House of Commons
CANADA

# Standing Committee on National Defence

NDDN • NUMBER 050 • 3rd SESSION • 40th PARLIAMENT

**EVIDENCE**

## Monday, February 28, 2011

## Chair

**The Honourable Maxime Bernier**

# Standing Committee on National Defence

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● (1530)

[*Translation*]

**The Chair (Hon. Maxime Bernier (Beauce, CPC)):** Welcome, everyone, to the 50th meeting of the Standing Committee on National Defence. Today, we have two items on our agenda, the business of the committee, and our ongoing study of Bill C-41, An Act to amend the National Defence Act and to make consequential amendments to other Acts.

[*English*]

Do you want to go ahead right now with the witnesses and have ten minutes at the end to speak on committee business, or do you want to deal with committee business right now?

Mr. Harris.

**Mr. Jack Harris (St. John's East, NDP):** There was some discussion between some of the members of the committee over the weekend. Concern was raised that we have four very interesting witnesses today with briefs to present on complicated issues. We hoped that we could have more time with some of the witnesses. There doesn't seem to be much agreement on that issue.

Given that our votes this evening are at 6:30, would there be agreement to extend the meeting beyond 5:30 to make more time available for the witnesses, and deal with committee business after 5:30?

**The Chair:** So there's a proposal from Mr. Harris to work today until 6:30.

**Mr. Jack Harris:** The votes are at 6:30.

**The Chair:** Mr. Payne.

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

I have other meetings already scheduled, so I would not be able to extend my time.

**The Chair:** Thank you, Mr. Payne.

Mrs. Gallant.

**Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC):** I have other meetings as well.

**The Chair:** Mr. Hawn.

**Hon. Laurie Hawn (Edmonton Centre, CPC):** I think we can deal with the motion and the issue of amendments and where they're required in ten minutes.

**The Chair:** Mr. Bagnell.

**Hon. Larry Bagnell (Yukon, Lib.):** I'd like to start with the witnesses right away and then do the committee business at 5:15.

[*Translation*]

**The Chair:** Fine. Mr. Bachand.

**Mr. Claude Bachand (Saint-Jean, BQ):** I would also prefer to hear from the other witnesses before we consider the motions. These are very important and well-informed witnesses. Even if a few members are absent, I don't imagine that any votes taken today would have serious consequences.

I suggest we give the witnesses an additional 30 minutes at the very least, if not 45 minutes, and that we move on to motions 15 minutes before the bells ring. That would give us an extra 45 minutes, or thereabouts, with the witnesses. I think it's important to hear what they have to say. Personally, this habit of not giving each witness at least 30 minutes on average is inconsiderate of us. This is an attempt to bulldoze the process by trying to speed up testimony unnecessarily.

Mr. Chair, I want you to know that I take Bill C-41 seriously. I do not want it to be adopted hastily. I have motions and amendments that I would like to table and I do not want to be rushed into hearing from witnesses or proceeding to the clause by clause study. I agree that we should spend more time with the witnesses today.

**The Chair:** So then, should we proceed immediately to hear from the witnesses?

**Mr. Claude Bachand:** Yes.

[*English*]

**The Chair:** Mister Hawn.

**Hon. Laurie Hawn:** I think we need all members present for the discussion on the motions and the issue of amendments, which is going to come up during that period as well. I think we're wasting time here. Let's get on with the witnesses and curtail that at 5:15 or 5:20, as discussed. This is the schedule that was set and agreed to. I suggest we get on with it.

**The Chair:** Mr. Drapeau will have the floor for seven minutes. Then Mr. Holloway will have seven minutes. Then the members will ask you questions.

[*Translation*]

Thank you very much. You have the floor.

[*English*]

**Colonel (Retired) Michel W. Drapeau (Professor, Faculty of Law, University of Ottawa):** Mr. Chair, let me open by thanking members of the committee for permitting me to appear before you this afternoon to present a commentary on Bill C-41.

Let me say at the outset that Bill C-41 contains a number of very useful changes. I recommend your support of these legislative measures. However, I also have a number of serious concerns about Bill C-41, most of which are addressed in my 12-page submission. I believe all members have received a copy of it.

Turning first to concerns, I personally find it very troubling that here we are, in 2011, and the government has still not implemented all of the recommendations that the late Mr. Justice Lamer made in September 2003. What's more, the government has ignored, without any explanation or justification, the central recommendation made by Justice Lamer—namely, the creation of a permanent military court.

What I find even more troubling is that DND appears to be in breach of its statutory obligation to conduct a second five-year review of Bill C-25. The first review was in 2003, and the second review should have taken place in 2008. We are now three years past that date, and to my knowledge there's been no independent review along the lines of what Justice Lamer recommended.

Let me address, in rapid succession, four concerns I have with Bill C-41..

Firstly, and of great concern, Bill C-41 is silent on summary trials. For a force of approximately 65,000 regulars, they have almost 2,000 summary trials every year. That's one trial for every 34 soldiers every year—a significant number. To put it into perspective, we have a total of 65 court martials a year. Despite the overwhelming number of charges heard at the summary trial level, and despite the fact that the summary trial proceedings are in need of repair, Bill C-41 ignores summary trial. It's almost as if it did not exist.

I strongly believe that the summary trial issue must be addressed by this committee. There is currently nothing more important for Parliament to focus on than fixing a system that affects the legal rights of a significant number of Canadian citizens every year. Why? Because unless and until you, the legislators, address this issue, it is almost impossible for the court to address any challenge, since no appeal of a summary trial verdict or sentence is permitted. As well, it is almost impossible for any other form of legal challenge to take place, since there are no trial transcripts and no right to counsel at summary trial.

From where I stand, I find it very odd that those who put their lives at risk to protect the rights of Canadians are themselves deprived of some of those charter rights when facing a summary trial. If Britain, Australia, New Zealand, and Ireland have seen fit to change the summary trial system, it begs the question: why is Canada lagging behind?

The second issue is grievances. The grievance system as it currently operates is inefficient and unfair, because it fails to address the legitimate grievances of soldiers within a reasonable period, let alone within the statutory delays. Given that there are 700 grievances filed every year—one for every 95 soldiers—this has a large impact upon the rank and file.

Bill C-41 addresses the grievance process, but it does so largely for cosmetic reasons. In my view, if the committee were to approve the recommendation made by the department in Bill C-41, the grievance system would become worse. Why? There are two reasons.

First, one major flaw in Bill C-41 is that it will allow the Chief of the Defence Staff to become almost totally disengaged from the grievance system. From where I stand, fundamentally a commander cannot lead his staff, lead his troops, lead his soldiers if he is not personally interested in and aware of what ails his troops.

Another flaw is that the current grievance structure does not grant the Chief of the Defence Staff authority to approve any monetary remedy—not a red cent. Despite a suggestion by the Lamer report in 2003 to the contrary, it appears that DND is happy with the status quo. Considering that the CDS is in charge of protecting the lives of Canada's sons and daughters, and that the annual budget of National Defence is roughly $17 billion a year, I find it odd that the CDS has no authority to grant pecuniary remedies.

● (1535)

Before I leave the subject of grievances, as much as we need a Canadian Forces grievance board as an oversight committee, I believe that such a committee must be external and independent. More importantly, it must be seen as being external and independent. To be seen as being external and independent requires that the members of the grievance board be drawn from civil society, which is certainly not the case at present.

Third, through no fault of its own the Military Police Complaints Commission is as weak and toothless as an oversight committee can be and still be referred to as such. This is because care has not been taken to provide them with the required legislative provision empowering them to act as an oversight body.

I am surprised at the amount of attention being paid in Bill C-41 to military judges, compared to the absence of any mention of summary trial, or the banal changes to the Canadian Forces Grievance Board. As discussed in my paper, with a population of 65,000 regulars the Canadian Forces has a total of four judges handling a total of 65 court martials per year.

Court martial judges have been compared in the past to provincially appointed judges; however, when we compare them to provincially appointed court judges, court martial judges have a disproportionately low caseload. For such a very low number of trials—65—I would be hard pressed to substantiate such a number of judges, let alone increasing it by forming a panel of reserve judges. That's particularly so when we consider that at National Defence at the moment there are four defence lawyers overall. So you have four judges and four defence lawyers to look after the trial system.

In conclusion, in order for me to play a part in your examination of this bill there is much to think about and much that deserves careful study and contemplation before Bill C-41 can be voted into law.

I appreciate your attention, and I'm now available for questions.

● (1540)

[*Translation*]

**The Chair:** Thank you very much, Mr. Drapeau. I will now turn the floor over for seven minutes to Mr. Holloway from the University of Western Ontario.

**Dr. Ian Holloway (Professor and Dean, Faculty of Law, University of Western Ontario):** Thank you very much, Mr. Bernier. I am delighted and very proud to be here. It's rather unfortunate that Mr. LeBlanc couldn't be here, as he is my member of Parliament.

[*English*]

I am, as the chairman said, the dean of law at the University of Western Ontario. I've been the dean there since 2000. Before becoming dean, I spent 21 years in the Canadian Forces. I was a chief petty officer. In other words, I was the subject of the system of military justice, and to that extent perhaps I offer a view that one doesn't often hear: the perspective of someone who has legal training but also was an enlisted person in the Canadian Forces.

As we all know, context is all-important when it comes to the interpretation of legal regimes. We hear over and over again that our Constitution is a living tree. That's a notion bequeathed to us by Lord Sankey and the Judicial Committee of the Privy Council 80 years ago now, and it has remained a core principle of understanding our Constitution and our legal system generally.

The adoption of the Canadian Charter of Rights and Freedoms was one of our crowning achievements as a country, but I think it's fair to say that we know much more about the pressures placed on an armed force through modern military operations than we knew in 1981. In 1981-82 we had not been in a hot—as they say in the service—situation since Korea. The fact is that since 1991-92 we've been perpetually in hot situations through the Gulf War, the Balkans, and most recently Central Asia. It seems to me that all of us who have an interest in and care about the system of military justice share a duty to try to breathe life into and try to fertilize the living tree that is the system of military justice, in the context of what we know now about the strains placed on a military organization by modern operations.

It is trite—and I know you've heard this before—that the purpose of a system of military justice is to preserve efficiency, and because that's trite, it makes it easy to overlook what's really embedded in that. Really what we are looking at is a system that will allow a commander to blow a whistle and to cause a bunch of young Canadian men and women willingly to go over the top, even though they know that most of them will be gone in a short period. That's the context of the system of military justice. Thankfully, it's not put to that litmus test very often, but that is still the litmus test to which we have to put it: how well would this suit our armed forces in the time of extreme peril?

