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Chair

Mr. James Bezan

Standing Committee on National Defence

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● (1530)

[*English*]

The Chair (Mr. James Bezan (Selkirk—Interlake, CPC)): Good afternoon, everyone. We're going to get on with meeting number 64.

Hon. John McKay (Scarborough—Guildwood, Lib.): Mr. Chairman, I have a point of order.

In light of the minister's recent announcements about changes in the senior leadership of the Canadian Forces, I wonder whether you and the committee would see it in order to offer our formal thanks to some of the people who have appeared—well, really all of them: Devlin, Maddison, and Donaldson. Donaldson was here on Monday. All have had exemplary careers. All have served this committee well in terms of our understanding of military.

We could include a corollary letter offering congratulations to those replacing them and stating that we look forward to having them appear before our committee and inform our committee. I wonder whether that would be in order, whether it would be favourably received by the committee as a formal thank you along with a secondary letter that would formally congratulate and welcome the replacements to our committee.

My suggestion would be that it be signed by you, and by me and Mr. Harris as vice-chairs of the committee, so that it is, and is perceived to be, a completely non-partisan gesture.

The Chair: I'd say the motion is out of order. It's not on topic. There are ways to deal with motions like these, through written submissions, in both official languages, circulated to committee members.

However, based upon the good nature and goodwill expressed in the motion, I would be open, if the committee so wishes, to concur in....

Mr. Harris, on that point of order.

Mr. Jack Harris (St. John's East, NDP): Mr. Chair, I'm taken a little bit by surprise, although I was told about it a few minutes ago, before the meeting started.

I'd certainly have no difficulty thanking those whose retirement has been announced, thanking them for their service, although I don't know if they're leaving just yet, so it may be a little premature.

As to the new appointees, we'll have an opportunity when the new appointments are made and we get notice of them, if they are Governor in Council appointees. Then we would have an opportunity to bring them before the committee and speak to them about their new roles.

I have no difficulty with thanking the outgoing vice-CDS and commander of the army, but....

The Chair: Mr. Alexander.

Mr. Chris Alexander (Ajax—Pickering, CPC): Mr. Chair, I'm happy to concur with the proposal, if you agree with it, and to leave the details of who should receive such letters to the three of you to work out and not waste further committee time.

● (1535)

The Chair: We have unanimous consent to move ahead with the letters of thanks and appreciation, and congratulations on the retirement of the outgoing generals and admirals, and go on from that standpoint. We shall do that. Thank you.

With that, let's get on with our business at hand, which is the study of Bill C-15, An Act to amend the National Defence Act and to make consequential amendments to other Acts.

Appearing as a witness today is Professor Ian Holloway, who is the dean of the faculty of law at the University of Calgary. From the Canadian Forces Grievance Board we have Bruno Hamel, who is the chairperson. Appearing as an individual is retired Lieutenant-Colonel Jean-Marie Dugas, who is the former director of the Canadian Forces defence counsel services.

Thank you all for appearing. I hope you can keep your opening comments to less than 10 minutes.

Professor Holloway, you have the floor.

Dr. Ian Holloway (Professor and Dean, Faculty of Law, University of Calgary, As an Individual): Thank you very much, Mr. Chairman, and thank you, members, for inviting me to speak to you today. I will be happy to answer questions from any of you about any of the provisions of the bill before you.

I thought that probably the most useful thing I could do is tell you a bit about myself and my own perspective on this and then talk about how I see the context of legislation like this.

As the chairman noted, I am currently the dean of law at the University of Calgary; formerly I was the dean of law for 11 years at the University of Western Ontario. I've been a member of the bar for 26 years now, and I hold the rank of Queen's Counsel in Nova Scotia.

Unusually, I think, for someone appearing before you, I also spent 21 years in the Canadian Forces, as we would say in the navy, as a rating, or in today's language, as a non-commissioned member. I had the experience of having been subject to the code of service discipline and to the apparatus of the military justice system for well over half my adult life. Perhaps that gives me a different perspective from that of some of the people you'll hear from who may have military experience but not from the perspective of an enlisted person.

I think my experience in discussing things like this with people whose background is primarily civilian is that the hurdle is not so much in the details but in appreciating the very different social contexts in which the system of military justice exists.

The purpose of a civil society, the society that we all live in, is to maximize freedom, to maximize liberty, to minimize the interference in our personal liberties by the state.

The purpose of military society is to protect civil society. To do that, we Canadians need a body of people who will do unnatural things. When ordered to do so, they will place themselves in harm's way, and when lawfully ordered to do so, will take the lives of other people, from which there is no lawful recourse. If a lawful order is given to take the life of another person, the only alternative for a service person is to comply with that order. To a civilian, that's a very unnatural way of structuring a social organization, but like every society governed by the rule of law, we need that. We need the police to protect us from within and we need the armed forces to protect us from without.

The price we pay for demanding that very unnatural commitment from members of the armed forces is that we have to be willing to accept that their values can be different from ours, not completely, but profoundly in some ways. That is they place a premium on social cohesion and on the maintenance of internal discipline and order that is alien to civilians. When comparing our system of justice, the civilian system of justice, with the military system of justice, it's very easy for us to assume that we're making an apples to apples comparison, when the underlying premise of society, this social organization, is really quite different.

I had a chance to study the bill and in my submission it represents an attempt to draw a balance between the appropriate relevant needs of the military to maintain fighting order and efficiency. Remember, even when the military is engaged in peaceful operations, it's able to accomplish them because it is a fighting force. It's a balance between the need of the military to maintain its effectiveness as a fighting force, a balance of that along with an attempt to, as much as possible, provide service people, people who make a tremendous sacrifice for us, with as much protection and liberty that is consistent with the need to maintain a fighting force.

● (1540)

Mr. Chairman, that's what I'll say by way of opening remarks. As I said at the beginning, I'd be happy to take questions from you or any member of the committee later on.

The Chair: Thank you, Professor.

Next up, we're going to hear from Mr. Hamel. I forgot to mention that he is also a retired lieutenant-colonel and served for a number of years. He was deployed to both Bosnia and Zaire.

We look forward to your comments.

Mr. Bruno Hamel (Chairperson, Canadian Forces Grievance Board): Thank you, Mr. Chairman.

[*Translation*]

Mr. Chair, honourable members, good afternoon.

It is a pleasure to be here with you today to answer your questions concerning the role of the Canadian Forces Grievance Board in the military grievance process, given that there are provisions in Bill C-15 that directly affect us.

I would like to begin by giving you an introduction to the board.

In operation since June 2000, the Canadian Forces Grievance Board is a quasi-judicial tribunal, independent from the Department of National Defence and the Canadian Forces. It is, in effect, the only external component of the Canadian Forces grievance process

Since its creation, the board has earned a reputation as a centre of excellence in analyzing and resolving military grievances. It has developed substantial expertise on a variety of subjects relating to the administration of the affairs of the Canadian Forces. In addition to reviewing individual grievances, our work enables us to identify larger trends and areas of dissatisfaction, which we are then able to share with the senior leadership of the Canadian Forces.

In law, the board is mandated to review the grievances referred to it under the National Defence Act and the Queen's Orders and Regulations for the Canadian Forces.

[*English*]

Operationally, the chairperson is responsible for delegating the work among board members. Once a grievance is assigned to a member, he or she is responsible for the review of the file, as a sole member. Upon completing the review of the grievance, the board member simultaneously submits findings and recommendations to the Chief of the Defence Staff and the griever, and the Chief of the Defence Staff is the final authority. The Chief of the Defence Staff is not bound by the board's findings and recommendations; however, he must provide reasons, in writing, should he choose not to act on them.

Turning now to Bill C-15, I am pleased to note that the bill includes a proposed provision that would change the board's current name to military grievances external review committee. This may appear to be a minor matter, but it is in fact an important change, and one that has been long sought by the board.

The board has found that its current name often leads to misunderstandings and complications. The proposed name change will lead to a better understanding of the specific and unique role for which the board was created. It will also underline its institutional independence while clarifying its mandate. In his December 2011 report, Justice LeSage agreed with the board’s reasoning, and supported the name change, in recommendation number 48.

[*Translation*]

Bill C-15 is intended to be the legislative response to the report on military justice submitted several years ago by late Supreme Court of Canada Chief Justice Antonio Lamer. Therefore, I would like to reaffirm the board's support for the 18 recommendations related to the grievance process that are included in his report.

