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Chair

The Honourable Maxime Bernier

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● (1535)

[*Translation*]

The Chair (Hon. Maxime Bernier (Beauce, CPC)): Good afternoon, everyone. Welcome to the 51st meeting of the Standing Committee on National Defence.

Pursuant to the order of reference of Monday, December 6, 2010, we will be studying Bill C-41, An Act to amend the National Defence Act and to make consequential amendments to other Acts.

It is our pleasure to have representatives from the Department of National Defence with us for the first hour, until 4:30 p.m.

Good afternoon, Vice-Admiral Donaldson.

[*English*]

Thank you for being with us.

[*Translation*]

We also welcome Mr. Alain Gauthier, Director General, Canadian Forces Grievance Authority.

And Mr. Timothy Grubb.

[*English*]

He is the Canadian Forces provost marshal.

Thanks for being with us. I will give the floor to Vice-Admiral Donaldson for seven to ten minutes.

VAdm Bruce Donaldson (Vice-Chief of the Defence Staff, Department of National Defence): Thank you very much, Mr. Chair.

Honourable members of the committee, let me begin by thanking you for the opportunity to appear before you today to discuss this important bill. I'd also like to thank you on behalf of all members of the Canadian Forces for your continuing interest and support for the men and women who wear the uniform for our country. Your ongoing commitment to a modern and relevant military is most appreciated.

I hope that my appearance today, both on behalf of the Chief of the Defence Staff and in my own role as vice-chief, will be beneficial to this important study. With me today are Colonel Alain Gauthier, the director general of the Canadian Forces Grievance Authority, and Colonel Tim Grubb, the Canadian Forces provost marshal, or head policeman.

[*Translation*]

In a healthy democracy, an effective military should both reflect the society and the values that it is designed to protect, as well as maintain the necessary discipline, efficiency and morale to be operationally effective in delivering that protection.

The changes proposed by Bill C-41 are necessary to succeed in both aspects of this challenge. Specifically, the proposed updates seek to address the three main subject areas of the Lamer report: the military justice system; the position of Canadian Forces provost marshal and the related military police complaints process; and the Canadian Forces grievance process.

[*English*]

Both the minister and the Judge Advocate General have already spoken to the provisions of the bill that are aimed at updating the military justice system. On these matters I really must defer to the expertise of the Judge Advocate General, who has statutory responsibility under the National Defence Act for military justice. However, the other two topics, the Canadian Forces provost marshal and the Canadian Forces grievance system, are indeed part of my responsibilities as Vice-Chief of the Defence Staff. Today I'd like to focus my remarks on these topics.

With regard to the Canadian Forces provost marshal, the Lamer report recommended that the responsibilities and command relationships of this position be clearly defined in the National Defence Act. This is exactly what Bill C-41 proposes. The bill sets out the responsibilities of the provost marshal, specifies the minimum rank to be held by the provost marshal, and clearly defines the conditions of tenure for the position. The bill would also increase transparency by requiring the provost marshal to submit an annual report to the Chief of the Defence Staff.

I understand that some concerns have been expressed regarding Bill C-41's potential impact on the investigative independence of the provost marshal, and this afternoon I'd like to address those concerns.

[*Translation*]

It is important to note that the military police in general, and the provost marshal in particular, are unique amongst police in Canada. They perform military duties in addition to investigative duties and often conduct investigations in active theatres of operation such as Afghanistan.

Certain command relationships must exist to recognize this reality. Clause 4 of the bill provides that the provost marshal acts under the general supervision of the vice-chief of the defence staff in respect of the provost marshal's statutory duties. The clause authorizes the vice-chief of the defence staff to issue general instructions in writing regarding these responsibilities, and it requires the provost marshal to ensure that these instructions are made available to the public. I believe that this is generally well understood.

[*English*]

However, I understand that the section proposing that the vice-chief may issue instructions or guidelines in writing in respect of a particular investigation has been the subject of some concern. This authority, which would only be exercised in exceptional circumstances, reflects the necessity for a transparent mechanism to convey direction to the provost marshal when operational imperatives must take priority over or be weighed against the investigative obligations of the military police.

For example, given the unique requirement to conduct investigations in zones of armed conflict, this authority might be exercised in a situation the provost marshal is investigating under circumstances in which its continuation may for logistical reasons or because of high risk to CF personnel directly impact upon the potential success of an ongoing operation.

The VCDS is the appropriate authority to balance the commander's concerns for mission success and the provost marshal's need to advance an investigation. To protect against a potential abuse of this authority, Bill C-41provides transparency safeguards. It would require the provost marshal to make any instructions or guidelines from the VCDS regarding the specific investigation available to the public, unless the provost marshal himself or herself considers that making it public would not be in the best interests of the administration of justice.

In addition, existing sections of the National Defence Act would allow the provost marshal to make an interference complaint to the Military Police Complaints Commission if he or she suspected the VCDS of improperly interfering in an investigation. This is an area in which there are competing principles, requiring a balance between two legitimate and fundamental concerns: the investigative independence of the provost marshal and the responsibility of the chain of command for the accomplishment of operational objectives.

I believe that Bill C-41 proposes a viable and appropriate balance between these two imperatives. I also understand that in his report, Chief Justice Lamer concluded that independence was protectable through transparency and accountability, exactly what is proposed in this bill. Furthermore, on April 1, 2011, the Canadian Forces provost marshal will be assuming full command of all Canadian Forces military police directly involved in policing duties. The changes to the military police command and control structure are a continuation of the recommendations made in various reports to strengthen the independence, authority, and efficiency of the provost marshal in the exercise of his or her policing mandate.

I'd now like to turn to the subject of the Canadian Forces grievance process. Let me underscore that dealing effectively with grievances in the Canadian Forces is not a simple corporate management issue. It is a key leadership responsibility that the Chief of the Defence Staff, I, and all leaders take very seriously.

● (1540)

[*Translation*]

An effective grievance system is crucial to ensuring the welfare of the men and women of the Canadian Forces and to maintaining the very discipline, morale and operational effectiveness that I mentioned earlier. The bill would rename the Canadian Forces Grievance Board, which has done excellent work since 2000, as the Military Grievances External Review Committee. Renaming the organization would help reinforce the fact that the board, like the military police complaints commission, is an independent review body and not part of the Canadian Forces.

[*English*]

The bill would also make the entire grievance process more efficient by allowing the Chief of the Defence Staff to delegate his power as the final authority in the grievance process to other senior officers directly responsible to him. I must emphasize that the CDS would remain ultimately responsible and accountable for these decisions. It is not, as some have suggested before this committee, an abdication of the CDS's responsibility for the welfare of the men and women of the CF. Rather, it is a reflection of the reality recognized by Chief Justice Lamer that it is impractical and unreasonable to expect the CDS to personally decide every grievance in an organization of the size and complexity of the Canadian Forces. Both of these measures are endorsed by the grievance board.

[*Translation*]

Last spring, the Canadian Forces conducted a ten-year review of the grievance system and we remain committed to its constant improvement. This improvement involves many non-statutory changes that are already underway, many of which address some of the concerns presented by the grievance board. Several initiatives, such as the digitization of the grievance file, the creation of a central registry and the adjustment of timelines, are underway to reduce the time it takes to staff a grievance.

[*English*]

A key initiative is the trial of the principled approach, which allows the grievance board to review a larger number of files in order to increase transparency and fairness. Currently, the grievance board provides findings and recommendations on only four types of files: reversion of rank and release from the CF; conflict of interest and harassment; pay and financial benefits; and entitlements to medical and dental care.

I'm confident that these new initiatives will give us the ability to reduce the staffing of grievances to 12 months while increasing the transparency and the fairness of our complaint resolution system. Of note, the Lamer report recommended that the Chief of the Defence Staff be given statutory authority to approve financial compensation in resolving a grievance. While we agree with this recommendation and we are committed to its implementation, there are a number of complex authority issues that must be resolved before we can move forward.

When I took over as Vice-Chief of the Defence Staff last summer, my goal was to resolve this issue immediately, but I must admit that I have yet to find a mechanism that is legally, administratively, and practically acceptable. We are currently reviewing options that range from legislative amendments to *ex gratia* authority. This is one of my top priorities, and I will closely monitor the working group that has been tasked to find a solution.

Mr. Chair, let me conclude by re-emphasizing how important I believe it is that the provisions of Bill C-41 be adopted as soon as possible. In that vein, I would be pleased to assist you in your consideration of the bill by providing any additional background information or explanation that you might require.

