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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 this 53rd meeting of the Standing Committee on National Defence. Pursuant to the Order of Reference of Monday, December 6, 2010, we are pursuing our study of Bill C-41, An Act to amend the National Defence Act and to make consequential amendments to other Acts.

We have with us today Colonel Gleeson and Lieutenant-Colonel Gibson, from the Department of National Defence.

Thank you for your presence here.

I would like to tell members that if they have questions of a more technical nature, these gentlemen are here to answer them.

(On clause 11)

The Chair: Last week, we were at clause 11, for which the NDP has moved amendments.

Regarding amendment NDP-4, I believe it had been suggested to group together amendments NDP-4, NDP-5, NDP-6 and NDP-7, so as to deal with them as a whole.

[*English*]

Mr. Harris, you have the floor on amendment NDP-4 and the question to bring together amendments NDP-4, NDP-5, NDP-6, and NDP-7.

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

Just as a small point of order or something like that, I'm noticing that it's 2:30 today, the same time as it was when we finished the other day. I'm told that requests were made to have the battery put in the clock, but that hasn't happened.

I'm given to understand that it requires the good offices of a member of Parliament or a *député* such as yourself, as chair of this committee, whose request might actually be listened to. I wonder if you could undertake to do that. Just as a committee member here who is trying to keep track of how long we're at this, it's a bit disturbing.

An hon. member: Do we need a motion?

Voices: Oh, oh!

The Chair: Thank you, Mr. Harris. That's a good point.

I have another point of order, maybe on the same kind of subject. For next time, I would ask that the people in charge of the room here would ensure that next time we have room on my right, because it's so tight here and members from the government cannot circulate. I will ask the people who understand this to work the room a little bit more—

An hon. member: A move to the left?

The Chair: A move to the left, yes. I have difficulty saying that but I'll say it: move to the left a little bit.

Voices: Oh, oh!

The Chair: That being said, Mr. Harris, you have the floor on amendment NDP-4.

Mr. Jack Harris: Thank you.

I believe what happened the other day was that, after debate, amendment NDP-3 was passed and Mr. Hawn requested an opportunity to have a closer look at amendments NDP-4, NDP-5, NDP-6, and NDP-7, which were presented by me as consequential amendments. They were provided to me by the legislative counsel and were consequent on the amendments that we had.

It is possible—and I just say that because I don't know what Mr. Hawn has come up with in response—that some of the issues relate to another amendment that we have circulated, but which is not numbered. I think someone has graciously called it amendment NDP-3.1, but it's an amendment to clause 11 that has been circulated and refers to section 29.16 of the act.

Perhaps Mr. Hawn could respond to amendments NDP-4, NDP-5, NDP-6, and NDP-7. As I say, they were presented to me as additions required on the passage of amendment NDP-3.

Hon. Laurie Hawn (Edmonton Centre, CPC): I'd be happy to do that.

Amendments NDP-4, NDP-5, NDP-6, and NDP-7 are consequential to amendment NDP-3, so I suggest we talk about those for a minute, and then go back to what somebody has labelled amendment NDP-3.1.

With respect to amendments NDP-4, NDP-5, NDP-6, and NDP-7, amendment NDP-3 was passed, and we think that was a serious mistake. Be that as it may, what it has done—and I'm not going to re-debate it— again—is tie the hands of the Governor in Council with respect to making appointments.

We're not so much concerned with the removal of currently serving officers and NCMs, because there are lot of retired folks who could fill that bill just as well. What we are concerned with is the limiting of retired service members—officers or NCMs—to 40%. That is a huge mistake. It is tying the hands of the Governor in Council. It is not going to be very workable at all.

All that said—I just say that from the point of view of getting it on the record—I recognize that they are consequential and linked to amendment NDP-3, so I suggest that we just call the vote. We'll be voting against amendments NDP-4, NDP-5, NDP-6, and NDP-7 on principle, because we think amendment NDP-3 was wrong, but I understand that it will pass.

Just to take the chair off the hook, I just want to make a clarification. If it's a tie vote, how does the chair vote on this? Because I'm only seeing five across....

Mr. Jack Harris: Well, I have some more to say on that—

Voices: Oh, oh!

Hon. Laurie Hawn: No, it's just that today Cheryl is not here. You can call the vote.

● (1535)

The Chair: Mr. Harris.

Mr. Jack Harris: As to what would happen in the case of a tie vote, I don't know. If they're consequential amendments on item NDP-3, then the status quo would then assume they would be part of the motion.

I think Mr. Hawn referred to tying the hands of the Governor in Council. I think the experience has been that there has historically been a balance, and that balance can obviously easily be achieved once again. The fact that it's mandated by legislation is only the reality.

I want to go back to one thing that was debated the other day, because I had a lot of trouble with it when we were getting down to the various positions one way or the other. It was mentioned that this is about quotas, etc. I think it's really more about making sure there's a balance on the board.

I would like to add one other thing. I'm sure the Judge Advocate general would want to put this on the record too. In discussions afterwards, the Judge Advocate General advised that the information provided to the committee about an actual competition for these positions was not accurate.

They are not competitive positions. They're Governor in Council appointments. I understand that there is a competition for the chair. Applications are called for and people are interviewed for the chair, but the other positions are not competitive. Information was provided that suggested there was a competition and that if 30 people applied you would have to refuse to hire some people because they didn't meet the civilian qualifications.

I'd like to give the Judge Advocate General an opportunity to correct the record on that. I'm sure they wouldn't want to have that information on the record if it's not correct. Perhaps the chair would allow that.

The Chair: Okay.

Mr. Wilfert.

Hon. Bryon Wilfert (Richmond Hill, Lib.): I have a quick question, Mr. Chairman, for the Deputy Judge Advocate General, on NDP-6. Will this allow for double-dipping?

The Chair: Colonel Gleeson.

Col Patrick K. Gleeson (Deputy Judge Advocate General, Military Justice and Administrative Law, Department of National Defence): Mr. Chair, I'll have a quick look at NDP-6. Let me quickly check the act to make sure I know what I'm referring to.

All NDP-6 will do.... Currently, the act makes reference to members who are not officers or non-commissioned members. NDP-6 will remove that reference to officers and non-commissioned members, because the effect of NDP-3 is to essentially prohibit non-commissioned members from sitting on the board. So it doesn't really impact on the double-dipping issue one way or the other. It doesn't permit it if it doesn't already occur. If it does already occur, then presumably it won't make anything that would prevent it from occurring.

● (1540)

Hon. Bryon Wilfert: Thank you for that clarification.

Mr. Chairman, thank you.

Col Patrick K. Gleeson: If I may mention this, Mr. Chair, I have one final point in response to Mr. Harris's comment on the competitive process. I was informed after our meeting yesterday wrapped up—informally, and I have not gone back and checked, so this is very informal information.... But I was advised that yes, the chair's position was competitive, but not necessarily the member positions.

Again, just for the record, I'm not saying that this is in fact absolutely accurate, but somebody obviously had a different understanding than I did. So we're unclear as to whether or not there was a competitive process for all of the member positions on the grievance board.

The Chair: Okay. *Merci.*

So we're ready to call the vote on amendments NDP-4, NDP-5, NDP-6, and NDP-7. All in favour? Against?

[*Translation*]

(Amendments agreed to [See *Minutes of Proceedings*])

The Chair: We will now move on to amendment NDP-6.1.

[*English*]

Mr. Harris.

Ms. Gallant?

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): On a point of order, Mr. Chair, when you called the vote last time.... I just want to make sure I heard, because I'm at the back of the room and somebody else picked it up as well. You said, “All in favour?”, and then the opposition put up their hands. Then you said “And again?”. I heard “again”. Did you mean—

The Chair: “Against”. I'm sorry, it's my pronunciation. But you were counted.

Mrs. Cheryl Gallant: No, no. I just want to make sure that on the record we have the correct—

The Chair: Yes. Not “again”, but “against”. Thank you.

Mr. Harris.

Mr. Jack Harris: Thank you, Chair.

NDP-6.1 is an amendment is for the grievance board. We've seen a problem, for example, with the MPCC, in that if there's a grievance in process, and they may have had hearings that have gone on or they may have been involved in this process, if their term—

The Chair: I'm sorry, Mr. Harris, but just to be precise for all the members, NDP-6.1 has the number 4993427 at the left of the page. I want you to have the right page.

Go ahead, Mr. Harris.

Mr. Jack Harris: Thank you, Chair. That is the correct section that I'm looking at. It's an amendment to section 29.16 of the act, adding a new subsection 3.1. The idea is that if the term expires of the person who has been participating in the consideration of a matter, or if the person resigns before the grievance committee concludes its consideration of the matter or gives a decision, the member is considered to be a member of the grievance committee for the purposes of rendering a decision.

It is a tidying up of the powers. Essentially, the problem is that if your term expires, you are no longer a member of the committee, and there are administrative law issues having to do with people who haven't participated in the consideration of the matter actually rendering the decision. If someone else were appointed the next day, that person couldn't rely on the other members to make a decision. You would have to rehear the whole matter.