Several of the recommendations have already been implemented and others are included in Bill C-15. Unfortunately, three recommendations that specifically relate to the board and that were intended to facilitate its work do not appear in the bill. One of these recommendations proposes that board members be permitted to complete their caseload after the expiration of their term. A second would provide the board with a subpoena power, while the third calls for the alignment of the board's annual report with the fiscal year rather than the calendar year. To give effect to these recommendations, legislative amendments to the National Defence Act will be required.

The importance of these three recommendations cannot be overstated. For example, the inability of board members to complete the review of their assigned grievances following the expiration of their term has recently had negative consequences for the board directly. From file receipt, it takes, on average, two to three months for a board member to complete their review and issue their findings and recommendations report. Accordingly, last fall, I was unable to assign grievances to three experienced board members during the last three months of their tenure, despite having files that needed to be reviewed.

● (1545)

[*English*]

I would now like to turn to an ongoing matter of concern for the board, that only certain types of grievances are sent to the board for review. The National Defence Act places no restrictions on referrals to the board. However, under the regulations, only four types of grievances must be referred to the board. This represents approximately 40% of the grievances that reach the final level of the grievance process. Other grievances can also be referred to the board, on a discretionary basis.

Because of this, the majority of Canadian Forces members whose grievances reach the final level do not benefit from the external and independent review of their grievance by the board. We believe that every Canadian Forces member should, at the final level, have their unresolved grievance reviewed by the board, regardless of the subject matter. This is a question of fairness, transparency, and access, concerns that were raised by Chief Justice Lamer in his report.

As you may also be aware, the latest review of the National Defence Act completed by Justice LeSage last year made a recommendation to the effect that any grievance not yet resolved to the Canadian Forces member's satisfaction should be reviewed by the board once it reaches the final authority level.

In Justice LeSage's opinion, the board's review would provide a more balanced input to the Chief of the Defence Staff. The board shares this view and feels that if all unresolved grievances were reviewed by the board, Canadian Forces members and the Chief of the Defence Staff would benefit from an independent and expert review, and the board's potential to contribute to the grievance process would be optimized.

The board firmly believes in the benefits of a new model of referral, as supported and recommended by Justice LeSage. We are optimistic and hopeful that it will be adopted and implemented by the Canadian Forces.

[*Translation*]

Finally, during the debate on Bill C-15 in the House of Commons, I noted the interest of many honourable members in the makeup of the board. Some members proposed that 60% of the board's members should not have any experience within the Canadian Forces.

While the appointment of board members is the responsibility of the governor in council, as the chairperson, I would like to take this opportunity to share with you some of my experiences, as well as my concerns on this issue.

The independence of the board is essential for delivering on its mandate. The board is not part of the Canadian Forces or the Department of National Defence. It is established by statute, and board members, as mentioned before, are appointed by the governor in council. The chairperson, vice-chairpersons and board members serve during good behaviour, not at pleasure, for a term not exceeding four years and can be reappointed. The chairperson is the chief executive officer of the grievance board, supervising and directing its work and staff.

Finally, as a deputy head, the chairperson is accountable to the portfolio minister and before Parliament for ensuring that the board functions effectively and fulfills its mandate. These, in my opinion, are all safeguards already in place that provide for the independence of the board.

That being said, the independence of the board from the Canadian Forces must be shielded and preserved. However, as I testified during my previous appearance before you in February 2011, the current statute does not provide such protection. Section 29.16(10) of the National Defence Act allows for the appointment of an officer or a non-commissioned member, on secondment, to the board as a board member.

One of the fundamental reasons for the creation of the board was the provision of an external review to the Chief of the Defence Staff and to the Canadian Forces members who submit a grievance. Should a serving Canadian Forces member be appointed as a board member, the board's independence from the chain of command would be in jeopardy. In his report, Justice LeSage recommended that serving Canadian Forces members not be appointed as board members. I agree.

I hope that through the work of the honourable members of this committee, consensus can be reached during the review of Bill C-15 so that this provision is removed from the National Defence Act. This would go a long way in ensuring that grievances are reviewed independently and externally from the Canadian Forces.

● (1550)

[*English*]

With respect to the composition of the board, after four years as the chairperson, I can attest that having a military background is definitely an asset for a specialized tribunal like the Canadian Forces Grievance Board. That being said, I also believe there is a place for diversity among board members. In fact, in his report, Justice LeSage indicated, "appointments made to the Board/Committee should reflect a variety of backgrounds, including persons who do not have a military background."

Knowing that the board's mandate is entirely devoted to the review of military grievances, I believe it would be a mistake to exclude potential candidates on the basis of previous military service or simply because a set quota has been reached.

Experience and knowledge of the Canadian Forces, a complex, dynamic, and unique military organization, is undoubtedly an asset. As with many other existing specialized tribunals, boards or commissions, experience and knowledge of the profession from which the acts, decisions, or omissions being reviewed have originated is always considered an asset, if not a requirement.

It is not unusual for professionals to review professionals. The profession of arms should not be treated any differently. Board members with previous Canadian Forces experience understand the language, the structure, the modus operandi, and the culture of the profession. Their knowledge allows them to understand issues faced by the griever and to put arguments in context and perspective. Their experience allows them to ask the sometimes probing questions and to question the right individuals.

In my opinion, having some military experience, especially in the context where currently all unresolved grievances, regardless of type, may ultimately come to the board for a review, should be viewed as an asset rather than an impediment or employment limitation.

In addition, imposing a quota may also delay the appointment process given that labour, employment, and regulatory law in a military setting may not be so appealing to many, particularly in the cases of part-time board members. Ultimately, it is my belief that the decision by the Governor in Council to appoint a board member should be based on competency, experience, and knowledge. Only the best candidates should be appointed, regardless of their background. Canadian Forces members, the Chief of the Defence Staff, and Canadians deserve no less.

[*Translation*]

Mr. Chair, in conclusion, the board welcomes the name change proposed by the bill, believes in the benefit of having all unresolved grievances reviewed by the board at the final authority level, requests the removal of the statutory provision allowing serving Canadian Forces members to be appointed as board members, and supports board membership diversity where competencies are not compromised.

I thank you for inviting me to speak here today. I would be pleased to answer your questions afterwards. Thank you.

[*English*]

The Chair: Thank you very much.

Monsieur Dugas.

[*Translation*]

Mr. Jean-Marie Dugas (Former Director, Canadian Forces Defense Lawyers, As an Individual): Good afternoon.

Mr. Chair, members of the committee, I would like to thank you for inviting me to take part in the discussion on the amendments to the National Defence Act. Appearing before you is an honour, and I will do my utmost to rise to the occasion.

[*English*]

This year will mark the 10th anniversary of the Lamer report. There were very good basic principles in that report. Mr. Lamer said that unless there was a very good reason to have discrepancies between the National Defence Act and the Criminal Code, then the act should be as close as possible to the Criminal Code.

[*Translation*]

I intend to keep my comments brief.

I wish to make three points that I feel are very important and that I would encourage you to consider.

● (1555)

[*English*]

I fail to see any reason for panel members to exclude any ranks of the Canadian Forces at a court martial. If you look at the section, we don't treat officers the same way as we treat privates. When you look at that under the Criminal Code, those same privates, with the same people involved—because you know that on some occasions both a court martial and a civil court have jurisdiction over a case, so you could see a case where a high-ranking officer would be charged with, for example, assault or sexual assault—could be called and be members of the jury, but in the forces, he would be precluded and excluded. If that same private is charged with any offences, he is not entitled, under my reading of the act, to have a peer appear there, because the lowest rank would be sergeant.

Again, I suggest that there is no reason to have that kind of discrepancy.

The second part on that panel, if you look at the National Defence Act and the way it's done, contrary to the criminal civil court, none of the parties in court have any say in who the panel members will be. There's no challenge process. There's an informal one where you can have a look at the people, but it's only at a court martial.

I understand that there would be something to be made out of that. It has to be addressed differently because sometimes the court martial is far away, but with the technology today, I suggest that the court martial administrator should have some responsibilities toward both the prosecution and the defence in the selection process. You end up with panel members at a court martial and you don't know how they've been selected.

[*Translation*]

The process is also said to be random, but at the end of the day, it is more or less clearly explained.

