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Monday, March 7, 2011

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Chair

The Honourable Maxime Bernier

Standing Committee on National Defence

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• (1530)

[Translation]

The Chair (Hon. Maxime Bernier (Beauce, CPC)): Good afternoon and welcome to the 52nd meeting of the Standing Committee on National Defence. Pursuant to the order of reference of Monday, December 6, 2010, we are going to study Bill C-41, An Act to amend the National Defence Act and to make consequential amendments to other Acts.

We have here with us today Colonel Gleeson and Lieutenant-Colonel Gibson, who were also here last week.

[English]

Thank you for being with us. If we need you, it will be very useful for members.

(On clause 6)

[Translation]

The Chair: The Bloc Québécois has suggested that we amend clause 6. That's amendment BQ-3.1.

Mr. Bachand, the floor is yours. We are then going to move to amendment NDP-1, which also deals with clause 6.

Mr. Claude Bachand (Saint-Jean, BQ): Mr. Chair, I think you made a decision last time. Was it on amendment BQ-3?

The Chair: Yes, it was on the Bloc Québécois amendment.

Mr. Claude Bachand: Basically, it was out of order. Is that right?

The Chair: Yes, it was amendment BQ-3.

Mr. Claude Bachand: Okay.

What I have here and what I was asking about is your decision. It is the draft decision of the chair.

The Chair: Yes. The decision was made last time. The draft decision became the final ruling.

Mr. Claude Bachand: Okay.

So you read the draft decision and decided that it was the final decision.

The Chair: Yes.

Mr. Claude Bachand: Very well. I do not want to appeal your decision. To date, especially from a political standpoint, what I have seen in this bill is a mix of ideas dealing with the higher structure. It's about having more judges, more of this and that. In some ways, I don't see how we can save judicial independence. As I said, I am not questioning your decision, but I am a little disappointed that we

would agree to this type of judicial responsibility. It has actually been ruled out of order because, under the act, military judges and the Chief of the Defence Staff will have the final authority. In other words, the bill that was submitted to us deals with very specific issues that, in my view, do not go far enough. I wanted you to know that I accept your ruling, but I had to say that about amendment BQ-3.

I will now go to amendment BQ-3.1. My suggestion was to have the following wording: “final authority in the grievance process—except in the case of grievances submitted by a military judge—”, but given your decision, I suspect that we will have to withdraw it. However, there is still a principle set out in the amendment through the wording: “including for the settlement of financial claims, and shall”.

I am not sure how to proceed. Can we simply cross out the words “except in the case of grievances submitted by a military judge”?

• (1535)

The Chair: Yes.

Mr. Claude Bachand: We can do it?

[English]

The Chair: Mr. Harris.

Mr. Jack Harris (St. John's East, NDP): There's another amendment that has wording very similar to Mr. Bachand's. It's NDP-1. It does what Mr. Bachand suggests to do, without amending his amendment. I'll leave it to the committee, but my amendment also has specific wording that effectively adds the words “including financial matters”.

The Chair: Mr. Harris, we will deal with your amendment after BQ-3.1. I understand your point.

[Translation]

Mr. Claude Bachand: Do you agree with my removing the mention of a military judge from the clause?

The Chair: Yes. So amendment BQ-3.1 would read as follows: “final authority in the grievance process, including for the settlement of financial claims, and shall”.

Mr. Claude Bachand: But the point is for the Chief of the Defence Staff, who is the final decision-making authority, to have the proper legal instruments for settling claims. You must remember that this is what the ombudsman suggested when he came to testify before us.

The Chair: Thank you.

As to your amendment, even if we change the initial BQ-3.1 amendment based on the ruling of the chair, your amendment is still inadmissible, because it contravenes the terms of the royal recommendation.

To be more specific, I will say that “[s]ince an amendment may not infringe upon the financial initiative of the Crown”, this amendment is inadmissible because it “imposes a change on the public treasury...it extends the objects or purposes or relaxes the conditions and qualifications specified in the royal recommendation”.

Therefore, I am of the opinion that this amendment proposes a new mechanism that will change the terms of the royal recommendation. As a result, the motion is out of order.

Mr. Claude Bachand: Can I get a copy of your decision?

The Chair: Yes.

Mr. Claude Bachand: I believe poor Mr. Harris is headed down the same road as me.

The Chair: Yes.

Mr. Harris, would you like to introduce your amendment?

[*English*]

Mr. Jack Harris: Well, I may or I may not. We'll see.

I would like to point out to the committee and the chair that the issue of royal recommendation is one that really is not a matter for this committee. That's a matter for the House. Our job here is to look at the legislation, recommend changes, and make amendments here in committee. It may well be that the royal recommendation will be to include such a thing.

We've heard from witnesses from the government, just this last time from Vice-Admiral Donaldson, that this is exactly what the government wants to do. They want the Chief of the Defence Staff to be able to resolve these matters. They've simply been trying to find a mechanism to do that.

It seems to me that this committee's role is to make recommendations for amendments to the act that may assist in the performance of the duties, in this particular case, of the CDS in accordance with the desire and aspirations of the military themselves. So for us to refuse to make a recommendation that follows along with that, that may assist that cause.... Who is this committee to say that when this matter goes back before the House, if indeed a royal recommendation is required, that it won't be forthcoming? I think this committee should, as a committee, make this recommendation an amendment anyway, whether or not it's the view of the chair at this particular point that such a recommendation requires a royal recommendation.

It was suggested to us that it was difficult to amend this act to achieve that object. Well, if it can be done with a royal recommendation, then that's not the case at all. I would submit that it's up to this committee to make whatever amendments it wishes at this stage. I'm no expert in parliamentary procedure, but my understanding, from talking to the legislative people who helped draft this—my amendment, at least—was that it could be decided by this committee to forward it to the House and have a ruling made then. The royal recommendation is one that's open to change,

frankly, when it goes back to the House. We don't know what the royal recommendation is going to be, whether it's considered to be broad enough at this point to include this or not.

You have made your ruling on Mr. Bachand's.... Unless the committee wants to seek to overrule your ruling, to challenge your ruling...and it's up to Mr. Bachand to ask for that. But I believe that given the importance that's been given to this by witnesses, by the ombudsman himself, by the grievance board, and by the expression of frustration by Vice-Admiral Donaldson, who's charged with this responsibility, we as a committee should try to assist by recommending a change that could at least go some way, and hopefully be successful, in allowing the CDS to do what he wants to do, what we're told he wants to do, and thereby assist in the greater morale in the Canadian Forces and all of the positive things that were suggested here.

When the ombudsman, Colonel Daigle, comes here and says that the CDS can't give you \$2,000, but some captain in Afghanistan can pass out \$10,000 to a villager, based on whatever authority is given to them, it seems to me rather extraordinary that the royal recommendation rule would be used at committee stage to thwart a helpful recommendation to the House. If the minister decides not to provide a royal recommendation when the time comes, at report stage, well, then, let them say so.

I don't know if this committee chair is required to prevent the committee from bringing forth a recommendation to amend an act before we've been notified by the ministry or by the government that the royal recommendation would not be forthcoming.

• (1540)

My point is that's an objection that should be made by the government or the government House leader in the House, not by the chair—apparently to his own motion—here in the committee. That's my view on it, sir. I'll be prepared to listen to what other people have to say, but that's my view on it.

The Chair: *Merci.*

Mr. Hawn.

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

Our problem is that while we don't deny the desirability of getting to the solution, this is simplistic. It is in fact beyond the scope of the bill as written. It's not a solution that works, because the authority to disburse funds actually doesn't come from this act. It doesn't come from the National Defence Act. It comes from the Financial Accountability Act. If I recall Vice-Admiral Donaldson's remarks, he did want it to be solved, but he said the department was in the process of solving it and that he preferred to see it solved through that ongoing process.

For the same reason that amendments BQ-3 and BQ-3.1 were outside the scope of the bill, we believe that amendment NDP-1 is also outside the scope of the bill, and we would vote against it.

The Chair: Mr. Harris.

Mr. Jack Harris: I might have some sympathy for the comments of my colleague, Mr. Hawn, but this recommendation was made by Chief Justice Lamer in 2003—eight years ago. We're told they're working on it. Well, let's give them a hand here, folks.

In my amendment, all we're talking about is the authority to decide on all matters related to a grievance, including financial matters, so at least the decision is there. We're being told, frankly, that he has the power to give his views on it. I think that was the phrase used. Given the power of authority to decide, then maybe the person who has the authority to decide this question—and frankly, I haven't heard the ruling on my amendment yet, so I'm trying to make a pre-emptive argument here—will be motivated to write a cheque instead of going through some other process.

From what I see here, the problem is—and we have been told what happens here—that we have the Chief of Defence Staff as the final arbitrator of the grievance deciding whether something should be settled, and the only thing that can happen after that is they're sent off to some lawyers who decide whether or not it amounts to a claim against the crown. It's then decided on other issues that have nothing to do with the grievance process but have to do with whether or not a person would succeed under the law in getting this claim.