The idea here is simply that of an administrative tidying up, which I think is useful. There are similar provisions in other legislation in other jurisdictions that I was certainly familiar with, and we were aware, of course, of the difficulties and issues with respect to the MPCC and thought this would be something that would be useful. It may not be used very often, but it would be a useful improvement to the powers of the members of the grievance committee.

The Chair: *Merci*.

Mr. Hawn.

Hon. Laurie Hawn: We have a problem with this amendment in several areas. First of all, it doesn't talk about if a member is removed for a cause, and it also says that the member “shall continue”, which means the chair has no say in the matter. We don't think that's appropriate.

It also talks about the committee “giving its decision”. This committee doesn't render decisions; it gives advice. Frankly, we think it's probably outside the scope, but I think that would have been brought up if the legislative clerk had thought so as well.

But we don't think the way it is written it is technically correct. It is not accurate and it should be further considered. As has been stated by the JAG, this is one of those areas that's for further consideration. We can't support this. There are too many things wrong with it.

The Chair: Ms. Gallant.

● (1545)

Mrs. Cheryl Gallant: I think the comment just made by Mr. Harris is really shortchanging someone who slips into the new position. Anybody who is taking on a new position where there is a case in progress would do the homework initially.

We see it through Parliament in committee when we're studying something and we're going through a bill and new members are added to committees all the time. We do our homework in advance to make sure we're well aware of the situation.

I don't think his arguments are valid, Mr. Chairman.

[*Translation*]

The Chair: Thank you.

I will now call the vote on the amendment put forward by the New Democratic Party.

Yes, Mr. Harris?

[*English*]

Mr. Jack Harris: Mr. Chair, if I may reply to Mr. Hawn, if someone is removed for cause, I guess you wouldn't really expect them to be participating in a decision. I'm assuming you wouldn't want them to participate in the decision after the fact that they were removed for cause, so that's purposely left out.

The Lamer recommendation—number 85—recommended this, so Chief Justice Lamer obviously thought this was important. I think the decision is the decision as to what advice it's going to give, so I don't see that as a problem. And why should the chair have a say? If the person is appointed and participating in a decision, then it's just simply a matter of ensuring that the jurisdiction doesn't lapse. This is really a legal point that the Chief Justice of Canada recognized as an important legal point. I don't see why we should try to second-guess him at this stage.

The Chair: Thank you, Mr. Harris.

[*Translation*]

We will now move to the vote on the amendment from the New Democratic Party.

Mr. Bachand, you wish to discuss amendment NDP-6.1?

Mr. Claude Bachand (Saint-Jean, BQ): Yes, I would like to discuss amendment NDP-6.1. I am somewhat sensitive to Mr. Hawn's arguments. Might the committee make amendments to what is already on the table, in order to take into account Mr. Hawn's idea?

I am sensitive to the fact that a member of the board might make a serious mistake and, in so doing, be forced to resign. Mr. Harris will correct me if I am wrong, but, with this clause, such an individual might be allowed to deal with the matter right up until the end, which I would not like to see happen.

Would it be possible for us to try and insert an additional provision that would resolve this problem?

The Chair: It is possible, if you provide, in writing, a sub-amendment to the NDP amendment.

Mr. Claude Bachand: Must I do that right this instant?

The Chair: This very instant.

Mr. Claude Bachand: That is a problem. I would need a lawyer in order to do that. I do not know if Mr. Gleeson would be prepared to cooperate and help me in this regard.

[*English*]

Col Patrick K. Gleeson: I'd be happy to if I had legislative drafting skills, but trust me, Mr. Bachand, you probably wouldn't be well served by that service.

Voices: Oh, oh!

The Chair: Mr. Harris?

Mr. Jack Harris: I'm not sure what assistance Mr. Bachand requires. If someone is removed for cause, they're removed for cause; this says if someone "resigns". Is that what you're suggesting, that if someone is forced to resign...? Well, you know, nobody can be forced to resign—they choose.

Mr. Claude Bachand: Oh, I see.

[*Translation*]

The Chair: We are now going to vote on amendment 6.1 of the New Democratic Party.

(Amendment agreed to)

The Chair: We will now vote on clause 11 as amended.

[*English*]

Hon. Laurie Hawn: Can you count the hands...?

● (1550)

The Chair: Yes. It's five against and two for.

Mr. Jack Harris: So clause 11 as amended, does that include the—

Hon. Bryon Wilfert: The last one, we've voted—

Hon. Laurie Hawn: No, no. Now we're talking about the whole clause.

Mr. Jack Harris: Mr. Chair, could I—

The Chair: I will—

Mr. Jack Harris: Could I ask you for a recount, Mr. Chairman?

The Chair: Okay. We're going to vote on clause 11.

Shall clause 11 carry as amended?

Mr. Jack Harris: Clause 11 is the clause that includes all the amendments—

The Chair: You're right.

Mr. Jack Harris: —amendments 3, 4, 5, 6, and 7...?

The Chair: You're right.

I'm going to do that in English a second time.

Shall clause 11 carry as amended? All in favour? All against?

(Clause 11 as amended agreed to [See *Minutes of Proceedings*])

The Chair: Okay. This clause carries as amended. *Merci*.

[*Translation*]

(On clause 35)

The Chair: We now move on to clause 35.

We will be dealing with amendment 7.1 put forward by the Bloc québécois. I would point out to members that the reference number is 5011571, which can be found on the left-hand side of the page.

Mr. Bachand, you have the floor.

Mr. Claude Bachand: You have just given the reference number. Must I consider that all members around the table have received this sheet?

The Chair: Indeed, and that is why I quoted the reference number: 5011571.

Mr. Claude Bachand: Mr. Chairman, it is really not complicated. I was astounded to learn that, in the case of a summary trial, an individual may be hit with a judicial record.

I understand full well that military justice must be stringent and rigorous. It has always been said that military justice cannot be a replica of civil justice. However, I find that it is really an exaggeration that someone who leaves his or her post to go to the washroom and then reports to his or her commanding officer can be told that because he or she left his or her post —and there is no interest in knowing if it was to go to the washroom or not —, he or she will have a judicial record. It is absolutely essential that this situation be corrected, because I find that the penalty is very much exaggerated compared with the seriousness of the infraction.

Consequently, amendment BQ-7.1 would remedy this situation. As for the superior commander — we will be looking later on at amendment BQ-7.2, pertaining to the superior commander —, the same type of reasoning will apply.

I do not know if I had made myself clear, but, in essence, we no longer wish to see people coming out of a summary trial with a criminal record.

The Chair: Thank you.

Mr. Hawn, you have the floor.

[*English*]

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

That case is grossly exaggerated. That is just not what would happen at all.

Now, on amendment BQ-7.1, we have significant problems with purely on a technical basis, notwithstanding the policy problem we have. First of all, "judicial record" is not a defined term anywhere. It's not a defined term under any act. It is in fact inconsistent with the Criminal Records Act, so technically the amendment does not mean anything. It's technically wrong.

What I would suggest for consideration is that amendment NDP-8 covers the same issue. We still have a problem with the policy side of that, but at least amendment NDP-8 is technically correct.

I would throw this out just for consideration. We might want to vote down amendment BQ-7.1 and have the same discussion on amendment NDP-8, because I believe it has the same meaning. But at least, as I say, NDP-8 is technically correct.

[*Translation*]

The Chair: Thank you.

Mr. Wilfert, you have the floor.

[*English*]

Hon. Bryon Wilfert: Mr. Chairman, through you, I would like to ask the JAG this question: as it currently stands, what types of convictions result from a summary trial conviction? The concern we have would be to ensure that summary trial convictions for regular service members don't end up on the criminal record.

● (1555)

Col Patrick K. Gleeson: Currently, Mr. Chair, as was discussed I think by the witnesses who appeared from the Criminal Lawyers' Association, “criminal record” is a very vague term in the Canadian legal structure. There is a provision in the Criminal Records Act that talks about criminal records as defined in the Criminal Records Act, so it's a fairly legally convoluted term.

Essentially, what the Criminal Records Act provides is that if you are convicted for an offence under federal law, you will end up with a criminal record within the meaning of the Criminal Records Act. The effect of that is that any federal conviction puts you into that category. That includes a conviction under the National Defence Act. That does visit what we believe to be, in certain circumstances, an undue harshness on certain members of the Canadian Forces who are convicted for very minor matters, as was suggested by Mr. Bachand earlier.

Clause 75 of the bill was introduced to address that very circumstance, to ensure that people convicted of minor offences and minor circumstances do not fall within the scope of the Criminal Records Act definition of a criminal record. This is modelled on what you find in the Contraventions Act, a piece of legislation which ensures that for minor federal offences, ticketing type offences, you don't end up with a criminal record as defined in the Criminal Records Act.

So essentially what clause 75 does, unamended, is address the concern that I'm hearing being expressed here today.

Hon. Bryon Wilfert: I appreciate that.

Thank you.

The Chair: *Merci*.

Mr. Hawn.

Hon. Laurie Hawn: I guess I'd just suggest that maybe the simplest thing to do to not induce confusion would be.... I suggest that we vote against BQ-7.1 and maybe have the policy discussion when we get to NDP-8, if that's simpler.