Lastly, as a former director of the Canadian Forces Directorate of Defence Counsel Services, I would point out one thing. While it is positive that the four-year term can be renewed, keep in mind that renewal is once again at the discretion of the authorities.

By its very nature, the role of the director of the Directorate of Defence Counsel Services is somewhat at odds with the organization. Indeed, in light of all the amendments, the various courts and the motions related to the likely amendments to the National Defence Act, the director may be the target of some animosity. It's human nature.

From my experience, I would once again suggest that the term of the director of the Directorate of Defence Counsel Services be renewed at the director's request, instead of further to a decision by the administration.

Thank you. I would be happy to answer questions.

[*English*]

The Chair: Thank you. We appreciate those opening comments.

We're going to go to our seven-minute round.

Mr. Harris, you have the floor.

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

I want to thank all of our guests for coming here today and offering their opinions and experience to the committee.

This is a complex bill in the sense that there are a lot of clauses that we're dealing with here. Some of them have to do with relationships, as Ian Holloway has pointed out, in terms of the nature of military justice and it being a different system.

I think we all recognize the importance in the military context of having a disciplined system that responds to the operational needs. As Dean Holloway pointed out, in an extreme situation where the taking of a life is part of an obligation that one is required to do, I'm sure implied in that, Dean Holloway, is the qualification that unless such an order is unlawful, in which case one would be required to refuse. These are not black and white situations we are dealing with. We are dealing with degrees. All three of you have been in the military, so perhaps you could all offer your opinion on that.

One of the concerns that we have raised on this issue this time out and the last time with Bill C-41 was the attraction of criminal records to service offences. There are quite a lot of them, as we know. We do know that the procedure for some retrials is rather bereft of procedural protections that would normally be attracted in a civil trial, and yet we end up with individuals getting criminal records. There are dozens of offences. I add to that the fact that, based on the last records that we have here from the JAG, there are some 2,500 offences per year in a relatively small force—65,000 regulars and another 20,000 or so reservists—most of which are tried by summary process. That's only for one year. If you're in for five or ten years, what percentage of our forces come out having served and being subject to the kind of discipline we're talking about—for good reason—end up with criminal records for which no pardons are available? Now they have something called a record suspension. Isn't there something wrong with that, and shouldn't we try to find a way to fix it?

I'm inviting all of you, because I know you're junior ranks, Dean Holloway, and others have served as officers, so there are different perspectives here.

● (1600)

Mr. Jean-Marie Dugas: Actually, I have a small contribution. It's been there for a long time, and that's highly unfortunate, and your point is very good. You will see over the years that we have in the Canadian Forces what was called a conduct sheet. The members who were going out of the forces who had been convicted of an offence, if they wanted to have it pardoned, they had to basically open a criminal record to get the pardon. Some of these offences were very minor offences that we would not normally be charged with on the city streets. Your point is extremely valid. It should be really in a frame where it's clear that those officers are not subject to be charged for offences that would go into a criminal record.

Mr. Jack Harris: Any others?

Mr. Bruno Hamel: For myself, I'm unfortunately unable to contribute to this part of the conversation because disciplinary matters are excluded from my mandate. I don't look at disciplinary matters at all.

Dr. Ian Holloway: We chatted about this the last time I was here, Mr. Harris, and I agree with you. In effect, this bill, I think, accomplishes what you've just said, that for most offences that are triable only by summary process, a criminal record will not attach. For those offences where a criminal record will attach, as I read it, the accused service person has an election. They can elect to choose trial by court martial. I am reasonably confident that this bill addresses the concern that I heard you raise last time and that you've just raised now.

Mr. Jack Harris: I don't want to be correcting you, but, in fact, amendments were made last time that did go some considerable way in removing the number of offences that were to be subject to a criminal record. Unfortunately, that amendment did not appear in Bill C-15 when it was presented to the House. We're kind of back to square one here and we're having that debate this time out, although there's some suggestion there may be an amendment coming forward.

Dr. Ian Holloway: Didn't the minister undertake to you to resubmit? I don't know. I just know what I read in the paper. You're in the know, not me.

Mr. Jack Harris: I'm just telling you, in the bill that's now before this committee, Bill C-15, of the six or eight amendments that were made last time, only one of them appeared in this bill when it was submitted to the House.

Dr. Ian Holloway: I think the essential fact is that, I can't say in every case, but in most cases where a criminal record would attach, the person has the right to elect a trial by court martial.

Mr. Jack Harris: Let me ask you this question because I've asked it of a lot of people. You were an enlisted guy as opposed to an officer. I think, of these 2,500 offences per year, 60 to 80 of them are charged by court martial.

If someone said to you, “Young man, we're going to charge you with this offence. Now, you have a choice. You can be court martialled or you can go to the CO and the CO will take care of it this afternoon and you'll probably get this...”, how many people in your circumstances, and never mind your law degree and all of that stuff.... When an ordinary guy is caught doing something, being drunk and disorderly, AWOL, or whatever, how many people are going to choose a court martial?

Dr. Ian Holloway: The evidence would suggest very few, but the fact is that a well-trained divisional officer will explain this, because before you elect, you are interviewed by your divisional officer and he or she will explain that to you, and explain the consequences of the choice you will make.

Mr. Jack Harris: But there is no right to counsel at that stage of the proceedings, and they don't have access to legal advice. The choices that are made in those circumstances are made in the context of, “You've got a choice, soldier. You can deal with it this afternoon or tomorrow morning or you can go—”

Dr. Ian Holloway: With respect, I think you're being unfair to the quality of the junior officers we have in this country. They're trained to advise soldiers, sailors, airmen and airwomen of the consequences of their choices. I don't think you can be so dismissive.

● (1605)

The Chair: Time has expired.

Mr. Alexander, you have the floor.

Mr. Chris Alexander: Thank you, Chair.

I have questions for each of you, if time allows. Thank you all for appearing today. It's an important piece of legislation and we appreciate your expertise.

For Monsieur Dugas, you mentioned your view that privates should be allowed to sit on courts martial. You cited precedents and arguments from the civilian system. Obviously that's why we're here today. Developments in the civilian system do influence the military justice system, but the military justice system does have its own particular characteristics.

You will remember that former Chief Justice Lamer asked in his report for the discrepancy in rank in courts martial to be removed or reduced. Our current proposal in this bill would see sergeants sitting on courts martial, not privates, thereby reducing the potential discrepancy in rank quite significantly.

The argument that was put to us as this bill was developed is that it is very much in the spirit of the military justice system, which has to combine rendering justice with attention to discipline, morale, and cohesion within the chain of command within the military as a separate entity with special responsibilities.

Would you not agree, in spite of your own view, that the proposal as contained in Bill C-15 on this front does meet the formal recommendation that Lamer put forward in his report?

Mr. Jean-Marie Dugas: I surely would agree that he gave a bit of latitude. I spent two and a half days with Mr. Lamer when he went down to Montreal and Valcartier and interviewed people. He was aware also that those were big changes.

That's why I opened up with the questions where he said that as much as possible, if there is no reason to disregard the Criminal Code and the way the proceedings are done, we should go as close as....

The reason I am uncomfortable with this section is that there is no reason.... I have discussed that. I've been director of defence counsel services for almost eight years and never did I find anyone who would tell me there was a reason not to include a private. As I said, it's a weird situation. The same person we're sending to defend Canadians, Canada, and our values abroad, fully armed, here on the civvy side, that person could do exactly the same job and he would be entitled to do that.

Where I would go, and I would accept what you are talking about, is maybe there are some offences where we would not allow a private or some ranks to be part of a panel, but I fail to see why we treat different ranks differently. Again, there may be a reason. I was never given one, and I fail to see one. I did look into it. We challenged a lot of dispositions in the past and this is there because, again, we argued that too. Again, I cannot find any reason. I'm sorry.

Mr. Chris Alexander: But we agree that the discrepancy in rank would be reduced by the current bill.

Monsieur Hamel, I have a question about your proposal with regard to extending the opportunity of board members to finish their case load beyond the expiration of their terms.

Obviously, we're aware of the recommendation. Obviously, it is being considered. But would you not agree that a change such as that proposed by Lamer and such as that repeated by you today could have implications elsewhere in government as a precedent, that the government in deciding how to frame this legislation is required to analyze and take into account?

Mr. Bruno Hamel: Thank you for the question.

Mr. Chair, there are many tribunals currently that have that provision in their governing statute. I don't know the recommendation number by heart but the LeSage report also recommended the same thing for the MPCC in his report.

