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Chair

Mr. James Bezan

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● (0845)

[*English*]

The Chair (Mr. James Bezan (Selkirk—Interlake, CPC)): Good morning, everyone. We are in meeting number 12 of the new session. We're going to be dealing with the order of reference that was sent to committee from the House of Commons on November 4 to undertake the study of Bill C-16, An Act to amend the National Defence Act (military judges).

As a witness this morning, for the first hour, we have Colonel Michael Gibson, Deputy Judge Advocate General—Military Justice.

Colonel, if you would please make your opening comments and give us background on the bill, we'd appreciate that.

Col Michael R. Gibson (Deputy Judge Advocate General, Military Justice, Office of the Judge Advocate General, Department of National Defence): Thank you, Mr. Chair.

Honourable members of the committee, thank you for giving me the opportunity to briefly address you regarding Bill C-16, Security of Tenure of Military Judges Act.

I am pleased to be with you this morning as you begin your examination of this bill, which, as members will be aware, is a companion bill to the more comprehensive Bill C-15, which is currently at the debate stage of second reading.

Bill C-16 is specifically aimed at expeditiously and effectively responding to the recent judgment of the Court Martial Appeal Court in the case of R. v. LeBlanc regarding the constitutionality of the appointment and tenure of military judges.

[*Translation*]

Currently under section 165.21 of the National Defence Act, military judges must be officers and barristers or advocates of at least 10 years standing at the bar of a province before they may be appointed by the Governor in Council. That section further provides that a military judge holds office during good behaviour for a term of five years; is removable for cause by the Governor in Council on the recommendation of an inquiry committee; and is eligible to be selected for renewal for a second or subsequent term on the recommendation of a renewal committee.

[*English*]

On June 2, 2011, the Court Martial Appeal Court delivered its judgment in the case of R. v. LeBlanc. In its decision the court determined that those portions of section 165.21 regarding the appointment and tenure of military judges do not sufficiently respect judicial independence as required by paragraph 11(d) of the Canadian Charter of Rights and Freedoms. The court specifically declared that subsections 165.21(2), 165.21(3), and 165.21(4) of the National Defence Act were constitutionally invalid and inoperative. However, it suspended the declaration of invalidity for a period of six months to allow Parliament to enact remedial legislation. The court's declaration, absent of such an enactment, will be effective on December 2, 2011.

[*Translation*]

This decision is consistent with the recommendations of the Right Honourable Antonio Lamer, the late former Chief Justice of the Supreme Court of Canada, who submitted an independent review of the National Defence Act in 2003. Former Chief Justice Lamer found that while these current provisions were not unconstitutional, military judges should be awarded security of tenure until retirement, subject only to removal for cause on the recommendation of an inquiry committee.

● (0850)

[*English*]

Bill C-16 responds directly to the recommendations in the Lamer report and to the decision in R. v. LeBlanc. The proposed amendments will enhance security of tenure for military judges by providing that they serve until the retirement age of 60 years unless removed for cause on the recommendation of an inquiry committee or if the military judge resigns.

As mentioned earlier, Bill C-15, Strengthening Military Justice in the Defence of Canada Act, introduced at the same time as this bill, addresses the same security of tenure issues and proposes broader systemic changes. Coordinating amendments have been added to Bill C-15 to ensure that in the event both bills enter into force, it will be the provisions of Bill C-15 that take effect. Those provisions in this regard are identical to this bill.

I would be pleased to assist the committee by answering any questions you may have regarding Bill C-16.

Thank you.

The Chair: Thank you, Colonel.

We'll go now to our first round with Mr. Christopherson.

Mr. David Christopherson (Hamilton Centre, NDP): Thank you very much, Chair.

Thank you very much for your presentation, Colonel.

As colleagues will know, we've been very supportive of this and have been working with Mr. Alexander, the parliamentary secretary, to move this through as quickly as possible. We don't see this as controversial. We see this as a matter of housekeeping in terms of justice matters.

We have a couple of questions just for the purposes of clarification, but it's our intent to move this through both committee and third reading as quickly as possible and to get this in place.

With that, I'll just turn to my colleague Madame Moore and ask her to put a couple of questions for clarification. But do understand it's our intent to move this through as quickly as possible, Chair.