[*Translation*]

Mr. Claude Bachand: I could also withdraw the amendment. I am not a masochist: I do not enjoy getting beaten.

Voices: Ah, ah!

The Chair: Do I have committee members' consent for the withdrawal of amendment 7.1 of the Bloc québécois?

Voices: Agreed.

(Amendment withdrawn)

The Chair: The committee will now vote on clause 35.

(Clause 35 agreed to)

(On clause 36)

The Chair: Given that clause 35 was carried as is, the amendment having been withdrawn, we are now on clause 36, and amendment BQ-7.2.

Mr. Bachand, you have the floor.

Mr. Claude Bachand: As I was saying earlier, it is the same thing here.

However, amendment NDP-8 deals only with the commanding officer. Personally, I would like to see this also capture the superior commander.

Might it be possible to apply amendment NDP-8 to the superior commander, given that I made a distinction between "immediate commanding officer" and "superior commander"?

Might I be authorized to not move this amendment right away, but rather after amendment NDP-8?

The Chair: Yes, you could indeed not move it.

I will give the floor to Mr. Hawn.

[*English*]

Hon. Laurie Hawn: I believe the same thing applies: NDP-9 would in fact cover BQ-7.2.

The Chair: NDP-9 is on clause 75.

Colonel Gleeson.

Col Patrick K. Gleeson: Again, the way clause 75 is worded, it would capture both of these. It deals with convictions by any service tribunal, including a summary trial, whether it's done by a commanding officer or a superior commander. So it doesn't line up perfectly with the two amendments. The NDP amendments don't line up perfectly with the two amendments by the Bloc, but the effect would be the same if those amendments were implemented. So this peer commander notion is captured in the NDP amendment—at eight.

[*Translation*]

The Chair: Mr. Bachand, you therefore wish to withdraw your amendment?

Mr. Claude Bachand: Indeed.

The Chair: Do I have committee members' consent for the withdrawal of amendment BQ-7.2?

Voices: Agreed.

(Amendment withdrawn)

The Chair: Given that the amendment is not being moved, we will now vote on clause 36.

(Clause 36 agreed to)

The Chair: We are now on clause 37, for which there are no amendments.

● (1600)

[*English*]

Shall clause 37 carry?

An hon. member: To clause 40, as a group?

The Chair: Okay. Shall clauses 37 to 40 carry? Carried? Okay.

(Clauses 37 to 40 inclusive agreed to [See *Minutes of Proceedings*])

(On clause 41)

The Chair: On clause 41, we have an amendment by the Bloc Québécois, BQ-8.

[*Translation*]

Mr. Bachand, you have the floor.

Mr. Claude Bachand: I would like to remind my colleagues of the way in which we decided to proceed in this regard.

Legislative counsel wished to group together amendments BQ-1, BQ-8, BQ-9, etc., but we had preferred that we deal with amendment BQ-8 and that BQ-1 be rejected. In fact, we did not want to reject amendment BQ-1, because it was nevertheless my motion. Given that it was simply a definition, we did not want to fold it in completely with amendments BQ-8, BQ-9, etc.

The Chair: You therefore wish the result of the vote on amendment BQ-8 to also apply to amendments BQ-9, BQ-10 and BQ-11.

Mr. Claude Bachand: That was the suggestion made by the legislative counsel. There is nothing to be gained by my going through my spiel three times. I will only do it once, and it will apply to everything.

I maintain my argument. We do not need part-time judges. We had 65 court martial cases last year. To my mind, four full-time judges would suffice. I see no use in adding judges to try and... Flexibility is being invoked here, but I believe that that would lighten the workload of the four judges who are presently in place.

I believe, unfortunately, that this bill is not serving ordinary soldiers; it seems that it would mostly impact upon the higher echelons.

Consequently, relying on the reasoning I developed with regard to amendment BQ-1, I consider that it would be appropriate that there not be reserve force military judges. This is what we are proposing in the three clauses you have before you.

The Chair: Thank you.

I will now give the floor to Mr. Hawn.

[*English*]

After that, I have Mr. Payne.

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

It really is quite simple. With only four judges, there are going to be times, unpredictable times, when we will need more. If it's a major operation such as Afghanistan, Somalia, or whatever, or if we happen to get into things in Libya...who knows what's going to happen?

The simple fact of having reserve force judges means that, yes, they do have tenure until they retire, but they are not paid, and they're not used unless they're actually needed. It's a no-cost way to give the Canadian Forces legal system some flexibility. It just makes common sense to us. It doesn't cost anything unless we use them. We won't use them unless we need them, but we can't use them if they're not there.

[*Translation*]

The Chair: It is now Mr. Payne's turn, after which it will be Mr. Bachand's.

[*English*]

Mr. Payne, do you want to...? No?

Monsieur Bachand.

[*Translation*]

Mr. Claude Bachand: I would simply like to be provided with a clarification. It is amendments BQ-8, BQ-9, BQ-10 and BQ-11 that are grouped together, correct?

The Chair: You are right, the vote on amendment BQ-8 will also apply to amendments BQ-9, BQ-10 and BQ-11.

Mr. Claude Bachand: We are going to be voting in favour, but we will be alone in doing so.

The Chair: Very well.

[*English*]

Colonel Gleeson, do you want to add something to that?

Col Patrick K. Gleeson: Mr. Chair, I think we discussed this last week when we did clause 1. We discussed the purpose for this. It really is, as was indicated, a flexibility provision. It is intended to introduce a degree of flexibility to a rather small bench within the military context. And it is not limited to a very small group of people, which was something I think that was put on the record by some witnesses who appeared before the committee.

I'm happy to expand on any of that, but I think the points have already been made on the record.

[*Translation*]

The Chair: Very well. Thank you.

We are therefore going to be voting on amendment BQ-8.

(Amendment negatived)

● (1605)

The Chair: We will now vote on clause 41.

(Clause 41 agreed to)

[*English*]

The Chair: We have no amendments to clause 42.

[*Translation*]

We will now vote on clauses 42 to 46.

(Clauses 42 to 46 agreed to)

(On clause 47)

The Chair: We now move to clause 47, for which we have amendment BQ-12.

Mr. Claude Bachand: Mr. Chairman, the purpose of this amendment is to change the make-up of the panel. From the very beginning, one of the Bloc québécois' concerns has always been to bring military justice closer to civil justice, without however going so far as to having the former be a replica of the latter. It is in itself a noble objective. As a matter of fact, I would remind you that a certain number of countries, for example Great Britain and Australia, were called to task for having too great a distance between the two justice systems.

Under the provisions of the bill as it now stands, if the accused is a non-commissioned member, the panel is composed of two officers and three non-commissioned members. The Bloc québécois would like to change this make-up in order for the panel to be composed of one officer and four non-commissioned members.

This would fall in with the decisions made within our society regarding the treatment of persons facing accusations, or the redress of grievances. People from every layer of society present their arguments and decide on the fate of their peers. I believe the same principles should apply in the case of non-commissioned members. It might even have been advisable to go even further and to propose that a non-commissioned member be judged by five non-commissioned members, in other words his peers. However, we wish to position ourselves between the two options. Instead of there being two officers and three non-commissioned members, we are proposing that there be one officer and four non-commissioned members.

That is our submission.

The Chair: Thank you, Mr. Bachand.

[*English*]

Mr. Wilfert, and then Mr. Hawn.

Hon. Bryon Wilfert: Mr. Chairman, through you to the JAG, will this amendment affect the panel's ability to properly function? As well, are there any practical purposes for having a second officer?

Col Patrick K. Gleeson: I'd be happy to address that question.

The panel is not intended to be a jury of peers. The military justice system exists for a different purpose. You see that purpose set out in the sentencing principles in this bill. One of the fundamental objectives of the military justice system is the maintenance of discipline and operational effectiveness.

The responsibility for discipline and operational effectiveness does not rest with peers. It rests with the chain of command. That's what the panel makeup is intended to reflect. So the view is that, yes, this would have a negative impact on the military justice system as you try to turn the panel into a jury.

Certainly this bill does provide a greater level of representation for NCMs on panels. We recognized back in 1998 when we introduced Bill C-25, the importance of having senior NCMs sit on panels. Prior to that, no NCM could sit on a panel; it was all officers. It was certainly recognized that NCMs are the senior disciplinarians in units; they play a key and critical role, with significant responsibility for discipline at the unit level, and therefore should be represented on panels.

We have now increased that representation in this bill to three. I would submit that to move to a representation of four and essentially exclude officers—which I think I heard suggested might be the better approach—would definitely undermine the purposes and intent of the military justice system and the court-martial process.

Hon. Bryon Wilfert: Thank you.

[*Translation*]

The Chair: Thank you.

[*English*]

Colonel Gibson, did you want to add something?

● (1610)

LCol Michael R. Gibson (Director, Strategic Legal Analysis, Department of National Defence): There's just one further point of important information for the members of the committee to be aware of.

The Charter of Rights actually makes an explicit recognition of the distinct nature of the military justice system. But particularly in the context of juries and panels, paragraph 11(f) of the charter provides as follows: “Any person charged with an offence has the right...(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury...”.