Of course, unbeknownst to them, they have no power to do that anyway, and they'd be going off to a lawyer on a fool's errand. I think this is an untenable situation for our military to be faced with. If all we're saying—and I'm talking about my amendment here now—is that the CDS has the power to decide all matters relating to a grievance, adding the words “including financial matters”, then the actual payment may come from somewhere else, but the decision at least will be there, and I don't think that requires an expenditure upon us.

• (1545)

The Chair: Mr. Harris, my understanding is that you're proposing your amendment, NDP-1. As I just said to Mr. Bachand, the ruling on your amendment is the same as the chair of the committee....

[Translation]

We all know that, under the regulations that govern parliamentary committees, we can accept neither this amendment nor that of the Bloc Québécois. This has to do with the terms specified in the royal recommendation.

That being said, and before proceeding with the vote on clause 6, I will turn the floor over to Mr. Hawn.

[English]

Mr. Jack Harris: I have a motion, sir.

I would like to move, notwithstanding the ruling of the chair, that this committee move amendment NDP-1 as an amendment to clause 6.

The Chair: Mr. Harris, the official way to do it is to appeal my decision and challenge the decision of the chair.

Mr. Jack Harris: Then I'll change my amendment to “challenge the decision of the chair” or “appeal the ruling of the chair and challenge the decision of the chair”.

The Chair: Mr. Hawn.

Hon. Laurie Hawn: Procedurally, but on a point of order, could we get some input or advice from our subject matter experts on Vice-Admiral Donaldson's comments and the process that is under way to try to resolve this through another—

Mr. Jack Harris: No. It's a matter of argument whether we should pass the motion, I think.

Hon. Laurie Hawn: But it's directly related to the motion and the advisability of passing it. I'm not sure you can do this anyway.

The Chair: I don't think we can debate that. We have a motion in front of us.

On a point of order, Mr. Wilfert.

Hon. Bryon Wilfert (Richmond Hill, Lib.): I wanted to get clarification from the chair as to what you were citing to make that ruling. What was it? I think it would be helpful if the members heard what it said.

The Chair: I have it in front of me in French right now.

[Translation]

On page 767 of the 2009 second edition of O'Brien and Bosc's *House of Commons Procedure and Practice*, we read the following: Financial Initiative of the Crown: Since an amendment may not infringe upon the financial initiative of the Crown, it is inadmissible if it imposes a charge on the public treasury, or if it extends the objects or purposes or relaxes the conditions and qualifications specified in the royal recommendation.

In short, this amendment infringes upon the financial initiative of the Crown and is, as a result, inadmissible.

[English]

We have in front of us....

[Translation]

Yes, Mr. Harris?

• (1550)

[English]

Mr. Jack Harris: I don't know if my motion needs to be seconded.

My position would be that it's for the House to decide, not the committee. Whether it actually imposes a financial obligation is a matter of interpretation, I suppose. The question as to whether it's inadmissible is really a question for the House to decide, not the committee. Through my appeal of your ruling, frankly, I would like to just move it to the House so that the House can determine this issue on its merits. As I say, if it does in fact turn out to require a royal recommendation, then perhaps one will be forthcoming by the time this gets to the House.

The Chair: Okay. Thank you.

Yes, Mrs. Gallant.

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): Chair, is it correct procedure to challenge the decision of the chair? We are masters of our own destiny, so to speak, in this committee.

The Chair: You're absolutely right. Right now Mr. Harris is challenging the decision of the chair. I want to give the floor to the clerk, because I'm in a conflict. We'll have a vote on that right now.

The Clerk of the Committee (Mr. Jean-François Lafleur): Thank you.

Mr. Harris, I get the idea of what you're saying. The way to resolve it, according to our practices, is to have the motion read as follows: that the chair's ruling be sustained. It is written in an affirmative way. Those who challenge the chair's ruling would vote against this motion.

Is it my understanding that you would like to overturn the chair's ruling?

Mr. Jack Harris: I would say to overturn the chair's ruling, as long as my making a motion that the chair's ruling be sustained does not preclude me from voting the other way.

The Clerk: Procedurally, that's the way to do it.

Mr. Jack Harris: That is unless Laurie would like to make such a motion.

Hon. Laurie Hawn: For further clarification, hypothetically, if Mr. Harris' motion to overturn the ruling of the chair passes, we would vote on the amendment. It doesn't automatically say that the amendment passed; it just says—

Mr. Jack Harris: You can make those arguments.

Hon. Laurie Hawn: It just brings it back into order, as far as the committee is concerned.

Mr. Jack Harris: That's my understanding.

The Clerk: To answer your question, Mr. Hawn, in the event the said motion is defeated, the motion goes to the floor of the committee as a regular one. It could be amended and subamended.

The motion is that the chair's ruling be sustained. All in favour of the motion?

[*Translation*]

Mr. Claude Bachand: Just a moment. Do we need three hours to sustain the chair's ruling?

The Clerk: Mr. Harris has made it clear that he would like to overturn the ruling.

Mr. Claude Bachand: Mr. Harris cannot propose to sustain the chair's ruling since he wants the opposite.

The Clerk: As I said, procedurally, the motion is written in an affirmative way out of respect for the chair.

Mr. Claude Bachand: Someone has to propose it.

The Clerk: Yes, and Mr. Harris did so.

[*English*]

Mr. Jack Harris: He made a ruling on my amendment that is similar to yours, and I challenged the ruling. I have to do it by proposing that it be sustained under—

Mr. Claude Bachand: Do you propose that?

Mr. Jack Harris: I propose that it be sustained, but I'm voting against this.

Mr. Claude Bachand: I would prefer that somebody else who is opposing it sustain the decision of the chairman. If nobody proposes that, it means we have unanimous consent that we're appealing the—

Mr. Jack Harris: No, we're calling for a vote. They voted to sustain it, and I'm voting the other way.

Mr. Claude Bachand: Okay.

[*Translation*]

The Clerk: It is the opposite proposition. It is a bit odd, but that's the procedure.

[*English*]

(Ruling of the chair overturned)

The Clerk: As the motion is defeated, the amendment is on the floor of the committee.

The Chair: Mr. Hawn.

Hon. Laurie Hawn: I'm going to seek the advice of the subject matter experts, except to say that what we are doing here specifically is not what Admiral Donaldson asked us to do. He said there was a process under way through which the department was addressing it. It's taking time, but it's involved with the Financial Administration Act, the National Defence Act, and this.

This act does not give anybody the authority to spend money, nor does the National Defence Act. That comes from the Financial Administration Act. So saying that here is not an appropriate response to the bill as written. Despite the ruling or vote just made, it is out of our scope.

On my question going forward, will we be going through this every time? A number of these amendments are outside of the scope of the bill, so will we go through the same process every time we come up with that? I just throw that out as a rhetorical question at the moment, because I'm afraid I know where this is going, and it's going to take some time.

We have a legislative clerk here who is giving us advice. We have subject matter experts who are giving us advice. I think we should, to the maximum extent possible, listen to that advice.

• (1555)

The Chair: Thank you.

Next is Mr. Harris, and then Mr. Dryden.

Hon. Laurie Hawn: Then I'd like some advice from the subject matter experts.

The Chair: Okay.

Mr. Harris.

Mr. Jack Harris: I just want to speak to this motion. I know I made some comments along the way.

I think what we've heard so far from the officials is a degree of frustration that they haven't found a solution. I didn't hear about the financial administration. I heard from Mr. Hawn about it quite a bit. The RCMP have a situation where the commissioner can settle a grievance. We were told that's different because he's an accounting officer. An accounting officer, it seems to me, seems to be some sort of appointment or position.

There may well be bureaucratic ways to solve this problem that require regulation or change or whatever. But what I thought we would do here is make it clear that the CDS is not just offering his views as to what a proper settlement of a grievance is, but if he's the settlement officer, then he should have the right to make these decisions.

The implementation of the decision is something else. What we've got now is the non-implementation of a decision. What we've got now is a decision being made by the grievance officers as grievance authorities that Corporal Smith is entitled to \$1,200 reimbursement for his expenses or his moving costs or whatever. Instead of that being the decision, that's the view of the CDS in the settlement of a grievance, and then he's got to go and try to convince some lawyer in the Department of National Defence that this is a proper claim against the crown. That seems to me to be totally untenable from the point of view of resolving grievances.

This has been hanging around for a long time. It's been pointed out by Chief Justice Lamer. It's been the source of impassioned representation by the ombudsman for the Canadian Forces and the grievance board chair. We really should try to do something about it. This at least puts the decision-making authority where it happens. The actual payment is another matter. I'm sure with all of the clever people in the Department of National Defence and the JAG's office, and given the authority or given the fact that a decision was made, they can find a way of implementing it. As I said to Vice-Admiral Donaldson after the meeting the other day, we're going to try to help you solve this problem. He didn't say, don't do it; he said, we're working on it.

I think this is something we can do at this committee. We can say, look, this was recommended by Chief Justice Lamer eight years ago now. It's clear that we want the CDS to be able to make that decision for the goodwill and morale of the Canadian Forces, and we want to give that authority. As I said, if it requires a royal recommendation, then this committee, in effect, is calling on the government to give it a royal recommendation so that this problem can be solved, without another eight years passing while someone tries to figure out how to make it happen.