I would like to once again thank you for your time. I welcome any questions you might have.

● (1545)

[*Translation*]

The Chair: Thank you very much, Vice-Admiral Donaldson.

I now give the floor to Mr. Dryden.

[*English*]

Hon. Ken Dryden (York Centre, Lib.): Thank you, Mr. Chair. Thank you all for being here today.

I think there's only one person at the table who has military experience, and the rest of us have to try to imagine what the experience is, knowing there can very well be special circumstances, special considerations. All of us come from certain fields where those fields only work if people really understand the special nature of what it is we're doing. We have all had experiences of saying to others, often in our own self-interested ways, that they don't understand, that they don't get it, that the way things work in real life in this area is different, so we need special rules, whether it's in law or medicine or sports or lots of different fields.

We grapple with it when we are dealing with these kinds of questions. We want for you to have those authorities and those rights to do what you need to do. At the same time, we also want to provide the kinds of protections that every citizen should have. It's a struggle. We have heard from different witnesses, and often witnesses who have military backgrounds argue different points in all of that.

We get to questions in the grievance area and in others. We had a very good debate in the last session between the primacy of the charter of rights as opposed to the charter of rights in very special circumstances. How do you understand that? How do you approach those very basic questions that really underlie any of the recommendations any of us might make?

VAdm Bruce Donaldson: Well, Mr. Dryden, it's a difficult question. As I said early on, I defer to the Judge Advocate General on technical matters of law, but as a leader, I share your concern with these questions. As a leader, it is critically important to me to do what is fair and right for the men and women under my command, and I am as seized of the importance of protecting their rights and seized of the importance of protecting the collective rights of the men and women in uniform as you are.

I believe that we need to be careful when we look at special circumstances and not be self-serving when we identify special circumstances, but I think most would agree that in the case of a military force there are circumstances in which provision of access, for example, to swift and appropriate justice may be a challenge in a Canadian context, so we need to provide a context for that for our people.

Also, when the circumstances and the expectations may be different, we need to make those clear to our people. At the end of the day, we need a system of justice that supports discipline and morale in a military force that meets the requirements of the Government of Canada and the expectations of Canadians.

These are challenging questions, and they're good questions to ask ourselves on an ongoing basis. I believe we have found a very good balance, in the amendments to the military justice system that we have been making for some time now, in recognizing the charter rights of our people and in amending the way we go about administering justice on an ongoing basis, the way we deal with procedural fairness, and the way we deal with the involvement and the independence of policing functions, of courts, and of summary trials. I think we were mindful in all that we have amended as we have gone forward, and in everything we do we are mindful of these rights.

I'm not sure that answers your question.

● (1550)

Hon. Ken Dryden: Well, I'm sure that as the discussion goes on, the question will come up again in more specific ways.

I have two questions at the end of my time.

Why has it taken so long since the Lamer report of 2003 to get to this stage? That's one question.

Also, you made reference towards the end to the decision on the financial compensation of grievances and to your having struggled with it and not being there yet. Why is that so complicated?

VAdm Bruce Donaldson: Sir, it's taken us very long to get here; this is not our first attempt. We have tried—I say we, but there have been two other bills before the House that did not make it through and died on the order paper. One of the reasons Bill C-41 is structured the way it is is to try to take the essential elements that were felt to be more or less agreeable and get those established so as to avoid another protracted process that might not lead us to some of the changes that we need to put in place.

In terms of the financial compensation, sir, I think the way government is structured, the way departments are structured, the way federal accountabilities are structured, and the way the Department of National Defence, the Chief of the Defence Staff, and the deputy minister are positioned in that organization work very well from a number of perspectives. However, in this particular one, it has become very challenging to connect all of that in a way that would give the chief the ability to make the types of decisions that from a grievance perspective we feel he ought to be able to make and yet accept for the government the financial commitment that this would entail in order to redress the grievance. We have looked at an internal procedural resolution to that and we continue to experiment with it, but because of some of these other issues, that procedural fix is unlikely to satisfy the members of this committee, because it's not satisfying me.

We have looked at the potential for a legislative change, but I believe that the cascading requirements of legislation may make that a rather challenging approach. We've looked at a way of approaching Treasury Board to get authorities for the chief in these specific areas. That work continues, with Treasury Board and internally, to see how we would do that. As I say, I have been surprised at the challenge that we have encountered in dealing with some of the positions inside and outside the department. They were fairly hard when we started this investigation, but I believe they have been adjusted through a process of dialogue, negotiation, and experimentation, to the point that I actually feel that we can probably address this issue through a combination of both regulatory adjustments through the Treasury Board and procedural adjustments to how we approach the question.

● (1555)

[*Translation*]

The Chair: Thank you very much.

Mr. Bachand has the floor.

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

First, welcome to my friends.

My first question is for Mr. Donaldson. Everyone agrees that the final authority in the grievance procedure is the chief of the defence staff. But we are told that the chief of the defence staff also delegates a part of his responsibilities.

Does the chief of the defence staff delegate those responsibilities for grievances to you, making you the final authority?

[*English*]

VAdm Bruce Donaldson: Sir, on rare occasions I may be delegated this authority. On other occasions, aspects of this would be delegated to the director general, working directly for the chief, with certain clear guidelines in place upon which to base decisions.

I do want to emphasize that the act of delegation, at least in the context of the Canadian Forces, is in no way an abrogation of authority. The Chief of the Defence Staff is fully and absolutely responsible for many aspects—virtually all aspects—of the control of the administration of the Canadian Forces. That's success in operations, that is the management of personnel policies, that is virtually anything you can think of. The chief has delegated authorities in respect of many of those areas with great success, historically and to the present day. The method of delegation makes the parameters clear and also makes it clear when someone who has delegated authority needs to come back to the Chief of the Defence Staff. I don't know if that answers your question.

[*Translation*]

Mr. Claude Bachand: Yes, in part.

Is that delegation of authority provided for in the current National Defence Act? Or can the chief of the defence staff delegate his responsibilities on certain occasions through regulations?

[*English*]

VAdm Bruce Donaldson: I'm not sure of the answer.

May I turn, Mr. Chair, to Colonel Gauthier?

[*Translation*]

Col Alain Gauthier (Director General, Canadian Forces Grievances Authority, Department of National Defence): It is a combination of both, Mr. Bachand. The National Defence Act states that, for some categories of grievances, the chief of the defence staff has the authority to delegate…

Mr. Claude Bachand: Can you tell me what those categories are? Do you know them by heart?

Col Alain Gauthier: Yes, they are exactly the ones we listed…

Mr. Claude Bachand: …in the presentation?

Col Alain Gauthier: The ones that are referred directly to the board. So anything to do with rank and with release from the Canadian Forces, conflict of interest and harassment, pay and financial benefits and, lastly, anything to do with release for medical or dental reasons.

Mr. Claude Bachand: All those can be referred to the chief of the defence staff or to you, correct?

Col Alain Gauthier: They are all referred. When we receive them, the system moves in two ways. When the case is in one of those four categories, they are automatically referred to the Grievance Board. For everything else involved with Canadian Forces leadership, the authority is delegated to me by the chief of the defence staff. That represents about 60% of the grievances we receive.

To go back to your question, there is a very close link because I meet personally with General Natynczyk every month to discuss the various cases. I meet with General Natynczyk monthly, without fail.

Mr. Claude Bachand: So those various aspects that you have just mentioned are covered by the act?

Col Alain Gauthier: The National Defence Act stipulates only that cases are referred to the Grievance Board in certain specific categories. This is all set out in the Queen's Regulations and Orders…

Mr. Claude Bachand: Excuse me?

Col Alain Gauthier: I said the Queen's Regulations and Orders.

Mr. Claude Bachand: So the Queen is involved now!

Col Alain Gauthier: Those are our internal regulations; that is where the details are. It is where you find the four types of grievances that must be referred to the board.

Mr. Claude Bachand: Okay, I see.

I have another question about dealing with grievances. We have heard about cases where the chief of the defence staff goes to resolve the matter. Unfortunately, if there are financial implications, the chief of defence staff may claim not to have the authority to make any financial settlement that may have been awarded. As I understand it, it's the legal department that evaluates the complaint and can say yes or no.