It has certainly been our view—and we think a quite correct view—that the charter actually makes recognition that there is a distinction between a jury and a panel and that there are valid reasons underlying that distinction, which Colonel Gleeson just alluded to.

Thank you.

[*Translation*]

The Chair: Thank you.

Mr. Hawn, you have the floor.

[*English*]

Hon. Laurie Hawn: I'll add just one thing. We've gone from one officer and four NCMs to three officers and two NCMs. We don't have any experience with that yet. That's a step towards what Monsieur Bachand is talking about.

For all the reasons that have been stated, I think we should not support this amendment.

The Chair: Thank you.

[*Translation*]

We are therefore now going to vote on amendment BQ-12, that relates to clause 47.

(Amendment negatived)

The Chair: We will now vote on clause 47 itself.

(Clause 47 agreed to)

[*English*]

The Chair: Now we have clauses 48 to 61 without amendments. Shall clauses 61 to 48 carry?

(Clauses 48 to 61 inclusive agreed to)

(On clause 62)

[*Translation*]

We are now on clause 62. We have two Bloc québécois amendments: BQ-13 and BQ-13.1

Mr. Bachand, you have the floor.

Mr. Claude Bachand: The purpose here is to add conditional discharge, suspended sentence and probation to the possible outcomes. In the end, the idea is to have new ways of resolving problems rather than resorting to more draconian solutions.

It is important that conditional discharges be listed among the conditions set out in an order, which is not the case at the present time. This would increase flexibility for military judges, enabling them to use these concepts in order for the justice system to be more balanced and more flexible. I am using this term, because it is often mentioned by military judges and lawyers. It is important that there be greater flexibility. What is at the heart of my submission is that military justice must be less rigid towards soldiers and there must be other ways of punishing them.

The Chair: Thank you, Mr. Bachand.

I must advise you that, in the Chair's opinion, clause 13 is out of order because it goes beyond the scope and the principle of the bill. I am relying here in rendering my decision on the second edition of the *House of Commons Procedure and Practice*.

Indeed, it states on page 766 that: "An amendment to a bill that was referred to committee after second reading is out of order if it is beyond the scope and principle of the bill." I believe that this is the case with amendments BQ-13 and BQ-13.1.

Mr. Bachand, you have the floor.

Mr. Claude Bachand: Is your decision exactly, word for word, the same as the one you gave last time?

The Chair: No, it is a new decision. In fact, in the case of the previous one, my reasoning was different. The reasoning I am invoking today is that this goes beyond the scope and principle of the bill.

Mr. Claude Bachand: Do you have something against me, Mr. Chairman? You are looking for reasons to lock horns with me.

I would very much like to have your decision in writing, please.

● (1615)

The Chair: Yes, here it is.

You know that I enjoy working with you, Mr. Bachand. As a matter of fact, I will soon be going to Saint-Jean, for the Royal Military College Saint-Jean, where there is not simply one activity.

Mr. Claude Bachand: There are many activities at the Royal Military College Saint-Jean.

I have the impression that he is going to be announcing its complete reopening.

Hon. Dominic LeBlanc (Beauséjour, Lib.): I think he wishes to privatize it, or else give it to the provinces.

The Chair: It is under federal jurisdiction.

Mr. Bachand, I will give you a few minutes to read the decision.

Mr. Claude Bachand: Mr. Chairman, does your decision apply to both amendments, in other words both BQ-13 and BQ-13.1?

The Chair: It applies to those two amendments.

Mr. Claude Bachand: I will comply with your decision, Mr. Chairman.

The Chair: Thank you, Mr. Bachand.

We will now vote on clause 62.

[*English*]

(Clause 62 agreed to)

[*Translation*]

The Chair: Now that clause 62 has been carried, we will move on to clauses 63 to 74, for which we have no amendments.

[*English*]

Shall clauses 63 to 74 carry?

(Clauses 63 to 74 inclusive agreed to)

[*Translation*]

(On clause 75)

The Chair: We are now on clause 75. We have two amendments from the New Democratic Party: they are amendments NDP-8 and NDP-9.

I will now give the floor to Mr. Harris.

[*English*]

Mr. Harris, for your NDP-8, you have the floor.

Mr. Jack Harris: Thank you, Mr. Chairman.

Amendment NDP-8 essentially deals with the question raised by the witnesses on the concern that, due to the lack of procedural fairness to the standard that civilian law has under the charter, the additional civilian consequence—I guess I would call it that—of being stuck with a criminal record ought not to apply.

I think this provides a balance in that we understand the principles of military law—and I don't need to repeat the authorities, because I think they're accepted by all members of this committee—in terms of the role of military justice and the importance of morale and efficiency and discipline and order. But in order to treat our men and women in uniform fairly, they ought not to carry the additional burden of a criminal record. This is designed to deal with that. Of course, as is obvious from the existing clause 75, the framers of this legislation recognize that there's a difficulty there.

If you look at the existing clause—and I'm waiting for my assistant to come back with a full list of offences for which a summary trial can take place—there are only a few of them picked out: those described in sections 85, 86, 90, 97, or 129. There is the further restriction that someone sentenced to a minor punishment, to a fine of $500 or less, or to both, doesn't get a criminal record.

One side point is that we did have Colonel Dugas testify that a fine of $500 is probably unheard of. The minimum fines seemed to be around $1,000, so obviously that was not in keeping with the practice in military justice, and that seems to be a difficulty to start with.

If I could go into some of the other service offences that would be covered by my amendment but that aren't covered by the existing clause 75, I think you might see that there are plenty of service offences that really ought not to end up in the same category.

We have, for example, section 83, on disobedience of a lawful command. Well, that could be something extremely minor: someone doesn't salute when they're told to salute, or someone doesn't obey a command in a manner satisfactory to the superior officer. Why would that have a criminal law consequence? Why would someone have to go under the pardons act to clear their record for that?

Section 84 is on striking or offering violence to a superior officer. Now, I'm not encouraging mutiny or anything here, but still, I think offering violence is what is called in civil criminal law “uttering threats” or something like that.

Section 85 is on insubordinate behaviour. Well, I suppose the first two might be branches of insubordinate behaviour as covered under the existing clause, but the others aren't. Under section 86, quarrels and disturbances are covered, but section 87, on resisting or escaping from arrest or custody, for example, is not. Section 89 is perhaps a rather serious one. It's connivance at desertion.

● (1620)

Section 90, absence without leave, is covered, but section 91, false statement in respect of leave, is not. I think I gave an example the other day of somebody who gives incorrect information, false information, about their reason for having a leave: he really wants to see his girlfriend,but he says his mother is sick or something like that. Is that something that a person should get a criminal record for? That's my concern here.

Members who have large contingencies of soldiers would know that there are an awful lot of circumstances that might come under some of these sections that ought not to, in common sense, result in a criminal record. Signing an inaccurate certificate could be serious or it could be not serious. Improper use of a vehicle is not covered. That's section 112: improper driving of vehicles. Next is “Causing fires”. That's not the same as arson. This doesn't mean deliberately causing fires. It could be a negligent causing of a fire by not properly looking after equipment.

These are things that concern me. First of all, it's obviously important for maintenance, good order and discipline that these be considered to be service offences and be treated with seriousness by the military. I don't have a problem with that. I don't think anybody has a problem with that. But the issue here is, should these offences, particularly when they're covered by the summary conviction process without the rights that are associated with that, result in a criminal record? That's what I'm trying to avoid here.

I'll say at the outset that there's opportunity here for some flexibility. Actually, I have a list of offences that can be included in another version, for example, of this amendment. So I will say that if members aren't satisfied with a blanket approach here, I have another version that may be more acceptable. But my starting position, I guess, and I may as well say it, is that I think the summary conviction procedure has been shown by the witnesses and the evidence to be inadequate in terms of protection of the individuals in the military under the law.

I don't agree, frankly—despite the debate that we had here the other day—with Mr. Hawn that you park your charter rights at the door, and that despite the fact that you are in the military you can suffer these other civil consequences of having a criminal record that you have to deal with, and the consequences thereof, and despite the fact that you don't get treated with the same degree of procedural fairness. I think Mr. Hawn did a very good job of defending that position. We heard the debate between him and retired Colonel Drapeau the other day.

I don't agree with Mr. Hawn. I think we can find a better balance here by ensuring that there's a protection for members of the force who can be subject to military discipline, but not suffer the consequences. That's basically what I have to say in relation to this. I will allow other members the opportunity to speak.

● (1625)

The Chair: Thank you, Mr. Harris.

I will give the floor to Mr. Payne, and after that to Mr. Hawn and Mr. Boughen.

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

I have a question that I'd like to pose to Colonel Gleeson. It's in regard to what Jack talked about in terms of causing a fire. It led me to think about negligence and maybe not maintaining equipment properly, or failing to do your duty and a fire resulting from that. So my question to you, Colonel, would be, would that in fact then be criminal?

The Chair: Colonel Gleeson.

Col Patrick K. Gleeson: I'm just looking through section 113. One of the general points that I think it is important to make is that the offences that were identified certainly can occur in subjectively minor circumstances, but they are objectively serious offences and can encompass very significantly serious behaviour or conduct.