Another thing that lawyers often talk about is the notion of purposive interpretation, that we should give our laws an interpretation that would best meet the purpose for their existence. I think it's important for us to remember that a system of military justice exists for very different reasons from a system of civil justice. The regular justice system, the one that all of us who are private citizens live under, exists to preserve our freedom, to keep the government out of our lives as much as possible—what the late philosopher Isaiah Berlin described as negative liberty. That's mostly what the Charter of Rights and Freedoms is ensured to do, to ensure that I've got as much freedom as I can have to say and do what I want.

The purpose of the system of military justice is very different. It exists not to preserve freedom, but to preserve unit cohesion, to ensure—to repeat myself—that young men and women will willingly place themselves in situations of extreme peril because someone told them to and for no other reason. In other words, the system of military justice doesn't exist to reflect Canadian values; it exists to give us an instrument with which we can project Canadian values. That's what we're doing in Central Asia; that's what we did in the Balkans; that's what we did in the first Gulf War; that's what we did in Korea. We need an instrument as a country with which we can project Canadian values.

● (1545)

As someone who was subject to this system for 21 years, for more than an adult lifetime, I can say that the real key from the perspective of the men and women in the trenches, so to speak, is a sense of fairness. It's not whether it's the same as what civilians have. It's whether people think they're getting a fair shake, whether they think that their commanding officers will listen to them when they have a story to tell, whether they think that their commanding officers will give a contextual interpretation to whatever happened. That is why the vast majority of people who can choose between a summary trial and a court martial choose a summary trial. For the most part, they have confidence in the fairness of the system.

As someone who teaches administrative law, I would say the real core of the system of military justice is the doctrine of natural justice. If people think they're going to have a fair shake, that they're going to have the opportunity to tell their side of the story, that's really what's important.

I'll finish by saying that the Canadian system of military justice is probably the most studied system of military justice in the world, certainly in the western world. We had the Somalia inquiry; Chief Justice Dixon did a study; Chief Justice Lamer did a study; we have this meeting today. The truth is that our system of military justice, though not perfect, is pretty darn good. We do not have instances of mutiny, insubordination, or violent insurrection by people in the service. Our service people, in the main, have confidence in the system of military justice.

I think that Mr. Drapeau and I agree on some things, but we have a different view on others. This is the third attempt that Parliament has had at trying to introduce some amendments. I urge you to pass this legislation so that we can move on to other legislation.

Thank you.

[*Translation*]

**The Chair:** Thank you very much.

[*English*]

Thank you, Mr. Holloway.

I will give the floor to Mr. Dryden.

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

Mr. Holloway, you offered a context and a way of thinking. I'm not sure how you would apply that context to the bill in front of us. At the same time, in fairly fundamental ways, I'm not sure that what I heard from Mr. Drapeau relates to the same thing. One of your statements was that the system is there not to reflect but to project Canadian values.

I don't think that's what you said, Mr. Drapeau. Maybe we'll start there. But after that, I'd like to go back to Mr. Holloway and see if we can apply some context to what's in front of us.

● (1550)

**Col Michel W. Drapeau:** If I understand the comment made by Professor Holloway, it would suggest that members of the military have fewer rights, and that those are subordinated to the instrumentation of this right to project values. I have difficulty with that concept. I don't see anywhere in Canadian law that a member of the military pushes aside some of his rights.

I think we can and should establish both. I agree that when abroad, in the transmission and the projection of power, we are in some ways translating Canadian values and rights in the pursuit of a given objective. But that does not necessarily push aside or subordinate rights that Canadian soldiers have.

**Hon. Ken Dryden:** Mr. Holloway.

**Dr. Ian Holloway:** I have a different view. I think that when we join the service we willingly surrender some of our rights. As a civilian, I can decide whether I want to quit a job. I can decide what time I want to get up in the morning. I can decide whether I want to shine my shoes or not. I can call the Prime Minister a jerk if I want to, in public, and there's nothing anyone can do to me. But when I decide to join the service, I give up all of those rights. People tell me when to get up. They tell me what clothes I'm going to wear and what condition the clothes have to be in. I'm not permitted to voice my political opinions publicly. All this comes with joining a military organization.

**Hon. Ken Dryden:** How are we to resolve this? It's a fundamental dispute. I'm not sure how one applies these concepts to an act. I think you said that essentially the standard is the standard that applies when you're on the battlefield. That's the standard that applies in general to a military life. Is that what you're saying? Are you saying that it's not contextual, that the rights and understandings come from that very event and apply to the vast majority who will never be in that situation?

**Dr. Ian Holloway:** Let me say two things, Mr. Dryden. First, there is this core principle in the service: the principle of universality. The theory is that everyone could be called upon to serve in positions of extreme peril. It's not open to say, "Well, I didn't sign up for that part of the armed forces, I only chose the Ottawa part of the armed forces."

As to the first part of your question, I'm not sure I would say the standard should be applied, but I would say that the system we design—we're talking about a system here—has to be able to accommodate the demands of situations of extreme peril. You can't be designing a new system of military justice on the battlefield; by definition, that's arbitrary and potentially capricious.

**Col Michel W. Drapeau:** Monsieur Dryden, to answer both your intervention and the professor's response to it, with respect to where you start and where you go, first and foremost I would say you go to the sons and daughters of Canada who are not only recruited but who volunteer for military service.

I am anything but certain that they, and their mothers and fathers, understand that when they join the forces they leave at the door the rights they got at birth. We're not recruiting mercenaries; we're recruiting our sons and daughters to serve under the flag.

To say I would be upset would be an understatement, if the advertisement for enrolling Canadians would have a subtext that says "If you serve in the military, then we will apply a different type of law. Your right to fair trial, your right to whatever it is, will be applied arbitrarily by the Canadian Forces as an instrument of the state."

I would object to that with every ounce of my mind.

● (1555)

**Hon. Ken Dryden:** Mr. Holloway.

**Dr. Ian Holloway:** There's a simple test. We can ask ourselves whether service people have the same rights as civilians. Can service people organize into trade unions? Can service people exercise the untrammelled freedom of expression that I can as a civilian? The answer to both of those questions is no. Obviously, as a matter of fact, service people have a different set of rights.

As to the suggestion that by joining the service you're voluntarily saying you're giving up your right to a fair trial, I don't think that's a fair way to characterize what I'm saying. I think the question is what we mean by a fair trial. If an employer seeks to dismiss an employee who belongs to a trade union, they have a different sort of trial from someone who doesn't belong to a trade union and is dismissed. Can we say that one is fairer? They're different because of the context.

**Col Michel W. Drapeau:** Pity the day when a Canadian Forces soldier who has just completed his training and is ready to go to war, to put his life at risk, has fewer rights than somebody who happens to land at Trudeau Airport, in Montreal, and because he is on Canadian soil has the full benefit of charter protection. Pity the day when this happens.

A Canadian soldier, when he is stripped down to his underwear, is a Canadian soldier. He's a citizen first and foremost. The charter makes no distinction that when you join the military then section whatever doesn't apply to you. It applies to the fullest extent.

I want my soldier to be protected by the charter. I want him to be the best model of a Canadian citizen and the value system embedded in him so he can act as a soldier and defend our value system abroad.

[*Translation*]

**The Chair:** Thank you, Mr. Drapeau. We will now go to Mr. Bachand.

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

The discussion appears to be well under way. We have with us two former members of the military who hold very different views. We will try and draw on both sides of the argument to come up with the best possible bill.

I'll start with you, Mr. Holloway. I admire those who have the courage to say that once a person joins the Canadian Forces, he no longer has the same rights as others. I agree with you in part, because most NATO member countries see a major difference between civilian and military justice. I can appreciate that there is a difference, but just how far does it extend? I disagree with you on this point. As I see it, there are two major issues here. There are summary proceedings, for which there are no transcripts, where decisions are not based on evidence, but rather on hearsay. Sometimes, a soldier faces a commander against whom he has filed a grievance. Having worked for 20 years in labour relations, I do not think that makes a lot of sense.

I also note that you are the dean of the Faculty of Law and a professor at the University of Western Ontario. Do you not think there would be a revolution in Canada if we were to apply all military rules to civilian society?

[*English*]

**Dr. Ian Holloway:** Of course there would be a revolution, because the purpose of our system of civil justice is to preserve freedom. That's why the armed forces exist—so you and I can do what we want, say what we want, organize trade unions if we want, and so on. Those rights don't exist in the service. So there's a different purpose for the existence of the justice system. To me that's axiomatic. If people don't see it that way, I'm happy to argue further, but that's just a starting principle.

As to the question of how wide the gap should be, I guess that's up to you as members of Parliament to decide.

**Mr. Claude Bachand:** Do you feel it's too wide now?

**Dr. Ian Holloway:** No, I don't feel it's too wide now. The system isn't perfect. In fact, Colonel Drapeau and I agree on many of his points. But I also don't think the system is fundamentally broken. The service people enjoy a wide range of rights, but contextualized; they're different from the rights that civilians enjoy. People are joining the service. They're having happy and successful careers. They're retiring and becoming—as they were in the service—good Canadian citizens.

On the point about summary trials you referred to, surely it's telling that of the people who have the choice of electing a full court martial with lawyers and transcripts and all the sorts of things that seem dear to me as a common lawyer, only 5% of them do that; 95% of people who have a right of election will choose a summary trial. That surely is significant.

[*Translation*]

**Mr. Claude Bachand:** Can I ask you another question?

**Mr. Ian Holloway:** Certainly.

**Mr. Claude Bachand:** Do you believe that in many instances, military justice violates the Charter of Rights and Freedoms? As an expert in civil law, would you agree with that statement? Is that true?

[*English*]

**Dr. Ian Holloway:** I don't think it violates the charter. Ultimately, of course, nine people farther down Wellington Street are the ones who will make that decision. But I do know that Chief Justice Dickson, an eminent jurist and the person who gave life to much of the Charter of Rights and Freedoms, expressed the view that it didn't violate the charter. Chief Justice Lamer, Chief Justice Dickson's successor, is someone else who can hardly be characterized as sort of a right-wing jurist. He also expressed the view that the system of military justice was consonant with charter values. Who am I to second-guess two such distinguished Canadians?

● (1600)

**Mr. Claude Bachand:** But you're the dean of the faculty of law.

**Dr. Ian Holloway:** Yes, and I'm not trying to express my views if they're contrary, but I don't think they are. I was an enlisted person, and I never once felt that my rights were being trampled upon because I had the choice of going before the captain or a court martial.

[*Translation*]

**Mr. Claude Bachand:** What is your opinion, Colonel Drapeau?

[*English*]

**Col Michel W. Drapeau:** I wouldn't make too much on the issue of having a right to trial. First, until very recently, until the Trépanier decision in 2006, that right in fact was exercised by the crown, not by the soldiers themselves.

