be of assistance—to me, at least. One of my concerns is to try to ensure that people who serve in our military are not treated less fairly under a system of justice than those in civilian life, because those in the military are not going to be in the military forever. Even the Parliamentary Secretary to the Minister of Defence, who sits with us, was in the military for a while. He's not now, and many military people leave after a short number of years. Some have a full career there.

I'm very interested in the criminal record, for one. I see the relationship between that, perhaps, and the summary process we have. I'm not sure if you're familiar with the notion that military justice is different because it requires discipline and speed and morale and maintaining the cohesiveness of a fighting force. Some of the elements of a "fair trial" under our charter I don't think you can eliminate. You might have a transcript, but you're not going to stop the commanding officer from being the commanding officer, and you're not going to make them all have law degrees, etc.

One suggestion has been made that in the area of the criminal record you can withstand a system that's less fair in terms of procedural fairness if the consequences to a military person are not as consequential, shall we say. The military can try you for possession of marijuana or offences that would perhaps give you a difficult time in civilian life. In modern times, with CPIC and crossing borders—and God knows what other countries may think of convictions—the criminal record is still there.

By the way, 90% of all offences in the military are tried under the same procedure that you've criticized. Do you see any merit in having some circumstance whereby any summary trial could not lead to a conviction within the meaning of the Criminal Records Act? Clause 75 has a reference to minor punishments, and they're defined, and regulations could change. I'm not even sure what they are right now. Is there any merit in having a blanket prohibition of a criminal records offence if you're using a procedure that might serve the purpose of the military in maintaining discipline and order but does not serve the rights of an accused person for their future?

Mr. Michael Spratt: I would agree with you on that point. When you're balancing the nature and gravity of the charter breach and the potential consequences, those are all factors that go into the balance, so that's a system that's less fair or that wouldn't withstand scrutiny in the criminal context. It may pass muster if there's less of an impact after the end of that system.

Certainly I would agree with you, sir, that criminal records are becoming more and more relied upon. It's not just crossing the border, but it's vulnerable background checks if you want to work with children, be a teacher, be a nurse, be a doctor, enter a profession. It seems to be taking on a larger and larger role in our society. It would be a shame if someone who's served their country and incurred some minor infraction is penalized for that service with a criminal record that may limit them in the future.

I certainly think limiting the information that would make its way onto CPIC and expanding the scope of clause 75 and those amendments would provide greater latitude for this act to operate in the expeditious and flexible way that it needs to for the military.

Mr. Jack Harris: I'll just give you part of a quote from R. v. Généreux.

In 1992, Chief Justice Lamer said:

> To maintain the Armed Forces in a state of readiness, the military must be in the 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. That Code of Service Discipline incorporates the Criminal Code offences that we talked about. Do you think it would be possible to insulate the activities of the military tribunals in the summary conviction trials from the Criminal Records Act? Do you think that's legally possible?

● (1605)

Mr. Michael Spratt: It's legislatively possible, certainly.

Mr. Jack Harris: So if you decide to do it through legislation, you think that could be effective.

Mr. Michael Spratt: Yes, but I think the legislation.... In a criminal context we already have difficulty defining what a criminal record is. Is it just Criminal Code offences? Is it broader than that? Does a criminal record encompass discharges, absolute or conditional? There's a raging debate about that, so any legislation directed at that would have to be explicit and leave no doubt in the authorities' minds what would make its way onto CPIC.

However, I certainly agree with you that if that was contemplated, then perhaps there might be more flexibility to proceed in the expeditious way that is sometimes required.

Ms. Constance Baran-Gerez: I'm sorry to interrupt, but section 196.29 of the National Defence Act is the starting point.

Mr. Jack Harris: One of the punishments possible under the discipline code is confining to barracks, or confining to ship in the case of naval personnel in the Canadian Forces Maritime Command, as I think they call it. Everyone else calls it the navy. Do you consider those punishments a deprivation of liberty? It's not necessarily in the same category as being locked in a cell.

Ms. Constance Baran-Gerez: My husband, who is ex-military—a retired major—tells me that when soldiers sign up, they sign up for just that thing. Whether or not someone is deprived to their room for punishment or deprived to their room because their course officer has deprived them of their liberty, they are not leaving base for two weeks and they have extra duties. Soldiers, when they sign on, expect that kind of deprivation. That is very different from being sent to Edmonton under the current punishment available. That is a real deprivation.

Mr. Jack Harris: What's in Edmonton?

Ms. Constance Baran-Gerez: The military prison.

[*Translation*]

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

Mr. Hawn, go ahead, please.

[*English*]

Hon. Laurie Hawn (Edmonton Centre, CPC): Thank you. Thank you very much, Mr. Chair.

I'm from Edmonton. I have been there, but on the right side of the bars.

Can you outline your specific interest in this case? You have no experience in the military justice system at all. What's your interest in this?

Mr. Michael Spratt: Our interest is to ensure that, for the legislation currently on the books, any amendments to that legislation meets the high charter standards that are expected and the procedural fairness that is expected in our legislation.

Hon. Laurie Hawn: Can you give me your perception of the concepts of operational effectiveness, good order, and discipline, and how those interact?

Mr. Michael Spratt: As I said in my opening remarks, certainly things are very different in the military. I won't pretend to know what it's like in the military. I've never been in it, nor do I practice extensively in that area.

I'm fully aware, as I expect this committee is going to hear or has heard from other members who can comment, of the necessity of expeditious resolution to the sorts of problems that this act deals with. I'll simply leave it at that.

I'm just here to offer you my perspective on how the charter might affect these amendments in this bill and speak about it in a criminal context. As you're aware, section 1 of the charter is designed to save any legislation that may infringe or overstep charter bounds. That's something the committee can consider when they have the evidence that would apply to section 1.

Hon. Laurie Hawn: Thank you.