That's my point here. It may be considered a political point and people might accuse me of trying to get brownie points. You can say what you like, it doesn't matter to me. It doesn't matter what you say. What I think is that this committee at least can go on record as having moved an amendment that will give effect to the recommendation of Chief Justice Lamer allowing the CDS to make that decision, giving the ministry an opportunity, if it desires, to include a royal recommendation so that this problem can be solved without waiting another eight years.

• (1600)

[Translation]

The Chair: Thank you.

[English]

Mr. Dryden.

Hon. Ken Dryden (York Centre, Lib.): My point is essentially the same.

Just very briefly, I didn't hear Vice-Admiral Donaldson say that he had it in hand. I thought I heard him say quite the opposite, that he thought he would have it in hand and he didn't imagine it was going to be difficult, but he found it far more difficult than he imagined. So we are where we are at this particular moment, which is not the right resolution. This should not have taken eight years. It should not take a lot of time into the future.

We need to find an answer, and I don't know what the answer is. But I think it's important to deliver the message and to reinforce the message. I think they have heard the message, but I think it's important to reinforce the message that it's just not acceptable for all this period of time to pass without a resolution. That's my reason for voting as I have. Again, I thought I heard Vice-Admiral Donaldson say that, really, it's as if he was out of answers, and that he was quite sure he would have one, and has looked in every direction and doesn't have one. But that's not where we as a committee need to be. We need to be sure that an answer emerges out of all of this.

The Chair: Thank you. *Merci*, Mr. Dryden.

Mr. Hawn asked for advice from Colonel Gleeson. I don't know if you want to give us your comments.

Col Patrick K. Gleeson (Deputy Judge Advocate General, Military Justice and Administrative Law, Department of National Defence): Certainly, Mr. Chair. I'd be happy to make a few comments on this.

I think you heard from the vice-chief when he appeared that he did note that the underlying issue that's trying to be addressed here is very complicated. He certainly acknowledged the time that had passed in trying to deal with it, and he noted that much work was ongoing within his organization to try to find a solution.

The issue is really from the perspective of what the effect of this proposed amendment would have. It's very unclear what it would do. I think Vice-Admiral Donaldson made clear that the Chief of Defence Staff currently has the authority to render the decision that I believe Mr. Harris was referring to, a written decision saying the member is entitled to x . So the issue isn't one of granting, through this amendment, the authority for the chief to direct or give that decision; the issue really is one of how we give effect to that decision. Vice-Admiral Donaldson, I think, was very clear that the objective is to find a mechanism to do that.

With respect to the whole question of his being out of answers, again it's not for me to interpret the evidence that was heard, but I do believe that the Vice-Chief of Defence staff did point out that he was looking at a number of options right now, a number of mechanisms to achieve this. He did say they were much more complicated than he had anticipated them being when he started looking at this last summer. But I didn't hear him say that he was out of ideas or out of ways to try to make this better.

So again, I think the only point I would make is that it's not clear what this amendment achieves with respect to the change in the act. I appreciate that it does make an express reference to financial matters, but that authority seems to exist already and is exercised on a regular basis by the CDS in rendering his decisions. Perhaps it might even further complicate or make this matter even more complex to resolve if we end up with a legislative provision that says this and nobody really knows what it does or how it works within the broader framework of the Financial Administration Act and the authorities issues that the vice-chief and his staff are currently struggling with. The same would be true for the membership, obviously, as they try to figure out what that means when they render a decision. They receive a decision from the CDS, but the effect is really no different than it is today.

I put those comments on the table for the committee to consider.

• (1605)

The Chair: Thank you, Colonel Gleeson.

I will give the floor to Mr. Hawn.

Hon. Laurie Hawn: Yes. We need to proceed on this one, but I would just pick up on that a little bit. The Chief of Defence Staff is not an accounting officer like the Commissioner of the RCMP is. I think we're all sympathetic to the situation. I don't think there's any doubt about that, but it's finding something that will actually work and be able to conform with the various acts, to be able to conform with the regulations. This isn't that solution. It is too simplistic. Notwithstanding the desirability of finding a solution, this one will not work within the greater context of all the things it has to interact with. So that's our problem with this. It's simplistic, and it won't conform to what it has to conform to, to actually be a solution that is actually going to be workable in the real world.

The Chair: Thank you, Mr. Hawn.

Mr. Bachand.

[*Translation*]

Mr. Claude Bachand: I would like to add my voice to the people who are saying that, if we cannot come up with a legal solution, it won't be good for the morale of the troops. We are lawmakers, so we pass legislation. Clearly, with this amendment, we are giving the CDS the power to settle financial claims. So put yourselves in the position of who knows how many individuals who have suffered injustices and lost money because of the financial repercussions. At the end of the day, they are being told that yes, an injustice was committed, but they should forget about the money they lost because it's over. They will go to see a lawyer who will tell them that they don't have the right to sue the Crown, so they won't get the money. That will have an impact on the soldiers' morale.

I have always appreciated the contribution of lawmakers. If this amendment is passed, the intention is to rectify an unacceptable situation. I caution my colleagues, because all we have before us are the provisions that the department wanted. They don't seem to want to add anything else to the legislation. Some people have been waiting for eight years. How much longer will they have to wait? We will have a huge problem on our hands if we pass the reform proposed by the bill asking that more judges be added, that military officials have more control and give instructions, and that we

completely forget about 90% of those who have been treated unfairly.

That is why I am asking you to support this amendment and then see how useful it can be. Higher decision-making authorities will perhaps tell us that the only way to correct this is with a decision by Queen Elizabeth. I am a lawmaker and I would like us to be able to amend the bill so that the CDS gets a new mandate. Not only would he be able to remedy an injustice in principle and in practice, on paper, but he would also have the power to address financial matters.

The Chair: Thank you, Mr. Bachand.

It is now Mr. Harris's turn, and then it will be Mr. Hawn's.

[*English*]

Mr. Jack Harris: Thank you, Chair.

I'll try to avoid repeating any previous arguments, but I propose to deal with Colonel Gleeson's submission.

It's a bit ironic that the proposition before us either requires a royal recommendation, because presumably it has some financial implications, or, on the other hand, we're being told it might not do anything. So it's either one or the other.

If it's as simple as what Mr. Hawn is suggesting, that it would need to be an accounting officer, well, maybe the cabinet has the power to appoint the CDS an accounting officer for the purposes of grievances and give him a budget to deal with it. It could be as simple as that; I don't know. What I do know is that it's taken eight years and a lot of members of our Canadian Forces being denied the fruits of their successful grievance to get us to the point where this is even debatable.

This may well be a tool that would force the government either to give a royal recommendation, if that's what is needed to solve the problem, or something to solve the problem itself. If it's redundant, which is suggested by Colonel Gleeson, and maybe the power is already there, then what's the problem?

By bringing the attention of the legislature to this issue, that this is an important matter that this committee brings to the House, if the House decides to pass it, it becomes a legislative provision that gives the CDS the power to decide it. So the decision is not being made by some lawyers in the Department of Justice, but it's being made by the CDS. I think we should pass that and let the chips fall where they may, and hope that somewhere in this brilliant government we have, somebody can figure out how to make sure that a guy who is a soldier who wins his grievance might actually get the cash in his hand.

It works in the labour movement. You settle your arbitration, you get a ruling, and you're required to pay up. Well, why can't it work for our soldiers in uniform? They don't have a union—we understand that—but they have a process that's supposed to be able to help them resolve matters. We're talking about matters that are within the grievance process. We're not talking about all sorts of other matters, but we're talking about financial compensation that's due as a result of a successful grievance. Well, let's pass this amendment and let the government figure out a way to ensure that people get what they're entitled to.

•(1610)

The Chair: *Merci.*

Mr. Hawn.

Hon. Laurie Hawn: Thanks.

My final comment, because we need to move on, is that despite the best intentions—and everybody has the best intentions, there's no question about that—this amendment has been ruled outside the scope of the bill, although the committee has overturned the chair's decision, and that's going to happen again. The Speaker may in fact rule that it was outside the scope of the bill and override the committee. I'm not sure of the process for that.

Second, despite the best intentions that I think we all acknowledge, this amendment is not workable in the real world. It's not that simple. This amendment won't do what the best intentions want it to do.

The Chair: Thank you.

Mr. Gleeson.

Col Patrick K. Gleeson: Chair, I would just add one thing, and it goes back to the discussion we had last week with respect to the effect of the legislator speaking.

Yes, this may well be redundant, but as soon as it's in the statute, the expectation or the presumption is that it means something. There will be a lot of effort undertaken to try to attribute some meaning to those words.

As I say, with those words not working within a framework that allows them to be interpreted, it's going to possibly create confusion, not only among those who need to interpret it, but also among the very people you're trying to help. I think we heard the vice clearly articulate that the senior leadership of the Canadian Forces has those people in mind here as well.

I'd throw that thought out for you as you consider this.

The Chair: Thank you, Mr. Gleeson.

We have an amendment in front of us, NDP-1. I will call the vote on that amendment.

(Amendment agreed to)

The Chair: I'll ask for the vote on clause 6.

(Clause 6 as amended agreed to)

[*Translation*]

The Chair: Yes, Mr. Hawn?