Secondly, it's not because someone decides between two forces that are really not very pleasant—a court martial or summary trial—that he opts to and enjoys the exercise. It's like pleading guilty to a traffic ticket. You may do it just because you want to get it over with. The fact that 95% will elect to have a summary trial doesn't give legitimacy or authenticity to the process itself. I don't think it does.

One of the comments that I need to make to some of the discussion that took place between Mr. Bachand and the professor, what I almost understand to be on the table here, is that it's almost as if we have a Charter of Rights for civilians and a Charter of Rights for military. No, we don't. Any derogation in the application of Canadian law between the civilian tribunals and the military tribunals ought to be put together. A court martial is in fact subject to review, and some of them are before the Court Martial Appeal Court. Those civilian judges who sit at the Court Martial Appeal Court do precisely that in order to make sure that all of the Canadian law and all of its changes are applied as perfectly and fairly to military members as they would be to a civilian.

So there is no different system of laws, and derogations, where they are applicable, are to be restrained. In fact, Bill C-41 does exactly that. As a result of discussion before this committee and in the Senate before, when we said that up to now, because of a fairly restricted, outdated military system, we have a specific system of punishment in the military—dishonourable discharge, reprimand—but we don't have things like conditional sentences, Bill C-41 provides for that, and I agree with that. Why does it do that? It does that because of recommendation, and recommendation has been accepted by the defence department that those flexibility issues available to a civilian trial sentencing judge are now to be made available in a court martial, and I think we should applaud that.

The aim is to reduce the difference between the two, and that's the way we should be going.

● (1605)

[*Translation*]

**The Chair:** Thank you, Mr. Drapeau.

I will now turn the floor over to Mr. Harris.

[*English*]

**Mr. Jack Harris:** Thank you, Chair.

Thank you, gentlemen, for appearing and for your interesting presentations.

Dean Holloway, I have to say we've been struggling here as a committee with this notion of the difference between a summary trial and the lack of procedural fairness, and that's the first time I've heard it justified the way that you have here. I will agree with you that what's important here is fairness and the doctrine of natural justice, which you refer to. As someone who has also practised law for many years—administrative law and criminal law—I would say the essence of natural justice is procedural fairness—not to be judged by someone who is biased, the right to know the case against you and to make full answer and defence, etc. We have problems with disclosure, we have problems with the judges knowing the witnesses, etc. So I don't think you can really say that procedural fairness operates in that way.

What I do want to ask is this. As a way of dealing with this, I've thought about the different options. Given the fact that we do have a procedure, and accepting that morale and efficiency are important considerations in this, is there not a way of ameliorating some of the downside—if you have less fairness or less procedural protection, having the consequences be a little different as well? Mr. Justice Lamer also said that soldiers are not second-class citizens.

So if you have a civilian who is charged with a particular offence, goes to court, has all the protections, etc., ends up being convicted, and has a criminal record as a result of that—that's under all of the protections that you have—isn't there a way of saying, in the military courts...? If you have a summary trial that meets the test of efficiency and does all of that, can we not ameliorate the sentencing side and say you're not going to get a criminal record for something you go through a summary trial on?

There's a stab at it here, in clause 75, removing some of the offences, but there's an awful lot left—for example, making a false statement in respect of leave. You said your mother was sick and she really wasn't that sick, so you get a criminal offence for that. Or there's making a false accusation or suppressing a fact, signing an inaccurate certificate, section 108—the Bev Oda offence. These things are all listed there as things that a summary conviction trial in the military can do. Take improper driving or use of vehicles, for example. Why should they end up with a criminal record that they carry with them the rest of their lives, with the consequences that flow from that? And there are more and more consequences, as time goes on, with cross-border traffic, etc. Can we not do that? Can we say yes, there's a different level of procedural fairness, for pragmatic reasons, but let's take away the sting and treat them more fairly by doing that?

**Dr. Ian Holloway:** I agree, Mr. Harris.

Let me say this, though. The conviction rate in summary trials is actually lower than it is in civilian proceedings. Rather than there being a sort of railroad where we're going to, as they used to joke, "march the guilty bastard in", I don't think the evidence actually bears that out. There is a higher acquittal rate in summary military trials than there is in civilian proceedings.

Leaving that aside, I agree with you in principle, but the challenge will be resolving this. As a service person, if I.... And some of the things the system deals with are charges like drunk and disorderly, when two people get into a fight in a bar, which is assault. Under the current system, I have a right to elect for a summary proceeding. If I were convicted through that, presumably most people would say there should be a criminal record, because if I thumped someone on civilian street, I'd get a criminal record for assault causing bodily harm. I agree with the premise. The challenge will be finding the right sort of language to allow us to determine which sorts of offences we think should attract a criminal record versus those we might call pure service offences—to take a silly example, having filthy shoes or something like that. That would be the drafting challenge. The principle I agree with.

● (1610)

**Mr. Jack Harris:** Colonel Drapeau.

**Col Michel W. Drapeau:** I have to turn to our allies in Ireland and Australia. They made it a point in law that a conviction by summary trial does not lead to a record, thank you. In the U.K., Australia, and New Zealand, there is now an appeal process for conviction and sentences in summary trials. Why did this happen in the U.K. to begin with? Because when a challenge was made before the European Court of Human Rights, the summary trial system was found not to be in accord with the convention on human rights in Europe. There is a movement in our common law jurisdiction in all the countries I've named that says we have to change our ways. We have to provide more procedural fairness.

One last example is that in the RCMP you can be convicted of a service offence, and you don't end up with a criminal record either. It's a disciplinary process. It's the same if you are in the public service. Why is it that because it's military in 2011 you have to have a stigma attached to it? We can enforce discipline without having detention, custodial power. That's exactly what Ireland just did. They removed from the commanding officer holding a summary trial the capacity to send someone to detention. That way you don't have to have legal representation, appeal processes, and so on. There's a way to make it more akin to what you would find in civilian labour or a civilian organization of some sort.

**Mr. Jack Harris:** Go ahead.

**Dr. Ian Holloway:** This is one of the points on which Colonel Drapeau and I agree. I would say, though, that the devil is always in the details. We can understand why someone—

[*Translation*]

**The Chair:** One moment, Mr. Holloway.

Do you have a point of order, Mr. Bachand?

**Mr. Claude Bachand:** Is it normal for the Minister of National Defence's press secretary to be handing over, for the second time, some documents to the parliamentary secretary? Could committee members get copies of these same documents? Is this standard procedure?

**The Chair:** [*Inaudible—Editor*]

[*English*]

**Hon. Laurie Hawn:** I'm happy to run off copies.

**Mr. Claude Bachand:** Is it a love letter or...?

**Hon. Laurie Hawn:** I'm serious about this, Claude. I hope you are.

[*Translation*]

**The Chair:** Thank you for your point of order, Mr. Bachand. Let's get back to the business at hand.

Mr. Holloway.

[*English*]

**Dr. Ian Holloway:** I agree with Colonel Drapeau when he says that we don't want someone necessarily being able to be sent to prison for a summary offence. What about the old-fashioned punishment where—and again, I'm most familiar with the situation in a warship—the first day in port the sailor gets in a fight in a bar and the captain says you're not going ashore until we leave here? As a lawyer, I can make an argument that that's detention.

**Mr. Jack Harris:** That's fine, but if you make the argument that it's detention and you call that an offence and say you end up with a criminal record.... Even for assault cases, with the pressures and stresses of army life, maybe they should be treated a little separately and perhaps a little bit more leniently in terms of consequences, given the pressures of a wartime situation in which people might get a little out of hand with each other, and so on. I'm not talking about murder here now.

You have to understand. From my point of view, if you're going to say they don't have absolutely, exactly the same rights, but they ought to be treated fairly, maybe that's the way it goes.

[*Translation*]

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

[*English*]

**Hon. Laurie Hawn:** Thank you, Mr. Chair, and my thanks to our witnesses for being here.

Mr. Drapeau, I want to correct something that I think you said earlier with respect to Trépanier. The choice in Trépanier was not summary trial or trial by court martial; it was between a judge alone or a panel.

**Col Michel W. Drapeau:** That's right. If I said that, I misspoke, and I apologize.

**Hon. Laurie Hawn:** Okay, I just wanted to clarify that.

Mr. Drapeau, a lot of the stuff we're talking about is outside the scope of Bill C-41. It may be a good discussion, but it's outside the scope of the bill we're trying to get moved through here.

Are you aware that two of Canada's most eminent jurists, Chief Justice Dickson and Chief Justice Lamer, reviewed the summary trial system and made recommendations? I think government has followed 85 out of 88 or something like that. Both have endorsed the summary trial system. Do you agree with the chief justices or do you disagree with them?

**Col Michel W. Drapeau:** I cannot say yes or no. Do I agree with the statement? I agree with what Justice Lamer said in his report. But do not draw from my comment the conclusion that I agree that the summary trial system is not in need of reform. Justice Lamer would have given it only a superficial look in his report. In the Lamer report, there is a requirement to address summary trials in today's world. In my opinion, it does not meet a charter protection that anybody else facing a criminal trial would have to meet in Canada.

● (1615)

**Hon. Laurie Hawn:** I don't normally know chief justices to be superficial. Do you believe that these two eminent jurists would not have analyzed charter issues before endorsing summary trials? If so, can you comment on the weight that Chief Justices Dickson and Lamer gave in their analysis to such safeguards as the right to an election of trial or court martial, the right to receive legal advice, the role of the assisting officer, and the right to request a review of the findings and sentence of a summary trial. I think they were not superficial.

**Col Michel W. Drapeau:** I don't tend to skirt a question, but this one I will. I don't have Justice Lamer's exact wording, which you obviously have before you, to see whether or not this is the interpretation one can give to it. I have never questioned Justice Lamer, because I have too much respect for him. I have argued that his recommendations should be applied, including the creation of a permanent military court. But on the issue of summary trials, I'm going above and beyond what the Lamer report said. I'm saying it doesn't meet the test in today's world.

**Hon. Laurie Hawn:** Do you believe, Mr. Drapeau, that Canadian soldiers should have the right to publicly criticize the Prime Minister or government policy or the right to refuse duty that someone might find distasteful or hazardous, even on the battlefield?

**Col Michel W. Drapeau:** I never have and never will. Don't shake your head. I've served for 34 years. I'm proud of my service. I'm an Officer of the Military Merit. I believe in military discipline. I believe in military efficiency, but I also believe in justice. I also believe in fairness. I also believe that our soldiers can be first and foremost Canadian citizens who enjoy all their charter rights in addition to having the duty to fight when called upon, observing the regulations and obeying their orders. I will not in any way suggest that they can contravene a regulation that is legally binding.