[*Translation*]

Ms. Christine Moore (Abitibi—Témiscamingue, NDP): My first question concerns one of the amendments to the act that the bill proposes. As amended, subsection 165.21(3) of the act would indicate the following: "A military judge ceases to hold office on being released at his or her request…"

I'm wondering whether the words "at his or her request" are important. When the judge is released from the Canadian Forces, whether or not it is at his or her request, he or she is released. It may be that the judge is released for medical reasons that he or she did not request.

Do you think the words "at his or her request" are relevant?

[*English*]

Col Michael R. Gibson: Thank you for the question.

Yes, of course, it addresses the fact that once appointed as a military judge, a particular judge may not wish to continue in office as a military judge for reasons of his or her own. In those cases, of course, there is no infringement upon judges' traditional independence if they ask to be relieved of that function or if they take their release from the forces.

In the event that a judge was found to be, in a hypothetical case, medically incapable of continuing in office, that would require that an inquiry committee be struck and that a recommendation be made by the inquiry committee, which would be upon the grounds that the person was not medically capable of fulfilling the office. That would be, in essence, exactly the same way that it would happen for a civilian judge in the civilian justice system.

[*Translation*]

Ms. Christine Moore: Okay.

I would also like to ask a second question, which is also a little technical.

Why is the retirement age set at 60, and not 65? What is the current retirement age? I would like more detail. Why was 60 years chosen?

[*English*]

Col Michael R. Gibson: The reason 60 years was chosen is that military judges are military officers in the Canadian Forces, and it was considered to be important, for reasons of consistency of personnel policy, that their retirement age be consistent with that of Canadian Forces officers generally. The age of retirement for officers in the Canadian Forces is described in QR and O article 15.17, and currently for members who have joined since 2004, the specified age of retirement for Canadian Forces officers generally is 60 years. Since military judges are military officers, as I said, that's why the age of 60 was selected.

[*Translation*]

Ms. Christine Moore: Thank you. I have no further questions.

[*English*]

The Chair: Thank you.

Ms. Gallant, you have the floor.

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

And thank you to our witness.

I'd like to understand better the composition of the inquiry committee. Should there be complaints against a judge, how would that process work? How would the membership of the inquiry committee be comprised? How would members be found? How difficult would it be for someone to remove this judge?

Col Michael R. Gibson: The provisions in our law regarding an inquiry committee are largely consistent with similar provisions set up under the Judges Act with respect to civilian judges. So currently, today, the inquiry committee is constituted in the Queen's regulations and orders and would be composed of three judges of the Court Martial Appeal Court selected by the chief justice of the Court Martial Appeal Court. It is meant to be a safeguard of independence that the composition of the committee is determined by an external independent authority and that the actual members of the committee would be judges of the Court Martial Appeal Court who would examine this.

Under the proposals in Bill C-15, the inquiry committee as recommended by former Chief Justice Lamer would be shifted from regulations into the National Defence Act itself to give greater prominence to that and to give even greater perception of the security of independence.

So to answer your question about how difficult it is to get rid of a judge, of course, that is something that would not be undertaken lightly in either the military or civilian justice system. It happens extremely rarely, and the conditions that would be required for that would either be that the judge had sufficiently misconducted himself or herself in demeanour so as to no longer be able to continue as a judge or that the judge was medically incapable of continuing.

The conditions and the criteria for removal are specified in law, and the decision to make a recommendation is made by an external independent authority.

● (0855)

Mrs. Cheryl Gallant: So the process would have to be initiated by someone in the judiciary.

Col Michael R. Gibson: The process would be initiated, if it were considered required, by an authority's writing—for example, hypothetically, the Judge Advocate General, who has statutory responsibility to administer the military justice system, writing to the chief justice of the Court Martial Appeal Court, who would then constitute the committee.

Mrs. Cheryl Gallant: What would it take to compel the Judge Advocate General to go forward with the process?

Col Michael R. Gibson: As I said, it would have to be clearly a very grave situation such that it was considered that the judge had misconducted himself or herself to such a degree—for example, had been convicted of a serious criminal offence—or had had a stroke or something like that, which rendered the judge medically incapable of continuing in office. But the point to be made is that the purpose of the inquiry committee is to ensure that a judge could only be removed from office on extremely grave grounds and that the process to make that recommendation would be transparent and rigorous.

Mrs. Cheryl Gallant: Can you please tell us what the consequences will be if this bill does not receive quick and speedy passage through either this committee or the House of Commons? In other words, how urgent is it that this bill receive royal assent as soon as possible?