In your presentation, you seem to be saying that there are some complex questions that need to be resolved. You do not mention what they are, but it seems quite simple to us. Just suppose that it is recognized that an injustice has been done to someone and we owe him $1,000 because of that injustice, but we don't take the next step. Would you not agree with me that it would be a lot easier, and would save a lot of time and effort, if the chief of the defence staff had the authority to correct, not only the injustice itself, but the financial injustice that resulted from it?

● (1600)

[*English*]

VAdm Bruce Donaldson: Yes, sir, it would be much easier.

The challenge is not agreeing that the chief should have these authorities; the challenge is finding the mechanism for giving the chief these authorities. It could be a legislated mechanism, but I think a simple legislative amendment to the National Defence Act, given the structure of financial authorities in the Government of Canada, would not be sufficient. There would probably have to be a number of different legislative amendments made in order to give effect to that delegation of authority to spend.

Mr. Claude Bachand: Could it be done by rules?

VAdm Bruce Donaldson: What we are approaching is a solution that is a combination of internal procedures—that is, connecting the grievance process and the decision-making in the grievance process with the resources that are available to analyze the implications of committing the money if the chief says to go ahead and do it. It's very important, if the chief is committing the Government of Canada to spending, that we know exactly what the commitment is. That is a procedural aspect.

At the same time, the chief does not have financial authority for these issues, so in essence the default position is to treat them as a claim against the crown, but the test for a claim against the crown is very different from the test for the redress of a grievance, and it is that inconsistency of approach that is frustrating the procedural solution.

I believe that a regulatory solution with Treasury Board to supplement the procedural solution gives us the best chance of a way ahead, and that is what we are pursuing, but as I say, having started last summer, I am surprised at how challenging this issue is. Still, I believe that in the next few months we will have at least a trial of a solution that we can put into place.

[*Translation*]

The Chair: Thank you. I now give the floor to Mr. Harris.

[*English*]

Mr. Jack Harris (St. John's East, NDP): Thank you, Mr. Chair, and thank you, Vice-Admiral Donaldson, Colonel Grubb, and Colonel Gauthier, for joining us today.

This is a most interesting piece of legislation. A lot of complex issues are before us, some having to do with the relationship between the CDS and members of the forces. I think in the case of the grievances in particular, we were given a few very passionate ideas about the relationship between the CDS and the members of the forces. These ideas came from ex-military people with a great deal of respect for their lives in the military and the military commitment.

We've had very outstanding chiefs of defence staff in our forces. The relationship seems to be important for the purposes of morale and leadership. There's almost an attempt to achieve a personal relationship, if you will, as part of the function of leadership. I think you would agree with that; I see your head nodding. I think that's desirable. It was suggested that in that context it was unwise to have the CDS delegate that authority for something like grievances, for example.

Maybe Colonel Gauthier or either of you could answer this. Would it not make sense to retain the right to settle grievances in the Chief of the Defence Staff as the final authority, recognizing of course that even in your role as a delegate, you would consult with him and that perhaps even the decision would be made by him? Couldn't the final authority still be retained with the CDS? It's been suggested, although not by any witnesses in this committee, that maybe the CDS doesn't want that responsibility, either for financial aspects or for final authority.

Is there any sense of that in your organization?

● (1605)

VAdm Bruce Donaldson: Mr. Harris, the chief takes deeply personally his relationship with the members of the Canadian Forces and deeply personally their sense that they're being fairly treated. The issue in terms of delegation of final authority is not to sever or to adjust that relationship. It is, in fact, to establish a set of reasonable conditions within which final authority decisions can be made.

We have quite a lot of history. There are many grievances that manifest themselves with different people. The issue is that if the chief acted as the final authority for every grievance, he would spend more than a third of his time as Chief of the Defence Staff working on those issues.

He needs support. The key is to make it clear what his criteria are, what his views are, and to meet regularly to understand the grievances under consideration and to select those that he feels he needs personally to become involved with, either because of their complexity, because of the precedent they may establish, or because of the key leadership issues that are involved.

May I turn to Colonel Gauthier to add anything to that, Mr. Chair?

Col Alain Gauthier: On average, there are about 250 grievances that reach the final authority level. Most of those grievances are more complex, because they were not able to be resolved at the initial authority level.

Some of those grievances have boxes of documentation, and because the final authority needs to act as an administrative tribunal, it needs to review all the documentation that is in front of it. I would add that acting as a final authority on behalf of the CDS, where about 60% of the grievances reach final authority, I spend three-quarters of my time on a yearly basis rendering decisions.

This cannot be taken lightly; it cannot be taken by reading a synopsis of a case. You need to look at the whole thing. You need to look at the disclosure and the remarks from the member. It's a long and arduous process to be fair to the member.

Mr. Jack Harris: In connection with the authority of the Chief of the Defence Staff to decide financial matters, I'm going to propose an amendment later on in the hearings of this committee to suggest that the clause that gives the Chief of the Defence Staff the final authority in the grievance process be amended to say that the chief shall have the authority to decide on all matters relating to a grievance, including financial matters, which would allow the Chief of the Defence Staff at least to say, "I believe this person is entitled to *x* dollars."

How you actually get that money out of Treasury Board or out of your budget and into the hands of the person may be a technical matter. It seems to me that if that authority at least is given to the CDS, that would assist you in finding a way to get the money that the griever is entitled to into his hands. Is that something you think may help?

VAdm Bruce Donaldson: Mr. Harris, the chief has that authority now. In fact, he has the authority to hear all grievances and to render a decision as final authority. That includes financial matters, and he does. He renders a view of entitlement in terms of redress. The challenge is not so much rendering the view; it is finding the mechanism to actually commit the money to redress the grievance. It is not so much the chief's authority to make a finding; it is the government's ability and structure to empower the chief to cause that finding to be implemented.

Mr. Jack Harris: I won't get into the argument over the drafting, but we understand that the RCMP commissioner has similar authority to settle a grievance, and that's the mechanism that's used to give that authority.

● (1610)

VAdm Bruce Donaldson: I believe the commissioner is an accounting officer, sir, which is a different arrangement than the chief has.

Mr. Jack Harris: Maybe that can be handled in another forum.

We've received some pretty strong representations from the Military Police Complaints Commission. Perhaps you've seen them. I'm sure Colonel Grubb has seen them. Its about the authority given to you, sir—not you personally, but your office—to issue specific instructions on individual cases. I'm referring here to the provisions in proposed subsection 18.5(3).

VAdm Bruce Donaldson: I understand the ones you are referring to.

Mr. Jack Harris: I don't mean the general instructions—there is no objection to those—but the specific instructions. They are unnecessary, because the chain of command permits that to happen for operational reasons, as you've suggested, but it is inconsistent with the independence of police authority to put that in legislation. They've backed up that position with a significant legal argument, plus a legal opinion from an academic authority.

Have you considered that position? Do you think it is necessary to have a specific provision of that nature? Is there legitimacy to that concern about the independence of the MPCC or the provost marshal?

The Chair: Please give a short answer, Admiral.

VAdm Bruce Donaldson: I'm not sure it's possible, Mr. Chair, to answer that question shortly, but let me offer a couple of thoughts.

First of all, this is a different business. Colonel Grubb and the provost marshal have the unenviable task of operating a world-class police force in incredibly changing and challenging environments. In that regard, the imperatives of conducting an investigation, the expectations of Canadians, and perhaps even the responsibilities of a provost marshal may come into conflict with some of the other priorities the Government of Canada has established for its fighting force.

One example would be conducting a forensic investigation in a battle scene. It goes without saying that we wouldn't send a whole bunch of military police into a live fire zone and put them at risk, but there may be a desire to send a bunch of military police into an area that will soon become a live fire zone, and there may be a requirement to balance some of that off.

I cannot really foresee very many circumstances in which I would make use of this provision, Mr. Harris. It makes me a little uncomfortable, because I value quite highly the independence of the provost marshal. In fact, I depend upon it.

Having said that, I could foresee, potentially, occasions when the provost marshal may wish for me to provide instructions to guide the course of an investigation in a complex scenario, because he may feel conflicted. He may seek that type of guidance. A provision in the bill would allow us to confront that quite openly and transparently and allow us to address that. I think that 10 or 15 years from now I would not want to be a vice-chief wishing that we had some way of dealing with the situation. Having it in the bill gives us that option, even if we never exercise it.

[*Translation*]

The Chair: Thank you.

[*English*]

Thank you very much.

Now I will give the floor to Ms. Gallant.

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

Admiral, there's been significant discussion in this committee relating to the fairness of a summary trial process, although all witnesses have acknowledged the importance of the process.