**Hon. Laurie Hawn:** So in other words, a Canadian soldier when he signs on does give up some rights that an average Canadian citizen has.

**Col Michel W. Drapeau:** No, he does not. He signs. He has all his rights, but like any other professional he's also subject to additional obligations. As a lawyer, I don't give up my rights because I become a lawyer. In addition to all my rights and obligations, I have certain rules that the law society imposes upon me. One of these is to keep confidential conversations and facts that I have from my clients. That's fine. That doesn't abridge my rights. It just gives me additional obligations. And it's the same for a soldier.

**Hon. Laurie Hawn:** But the soldier is obliged not to do things like publicly criticize government policy or the Prime Minister, or refuse a legal order on the battlefield.

**Col Michel W. Drapeau:** I would suggest to you that the first obligation applies to you, too. I don't see you criticizing the Prime Minister.

**Hon. Laurie Hawn:** No, absolutely not. But I could and I wouldn't be charged with an offence.

**Col Michel W. Drapeau:** Well, you wouldn't be an MP any more. You wouldn't be sitting here any more, either.

**Hon. Laurie Hawn:** That's fine, but I'm not charged with an offence.

**Col Michel W. Drapeau:** Many public servants cannot criticize. If they want to, they have to wait till they retire.

So having an obligation because you agree to perform certain functions or be in the employ of somebody doesn't abridge your rights. You consciously agree that if you join the forces, you're going to be putting on a uniform, you're going to be subject to transfer, and you're going to have to observe certain restrictions on what you can and cannot do.

**Hon. Laurie Hawn:** Precisely the point. So a person who joins the military gives up some of the rights that an average Canadian has, day in, day out, and I have no problem with that. I served for 31 years as well. That is the foundation of military service.

**Col Michel W. Drapeau:** And I know that, and I salute your service. But at the same time, I do not and cannot make the bridge that because a military officer or a non-commissioned officer on arrival, in swearing allegiance or loyalty to the Queen, at the same time has detached himself from some of the charter rights he has.

I don't agree with that. He just has put on additional obligations that he will meet and orders and directives and so on that are unique to the military, not unlike a peace officer serving in the RCMP. He has certain obligations he cannot escape.

**Hon. Laurie Hawn:** Do you think the Canadian Forces should be allowed to unionize?

**Col Michel W. Drapeau:** Allowed? Probably yes, but through a legal process. I see no reason why they should not. It applies elsewhere. I'm not advocating it, far from it, but I think one of the ways to ensure that does not happen is to make sure that the Canadian Forces members are given as many rights as we can and that those rights are reconciled with their obligations.

If we do that.... As I said, there are 2,000 summary trials a year in the Canadian Forces. One out of 34. If they gained a perception they are not treated fairly—I'm not suggesting they are—this gives an opening to a desire to unionize or make some association of some sort. I think the military, like any good employer, ought to be one step ahead, and try to make sure that we provide as many rights and as much justice as the system can endure, in keeping with the obligation first and foremost to the crown and to the service.

● (1620)

**Hon. Laurie Hawn:** Within the limits of what the Canadian Forces demands of people, and that's to obey without question, regardless of what people think are their individual rights. We're talking around the same thing, but I think I would go with Dr. Holloway's interpretation of the duty of the military member.

**Col Michel W. Drapeau:** By all means.

[*Translation*]

**The Chair:** Thank you, Mr. Hawn.

Go ahead, Mr. Wilfert.

[*English*]

**Hon. Bryon Wilfert (Richmond Hill, Lib.):** Thank you, Mr. Chairman.

Thank you, gentlemen, for coming.

This is the third attempt at this piece of legislation, and obviously we're trying to balance the rights of individuals within a military context.

Mr. Drapeau, you made some very compelling arguments. The question I would have is in your view what immediate changes would you suggest to Bill C-41 versus those that may come in future legislation, which I hope wouldn't be in the far distant future? In other words, after the third time, I think we need to get this legislation through, but if there are useful amendments that you think would be helpful, specifically in addressing the current summary trial process, could you provide those?

**Col Michel W. Drapeau:** Mr. Wilfert, I'll get right to the point. The answer is yes, and I can be very brief. Decriminalize the summary trial system. End of discussion. Remove today the custodial power of the commanding officer to send somebody to detention. If that needs to be done, then that person ought to be tried by court martial where all the rights are provided. So you remove that in the same way as Ireland has done it, as Australia has done it; you decriminalize it. There's no record.

By doing so, you solve almost instantly the problems of legal representation. I wouldn't be here arguing that you need legal counsel at the trial, that there are rules of procedure that are not applied, that there is a conflict with the commanding officer presiding over the trial. It would be like what you see in the RCMP, in the public service, in the workplace. The individual would not have that stigma attached to him just because he didn't shave that morning or he showed up late. Whether he gets a fine or a suspension of leave or he has to stay on the ship when alongside, I can live with that, and that would apply in Canada and abroad. And if there really is a requirement to prosecute someone because of the severity of the offence, then a court martial, and a court martial can be held any place in the world.

**Hon. Bryon Wilfert:** Colonel Drapeau has put forth three specific suggestions or recommendations. Can you explain to me, Colonel, why you think those recommendations would be resisted? Because apparently you believe they would be.

**Col Michel W. Drapeau:** I don't know if they would be resisted. If they were to be resisted, my first argument would be this: what is it that our brothers in Ireland, in Britain, in Australia, in New Zealand—

**Hon. Bryon Wilfert:** They're already there.

**Col Michel W. Drapeau:** They're already there. Why is it that we don't have a permanent military court? To use Mr. Hawn's point earlier, this is one of the key recommendations of Lamer, and we haven't done it. Why aren't we doing it?

I practice military law and I teach military law. I'm fully in favour of it; I want to make military law better, not less than what it is at the moment. But to make it better, it may mean that we may have to change our mindset. And that's one aspect of it. I don't see why we would resist, particularly when the rest of the world, at least the common law world, has changed and is ahead of us. As I said, we're lagging behind.

**Hon. Bryon Wilfert:** Mr. Drapeau, you and I of course have talked many times. You know that I have great respect for you. I want to get your specific suggestions, because I think they'd be helpful.

With regard to clause 4, proposed subsection 18.5(3) gives the Vice-Chief of the Defence Staff authority to issue instructions or guidelines in writing to the provost marshal in respect of a particular investigation. Why would the Vice-Chief of the Defence Staff want to issue instructions or guidelines in what's supposed to be an independent investigation?

Either gentleman could comment on that, Mr. Chair.

● (1625)

**Col Michel W. Drapeau:** This provision is fairly recent, post-Somalia. And all of Somalia was about the military justice system, including the military police. When we made the military police more independent, we added it. In fact, from an organizational standpoint, we put it under the Vice-Chief of the Defence Staff for administrative and control purposes, and that's it. But the VCDS provides it with budgetary support, administrative support, professional advice, and that sort of thing, except in the conduct of a military investigation.

There may be some rare occasion when, as the second-ranking officer in the forces, he may have to if not intervene then at least provide some advice. I think a salutary escape is that if he were to do so—and I don't know of any instances since 1999, since the provision has been in—he would have to show it in writing.

I have no difficulty with it, frankly, because of its openness and because members of the military and the military justice system or individuals would have access to it and would be aware of why this is being done. It would be unusual, exceptional, but open.

[*Translation*]

**The Chair:** Thank you very much, Mr. Wilfert and Mr. Drapeau. I will now turn the floor over to Mr. Braid.

[*English*]

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

Thank you very much to both of our witnesses for being here and for their presentations this afternoon.

Mr. Drapeau, I just wanted to start with a question for you, if I could. You currently teach military law at the University of Ottawa. Is that correct?

**Col Michel W. Drapeau:** That's right.

**Mr. Peter Braid:** You mentioned that you've practised military law as well. Could you just elaborate on that? Where or when have you practised?

**Col Michel W. Drapeau:** I served for 34 years in the Canadian Forces, retiring in 1993 as secretary at the Armed Forces Council and secretary at National Defence. After that I went to law school to obtain a law degree in civil law and a law degree in common law. I articled at the Federal Court of Appeal. I opened up my own practice in 2002. About 50% of my practice is dealing with military law, with clientele drawn from across Canada and drawn across a wide spectrum.

**Mr. Peter Braid:** Thank you.

During your service, did you practise military law?

**Col Michel W. Drapeau:** I did not. I did act, on more than one occasion, as a presiding officer at summary trials, having been a commanding officer.

**Mr. Peter Braid:** Thank you for that clarification.

Professor Holloway, I'm from just down the road, in Waterloo, so welcome.

You mentioned in your presentation that one of the primary purposes of the military justice system is to preserve unit cohesion. Do you feel that Bill C-41 helps to achieve that goal, to further reinforce that goal?

**Dr. Ian Holloway:** Yes, I do.

**Mr. Peter Braid:** You do. Very good.

There are some important elements and features of Bill C-41. I wanted to run through some of them and get your impressions, your perspectives.

I didn't hear any specifics in your presentation, Professor Holloway, so I just wanted to provide these specific elements and ask you to comment on them, starting with the judicial independence of military judges.

**Dr. Ian Holloway:** It's absolutely essential, in terms of the service people feeling that they're getting a fair shake if they elect trial by court martial—for the minority who do—that they know that the judges will not feel pressure from higher command. It's important, and I think this bill goes a long way in that regard.

**Mr. Peter Braid:** Okay, so it's an essential element.

Secondly, could you comment on the proposed sentencing purposes, the principles and objectives that are outlined in the bill?

**Dr. Ian Holloway:** I'll try. They mirror, to an extent, what's contained in the criminal justice system, but they have the added features of talking about unit cohesion, operational efficiency, and so on. So I quite like them.

**Mr. Peter Braid:** Okay. Thirdly, could you comment on the additional sentencing options, such as absolute discharges, intermittent sentences, and restitution?

**Dr. Ian Holloway:** I think those are good as well.

It goes back to the reasons. Unlike Colonel Drapeau, I'm not so skeptical about the current summary trial system. Its informality, by definition, gives wise commanding officers the opportunity to tailor sentences. If the right sentence is to say you're not going ashore until we leave here, that could be the right sentence, even though something like that is completely alien in the civil justice system.

The sorts of things this bill seeks to incorporate—codifying the wisdom of Solomon, I think—has always had appeal to me in terms of the system of military justice.

● (1630)

**Mr. Peter Braid:** Very good. Bill C-41 proposes to protect people against retaliation, persons who have made conduct or interference complaints concerning the military police.