To us, it's mainly a matter of making the right choice and the right decision. It wouldn't be fair for a griever, a Canadian Forces member, to have a case assigned to a board member like a judge, and then suddenly this judge is no longer a judge and the case has not been decided. As the chairperson, I would have to reassign the case to another board member and basically that would mean additional delays. Because every single board member is independent intellectually, he or she would never accept the findings or recommendations of a colleague. Maybe they would take them into account, but he or she would have to start all over again, causing delay to the service member.

● (1610)

Mr. Chris Alexander: I think we would all agree with you that in a court there is a certain practice, but in quasi-judicial tribunals, independent tribunals on the model of yours, there is a variety in the practice. Would you not agree there are some other federal tribunals where such extensions are not given?

Mr. Bruno Hamel: There are some tribunals where such provisions do not exist. However, I will just restate that

[*Translation*]

the well-being of a Canadian Forces member, it is unfair to impose that.

[*English*]

Actually, even for the board to impose.... I had my hands tied basically for three months where I could not assign cases to three board members. They were there, sitting, and I could not employ them, and they were valuable resources. They could have helped get some of these soldiers' cases reviewed and recommendations made to the Chief of the Defence Staff, and if we're talking about something like a $100,000 refund or remission, that's a lot of money that would have to be reassessed again.

So it's all in fairness to everyone. We're not a court. We realize that. But in all fairness to the soldiers and the Chief of the Defence Staff, they deserve a decision in a timely fashion.

[*Translation*]

Mr. Chris Alexander: We fully understand your view, but can you confirm for the committee that a number of other recommendations that you made stem from Justice LeSage's report, a report tabled in Parliament in June 2012 and still being reviewed by the government?

[*English*]

Mr. Bruno Hamel: Yes, I will confirm that these three outstanding recommendations by Justice Lamer have been ongoing for quite a long time. Since I've been the chair, I've been pushing for those to go through. They're still under review, but have been accepted by successive governments. They were all agreed to and just not in the bills, in successive bills actually.

[*Translation*]

The Chair: You're out of time.

[*English*]

Mr. McKay, you have the floor.

Hon. John McKay: Thank you, Chair, and thank you to each one of you.

I thought Dean Holloway articulated very well the differentiation between a civilian system of justice and a military system of justice. I thought in that respect it was very helpful. In effect it sets up a test. The test is on these changes and any other legislative changes, either on the balance of probabilities or beyond a reasonable doubt. Whatever test you want to choose, what is the basis for the differentiation in the system? Much as Justice Lamer said, unless there's a very good reason to be different, it should be the same.

So applying that test, and I'll direct the question to Dean Holloway and to Mr. Dugas, with respect to the empanelment of a jury in a court martial, it seems to me that the government has sort of taken a half-pregnant approach. Either you go with only captains who can sit on jury trials for captains, or you say all ranks can sit on jury trials for any rank.

By dropping it to sergeant, you drop off a significant portion of your population. So, Dean Holloway, make the government's argument here.

Dr. Ian Holloway: First of all, it's not a jury trial. The function of the members of a panel in a court martial is not to find facts like a jury does. It has a different role from a civilian jury. It may seem pedantic on my part, but it's critical to conceiving the way in which a court martial is meant to work. It's one of the challenges, too, by the way of comparing our system with the system as it operates in Great Britain or Australia. We may use the same titles, but they can mean different things. That's the first thing I'd say.

I'm not sure our system of civil juries in Canada today is particularly covered in glory. There's that old joke that the people who determine your guilt or innocence are the people who are too stupid to be able to evade jury service themselves.

● (1615)

Hon. John McKay: I don't think we're going there.

Dr. Ian Holloway: I'm sure we're not going there, but to suggest the jury system as we have it in Canada today represents the apogee....

Hon. John McKay: It may not be the gold standard, but it is the standard.

Dr. Ian Holloway: It is the standard, but I guess the point is to be an effective member of a court martial, I think you have to be able to bring a certain sense of the big picture. Remember, the context of the system of justice is discipline, unit cohesion, and fighting effectiveness. That requires a certain degree of seasoning. You have to have been around awhile.

Hon. John McKay: If a private has been around for 15 years, is he not capable of...?

Dr. Ian Holloway: We won't have any privates—

Hon. John McKay: I know. In this system we won't, but you're saying that a private who has been around for 15 years won't be able to....

Dr. Ian Holloway: There aren't such privates in Canada any longer, unless they have been reduced in rank. Maybe master corporal is the right rank, or maybe it's warrant officer, but someone other than a private who has been in the service for 18 months or two years or less, I'm not sure they will have the right level of war experience.

It's the same reason second lieutenants or officer cadets don't serve as panel members in courts martial.

Hon. John McKay: Lieutenant-Colonel Dugas, I'm interested in your reaction.

Mr. Jean-Marie Dugas: I'm not sure I understand that the meaning of the role of the members of the panel is not the same as the jury, because I have been in both rooms, and their role is exactly the same. They are fact-finders in the end, and they decide if the person is guilty or not.

I like your approach because I've met privates who have decided to remain privates up to corporal because they want to stay on one base in particular because the family is there and the kids are there. I've met privates and master corporals who have master's degrees, but they are happy to be there because they are not using their master's degrees where they come from. We have very good people there.

I don't understand why you have to be in the forces for three years to be able to decide on some issues of a case that have nothing to do with military issues.

Hon. John McKay: Regrettably, I have very little time.

Let me switch to the board for a second, and the three main things you're interested in.

It does seem to be an incredible waste of resources that for the last three months of your appointment you can't sit on cases and make decisions. The government's argument, as articulated by the parliamentary secretary, seems to be that this is the way other boards do it. The way other boards do it may be wrong.

Is there any other compelling reason why a board member who is about to retire can't finish his caseload?

Mr. Bruno Hamel: In 2011 when I appeared, one of the arguments put forth by one of the members was that this could be perceived as a mechanism for one to forever extend a membership within an organization. I disagree with that profoundly in that, first of all, every board member doesn't know...and we're only talking here about cases that would have been assigned prior to a mandate being at the expiry date, which in the case of our board would mean technically no more than two to three months. So, if my term were to end today, and I had a case in my hands today that had not been decided, I could automatically be extended for another two to three months.

Hon. John McKay: It seems like a fairly weak argument, with the greatest respect to whoever put it forward.

I was surprised you don't have subpoena power. Why is that?

Mr. Bruno Hamel: Subpoena power is another issue that's still ongoing. It's an ongoing discussion. There's an obligation in the statute for the Canadian Forces and the department to basically give our board everything we require. We don't have an issue with that. We don't have a problem. What we request we get, sometimes easily, sometimes a little bit later. But we always get around it and get what we need to adjudicate on a case, i.e., provide the finding, a recommendation to the CDS.

Where the problem lies is that for everyone who's no longer in the Canadian Forces, the Canadian Forces or the department cannot help us acquire that information. If we're looking to acquire a piece of information that belongs to a retired member, short of holding a hearing and then potentially having to go before the courts because we don't have that power, we would have to go into a hearing, and have that member testify. If he or she doesn't come or doesn't want to provide the evidence, then we go to court and have a judgment to have that enforced. It's just a question of an ability to have the proper tool, when required. It's not to subpoena a CF member because we can have a hearing for that and we have no relationship problem for acquiring information. It's mainly for those cases.

I had a case last year where I came very close to having to have a hearing only to get a piece of information. I decided not to go there because it was the griever, and I said in that particular case if he didn't want to help his case, I wasn't going to hold a hearing for that. But had he been a witness, I would have had to hold a hearing, which is costly and time consuming.

Part of my mandate in the legislation is that I must do things as efficiently and fast as possible. The subpoena would actually alleviate that problem of going to a hearing and potentially to court to have a piece of evidence submitted to the board. That's why we're seeking that.

● (1620)

The Chair: Time has expired and we do need to move on. We're going into our five-minute rounds of questions now.

Ms. Gallant, you have the floor.

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

Dean Holloway, can you please comment on the sentencing provisions in Bill C-15? In your view, is this a positive development for the military justice system?