In the course of those discussions, it's been suggested by some witnesses that Bill C-41 could be used as a vehicle to amend the NDA to eliminate the punishment of detention as a possibility at summary trial and remove any possibility that an offender convicted at summary trial would acquire a record under the Criminal Records Act.

Recognizing that, do you not currently have policy responsibility in the military justice area? I also note that you're the only representative in the chain of command to have appeared before us in the study of this bill. I'm wondering if you have any general comments or thoughts that you could share with us in this regard.

VAdm Bruce Donaldson: Thank you for the question.

First of all, I would say that to contemplate significant changes to available punishments in the summary trial process should be looked at very carefully and taken very seriously. My thoughts today, I would say, would be an incomplete view of those contemplated changes.

In terms of eliminating detention, detention by its nature is a rehabilitative sentence. In my experience—and I have some reasonable experience administering justice in the Canadian Forces—it is an extremely useful behaviour correction method. It is also a particularly effective deterrent to young men and women whose most precious commodity these days is their free time. Given the interests of the summary trial system—the importance of swift administration of justice while effectively maintaining morale and discipline in the unit—I consider detention to be a very important tool. Although it is a fairly serious tool for a summary trial process, I consider it to be entirely appropriate for what it is we're trying to achieve.

I would also say that if you took a poll of the men and woman affected by the summary trial process, they would be very uncomfortable if we did not have such a process. I think that for the minor charges that are dealt with by summary trial, it very much serves the interests of justice and fairness and swiftness that our men and women are looking for.

I would also say that the removal of detention as a sentence would concern the men and women of the Canadian Forces because they would feel that administration of justice would perhaps not be sufficient to maintain discipline and morale and to act as a deterrent effect within a unit for behaviours that everyone would like to correct.

Does that answer your question?

● (1615)

Mrs. Cheryl Gallant: Well, it half answers the question. The other part of the question was whether you would agree that we should be removing any possibility that the offender convicted at summary trial would acquire a record under the Criminal Records Act.

VAdm Bruce Donaldson: It seems to me that our summary trial process is enforcing the laws of Canada as they apply to the members of the Canadian Forces, and in those circumstances in which you would acquire a record for an offence under the laws of Canada, I see no reason that you would not acquire a record for having broken similar laws as a member of the Canadian Forces. Having a record merely allows for it to be understood that you have engaged in sanctionable behaviour in the past.

I'm not an expert in this regard, but those are my thoughts.

Mrs. Cheryl Gallant: You indicated in your opening remarks that granting the CDS a much broader authority to delegate his power as a final authority in the grievance power will enhance the efficiency of the grievance system. Could you expand on this, and also address the criticism to the effect that the exercise of this delegation authority would be an abdication of the CDS's responsibility?

VAdm Bruce Donaldson: Well, I've spoken about how I feel that it's not an abdication at all. I've spoken about the principle of delegation that we apply in many other respects that affect the lives and safety of men and women in uniform, and that in fact it enhances the safety of those men and women to empower leaders to make the right decisions in the right way at the right time. I feel that in the same vein the Chief of the Defence Staff's delegating of some of his responsibilities and authorities as final authority in the grievance process will in no way detract from his accountability or responsibility at the end of the day or from the efficacy of the system.

We balance, with the grievance system, two very challenging objectives. One is the objective of time limits. We have done a lot of work and we have made a lot of changes to allow us to address grievances faster than we have in the past. Frankly, we haven't done well historically, but we're doing much better. We still have work to do, and we hope the trial of the principled process will help us do that.

On the other hand, one of the reasons it takes so long is that we are focused on fairness—making sure that we thoroughly understand the grievance, thoroughly understand the issues involved, understand the precedents that have been set, understand the latitude that is available to the final authority, and are able to render a decision that meets the expectations of full consideration and a fair treatment of the grievance. That takes time. In fact, as we've heard, grievances that get to the final authority can be immensely complex and involve a number of different important principles that need to be reconciled.

So on one hand we have the requirement for timeliness and on the other the requirement for fairness and thoroughness, and it is by the chief's ability to delegate some of his decision-making that we're able to do both: we're able to be thorough and to address the issues in the detail required and manage the complexity, and yet still render a decision in an acceptable timeline. This is why we're pursuing that course of action.

● (1620)

The Chair: *Merci.* Thank you, Admiral.

Merci, Ms. Gallant.

Now I will give the floor to Mr. Hawn.

Hon. Laurie Hawn (Edmonton Centre, CPC): Thank you, Mr. Chair, and again thank you to the witnesses for being here.

I just want to wrap up—in my view, at least—some of this discussion about the CDS and his authority and responsibility and so on. As you said, Admiral, the CDS does render his view on financial commitments; he just doesn't have the authority to write the cheque. Just to be clear—you alluded to this—the CDS is not an accounting officer; the deputy minister is an accounting officer. This marks a differentiation from the RCMP. The commissioner of the RCMP is in fact at a deputy level and therefore is an accounting officer. We can't just say that since the RCMP does it, the CDS can do it.

Is that a fair summary of the CDS's authority in that area?

VAdm Bruce Donaldson: Yes, it is.

Hon. Laurie Hawn: Okay.

VAdm Bruce Donaldson: There may be other technical and legislative differences that come into play as well, but in a nutshell, I think you've summarized it.

Hon. Laurie Hawn: With respect to detention, I have to say that the use of detention in my view is essential. I've used it. Most times I didn't have to use it. Most times, if somebody was getting uppity on the squadron, a simple visit with the squadron chief taking him down to Edmonton to take the tour was enough to deter anybody from further misbehaviour. I agree that detention or the threat of detention is a very important element of that system.

On the grievance system a little bit, we have about 700 grievances a year—is that the right number?—about 250 of which reach the CDS for final authority. Now that's 700 grievances out of a population of about 90,000 who are eligible to grieve.

VAdm Bruce Donaldson: That is 90,000 uniformed, yes.

Hon. Laurie Hawn: Exactly. I would take that as a sign of faith in the system that people feel they can grieve, because there will be some resolution of grievance, and as you've pointed out, Admiral, we haven't done all that well in the past but are doing much better now. I would almost take that as an encouraging sign that people have faith that their grievance will in fact be resolved in some measure.

I suppose, Colonel Gauthier, you would be the most closely associated with that. Would you agree?

Col Alain Gauthier: Yes.

Hon. Laurie Hawn: Again talking about courts martial and summary trial, we have about 65 courts martial a year and about 2,000 summary trials a year. I think that's the number we've seen. It's in that ballpark. The fact that so many opt for summary trial, I would suggest, with your disagreement or agreement, is an indication that members have faith in the summary trial system. They opt for it because they have faith that the commanding officer or whoever is hearing it will treat them fairly.

VAdm Bruce Donaldson: I completely agree. In fact, in my experience folks are much happier with the summary trial process because, for the types of things we charge people for, people just want to get it over with. They want justice to be done; they want to get their opportunity to defend themselves; they have, in my experience, great confidence in the summary trial process. They have recourse in those instances in which they feel they have not been dealt with appropriately. It allows us to administer justice in a way that is consistent with the environment within which we find ourselves on an ongoing basis.

● (1625)

Hon. Laurie Hawn: Colonel Grubb, we talked about the balance of maintaining the investigative independence of the Canadian Forces provost marshal and the responsibility of the chain of command to act. The admiral addressed that, and it can be a delicate balance from time to time. I know you're liable to say yes because you're a loyal soldier, but I'm asking you to forget the loyal soldier part.

VAdm Bruce Donaldson: Actually, he hardly ever says yes to me. He has taken this independence thing way too far.

Hon. Laurie Hawn: When are you due to retire? Never mind.

Do you feel, as the Canadian Forces provost marshal, that the balance that has been struck is in fact effective and allows you to have that independence of investigative authority and yet still operate within the chain of command?

Col Timothy Grubb (Canadian Forces Provost Marshal, Department of National Defence): Yes, sir, absolutely. I think if I were just to take the legislation as written, without the safeguards that are present, I would have a lot more concern, but due to the transparency clauses that exist—the interference complaint process under part IV of the NDA—those types of safeguards certainly make it more robust. It allows me to make sure that there is an avenue of approach, should there be a conflict.

Hon. Laurie Hawn: That just twigs me to a final question, Mr. Chair, to Vice-Admiral Donaldson.