Col Michael R. Gibson: It's very important. As I mentioned in my opening remarks, the Court Martial Appeal Court, in its judgment in the LeBlanc case, suspended its declaration of invalidity only until December 2. So in the hypothetical case where this bill does not receive royal assent and is passed into law by that time, it will create a situation of great uncertainty in the military justice system.

I think one could reasonably anticipate a proliferation of applications and courts martial regarding the independence of military judges. That would clearly introduce great uncertainty in the system, delay the progress of cases, and introduce uncertainty for both those accused and victims in cases that involve victims.

Mrs. Cheryl Gallant: Right now, how many do we have on the bench, and what effect will this bill have on those who are currently serving on the bench?

Col Michael R. Gibson: There are currently four military judges. If the bill were passed, by operation of law the provisions for security of tenure until retirement would apply to those judges. They would have security of tenure until the retirement age of 60.

Mrs. Cheryl Gallant: The National Defence Act currently provides that an officer may be appointed a military judge if the officer is a barrister or advocate of at least 10 years' standing at the bar of a province.

Why are civilian lawyers with sufficient legal experience not able to be appointed military judges?

Col Michael R. Gibson: The policy rationale for having military judges really goes back to the fundamental attributes that we consider are required for a military court. Amongst them is a profound understanding of not only the necessity for the maintenance of discipline in the forces, but also the requirements of it.

As has actually been recognized by the Supreme Court of Canada in the case of MacKay in 1980, it is considered that military officers are best positioned, by virtue of their experience, to be military judges.

Mrs. Cheryl Gallant: What contributes to the selection of a judge from the pool of lawyers you have within the military?

Col Michael R. Gibson: The process for selecting a military judge is closely analogous to that found in the civilian system. People who wish to make application to be assessed for appointment as military judges provide their names to the military judges selection committee. The administration of the process of that committee is actually done for us by the Commissioner for Federal Judicial Affairs—the body that does a similar process for the administration of assessment of civilian nominees.

The military judges selection committee currently comprises five persons: a retired Superior Court judge; a nominee of the Canadian Bar Association; a civilian lawyer; the officer occupying the position of Chief of Military Personnel; and, to ensure that the perspective of non-commissioned members is represented, a Canadian Forces chief warrant officer.

The military judges selection committee would provide a recommendation on each applicant to the Minister of National Defence. He would then select the name of the person he considers to be advisable and take it forward to cabinet. That would ultimately lead to an appointment of the military judge by the Governor in Council.

● (0900)

Mrs. Cheryl Gallant: How is the availability of the appointment advertised? How do the lawyers within the system know that this position is coming up?

Col Michael R. Gibson: Within the Canadian Forces there is a mechanism known as a CANFORGEN, or Canadian Forces general message, which is distributed very broadly in the forces by a variety of means. A CANFORGEN is published when the time in the cycle comes along to refresh the list of potential applicants. The list is valid for three years.

For example, earlier this year there was a CANFORGEN, and people who were interested were invited to submit their names to the Commissioner for Federal Judicial Affairs for consideration and fill out an application form, which is very closely analogous to that for applying for appointment as a civilian judge.

The Chair: Thank you. Your time has expired.

Mr. McKay, you have the floor.

Hon. John McKay (Scarborough—Guildwood, Lib.): Thank you, Chair.

Like the NDP, the Liberal Party will support this bill and encourage its passage at all stages as quickly as possible.

My questions are a bit broader in scope than the bill itself. They have to do with, if you will, the origin of the bill, which is the LeBlanc case. Essentially, the LeBlanc case is a conflict between the chain of command and the Charter of Rights and Freedoms. If LeBlanc had not happened, in this case something similar would have happened, because any defence counsel is going to try to pick up the discrepancies between the two systems.

In the United Kingdom, they have gone about civilizing or demilitarizing the process so as to minimize the conflict between the chain of command and the requirements of justice in the military. As I understand it, the Judge Advocate General is stripped of his legal advisory and prosecutorial functions. The JAG position was civilized and moved to the Ministry of Justice, the prosecution function was civilized and moved to the Ministry of the Attorney General, and a number of other complementary changes were made.