[*English*]

Hon. Laurie Hawn: On a point of order and a clarification of procedure—and I'm not sure we can answer it here—is there a process for the Speaker to rule that this is outside the scope of the bill?

The Chair: Yes.

I will give the floor to *la greffière*.

[*Translation*]

Ms. Lucie Tardif-Carpentier (Procedural Clerk): When the bill is reported to the House, there will be two possible options.

If the problem is with the royal recommendation, the Speaker will act on his own; he has no choice. If he considers that this clause causes a problem with the royal recommendation, he will make that decision and remove the clause from the bill.

If there is no problem with the royal recommendation, it will depend on whether a point of order is raised. If that is the case, the Speaker will examine the arguments and make a decision. So similarly, if he decides that the amendment is out of order, it will be removed.

•(1615)

[*English*]

Hon. Laurie Hawn: So it would be somebody on the government side, presumably, who would raise the point of order.

The Chair: Yes.

Hon. Laurie Hawn: I'm not sure how we'd note that, but obviously we'll be proceeding in that manner.

(On clause 7)

The Chair: We have an amendment by the Bloc Québécois, BQ-4.

[*Translation*]

Mr. Bachand, do you want to move amendment BQ-4?

Mr. Claude Bachand: Are you suggesting that it is out of order?

The Chair: No.

Mr. Claude Bachand: Okay, then certainly I will move it.

I didn't think I would have one today that was admissible.

The Chair: It's admissible. We just have to find out if committee members are going to approve it now.

Mr. Claude Bachand: Yes.

The intent of this amendment is to relieve the Chief of the Defence Staff of the authority to sit in judgment over grievances submitted by military judges. Once again—I draw my colleagues' attention to this—judicial independence is important; justice is important and so is the appearance of justice.

I would also like to point out that Justice Lamer's report also proposed separating the two. He suggested that the grievances committee should deal with grievances from military judges.

So I want to amend the wording of clause 7. That is what amendment BQ-4, which you have before you, sets out to do.

The Chair: Thank you.

Mr. Hawn.

[English]

Hon. Laurie Hawn: Mr. Chair, this is about justice being served and the appearance of justice being served. The grievances we're talking about have nothing to do with the judges' role as military judges. The grievances we're talking about are the same types of grievances that a judge or an infantryman or a pilot or anybody could make who is a member of the Canadian Forces. It has nothing to do with the judge's role. It has everything to do with a judge's membership in the Canadian Forces, as an officer of the Canadian Forces. He or she is allowed to grieve the same kinds of things that anybody else can grieve, whether it's a moving claim or a travel claim, or whatever. This is exactly about making sure that judges have the same access to justice and the grievance system that everybody else has in the Canadian Forces.

What we are proposing here is to change this. It is counter-productive to the delivery of justice and the appearance of the delivery of justice. This has nothing to do with their jobs or their role as judges. It has to do with their status as members of the Canadian Forces who are able to access the grievance process just like any other officer or non-commissioned member of the Canadian Forces.

[Translation]

The Chair: Mr. Bachand. Then Mr. Hawn.

Mr. Claude Bachand: I ask Mr. Hawn what he has against the fact that, when judges file a grievance, it is decided on by the grievances committee. Basically, we are just taking it out of the hands of the Chief of the Defence Staff.

According to the wording of the clause, the Chief of the Defence Staff shall refer it "to the grievances committee for its findings and recommendations." So the Chief of the Defence Staff makes the final decision again. That is not what Justice Lamer wanted. He wanted the final decision to be made by the grievances committee and not by the Chief of the Defence Staff. That is the intent of my proposal.

[English]

Hon. Laurie Hawn: We have a fundamental disagreement with that as stated. We suggest that judges, as officers of the Canadian Forces, have access to the same grievance process as anybody else in the Canadian Forces. There is no reason for a judge to have any other grievance process. It has nothing to do with any decision they make as judges. It has nothing to do with their role as judges. It has everything to do with their status as members of the Canadian Forces. In our view, they should follow the same grievance process as other members of the Canadian Forces.

The Chair: Mr. Gleeson.

Col Patrick K. Gleeson: This amendment is removing the obligation of the CDS to send military judges' grievances to the grievance committee. It removes the language that's in the original clause of the bill that says "and every grievance submitted by a military judge". I believe it was intended to be consequential to Bloc amendment BQ-3, but I don't think that was carried, so this would actually remove the obligation that is now in the act for the purposes of reflecting the concern of judicial independence, of having the

chief refer these for review and recommendation regardless of the content of the grievance.

I put that information on the table for the members of the committee.

• (1620)

The Chair: Okay, Mr. Harris.

Mr. Jack Harris: Mr. Bachand, is it your hope that the military judges would have the right to have their grievances considered? The way I read this amendment, one of the worries was that the Chief of the Defence Staff shouldn't have authority over the military judges. This seems to say that the Chief of the Defence Staff doesn't have discretion in referring those grievances to the committee. It says that every grievance shall be submitted to the grievance committee. Every grievance of a military judge shall be referred. Then the last sentence says the Chief of the Defence Staff "may" refer other grievances to the grievance committee. In other words, he has an option on other grievances, but he doesn't have an option with the military judges. He has to send them to the grievance committee. Is that a problem? I'm just trying to understand.

[Translation]

Mr. Claude Bachand: No, Mr. Chair, the Chief of the Defence Staff can refer them to the grievances committee, which in turn can provide recommendations in its findings. That being the case, I feel that the Chief of the Defence Staff has the final word again. I want to avoid that. I want the grievances committee to have to be responsible for the final decision when a military judge files a grievance. The decision would not fall to the Chief of the Defence Staff. In my view, that would protect the independence of the judicial system.

[English]

The Chair: Mr. Gleeson, is that what the amendment is doing?

Col Patrick K. Gleeson: It certainly doesn't in itself, Mr. Chair. Again, correct me if I'm wrong, but amendment BQ-3 was not carried. Am I correct in that regard?

The Chair: You're right.

Col Patrick K. Gleeson: So with amendment BQ-3 not being carried, the Chief of the Defence Staff is the final authority with respect to all grievances, including those submitted by military judges. Given that starting position, what happens with amendment BQ-4 is that we're now removing the obligation that the chief would have if this bill were to pass unamended to refer every grievance from a military judge to the grievance board for their findings and recommendations—not for a final decision, but for their findings and recommendations.

That is in the bill to address the type of concern you're talking about, which Mr. Bachand was referring to. The amendment that's being proposed would remove that obligation, so it would read, after the amendment, simply that "the Chief of the Defence Staff shall refer every grievance that is of a type prescribed in regulations made by the Governor in Council to the grievances committee for its findings and recommendations".

So the CDS would have the discretion as to whether or not military judge grievances would go forward, and it would be based on the nature of the grievance and not on the fact that it came from a military judge.

The unamended clause would cause any military judge grievance, as long as it falls within the scope of the act—and there are some prohibitions on what military judges can grieve, but any grievance that's properly submitted by a military judge, regardless of its content, would go to the grievance board for findings and recommendations. That's what would disappear if this amendment were adopted.

[*Translation*]

The Chair: Thank you, Mr. Gleeson.

We must bear in mind that the committee has not approved Bloc Québécois amendments BQ-3 and BQ-3.1, and that has an impact on amendment BQ-4.

Do you still want to move to the vote on amendment BQ-4, Mr. Bachand?

Mr. Claude Bachand: You told me that it was in order.

The Chair: Yes, it is in order.

Mr. Claude Bachand: So, yes, I want to move to the vote.

The Chair: Yes, Mr. Hawn?

[*English*]

Hon. Laurie Hawn: Let's just call the vote, Mr. Chair.

The Chair: Okay.

Mr. Harris.

Mr. Jack Harris: Was amendment BQ-3 rejected by the committee or was it ruled out of order?

The Chair: Amendment BQ-3 was ruled by the chair as not receivable.

Mr. Jack Harris: It was ruled out of order, was it?

The Chair: Yes.

Mr. Jack Harris: So we can't revert to it.

The Chair: It's too late.

Let's vote on amendment BQ-4 on clause 7.

(Amendment negated)

•(1625)

[*Translation*]

The Chair: Amendment BQ-4 was not passed by the committee.

Now we are going to vote on clause 7.

[*English*]

(Clause 7 agreed to)

(On clause 8)

[*Translation*]

The Chair: Turning to clause 8, Mr. Bachand, you have another amendment, amendment BQ-5.

Mr. Claude Bachand: I do. I am very much afraid that the intent is once more to require grievances filed by military judges to be submitted to the Chief of the Defence Staff.

I stand by my arguments. After all, we can agree to disagree at this committee. So I will stick to my guns and I will not just drop this.

I want to keep the amendments, even though I know that, generally speaking around this table, people want to keep the Chief of the Defence Staff as the final authority. That seems to me to be a kind of conflict of interest that means that judicial independence is not protected. So I am going to keep my amendment.

The Chair: Okay, thank you.

Mr. Hawn.

[*English*]

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

As before, we see this as consequential to amendment BQ-3, and therefore, for the same rationale or reasoning, we don't think it should pass.

[*Translation*]

The Chair: Fine.

I am now going to call for a vote on the Bloc Québécois amendment.

[*English*]

Monsieur Harris, do you want to speak to that amendment?