The fact that things are covered in Bill C-41 and that there may appear to be some things missing out of it that may be covered, in fact, in the National Defence Act would ameliorate or would fill the gap that might be apparent in Bill C-41 in some areas. Is that a...?

VAdm Bruce Donaldson: Absolutely, and in fact recourse to the Military Police Complaints Commission is one. It's why we established the commission: to make sure that in matters that affect the military police, if we don't think they're right or if someone doesn't think they're right, there is a recourse.

[*Translation*]

The Chair: I now give the floor to Mr. Bachand; he will be the last committee member to speak.

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

Vice-Admiral, with the Grievance Board becoming the Military Grievances External Review Committee, is it just a name change? Will the composition of the committee be the same? Will the committee's mandate and responsibilities remain the same? In other words, is this just a cosmetic change, or does it go deeper?

[*English*]

VAdm Bruce Donaldson: I think it is the evolution of the committee, and it is determining how best to conduct its business, which has already taken place. We're trying to catch up with the intent of the committee by changing the name.

You may say that it is a somewhat cosmetic change in Bill C-41, but I think it reflects the maturity of the Canadian Forces Grievance Board by making clear that it's not part of the Canadian Forces, but an external review board that we rely upon to give us impartial advice.

[*Translation*]

Mr. Claude Bachand: Okay, but all the committee members are military people. So the mandate and responsibilities will stay the same. We are just changing the name of the committee, but it has the same composition and the same mandate. If that is the case, just say so; it's no problem.

[*English*]

VAdm Bruce Donaldson: The current membership will not change as a result of the change in names. They are not members of the Canadian Forces. Many of them are retired members of the Canadian Forces, or perhaps all of them are retired members of the Canadian Forces. I think the grievance board will have to decide the types of people that they're pursuing to help with the work that they're doing.

I wouldn't want to comment on an appropriate makeup of that board, because I think that's the purview of the board itself, but I will say that given the types of questions they consider, I don't believe that a detailed understanding of the Canadian Forces, as Mr. Dryden pointed out at the beginning of his comments, and an understanding of the environment is a disadvantage for the members of that board.

[*Translation*]

Mr. Claude Bachand: I have one last question about military judges filing grievances and having them finally resolved by the chief of the defence staff. It seems to me that this compromises judicial restraint a little. I feel that judicial independence must be protected. Do you feel that it could be dangerous for a judge to file a grievance and have it come down to the chief of defence staff to resolve it?

Do you see judicial independence compromised by that?

● (1630)

[*English*]

VAdm Bruce Donaldson: No, I do not. We're not talking about grievances that pertain to the role of the judge or the decisions rendered by a judge. These are grievances like those of any other member of the Canadian Forces, so I think we have partitioned very well the independence of military judges. To say that because a military judge is in a position of independence, any aspect of administrative concern should be treated differently than other members of the Canadian Forces because, perhaps, the Chief of the Defence Staff may use that grievance as leverage over a judge in conducting his or her business I think calls to question the fundamental motivation of a Chief of the Defence Staff towards the grievance system. The chief must be motivated towards the benefit of the members of the Canadian Forces and the health of the institution as a whole. The resolution of grievances is a leadership function.

If a military judge, in a matter that has nothing to do with judicial responsibilities, pursues a grievance to the final authority with the Chief of the Defence Staff—for example, a sale of a house or a move, where he or she felt that administratively they weren't treated the way they should have been treated—I don't see how treating that grievance somehow differently because the person is a military judge benefits the Canadian Forces at all. In fact, I think it calls into question the whole principle of the chain of command and the Chief of the Defence Staff being responsible for the welfare and the well-being of every single member of the Canadian Forces and of the institution as a whole.

Does that answer your question, sir?

Mr. Claude Bachand: Yes. I don't agree, but it answers my question.

[*Translation*]

The Chair: Thank you, Mr. Bachand.

Thank you, Vice-Admiral Donaldson, Colonel Grubb and Colonel Gauthier.

We are going to suspend our proceedings for a few minutes. Then we will move to the clause-by-clause study of Bill C-41.

● _____ (Pause) _____ ●

● (1640)

The Chair: Good afternoon, everyone.

We now continue the 51st meeting of the Standing Committee on National Defence.

[*English*]

You have two budgets in front of you. We want to be able to reimburse the witnesses who were before us when we did our study on search and rescue and the other study on Bill C-41.

The first budget I want to have the committee approve is in relation to our study on search and rescue response times. The proposed budget is in the amount of $35,500. I'm asking the committee to adopt this budget in the amount of $35,500 to reimburse witnesses.

Do we have agreement?

Some hon. members: Agreed.

The Chair: Thanks.

The second budget is in relation to Bill C-41, An Act to amend the National Defence Act and to make consequential amendments to other Acts. The proposed budget is in the amount of $11,650.

I'm asking that this budget be adopted by the committee, in the amount of $11,650.

Do we have agreement?

Some hon. members: Agreed.

The Chair: This budget has also been approved. *Merci*.

Now we'll go to clause-by-clause consideration.

Oui, monsieur Bachand, vous avez la parole.

[*Translation*]

Mr. Claude Bachand: Mr. Chair, I just wanted to say that I really appreciated Admiral Donaldson's testimony. Personally, I would have liked another hour with those witnesses because some of their views could affect the kinds of amendments I want to propose. But we are short of time. I actually saw that coming, as I already said that I wished we could have had a little more time with the witnesses.

This is typical. They answered questions very well, and we now have to debate amendments that we no longer have the time to thoroughly discuss. I see that as an obstacle to the way we work. I just wanted that noted.

The Chair: Thank you. Duly noted.

Pursuant to Standing Order 75(1), consideration of clause 1 is postponed until the very end. The chair moves to clause 2. We have an amendment from the Bloc Québécois, BQ-1.

(Clause 2)

The Chair: You have the floor, Mr. Bachand.

● (1645)

Mr. Claude Bachand: Mr. Chair, this boils down to saying that we want to do away with reserve force judges. Let me explain our reasons a little.

We see that there are four full-time judges for the 65 cases before courts martial at the moment. That is not a lot of cases per judge. It is all very well for people to try to explain that it is to give a little more flexibility, but we see it as needlessly creating extra positions, especially given that these are reserve force judges.

So the Bloc Québécois would like to dispense with this addition of part-time, reserve force judges. We feel that four full-time judges are sufficient to be able to handle 65 court martial cases.

The Chair: Thank you, Mr. Bachand.

Mr. Hawn.

[*English*]

Hon. Laurie Hawn: Mr. Chair, we can't agree to that. This is simply a matter of providing some flexibility. There are things that go on, as in Afghanistan—and who knows what is going to go on in places such as Libya or wherever—in which the Canadian Forces might need that flexibility. You have judges who also take leave or get sick, and there are many other reasons that some people may not be available for duty. This simply gives the Canadian Forces the flexibility to hire part-time judges—people who are qualified—to do that duty. To take away that flexibility could jeopardize the timely and effective application of military justice.

It's not a financial burden on the CF. It simply gives them the authority, with properly qualified people—and these are all properly qualified people—to act in that capacity, so we cannot support that amendment.

[*Translation*]

The Chair: Thank you.

Mr. Harris.

[*English*]

Mr. Jack Harris: Perhaps Colonel Gleeson can help us here. Are these part-time positions, paid as used? Is that the way it works? Are they on reserve, like a supernumerary of some sort?

Col Patrick K. Gleeson (Deputy Judge Advocate General, Military Justice and Administrative Law, Department of National Defence): That's exactly correct, Mr. Harris. It would be very analogous to a supernumerary type of program. When the judge was called out by the chief military judge for duty to perform a judicial function or to do judicial training, he would be paid for that function, and when he is not performing those duties, he would not be getting paid.

Mr. Jack Harris: Are these retired judges, or could they be serving in another capacity?

Col Patrick K. Gleeson: There would be some restrictions on what other work they could do, but they would be individuals who could perform other functions. I'm just looking for the clause.

It's at page 18 of the bill. If you look at page 18 at proposed section 165.22, you will see that there is a list of four categories of individuals who could be placed on this panel.

I think there was some information put before the committee earlier that was incorrect. It suggested that the only people who would be qualified to perform this function would be retired military judges. That's one of the classes of people who could do it, but if you look at proposed paragraph 165.22(c), there is an “or” there; it's a disjunctive list.