If we look at causing fires, section 113, it talks about a “person who wilfully or negligently or by neglect of or contrary to regulations, orders or instructions, does any act or omits to do anything, which act or omission causes or is likely to cause” a fire. Again, this type of offence is not unique to the code of service discipline. Civil society also prohibits that type of activity and seeks to punish it.

If we look at the offences in relation to vehicles, we can see again that they encompass what may be minor offences but also very serious conduct. Paragraph 111(1)(a), for example, says “drives a vehicle of the Canadian Forces recklessly or in a manner that is dangerous to any person or property having regard to all the circumstances...”. Paragraph (b) talks about driving a vehicle while your ability to do so “is impaired by alcohol or a drug”. Again, this is criminal conduct in civil society. This particular offence is punishable by a term not exceeding five years' imprisonment.

These are objectively serious offences that are within the jurisdiction of a summary trial officer because we recognize that they can also occur in very minor circumstances that are critical and important to discipline.

So when you look at the way clause 75 is drafted, it does not provide that you do not obtain a record within the meaning of the Criminal Records Act with respect to convictions at summary trial. It says that you shall not receive that record with respect to any service tribunal conviction. In other words, what we're looking at is the harshness of the Criminal Records Act effect, where these types of offences—the list of offences—occur in very minor circumstances. What we don't do is try to exempt one of the types of service tribunals from the Criminal Records Act structure or mechanism. The reason that is not done in this legislation is that the military justice system, with its two tiers of tribunal structures, needs to work as two parts of a machine that need to work together.

We've heard about the summary trial system and it has been noted that not all the procedural protections exist at summary trial that exist at court martial. We've explained why that occurs. But one of the key safety mechanisms in place to ensure that soldiers are fairly protected is that in all but the most minor of circumstances, a soldier always has the right to choose to be tried by court martial.

If we introduce a system that essentially includes a disincentive to exercise the right to go to court martial, the effect that will have, we believe, is to unfairly disadvantage the soldier in making a bona fide informed choice with respect to what type of tribunal he wants to appear before. If you tell a soldier that he will get a record within the meaning of the Criminal Records Act if he exercises his right to be tried by a court martial, our fear is that the soldier won't exercise that right and will feel compelled to have the matter dealt with at summary trial. That is the very fairness issue that I think many people have talked about within the context of the hearings around this issue.

The introduction of this type of amendment that makes a distinction based on tribunal we think does not serve the interests of the system, and it does not serve the interests of the people who are subject to the system.

Colonel Gibson, I don't know if you have anything you want to add to that, but if you do, please do so.

● (1630)

The Chair: Colonel Gibson.

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

Yes, I would certainly concur with the concern expressed by Colonel Gleeson with respect to a potential chilling effect of such an amendment on the exercise of the right to elect court martials. Court martials exist not only for the very important purpose of trying the most serious types of offences, but also as a safety valve for the system, to prevent any circumstance where the accused has a concern that he or she may not be treated fairly at summary trial.

If you're putting in place a disincentive for that person to exercise that right to elect court martial—if they do have a concern—by saying that if they go to summary trial they'll have no record, and that if they go to court martial and get convicted they may get a record, that frustrates that important safety valve.

The other point that l think is important for members of the committee to appreciate is that the list of offences that are triable at summary trial is set out in QR and O article 108.07. At the most serious end of those, there are some very serious Criminal Code and Controlled Drugs and Substances Act offences, including assault, assault with a weapon or assault causing bodily harm, assaulting a peace officer, or possession of a substance under subsection 4(1) of the CDSA.

I would suggest that the members of the committee would wish to very seriously consider from a public policy perspective whether Parliament's intent is best suited or best served by exempting those types of—literally—Criminal Code offences from acquiring a record, whereas if a person had been tried at a court downtown, they would.

I have one last very small point. I would not want the members of the committee to be under any misapprehension as to what the policy intent of clause 75 was. It was put into the bill, as Colonel Gleeson mentioned, for the purpose of recognizing that by the nature of service life, one is subject to constant scrutiny, to being held to a higher standard of discipline than a civilian would be, and therefore, as a consequence of that, one should not acquire a meaning within the Criminal Records Act for conviction for very minor types of offences. It was not put in there under any notion or suggestion that the scheme of summary trials was deficient.

[*Translation*]

The Chair: Thank you.

Mr. Hawn, you have the floor.

[*English*]

Hon. Laurie Hawn: Thank you, Mr. Chair. You can't add a lot more to that.

Just to reiterate two points: the chilling effect it would have with respect to a service member's liability to select court martial with all the options and protections he has in that, and the point just made about some very serious offences that would automatically then not have a criminal record. I clearly don't think that is our intent here. Those reasons are much better explained than I could explain them. I don't think there's any way we can support this amendment.

[*Translation*]

The Chair: Thank you.

Mr. Dryden, you have the floor.

[*English*]

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

You described certain instances where you said objectively they were minor. The example was used about causing a fire or something along that line. If somebody was causing a fire but in an instance that was very minor, objectively, then would the decision rendered be necessarily one where a criminal record would follow?

● (1635)

Col Patrick K. Gleeson: If the individual is convicted of an offence—in this case, causing fires—yes. Regardless of the level of punishment, a criminal record within the meaning of the Criminal Records Act would follow, but that individual in a civil circumstance would suffer the same consequence, I would suggest, sir.

Hon. Ken Dryden: Well, again, we're talking about something that is objectively minor. My question is the same point: do we want somebody to carry a criminal record where they have caused something that was objectively very minor?

Their option would be either to render the decision where there would be a criminal record, or to say to themselves, “Look, I realize that it's causing a fire, but it's really not all that significant, and I know that it would generate a criminal record, so therefore I am not going come down as hard as I should because I don't have the option of coming down in a less serious way...I only have to come down in a harsher way, which in fact is a punishment beyond what should be the case”.

Col Patrick K. Gleeson: Mr. Chair, may I reply? Then maybe I'll ask Colonel Gibson to add to that.

First of all, if an individual is tried with the causing fires offences, it is triable at summary trial, but the accused has an automatic election. The individual accused gets to decide in which forum or before which tribunal he or she will be tried with respect to that type of offence, regardless of how serious it is—

Hon. Ken Dryden: That's not my question.

Col Patrick K. Gleeson: I'm going to get to that in a moment.

Hon. Ken Dryden: Well, that's the question I want to have answered.

Col Patrick K. Gleeson: Okay. I understand. I just wanted to make sure that context was there.

If that individual is convicted by either tribunal for that offence, regardless of the seriousness of the punishment it would then be a record within the meaning of the Criminal Records Act, because it would be a conviction under a federal act of Parliament and it's not exempted in the current drafting of clause 75. So yes, they would get a criminal record within the meaning of the Criminal Records Act, but the presiding officer would in no way feel compelled to give a harsher punishment.

Maybe I misunderstood that. I'm not sure how the harsher punishment piece comes in—

Hon. Ken Dryden: Well, the harsher punishment is carrying a criminal record.

Col Patrick K. Gleeson: Well, it's an administrative consequence. The criminal record within the meaning of the Criminal Records Act is not a punishment in law. It's an administrative consequence based on.... But technically speaking—

Hon. Ken Dryden: It's a harsh consequence.

Col Patrick K. Gleeson: It is a harsh consequence or can be a harsh consequence.

Hon. Ken Dryden: Right.

Col Patrick K. Gleeson: As I say, clause 75 as drafted is seeking to ameliorate that consequence with respect to the matters where an accused doesn't get the right to elect. That's what it's trying to do.

If I could ask him, perhaps Colonel Gibson could help you a little more.

The Chair: Yes, Colonel Gibson, briefly, please, and then Mr. Harris.

LCol Michael R. Gibson: I would not want the members of the committee to be under any misapprehension about the current state of the law and what is proposed.

Under the current state of the law, any conviction at a summary trial would be, pursuant to the meaning of section 3 of the Criminal Records Act, a conviction under an act of the federal Parliament. So it would result in the creation of a record within the meaning of the Criminal Records Act.

The effect of what's proposed in clause 75 of the bill would be that in those instances where the circumstances were sufficiently minor that a person received a punishment under the thresholds set out in that act, you wouldn't actually acquire that record.

So just to make it absolutely clear: in current law you would get a record. If clause 75 were passed and it was an objectively minor circumstance with the punishment underneath the threshold, you would not.

The Chair: Thank you very much.

Mr. Harris.

Mr. Jack Harris: Thank you, Chair.

I'm encouraged.... I don't want to get into arguments with the JAG. Obviously they're here to help us out with factual information. But I want to say that what we're hearing here is the real problem: it's extremely arbitrary. If a member of the forces is charged with an offence and is fined $500, he doesn't get a criminal record. If he's fined $600, he does. It doesn't make sense, frankly.

When we look at the rate of conviction or the rate of charges, we're looking at 2,019-odd people per year in a force of, what, 60,000 regular members or thereabouts? We're talking about a pretty high number of people being exposed to this military justice. That may be necessary for disciplinary reasons—I'm not arguing that issue here, or at this point—but a lot of people are affected by this.