Mr. Jack Harris: Can I ask a question?

I admit that this is a technical question. This says that there have to be reasons given by the CDS if he doesn't act on the recommendation of the grievance committee, or I gather, for some reason, if the grievance was submitted by a military judge. It seems to me to be unusual to say that the CDS provides reasons only if he's disagreeing, I presume, with the grievance committee. When it's anybody else, when it's a military judge, he's expected to provide his own reasons, even if he's agreeing with the grievance committee.

I don't see the point in that and why it would be separate, especially if we are trying to avoid, as Mr. Bachand is hoping to do, a minimal amount of potential for interference with military judges by the CDS. Maybe we can get an explanation from the JAG on that, from Colonel Gleeson, as to why that would be.

The Chair: Thank you, Mr. Harris.

I will give the floor to Mr. Hawn and after that to Mr. Gleeson.

Hon. Laurie Hawn: The way I read that, it gives further protection to judges, because the CDS has to give reasons when it is a grievance by the judge, whereas he doesn't have to otherwise. Judges are in fact getting more protection, the way it's written. But I'll defer to my JAG colleague.

The Chair: Go ahead, Colonel Gleeson.

Col Patrick K. Gleeson: Yes, Mr. Chair.

It is essentially that. It's a transparency provision so that any time a judge submits a grievance, it's properly within the scope of the grievance system for a military judge. The objective is to ensure that there is a clear record of all the decisions taken with respect to that grievance for transparency reasons and to address the general concerns that have been expressed around the table here.

It really is simply that. It's transparency. It is different from the requirement for reasons in any other case or with respect to any other member of the Canadian Forces. It seeks to strike that balance between military judges who continue to be members of the Canadian Forces, and who should have access to the grievance system with respect to matters that don't fall within the scope of their judicial duties, and this judicial independence matter that is so important to the integrity of the military justice system.

Again, it's a transparency measure.

[*Translation*]

The Chair: Thank you.

We are now going to vote on Bloc Québécois amendment BQ-5.

(Amendment negated)

• (1630)

The Chair: Now we are going to vote on clause 8.

(Clause 8 agreed to)

(Clause 9)

The Chair: Now we move to clause 9.

Mr. Bachand, proposed amendments BQ-6 and BQ-7 are yours. Please go ahead and enlighten us on amendment BQ-6 first.

Mr. Claude Bachand: Hold on a second, Mr. Chair. I am trying to follow and it takes a little time.

Mr. Chair, the amendment proposes removing the words "a grievance submitted by a military judge". This is along the same lines as the other amendments we have proposed, and, once more, it is in order to protect judicial independence. That is also the wish expressed by Justice Lamer. We do not want military judges affected by this clause any more, just as we suggested in the previous amendments.

The Chair: Thank you.

Mr. Hawn.

[*English*]

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

I totally applaud Mr. Bachand's aim to protect judges and make sure they're treated properly. I think that is, again, in fact what this does. It's not saying at all that grievances by military judges will be thrown out. That's not what it says at all. It talks about the delegation of dealing with that grievance. I would just like to refer again to Colonel Gleeson or Colonel Gibson to get their interpretation of what this actually means.

The Chair: Mr. Gleeson.

Col Patrick K. Gleeson: As the clause is currently drafted, it provides that the CDS may not delegate decision-making authority with respect to a military judge grievance. He must decide on that grievance personally. The amendment would remove that requirement.

So you're now moving the military judge grievance into the delegation scheme. This is simply a transparency protection measure aimed at maintaining or indicating the importance of the judicial

independence element and balancing that with the right to allow officers who happen to be in a military judicial appointment, or performing that function, to maintain their right to access the grievance process.

The Chair: Mr. Harris.

Mr. Jack Harris: I'll speak briefly in support of the amendment.

On the delegation of the CDS's power, the issue is the independence of the judiciary here. If we're talking about delegating, presumably a person of lesser rank than the CDS would be making the delegated decision. My preference would be that these matters not be delegated to someone of lesser rank. If the CDS has to face the fact that there's a grievance from a military judge, then he should face it head-on and not delegate it to anybody else.

So if the effect of the amendment is to prevent the delegation of military judges' grievances, I support that.

The Chair: Thank you.

I'll give the floor to Mr. Gleeson.

Col Patrick K. Gleeson: To respond to Mr. Harris' concern, the clause prior to the amendment does exactly what you've just said you prefer to happen. The CDS, in the currently drafted text, could not delegate. The amendment would allow him to delegate.

The Chair: Mr. Hawn.

Hon. Laurie Hawn: It's what Jack wants.

[*Translation*]

The Chair: We now move to the vote on Bloc Québécois amendment BQ-6.

(Amendment negated)

The Chair: Mr. Bachand may now speak on amendment BQ-7.

Mr. Claude Bachand: If the Chief of the Defence Staff regularly delegates his responsibilities to an officer, I think that the officer must regularly report to the Chief of the Defence Staff on the powers, duties or functions that have been delegated.

So, in clause 9, I would add a new subsection (2.1) requiring the officer to regularly report to the Chief of the Defence Staff on the exercise of any powers, duties or functions delegated to him or her under subsection (1).

• (1635)

The Chair: Great. Thank you.

Mr. Wilfert.

[*English*]

Hon. Bryon Wilfert: We could support the amendment, except for (1.4) and (1.5). We have concerns about them, on the basis that as long as serious crimes can still be tried by summary trial, I don't think we can support a blanket amendment to remove those convictions.

Hon. Laurie Hawn: You're on the wrong one.

The Chair: We're on BQ-7 right now.

Hon. Bryon Wilfert: That's BQ-7.1, sorry. We don't like that either, just so you know. So I won't repeat myself when I get there.

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

Hon. Laurie Hawn: BQ-7 formalizes what is actually happening already, so we have no problem with it. We support that amendment.

(Amendment agreed to)

[Translation]

The Chair: We are now going to vote on clause 9.

(Clause 9 agreed to as amended)

The Chair: We now move to new clause 9.1.

[English]

We have amendment NDP-2.

Jack Harris, you have the floor.

Mr. Jack Harris: My amendment is essentially designed to fulfill recommendation 74 by Chief Justice Lamer. This is of course because of the long-standing concerns about the length of time the grievance process was taking. It was a significant concern for people in the military who had a grievance. They were automatically put on the long finger, as it used to be said at one time, and they didn't get their matters dealt with.

I know significant efforts have been made, and we've heard about them. The grievance board representatives talked about how they've improved their procedures. Everybody has been talking about how they've been working very diligently to try to get these matters dealt with.

Frankly, the length of time it takes to do these things can be affected by the amount of resources put in to allow for this. If Justice Lamer felt that 12 months was a drop-dead date for the resolution of what are, for the most part, basic matters, then a way should be found to have these decisions made within 12 months. This amendment seeks to implement the recommendation that Justice Lamer made eight years ago.

I don't need to say much more than that. We did hear from witnesses about the consequences of delay, the effects on morale. These are what would normally be regarded as employment types of grievances, and 12 months, frankly, is a fairly lengthy period of time.

Granted, they may have to gather evidence from here and there. But the military has a terrific way of communicating; they have their own communications systems. If they were to devote the resources to this in the human resources department or the grievance section, then they should be able to meet that timeline. This would allow for a remedy for people who weren't getting their grievances heard within what's considered to be a reasonable period of time.

I think we should support it.

[Translation]

The Chair: Thank you.

Before we continue, I would like to clarify something, Mr. Harris.

● (1640)

[English]

I think there is a clerical mistake in your amendment, NDP-2. It's in the French, in proposed subsection 29.151(3), at the bottom of the page.

[Translation]

As it stands, it is "*les dépens au tarif des frais*".

[English]

It must be "*les dépenses*", so you must add "es". That will make it the same thing in French and in English.

I'll give the floor to Mr. Hawn.

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

It's a nice goal, and everybody wants the system to move faster, but we have some significant problems with the amendment as written. In fact, I don't think it's going to make the process any more expeditious. More fundamental is that in proposed subsection 29.151(3), we say "The Federal Court shall award". We can't tell the Federal Court what to do.

The other impact is that if we were able to tell them what to do, we would burdening the Government of Canada to fund that. It says "regardless of the outcome of the application", so even if it were a frivolous claim or a claim without merit, we'd be putting the Government of Canada on the hook to fund that solicitor-client cost, or the court cost. That doesn't simplify it; in fact, it makes it more complicated.

Beyond that, Mr. Chair, and to our legislative clerk, I would submit that this is outside the scope of the bill because we would be amending the National Defence Act, not Bill C-41.

The Chair: Mr. Wilfert.

Hon. Bryon Wilfert: Mr. Chairman, we tend to support the comments of Mr. Hawn. But I wonder if I could ask for Mr. Gleeson's comments on proposed amendment, NDP-2.

Col Patrick K. Gleeson: Mr. Chair, I'll ask Colonel Gibson to respond to this for Mr. Wilfert.

Hon. Bryon Wilfert: Thank you.

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

We would consider that the committee should be aware of four significant concerns with this particular amendment as drafted. First of all, there is the issue of purporting to prescribe a hard and fast twelve-month deadline. Clearly that was the goal both of Justice Lamer and of the department, but one should be very careful, one would suggest, when prescribing in law a hard and fast deadline. But that's a policy judgment for the committee to make. However, there are I think a number of technical issues that the committee should definitely be aware of.