Dr. Ian Holloway: I think so. The system we have, as with so many things we have in Canada, we have acquired through inheritance from the United Kingdom, and our history has diverged from theirs in the years since. I think most people in the system would have a vague sense about fighting efficiency, the kinds of things I talked about. In terms of actually giving statutory clarity to the principles according to which people are charged and convicted of military offences, I think it is actually quite helpful. It actually crystallizes it. Frankly, it gives courts, which might ultimately review this, a firmer yardstick against which to measure the propriety of what the military system has done.

Mrs. Cheryl Gallant: Okay.

Dean Holloway, can you comment on how the proposed amendments impacting military judges strengthen the military justice system?

Dr. Ian Holloway: Specifically, Ms. Gallant, are you talking about the retirement age, the security of tenure provisions?

Mrs. Cheryl Gallant: Yes.

Dr. Ian Holloway: There was a concern among ordinary sailors and soldiers about judges who stood to be promoted and have future postings. There was a fear that it would depend on how much you please those above you. It's a similar concern that we heard from Lieutenant-Colonel Dugas.

Fully separating the corps of military judges from the line officers in the Judge Advocate General branch, which was done some years ago, was a positive step in that regard. Still there was a lingering concern that one's pension depends on the length of service. A judge who was ruling in the wrong way might be ushered out the door earlier and that would have an impact on his or her pension.

Crystallizing the retirement date is, in principle, a very positive move. The last time I was here I think it might have been Mr. Harris, again, who was asking me questions about why the age of 60, why not the age of 75, like judges appointed under section 96 of the Constitution Act. I think the answer to that is that military judges, unlike civilian judges, have to go operational sometimes. We have had courts martial in Canada but held overseas. Military judges have to be prepared to put on boots and a heavy rucksack and deploy. Again, why is it 60 years? Why is it not 59 or 61 years? At some point, you just have to make a choice. It seems to me that's a rational justification for something other than 75 years.

Mrs. Cheryl Gallant: Dean Holloway, during your opening remarks before the committee on Bill C-41, you stated, and I'm paraphrasing here, that the purpose of the military justice system is to preserve unit cohesion and to ensure that young women and men will willingly place themselves in situations of extreme peril because someone tells them to, and for no other reason. You mentioned this a bit today.

Can you explain that further, please?

Dr. Ian Holloway: Sure.

We're in the process of bringing our troops home from Afghanistan. That was an example where young Canadians, who were raised in the same way that your children were raised, were placed in very unnatural situations.

First of all, they were told they were going to some place where there were people who would try to kill them, and they had no choice but to go. Then when they were there, many of them lived and served and fought in conditions that were alien to the lives of most Canadians. They had no choice, and they did it very well on the whole. They didn't desert. Unlike the Americans, we didn't have large-scale desertion. Our women and men did what they were told. They did it well, on the whole, and they did it because it's a system they have faith in, that they believe in.

It's well and good for us to reminisce about the Second World War, or even the Korean War, but that was a different generation, with different sorts of expectations. Afghanistan, it seems to me, was a crucible. Today's youth were placed against the measuring scale, and they measured up very, very well.

I think the organization of the Canadian Forces measured up very well. We learned things. Mistakes were made. If, God forbid, we ever have to do something like that again, I think we'll do it even better. But there weren't breakdowns in unit cohesion. There weren't breakdowns in morale. There weren't mass desertions. Our men and women acquitted themselves in a way in which every Canadian can be proud.

● (1625)

The Chair: Thank you very much. The time has expired.

[*Translation*]

Ms. Moore, go ahead.

Ms. Christine Moore (Abitibi—Témiscamingue, NDP): Thank you.

Mr. Holloway, I would like to pick up on the matter of summary trials and clause 75 of Bill C-15.

According to the Queen's Regulations and Orders for the Canadian Forces, or QR&Os, prior to passing sentence, the presiding officer of a summary proceeding shall take into account many factors, including the number, gravity and prevalence of the offences committed, as well as the family problems and financial situation of the accused. What that means, then, is that, when two individuals of the same rank commit the same offence, there is no way to ensure that both receive the same sentence, owing to the numerous factors the presiding officer must take into account. I don't object to the requirement to take those factors into account.

Pursuant to clause 75 of Bill C-15, and even in its previous incarnation, Bill C-41, the determination as to whether the accused will be subject to a criminal record is based on the sentence imposed on the accused. I would like to hear your take on that.

Furthermore, looking at the amendments contained in Bill C-41, among the sections of the National Defence Act that were added, some were not added to the amending legislation. For instance, section 98 of the act concerns those who aggravate disease or infirmity. That was not included in the amendments under Bill C-41.

I have met people who were accused and subjected to a summary trial under section 98, because they had sprained an ankle during a particularly challenging leader's course and had asked for a bandage in order to be able to walk on the ankle for three days, as they did not want to have to start the very difficult course over again. It's common for people to do that kind of thing, depending on the mission. Since that section was not included in the amendments under Bill C-41, the accused could have been subject to a criminal record.

In light of the fact that numerous factors must be taken into account, I would like to know whether clause 75 of the bill could not use more effective wording, to prevent people from having criminal records as a result of a conviction or summary trial, a proceeding that would not have happened in the civilian justice system for the same offence or act. I realize, of course, that we're talking about legal language for a bill and that kind of thing isn't done on the fly. I would appreciate it if you could provide some suggestions in writing afterwards.

I'd like to hear your take on what I just said.

● (1630)

Dr. Ian Holloway: Thank you, Ms. Moore.

Forgive me, but I will have to answer in English. My French is not good enough to do your question justice.

[*English*]

I can't respond directly to why things weren't included in this version of the act. The drafters, I'm sure, would be able to give you that information.

In terms of the principle that whether you get a criminal record depends upon a number of factors, that is something that's no different from the civil system. A judge in a civilian court has the power to grant an absolute discharge, to grant a conditional discharge, to find someone not guilty, and even to deny that he or she has jurisdiction on the basis of the old maxim *de minimis non curat lex*. In that sense, in the same way that a civilian judge can take full account of the circumstances to determine the level of moral culpability and the appropriate reaction of the state, so too can a military judge, in the current system as well as in the proposed one, determine the appropriate punishment. I think in that sense there is direct equivalence between the civilian system and the military system.

[*Translation*]

Ms. Christine Moore: Coming back to the QR&Os, I want to be sure I understand correctly. So, on the basis of all the factors, there is no guarantee that the same sentence will be imposed for the same offence. Have I understood the QR&Os correctly?

[*English*]

Dr. Ian Holloway: Yes, you did.

[*Translation*]

Ms. Christine Moore: Very well. Thank you very much.

[*English*]

The Chair: Thank you.

Mr. Opitz.

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

First of all, thank you all for your service. I know that all of the things you have done in your service life have impacted everything you do here. This expertise is valued by this committee, so thank you so much for that.

Mr. Dugas, it was earlier mentioned that the right to consult counsel by a member on the election of either a summary trial or a court martial was not available. Could you clarify if there is in fact a right or no right to consult counsel?

Mr. Jean-Marie Dugas: Yes, and I'm so happy to be able to respond. We ran out of time on the other question that my colleague was answering.

Basically it's quite open now. I must say that if there is something that is extremely open in the Canadian Forces, it is to inform the member under any circumstances. You go on the website and the number is there. I can tell you that this 1-800 number is used by all members, not only for disciplinary purposes, but also for administrative purposes. Sometimes they will inquire about what they can do or where they can go. At the end of the day, it's always their choice. But it will be by phone; counsel will not be on site. I must say that it's probably one of the better services that we have in the Canadian Forces.

Mr. Ted Opitz: You're saying that this is all done through the 1-800 number, and it's not necessarily directly through individuals. I remember as an assisting officer I would advise guys to do that, and sometimes they would access the JAG directly.

Mr. Jean-Marie Dugas: There was a time when the services were not separated. When I was at Valcartier, I was doing court martial prosecuting in Valcartier, defending in the rest of the country and around the world, and there would be an afternoon when it would be legal aid. You just made sure not to be in a conflict of interest with a case that would come up. But as we speak, unless you're on that base doing a court martial as a defending officer, there will be no direct access to....

Mr. Ted Opitz: Okay. I've got a copy of the QR and Os here. Article 108.18, "Opportunity to consult legal counsel on election", states:

> (1) An officer exercising summary trial jurisdiction shall ensure that an accused making an election pursuant to article 108.17 (Election To Be Tried by Court Martial) is provided with a reasonable opportunity, during the period given to make the election, to consult with legal counsel with respect to the making of the election.
>
> (2) Where a legal officer is consulted pursuant to paragraph (1), it shall be at no expense to the accused.