Starting from the top, “a barrister or advocate of at least 10 years' standing at the bar” could do this; anybody who “has been a military judge” could do this; anyone who had “presided at a Standing Court Martial or a Special General Court Martial” could do this; or anybody who “has been a judge advocate at a court martial” could do it. Those categories in proposed paragraphs (c) and (d) are fairly technical, to reflect some unique status of individuals prior to 1995 with respect to how we appointed military judges at that time, but essentially, under proposed paragraph 165.22(a), any person who “is a barrister or advocate of at least 10 years’ standing at the bar of a province” could do this, as long as they're a member of the reserve forces and they're an officer in the Canadian Forces.

Mr. Jack Harris: And they're not paid a stipend except when they're on duty?

Col Patrick K. Gleeson: When they perform their duties, it would be all set out through the compensation scheme as to how they would be paid, but no, they would not be paid on a full-time basis to do part-time work. As was pointed out, the objective here is to provide flexibility if there were to be a significant mobilization of the force.

It's particularly important from a policy perspective for you to understand that in this bil we arel introducing tenure until retirement for military judges, so if we were to respond to a mobilization type of situation and were required to move from four to twenty military judges, that might be a situation that existed for a five-year period; if we appointed 16 more military judges, when the force demobilized, those 16 military judges would be there on a full-time basis until they reached retirement age, pursuant to what this legislation does.

This also just provides general flexibility in the day-to-day operation of the chief military judge's office. Four people, while there are not a lot of courts, are also not many judges, and if somebody is sick or whatever, it is challenging for the chief judge to balance his pool of judges.

● (1650)

[*Translation*]

The Chair: Thank you.

[*English*]

Thank you.

I just want to inform the member that, as you know, we have with us for our clause-by-clause consideration,

[*Translation*]

Colonel Patrick K. Gleeson, Deputy Judge Advocate General, Military Justice and Administrative Law; Lieutenant-Colonel Michael R. Gibson, Director, Strategic Legal Analysis; and Lieutenant-Colonel André Dufour, Director, Directorate of Law, Military Personnel. Thank you for being here with us and helping us with our work.

I would also like to tell members of the committee that the law clerk has suggested to the chair that Bloc Québécois amendments BQ-1, BQ-8, BQ-9, BQ-10 and BQ-11 be grouped. It is better for the committee to discuss these amendments and then proceed to vote on them all together.

Mr. Bachand, the floor is yours.

Mr. Claude Bachand: Did you just read out the lottery numbers?

The Chair: They are your amendments.

Mr. Claude Bachand: That is what I have just found out. What can I say? I have to read them through.

Can I ask for a suspension? I have to look at this more closely, because I am being told that five or six of my amendments are being grouped together.

Can we suspend, Mr. Chair?

The Chair: Yes, you can.

Mr. Claude Bachand: Can we suspend the meeting?

The Chair: We are suspending the meeting for two or three minutes.

Mr. Claude Bachand: It will take me more than two or three minutes. I have to re-read all those various amendments.

Could you tell me those lottery numbers again?

A voice: Ah, ah!

The Chair: The number is on the right, the top right. The numbers are BQ-8, BQ-9, BQ-10 and BQ-11, all going with BQ-1.

Mr. Claude Bachand: So, I win them all or I lose them all. It really is like the lottery.

The Chair: No. You have arguments for us, Mr. Bachand. Then the committee will decide how persuasive your arguments are.

Mr. Claude Bachand: Okay. So can I ask the committee to give me 10 minutes so that I can look at this?

The Chair: Okay, we are going to suspend the meeting for…

Mr. Claude Bachand: I would be just as generous towards my colleagues if they were in the same situation.

The Chair: Mr. Hawn.

[*English*]

Hon. Laurie Hawn: Is the reason we're grouping those because they're consequential?

Yes, the government has the same comment we have; these are clearly consequential.

Mr. Jack Harris: Maybe Mr. Hawn can figure out what the consequences are. Is the legislative clerk around? Okay, maybe he can discuss it with the clerk and figure it all out. Let him decide that.

The Chair: Do you want to have a—

[*Translation*]

Could you answer his question? Is it because these are consequential amendments?

Mr. Claude Bachand: I will check with the clerk.

The Chair: The meeting is suspended for five or six minutes.

● _____ (Pause) _____

●

● (1700)

The Chair: We will now reconvene.

I would like to confirm that we are looking at clause 2. The Bloc Québécois is proposing amendment BQ-1, which affects amendments BQ-8, BQ-9, BQ-10 and BQ-11. So, when we go to vote on that amendment, all the amendments will be taken into consideration.

I am giving the floor to Mr. Bachand.

Mr. Claude Bachand: First, Mr. Chair, I think that, instead of saying that there is an impact on a group, we should say that there is a correlation. That is the first thing.

Secondly, we would like to hold a vote on amendment BQ-8 because BQ-1 is simply a definition. Amendment BQ-8 is the principle we are fundamentally defending.

So, if you agree with what I am proposing, I would like us to deal with amendment BQ-1 first, and then amendment BQ-8. We won't deal with it automatically. If amendment BQ-8 is rejected, we will support the rejection of the rest of the amendments.

Does the procedural clerk agree with my interpretation?

The Chair: Mr. Hawn.

[*English*]

Hon. Laurie Hawn: Yes, I think that's fair. I'll just say that if we are going to make determinations of consequentiality, or whatever the right word is, could we have a little bit of an explanation as to why that is?

[*Translation*]

Ms. Lucie Tardif-Carpentier (Procedural Clerk): Basically, amendment BQ-8 removes the concept that military judges can be from the reserve force. Then, in amendment BQ-1, we are removing the same concept in the definition. In amendments BQ-9, BQ-10 and BQ-11, we are removing the reference to the reserve force military judge. That is why it is correlative.

[*English*]

Hon. Laurie Hawn: I understand.

[*Translation*]

The Chair: So, Mr. Bachand's proposal is that we discuss amendment BQ-8 immediately.

Mr. Claude Bachand: Yes, that is another way of doing it.

We can deal with amendment BQ-1 without dealing with the others. When we come to amendment BQ-8, if we deal with it, we will be dealing with the others.

The Chair: Perfect. Amendment BQ-1…

Mr. Claude Bachand: I would like to mention one last thing, Mr. Chair.

I have here in the department's summary and explanations: Given, however, that these judges would have security of tenure until their retirement, it would not be desirable for the Canadian Forces to have too many full-time military judges in relation to the number of cases that are usually heard by court martials.

So, in other words, instead of resolving the problem with full-time judges, we want to resolve it by bringing in part-time judges that we can get rid of more easily. That is the department's argument. That is why I maintain that, if we want to resolve the problem and if we do not have enough judges, make them part-time and then use those part-time judges, telling them that we no longer have any responsibilities toward them.

The Chair: Mr. Hawn.

[*English*]

Hon. Laurie Hawn: I would ask a question of Colonel Gleeson. In normal circumstances, without any operations like Afghanistan or things that might come along, is having four full-time judges sufficient?

● (1705)

Col Patrick K. Gleeson: I think that if you spoke to the chief military judge, you would find that he certainly seems to be comfortable with the complement of judges that he has right now.

If I could just clarify, though, the intent isn't to get rid of these reserve military panel judges. They would be appointed and have security tenure in the same way a full-time judge would have that tenure, the difference being that unlike the full-time judges, as in the civilian court structure, they aren't paid on a full-time basis. They would continue to hold that position until they reached retirement age, but the chief military judge would decide when he wanted to, for lack of a better term, call them out for service to perform a judicial function. It's just a means of providing a greater pool of individuals available to the chief military judge.

As I said, the extreme example is the mobilization example I talked about earlier, but there are many more practical day-to-day examples of how this could arise. For example, if you ended up with a case with six co-accused who were all being tried separately, having four judges would create a significant problem. We haven't faced that problem to date in our system, but six co-accused with four judges would create a significant problem for the chief military judge as he tried to find a judge who was not conflicted, based on something he'd done earlier. This panel would give him a pool of other people he could go to in order to resolve that type of situation.

It really is not intended to in any way undermine the tenure or judicial independence of this pool of, for lack of a better term, part-time individuals. They would remain in their positions; once appointed, they would remain there. It really would be up to the chief military judge as to how he chose to employ them, and when he employed them, of course, they would be paid for those services.

That's the intent here.

The Chair: Thank you.

Go ahead, Mr. Hawn.

Hon. Laurie Hawn: Just so I'm crystal clear, once they're appointed, those reserve judge panel members are there until retirement. They're just not going to be collecting—

Col Patrick K. Gleeson: They would be there until the prescribed retirement age for members on that panel.