Ms. Constance Baran-Gerez: The analogy that I draw, to answer your question in respect of summary trials, is disciplinary court for federal inmates serving time in penitentiary.

Inmates in federal penitentiary are a different category: there is a need for speedy, expeditious discipline, and there are fewer protections for the person who's facing charges. However, even in penitentiary, people convicted of serious criminal offences who are facing the kind of trial that a summary trial is have the right to counsel. There is the right to have duty counsel present, it is a court of record, and there is an automatic right of appeal to the federal court, so in certain circumstances inmates are getting more rights than soldiers.

● (1610)

Hon. Laurie Hawn: In regard to clause 54, you talked about problems with the absconding of the accused, and so on. Clause 54 will refer you to that; it's talking about absconding accused. Have you looked at Justice Lamer's recommendation? Would you not acknowledge that it is, word for word, Justice Lamer's recommendation?

Mr. Michael Spratt: Yes, it is.

I think the legislature should be commended for implementing those. Justice Lamer obviously had much more information then we have. We're simply here to say that from our perspective, in the criminal courts it's something that wouldn't happen and wouldn't be acceptable. Obviously, there are different considerations in the military, and Justice Lamer had that information, as this committee, I expect, will have that information and take that into account when analyzing the amendments.

Hon. Laurie Hawn: Is the wording of clause 54 not exactly the same as section 475 of the Criminal Code?

Mr. Michael Spratt: I haven't done a line-by-line comparison, but in the Criminal Code only under very extraordinary circumstances do matters proceed when an accused can be subject to deprivation of liberty in the absence of the accused.

Hon. Laurie Hawn: Obviously, you don't have time to do it now, but I would refer you back to section 475 of the Criminal Code, and I think you'll find it's word for word the same thing.

On summary trials still, do you agree with the views of two of Canada's most eminent jurists, the Right Honourable Brian Dickson and the Right Honourable Antonio Lamer, both, obviously, former chief justices of the Supreme Court, who have reviewed and endorsed the summary trial system?

Just to finish that question, or add a wrinkle to it, do you believe that these kinds of eminent jurists would have analyzed charter issues before endorsing the summary trial system?

Mr. Michael Spratt: Obviously, I would expect that those jurists wouldn't have just been presented with one perspective. As I have said continuously from the beginning of our presentation and throughout, this committee, Justice Lamer, and others who have examined the bills would have been presented with a wide variety of perspectives that would have informed their analysis.

As we're aware, there are many provisions that infringe the charter. For example, random stopping and RIDE programs to check for impaired driving infringe the charter, save by section 1. There may be very many cases in which the sections that I'm commenting on, the summary trial sections, from my perspective would infringe the charter, but much like the situation with regard to the RIDE programs, perhaps this committee and those who have drafted the legislation have heard other evidence that would put that into context.

Hon. Laurie Hawn: You're absolutely right. Justices Lamer and Dickson did have access to much more information and, as you admitted yourself, probably had a better understanding of criminal justice.

Mr. Michael Spratt: Who said that?

Hon. Laurie Hawn: Could you comment on the weight they gave in their analysis to such safeguards as the right to elect between summary trial and court martial, the right to receive legal advice on the making of the election, the role of the assisting officer, and the right to request a review of the findings? Can you comment on the weight that they put on those?

Mr. Michael Spratt: I can't comment directly on the weight that they put on those. Of course I'm not in a position to do that. I'm here in a position to give evidence on the CLA's perspective in terms of criminal law in general. I'm hear to present that information.

The election is important, and the right to receive legal advice is important. I'll simply leave it at that.

Hon. Laurie Hawn: Constance, you talked about—I'm sorry, Ms. Baran-Gerez, I shouldn't be so personal.

You talked about the CO and lack of legal qualifications. COs do get training now, which they didn't used to, and there is JAG support too. I think you mentioned in relation to some of the cases that you referred to that there is JAG support to a commanding officer to assist him with the legal items that he may not be totally familiar with.

● (1615)

Ms. Constance Baran-Gerez: Certainly there's a manual. Assisting officers are given a manual, and I've read the manual. There is a legal officer who's available, but a suggestion to make the summary trial process more fair to the member might be that all non-serious charges also be referred to legal counsel for advice. Right now there's no obligation on a CO to consult with their legal adviser in respect to non-serious matters.

Hon. Laurie Hawn: Just to be clear, it's more than a manual. Commanding officers get training.

[*Translation*]

The Chair: Thank you very much.

Ms. Folco, go ahead, please.

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

Clause 4 of the bill, which concerns the Chief of the Defence Staff, reads as follows:

> (2) The Vice Chief of the Defence Staff may issue general instructions or guidelines in writing in respect of the responsibilities described in paragraphs 18.4 (a) to (d). The Provost Marshal shall ensure that they are available to the public.
>
> (3) The Vice Chief of the Defence Staff may issue instructions or guidelines in writing in respect of a particular investigation.
>
> (4) The Provost Marshal shall ensure that instructions and guidelines issued under subsection (3) are available to the public.
>
> (5) Subsection (4) does not apply in respect of an instruction or guideline, or of a part of one, if the Provost Marshal considers that it would not be in the best interests of the administration of justice for the instruction or guideline, or that part of it, to be available to the public.

In my view, these provisions may conflict with the principle of the independence of the police and the judiciary, which prevails in the Constitution. Consider the worst-case scenario. That's what I want to address.

[*English*]

Ms. Constance Baran-Gerez: From the Criminal Lawyers' Association perspective, the necessity is for the judicial officer to be independent and impartial, not necessarily for the police to be independent and impartial. The ultimate arbiter of whether or not an investigation has been fair and complete is the presiding officer or judge hearing the matter.