**Dr. Ian Holloway:** Yes, that's important. One of the hallmarks of the grievance system—it's not perfect, as Colonel Drapeau noted—is that there are supposed to be no negative things that go along with having made a complaint through lawful channels. To the extent that this codifies that or extends it further, it has appeal to me.

**Mr. Peter Braid:** Okay. Lastly, again going back to your opening statement, you said that our military justice system has been one of the most studied in the western world. You also described it currently as “pretty darn good”. I think that was the quote. Does Bill C-41 help to make it better?

**Dr. Ian Holloway:** I think so. I didn't say this in the introduction, but after leaving the Canadian Forces I became an officer in the Royal Australian Navy. I wasn't a legal officer, but I did advisory work for the director of Australian naval legal services.

I can say, and I know this is going to be on the record, that the Australian approach to the reform of military justice is much more visceral, much less reflective than our approach in this country. That's why, as some of you may know, they've just gone through an awful time. There's been a constitutional challenge that has pretty much neutered the whole Australian system of military justice. It has undercut much of what Colonel Drapeau said they were trying to do.

We've not done that in Canada. We've had the chance, several times, to reflect and so on.

I think that Bill C-41 is not perfect, and if I were the parliamentary drafter there are things I might do differently. But I do think that in a reflective way, with almost 20 years now of hot operational experience to inform it, it has come a long way.

**Mr. Peter Braid:** Thank you.

[*Translation*]

**The Chair:** Thank you. I will suspend the proceedings for three minutes to give the next witnesses time to take their seats. I'd like to thank Mr. Holloway and Mr. Drapeau for joining us today and for their presentations.

● (1635)

**The Chair:** We now continue with our 50th meeting.

We're happy to welcome Mr. Gratl.

[*English*]

Mr. Gratl is the vice-president of the British Columbia Civil Liberties Association.

[*Translation*]

Also, Mr. Dugas, testifying as an individual. Thank you for being here.

Mr. Gratl, you have the floor for seven minutes.

[*English*]

Mr. Gratl, you have the floor.

Merci.

**Mr. Jason Gratl (Vice-President, British Columbia Civil Liberties Association):** Merci, monsieur le président.

My name is Jason Gratl, and I am the vice-president of the British Columbia Civil Liberties Association. In my private life, non-volunteer life, I act as a criminal and constitutional litigator.

The British Columbia Civil Liberties Association, as many of you know, has taken an interest in the last decade in affairs involving national defence, and Bill C-41 is no exception. We are a non-profit, non-partisan, public interest organization devoted to the protection of civil liberties and human rights within British Columbia and Canada, and in addition in circumstances where some of our citizens are acting off Canadian soil.

I can say at the outset that the B.C. Civil Liberties Association takes the position that many of the amendments proposed by Bill C-41 do represent an improvement over the status quo, and we would support many of these provisions in Bill C-41. Where the bill is in our view found to be lacking is in its absence of attention to procedural fairness issues arising from the summary trial process. While many of those are beyond the scope of any improvements or amendments to Bill C-41, we believe that the principal problems or the greatest problems can be rectified with two small amendments to the National Defence Act.

The first amendment would be the removal of the provision allowing detention to be imposed as a sanction following a conviction under a summary trial. The relevant sections are found in section 163(3)(a) of the National Defence Act, in respect to commanding officers at summary trial, and 163(4), which involves a summary trial presided over by a delegate of the commanding officer. The first sets out the potential for detention for a period not exceeding 30 days, and the second detention not exceeding 14 days. In our view, those ought to be repealed. They are simple provisions to address in Bill C-41. As a pragmatic political question, it's available to the membership of this committee to address that particular issue within this session.

The second issue is that we would recommend an enactment of a restriction of the creation of a criminal record arising from summary trials.

The remainder of my remarks will be oriented to the question of how these proposed amendments or additions to Bill C-41 can be supported.

We begin from the principled stance that the Constitution of Canada is the supreme law of Canada as set out in section 52, part VII, of the Constitution Act. It's the supreme law of Canada. It's supreme over the National Defence Act, and absent any justification under section 1 of the Charter of Rights and Freedoms it can't be abridged. The larger analysis of the summary trial process for the B. C. Civil Liberties Association is informed by section 7 of the Charter of Rights and Freedoms, which, as the committee will be well aware, protects an individual's right to liberty and security of the person. There's a wealth of case law supporting the proposition that detention represents an abridgement of liberty.

That brings us into the question of whether the deprivation of liberty can be justified in accordance with the principles of fundamental justice. The principle of fundamental justice that has sway in this context is the principle that the greater the consequences to an individual resulting from a process, the greater the procedural protections must be. We see in the case of Charkaoui the possibility for deportation to face torture, so the level of procedural protection must be as high as possible. We see in a case called Rodgers from the Supreme Court of Canada that in cases where individuals have been convicted, the DNA can be taken even retroactively because the interest in that context is not that great.

● (1640)

So the greater the abridgement of interest, the greater the procedural protection might be, and here, with the deprivation of liberty, with the possibility of detention for 14 or 30 days, we fall somewhere along the high range of the requirement for procedural protection.

The committee is familiar with many of the problems with the summary trial process, the restrictions on access to counsel and the limited training opportunities for advising officers. One of the best sources for information regarding the problems with the summary trial process is found in the annual JAG survey of the summary trial process, where surveys were distributed to participants in the summary trial process.

The 2007 report—just to choose one, for example—reveals some troubling trends. Approximately 5% of persons tried by summary process reported that they were not offered an election to court martial. Those are not cases where no court martial option was available, but rather where, by statute, court martial was to be available and the individual was to be put to an election. Fully 5% of individuals who were tried say they weren't even given that option.

Only 76% of persons tried by summary trial process indicated they'd been given their choice of advising officer. That means the presiding officer dictated, contrary to the people's wishes, who their advising officer would be. And 49% of persons tried by summary trial process reported that their advising officer did not explain to them their right to speak with military defence counsel. As well, 70% of persons tried by summary trial process reported that the advising officer did not assist them with examining witnesses during the trial.

● (1645)

**The Chair:** Could you conclude?

**Mr. Jason Gratl:** Thank you, Mr. President.

I can confirm that those problems and more problems are set out in the 2007 JAG annual survey. The answer pragmatically available to this committee is not to wholesale buttress and fix the summary trial process, but rather remove the consequences that should not flow from a process with this level of procedural unfairness.

[*Translation*]

**The Chair:** Thank you very much, Mr. Gratl.

I will now turn the floor over to Mr. Dugas for seven minutes.

**Mr. Jean-Marie Dugas (As an Individual):** Mr. Chair, members of the committee, I would like to thank you for your invitation to join you today to discuss the proposed amendments to the National Defence Act. I am honoured to appear, and I hope my remarks are worthy of your consideration.

My name is Jean-Marie Dugas, and I was a lieutenant-colonel with the Canadian Forces up until almost three months ago, when I retired. Some of you may remember that I appeared before this committee previously, when I was the director of Defence Counsel Services. That was the last position I held.

Based on my reading of the recommendations you made in your initial report and of the bill, you appear to have been paying close attention to what my colleagues and I have to say. I stand before you today with great humility and with the utmost respect for those who hold opinions that differ from mine.

The context does not lend itself to calling into question the relevance of the court martial system in 2011, so I will confine myself to addressing the proposed amendments, or lack thereof. I will focus mainly on amendments to the court martial system, its administration and the process that leads up to a sentence being handed down, if indeed this occurs.

Intermittent sentences are one item that deserves a closer look. In such instances, the offender's family situation and place of residence should be taken into consideration.

The six-month limitation on jurisdiction for the summary trial should be considered as the rule, not the exception. Another item for consideration is Reserve Force military judges and if they are excluded from the treatment.

With respect to the rules governing practice and procedure, power should be shared with the panel and the judicial branch.

The composition of the court martial panel should be taken into consideration, along with the requirement that an officer serve in the CF for at least three years before being eligible to sit on a court martial panel.

Furthermore, not extending the delay for producing rules of evidence can—and that is how it is phrased in the bill—result in rules that today are largely no longer valid. Another issue that should be looked at is the availability of sentences in the community for offences that are similar to civil offences.

The mandate of the director of Defence Counsel Services should be automatically renewed at the director's request. With respect to the appeal committee, the decision should be left to the discretion of the director—by this, I mean the director of Defence Counsel Services—according to recognized established criteria, as is done for the determination of legal action. Lastly, regarding the maximum fine of $500, few fines are below this amount, which makes this provision obsolete. The amount should be adjusted to at least $1,000, or perhaps to a figure that corresponds to a percentage of the member's pay.

I would like to draw your attention also to the following items, which were not addressed in the bill. There is the matter of the significant discretion given to the court martial administrator when selecting members of the court martial panel, the lack of transparency in the selection process for panel members, the lack of indication that there is a choice as to where a court martial must be held, the fact that the court martial administrator reports to the chief judge and the issuance of a subpoena.

Once again, thank you for your attention.

**The Chair:** Thank you, Mr. Dugas.

I now yield the floor to Mr. Wilfert.

[*English*]

**Hon. Bryon Wilfert:** Thank you, Mr. Chairman.

Thank you, gentlemen, for coming today.

Mr. Dugas, in your former role as director for defence counsel services you had mentioned that officers in the chain of command have often intervened inappropriately. You cited the case of a general who had spoken directly to the chief military judge on a particular case, etc.

This committee heard from the JAG a few weeks ago about the issue of judicial independence, specifically with reference to a section of the bill allowing the VCDS to issue instructions in reference to particular issues. He testified that he felt this power would be used sparingly and outlined several scenarios where instructions should be issued, including security and logistical concerns.

From your experience, do you see any potential dangers in this clause? If you do, how could the language be adjusted in order to account for the need for the chain of command to retain power over the JAG—for example, in logistics and security—and the need for judicial independence in terms of the respect for rule of law?

**Mr. Jean-Marie Dugas:** I'm not certain if I understand your question when you are talking about the JAG. Are we talking about the judges?

● (1650)

**Hon. Bryon Wilfert:** Yes.

**Mr. Jean-Marie Dugas:** I'm not certain if I understood in here that the CDS would issue instructions on specifically what relates to court martial. When I read that, in my sense it was more to the administrative side of the house, where the judges would not be involved.

When it refers to some issues where the judges could redress some other issues, I understood that it was only administrative issues. As may have been mentioned, obviously that could be an interference from the administration. If the judge is for example unsatisfied with the settlement of his redress of grievance—could he normally be a human being and use it afterwards—I guess your answer is as good as mine. But obviously the fact that they have to go to the administration is a difficulty that we have. You will see that some of what we had on previous court martial appeal courts.... The fact that the judges had to go through the same route to be renewed was also a problem for us.