That has been in effect since November 30, 1997.

● (1635)

Mr. Jean-Marie Dugas: Unless they have the changed the practice since I left, "consult" was interpreted as getting in touch with counsel. It didn't mean consulting face to face.

Mr. Ted Opitz: Okay.

Mr. Jean-Marie Dugas: That said, there were occasions where the case was serious enough that we made counsel available.

Mr. Ted Opitz: But if the accused chooses, he can request a face-to-face meeting, rather than do this over the telephone, right?

Mr. Jean-Marie Dugas: I guess someone could, yes.

Mr. Ted Opitz: Okay.

Sir, could you expand a bit on your role as the director of defence counsel services? For example, what is the criteria of the position and the duties that you perform? What exactly does a director do within the military justice system? I have a little bit of confusion on that right now.

Mr. Jean-Marie Dugas: Unless it has changed, in those days I would also be counsel at court martial. I had clients and would defend people who were charged. Then when the system became one, we would usually receive a phone call from an accused who wanted to be represented at court martial and my second role would be to assign a lawyer who was working with me at the time, both from the reserve and from the regular force. Then once the trial was over, we also would have the responsibility to inform the accused, or the person who was found guilty, of their right of appeal and how to proceed. We would proceed with the first step of the appeal. Then it would be up to the appeal committee to decide whether or not an appeal could proceed under our supervision, or be paid by the director of counsel services, or if he would have to pay for it himself.

I was also given the mandate at times to outsource lawyers to appear in court martial because either we were running out of personnel, or we would be in a conflict of interest.

Mr. Ted Opitz: In paragraph 11(f) of the Canadian Charter of Rights and Freedoms, there's a specific exception to the requirement of trial by jury in respect of offences under military law that is tried before a military tribunal. Sir, would you recognize that special rules are required to ensure that court martial members are able to fully play their role in the performance of their duties when dealing with the offences under the code of service discipline, in light of their own experience and at the unit level in the maintenance of that discipline?

Mr. Jean-Marie Dugas: I surely agree with what you just said, yes.

Mr. Ted Opitz: Okay.

The Chair: Thank you. Your time has expired.

[*Translation*]

Mr. Larose, go ahead for five minutes.

[*English*]

Mr. Jean-François Larose (Repentigny, NDP): Thank you, Mr. Chair.

[*Translation*]

My question is for Mr. Dugas.

Thank you for being here. It's an honour to have you.

I want to discuss the issue of summary trials. I would say that context and culture are important factors. A bit earlier, we talked about the quality of the officers responsible for advising people who are subject to a summary trial. I do not agree. I want to tell you about something that happened to me.

In 1994, I was in training in Shilo, as a recruit. I spent seven weeks there. The environment was very challenging: very little sleep, intense training, temperatures of 30 degrees below, and so on. The instructors were tremendous. Our NCOs and officers had combat experience and wanted to teach us everything they could to ensure we were well-trained.

One day, an instructor even started crying because the situation was emotional. He had lost a friend in combat. At one point, we were given a day of rest, and when we got back,

[*English*]

we got charged. We had no idea what we were getting into. We were very nervous. Frankly, the only thing that was going through my mind, and there were six of us at the same time, was that we wanted to go to Mexico, because we had no idea what we were getting into. When we sat down with the officer who explained the process to us, we didn't hear anything. You have to understand that we were tired and we were nervous.

The fact that today we're talking about choices, I find that a little ironic. I think there's a double standard here. We say that the Canadian armed forces is unique, and yet we expect that human beings are going to respond normally as if everything is hunky-dory. We ended up going in front of the commanding officer and being charged three days pack drill. It was a basic mistake. I can only imagine people going overseas in combat situations where an officer is going to give them a choice.

I think Bill C-15 is good. It goes a certain way, but it doesn't go all the way.

[*Translation*]

Do you think Bill C-15 needs some improving as far as summary trials are concerned? I told you what happened to me, but I would say a lot of other members have had all kinds of experiences, including yourself, for that matter.

● (1640)

Mr. Jean-Marie Dugas: If you mean to suggest with that example that abuses are possible with summary proceedings, my answer would be that abuses were much more likely to occur before than they are now. One of the reasons is that, over the years, the Judge-Advocate General's office has increased the number of available officers on military bases. For example, when I was in Valcartier, I was in charge of the Valcartier reserve and the Bagotville reserve, whereas today, you have two, three, and sometimes four officers assigned to Valcartier. Another handles the reserve and yet another does Bagotville. The number has changed, and so has the ability to access counsel.

You, yourself, had a certain experience, and that's a good thing because it helps you understand. I'll give you an example.

When I was in Cyprus, I was reviewing a proceeding—actually, the judge advocate eventually intervened. A deputy commander's driver had run a red light. The deputy commander was sitting beside the driver when it happened. He was charged by his chief warrant officer. The deputy commander ended up being both judge and judged in the case. There was no malice in the situation. It just happened. Everyone thought that because he had run the red light, he would plead guilty.

Naturally—and this goes back to what we were saying before—when an individual tells their commander or deputy commander that they do not trust their judgment, that individual is court martialled. When they rejoin their unit, things are always a bit challenging. That's the feeling you get when you talk to people on the toll-free telephone line.

As for improvements, there again, I am inclined to refer you to Mr. Drapeau's detailed comments on the matter. It's not possible now, but a commander's decision could be subject to a review. I know it's harder, but it can be done. It's done in the case of the chain of command and it could be done in other situations, for example, with a court martial. However, it would require closer monitoring, which would likely involve recording the proceedings, among other things.

Mr. Jean-François Larose: What measures could be taken to further improve the situation?

Mr. Jean-Marie Dugas: Currently, there is no rule of evidence, or very little. I think there should be tighter controls. The Judge Advocate General put together a very clear directive of sorts as part of the last reform. But perhaps it should be incorporated into the QR&Os. That way, things would have to be done in a specific order and the procedure would have to be followed. It would require more detail. Obviously, those people are not lawyers, but people who have been assigned to operations, and usually they hold commander or deputy commander positions.

It is also important not to make the system so cumbersome that it turns into a court martial. But, so as not to overburden our commanders, a review system through court martial would probably be a good idea.

The Chair: Mr. Larose, your time is up.

[*English*]

I'm going to move on.

Mr. Chisu.

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

Thank you, witnesses, for appearing before our committee. I only have three questions, one for each of you.

Dean Holloway, the government has indicated that it would be amending clause 75 relating to criminal records. The amendment would exclude approximately 95% of convictions at summary trial from resulting in a criminal record.

In your opinion, does this amendment enhance the military justice system? Perhaps you could elaborate and give an example of a conviction in a summary trial that would result in a criminal record that would not be one on the civilian street. I passed my military law a long time ago , and I don't remember anymore.

Dr. Ian Holloway: This was a point of agreement between Mr. Harris and me. As was just said, there are a lot of unnatural stresses associated with service life, and all of us who wore a uniform did things under stress that we regretted, that we might even have known were wrong. We deserved to be punished for them and we were punished for them.

Whether that means that you shouldn't be able to go to the United States ever is a different thing. I agree with Mr. Harris's point, that most purely military offences should not attract criminal records.

Mr. Corneliu Chisu: Could you give an example of that?

● (1645)

Dr. Ian Holloway: Sure. I'll give an extreme example of it, and then I'll give a more commonplace example.

An extreme example of it is the serviceman who says,—excuse my language, Hansard—"Go to hell! I'm not going to cut my hair anymore." He will be charged, convicted and punished for that. Presumably he will be ultimately released from the service. A position such as that is fatal to fighting effectiveness, unit cohesion, and so on in an organization such as the Canadian Forces, but does it mean that he should have a criminal record for evermore? Probably not.

Mr. Corneliu Chisu: Does it result in a criminal record? I'm asking you because you are telling me substantiating stuff, but does it result in a criminal record or not?

Dr. Ian Holloway: I don't know. But if the service person went one step further and slugged the person who was ordering him to have a haircut, that would attract a criminal record, and I'm not sure it should.

Mr. Corneliu Chisu: But if it is an assault, it is punishable with a criminal record also on the civilian street, isn't that right?

I'm asking this because I was serving in the military and I don't want any of the military to be treated separately or treated better than every other citizen. I was a citizen and I served this country. It is not that they use different treatment in the military, mostly, when you are looking at life in the garrison. When you go on operations, there are rules of engagement, and you know very well that is a different thing.