The second concern is that this is obviously meant to address the issue of delay. However, the committee should be aware that under the regulations prescribed, if a member chooses to take their grievance to another forum, for example, the Federal Court, that has the effect of suspending consideration of that grievance pending the outcome of that other process. If the goal of this is actually to expedite the consideration of grievances, that goal would not actually be achieved, because the Federal Court itself, of course, has a significant docket. There is a significant delay in actually getting a matter before the Federal Court, which we understand to be something in the order of fourteen months. So actually the practical effect of doing this wouldn't be to achieve the goal sought.

The third concern we have is that it prescribes costs on a solicitor-client basis regardless of the outcome. The members of the committee who are lawyers would of course be aware that there are a number of different tariffs, and solicitor-client costs are generally only awarded in cases where the court wishes to convey a punitive message. So that's a consideration.

Perhaps very significantly, the fourth concern is that this doesn't actually accord with the Lamer recommendation in the way that he made it. What Chief Justice Lamer said was that a griever should be entitled to his costs. In other words, those costs would be subsidized or paid for by the crown. But the amendment on its face says "the Federal Court shall award", which we would suggest might actually engage some significant considerations about infringement on judicial independence of the Federal Court.

So taken all together, those are, I believe, some significant concerns with this amendment as drafted, which the committee should be aware of.

Hon. Bryon Wilfert: Colonel Gibson, thank you for that.

The Chair: Mr. Harris.

Mr. Jack Harris: I guess to paraphrase Mr. Hawn, I have a great deal of respect for Chief Justice Lamer. He certainly made it clear that he thought a twelve-month period was reasonable.

With regard to the technical side, I have two technical questions. A hard and fast deadline is a deadline after which an individual who thinks the delay has been unreasonable—and there's no excuse for it, let's face it, because nobody goes to the Federal Court without a lawyer. So presumably someone is going to say to the department, "Look, my grievance has not been settled and it's been over a year. It's been a year and a half now and it still isn't settled. What's going on here? Can you give me a time when it's going to be resolved?" From a practical point of view, nobody is going to rush off to the Federal Court on day one after the twelve months.

Secondly, I don't agree, frankly, that there is any automatic suspension of an ongoing matter by virtue of an application to the Federal Court. It's not the case with arbitrations. It's not the case even with orders of a labour relations board, for example. There's no automatic suspension of an existing action or decision unless the court gives such an injunction. So I don't happen to agree with that in law. But as for a hard and fast deadline, it's not really hard and fast except that it gives rise to the right to go to Federal Court.

In terms of an application, it's going to be an interlocutory application, something that's heard. It's not going to be something

that has to find time on the docket, applications for injunctions, or other things like that, which are heard fairly immediately, and there's no reason, in my view, why this wouldn't happen.

As regards a technical objection—and I hear what Colonel Gibson has offered there, and Mr. Hawn has made the same point—perhaps the wording here is not in accordance strictly with what Chief Justice Lamer had said, and I would submit a minor rewording of that, which says, "that any officer or non-commissioned officer who makes an application under subsection (2) shall be entitled to his or her costs before the Federal Court on a solicitor-client basis regardless of the outcome of the application." So I think Colonel Gibson is right, that to order the Federal Court through legislation to award them is probably not appropriate, but to reword that in a minor way to deal with an objection would be consistent with what Chief Justice Lamer had said and would still be acceptable, in my view, as a piece of legislation.

And as far as it being outside the scope goes—and Mr. Hawn made that argument—this has been through the procedural officer of the House, who has not made any objection of that nature. The procedural clerk has not provided any objections to this particular piece.

• (1645)

The Chair: Thank you.

I will give the floor to Mr. Dryden.

Hon. Ken Dryden: I think perhaps Colonel Gibson is going to do what I was going to ask if he would do. Could you respond to Mr. Harris' comments?

LCol Michael R. Gibson: Thank you, Mr. Dryden.

There are two further points in response to the concerns raised by Mr. Harris that we would consider the committee should be aware of. In fact in the regulations—the Queen's regulations and orders, which prescribe the regulations with respect to the grievance system—there is a specific provision that provides that the consideration of the grievance would be suspended pending a determination of the process in the other forum.

The second issue, of course, is when one considers what you would be going to the Federal Court to do; one would be making an application for judicial review pursuant to section 18 or 18.1 of the Federal Courts Act. That's a consideration for a request for that court to consider a decision made by a federal board, commission, or tribunal.

In this case, since there wasn't a decision, presumably the only relief the Federal Court could grant in that circumstance would be an order to get on with the process. So in other words, once again, the remedy or relief sought wouldn't actually be accomplished by this mechanism.

The Chair: Thank you.

Concerning the question raised by Mr. Hawn about the receivability of this amendment, yes, it is receivable because it's a new clause that is in line with the bill generally. So that is the decision of the chair.

Let's call the question on NDP-2.

(Amendment negated)

[Translation]

(Clause 10)

The Chair: Now we move to clause 10.

[English]

There's no amendment on clause 10.

(Clause 10 agreed to)

(On clause 11)

The Chair: We have amendments from the NDP. The first one is NDP-3.

Mr. Harris.

• (1650)

Mr. Jack Harris: NDP-3 reflects some of the concerns that were raised in particular by the chair of the grievance board. We had a discussion about the composition of the grievance board. I have to say my initial view was that this should be a civilian board totally, and I suppose along the same kinds of lines that someone outside the military should be deciding this on general principles of what might be considered to be employment law or entitlement for employees who in this case don't have the right to unionize. But I was persuaded by what I heard, that it doesn't hurt to have people who understand the military and the idiosyncrasies of how things get done, and that it does take a little while for people to understand how it works.

There was some suggestion as well from the chair of the grievance board that even though it was permitted by the act for serving members to be appointed to the board, he didn't think it was desirable. So NDP-3 actually incorporates both of those ideas, and I'm told by the legislative clerk that the rest of these items, 4, 5, 6, and 7, are consequential on the first. We're not talking about them all now, but I don't want to re-argue each one. If one fails, they all fail.

The point here is that I don't believe that serving members of the military ought to be on the grievance board—I think there probably are now some seconded, I'm told—and that at least 60% of the members of the grievances committee ought never to have been a member or a non-commissioned member. In other words, as much as 40% would have a military background and they could bring that experience to the board, but the majority ought not to have been either an officer or a non-commissioned member of the force. That's my amendment. I guess there's not much further to say about it. The arguments were made essentially before the grievance board.

The Chair: Thank you, Mr. Harris.

Yes. As you said, your amendment NDP-3 is consequential to NDP-4, -5, -6, and -7. If the committee agrees to vote for NDP-3, it will apply to NDP-4, -5, -6, and -7. You were right in saying that.

Afterward, we will discuss NDP-6.1.

Mr. Hawn.

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

Is this within the scope of the bill?

The Chair: Yes.

Hon. Laurie Hawn: We have no objection to that?

I'll just make a couple of points on this. It's an odd way to write an amendment. I understand the rationale, but it's a negative amendment. There's a sense of negativity there, instead of...

Mr. Jack Harris: I didn't write it. You know how this works. You suggest what you do, and someone with the drafting experience puts it the way they see fit. I'd be happy to see it.... If you want to reverse it, so it's—

Hon. Laurie Hawn: I would have a problem with it in any event, because what it does is it betters the discretion of the Governor in Council on making appointments. The suggestion is—and I think you backed off from that a little bit, Mr. Harris—that you can't be impartial if you serve. Well, of course, you can. Anybody can be impartial. Having relevant experience to deal with an issue is not a detriment; it's an asset, for goodness' sake. They all swear an oath, in any event. If we put any trust in people putting their hand up and swearing an oath on whatever it is, then whoever it is, if they're qualified to serve by virtue of a variety of experience—one of them is certainly military experience, which is clearly valuable in serving on this kind of board—and they've all sworn an oath to act in accordance with the rules and regulations, then from our point of view, this amendment is simply not necessary.

• (1655)

The Chair: Thank you.

Mr. Dryden.

Hon. Ken Dryden: In the original discussion a week or so ago, a point was made of how, historically, the committee has often been made up of, and perhaps even usually made up of, a mix. Currently it isn't. Currently it's all former military people.

When Vice-Admiral Donaldson was here, his answer to one of my questions seemed to suggest that I had said it was inconsequential what somebody's background was. So when the discussion was over I went to speak with him to make the point that I did and about how the makeup of the committee had changed. His point was that he thought it probably evolved this way. When the Governor in Council—and I don't know the words to use—made it known that there were openings and that they were looking for people to apply, it was a whole lot easier for that notice to go out to former military people, and that was likely why the imbalance had resulted.

So then our discussion went on that it may well be the case and that's how it has played out. The question is whether that's a good thing. His point back to me was that he thought it was healthier if there was in fact a mix of people who were involved and that really part of the challenge in any situation, in any court, is that one has to be able to find a way of explaining it to somebody who has lots of other experiences but may not have this particular direct experience. One has to be able to put that person into the situation so that that person understands and gets it. Of course, in anything like this, ultimately it is a public who are determining whether something is appropriate or not, and that public is made up of lots of people who don't have any specific experience but have a "reasonable person" experience to be able to judge.