The greater the differentiation between the military system of justice and the non-military system of justice—the more it looks different—the more you set up situations in which you have LeBlancs or "sons of LeBlanc", or things of that nature. The question I have for you as an experienced military officer who has been on the inside for a long time is, what is the rationale for not taking this opportunity to make the military system look as much as possible like a civilian system in compliance with the Charter of Rights and Freedoms?

Col Michael R. Gibson: Thank you for the question.

There are three things I'd like to say in response to that. I think they're very important for members of the committee to understand.

First of all, your analogy to developments in the United Kingdom clearly borrows from recent articles written by Mr. Michel Drapeau. Some of those things are actually inaccurate. It's not the case that the prosecution function in the United Kingdom has been moved to the Ministry of the Attorney General. The prosecution function in the United Kingdom is performed by the Director of Service Prosecutions. That position was created by the Armed Forces Act 2006 and very much resides within the Ministry of Defence.

The person who is appointed to that position may be either a civilian barrister or a military officer—currently it's a civilian—and the prosecutors are military. The incumbent of that position has advertised the relationship of general supervision with the Attorney General, but the Director of Service Prosecutions—the service prosecuting authority—is still very much in the Ministry of Defence. They get their personnel from there and they get their budget from there.

There are also several other inaccuracies in Mr. Drapeau's depiction, about which I won't go into detail now, since it is not directly pertinent to your question. Also, one has to be very careful about looking at other states and saying that they're doing such-and-such: first of all, to make sure that one has the facts correct; and secondly, not to make too loose an analogy.

We do a lot of research in comparative law. For example, I've just returned from Australia, from having discussions with my colleagues there about their system. I can certainly tell you that they wish they had our problems. Our military justice system is the envy of most states in the world.

To directly respond to your question about the reason it's structured the way it is, we have had some discussions before and have done an assessment on as objective a basis as we can of what are the functional attributes required or desirable for a military court system. As I mentioned, one of the primary attributes that is required is that the judges have a profound understanding of the necessity for and the requirements of the maintenance of discipline. Different states have chosen different mechanisms to accomplish that, but in our assessment, that goal is actually best accomplished by military officers with the requisite military experience.

I want to point out that other significant states, for example, the United States, clearly agree with that, because in the United States military judges are military officers.

● (0905)

Hon. John McKay: I don't argue with the point that there's a supervisory requirement for the maintenance of discipline, and therefore you have to feed into the chain of command. But in many instances an assault is an assault, whether it's inside the military or outside the military. You can go through the whole list of Criminal Code offences and they're all the same.

Putting Mr. Drapeau's accuracies or inaccuracies aside, he makes the generalized point that the European Union in particular—27 nations, I believe—are moving toward a much more civilianized approach to military justice. That in effect reduces the conflict between the chain of command—which has a particular agenda, shall we say—and the proper prosecution of a Criminal Code offence, which may or may not have a coincidental agenda.

I'll go back to the core question here. On the issue of discipline, why do we need officers to be judges?

Col Michael R. Gibson: I beg two points in response. For exactly the reason I just described, on a functional basis the attributes that are required of the court are best fulfilled by people with that military experience. Justice Ritchie agreed with that in the MacKay case, and specifically said that with all respect to people with a contrary view, that function was best performed by officers with military experience.

I think the bottom line is that there are differences between the civilian justice system and the military justice system, and those differences exist for a reason. The real question should not be why it isn't the same as the civilian system; the real issue is whether it is constitutionally compliant and effective for the purposes it needs to fulfill. Those two purposes are: to enhance the operational effectiveness of the Canadian Forces through the promotion and maintenance of discipline, cohesion, and morale; and to do justice.

You'll see that in Bill C-15, clause 62, our statutory articulation of sentencing, we've tried to set out the fundamental purposes of the system to exactly delineate in statute—

Hon. John McKay: I think that's a good idea.

Has there been a study done on the discrepancies or differences between the sentencing of military personnel and civilian personnel with similar fact situations?

Col Michael R. Gibson: We are very much aware of the differences in sentencing regimes between what currently exists under the civilian Criminal Code and the code of service discipline in part III of the National Defence Act. As you will be aware, Chief Justice Lamer made a recommendation that we should try to enhance the flexibility of sentencing options. In fact, Bill C-15 tries to accomplish that by proposing to introduce a number of new sentencing options, such as intermittent sentences and absolute discharges.

The Chair: Thank you.

Mr. Opitz.