Ms. Raymonde Folco: In other words, you don't feel that this might be a dangerous precedent, a dangerous power, or that it might turn out to be so. I am not saying it is explicitly dangerous. When I mentioned the worst-case scenario, I was imagining that there could be a case in which such powers could go very far and could change the course of the trial, with dire consequences for the person standing trial.

You have no opinion on that?

Ms. Constance Baran-Gerez: Perhaps I'm not looking at the right section. The appointment of a provost marshal is, as I understand it, the equivalent of the appointment of a police chief.

Ms. Raymonde Folco: Thank you.

[*Translation*]

Earlier the Honourable Laurie Hawn asked you a question about the decision by Justices Lamer and Dickson. I'd like to continue in the same vein. You said that some clauses didn't meet current Charter standards but that those two judges definitely had access to much more information than you.

Do you have any suggestions to make to improve the summary trial process? Should we try to find a compromise between the judges' decision and the provisions of the Charter?

[*English*]

Mr. Michael Spratt: I think it is indeed possible to find that midway point. In a context such as the military, it is important to have expedient, flexible measures that also serve to maintain discipline and cohesion. The midway point will have to be found. I would rest on our earlier comment that this midway point can be achieved through stronger access to counsel, stronger appeal mechanisms, and amendments that serve to foster these elements.

For the appeal mechanisms, it is important that there be an evidentiary record. It is also important to require impartiality, as this bill does. This bill also allows for a diminishing of the consequences on conviction through removing certain offences from appearing on one's criminal record. If the punishment isn't severe and the procedural safeguards and access to justice are increased, then I think a flexibility can be achieved, and there will be more tolerance of procedures that may in different contexts infringe the charter in a more egregious way.

● (1620)

[*Translation*]

Ms. Raymonde Folco: Thank you.

The Chair: Thank you, Ms. Folco. Mr. Braid, go ahead, please.

[*English*]

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

Thank you very much to our representatives for being here this afternoon.

Ms. Baran-Gerez, perhaps I could start with a question for you, please, with respect to clause 62, which you touched on in your opening statement.

In the bill, as you mentioned, there is an articulation of the purposes and the objectives and the principles for sentencing. Could you explain why you think it's important and beneficial to have that included in the bill?

Ms. Constance Baran-Gerez: Well, it mirrors the Criminal Code, so it sets out a list of statutorily mandated concerns that a CO would consider in imposing sentence. It leaves less to the individual whim of the individual CO. It provides guidance to the CO, much as it provides guidance to judges.

In particular, though, clause 62 recognizes the unique operational situation, the unique nature of the organization, in proposed paragraphs 203.1(1)(a) and (b):

> (a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and
>
> (b) to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

So it does well to merge both the civilian concerns about sentencing as well as the unique requirements of the Canadian Forces.

Mr. Peter Braid: Very good. Thank you.

A little further on in the bill, some added flexibility is included with respect to sentencing options, specifically with respect to the options of an absolute discharge, an intermittent sentence, or restitution.

Do you agree that these are positive changes?

Ms. Constance Baran-Gerez: Absolutely.

Mr. Peter Braid: Could you elaborate on the benefits and on the importance of these sentencing options in the bill?

Ms. Constance Baran-Gerez: The more flexibility a sentencing body has in sentencing an individual, the more individual the sentencing will be. This is not only in terms of what was done; it's also in terms of the individual's own prior record—whether they have a conduct sheet, whether it's been their first offence or their tenth, and so on.

Flexibility in sentencing assists not only the military but also the individual member.

Mr. Peter Braid: Great.

I'd like to ask a question about an issue that I don't believe has been touched on yet this afternoon. This is an important pillar of the bill, certainly from our perspective, and it also meets our objective of bringing military justice law more in line with civilian justice. I'm referring to the issue of victim impact statements.

Do you agree that this is a welcome and necessary addition to the military justice system?

Ms. Constance Baran-Gerez: It certainly brings it in line with the civilian system and with the way in which matters are heard in criminal courts.

Mr. Peter Braid: You nicely evaded my question: do you agree it's a beneficial aspect?

Ms. Constance Baran-Gerez: Certainly it's one more piece of evidence for the sentencing body, and absolutely they should have all the information necessary.

Mr. Peter Braid: Okay.

Thank you very much.

● (1625)

[*Translation*]

The Chair: Now I'll give the floor to the last speaker, Mr. Bachand.

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

Earlier, Mr. Spratt, I talked to you about judges' compensation. I don't want to resume the discussion on that topic, but I simply want to point out to you that this concerns section 165.38. If possible, could you send me your opinion on this matter in writing?

Today, I instead want to talk to you about the possibility for a judge to file a grievance. I would like to talk to you about the concept of judicial deference. I find it curious that a judge can file a grievance directly with the Chief of the Defence Staff. I consider that a breach of judicial deference. I'm talking about section 29.101.

For example, what do you think of a judge who, in order to complain, would complete a grievance form and file it with the Chief of the Defence Staff? It seems to me that, in that case, that constitutes a breach of judicial deference.

[*English*]

Mr. Michael Spratt: Certainly that's obviously not the system that exists in the civilian system. It's a measure that could be strengthened when one's looking to encourage judicial independence, and it's a perception. When we look at bias and the perception of bias, it's not whether there is actual bias, but whether an observer looking at the system has a perception of bias.

I agree with you that this bill goes a long way to immunity from civil action, and there are a number of measures in this bill that seem to be a step forward for a sort of judicial independence. As we know from our system, judicial independence is one of the pillars of a fair and just judicial process, so I'd certainly agree with you: that's a measure in this bill that could be strengthened if one is looking to go even further to achieve that goal.

[*Translation*]

Mr. Claude Bachand: Would you like to hazard a response, even a brief one, on the Military Judges Compensation Committee, that is on section 965.38 that I discussed with you earlier? Would you be able to respond to that immediately, or would you prefer to respond in writing to the committee?