**Hon. Bryon Wilfert:** You'd mentioned in the 2008-09 annual report that you were concerned that the number of cases dealt with greatly exceeds the number of court martials. You've expressed this issue several times of the number of disciplinary files in relation to the number of court martials and the drain upon the DCS's resources. Do you have any specific suggestions that you would make to this committee on that issue and how they might be addressed in this bill?

**Mr. Jean-Marie Dugas:** I'd say there were two separate reviews made both for the prosecution and the defence where they identified some issues. It might have also been at the time when the system was new and it was a lack of experience on both sides. Sometimes people will come into positions where they really didn't have the disciplinary experience. So we take a bit more time and the problem.... That is a lot more complicated than just trying to change a section of the act.

We have to understand that the charge is sometimes laid at the unit level. It could also be laid by the military police. In both instances, depending on where it goes, then it's going to go to the base where the soldier is actually posted and then it's going to go up.

So in some instances, and that's where I don't know if it's in the regulations or in the act, we will get a phone call on the 1-800 line from the member right away. So we do have a file on that member and it goes from there. In other instances we will basically just receive for the first time the fact that the guy had requested our services and now we're facing the court martial and we only have a few weeks to get ready to proceed.

It's somewhere in the system, more the regulations than the National Defence Act that there's a problem, and that should be fixed in the QR&Os.

**Hon. Bryon Wilfert:** So it should be fixed in the...?

**Mr. Jean-Marie Dugas:** In the Queen's Regulations and Orders, rather than the National Defence Act. I believe it relates to procedures that should be followed by every entity that lays charges or is made aware of the charge, rather than under the NDA. I don't believe the problem was because of the NDA and the way it's spelled out.

**Hon. Bryon Wilfert:** Thank you.

There was an interesting point brought up by one of our colleagues in the past about whether or not some of these individuals should have combat experience when dealing with cases of that nature on these five-member panels. Do you have any comment on that, as to whether someone who is trying an individual who is in theatre and there is an issue that happens, that at least one of the members should have combat experience in order to deal with this individual?

**Mr. Jean-Marie Dugas:** We're talking about the panel on the court martial?

**Hon. Bryon Wilfert:** Yes.

**Mr. Jean-Marie Dugas:** I believe it goes without saying that you need to have some knowledge, but as we do with civilian juries.... For example, if there are medical issues, you'll make sure that there will be no medical doctor on the panel, just because they have to be informed and all the evidence has to be brought up by the witnesses. So it's the burden of the prosecution to make sure that all the information is given to the panel members so they can render a decision.

There is also one of the dispositions where they're considering that before you can be selected to be a member of the panel you should have been in the forces for at least three years. So does that mean that someone who has less than three years should not be charged with that offence because he's not able to understand what he did? I sort of disagree. But people in the forces learn pretty quickly what they have to do.

● (1655)

**Hon. Bryon Wilfert:** Yes, okay. It was an interesting perspective. I just thought I'd get your comment on it, because I had a minute left.

Thank you.

[*Translation*]

**The Chair:** Thank you, Mr. Wilfert and Mr. Dugas.

Go ahead, Mr. Bachand.

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

Welcome to both of our witnesses.

Mr. Dugas, how many years did you serve as director of Defence Counsel Services?

**Mr. Jean-Marie Dugas:** I held the position for seven years.

**Mr. Claude Bachand:** From what year to what year? Did you hold the position recently?

**Mr. Jean-Marie Dugas:** In fact, I wrapped up a court martial case in August. I used up leave that I had accumulated until December 8, which was my official retirement date.

**Mr. Claude Bachand:** So then, you were appointed to the position in 2004, or thereabouts.

**Mr. Jean-Marie Dugas:** In 2003, as a matter of fact.

**Mr. Claude Bachand:** Let me tell you where I'm going with this, because I'm not trying to set a trap for you. Quite the contrary in fact.

Through the course of our discussions, we've learned that there are four defence counsel, compared to 12 counsel for the prosecution. It appears that you identified this imbalance in two of the studies you conducted at the time. Did you conduct a study on this imbalance?

**Mr. Jean-Marie Dugas:** Yes, but to be honest, there is a difference here. The director of Defence Counsel Services has the power to hire counsel as needed, which in fact our office did on several occasions. For nearly four years, if not up until the fifth year, we tried to get across the idea that there was no maximum number involved when it came to hiring a lawyer on a general contract. But yet, Treasury Board regulations imposed a limit on expenditures for that purpose. It took us five years to get a legal opinion.

If you look at the JAG's annual report, you will see that a section is devoted to the Director of Defence Counsel Services. We made our needs known. A more recent study on resource allocation concluded that the rank of director of defence counsel services should be equivalent to that of director of military prosecutions and that more counsel should be assigned to the DDCS's office.

There is also another difference in terms of perception. I'm not saying that there should be more counsel, but that seems to be the direction in which DDCS is heading. Also, prosecution counsel are deployed from time to time on different missions. I object in principle to defence counsel being deployed, but occasionally, when some of them specifically ask to be deployed, then we make arrangements for that. When members are deployed, we need to increase our staff levels. However, a general imbalance does exist nevertheless.

**Mr. Claude Bachand:** Is it true that prosecution counsel are usually busier than defence counsel, given deployments and the extensive research required to prepare their case? That is one of the arguments that I have heard.

**Mr. Jean-Marie Dugas:** Let me share with you my personal experience. Since 1998, both offices have operated independently, but prior to that time, counsel worked for the prosecution as well as for the defence.

There are certain differences today. However, to say that the prosecution has a tougher job, I would answer that they have more work to do because they must compile solid evidence. Occasionally, they must ask law enforcement officials for additional evidence, but both sides work with the same documents. Defence counsel spend as much time reading documents submitted as do counsel for the prosecution. Asking for new investigations to be carried out may involve a little more work, but it's all the same as far as we are concerned. Fewer delays are encountered, however. There is also the fact that witnesses must be tracked down. In many cases, medical evidence must be found, which means meeting with doctors and so forth.

**Mr. Claude Bachand:** Were your studies made public at the time? Were they made public or were they reserved for internal use only?

● (1700)

**Mr. Jean-Marie Dugas:** They were for internal use. I really cannot say if they were made public or not.

**Mr. Claude Bachand:** Would you have any objections to tabling these studies to the committee?

**Mr. Jean-Marie Dugas:** I don't have them with me, but if the JAG wants to table them—

**Mr. Claude Bachand:** A request would have to be filed with the JAG to have your studies tabled. Do you conduct studies every year or is this done more on an ad hoc basis?

**Mr. Jean-Marie Dugas:** Studies are conducted to assess needs. One study was done on the office of the director of military prosecutions and another on the office of the director of defence counsel services.

**Mr. Claude Bachand:** One study focused on the director of military prosecutions. What was the other study on?

**Mr. Jean-Marie Dugas:** On the director of defence counsel services.

**Mr. Claude Bachand:** Then, if we intend to file a request with the JAG, we should ask to see the study on the director of prosecutions as well as the study on the director of defence counsel services.

**Mr. Jean-Marie Dugas:** Yes, but you should specify that you want to see the study on the director of military prosecutions.

**Mr. Claude Bachand:** Mr. Gratl, were you present for Mr. Holloway's testimony?

**Mr. Jason Gratl:** Yes.

**Mr. Claude Bachand:** I assume that you object, as a civilian lawyer, to the approach advocated by Mr. Holloway. Am I correct?

[*English*]

**Mr. Jason Gratl:** I don't agree with the fundamental assessment he has made that the potential for incarceration at summary trials is necessary to keep unit discipline, even on the battlefield. There might be some exigent circumstances where it is of assistance to have the threat of incarceration, but certainly in a non-deployment context it's difficult to sustain that argument.

[*Translation*]

**Mr. Claude Bachand:** Thank you.

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

I now yield the floor to Mr. Harris.

[*English*]

**Mr. Jack Harris:** Thank you, Mr. Chair.

I thank both of you for appearing today with two very different presentations.

Perhaps, Colonel Dugas, I can start with you. Am I right in detecting a sense from you that perhaps the defence side of the JAG and the prosecution side are not exactly treated equally? Is the rank of the chief prosecutorial officer versus that of the defence higher? You seemed to be concerned that you didn't have the right amount of resources to do your job. Did you get a sense that the defence was treated less seriously than the prosecution in the operation?

**Mr. Jean-Marie Dugas:** Again, I'm not saying anything negative about the former JAGs, because they did try to support the organization when we really needed something.

**Mr. Jack Harris:** When I say JAG I don't mean the individual, I mean the institution.

**Mr. Jean-Marie Dugas:** That's what came out of the report we had. Because the director of defence counsel services had a different rank from what the prosecution had, there was the perception that they were not treated equally. There's also the fact that over the years the prosecution had a deputy and now has two deputies, while the establishment, at least to my knowledge, has not changed with the defence counsel services.

At the same time, I was always told by the organization that if we needed to retain counsel they would find whatever funds needed to support the defence in that action. There's also the problem that you don't have that many lawyers on the city streets who are able to take care of our soldiers. Military law is military law, and there are regulations nobody has ever read or heard of before. That was another thing that was imposed on our organization to support at the same time. So even if you were not handling the case, you were basically handling the support of the other lawyers to get through the case and the regulations.

**Mr. Jack Harris:** I take it you're aware of the report Mr. Gratl referred to—the JAG survey of the trial process, where only 49% of persons reported that they had the right to speak to military defence counsel. I suppose it would reflect on the amount of business you actually got as defence counsel if no one knew they had the right to consult with you.

Does that disturb you as a lawyer?

**Mr. Jean-Marie Dugas:** If you read the reports throughout the years, there were comments saying we found out that members who had requested our services for the longest time never got to us. Sometimes there were even papers in the court martial files that got to us at late dates saying “We're ready to proceed, and by the way, you did ask for defence counsel services to be represented”.

I mentioned the regulations, and there is a part in the regulations that says it's supposed to be sent to us. But some people are not as aware of the regulations as they should be. I'm not complaining about those poor guys who sometimes don't know the regulations exist. On other occasions we received phone calls right on the spot, and we were made aware of that.

● (1705)

**Mr. Jack Harris:** I guess that fits in with some of the themes of this afternoon, things like consequences such as criminal records. Do you have any comments on the issue of summary trials? I know you didn't address that in your remarks.

**Mr. Jean-Marie Dugas:** Yes, I did, actually. There's nothing to report. I was away on vacation.

There is an issue even with the actual proposal you're making there. If it is a summary trial, there should not be consequences, because we know that some of the offences are treated the same way. Section 129 includes almost everything. It goes from almost nothing to very serious offences for which higher fines will be requested.