Can you elaborate on this? Which amendments would you want to see? I think Mr. Harris was alluding to amendments. How do you see these things balancing?

Dr. Ian Holloway: What I would say is that if someone is charged and convicted of an offence that is an offence under the Criminal Code, then I'd be inclined to suggest that it's appropriate for them to carry a criminal record. But if someone is charged with an offence that is purely a military offence, I'd be inclined to say that it is not.

I don't mean to be difficult, Mr. Chisu, but unless I had a full list before me, and I'd be happy to go through it one by one, I'm not sure I could give you a conclusive answer. I do stand for the principle that service men and women make mistakes in response to unnaturally stressful situations, and a criminal record shouldn't be the reward for having volunteered to serve their country.

Mr. Corneliu Chisu: I have a question for Mr. Hamel.

One of the propositions advanced during the debate on Bill C-15 at second reading was to impose a quota on the composition of the Grievance Board, specifying that 60% of the members must not have had previous military service.

The Grievance Board is an administrative tribunal, and you know that I have participated in different administrative tribunals. The role of the administrative tribunal is to apply expertise to a particular body of facts or mixed facts of law. Given this, do you think it is a logical proposition to have a quota that would exclude persons who have relevant experience from being selected as members of the board?

Specifically, I'm asking you why are you for the exclusion of a member who is a serving member in the forces? I think I understand from your proposal that you are against having a serving member on the board.

Mr. Bruno Hamel: Thank you for the question, Mr. Chisu.

No, it's the opposite, actually. Maybe I misspoke, but military experience in my view is an asset. What I said in my comment is that I also believe in variety and diversity. I don't think I said.... A quota to me would be an error. As the chairperson, all I'm interested in is getting the best board member available. I believe that excluding members based on their qualifications or because a quota has been reached would be inappropriate. That's my view.

If you put it in context.... Say, for example, that someone wasn't a cadet in his youth, just for reasons of having fun and deciding whether or not he was going to go into the military, and then had a successful career through many tribunals, maybe he would not be able to apply for a position. Alternatively, take someone who was in the reserves just to pay his tuition fees while going to college and never served afterwards in the Canadian Forces. He or she would also be excluded as a board member, if that quota was reached.

I think a serving member who has a grievance submitted.... For the Chief of the Defence Staff and for the board, I'm only interested in having the best available candidate. If that means that he or she has experience, so be it. If it means that for what is available at the time, he or she does not have the experience, so be it. But we should not be excluding, in my view, individuals from applying for these kinds of jobs because they have served in the military. I don't think there is tar attached to their bodies. I don't think they should be disadvantaged. I don't think they should be excluded.

● (1650)

The Chair: Thank you. The time has expired.

[*Translation*]

Mr. Brahmi, go ahead.

Mr. Tarik Brahmi (Saint-Jean, NDP): Thank you, Mr. Chair.

My first question is for Mr. Dugas.

When we discussed jury makeup and the selection process for court martials, I sensed some disagreement with your neighbour there. It had to do with the fact that jury makeup or selection for a military court is different from that of a criminal court in the civilian justice system. Since you didn't really get an opportunity to explain your point of view versus your neighbour's, you can do so now.

Mr. Jean-Marie Dugas: I wasn't actually disagreeing with his comments on the makeup. My neighbour was saying that the role was different. As I see it, panel members have the exact same role as jury members do in criminal court. They show up, they sit down, they listen to the evidence and they deliberate on whether the person is guilty or not.

Mr. Tarik Brahmi: In a criminal matter, however, the whole idea of rank comes into play as far as selecting panel members goes, and that is not the case in the civilian world.

Mr. Jean-Marie Dugas: Yes, that is kind of what I was saying earlier. That is the big reason I have reservations about the current process, although I do agree it is an improvement over the previous one. This isn't the first time people have said it was impossible to do certain things in the Canadian Forces. But, ultimately, once they're done, they work quite well.

For example, there was discussion about the possibility of having a court martial in Afghanistan. One was held in a murder case. That shows that there is indeed room for improvement.

I quite appreciated another comment someone made earlier, one that supports my views on selection. Again, I am not questioning the court martial administrator's honesty, but the process isn't transparent. It's all done in his office or on his computer. Depending on the rank of the accused, the panel must include a general, a colonel or a lieutenant-colonel, and it can go to the rank of captain currently. But if you limit it to only soldiers, corporals, master corporals and even sergeants now, you exclude over half of Canadian Forces members.

The process is not about being judged by one's peers, although the principle should be the same. This is a slightly more British system where officers had oversight authority over just about everything that went on in their army corps. Today, we are a professional force, and as I said, I knew and still know people with master's degrees. Some have even gone after their Ph.D.'s, and yet they're corporals or master corporals by choice because they wanted a more stable position owing to their families.

Mr. Tarik Brahmi: Do you know of any cases where jury selection was poorly done, precisely because of the problem you pointed out?

Mr. Jean-Marie Dugas: In Capt Semrau's case, keep in mind that one of the requests made at the beginning of the proceedings had to do with the selection process. If you read the court record, you will probably see we went through all the steps in those proceedings.

Once again, the problem lies in the fact that it's not possible to know more about the panel members. You have the ability in other courts to determine if the members have an interest of some sort. So although there were five members on the panel, it ended up having just four members for the remainder of the proceedings because one member was absent owing to an illness we were not told about. Otherwise, we probably would have done a lot more to ensure that a replacement could serve as a fifth member. But there was no way for us to know if that person was absent for medial reasons. Therefore, we weren't able to make any inquiries as to whether the person would be able to sit on the panel until the end of the proceeding, which lasted a good three or four months.

That was what I meant about the process. Was it honest? Was there a reason for our not having that ability?

● (1655)

Mr. Tarik Brahmi: Thank you.

I have a question for Mr. Hamel about the board's membership.

We understand that you're against allowing someone who has served in the military to sit on your board. Conversely, as you said in your opening statement, having a military background provides for more pointed questioning and a better understanding of the military's distinctive nature.

You say in your report that some cases are assigned to just one board member. So isn't there a possibility that cases are handled differently? When only one member of the grievance board handles a case, isn't it possible that a civilian would approach things differently than someone with a military background would?

Mr. Bruno Hamel: Thank you for your question. It's an excellent one.

It comes back to our education or training process, if you will, when a new member is appointed to the board.

Generally speaking, files are assigned to a single member. But, when a member is new to the panel, whether that person has military experience or not, the chairperson usually puts two members on the case, to help the new member learn and fully understand the process. There is a training period.

The other thing to bear in mind is that, although a member sits on the panel alone, they are supported by a team, a bit like a judge has clerks. Every case has a legal advisor. We also have a team leader and a grievance officer. These are people with years of experience working for the board. We have former members of the military, civilians, sociologists and lawyers who do not work as such.

We surround members with a good team to ensure the board's approach is a consistent one. Although every member makes decisions independently, there is still a collective effort. On top of that, members are always available to help another member who may have questions. We have procedures in place.

To my mind, it's an asset, not necessarily a prerequisite. I am for diversity, but not a quota. I believe in appointing the right person, at the right time, to the board, in order to achieve the best review, the best recommendation to the Chief of the Defence Staff and the best possible resolution for soldiers whose grievances the board is reviewing.

I don't want a board made up solely of civilians or former members of the military. I want to see the right person appointed. I am against quotas.

[*English*]

The Chair: Mr. Brahmi, the time has expired.

I would ask the witnesses to also keep their comments as brief as possible. We are going over schedule.

Mr. Norlock, you have the floor.

Mr. Rick Norlock (Northumberland—Quinte West, CPC): Thank you very much, Mr. Chair, and through you to the witnesses, thank you for appearing.

My first question is for Dean Holloway. I'm going to respect the chair and ask you to abbreviate some of this because it could be a little expansive.

Dean Holloway, you referred to the Australian military justice system during your testimony before this committee on Bill C-41. You said, and I am paraphrasing, it was, or is, much more visceral and much less reflective than our approach in this country.

Given that we have two independent reviews by former Chief Justices Dickson and Lamer, along with a 2011 independent review by Chief Justice LeSage, all supporting the military justice system, does this not reinforce your view that here in Canada we have had time to reflect and make recommendations that suit our military justice system? My constituents, and I think most Canadians, like to compare us to our allies. You did Australia; I wonder if you could just make a short reference to the U.S. and Great Britain.