[*English*]

Mr. Michael Spratt: I never prefer homework, but I think I would be more than happy to take more time to consider it and to provide the committee with a short written response. I won't send you my bill.

Voices: Oh, oh!

[*Translation*]

Mr. Claude Bachand: Thank you. I have no further questions.

The Chair: Thank you, Mr. Bachand.

I want to thank the members of the Criminal Lawyers' Association of Ontario. Thanks to Mr. Spratt and Ms. Baran-Gerez for being with us.

I'm going to suspend proceedings for three minutes in order to allow the National Defence and Canadian Forces Ombudsman to take his place among us.

● (1625)

(Pause)

● (1630)

The Chair: Thank you and good afternoon.

Now I would like to welcome Mr. Pierre Daigle, National Defence and Canadian Forces Ombudsman. Thank you for being with us. I see you are accompanied by Ms. Mary McFadyen.

I'll give you the floor for 10 minutes. Then committee members will be able to ask you questions on the bill we are considering.

Mr. Pierre Daigle (Ombudsman, National Defence and Canadian Forces Ombudsman): Thank you, Mr. Chairman.

I am indeed here with Mary McFadyen, general counsel. I would like to begin by thanking the committee for inviting me to testify this afternoon regarding an obvious unfairness in the military redress of grievance process. It is an unfairness that was recognized and criticized by the former Chief Justice of the Supreme Court of Canada, the Right Honourable Antonio Lamer.

[*English*]

Following our investigation into the Canadian Forces redress of grievance process in May 2010, I issued a report entitled, "The Canadian Forces Grievance Process: Making it Right for Those Who Serve", which highlighted deficiencies in the grievance process that are causing further hardship for Canadian Forces members who have already been wronged.

As a result of our investigation, we found that the redress of grievance process, which is supposed to provide soldiers, sailors, airmen, and airwomen with a quick and informal mechanism to challenge Canadian Forces actions and resolve matters without the need for the courts or other processes, is flawed and unfair. Specifically, we determined that the Chief of the Defence Staff, who is the final decision-maker in the grievance process, does not have the authority to provide financial compensation to fully resolve unfairness.

[*Translation*]

I'll say it again. Specifically, we determined that the Chief of the Defence Staff, who is the final decision-maker in the grievance process, does not have the authority to provide financial compensation to fully resolve unfairness.

Instead, when a claim for compensation arising from a grievance is made, it is a government lawyer, not the Chief of the Defence Staff, who determines if compensation should be paid to the Canadian Forces member.

[*English*]

In my view, Mr. Chair, it simply defies logic that the Chief of the Defence Staff, who is charged with the control and administration of the Canadian Forces, is not given the authority to pay out a $50 claim.

It also seems unreasonable to our office that a government lawyer, whose role is to provide advice, has more decision-making authority regarding compensation than the Chief of the Defence Staff. As a result of our investigation, we have also found that government lawyers often deny financial compensation requests.

Moreover, when claims are rejected, Canadian Forces members are informed that they must initiate legal action against the Government of Canada in order to obtain compensation. However, unbeknownst to most men and women in uniform, legal action will rarely be heard by a court, because previous courts have ruled that there is no legally enforceable employment contract between the crown and Canadian Forces members.

At it currently stands, there is no real last resort for a Canadian Forces member to receive financial compensation, even when the Canadian Forces admits that the member has been treated wrongly or unfairly.

● (1635)

[*Translation*]

As a result of the investigation, I concluded that it is necessary for the Chief of the Defence Staff to be able to grant financial compensation for the simple reason that, in certain circumstances, fairness cannot be achieved by any other means.

[*English*]

As I mentioned earlier, our office is not the first to recognize this problem, nor is it the first to make recommendations that it be fixed. Indeed, after an external independent review in 2003, the former Chief Justice Lamer recommended that the Chief of the Defence Staff be given authority to settle financial claims and grievances.

[*Translation*]

In his report, the former Chief Justice stated, Soldiers are not second-class citizens. They are entitled to be treated with respect, and in the case of the grievance process, in a procedurally fair manner.

This is a fundamental principle that must not be lost in a bureaucratic process, even a military one.

Ultimately, a proper grievance process must be able to determine whether someone was treated fairly as well as to correct any unfair or improper treatment.

[*English*]

We must give the chain of command the tools and authority to take care of its people, and Canadian Forces members must have confidence that their chain of command will take care of them. This is a leadership and a morale issue. How can any military leader tell his or her troops, "I agree that you have been treated unfairly, but there is nothing I can do for you. I would ask you to continue to believe that I care about your situation."

The Minister of National Defence has informed us that our recommendations are still being considered. However, given that eight years have elapsed without a resolution to this unfairness, from a sound public policy point of view I believe it is time to make the legislative change necessary to clarify and ensure that the Chief of the Defence Staff has the authority to provide financial compensation to fully resolve unfairness and to ensure that the grievance system can actually serve the men and women in the Canadian Forces as it was intended to do.

Former Chief Justice Lamer was right: our military members are not second-class citizens, and they deserve to be treated fairly. I am pleased that this committee has turned its attention to addressing this challenge.

At this time we stand ready to provide any assistance that we can to the committee.

[*Translation*]

So I am pleased that this committee has turned its attention to redressing this challenge, and we stand ready to assist you.

Before concluding, I would nevertheless like to add that I find it somewhat unfortunate that we have to debate a question whose purpose is merely to obtain justice and fairness for the members of the Canadian Forces.

[*English*]

Rightly so. Nobody is questioning former Chief Justice Lamer's recommendations.

I agree with the Minister of National Defence when he wrote back to me on this issue and said:

> As you have rightly identified, this is not the first time this recommendation has been made, and the time has come to bring closure to it one way or the other.

Mr. Chair, I think the time is now.