At the end of the day, there are some issues. For example, if someone can choose to go to summary trial, he will not get any criminal record. If he believes he should get a better trial and for his defence he elects court martial and is found guilty, then he will end up with a criminal record. I believe it's unfair. It's the same offence that would have mandated.... It's justice, and as my colleague mentioned, it's fundamental. Even in those cases where the accused is given a choice, it should be treated the same way as an offence that goes straight to summary trial. Otherwise, it doesn't make sense to me. Why would you or I be prosecuted in one way and end up in worse jeopardy than we would otherwise?

**Mr. Jack Harris:** Thank you. That's a good point.

Mr. Gratl, perhaps you could address that as well. One of your comments was that there's nowhere in the act that says you get a criminal offence. I would suggest to you clause 75 of Bill C-41, which proposes that

> A person who is convicted of any of the following offences...has not been convicted of a criminal offence...for the purposes of the Criminal Records Act.

The implication is that if you are convicted of other offences, they are criminal offences for the purposes of the Criminal Records Act, so I think we can assume that they are. I assume you would agree with me.

Would you comment on what Colonel Dugas has just said about the distinction that for the same offence, if you go to summary trial, in your proposal there would be no criminal record, but if you go to a court martial and are convicted, perhaps you'd end up with an offence?

**The Chair:** Keep it short, please.

**Mr. Jason Gratl:** I think there's a distinction to be made between the interests served by promoting unit discipline and the interests served by protecting against offences at the level of the community of Canada at large in the way criminal law is intended to protect. In our view, summary trials are appropriate to the first aspect, and criminal law procedures and processes and consequences are appropriate to the second function. It should be up to the charging officer at first instance to decide which path to take. Then, if a summary trial is chosen by the charging officer, there might be a residual election for some offences for the summary trial processes. It ought to be up to the charging officer to decide whether it's a matter of sufficient importance to elevate the process to a criminal law type of process.

**The Chair:** Thank you very much.

I will give the floor to Mr. Hawn.

**Hon. Laurie Hawn:** Thank you, Mr. Chair.

Thank you to our witnesses for being here.

Mr. Gratl, don't you agree that Chief Justice Dickson and Chief Justice Lamer would have known if there were section 1 charter concerns in their review of the summary trial system?

**Mr. Jason Gratl:** I'm a great admirer of both Chief Justice Dickson and Chief Justice Lamer, as they then were, but I don't agree with everything they ever said. If they made these comments, they would have made them a while ago. I appreciate that Justice Lamer's 2003 report was made in the context of an entirely different act, in which he felt the summary process could be improved significantly.

It turns out that many of the problems that Justice Lamer identified in 2003 have not in fact been rectified, as we can see from the JAG reports. The annual JAG reports consistently within their surveys demonstrate that these problems are outstanding. They come in the form of comments. Sixty-six percent of people tried under the summary trial process reported that the process was unfair, and 16% of respondents believed that their guilt was predetermined by the process. Those are bad outcomes. I'm sure Mr. Justice Dickson and Mr. Justice Lamer would agree with those propositions.

● (1710)

**Hon. Laurie Hawn:** I suggest that somebody going through a trial in civilian court who is found guilty will many times assume that their guilt was predetermined. That's probably a normal human emotion.

You quoted the 2007 JAG report. Are those figures you just quoted from that same report?

**Mr. Jason Gratl:** They're all from the 2007 JAG annual survey.

**Hon. Laurie Hawn:** Have you reviewed later reports, such as 2008-2009, which show a high degree of compliance related to regulatory requirements?

**Mr. Jason Gratl:** I couldn't find them online. I'm sorry.

**Hon. Laurie Hawn:** Could you go back and look? They are available.

As well, I believe that surveys will show—perhaps you haven't found those either—that former accused members have a positive response about fair treatment when they get to the summary trial system. Maybe you haven't seen those either.

**Mr. Jason Gratl:** I don't know which surveys you're referencing.

**Hon. Laurie Hawn:** The 2008 and 2009 ones.

**Mr. Jason Gratl:** Pardon me?

**Hon. Laurie Hawn:** More recent surveys than the 2007 JAG survey.

**Mr. Jason Gratl:** What specific figure are you referring to?

**Hon. Laurie Hawn:** I don't have all the figures in front of me here, but I know that those 2008 and 2009 reports, which are available, do paint a slightly different picture from 2007, which would be what you would hope to find as the system matures and improves. That would be, one would hope, a normal course of events.

**Mr. Jason Gratl:** At the level of generality at which you're speaking, it's difficult to agree or disagree with you, but I can say that the problems and the dissatisfaction with the summary trial process remain at a sufficiently grave level that the B.C. Civil Liberties Association believes something ought to be done about it.

In terms of whether removing the provision allowing for detention really matters, I understand that in 2009 only 36 individuals had detention imposed upon them after the summary trial. It's not as though detention is often imposed, and it might just be that the looming threat of potential incarceration or detention from superior officers somewhere down the road is perceived to be necessary, but there's really no empirical study available regarding that issue.

**Hon. Laurie Hawn:** You mentioned section 1. You also mentioned section 7 of the charter, security of person, and that people have a right to invoke section 7 for the security of the person, unless I misunderstood you. Is that what you are implying?

**Mr. Jason Gratl:** Yes, that's correct.

**Hon. Laurie Hawn:** So would a member of the Canadian Forces who is on a deployment somewhere in a hostile environment be allowed to invoke section 7 of the Charter of Rights and Freedoms to say he's not going outside the wire that day?

**Mr. Jason Gratl:** The way the Constitution is structured allows for the types of scenarios of which you're speaking, in the form of justification. So yes, a soldier could invoke section 7, but their commanding officer's order that they go under the wire would be justified pursuant to the principles of fundamental justice, and even if not, they'd be justified pursuant to section 1, concerns about national security.

So it's not as though section 7—right to life, liberty, and security of the person—disappears entirely. It's only that the deprivation is later justified. So I think that accounts for that scenario and it accounts for many of the other scenarios you raised previously.

**Hon. Laurie Hawn:** So in that scenario, if a soldier simply refused to go, what action would be justified on the part of the military justice system?

**Mr. Jason Gratl:** I think he could be arrested, he could be subject to the court martial system. Or in the scenario that the B.C. Civil Liberties Association envisages, the charging officer could make the election of whether it was simply a unit discipline matter or should be elevated to the level of a criminal judicial process.

**Hon. Laurie Hawn:** So is it not then fair to say that somebody in uniform does not have, ultimately, without sanction, the right to refuse a lawful order, even though he may feel it violates his section 7 rights under the charter?

**Mr. Jason Gratl:** I'm not sure. I wonder if you could rephrase the question.

**Hon. Laurie Hawn:** It goes to the discussion we had earlier. Does somebody who joins the military have all the same rights, to the same level, as a civilian?

**Mr. Jason Gratl:** No, but we're talking about what happens if a person doesn't do as he's supposed to do, whether he commits a very serious crime or a small disciplinary infraction. The question is which process should be used to determine their guilt. What we're saying is if you want to impose imprisonment, you should have a good process; and if you don't need to impose imprisonment, you can just have a reprimand, then a less elaborate, less complicated process might be appropriate.

● (1715)

**Hon. Laurie Hawn:** Thank you.

[*Translation*]

**The Chair:** It is now 5:15 p.m. We will suspend the proceedings for three minutes and then reconvene to discuss the motions on the table.

Mr. Dugas, Mr. Gratl, thank you for joining us today.

● (1715)

(Pause)

● (1715)

**The Chair:** We now continue with the 50th meeting of the Standing Committee on National Defence.

[*English*]

Before starting, I want to inform the members that I will table tomorrow in front of the House our report, pursuant to Standing Order 108(2) and the motion adopted by the committee on Wednesday, February 16, 2011, that the committee recommends

[*Translation*]

> 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 as soon as possible and that it be reported to the House at the earliest opportunity.

[*English*]

That will be tabled tomorrow at 10 o'clock.

I'll also inform the members that you have until tomorrow, Tuesday, at noon, to give your amendments for Bill C-41 to the clerk, because we will start to work on this bill this Wednesday.

Do we have agreement on that? Jack?

**Mr. Jack Harris:** No, no. Where did that deadline come from? We're hearing witnesses on Wednesday, so how can we do that? How can we hear from witnesses on Wednesday and have amendments in by tomorrow?

**The Chair:** Yes, we have a witness for sure, but the second part of our meeting will be clause-by-clause.

**Mr. Jack Harris:** Yes, but if we have to have amendments in by tomorrow and we're going to hear from witnesses on Wednesday.... We just heard from witnesses this afternoon suggesting changes and things we have to think about. I don't think it's reasonable to expect amendments to be available tomorrow at 12 o'clock.

● (1720)

[*Translation*]

**The Chair:** Fine.

Go ahead, Mr. Hawn.

[*English*]

**Mr. Jack Harris:** It's not that we're not going to provide any, but I don't think it should be an absolute deadline.

**The Chair:** Thanks, Jack.

Mr. Hawn.

**Hon. Laurie Hawn:** Well, Mr. Chair, the only witness we're having on Wednesday is the vice-chief, and at the risk of being a little cynical, you're probably not going to take much advice from him anyway. It's just a guess.

We are starting clause-by-clause, so it seems to me if you're going to start clause-by-clause, then you need to be prepared to have whatever you want changed in there, because we're starting at the top, like any other clause-by-clause.

**The Chair:** But also all the members have the privilege and the opportunity to table amendments on the floor when we are in session, but it will be preferable to receive them before 12.

**Mr. Jack Harris:** I have no problem with that, Chair.

I mean, we have a number of amendments that have gone through the process, and they're translated into both official languages, etc., and we will be happy to table the ones that we have tomorrow. As long as we can present amendments on the floor as we go through, then that's perfectly reasonable.

**The Chair:** Okay. We have a consensus. We're going to do that.

We'll go ahead with the motion presented by Mr. Wilfert, if we can have a discussion on that.

Can you read your motion, Bryon?

**Hon. Bryon Wilfert:** Thank you, Mr. Chairman.

My motion is that the committee call the Minister of National Defence to appear before this committee in advance of the Minister of Finance's tabling of the 2011 budget, in order to brief committee members on the supplementary estimates (C), 2010-2011, and to answer questions pertaining to a fleet of Mi-17 helicopters the Department of National Defence secretly leased and has operated in Kandahar province, as referenced in the motion this committee passed on November 25, 2010.

I had no problem with having that in camera, the second part. On the first part, the issue on supplementary estimates, we should obviously have the minister before us, and I presume that the minister will make himself available before then.

**Hon. Laurie Hawn:** At the risk of not putting too fine a point on it, I don't think the Minister of National Defence knows when the budget is being tabled. I certainly don't. There are probably only a couple of people who do. I'm not disagreeing with having him come and so on.