Hon. Laurie Hawn: They won't be paid unless they're on duty, and they'll be on duty as required.

Col Patrick K. Gleeson: That's right, unless, as Colonel Gibson has pointed out to me, they voluntarily wanted to withdraw from the panel and resign from their position, which any judge can do, of course.

The Chair: Thank you.

Go ahead, Mr. Harris.

Mr. Jack Harris: I just have a couple of technical questions, Colonel Gleeson.

In terms of this notion of reserve force military judges, are they reservists in the sense of how the military talks about the reserve? Is that in the same context?

Col Patrick K. Gleeson: Yes.

Mr. Jack Harris: That's of the reserve.

Col Patrick K. Gleeson: That's right, but they would not able to perform their reserve military duties anymore once they move to this panel.

Mr. Jack Harris: I think you've explained the second thing I wanted to ask. In terms of the independence of the judiciary, they have the same security of tenure in the sense of the rules that are now being implemented here. I'm concerned about assignment or appointment. Is that in the control of anyone other than the chief military judge? Is there no other interference with that? I'm the chief military judge and I can say that I need you; is nobody else deciding that?

Col Patrick K. Gleeson: The appointment of the panel would be the normal judicial appointment process. That would be a GIC appointment. Once they're on the panel, how those individuals are employed is at the discretion of the chief military judge. Nobody else gets to—

Mr. Jack Harris: Nobody else gets to decide. No administrative person is making these decisions.

Col Patrick K. Gleeson: They're part of a judging pool that is available, just like the full-time judges. Their judicial duties are assigned to them by the chief military judge.

Mr. Jack Harris: In addition to the issues such as perhaps a deployment with a lot of forces and a potential need for more judges, there can be situations of disability or short-term or medium-term disability. There could be a conflict. A judge can be conflicted because he was the commanding officer of somebody or had some relationship. There are various ways in which these four judges might not be available.

Col Patrick K. Gleeson: There are. As I said, we've been very lucky to date in the last ten years that we've not run into a serious problem. I think that if you talk to the chief military judge—and I certainly can't speak for him—you'll find that he's had some challenges in trying to balance the small pool of officers he has over there performing those functions.

Mr. Jack Harris: Is there a limitation on the number of people who can be added to the panel?

Col Patrick K. Gleeson: There is no limitation prescribed in the legislation for the panel. No, there's not.

[*Translation*]

The Chair: Thank you, Mr. Harris.

Mr. Bachand, you have the floor.

Mr. Claude Bachand: I am going back to Mr. Harris' first question. Are they reserve judges or judges from the reserve?

Col Patrick K. Gleeson: The judges are members of the reserve force.

Mr. Claude Bachand: They are from the reserve.

[*English*]

Col Patrick K. Gleeson: If you look at proposed subsection 165.22(1) on page 18 again, sir, you'll see that there is established a reserve forces military judges panel, to which the Governor in Council may name any officer of the reserve force who has been an officer for at least 10 years and who meets one of the four criteria there. He would have to have military experience.

● (1710)

[*Translation*]

Mr. Claude Bachand: I have another, very important question, Mr. Gleeson. Is there a provision that prevents double dipping?

What I mean is, could a regular judge decide to retire with full compensation, with his pension, and be paid as a judge on top of that?

Can you address this issue?

Col Patrick K. Gleeson: Not really. I am not an expert in double dipping.

[*English*]

Certainly, these individuals would be treated the same way as any other former member or reserve member of the Canadian Forces in performing those functions. They would not have any special treatment. I don't know, to be quite frank, what the rules are around reserve service.

I know that we have retired regular force members who do reserve force work. To my knowledge, they continue to collect their pensions.

Mr. Claude Bachand: Yes. That's what I call “double-dipping,” as a matter of fact.

Col Patrick K. Gleeson: Again, there's nothing in this scheme that would treat these individuals any differently from any other member of the reserve force. If that's the scheme that exists and is available, then it would be clearly available here.

I would point out, though, that just because you're a member of the reserve force doesn't mean that you're collecting the pension as a regular force member. There are a lot of members of the reserve force who have never served in the regular force. It's not a preconceived notion that you would be receiving a pension as a retired regular force officer.

Mr. Claude Bachand: It does happen.

Col Patrick K. Gleeson: Of course, it happens. I just don't know the parameters and the rules around it. I truly don't.

[*Translation*]

The Chair: Thank you.

Let's move on to the vote on amendment BQ-1 of the Bloc Québécois, as proposed by Mr. Bachand.

(Amendment negatived.)

The Chair: Now let's move on to the vote on clause 2.

(Clause 2 agreed to.)

The Chair: Now let's move on to the vote on clause 3, to which no amendment has been proposed.

(Clause 3 agreed to.)

The Chair: Before we move on to the vote on clause 4, I will give the floor to Mr. Bachand.

(Clause 4—*Appointment*)

The Chair: You proposed amendment BQ-2.

Mr. Claude Bachand: The purpose of amendment BQ-2 is to give independence to the Canadian Forces provost marshall. This was a request from the Military Police Complaints Commission, which asked about the independence of the provost marshall if clause 4 were to be left as it is.

That is why we want to delete lines 11 to 23 of clause 4, to ensure that the provost marshall's independence is maintained.

The Chair: Thank you, Mr. Bachand.

Mr. Hawn.

[*English*]

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

I think both the vice-chief and the provost marshal covered that pretty thoroughly. The effect of this would be to remove the vice-chief from that area where he balances the independence of the provost marshal and yet is still able to operate within the chain of command. Both the vice-chief and the Canadian Forces provost marshal addressed pretty clearly that it does not jeopardize the things you're concerned with, so we can't support that amendment.

[*Translation*]

The Chair: Mr. Bachand.

Mr. Claude Bachand: You will recall that I told Mr. Donaldson that I understood his point of view, but that I did not share it. So, I understand your point of view, Mr. Hawn, but I do not share it.

The Chair: Thank you.

Mr. Harris.

[*English*]

Mr. Jack Harris: I read quite thoroughly the views of the chief of the Military Police Complaints Commission. I listened to Vice-Admiral Donaldson and Colonel Grubb as well. The question really wasn't answered. Maybe the JAG could help us here.

The argument put forth by the Military Police Complaints Commission is that this was unnecessary because the relationship between the vice-chief of defence staff, whoever that may be, and the provost marshal was within the chain of command, and that this power actually existed, so it was unnecessary to put that in there. Now, there may be a transparency argument to say that it may exist, but this puts it on paper and formalizes it, and it also provides the transparency side, which I think is a useful argument.

I have a second concern or question regarding this matter. We have two sets of guidelines here. One is the general guidelines. The Military Police Complaints Commission gave us a copy of a 1998 general set of instructions—or authorities, I suppose you'd call it—signed by the then Chief of the Defence Staff and the provost marshal of the day. I think it's called the accountability framework. I don't know if it's current or not. Maybe you could tell us about that.

If we're going down this road of formalizing the role of the provost marshal and formalizing the right to make instructions, I would be inclined to consider this amendment if we add to proposed subsection 18.5(4) so that it reads: The Provost Marshal shall ensure that instructions and guidelines issued under subsection (3) and subsection (2) are available to the public.

There are two sets of guidelines here. One is the general guidelines, or the accountability framework, and the second is the specific guidelines. I see the problem and I see that there may be circumstances in which it isn't possible to conduct individual or particular types of investigations in the way that the provost marshal as an independent police force might want in terms of professional standards, but in the interests of transparency and civilian or public awareness of this important relationship, I would want the general instructions, such as the accountability framework itself, to be made public as well.

Would you care to comment on this proposal?

● (1715)

[*Translation*]

The Chair: Thank you.

[*English*]

Col Patrick K. Gleeson: Yes, Mr. Chair, I would be happy to do so, maybe starting at the end of that request first.

If you look at proposed subsection 18.5(2), you will note that there is already an obligation for the general instructions to be made public. There is an obligation under both the general instruction requirement at the end of proposed subsection18.5(2) and in proposed subsection 18.5(3) for instructions to be made public, so the transparency element is there.

To step back to the question about whether this is required, generally speaking I think I would agree with the view expressed: that clearly the chain of command has the ability to give instructions to subordinates, so a senior member in the chain of command has that legal authority. However, clearly the military police are in a special position. They have special responsibilities. As the vice-chief said earlier, he takes the notion of investigatorial or police independence very seriously, and it's very important that we recognize it and not improperly interfere with it.