[*Translation*]

The Chair: Thank you, Mr. Daigle. I remind committee members that we are examining Bill C-41 and that your questions must be relevant to the current debate. I am convinced that this will take place in that manner. I therefore give the floor to Mr. Dryden.

[*English*]

Hon. Ken Dryden (York Centre, Lib.): Thank you.

I think your notes are clear, but I just want to make sure I understand them correctly. What you're saying is that the Chief of the Defence Staff does not have the authority. It's not that he gives over the authority to lawyers, but in fact that even if he wants to make that decision, he does not have the authority to do so. Is that what you're saying?

Mr. Pierre Daigle: That's what I'm saying. He doesn't have the authority to order any monetary compensation to address a grievance.

Hon. Ken Dryden: As you've pointed out, this has been going on for a long time, and even eight years after Chief Justice Lamer's independent review.

Things like this don't happen for no reason, so what do you suppose is the thinking within National Defence as to why they have allowed this to continue for eight years? Despite the recommendation that was clearly made and what would seem to be a fairly simple resolution, why have they decided not to do anything?

● (1640)

Mr. Pierre Daigle: Mr. Chair, it's difficult for me to talk on their behalf. As you pointed out, Chief Justice Lamer recommended that in 2003. At that time the government agreed to 16 of the 18 recommendations that have to do with the grievance system, and one recommendation is the one we're talking about today.

Hon. Ken Dryden: So it's one of those 16, as opposed to one of the two that they didn't agree with.

Mr. Pierre Daigle: Absolutely. There were 18 recommendations, two of which were still being debated at the time, which were funded judicial review and the subpoena for the grievance board. Among the 16 others, the one about the CDS authority to give financial compensation was approved, and during those eight years it was said that it would be implemented.

Now, since I took office, I did talk to some military entities. I know that the Canadian Forces Grievance Board, the director general of the Canadian Forces Grievance Authority, and some military senior officers agreed with that, but why it didn't happen after eight years is difficult for me to explain.

Hon. Ken Dryden: You offer the example of even $50. Obviously, in a situation like that, tt would not seem to be a difficult decision to make, but can you advise us on the range of matters that might be considered here when financial compensation would be sought and has not been given? Can you give a few examples and how much those might entail?

Mr. Pierre Daigle: I don't have readily available the amount of money. Maybe Mary can answer that question.

My numbers might not be as accurate, but I've heard that in about 60 cases in which the CDS has upheld a grievance and has agreed that they will require some financial compensation, about half of those decisions upheld by the CDS were rejected in terms of compensation. They were not—

Hon. Ken Dryden: What I'm trying to get at is this: are there thousands of dollars at stake somewhere, and therefore it's of real consequence to the military person who does not receive that compensation?

Mr. Pierre Daigle: I don't readily have the numbers. I've heard from my staff working on that, again recently, that we've not talking about a large sum of money. I don't know the numbers.

Hon. Ken Dryden: So in many ways it is annoyance, as opposed to hardship, in terms of the amounts of money involved. It's annoyance, which would relate to morale instead of hardship.

Mr. Pierre Daigle: Well, it is, in a sense, and when people have been wronged.... For instance, a lot of those cases have to do with wages or a reimbursement of expenses.

For instance, we have the case of a reserve officer who was removed from duty for a certain length of time. The investigation proved that he should not have been removed from duty, but being a reserve officer, he lost a lot of money, so he put in his request for redress, saying that he was unfairly removed of duty, and the redress was upheld by the CDS. They agreed that it was the wrong decision, but he lost salary during those days, and the CDS had no authority to give back the pay that he should have had.

So it does cause hardship in that sense, but mainly it's a leadership issue, and a big morale issue.

Hon. Ken Dryden: I think you're saying that all of this could be a fairly simple matter and could be simply dealt with, and whether it is dealt with more sympathetically under the current chain with a lawyer deciding it or whether the Chief of the Defence Staff has the ultimate authority, in either case they should be reacting much more sensitively to a matter that seems fairly inconsequential, at least to National Defence—

Mr. Pierre Daigle: Absolutely. The grievance process was intended to be effective, fair, informal, and expeditious. Now when people grieve the unfairness they have experienced, even though there is the chain of command and their leaders agree it was wrong, if there is money attached to it, the Chief of the Defence Staff, who is in charge of the armed forces, cannot authorize payment.

Hon. Ken Dryden: Thank you.

[*Translation*]

The Chair: Mr. Bachand.

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

I want to welcome General Daigle, who moreover is an eminent citizen of Saint-Jean-sur-Richelieu. It's always a pleasure to see our fellow citizens here.

Mr. Daigle, you provide a very interesting viewpoint, and I would like to pursue the example you cited of the reservist who was suspended from his duties without pay and who went all the way up the chain of command to the Chief of the Defence Staff, who told him: "You're right; you shouldn't have been suspended from your duties; so I'm going to correct that." He probably erased the remarks on the subject from his file, but he could do nothing about repaying him all the money he had lost.

However, I want to address another stage because you didn't refer to it. That's the one I want to hear you talk about. We see that the Chief of the Defence Staff referred the case, at that point, to the director of claims and civil litigation. Could you explain that director's duties to me?

● (1645)

Mr. Pierre Daigle: The director of claims and civil litigation is a lawyer who reports to the deputy minister of Justice. He is outside the chain of command and provides support to the Department of National Defence. So he is not part of the grievance process.

Since the Chief of the Defence Staff at National Defence has no authority in this regard, the case is submitted to that lawyer. All that lawyer can tell the individual is that, if you believe there has been an unfairness, you can file a claim against the crown. It may have been agreed before the courts that

[*English*]

there is no enforceable contract with the crown.

[*Translation*]

Even if you submit your claim,

[*English*]

there is no liability by the crown, so you're not going to get your claim.