Mr. Ted Opitz (Etobicoke Centre, CPC): Thank you, Mr. Chair.

Service members are still subject to civilian laws and regulations. In what context are they subject to them?

● (0910)

Col Michael R. Gibson: A member of the forces, like any other person in Canada, is subject to the general laws in Canada. Walking down the street in Ottawa, I am fully subject to the provisions of the Criminal Code, just like any other citizen. Of course, in order to fulfill these purposes for the maintenance of discipline, the Supreme Court of Canada recognized in Généreux a separate system with a separate code of service discipline.

Mr. Ted Opitz: What's the overall impact of this bill on fairness to Canadian Forces members?

Col Michael R. Gibson: It's clearly meant to enhance fairness, and I'd like to reiterate that point. Back in 2003, Chief Justice Lamer recommended that a shift be made to a situation of security of tenure until retirement. The government accepted that policy and tried three times—in Bill C-7, Bill C-45, and Bill C-41—to implement in legislation security of tenure for military judges until retirement. The only real distinction between those bills and this, in the wake of the LeBlanc decision, is that the court has indicated a preference to have an age specified in the act, rather than rely on regulations. That's why this bill was structured.

To respond to the point you asked, sir, this bill is very much intended to enhance independence of military judges, and that is a key element of perceptions of fairness in the system.

Mr. Ted Opitz: While waiting for this to be passed, is there a backlog of cases?

Col Michael R. Gibson: There isn't a backlog of cases, but the penny would drop, if one could put it that way, on the second of December if this bill had not achieved royal assent by then.

Mr. Ted Opitz: Mr. Chair, I'd like to share some of my time with Mrs. Gallant.

Mrs. Cheryl Gallant: I would like to follow up on the question about the selection process for judges. You described that the candidates for judge come from a pool of lawyers. I'd like to go one step further and ask whether or not the same process is followed when you're selecting a prosecuting lawyer.

Col Michael R. Gibson: Under the National Defence Act, since Bill C-25 in 1998, the Director of Military Prosecutions is responsible for preferring charges at courts martial, so he or she is the statutory prosecutor for the Canadian Forces.

The system is very much structured on a Director of Public Prosecutions model, that is to say to provide the functional independence required for prosecutorial independence. The DMP occupying that position provided by statute is responsible for selecting, with the concurrence of the JAG obviously, the appropriate personnel that he or she considers are best suited to perform that prosecution function. Like a DPP in a civilian system, they seek to recruit people they think are best suited to provide that function.

Mrs. Cheryl Gallant: So a CANFORGEN doesn't go out?

Col Michael R. Gibson: No. These are prosecutors as opposed to judges, so there wouldn't be a CANFORGEN in that sense.

Mrs. Cheryl Gallant: Okay. And is a contract made between the prosecutor, where the longevity...or is it strictly an appointment for a term of being a prosecutor?

Col Michael R. Gibson: The independence essentially flows from the head of the institution. For example, the Judge Advocate General has statutory responsibilities and statutory protection of his or her independence in the act. Similarly, the act provides for the appointment by the minister of a Director of Military Prosecutions for a specified term of four years. He or she would have that security of tenure for that time.

Mrs. Cheryl Gallant: What happens if during that four years the prosecutor violates a term of the rules of conduct?

Col Michael R. Gibson: There is a provision for an inquiry committee to be constructed, in essence similar to an inquiry committee for a judge, to examine the circumstances and make a recommendation to the appointment authority, in this case the minister for the DMP, as to whether or not he or she should continue in office. That provides the protection from any arbitrary interference by the chain of command.

Mrs. Cheryl Gallant: Thank you.

The Chair: The NDP are waiving the rest of their questions.

Any more questions coming from the Conservative side? One.

Mr. Chisu.

Mr. Corneliu Chisu (Pickering—Scarborough East, CPC): Thank you very much, Colonel.

I understand it is a combination of the profession of arms and the profession of law, and there's always a balance here. I think the profession of law is regulated by the provinces. The profession of arms is regulated federally. You need to be a good, deployable solider, and you also need to be a good lawyer. How do you see this combination happening?

Col Michael R. Gibson: With respect to military judges, sir?

Mr. Corneliu Chisu: Yes. How can the judges be deployable, for example, in the theatre of operations if it is necessary to be deployed?