Given that understanding, and in response to the recommendations made, we are actually framing in statute how that relationship should exist between the chain of command as represented by the VCDS and the provost marshal. As soon as you start framing that relationship in statute, it becomes necessary to articulate when and where that direction can be given.

If you were to include proposed subsection 18.5(2), which allows the issuance of general instructions, without the exceptional power that you see in proposed subsection 18.5(3), the only conclusion you could draw in the absence of proposed subsection 18.5(3) is that it's prohibited. You could never give that type of specific instruction.

So in response to your question and in response to the comments that the committee has seen in other material, I would suggest that it is in fact necessary because of what is being done in this bill.

● (1720)

[*Translation*]

The Chair: Thank you, Mr. Gleeson.

Mr. Bachand, it is your turn.

Mr. Claude Bachand: I would like to respond to Mr. Gleeson's arguments. The second paragraph indicates that the vice-chief of staff can establish guidelines or give general instructions. In the third paragraph, it also says that he establishes guidelines and gives instructions for an investigation in particular. We are no longer talking about general instructions.

I am not a judge or a lawyer, but I know the meaning of that expression. Justice is important in an institution like the Canadian Forces, but so is the appearance of justice. We have already seen cases where, considering that he had justice in his hands, the judge made his decision. There was an uproar of major concern, and public opinion was mobilized because the appearance of justice was absent.

To wrap up my argument, I think it is important that we leave all the provost marshall's responsibilities intact. From the moment a superior tries to establish guidelines or instructions, the appearance of justice no longer exists. To protect the principle of the appearance of justice, the Bloc Québécois presents this amendment.

The Chair: Thank you.

Mr. Hawn has the floor. Then it will be Mr. Harris.

[*English*]

Hon. Laurie Hawn: I understand Mr. Bachand's concerns, but that's exactly what it says, if you read proposed subsection 18.5(2): "The Vice Chief of the Defence Staff may issue general instructions or guidelines", and the last part of it says, "The Provost Marshal shall ensure that they are available to the public." Proposed subsection 18.5(3) says: "The Vice Chief of the Defence Staff may issue instructions or guidelines in writing in respect of a particular investigation." And proposed subsection 18.5(4) says: "The Provost Marshal shall ensure that instructions and guidelines issued under subsection (3) are available to the public."

So in both cases the provost marshal shall ensure that those are made available to the public. They aren't being treated differently; they're being treated exactly the same.

[*Translation*]

Mr. Claude Bachand: In my opinion, it is not because we make information available to the public that the appearance of justice is protected. Who is going to handle that? Who is going to start an outcry, who is going to alert the public because that person thinks a decision was rendered improperly? For me, it seems that a superior issues directives to the provost marshall, who administers justice to the Department of National Defence. I want to preserve the principle. It does not involve calling the public to witness all the decisions. That is not satisfactory.

The Chair: Thank you.

Mr. Harris.

[*English*]

Mr. Jack Harris: I just want to put my view on the record, having listened to Colonel Gleeson. I think it is important to understand that there is a principle of law, an interpretation, that if you give expression to one general power, it can exclude other powers, so if you say you can make general instructions, that could be interpreted to include that you're not allowed to make specific instructions. I think the Latin is *expressio unius est exclusio alterius*. I think that's what Colonel Gleeson was referring to when he talked about the fact that if you write one down, it means you've got to deal with the other one. so I accept that, even if clause 1 says the provost marshal acts under the general supervision of the vice-chief of defence staff in respect to responsibilities.

I think that if you start giving these general powers, you have to give the specific ones as well. I'm satisfied with the transparency contained in proposed subsections 18.5(2) and 18.5(4) in terms of satisfying the public interest.

The only quibble or reservation I may have is with proposed subsection 18.5(5), which allows the provost marshal to keep the instructions to himself. That isn't only in relation to the specific instructions, as I understand it. Perhaps, Colonel Gleeson, you can tell us some examples of when the best interests of justice would motivate the provost marshal not to make these instructions available.

Col Patrick K. Gleeson: Mr. Chair, yes, I'd be happy to take a quick moment and talk about that.

The first thing I would point out is that in proposed subsection 18.5(5), you'll note that it would not be for the instruction, or part of it, to be available to the public. It sends some instruction to the provost marshal that he can release part of the instructions if that would be appropriate.

The type of circumstance, I think, is one that arises in probably any police investigative situation. There may well be circumstances in which the police do not want to let an individual who is the subject of the investigation know the investigation is going on, or it could be witnesses. I'm not a police officer and I don't have a great deal of expertise in the nature of the work, but I do know that the police are often quite protective of the fact that they are pursuing an investigation, because to not ensure that this information is kept confidential actually jeopardizes their ability to pursue the investigation. I assume that it would be that type of assessment that the provost marshal would undertake in deciding whether or not to make the investigation or the direction public.

Again, that doesn't mean he can't make it public at a later date. The discretion is completely his as to what he does with that direction, subject to the test that he's got to be able to satisfy himself and anybody who may revisit that discretion that it was done in the best interests of the administration of justice.

● (1725)

Mr. Jack Harris: As you said earlier, he can complain about something that he thinks is unwarranted interference.

Col Patrick K. Gleeson: Yes, and that's an excellent point. If you go to the current part IV of the National Defence Act, specifically to section 250.19, it has a complaint mechanism there that, when it was introduced in 1998, was unique to the military. I don't think it's changed. I don't think there is any other police organization in this country that has a review body that looks at what are called interference complaints—which essentially recognizes, again, the unique nature of the military police working in a chain-of-command environment.

I know there's been some suggestion that this mechanism is not meaningful here, but, quite frankly, any authority can misuse a statutory authority. The mere fact that there's a statutory authority doesn't mean it's always proper. The test is “improper” interference that's out there, so that mechanism is there as well.

The Chair: Thank you, Colonel Gleeson.

[*Translation*]

We are now going to vote on the Bloc Québécois amendment.

(Amendment negatived.)

[*English*]

The Chair: Shall clause 4 carry?

(Clauses 4 and 5 agreed to)

(On clause 6)

[*Translation*]

The Chair: There is a Bloc Québécois amendment for clause 6.

Mr. Bachand.

Mr. Claude Bachand: I just raised this topic in posing the question to the vice-admiral. The opinion is that we are once again compromising legal independence by giving the vice-chief of staff the power to judge grievances submitted by military judges. In his report, Judge Lamer proposed a separation: he suggested that the grievances committee be able to render a decision in the grievances of judges, and not the vice-chief of staff.

So, the change we are proposing to the wording of clause 6 is aimed at reflecting the argument I just put forward.

The Chair: Thank you, Mr. Bachand.

With regard to your amendment, I have made a decision in consultation with the clerk. Bill C-41, which we are in the process of studying, amends the National Defence Act to clarify the delegation of the chief of the defence staff's powers and authority in the grievance process. More specifically, clause 6 states that the vice-chief of the defence staff will be the final authority in the grievance process. Your amendment proposes transferring the final authority to the grievances committee in the case of certain types of grievances, in other words, grievances submitted by the military judge. As *House of Commons Procedure and Practice* second edition states on page 766: "An amendment to a bill that was referred to committee after second reading is out of order if it is beyond the scope and principle of the bill." In the opinion of the Chair, after obtaining the much appreciated opinion of the procedural clerk, the transfer of final authority from the vice-chief of the defence staff to the grievances committee for certain types of grievances is contrary to the principle of Bill C-41 and is, therefore, out of order.

● (1730)

Mr. Claude Bachand: I do not want to appeal your ruling. I know that, sometimes, members are well-intentioned and want to resolve matters. It is now 5:30 p.m. Without appealing your very important and very articulate ruling, I would like to take it under advisement. You will understand that I just heard about this decision that, I am told, relies on extremely important facts and on jurisprudence that is probably extremely important. As we can all see, it is 5:30 p.m., which could allow me to… Especially since I think that you need to adjourn our work because the bells are starting to ring.

The Chair: Great.

Mr. Hawn.

[*English*]

Hon. Laurie Hawn: It is 5:30 and the bells are ringing, so, sure.

[*Translation*]

The Chair: We are going to suspend our work. We will see each other again Monday afternoon for a clause-by-clause discussion of Bill C-41.

Mr. Bachand, you will have the opportunity between now and then to consider my judicious decision.

And, so, I can now adjourn our meeting. Thank you.

The meeting is adjourned.

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