[*Translation*]

At that point, the individual's last resort is to go to Federal Court, but it has also held that, since the matter falls within the Canadian Forces' grievance system, there's nothing to do.

So a member of the Canadian Forces who files a grievance in a system that is established to provide a mechanism to solve internal problems, that is outside the legal system and the courts, finds that, if there is a resolution that merits financial compensation, it's as though he were dealing with three systems. Not only did they want to ensure that the system is more efficient, but if the CDS cannot solve his problem, he has to turn to a Department of Justice lawyer at National Defence, who, if there is no liability against the crown, will not submit his claim. He recommends that he go to court, which will dismiss his application because he has no contract.

So it's recommended that the soldier institute proceedings, knowing in advance that that will not solve his problem.

Mr. Claude Bachand: So it's a dead end wherever he turns.

I'd like us to talk for a few minutes about the civil courts. In fact, it states here that the civil courts have stated that there is no employment contract between Her Majesty and members of the Canadian Forces and that a person who enrols in the military does so at the pleasure of the crown and that such relations between Her Majesty and her military members do not give rise to remedies in the civil courts.

I understand that they're not given access to the civil courts, but even if there were recourse, the court would probably dismiss the claim very quickly, stating that they cannot sue the Queen.

When you know that there is no employment contract, it seems to me that, when a soldier enrols in the armed forces, he signs a contract for a number of years. So there is an employment contract. Is there a legal void that precludes pursuing his claims right to the end?

Mr. Pierre Daigle: In legal terms, there is no employment contract between a member and National Defence—and I'm not a legal expert or a lawyer. Furthermore, the member does not have the same legal recourse as his civilian counterpart because he belongs to a military formation. Consequently, if he is wounded in the performance of his military duties, the crown is not held liable. That is due to the fact that there is no employment contract. If the individual believes that he has been unfairly treated and files a claim against the crown, as that claim is outside the grievance process system and this grievance resolution policy is not part of the system, he therefore has no solution through that system.

Mr. Claude Bachand: All right. So your way of remedying the matter is to tell the Chief of the Defence Staff that you are ultimately the last resort and that it is now necessary to go to the additional stage in order to compensate individuals. Does that therefore mean that this is the end of the director of claims and civil litigation?

● (1650)

Mr. Pierre Daigle: The director of claims is nevertheless a legal advisor within National Defence. He reports to the legal advisor of the Canadian Forces and is also an advisor to the deputy ministers and so on. If the Chief of the Defence Staff at National Defence had the authority to order monetary compensation, it is understood that he could ask a lawyer for legal advice. Currently, however, he cannot even request advice because he does not have authority to do so. Legal advice is therefore still required.

Mr. Claude Bachand: The director of claims and civil litigation will continue his work, but he will no longer be the person who decides that a soldier cannot sue the crown because the Chief of the Defence Staff will not have been given authority to close the loop.

Mr. Pierre Daigle: We are indeed mixing two systems. The grievance process is not a system of justice or a legal system. Consequently, when someone files a complaint to obtain satisfaction for an unfairness that he has suffered, the Chief of the Defence Staff, who is nevertheless mandated to control the administration of the Canadian Forces, cannot bring redress of his grievances to a conclusion if it is necessary to correct the error by means of monetary compensation. I could tell you about certain cases in which people have come to our office because it had been decided that the Canadian Forces had not been fair with them and that compensation was part of that decision, but that the chief could not authorize it.

Mr. Claude Bachand: In closing, I also believe that you are going further by seeking a degree of retroactivity or a review of cases that have been poorly handled. And pending a final decision, you are suggesting that the department begin work to open this up. Once the final decision is made, it will be possible to proceed more quickly with cases where there has been unfairness.

Mr. Pierre Daigle: Absolutely, because the new redress of grievance system was put in place in 1998. It was much more complex before that. It's must simpler now. All the information on these people is in data bases. So we can start working on the issue in order to render justice to those who have been hurt by this question.

Mr. Claude Bachand: Thank you.

The Chair: Thank you, Mr. Daigle. Thank you, Mr. Bachand.

Mr. Harris, go ahead, please.

[*English*]

Mr. Jack Harris: Thank you, Chair, and thank you, General Daigle, or Mr. Daigle. I don't think in your current role you use "General", although many retired generals do, but I recognize your service and your rank while there.

Can I just put this to you, first of all? I'm quoting from Chief Justice Lamer in a very important case. He said:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with the matters that pertain directly to the discipline, efficiency and morale of the military.

Would it be fair to say that the establishment of an internal grievance system has as a purpose to pertain to the efficiency and morale of the military as well, particularly when we have a situation that, as you pointed out, has no recourse to the courts because there's no employment contract? I believe it is correct that they cannot form a union either, and have a grievance process under the general law of collective bargaining. Is there some parallel between this statement about military justice and the grievance procedure?

Mr. Pierre Daigle: You raise exactly a good point. When they instituted this grievance process, it was intended exactly to examine informally and expeditiously any issue that might affect a member of the Canadian Forces—any unfairness, and so on—without having to resort to any court outside the Canadian Forces.

It is not a negative thing within the Canadian Forces. The grievance process is a positive thing. The colonel in charge of the Canadian Forces Grievance Authority.... It's positive, because when people complain about injustice, they also bring forward a pretty good point that could also help modernize some policies and so on. This was the intent exactly, to facilitate the communication, and leadership in the forces can have a direct impact on the well-being of the troops when there's an injustice. That has been shown.

Mr. Jack Harris: On the military justice side they talk about speedy trials, efficient processes, and giving them quick punishment because morale demands it. Wouldn't the same thing be said for grievances—that there should be a speedy way of dealing with grievances, the opportunity for redress? I mean, on the military side they can put you in detention.