Col Michael R. Gibson: That comes back to one of the reasons why we consider that it's important that military judges be military officers, as you very rightly pointed out.

One of the functional attributes required in our system is portability—we conduct operations all around the world—and also flexibility, in the sense that our courts have to be able to sit in all points in the spectrum of conflict, from peacetime in garrison in Canada to a situation of armed conflict in an environment like Afghanistan. So it's very important that military judges need to be deployable, and that is again one of the reasons why they are officers and required to meet the same standards of medical and physical fitness of other officers, to ensure that if it is necessary to hold a court in Afghanistan or in the Democratic Republic of Congo, or in any other deployed setting, the officer who is a military judge is fully capable of deploying and sitting with that court in such a demanding environment.

● (0915)

Mr. Corneliu Chisu: Is a reserve component contemplated for judges?

Col Michael R. Gibson: There is a provision for a reserve for our military judges panel under Bill C-15. Of course, that is not part of the very narrowly focused provisions in Bill C-16 currently before the committee.

The Chair: A question from Mr. Alexander.

Mr. Chris Alexander (Ajax—Pickering, CPC): Thanks, Chair, and I'd like to thank all members for their cooperation on this issue, especially Mr. Christopherson and Mr. McKay, and thanks to our witness. Thanks to our ever vigilant chair and others on our side and analysts.

We have simply noticed, Colonel Gibson, that in the very brief Bill C-16, which only has two clauses, in proposed subsection 165.21(4), in the French translation.... Reading the English, it says, “A military judge may resign”. On the French side, it says, “*Il peut démissionner*”. In other words, the language “*Le juge militaire*” is left out for some reason. We will come back to this, no doubt, in the clause-by-clause, but would your professional view be that this is an oversight of translation?

Col Michael R. Gibson: Actually, if I may just take a moment to confer with my colleague, Colonel Dufour, who is a legislative drafter, I can get a much more authoritative answer for that.

I'm informed that it's a convention of the legislative drafters of the Department of Justice who actually do the drafting. Proposed subsection 165.21(3) uses “*Le juge militaire*”, and in subsequent paragraphs it is evidently the current drafting convention that one would use “*Il*”. Colonel Dufour informs me of that.

So it's not an oversight. It was a construction of the drafters.

Mr. Chris Alexander: Good. We're just checking while we have you as our witness.

Thank you.

The Chair: Okay. Monsieur Brahmi.

[*Translation*]

Mr. Tarik Brahmi (Saint-Jean, NDP): As for the translation, it says "un juge militaire" in one version and "le juge militaire" in the other.

[*English*]

In English it would be “a military judge” versus “the military judge”. It makes a difference.

Col Michael R. Gibson: Once again, we're informed, this is a drafting convention employed by the drafters at the Department of Justice, which they apply consistently across bills. It's drafting magic to me, but I take the advice given by instructing counsel that this is how it's currently done.

The Chair: Mr. Alexander.

Mr. Chris Alexander: We'll conclude that part of the conversation.

I think as Mr. Brahmi knows, sometimes there isn't an exact correspondence between indefinite and definite articles in English and French. In a good translation, there's variation.

The Chair: It is often pointed out to me that the way the wording has been done in French versus English in Bill C-15 is also quite deliberate. It's consistent with what we see in Bill C-16.

Col Michael R. Gibson: Just so members of the committee are aware, as part of the legislative drafting process, the drafts of the drafters are reviewed by jurilinguists at the Department of Justice legislative drafting section, and they ensure that the way articles are expressed in draft legislation conforms to the current drafting standards.

The Chair: Madame Moore, you had a quick question.

[*Translation*]

Ms. Christine Moore: Given that we are talking about legal texts and translation into French. I'm wondering whether it should say "le ou la juge militaire" or simply say "le juge militaire", which would imply "la juge" as well.

[*English*]

Col Michael R. Gibson: The answer to that is found in the Interpretation Act, which specifies that if one uses a masculine article, for example, that is deemed or interpreted to contain both. So it relies on the provisions of the Interpretation Act.

● (0920)

Mr. David Christopherson: I have one follow-up question to that. Do you sometimes do it the other way around? Do you lead in with the feminine?

Col Michael R. Gibson: Well, once again, it's not us. We don't actually draft—

Mr. David Christopherson: Well, no, but whoever does can answer that.

Col Michael R. Gibson: The standard of the Department of Justice is, as I understand it, to use the masculine article.