Vice-Admiral Donaldson's point—which was a point I was trying to make earlier—was how in fact it is a very healthy thing, and a necessary thing, really, for the ongoing health of the reputation of a committee such as this to have that kind of balance there. And if in fact those involved in the military cannot make the case, cannot make others understand the special nature, then in fact they have not met the challenge. So I would very much support what is in the amendment here.

The Chair: Monsieur Harris.

Mr. Jack Harris: Thank you, Chair.

To answer Mr. Hawn's point directly, yes, this is an attempt to fetter the discretion of cabinet in making these appointments. It appears it's necessary to do so.

The MPCC, the grievance board, and the ombudsman all were set up in the wake of the Somali inquiry, based on the notion that there needed to be more of a role for civilians or civilian oversight with respect to the military. At the grievance board, it's frankly appeals by individual soldiers on decisions made by someone within the military. If the only recourse they're going to have is an answer from someone else in the military, then that doesn't meet this notion of having a civilian or at least a partially civilian body to deal with it.

I was here last week, and I actually commend the transcript of the debate to anyone who wants to understand the nature of the problem. I'd have to call it a debate between Colonel Drapeau and retired Colonel Hawn about the nature of how many rights you park at the doorstep when you join the military, for anybody's accommodation. It was a brilliant piece of work on both sides, I have to say, as to what the differences might be.

I have to say that what we're trying to avoid here is having a grievance board composed of old boys or old girls from the military who have that particular point of view—not only that point of view but that point of view and that experience—without the advantage or without the leavening of a civilian presence.

As to the appointments process, I think what Mr. Dryden says may well be how we got to where we are. But the fact of the matter is, the grievance board has been “militarized” to the point of having only military people present, and I think that's wrong. This is not a condemnation of the individuals who sit on the grievance board nor is it a condemnation of people who serve within the military. This committee, above all others in the House of Commons, and its members know and share a respect for the service that all military people have given. That was evident as well in that debate between Mr. Drapeau and Mr. Hawn.

Clearly this is an important point that I think we should make by insisting that this grievance board or grievances committee have a majority—maybe 60% is not the way to go, but even just say a majority, but 60% is there and 60% is what we're voting on—of people without military experience who represent civil society and don't have their own experiences to bring to this table.

I think that's a valuable effort to ensure that, to a certain degree, at least, there is a civilian oversight of this level of grievances. It's not the biggest thing in the military obviously, but this is important to all those who have grievances. To know that it's not only military

people who are making these decisions, that your appeal can be broader than military, I think is desirable.

• (1700)

The Chair: Thank you very much.

I'll give the floor to Mr. Hawn.

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

I have a couple of things. Again, those who sit on these committees all swear an oath to be impartial and operate and so on. There's nothing to say that civilian members can't be appointed to the committee, nothing at all. I'm not sure it needs to be enshrined in the legislation that they must be in some proportion or other.

The other thing is that the ex-military people are just that; they are now civilians. They've been out of the military for some period of time. They've gained experience through other jobs or other careers and so on that they've gone on to. So there is a mix in fact of military outlook and civilian outlook in the same person. There is nothing to say that a properly qualified pure civilian couldn't be on the board at all. That's not restricted at all. They can appoint whoever they want.

As Mr. Dryden said, probably over time it has evolved to totally military or ex-military at this point. Again, I go back to the fact that these ex-military will have been civilians for some period of time and will bring that broader perspective.

I don't think enshrining this so that we must have this number or that number is the way to go in legislation. But I'll defer to our subject matter experts for some advice.

The Chair: Colonel Gleeson, do you want to add something?

Col Patrick K. Gleeson: There's not a whole lot to add, Mr. Chair. I think the discussion has been fairly inclusive.

I would point out that, as was noted at the start of the discussion, the proposed amendment does two things. The focus has been on the 60% number, but it also excludes any officer or non-commissioned member from being appointed, which deals with the provision in the act that I think Mr. Hamel raised when he was here, saying that it's something he would like studied and had some concerns with.

Obviously, there has been no internal policy discussion within DND or with the grievance board on that issue. Obviously, it's within the prerogative of the committee to do as it wishes in that regard. But I just want to make clear for all the members that it is doing that, as well as dealing with the 60% number with respect to the numbers of the members on the committee who must not have had previous experience. Again, I don't think I'm going to say anything that hasn't been said, but I'll just run through these points in case something has been missed.

First of all, the notion of using legislation to prohibit experience is unique. We actually talked to the holders of the federal statute base, and they were not aware of any provision that actually prohibits experience when talking about qualifications to fill a position. They generally prescribe what experience is necessary if they think it's relevant to the job. Again, that's based on that feedback.

The other point I would make is that these are four-year term appointments. They certainly are renewable, but they aren't automatically renewable. Generally speaking—again, this is a practice across the appointment structure within the federal scheme—it's the appointment authority that has the responsibility for considering and striking that balance, and it can rebalance that. That's why these appointments are made for defined and fixed terms.

If the balance has fallen out of whack, then one would presume that the appointment authority—in this case, that would be GIC—would be in a position to rebalance that as appointments come up for renewal or reconsideration. That point is out there for your consideration.

There was some suggestion that perhaps CF members or retired CF members were becoming aware of these appointments more than other members of the public. I can't really speak to that, except to say that it's certainly my understanding that notices of appointment or openings within these bodies are advertised in the same way as any other GIC appointment is and that they're advertised to the general public.

I'm not sure how that would favour CF members, but I'm not quite sure what the context of that discussion was. I'll leave that out there.

The final point I would note is that even the grievance board chair himself, when he appeared, noted that there was any infinite number of combinations and permutations with respect to experience that could work on the board, that certainly he didn't see it as being within his purview to indicate what would be the right balance, but he noted that there are a number of balances that probably are right and work. As we prescribe a specific balance in this piece of legislation, we seem to be moving towards a right answer, and that may be a bit of statement, because I see that it says "at least 60%", not 60%. It leaves some leeway.

Anyway, I throw those comments on the table for your consideration, and I'll leave it at that, Mr. Chair.

• (1705)

The Chair: Thank you.

Mr. Dryden. After, we have Mr. Harris.

Hon. Ken Dryden: Just to throw the comments back, I understand how in fact the process may well be made available to everybody, that notice may go out generally. The point the vice-admiral was making is that given how the process goes out, it is much more likely that former military people are going to be much more sensitive to the fact that these appointments may exist and will be much more aware of them and much more likely to respond to them. I think that was the point he was making, and that is a significant consideration: that even if in fact the notice is general, how that plays out is really the test.

What is also the test is that in terms of rebalancing, the rebalancing could be going on all the time. The fact is, what we have now is a situation where all of the people are former military people. That rebalancing could have happened at any point that appointments would be made. That didn't happen. And I think the message of this is to say this is a serious consideration, and clearly those who are making those decisions were not responding in that particular way, that they would probably be aware of the fact that

more former military people were responding to the notice, and second, they would certainly be aware of the fact of where the appointments came from.

Mr. Hawn makes the point about impartiality. I have no question that all of these people, whatever their background is, would be impartial. That is their job. They take their job seriously. I understand impartiality. I also do understand one's own sets of experiences. Yes, later on, these people are former military and they would have some experiences outside of the military, but I'm also aware of the kind of formative experiences that one has through that time of one's career, the kind of pride one would have had to join up, the pride one would have had in order to do what they have done, the pride that one sees all the time in people who are members of the military or former members of the military. So it is not a question of impartiality. It's just trying to balance the experiences that one has, and of generating the kind of test that all of us need, in whatever our fields are, to be able to explain why all of this is a separate and special set of circumstances and the determination should go this way rather than another. If that isn't there, in the end we all find ourselves off track often down the line.

• (1710)

The Chair: Thank you.

Mr. Harris, and after that, Mr. Hawn and Colonel Gleeson.

Mr. Jack Harris: Thank you.

I realize it may be a little inelegant to be specific here.

Hon. Ken Dryden: Mr. Harris, I have just one last thing.

Mr. Jack Harris: Go ahead.

Hon. Ken Dryden: I wouldn't see 60% as any magic figure. As Mr. Harris already said, I would look toward a majority and whatever that number would be—but a majority, not necessarily 60%.

Mr. Jack Harris: I don't know how many there are. If there are five, it would have to be three; if there are eight, it would have to be whatever. The idea is, I don't think there are dozens of people on this; 60% would guarantee a majority, and it's a question of figuring that out.

I realize this amendment is a bit inelegant, and I agree that the qualification issue is one.... But if I were writing the legislation, I'd do it differently. I'd say this is part of civilian oversight, and we'd define civilian—blah, blah, blah—and talk about a majority of civilians.

I've got fairly limited scope here in amending this legislation, so this is the route to go. The fact is, how do we get civilian oversight if we are not specific as we are here? Let's remember what this is about. The grievance board is dealing with how members of the CF are being treated when it comes to issues of medical treatment; when it comes to issues of fairness in promotion; when it comes to issues of discharge from the military and what conditions are they being discharged on. The notion is that the grievance is to decide whether you are being treated fairly by the military.