You're saying that there is no procedure for redress involving money without a lawyer saying yes or no. Who is this lawyer? Is this a JAG lawyer?

● (1655)

Mr. Pierre Daigle: No, he is not a JAG lawyer; he is CCL. He is the director of....

Ms. Mary McFadyen (General Counsel, National Defence and Canadian Forces Ombudsman): Claims and civil litigation.

Mr. Pierre Daigle: This position reports to DND/CF LA, the Canadian Forces legal adviser office. These civilian lawyers are from the Department of Justice, but they support the Department of National Defence.

Mr. Jack Harris: In your opinion, is there a consequence for military morale not to have this provision?

Mr. Pierre Daigle: Absolutely. When they streamlined the grievance process, in 1998, it was six or seven steps at the time, and they brought it down to two steps. That was to expedite the process, to make it more informal, and to make sure the connection was there. The system is very transparent and very fair. There is procedural fairness. They show everything that's going on. Once someone has put in for redress of a grievance, that person can follow step by step what is happening to the complaint. If it stops at one point because the CDS doesn't have the authority, then it would revert to a civilian lawyer system—

Mr. Jack Harris: There'd be no redress at that point. Ultimately, you'd have to go to court.

Mr. Pierre Daigle: There'd be no redress, and when those lawyers do address a claim issue, it's not as transparent as the redress process.

Mr. Jack Harris: Will this break the bank? I mean, we have the $56 billion. Is that going to jump up if this is passed? Are we talking about big dollars here? Is there a way of perhaps putting a cap of $5,000 or $10,000 on it?

Mr. Pierre Daigle: It never strikes me—

Mr. Jack Harris: Is that the issue, from your point of view?

Mr. Pierre Daigle: No, Mr. Chair, it never struck me to be a monetary problem. I find it a bit difficult, as I said at the beginning, that we're debating this issue here. The only aim of this is to make sure we bring fairness to the members.

As I said to Mr. Dryden, I don't think there is a huge amount of money. It never struck me as being huge. It's a question of fairness. People are going through the system; at one point the redress process needs to have closure and to be finalized, but it is never closed when there is financial compensation attached to it.

Mr. Jack Harris: I have one minute. On that point, again, in terms of a speedy disposition, are you satisfied that military personnel are getting speedy help dealing with their grievances? Is that a satisfactory system, or are you still complaining about it?

Mr. Pierre Daigle: I am happy to say that in the past two years there have been a lot of improvements with the redress grievance process at the CF, and they want to expedite that even more. There were grievances that could wait two or three or four years on a desk before they had a decision from the CDS, the final authority. Now they are trying to streamline everything, and they have imposed a timeframe on each of the steps in order it sort it out within a year.

Again, this is the process overall. If there is any decision that would award financial compensation, the CDS doesn't have the authority to do that, so all the good efforts to streamline and expedite this process will come to a stop for some individuals. They will be treated unfairly.

You mentioned the union. Going back to my example of reservists, if a reservist is in an office with a civilian employee, and both are taken off their jobs for whatever reason, and it was not a good decision, then the civilian public servant has recourse to go to the union and to go to court and to get financial compensation, while the military person doesn't have that because of their contract.

[*Translation*]

The Chair: I now give the floor to Mr. Hawn.

[*English*]

Hon. Laurie Hawn: Thanks, Mr. Chair, and thank you both for being here.

First, let me thank you for your attention to duty, both in uniform and since then.

A lot of this doesn't relate to Bill C-41, but it's an important topic to discuss nevertheless. One of the problems here is that we're mixing the Financial Administration Act and the National Defence Act, I think.

You note in your report, "The Canadian Forces Grievance Process: Making It Right for Those Who Serve", that you recommend the Chief of the Defence Staff be given the authority to settle financial claims and so on. That was recommended by Chief Justice Lamer. That principle has been accepted by governments of both stripes. Obviously it's been a long time. Apparently it's not as easy to resolve as might be suggested.

You note in your special report that the Financial Administration Act provides Treasury Board with the responsibility over the financial management of the federal government and that Treasury Board delegates certain powers to ministers and deputy heads of departments. In turn, the deputy minister is the chief accounting officer for the Department of National Defence. He is the financial authority.

Do you believe that Treasury Board would have to be involved in delegating powers to anyone other than the minister or the deputy minister? Do you know if the Financial Administration Act would have to be amended to allow this to happen?

● (1700)

Mr. Pierre Daigle: Mr. Chair, I've talked to many people on these files and I have heard many comments from various sources. Nowhere in the National Defence Act does it state that the CDS should not have the power to order financial compensation as part of a grievance decision.

The deputy minister of the department already delegates his financial authority to many people within the department. The Chief of the Defence Staff himself was delegated authority from the DM on all kinds of financial aspects: procurement, hospitality, etc. I even have delegated authority for claims liability and for all kinds of financial authority from the deputy minister of the department.

Former Chief Justice Lamer said this could be done within DND and the CF, and I have absolutely nowhere seen anything contradicting this, but it has been eight years since it was supposed to be done. Delegating authority could be done. The National Defence Act does not prevent or prohibit any authority for the CDS to do that.

Hon. Laurie Hawn: I am not a lawyer, as you're not, but not denying authority doesn't mean granting authority, in my layman's view. It's not the same thing.

Mr. Pierre Daigle: It doesn't mean denying authority either.

Hon. Laurie Hawn: I understand that. When we talking about disbursing funds and so on, whether it's small amounts or large amounts, authority needs to be given for somebody to do that. Just not saying you can't do it....

We're talking in a bit of a circle. Lack of denial doesn't mean granting of authority.

Mr. Pierre Daigle: My point here is that in 2003 former Chief Justice Lamer was still the Supreme Court's chief justice. He said that it was not acceptable and should be done within DND and the CF.