I think it might be more appropriate, rather than in relation to the budget, which is something that has not been announced, that we talk about before the expiry of the current supply period.

**Hon. Bryon Wilfert:** I'm sorry, Mr. Chair, but the supplementary estimates are out, so I think it's important that we have a....

**Hon. Laurie Hawn:** I don't disagree. We've already passed this motion anyway, have we not? So it's just a discussion about implementing it.

**Hon. Bryon Wilfert:** Yes, but I just want to make sure that the minister is available at the first available opportunity.

**Hon. Laurie Hawn:** Yes. If we're doing clause-by-clause...

**Hon. Bryon Wilfert:** On Wednesday to next Monday, that would leave next Wednesday.

**Hon. Laurie Hawn:** That's the ninth. That would be a possibility. I have no idea what his schedule is on the ninth. The next possible day after that obviously would be the 21st, after the break week. I can't speak at the moment to his personal availability on either of those days. I don't know when the budget is coming, but obviously we all know it's coming some time relatively soon. I'm just saying if we tie it to the budget, that might make it awkward.

**Hon. Bryon Wilfert:** I think it's important to have a heads-up that we try to get him in before. Those are two dates that I would suggest, if feasible. I would like to have a discussion.

**Hon. Laurie Hawn:** We'll go back and check his availability. The part in camera, absolutely. If we're going to discuss anything other than the fact that the Mi-17s are there, then that discussion needs to be in camera.

[*Translation*]

**The Chair:** Go ahead, Mr. Bachand.

**Mr. Claude Bachand:** My question concerns the first part of the motion. As far as I know, the minister is required to appear before the committee in conjunction with our study of the supplementary estimates. Do we really need a motion to compel him to appear?

**The Chair:** I'll let the clerk take that question.

**Ms. Julie Lalonde-Prudhomme (Procedural Clerk):** There is no obligation as such. The minister is free to choose whether or not to appear before the committee. It all depends on his availability and willingness to do so.

**Mr. Claude Bachand:** So then, by tabling this motion, we are merely extending an invitation to the minister.

**Ms. Julie Lalonde-Prudhomme:** The committee is in fact asking, not ordering, him to appear.

**Mr. Claude Bachand:** Okay.

**The Chair:** Thank you, Madam Clerk.

Go ahead, Mr. Harris.

[*English*]

**Mr. Jack Harris:** Can we amend the estimates in his absence, Madam Clerk?

● (1725)

**The Chair:** That's all right.

Mr. Wilfert.

**Hon. Bryon Wilfert:** It has been the practice or convention that the minister has come. I'm sure Laurie will do his best to make sure we get....

[*Translation*]

**The Chair:** You have the floor, Mr. Hawn.

[*English*]

**Hon. Laurie Hawn:** I do think it's fair to point out that the Minister of National Defence has been to this committee probably more than any other minister has been to any other committee, and he will make the appropriate effort to be here.

**Hon. Bryon Wilfert:** That's why I'm sure he'll be delighted to deal with the supplementaries.

**The Chair:** Okay.

**Hon. Laurie Hawn:** Really, it's just a matter of going back to the minister per the motion that I believe has already been passed.

**Hon. Bryon Wilfert:** I thought we already did it.

**Hon. Laurie Hawn:** Now it's just the execution.

**The Chair:** The motion has been passed already.

We'll go with Mr. Harris. You also have a motion in front of us?

**Mr. Jack Harris:** Yes, I have a motion that's pursuant to the statement the deputy minister made before the committee, that the department would cooperate in making information available to the committee. This is a list of a number of papers and reports that we understand are available. Many of them, if not most, were actually part of the bibliography of the NRC report that we had before our committee. I think most, if not all, of them are already available in both official languages. Those that need to be made available I guess will have to be translated.

A number of these documents are referred to in various reports and they have information that could be useful to the committee. My concern is that we won't be able to use them unless they're actually tabled before the committee, and we can't distribute them unless they're in both official languages. If they have copies in both official languages right now, well then table them with the clerk and have them distributed. If some of them need to be translated, then so be it. I think that's the nature of the beast. Is it not, Mr. Bachand?

**Mr. Claude Bachand:** It is.

**Mr. Jack Harris:** I'm sure most of them are available already. We were told by one of the witnesses that they're all available in both official languages and can be made available. Which ones aren't, I don't know. Maybe Mr. Hawn could help us with that.

I would move that we request that these documents from the deputy minister or the Department of National Defence be made available to the committee.

[*Translation*]

**The Chair:** Go ahead, Mr. Hawn.

[*English*]

**Hon. Laurie Hawn:** I have a couple of comments on that. In general, we have no problem with that. I haven't gone searching, but some of these documents may be available online. I don't know.

**Mr. Jack Harris:** I don't know either, but I want them tabled with the committee.

**Hon. Laurie Hawn:** Yes, one way or the other....

I don't know specifically which ones are translated right now. I do know the department has looked at some of these documents. For example, if the national search and rescue manual needs translation, their estimate is that it takes about 58 working days. It's a big document. It may already be in both languages; I don't know.

**Mr. Jack Harris:** I think it's in both official languages.

**Hon. Laurie Hawn:** Obviously, if it's available—

**Mr. Jack Harris:** I have a copy of it in English, but—

**Hon. Laurie Hawn:** Okay. The only consideration we really have with this is the statement of operational requirement. It's not injurious, from a national security perspective, but releasing it to the committee before the process is announced would potentially prejudice the competitive process we're going to launch on that.

The suggestion from the Chief of the Air Staff was to release the high-level mandatory capabilities, but not release the SOR until that process has been released to the competitors, because it would prejudice the competitive process.

**Mr. Jack Harris:** Which document is this now?

**Hon. Laurie Hawn:** Sorry, it's the statement of operational requirement. It's the last one on the first page: the statement of operational requirement fixed-wing search and rescue project, version 4.1.

Even if it is released, there will be some redactions, because there are some matters of national security.

**Mr. Jack Harris:** Is this not the version the NRC was reporting on?

**Hon. Laurie Hawn:** I'm not sure of the version. This was the 2006 version. I'm not sure whether there's a more updated version. I assume you would want the most updated version.

● (1730)

**Mr. Jack Harris:** Are we looking at the same thing?

**Hon. Laurie Hawn:** The last one on the first page.

**Mr. Jack Harris:** NSS-2010 backgrounder?

**Hon. Laurie Hawn:** No, it's DND 2006 statement of operational requirement. It's the bottom one on the first page that I've got here.

Oh, sorry, we laid that out in different format. It's the fourth one down.

**Mr. Jack Harris:** The fourth one?

**Hon. Laurie Hawn:** Yes, sorry.

**Mr. Jack Harris:** Statement of operational requirement fixed-wing search and rescue, version 4.1.

**An hon. member:** That's it.

**Hon. Laurie Hawn:** That was the 2006 document. I assume you want the most up-to-date one.

**Mr. Jack Harris:** That's the one the NRC was commenting on, isn't it?

**Hon. Laurie Hawn:** Yes.

**Mr. Jack Harris:** What about the most up-to-date one? Are you going to give us that one?

**Hon. Laurie Hawn:** I don't know if there's a more up-to-date one than that. I'm saying that releasing the most up-to-date one would be injurious to the competitive process.

**Mr. Jack Harris:** Well, I haven't asked for the most up-to-date one here. There may be an amendment proposing that we have that, but that hasn't been tabled yet.

**Hon. Laurie Hawn:** I don't know what restrictions NRC may have had in the use of that 2006 document. They may have had access to the document with certain provisos that they had to protect some information. I don't know.

I'm just saying there was concern from the Chief of the Air Staff that some of the information is injurious to the competitive process, if it's released before release to the public for potential bids.

**Mr. Jack Harris:** We're not talking about the 2006 statement now, are we?

**Hon. Laurie Hawn:** I'm still talking about that one. NRC may have had access to the statement of operational requirement, but they may have had some restrictions on it because of the very thing I just mentioned. They want to be careful about compromising the competitive process, because it has to be fair and all that.

I'm just raising a concern.

**Mr. Jack Harris:** I understand the concern, but are you suggesting the statement of operational requirement would not be made available to people who were seeking to bid on the project?

**Hon. Laurie Hawn:** Well, of course, but not through this committee. It gets released to them as part of the bid package that goes out.

**The Chair:** Do you have an amendment to propose to that motion?

**Hon. Laurie Hawn:** No, we don't have a big problem with the motion. I'm just saying there may be some difficulty with delivering some of these things as you envision them. As those come up, if they come up, then obviously it will have to come back to the committee

**Mr. Jack Harris:** Well, if somebody wants to come back to the committee and say we don't want to give you X, Y, or Z, then we can debate it, I suppose. But I don't want to qualify our request.

I think we should ask for these documents. If someone says we can't give you this part because there's something in it we don't think should be made public—

**Hon. Laurie Hawn:** No, that's fair. Ask for them all.

**Mr. Jack Harris:** —then we can deal with that.

I'm not trying to open up the windows to the world. At the same time, we are a parliamentary committee, and as we know, there are rulings of the House as to what the members of Parliament are entitled to.

**The Chair:** Okay.

Mr. Wilfert, do you want to add something?

**Hon. Bryon Wilfert:** Thank you, Mr. Chair.

I have three proposals, following consultation and discussions with Mr. Harris. With regard to the list of documents, one would be by Brigadier-General D.A. Davies, director general of the air force department. It's a rotary wing search and rescue study, with a slide presentation, 2009. Second is any other statement of operational requirements on the fixed-wing search and rescue aircraft. And then there is DND's analysis of the NRC report, which I believe is from 2010.

I would add those three as friendly amendments to Mr. Harris's motion.

**Hon. Laurie Hawn:** We have no problem with asking for the documents. Ask for whatever you want. I'm just giving you a heads-up that in one case there may be some challenge with someone just saying “here it is”. We'll come back with specifics on that. I'm giving you a heads-up on some of the concerns the Chief of the Air Staff has right now.

**Mr. Jack Harris:** If there is a problem with the whole document, that's fine. I take the same position on this issue as I took in the House of Commons on the other issue, which is that if there is something we need to know and it needs to be protected from public information, then we can find ways of dealing with that. I accept that, Laurie.

As far as the motion itself goes, I'll adopt those friendly amendments if it means they are part of the motion now.

**The Chair:** So do we have consensus to adopt this motion as amended?

**Some hon. members:** Agreed.

**The Chair:** Okay, then it's on.

[*Translation*]

Thank you very much. That concludes our 50th meeting. We will reconvene on Wednesday afternoon.

The meeting is adjourned.

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