We're suggesting here—and it was suggested as part of the creation of these boards—that there needed to be a system for that. What has happened, by default perhaps—I don't know how it happened, but we've got retired senior officers...we've got people moving into retirement, leaving the forces to go to the grievance board. They're not necessarily people who have been out there in the world for 10, 15 or 20 years having other experiences.

There's no way of controlling that, and yes, it's a control of discretion. I don't make any apologies for that, and if there's a better way of doing it, presumably at some later point.... There's a five-year review of this legislation supposed to be taking place imminently, and if someone comes back with a better method or a more elegant solution, then I think this committee would be happy to consider it when it comes before it. But as it stands right now, this is a proposal to challenge the existence of the exclusive dominance of this grievance board by military and ex-military, and I stand behind that.

• (1715)

The Chair: Thank you.

Mr. Hawn.

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

Again, I think we're all trying to do the right thing here. I'll ask a question of Colonel Gleeson in a second with respect to satisfaction rate with the grievance process, if we know that. Also, perhaps, to Colonel Gleeson, I don't know of anybody who retires to actually go on the grievance board.

Mr. Jack Harris: We were told that.

Hon. Laurie Hawn: You couldn't stop somebody from doing that. But the big problem that we have with this is the absolute prohibition against officers or NCMs serving on the board. It's absolutely not appropriate, in our view, that this group of people should be absolutely excluded and that we are mandating 60%. I sense there's some flexibility in that.

I think a mix is appropriate, but I don't think we can legislate a hard number on that. So we can't support it as written primarily for those two reasons, but I'd ask Colonel Gleeson or Colonel Gibson if they know if there is a satisfaction rate on the grievance system that we've ever measured to see....

The Chair: Colonel Gleeson.

Col Patrick K. Gleeson: Certainly, grievances are tracked. I don't have any data before me today that could talk to you about the satisfaction level within the membership of the Canadian Forces with respect to the grievance process.

I think I can say, though, that I certainly have not heard the grievance board criticized for being too closely aligned...and I guess that may be an implication, but surely not what has been said here.

I understand exactly what the message is, so I'm not engaging in debate, but just putting on the record expressly that I don't think this is being driven by this thought, and it's certainly not a criticism that I've ever heard, that the grievance board is aligned with the Canadian Forces and therefore is not providing meaningful and legitimate findings and recommendations. I would just throw that out there, again recognizing that that's certainly not what has been expressed.

The final point I would make, again, just for the record more than anything else, is that the current appointment process is competitive, to the best of my knowledge. So all of those individuals—and again, it was made very clear that nobody is talking about the qualifications or the integrity of anybody serving on the board at the current time, and that's well noted—were all appointed through a competitive process and were judged to be the best suitable based on the applications that were received. Obviously I can't speak to whether everybody who could have or should have applied did.

I make those two points. I think Colonel Gibson has just one thing to add.

LCol Michael R. Gibson: Mr. Chair, if I may just add one further thought, if members of the committee were to consider this, further to Colonel Gleeson's last point, I'd suggest that perhaps the reason that generally the legislation prescribes a standard or requirement for someone to apply for a position is that certain qualifications are considered desirable or necessary to effectively perform that function.

However, in phrasing in a negative fashion such as this amendment purports, what one is doing is establishing a quota. You're going to have a certain proportion of people who are not former military. And of course given that it's a competitive process, the danger of prescribing a quota in any environment is that one may distort the quality line or the quality level of people appointed. Say, hypothetically, 30 people applied and 25 of them were former military and their qualifications were miles better than the other people who applied but who didn't have that qualification. The difficulty with the quota aspect of this might be to reduce the quality of the people appointed to the board. That's just a relevant consideration for the committee to bear in mind.

Thank you.

The Chair: Thank you.

Mr. Hawn, and after that, Mr. Harris.

Hon. Laurie Hawn: I think that last point is a very important consideration.

How many people are on the board when it's fully manned?

Col Patrick K. Gleeson: I can just quote for you what the act provides for, which is that the board shall be established and consist of "a Chairperson, at least two Vice-Chairpersons and any other members appointed by the Governor in Council".

Currently the act prescribes a minimum of three persons on the board. I believe there are five now. I'd have to confirm that for the committee but I believe there are five members, not all of them full-time.

Hon. Laurie Hawn: Is there any upper limit?

Col Patrick K. Gleeson: The act does not prescribe an upper limit; it's based on workload, Mr. Chair. But again, I believe five has been the practice over time.

• (1720)

The Chair: Thank you very much.

Mr. Harris.

Mr. Jack Harris: Just briefly, this notion of a quota to me is not an issue here.

Qualifications include being a civilian, in my view. If you're going to have civilian oversight, you've got to have a civilian. These are Governor in Council appointments. There may well be applications and things like that. The Governor in Council can appoint whomever they want.

I'd like to call the question, Mr. Chair.

The Chair: We have Mr. Hawn and Mr. Bachand after that.

Mr. Hawn.

Hon. Laurie Hawn: On this whole concept of civilian oversight, there is civilian oversight of the military—that's a given concept in any democracy. That doesn't mean that every department of the military has civilian oversight, and I think that's what this is coming down to here a little, that this has to have civilian oversight because it's part of the military. That is not the concept of civilian oversight of the military in a democracy.

The Chair: Thank you.

Mr. Bachand, you are the last speaker,

[*Translation*]

Mr. Claude Bachand: I want to deal with two questions.

First, one of my major concerns since the beginning of this discussion has been to try to bring military justice closer to civilian justice. If we set up a military justice system that is completely military, we move away from the principle I want to maintain. That is why I am in favour of this.

In terms of the qualities of the individuals who are going to be appointed by the Governor in Council anyway, I just remind people that, in the civilian justice system, when major trials are held before a jury, all kinds of people make up that jury. We can't forbid someone from being part of a jury, which means having a person's future in one's hands in a legal sense, just because he sweeps the streets.

The civilian approach is important. There are also consequences to bringing the civilian and the military system together. There will be those who perhaps cannot fully understand military life, and then there will be those who may have spent 30 years in the Canadian Forces. But justice may also imply using a different approach. It will be interesting to see whether case law changes as the result of this amendment. I feel that the change is a step in the right direction.

The Chair: Thank you.

[*English*]

Mr. Gleeson.

Col Patrick K. Gleeson: Again, I don't want to prolong this, but I think it's very important to respond to the comment that Mr. Bachand just made, and that is that this is not a military justice issue; this is an administrative tribunal. It's not a jury, so it's not a jury of individuals who are coming to judge guilt or innocence; it's an administrative tribunal.

The very reason that administrative tribunals are formed is to bring a body of expertise to the table that has a special knowledge that can deal with issues.

So again, it's just the analogy to a jury system, and this is not. I wouldn't want to leave it on the record that somehow this is a jury that's out there making these decisions. This is an administrative body that has a special expertise in the area of grievances.

Mr. Jack Harris: They should be all military.

Col Patrick K. Gleeson: No, I certainly don't suggest that at all. And I'm certainly not trying to debate with the committee, but I think it's important for the record that it's not a jury.

The Chair: Okay, thank you.

Col Patrick K. Gleeson: This is your issue to make a decision on.

The Chair: Mr. Hawn.

Hon. Laurie Hawn: We cannot support this with the absolute prohibition against serving members. That is unacceptable. The quota, and that's what this is, is not acceptable.

As written, we can't support it.

The Chair: Okay.

[*Translation*]

No one else wants to discuss the amendment? Fine. We can now vote on amendment NDP-3.

(Amendment agreed to)

The Chair: Is there consensus in the committee to extend the result of the vote that we have just had on amendment NDP-3 to amendments NDP-4, NDP-5, NDP-6 and NDP-7?

[*English*]

Hon. Laurie Hawn: Hang on a second.

We would want to study this a little bit more, Mr. Chair.

The Chair: You want...?

Hon. Laurie Hawn: I'm going to invoke the same thing that Mr. Bachand invoked at the last meeting. We would want to have a closer look at these before we'd agree to that.

● (1725)

The Chair: Perfect.

Mr. Harris.

Mr. Jack Harris: I guess it's a question of time. We did agree initially that one would go for the other. We could actually vote on all of them if we wanted to.

Do you want to have time to argue them now, separately?

Hon. Laurie Hawn: No. What I'm saying is that I would like the same consideration that we gave Mr. Bachand the last time. Frankly, we didn't think that one would pass, which would have made the rest of them—

Mr. Jack Harris: So you want to have a closer look at them?

Hon. Laurie Hawn: Exactly.

As a suggestion, so that it makes us feel better, Mr. Chair, we can defer and go ahead and pass...because there are no amendments to clauses 11 to 34, we could make ourselves feel good and pass clauses 11 to 34, and then come back to this one, if that's okay.

The Chair: We have a proposal to do clauses 12 to 34 because we don't have any amendments right now. After that we'd come back with NDP-4 at the next meeting.

(Clauses 12 to 34 inclusive agreed to)

The Chair: That's great.

That will end our work for today. We'll be back Wednesday with NDP-4.

[*Translation*]

Thank you.

Meeting adjourned.

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