What I'm saying is that financial delegation authority exists right now, and the DM uses that. The DM gives financial delegation authority to a captain, a lawyer captain, who can spend $10,000 on a farmer in Afghanistan, but does not give to the Chief of the Defence Staff, who is the head of the whole Canadian Forces, the authority to spend $100 on someone who lost something on duty.

I support the Minister of National Defence. Mr. Chair, I really do appreciate that I was invited here on very short notice, but when I followed this up recently, I saw that the Minister of National Defence said in front of this committee that Bill C-41 includes provisions to improve efficiency of the grievance process with a view to making it more effective, transparent, and fair. I am saying if you don't give the Chief of the Defence Staff that authority, you're not going to make it transparent, fair, and effective.

Hon. Laurie Hawn: Thank you for that.

Nobody's arguing that.... Justice Lamer recommended was that we find a way to do this, but it has been through two governments, so I'm suggesting that maybe it's not that easy. There's nobody operating the system in bad faith or bad will. I just don't believe that.

You served as a major general. Obviously we never worked together, but I'm sure that you did operate with goodwill towards the troops and the troops' welfare and so on, as I think anybody in command does. However, in a letter to the committee you say you "believe there is an issue related to the military redress of grievance process that should be included in the draft legislation and would serve to address a significant unfairness that currently exists". That's what we've just been talking about. Then, in a letter to the Minister of National Defence recently, you said that "amendments to legislation may not be necessary and a solution may not be that complicated".

I'm not pointing that out as some big contradiction, but there's a variance of opinion, I think, in your own mind as to whether we need legislation. Can it be done through regulation? What mechanism would you suggest specifically to disburse funds employed by that position, by the CDS?

● (1705)

Mr. Pierre Daigle: Mr. Chair, I appreciate the comment that maybe there's a contradiction.

When I worked on that report after I arrived in the office in 2009 and when my office worked on that report a few years ago, I found that the former chief justice recommended that we amend the NDA to include that. Eight years later, it was not done, so when I wrote to the minister, I told the minister that there are other ways of doing it, because giving a financial delegation to the CDS could be done. When the minister's office stated in the media that to do this they would have to make a legislative amendment, I was concerned, because those legislative amendments hadn't been done for eight years with Chief Justice Lamer.

The minister himself said to me in a letter that we need to close this once and for all, and when I saw that it was not in Bill C-41, I saw this opportunity to close it right now. This is why I said it has to be in legislation: because if we don't do it, we'll wait another six years to find the proper way of doing it.

The Chair: *Merci.* Thank you.

I will give the floor to Mr. Braid—no, it will be Ms. Gallant.

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): Thank you, Mr. Chairman.

Through you to our witness, are you aware that there is a working group set up at National Defence to review this matter, which has not yet completed its work?

Mr. Pierre Daigle: Mr. Chair, I'm aware that the group met six times. They're going to meet a seventh time. The working group is looking at everything surrounding the redress grievance process, not just this particular issue, but I know they took note of our report because the minister told me that this working group is working on the issue.

Mrs. Cheryl Gallant: So after this review was completed and a solution was presented, did that not require a statutory change, and would it be acceptable?

Mr. Pierre Daigle: Again, all I'm saying is that after all the people we met, the investigation we did, the report we read, the legislation we read, this could have been done eight years ago, so what means should be used to do that?

I really took advantage of the fact that all the committee members here—and I read some of the earlier deliberations—are working towards helping the Canadian Forces and the members to be treated fairly. I'm saying now that this issue was raised by Chief Justice Lamer and that the Minister of National Defence agreed that we need to move on this, so it's whatever means he's been thinking of. I thought that now is probably actually the right time to deal with it, because Bill C-41 addresses this kind of issue.

How are you going to make the redress process, the grievance process—as the Minister of National Defence said to this committee—efficient, transparent, and fair, if right now there's unfairness in the CF and the Chief of the Defence Staff doesn't have the authority to give remedy to a soldier who has been wronged financially?

Mrs. Cheryl Gallant: If a solution was presented that achieved your intent but did not involve Bill C-41, would this be acceptable to you?

Mr. Pierre Daigle: Maybe I don't understand, because Bill C-41 has a chance. The amendment to the legislation has a chance right now to correct this eight-year-old issue once and for all. If you say you have to find another way, I have some serious concern that it will take some time. I'm convinced that there's no need to do all kinds of modification or restructuring of the Financial Administration Act. Right now the DM, for instance, has the right and the authority to delegate financial authority, and he does so to the CDS, by the way, so he could just add that to this too.

● (1710)

Mrs. Cheryl Gallant: In other words, is the end state more important than the vehicle to achieve the desired end state?

Mr. Pierre Daigle: What is important, Mr. Chair, is that the Chief of the Defence Staff, who is in charge of the control and administration of the Canadian Forces and is the final authority of the grievance process that will take care of unfairness for his troops, have full authority to close grievances with a full remedy in order for the troops to be satisfied. The full remedy sometimes has to entail financial compensation, and that's what the end result is. Give the authority to the CDS to do that.

It's very difficult for troops coming to our office to say, "I do believe in the chain of command, and I understand, sir"—to whatever military—"that you're saying it was unfair, and that you upheld that decision. I'm happy about that, but I've lost $2,000 here, and you're telling me you're going to send me to Afghanistan. The captain beside me will give $10,000 to a farmer over there, and you are the Chief of the Defence Staff; are you telling me you cannot give me $2,000 to close the injustice?" I don't think this is fair.

Mrs. Cheryl Gallant: Thank you very much.

[*Translation*]

The Chair: Mr. Daigle, thank you for appearing before us on such short notice.

This concludes the 49th meeting of the Standing Committee on National Defence. We will be seeing each other next week.

Mr. Pierre Daigle: I thank you for having invited me. Thank you.

The Chair: Thank you.

The meeting is adjourned.

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