I recognize that there's an attempt here at least to start the process, but I don't think it's adequate at all. It's been suggested that this would be a disincentive for people choosing a court martial. There's already a disincentive; if you go before a commanding officer, there's a limit on detention before a commanding officer that's not there for a court martial. There are all sorts of reasons...and we've heard the reasons why people choose a summary conviction, which have nothing to do with this; they're already choosing it anyway.

The real problem is the arbitrariness. If the sentence—and here I'm picking up on something the Judge Advocate General said—is so minor that....

Let's say you take section 113. There's a minor fire caused by somebody not following the regulation. A fire is caused and he's charged. If it's a minor circumstance, even though it's section 113, then it's very arbitrary to say, well, a minor incident under 113 shouldn't cause any problem, but even a major.... I suppose "absent without leave" could be somebody coming in after curfew, or it could be somebody taking off for two weeks, or it could be somebody not coming back from furlough for an extra week and they have to go looking for him, etc. He hasn't deserted, he just hasn't shown up.

I suppose there are insignificant issues of AWOL and there are some that are probably more serious. Both of them get treated the same—they're both AWOL—but in the case of starting fires, no matter how minor it is, it's treated as something that attracts a criminal record.

I think we really have to do something here that avoids this level of arbitrariness. Either we have to change the list of offences or we have to expand the nature of the punishment involved and make it so that it applies, as Colonel Gleeson said, to both court martials and other offences.

I think we have a serious problem here. I think anybody who has a constituent or relative or child in the forces ought to be concerned that they're being treated without the benefit of proper procedure under the Charter of Rights level of protections; at the same time, we're having a different consequence for them.

The threshold here is, I think, inadequate, and I've proposed that all of the summary conviction trials be...not attract a criminal record. I think that solves the one issue. There may be other ways of doing it, and the other ways might have to do with the sentence itself. But unless somebody has an amendment to that, or proposes a change in that, I will stick with this.

● (1640)

The Chair: Thank you, Mr. Harris.

I will give the floor to Mr. Hawn, and then Ms. Gallant.

Hon. Laurie Hawn: Thank you, Chair.

Our fundamental problem with what Mr. Harris is proposing is that assault, assault with a weapon, assault causing bodily harm, impaired driving, dangerous driving, driving causing injury—all of those things would not attract, if they're done under summary trial....

If I'm a guy in that situation, and I have a choice between court martial and summary trial, and I know I'm going to get away with assault causing bodily harm, it's a summary trial for me. We'll have people who deserve criminal records for very serious offences not having criminal records, and that's fundamentally wrong.

I don't know if there's some way around that, but that should not be acceptable to anybody, frankly.

The Chair: Thank you.

Ms. Gallant.

Mrs. Cheryl Gallant: I thought I heard our witnesses say that anything that would have been a criminal conviction would also be a criminal conviction according to a summary trial. Is that correct?

LCol Michael R. Gibson: I recognize that this is an area of the law that's really confusing. You saw that in the evidence of the witnesses from the Criminal Lawyers' Association. I don't want to be pedantic; I just want to try to clarify for the members of the committee the distinction between a criminal record and a record within the meaning of the Criminal Records Act.

The Criminal Records Act doesn't actually define the term "criminal record". At subsection 3(1), it speaks of "A person who has been convicted of an offence under an Act of Parliament...". So clearly, a conviction for a National Defence Act offence would be a conviction under an act of Parliament. In the current circumstance, a person would acquire a record within the meaning of the Criminal Records Act for any conviction at a service tribunal. I hope that assists you.

● (1645)

Mrs. Cheryl Gallant: What I'm trying to understand is whether the NDP amendment, if it were to go forward, would clear a summary conviction of, let's say, a soldier striking a superior officer. Under this amendment, would that still require a criminal record, according to the rules?

LCol Michael R. Gibson: According to the way the amendment is drafted, any offence tried at summary trial would not result in the creation of a record under the Criminal Records Act. If any offence you're describing were tried at summary trial, it would not result in the creation of a record.

Mrs. Cheryl Gallant: There are crossovers with charges being laid by civilian police and military police. We read in the local newspaper sometimes that somebody is up on charges via the military police and that sometimes the local police force is called in. In domestic circumstances, we would have the civilian police come in when there is a domestic dispute, for example. But in a situation where there are two soldiers who are married to each other and one assaults the other, would that bring in the civilian police or the military police? How would that type of incident be processed?

LCol Michael R. Gibson: Ms. Gallant, what you're describing is a situation known as "concurrent jurisdiction" between the civilian justice system and the military justice system. In many cases such as the one you've described, there will be an exercise of discretion between the civilian police and civilian crown attorneys, on the one hand, and the military police and the director of military prosecutions staff, on the other, in deciding which system a particular charge should be tried in.

If a charge is laid by the civilian police, it would inevitably be tried in the civilian justice system. If a charge is laid by the military police, it would depend on which system they laid the charge under. Military police are peace officers. They can go downtown and lay a charge in the civilian system. Or the charge could be laid in the military system.

But the point is this: if a particular type of offence is tried by summary trial under the proposed amendment, and if that person is convicted, he or she would not acquire a record, whereas if that person were tried for the same incident in a civilian court, then he or she would acquire a record.

Mrs. Cheryl Gallant: There is my concern. If we have a situation where a man assaults a woman and he chooses to go by summary trial, there will be no criminal record. I take issue with that. So on that basis, I would not—

The Chair: Thank you.

I'll give the floor to Mr. Dryden, and after that to Mr. Harris.

Hon. Ken Dryden: A criminal record is a significant consequence. So the question is, what should generate that significant consequence and what should not? I think that's what's behind Mr. Harris's amendment. And there is good sense to that.

I think what Mr. Hawn is saying is that the amendment as it reads now means the consequence would be that certain offences that should carry a criminal record might not carry a criminal record. And that makes sense.

I'm wondering whether we shouldn't put the matter aside and ask Mr. Hawn or the JAG to come back to the next meeting with some suggestions about what wording could give us serious consequences for serious actions, and less serious consequences for less serious actions.

The Chair: We'll go to Mr. Harris and then to Mr. Wilfert.

Mr. Jack Harris: Thank you.

I'm very glad we had that question about concurrent jurisdiction, because I think that answers the problem, frankly.

To deal directly with Ms. Gallant's question, I perfectly agree with her. But if you have concurrent jurisdiction, the problem you have is that if a person is tried, for whatever offence, under the military justice system, they don't have any protections and they can get a criminal record. If they're tried under the civil criminal process, they have all the protections and they do get a record.

Mr. Hawn has a good point. In a serious circumstance, such as impaired driving, why should a soldier not attract a criminal record when a civilian might? If it's a concurrent jurisdiction, it is a matter of discretion. And that discretion can be exercised by military police, according to what we've just been told.

If it's something regarded as being in the realm of service discipline—issues of good order, morale, and so on—which requires a military prosecution, then you go that route, and you get your quick and speedy disposition. You get your summary trials. You get your laxer—or lack of—rules of evidence. You get your lack of disclosure. You get all of those things, but you don't get a criminal record.

If it's something the military decides is criminal in nature and is deserving of all the criminal sanctions, including a criminal record, then you prosecute it in the civil court. If it's impaired driving or if it's a case of domestic violence—spousal assault—and is deserving of the sanctions of spousal assault and the consequences of spousal assault, then it is prosecuted under the Criminal Code. The discretion rests with the military police, with the system, or with policy, whatever it comes down to.

To me that is a good threshold and a good test. If you're going to use the military justice system, then you do it as part of the disciplinary process, as part of maintaining good order and discipline, and people don't end up with criminal records. If it's an offence such as, let's say, deliberate arson, that smacks of criminal behaviour, whether it's a military person or a civilian. Well, prosecute the person under the criminal law. But if you're talking about somebody not following the proper regulation, which requires him to do X, Y, and Z and he doesn't do it, and a fire results, why should that person end up with what looks like arson and end up with a criminal record?

That's the way I see it. I think this concurrent jurisdiction, this discretion, provides the answer to the problem. I think it's supportable as such. It answers Mr. Hawn's concerns, I think, in a way that works.

● (1650)

[*Translation*]

The Chair: Thank you.

Mr. Wilfert, you have the floor.

[*English*]

Hon. Bryon Wilfert: I won't prolong it, but I would comment that since this is such an important clause, and given that the arguments I've heard on both sides make a lot of sense, we really should stand it down and ask the JAG to come back with appropriate wording or wording we can look at, maybe in consultation with Mr. Hawn and Mr. Harris, so that we get it right. This would obviously significantly impact a lot of individuals, and I don't think we want to rush into it.

If it's appropriate to stand it down or put it aside, I think that might be helpful.

[*Translation*]

The Chair: Thank you.

Mr. Hawn, you have the floor.

[*English*]

Hon. Laurie Hawn: I don't have a problem with that.

I do have a couple of questions for the colonels. Correct me if I'm wrong, but when we talk about concurrent jurisdiction, we don't automatically have access to the civil system. The military police, because of all these things—and they're all legitimate concerns—can't call downtown in Cold Lake and say that they want them to try a guy on what they have charged him with and transfer the charge to them. Can we do that currently?