Mr. David Christopherson: I understand. I'm just pointing out that it's in the masculine. I wonder if they ever do it in reverse. Do we ever see it in the feminine and it's deemed to include the masculine?

Col Michael R. Gibson: No, the current drafting standard, having regard to the provisions of the Interpretation Act, would be to use the masculine.

Mr. David Christopherson: Really? You couldn't use the other one?

Col Michael R. Gibson: That's what Parliament has prescribed in the Interpretation Act.

Mr. David Christopherson: You're good. You're good—because I'm getting nowhere.

The Chair: That's another piece of legislation we'd have to tackle.

I think we'll leave that to the official languages committee to handle.

Monsieur Brahmi.

[*Translation*]

Mr. Tarik Brahmi: I'm sorry to be persnickety, but the English version reads "his or her request". So to be consistent, the French version should read "le ou la juge militaire". In my opinion, it would be very heavy. We usually use a neutral masculine when we want to talk more about the position than the person.

[*English*]

The Chair: Are there any comments on that at all?

Colonel.

Col Michael R. Gibson: Again, it has been reviewed by jurilinguists, and we're assured that it conforms to current drafting standards.

I take the sensitivities about masculine and feminine articles, but that's really a different argument.

The Chair: I've just been advised that this isn't a translation issue. This is the way it was drafted in French and in English by the department.

Col Michael R. Gibson: That's exactly correct. For members who may not be entirely familiar with the process, when one drafts legislation, one sits in a drafting room with legislative drafters, and it's drafted contemporaneously in English and in French. It's not a translation from one to the other. There's an English drafter and a French drafter, and they have to ensure that the meanings are the same. It may not be a literal translation, but the meanings are the same. It's drafted contemporaneously, and again reviewed by jurilinguists.

The Chair: I see no other hands. I'm going to move to consideration of the bill. As everyone knows, under Standing Order 75(1) it says:

> In proceedings in any committee of the House upon bills, the preamble is first postponed, and if the first clause contains only a short title it is also postponed; then every other clause is considered by the committee in its proper order; the first clause (if it contains only a short title), the preamble and the title are to be last considered.

Under that standing order we will set aside the consideration of clause 1. It's postponed. We shall move to clause 2, which is subclauses 2(1) and (2).

Are there any comments?

[*Translation*]

Ms. Christine Moore: We are moving to clause 2, which includes subsections 165.21(3) and 165.21(4)?

[*English*]

The Chair: Yes, subclauses 2(1) and 2(2) include proposed subsections 165.21(2), (3), and (4) as they all appear in the act.

[*Translation*]

Ms. Christine Moore: There is only the mistake that was highlighted in subsection 165.21(4). The French version reads "Il peut démissioner…", but it would be better to write "Le juge militaire peut démissioner…". So it involves simply replacing "Il" with "Le juge militaire". It's a syntax error.

[*English*]

The Chair: If you wish, you can move an amendment, and then we'll debate that amendment.

[*Translation*]

Ms. Christine Moore: I propose replacing the word "Il" with the words "Le juge militaire" in the French version.

[*English*]

The Chair: I'm going to accept that amendment, as it is consistent with proposed subsections (2) and (3). The French version would be consistent in all three paragraphs.

Are there any comments on the amendment? We're taking out the word "*Il*" and replacing it with "*Le juge militaire*" in proposed subsection (4), which is under clause 2 of the bill.

Is that understood? Are there any questions or debate?

I see none. We'll call the question. All in favour of the amendment?

● (0925)

Mr. David Christopherson: Where are we in terms of the issue? Give me some signal here.

Are you okay with this? Does this work for you folks?

Mr. Chris Alexander: It was drafted in both languages. It would work without this amendment, but I think it also works with the amendment.

The Chair: I don't think it changes the intent. As chair, I'm ruling that this amendment is admissible. It is consistent with the bill itself.

Are there any other paragraphs?

Mr. McKay.

Hon. John McKay: I'd just speak to the drafters. Are we interfering with some major drafting convention here? It's not only the consistency in this bill, but it's consistency in all bills. If we are, in effect, imposing a new convention of some kind or another, then maybe we should be informed as to what this amendment might mean, not only for this bill but for any other bills.

The Chair: If we apply the same rule as we move to Bill C-15, my understanding of C-15 is that they use the term "he" versus a "military judge" routinely in the bill.