Col Patrick K. Gleeson: Mr. Chair, I would make two points on concurrent jurisdiction. One is that certainly there is, within the context or within a circumstance where concurrent jurisdiction actually exists...then yes, there can always be a discussion between the two systems as to which system is most appropriately situated or has the greatest interest in dealing with the matter.

In the Cold Lake example, yes, that discussion could occur around the fence, but I think the point that is important to recognize within the military justice system is that the military justice system is a portable system, and it's a worldwide system. We have concurrent jurisdiction domestically with the civilian justice system, but we operate around the world, and people are being charged for offences that occur outside Canada. In those circumstances, the concurrent piece doesn't work.

So for the domestic assault description that was provided earlier, if it occurs in Canada, then yes, there can always be a discussion with the civilian justice system as to which system is better placed and has the greater interest in dealing with that matter, that domestic assault.

But if it happens in Germany or Belgium or somewhere else around the world, then that discussion doesn't occur. There is no concurrent jurisdiction in that circumstance. The military justice system will have to deal with that offence if it is to be prosecuted. I would make that point.

Very quickly, the final point I would make is that even within the military justice system, in serious matters—that list of offences that can be tried at summary trial—the accused has an election to be tried, but if the matters and the circumstances are serious, the chain of command, the commanding officer, will refer it automatically to court martial.

There are a number of ways to get to court martial. One of them is the accused saying, “I want to be tried”. The other is that the commanding officer always has an obligation to assess the circumstances of an offence, and if he thinks it's too serious for him to try because of his limited powers of punishment, he refers it automatically to court martial.

So we have a number of ways to get there. The civilian justice system isn't the only answer to this sort of circumstance. But again, that doesn't address the concern I know the committee members are struggling with, which is where you draw the line. What's the mechanism to...? Clause 75 provides a mechanism and an option, and I'm hearing that there's obviously some discomfort with that. Does that actually cover the waterfront on this issue to the satisfaction of the committee members?

● (1655)

[*Translation*]

The Chair: Thank you.

Mr. Hawn, you have the floor.

[*English*]

Hon. Laurie Hawn: I'm happy to go away and sit with the JAG folks and Jack to see if there's some way that we can word it differently to alleviate the concerns.

The Chair: Okay.

Ms. Gallant.

Mrs. Cheryl Gallant: I'll speak further to the NDP amendment. In situations where there is not concurrent jurisdiction, we would then be—if the amendment went forward—allowing very serious offences to go without a record, and that remains a concern.

Col Patrick K. Gleeson: We would be allowing objectively serious offences that may not be serious enough to refer to court martial, within the specific circumstances, to be tried at summary trial and, if a conviction is entered, that individual would not receive a record.

Consider the brawl or the fight in the mess on a Friday night that results in a number of assault charges. These are serious offences, but none of them took place in serious circumstances. The commanding officer, in the interest of discipline, decides that it's appropriate for him to deal with these. He would try them and, if convictions are entered, then under the amendment there would be no criminal record within the meaning of the Criminal Records Act.

These same types of offences are dealt with downtown in the civilian justice system all the time. If you were to get into a similar type of dust-up in a bar in Ottawa on a Friday night, and you were tried and convicted in summary conviction court in downtown Ottawa, receiving a similar type of punishment, then you would have a criminal record within the meaning of the Criminal Records Act for that. That's the distinction we're talking about here as we go forward.

The Chair: Thank you.

[*Translation*]

Mr. LeBlanc, you have the floor. It will then be Mr. Harris' turn.

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

[*English*]

I certainly think some of us on this side of the table are sympathetic to Jack's amendment and to what he's trying to achieve. We have a sense, I think, that perhaps the net is cast a little bit wide in the sense that we're removing the possibility of a criminal record from offences such as those Laurie enumerated that clearly jar us as deserving of a record.

But the reverse is also true. Perhaps in the JAG's efforts in drafting this legislation, they didn't restrict it enough, and it's only when people sit down with a list of the offences that we'll all know where it might be appropriate in the context to have a record trigger and where it jars us. Somebody throwing a cigarette in a garbage can and not disposing of it according to Queen's Order 46 in some regulation ashtray probably shouldn't trigger a criminal record.

Somebody has to look at those lists and figure it out. If we can stand this down and Laurie, Jack, the officials, Colonel Gleeson, and others can perhaps come up with a balance that is better, then I think we could move on quickly to adopt the rest of the bill.

● (1700)

[*Translation*]

The Chair: Thank you.

Mr. Harris, you have the floor.

[*English*]

Mr. Jack Harris: I think that's a wise approach. There may be another way of achieving the same object by talking about the punishments. If you included the punishment that the commanding officer is allowed to give for an offence, and say, okay, anything punished by that, or some version of that, would be considered not subject to a criminal record, whether, I suppose, it's done by court martial or otherwise, and that obviates the other....

I'd be happy to sit down with Mr. Hawn and the JAG, or representatives from the JAG's office, to see if we can craft something that does a better job of figuring out where the threshold should be. That's I guess what we're trying to find out.

The Chair: Thank you very much.

Monsieur Bachand, you have the floor.

Mr. Jack Harris: I welcome anybody from the committee, Mr. Bachand or others, to join in.

Mr. Claude Bachand: I was going to say that. You read my mind.

[*Translation*]

Mr. Chairman, it is a good idea to invite the JAG to the committee, but when politicians sit down with those individuals who must draft laws, things can start slip sliding.

Personally, I would have preferred to see the JAG team do its work. These two individuals who are present here are extremely intelligent and express themselves very well on the matter of military justice. They have a perfect understanding of where we are at. One must not be too stringent, but stringent enough in order for individuals to not be able to slip through the system's net.

I would prefer to have the JAG do its work and come back to the committee, at which time there could be another debate. Otherwise, there is a risk of political interference.

If you retain the suggestion made, then I would ask that there also be a representative of the Bloc québécois.

The Chair: Fine, thank you.

[*English*]

Do we have a consensus that we're going to stand this, go to clause 76, and come back to clause 75 at our next meeting with maybe another kind of proposal? Okay? We have a consensus on that.

(Clause 75 allowed to stand)

The Chair: Now we'll do clause 76. We don't have any amendments.

(Clause 76 agreed to)

(On clause 77)

The Chair: Now we have clause 77, and we have an amendment from the NDP, NDP-9.1 for clause 77.

I will give you the floor, Mr. Harris.

Mr. Jack Harris: I'm losing my numbering system here. It's not NDP-9, is it?

The Chair: It's NDP-9.1, number 4993497.

Mr. Jack Harris: Okay. This is an amendment similar to the other one. It may suffer the same fate. It is the MPCC we're talking about here, and we have had a situation.... I'm not sure why the other one was defeated, frankly, but it's a similar situation. This is, again, a matter of administrative law, and we've seen it in other tribunals. I'm familiar with other legislation in other jurisdictions, whereby if a tribunal is seized with a matter, the tribunal as constituted gets to finish the job. That's something that I would want to see available to the MPCC as well, and I therefore have moved that amendment.

I guess I don't have to say much more. It was Justice Lamer's recommendation 70, and we'd like to see it passed.

● (1705)

The Chair: Thank you, Mr. Harris.

I just want to inform you that I have a decision on that amendment. Your amendment attempts to amend clause 77 to allow for the extension of the terms of appointment of members of that commission. In the opinion of the chair, the introduction of the term “extension” that is beyond the scope of clause 77 and is therefore not receivable.

Mr. Jack Harris: How is that different from the other one, Chair?

The Chair: Sorry?

Mr. Jack Harris: We didn't have that ruling on the other amendment. I just wonder how that amendment is different from the other one.

The Chair: No, you're right. It was a different amendment.

I will give the floor to the legislative clerk for your question, Mr. Harris.

Ms. Lucie Tardif-Carpentier (Procedural Clerk): Clause 77 seeks to change the French text of the oath, so the scope of the clause is very, very narrow. Therefore, extending the terms of appointment of members of the complaints commission, in our view, is not relevant to that specific clause. Therefore it's outside the....

Mr. Jack Harris: Again, that was something...it wasn't ours. It wasn't something that we proposed. It was apparently some anomaly in the French text. It wasn't my problem, but when you're dealing with that, they've opened the door by including amendments to the clause as a whole, and therefore this amendment is changing that clause.

I'm actually trying to find my copy of it in front of me, but I seem to have lost it.

The Chair: Mr. Harris, do you wish to challenge the chair's decision? No?

Mr. Jack Harris: So you're ruling on two, are you? Is that...? That doesn't affect the entire amendment, does it?

The Chair: The ruling is on your amendment NDP-9.1 on clause 77. I'm saying that it is not receivable because you introduced a new concept that is beyond the scope of the clause.

Mr. Jack Harris: But you refer to an extension of the term. There is no reference at all there to extension of the term. Are you suggesting that in the French text there is?

The Chair: I just want to repeat the decision for everyone to be sure. The amendment attempts to amend clause 77 to allow for the extension of the terms of appointment of members of that commission. So in the opinion of the chair, the introduction of the term "extension" is a new concept that is beyond the scope of clause 77, and is therefore inadmissible.