Hon. John McKay: Yes. I understand Christine's sentiment, and there's a certain logic and consistency in it. However, there are also drafting conventions built up over time that have their own logic and consistency, and I would simply be reluctant to change the drafting conventions on the basis of what appears to be a much more sensible.... I'm in a big conflict here, because I think she's actually making a good point. On the other hand, they do these things for good reasons. I don't know what the good reasons might be, but they do these things for good reasons.

The Chair: Mr. Strahl.

Mr. Mark Strahl (Chilliwack—Fraser Canyon, CPC): I would simply echo Mr. McKay's sentiments. I think the place to address that issue would probably be if it were dealing with the Interpretation Act.... We've been informed previously by our witness that this is the convention, and if this becomes a precedent, we could spend quite a lot of time in future committee business amending language that does not actually affect the intent of the bill.

I would hope that if we're making amendments we would be doing it to affect the actual outcome of the bill, not to address the language. I think the appropriate place to address those concerns is probably in considering the Interpretation Act, if that ever comes up.

But I think we've been informed that this is in keeping with the convention. It's legally correct. It's what the drafters intended. So while, like John, I understand the concern, I think what's written there is fine as is.

The Chair: Are there other comments?

Mr. Alexander.

Mr. Chris Alexander: Chair, I think I'm persuaded by that last comment. I think it works either way. The meaning is clear either way. But if there's any danger of us violating a convention that has been used elsewhere in legislation or that is universally used in translation of legislation, we should probably err on the side of caution, which would militate in favour of keeping the current version.

I don't have any objection, but I'm not sure of the consequences. I don't think it's a major convention that would be trampled upon, but it might be a minor one.

The Chair: I'm going to let Colonel Gibson get in here for a minute.

Col Michael R. Gibson: I would agree with the comments that have been made: that it wouldn't make a substantive change in the legislation.

I would just point out, as I think Mr. McKay very correctly observed, that it's the current drafting convention. To inform members of the committee, it's used multiple times in Bill C-15, which we're certainly hoping will be before you relatively soon, so if you were going to make that change here, you're going to have to be prepared to make it multiple times in Bill C-15.

The Chair: Madam Moore.

[*Translation*]

Ms. Christine Moore: I will withdraw my amendment; it will be easier.

[*English*]

The Chair: Okay.

Do I have consent to withdraw the motion?

First we'll hear from Mr. Brahmi.

[*Translation*]

Mr. Tarik Brahmi: I have just one comment to make. I have no objection to withdrawing the amendment. In Bill C-15, using "le juge militaire" sometimes and sometimes "il" is confusing. The person who drafted it did not pay attention. It was not very important to that person to put either "il" or "le juge militaire". The fact that the translation is not equivalent is solely due to the fact that the English and French versions were drafted by two different people without consulting one other. In my opinion, that is the bigger problem.

● (0930)

[*English*]

The Chair: Colonel Gibson.

Col Michael R. Gibson: I would like to make the point that the drafters actually do pay a great deal of attention, and, for somebody who looks at it from a policy side, an unbelievably great deal of attention, I can assure you. The convention is that the first time it is used in a particular section it would be

[*Translation*]

"le juge militaire"

[*English*]

and in subsequent paragraphs it would be "*Il*". That's why you see both. The convention is consistent usage, so the first time it's used in that section it would be the full phrase.

[*Translation*]

Mr. Tarik Brahmi: This is not the case with section 165 of the act addressed by Bill C-15. What you are saying is contradicted in subsections 165.21(2) and 165.22(2) that Bill C-15 intends to amend. I think that is another liberty the person who drafted it took.

[*English*]

The Chair: Okay.

Madam Moore is withdrawing her amendment, but to do that I need consent from the committee. Do I have consent?

Some hon. members: Agreed.

(Amendment withdrawn)

The Chair: So we're back to clause 2. There being no other comments on clause 2, shall clause 2 carry as written?

(Clause 2 agreed to)

The Chair: Shall the short title carry?

Some hon. members: Agreed.

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill carry?

Some hon. members: Agreed.

The Chair: Shall I report the bill to the House?

Some hon. members: Agreed.

The Chair: Okay. With that, I'll entertain a motion to adjourn.

Mr. David Christopherson: So moved, Mr. Chair.

The Chair: Thank you. The meeting is adjourned.

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