An hon. member: [*Inaudible—Editor*]

Hon. Laurie Hawn: Mr. Chair, I think the confusion is.... I think what Jack's trying to do is add that in front of the section on the French version, etc. Clause 77 right now starts with "Subsection 250.1(11)...". If you look at Jack's amendment, that's at the bottom.

I think you're adding the first part there. That's what you're intending to do. Is that correct?

Mr. Jack Harris: Yes. I guess what we're saying is that section of the bill is being amended, so we're adding an additional subsection following that, the clause having been opened up. Yes, I mean, I would agree.... I don't think it's an extension of the term, but I think it's a legal means of allowing someone to finish a decision. If someone has interpreted it as an extension of the term, well, that's fine, but I think the availability to make the motion is valid.

Now you're making your ruling, and I'm making an argument against the ruling, and presumably an argument that should have been made when someone raised an objection. No one has raised.... I have a little problem with this procedure. As a guy who practised law for 30 years, I'm not used to hearing rulings and then arguing about them. I'm used to someone raising an objection and having an opportunity to argue about the rules.

Mr. Dryden, I'm not sure I know how much you actually practised in the trenches....

But that's the normal way things happen, Mr. Chair, so I guess the only choice I have is either to—

● (1710)

The Chair: Appeal or not.

Mr. Jack Harris: —appeal or accept it. So in the normal manner that we discovered the other day, I would move that the ruling of the chair be sustained.

Voices: Oh, oh!

The Chair: Okay, so you're challenging, and I'll give the floor to the clerk for that.

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

I don't think you need an explanation, so I will just put the motion as usual.

Shall the chair's decision be sustained?

(Ruling of the chair sustained)

The Chair: Okay. Shall clause 77 carry?

(Clause 77 agreed to)

The Chair: We're at clauses 78 to 100. We don't have any amendments. Shall clauses 78 to 100 inclusive carry?

(Clauses 78 to 100 inclusive agreed to)

(On clause 101)

The Chair: We have G-1, an amendment for clause 101. Oh, 101...I like that number. It brings back old memories.

Voices: Oh, oh!

The Chair: Mr. Hawn, you have the floor.

Hon. Laurie Hawn: It's really simple. It's just to alleviate some of the concerns that were expressed before about not having the Canadian Forces Provost Marshal under the review process. This just adds the Canadian Forces Provost Marshal to the review process.

Do you want me to say that again, Jack?

Mr. Jack Harris: Yes, please.

Hon. Laurie Hawn: There were some earlier concerns about the Canadian Forces Provost Marshal not being part of the review process, not being reviewed, and this just adds that, so that the CFPM is being reviewed with the same regularity and so on. It's in response to concerns that were expressed before.

The Chair: Mr. Harris.

Mr. Jack Harris: I just have a question about that. I guess it will come up somewhere else.

The concern raised by the MPCC was also a concern with respect to attempting to ensure that the review that's taking place, or that should be taking place as a result of the previous legislation, is in fact going to take place, not just by the good graces of the Department of National Defence, but done in the statutory manner.... I think maybe that's dealt with in another amendment—

A voice: Mr. Bachand—

Mr. Jack Harris: Mr. Bachand's amendment, I believe.

The Chair: Yes, that is Mr. Bachand's amendment.

Now we're dealing with amendment G-1. I will ask for the vote on that.

(Amendment agreed to)

(Clause 101 as amended agreed to)

The Chair: Now we have clauses 102 to 134.

[*Translation*]

There are no amendments for clauses 102 to 134.

[*English*]

(Clauses 102 to 134 inclusive agreed to)

The Chair: Thank you.

[*Translation*]

(On clause 135)

The Chair: We now move on to clause 135, for which we have amendment BQ-14.

Mr. Bachand, you have the floor.

Mr. Claude Bachand: Mr. Chairman, I withdraw amendment BQ-14.

The Chair: Do I have unanimous consent for the withdrawal of amendment BQ-14? Wait, I am told that this is not necessary.

[*English*]

Okay.

[*Translation*]

Mr. Claude Bachand: Before withdrawing it, it might be preferable for me to provide a bit of an explanation.

[*English*]

The Chair: It's up to you.

[*Translation*]

It is really clear.

Mr. Claude Bachand: We are attempting to resolve a problem, and the legal officers will most certainly listen to me.

The present act provides for a review of the law every five years. The Canadian Forces told us the other day that a review was under way and that it will be tabled shortly. We wish to provide for the tabling of an independent review report. The danger for us here, if we pass the bill as is, is that the clock will be turned all the way back, for seven years this time.

Even if we have the Canadian Forces' commitment, we would like this to be included in the act. We are therefore proposing that clauses 101 and 117 come into force two years after the bill receives royal assent. This would give the Canadian Forces the opportunity to table the review, which would avoid us having to start from zero for the next seven years. That is the purpose of my submission. I do not know if I have made myself clear.

● (1715)

The Chair: Do you wish to withdraw the amendment?

Mr. Claude Bachand: Amendment BQ-14 does not deal with this matter very much. We feel that we are somewhat getting lost in the forest with this amendment.

Amendment BQ-15 says that "[s]ections 101 and 117 come into force two years after the day in which this Act receives royal assent". That is what matters to us.

The Chair: Therefore, you are proposing to withdraw amendment BQ-14 in order to move ahead with amendment BQ-15.

I give the floor to Mr. Hawn.

[*English*]

Hon. Laurie Hawn: I have a question for Colonel Gleeson or Colonel Gibson. Does dropping BQ-14 and only doing BQ-15 somehow disrupt the continuity of the coming into force...?

Col Patrick K. Gleeson: Mr. Chair, I will obviously defer to the clerk, but in my opinion, yes. What clause 135 currently does is to say that those provisions come into force on royal assent, so we would have two conflicting provisions, with one saying royal assent and one saying two years after royal assent.

In my view, you have to deal either with BQ-14 and BQ-15 or with neither one of them. You can't pick one and leave the other, but I defer to the clerk on that.

[*Translation*]

The Chair: Thank you.

Mr. Harris, you have the floor.

[*English*]

Mr. Jack Harris: When you say “deal with” it, do you mean accept it as it is or do something a little differently? I think this is perhaps a good opportunity for you to provide advice to the committee on how we achieve what Mr. Bachand has suggested, so that the changes to the act don't lapse the five-year review that has yet to be completed and tabled.

I understood from your evidence earlier as part of this process that indeed a review was going on and that you were going to continue it, but I think the desire of Mr. Bachand—and certainly, it's my desire, and I would assume it's the desire of the whole committee—is that it be done as part of the process envisaged by Chief Justice Lamer and incorporated in the existing legislation, that there not be a 12-year review, in other words, that the five-year review that is contemplated actually takes place even if it takes an extra year to do it.

So can I ask you to tell us how we can best achieve that within the context of the legislation? Do we have to do BQ-14 and BQ-15 or some version of BQ-14 and BQ-15? Because if Mr. Bachand withdraws it, I'm prepared to move it, if necessary.

The Chair: I will answer your question.

[*Translation*]

We are of the view that amendments BQ-14 and BQ-15 are consequential. The two relate to the coming into force. Amendment BQ-14 removes clauses 101 and 117 from section 135(1), and the BQ-15 amendment creates a new section 135(3) to include in it those two clauses. This amendment is such that clauses 101 and 117 would only come into force two years after the date on which the act receives royal assent, rather than the date to be fixed by order of the Governor in Council.

Therefore, the committee's vote on amendment BQ-14 will also apply to amendment BQ-15. Either Mr. Bachand withdraws both amendments, or we vote on both of them, as Colonel Gleeson said. The legislative clerk is also of this opinion.

Mr. Bachand, you have the floor.

Mr. Claude Bachand: Could you grant us five minutes in order for us to discuss this.

The Chair: I would like this to be resolved before we leave here. I will give you a moment to reflect upon this, Mr. Bachand.

● (1720)

Mr. Claude Bachand: In the end, Mr. Chairman, we will bow to Mr. Gleeson's argument and to yours. We will maintain amendments BQ-14 and BQ-15.

The Chair: We therefore will vote on amendment BQ-14, on clause 135.

(Amendment agreed to)

The Chair: We will now vote on amendment BQ-15. I believe there is no need to discuss it.

(Amendment agreed to)

The Chair: We will now vote on clause 135.

(Clause 135 as amended agreed to)

The Chair: There are the last clauses, but we cannot move to a vote on them until we have resolved the fate of clause 75. At our next meeting, we will come back to clause 75 in order to conclude the clause-by-clause study of the bill.

[*English*]

I thank everybody.

Colonel Gleeson, do you have something to add?

Col Patrick K. Gleeson: Mr. Chair, I just want to make one point. I think it was indicated that there was evidence that the review had started. It has not started. Work is being done to advance it very shortly, but just so there's no confusion, I don't think there was any evidence put before the committee that it actually started. I just don't want anyone to be misled.

[*Translation*]

The Chair: Thank you to all committee members. We will see each other next Monday afternoon. This concludes our 53 rd meeting.

This meeting stands adjourned.

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