Dr. Ian Holloway: I'm not sure I can do much on the U.S.

In terms of Great Britain, our histories have diverged. They have a person called the Judge Advocate General, as do we, but he fills a very different role in the United Kingdom than our JAG does. Our JAG is, among other things, the adviser to the government on issues relating to military justice. The JAG in Great Britain does more than this, but largely his role is to appoint military judges. It's a very different role.

As with so many things in the United Kingdom, their system of military justice is being challenged by the process of Europeanization. It's a live question whether Great Britain is going to remain in the EU because of the pressures they feel, the potential incompatibility between the common law way of doing things and the continental way of doing things, as is embodied in the EU.

That's a brief answer.

● (1700)

Mr. Rick Norlock: Good. Thank you very much.

My next question is for Mr. Hamel. Subsection 29.16(11) of the National Defence Act requires members of the Grievance Board, before commencing their duties with that office, to take the following oath:

> I, ..., do solemnly swear (*or* affirm) that I will faithfully and honestly fulfil my duties as a member of the Canadian Forces Grievance Board in conformity with the requirements of the *National Defence Act*, and of all rules and instructions under that Act applicable to the Canadian Forces Grievance Board

Do you feel that members of the board take this oath seriously? I'm sure you do, but it's a rhetorical question. In your opinion, is there any reason to believe that former members of the Canadian Forces who take the oath and then become members of the board take it somewhat less seriously than people with only civilian experience? I'm referring to conflicts of interest here. Do you think that former members of the CF are capable of functioning objectively when they perform their duties as members of the board?

Mr. Bruno Hamel: Thank you for the question, Mr. Chair.

There's a number of sub-questions in that question. I'll try to be brief.

The question of bias is one that has been raised and discussed in the House of Commons. I look at myself as a board member over the last four years. The issue of bias, whether real or perceived, was never raised once by a soldier whose grievance I was reviewing, or by a Canadian Forces authority, which decision was also reviewed, or by any legal counsel representing a CF member in the grievance process. It was never raised.

There is an objective test to be done by the decision-maker when an issue of bias is raised. In the last four years, I've never had to do this test. Before coming here, I asked my vice-chairperson about it. He has been in the position for eight years. The question of bias, real or perceived, was never raised for his attention in any files. In one way, that speaks for itself.

Yes, we do take an oath, and the oath is taken absolutely seriously. If you look at the last page of my opening statement, you'll see that I've put there some statistics from over the last five years. That will show you the trend of the board's decision-making powers and ability, because at the board we make decisions, and our decisions become recommendations.

When a board member sits on a case, he or she makes the decisions. You will see that the tendency is actually going the opposite way. Over the last two years, 55% of the time on the board, with previous military experience for board membership, we recommended totally or partially in favour of the member, versus 45% where we stated to the chief that the institution made the right call. If you look at the three years before that, the ratio was reversed: it was 55% and 45%.

Historically, we're currently now at 50-50, really, and we're not there to advocate for the complainant or the CF. As a tribunal, we take the oath seriously. We look at the facts. We apply the rules. We apply the law. We apply the jurisprudence. We make what we believe is the most appropriate finding and recommendation to the decision-maker. It just happens to be that we're close to 50-50, but the last two years at 55% and 45% are an indication.

I do not think that having a military person's experience hinders your ability to be neutral. Actually, as I referred to in my opening statement, it allows me, when I ask questions, to know where to go. I know what to ask. I know who to ask. I have a kind of sense if what I get as an answer is really the answer or not, and I'm not afraid to go back, because I know how to do it. Also, I'm surrounded by a good team.

The Chair: Thank you very much.

The time has expired.

You have the last question of the second round, Mr. Strahl.

Mr. Mark Strahl (Chilliwack—Fraser Canyon, CPC): I will be giving my time to Mr. Alexander.

The Chair: Mr. Alexander.

Mr. Chris Alexander: Thank you, Chair.

I'd like to go back to this, seeing as how I didn't have a chance to put a question the first time. We've discussed in previous exchanges the difference between a civilian jury and a court martial panel, but I think it's particularly important for the committee and for Canadians to understand it. In fact, as one of my colleagues has already mentioned, the charter recognizes court martial panels at paragraph 11(f).

Building on your previous answers, I'm wondering if you could remind us of what the difference is between a civilian jury and a court martial panel and why that nuance—and there is a difference of principle as well—is of such fundamental importance to understanding the military justice system. It is protected by our charter and has been upheld by successive reviews so far, and actually by all the assessments that we heard, international and otherwise, as an exemplary system, albeit one that needs consistent, continuous updating.

● (1705)

Dr. Ian Holloway: Thanks very much, Mr. Alexander.

You know, this language has been used several times by members of the committee, that is, sort of slipping from panel to jury, jury selection, and so on. We mightn't like what the Charter of Rights says, but it's the Charter of Rights we have. The Charter of Rights clearly enshrined as a constitutional principle the notion that a court martial is different from a civilian jury trial. So it would be wrong, and I say this with respect to all of you, to take a view that the job is to deform the constitution, the clear language used in section 11 of the charter.

It boils down to the premise upon which the system of military justice exists, and that is something other than just the maximization of individual liberty. That's what the purpose is of our civil society in Canada. The purpose of military society is to maintain unit cohesion, discipline, and the willingness of people to place themselves in harm's way, and that's just different from what we expect.

There are people who know much more about the mechanics of the court martial than I do. I would happily defer to them. But in terms of the premises of the system of courts martial, I think just saying that we really have to make sure they're just like juries, and in fact we'll even slip into that language, would be contrary to the constitutional principles on which our country is founded.

Mr. Chris Alexander: Thank you.

Monsieur Hamel, you're aware, as I think the committee is, of Order in Council 2012-0861 of June 19, 2012. We on the committee were reminded of this by our researchers regarding *ex gratia* payments by the CDS in the context of the grievance process.

The operative component of that order in council is this:

> The Chief of the Defence Staff may authorize an *ex gratia* payment to a person in respect of whom a final decision is made under the grievance process established under the National Defence Act.

Could you comment on how this change, assuming the right Treasury Board authorizations are received, obviously, will represent, could represent, should represent, an improvement to the grievance process?

Mr. Bruno Hamel: Thank you for the question.

There's absolutely no doubt in my mind that this is an improvement on where we were years ago. However, in my view it's a limited advancement. It's somewhat limited.

I can tell you that since June, because I listened to what the Judge Advocate General said, and the VCDS, the other day, we have used this particular provision twice so far. In two cases we have made recommendations to the Chief of the Defence Staff that the *ex gratia* payment provision could be used, in our view, in two cases. These two cases are still pending, which is why there have been no decisions yet. So I can say before this committee that we've used it twice.

However, I must reiterate that, in our view, it is short of the Lamer recommendation to provide financial payment ability...like in tort, and *ex gratia*; it's somewhat limited.

I'm not a lawyer, but the way I understand *ex gratia* is that if there is a rule, if there is a regulation, that cannot be used to circumvent or to fill in a gap. So if Treasury Board has decided to limit in the CBI a specific benefit, *ex gratia* cannot be used to complement it, restrict it, backfill it, etc. It's limited to those rare exceptional circumstances where no other remedy is available.

So it is a pace forward. It is short, in my view, of the Lamer recommendation, but I cannot say it's a move backward. In all honesty, it's a move forward. We've used it twice so far.

● (1710)

The Chair: Thanks. Time has expired.

We do know that the bells are going to ring sometime in the next five to ten minutes. We also have some committee business that we need to deal with. In light of that, I have time for only one question per party. I'd ask each person to keep their question very short.

Mr. Harris, for the NDP.

Mr. Jack Harris: Thank you, Chair.

To Dean Holloway, I'm not going to play lawyer with you, even though we're both lawyers and we both have Q.C.s, etc., but I will ask you to answer one question about the Charter of Rights, because you brought that up in the context of the issue of the right to trial by jury.

That's excluded in one part of section 11 of the Charter of Rights, only one section, where it says "except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury". You don't have the benefit of trial by jury, but the implication—and this is a legal implication—is that all the other rights you have in section 11, or in any other part of the charter, are available to you.

Would you agree with that?

Dr. Ian Holloway: That's subject to section 1.

Mr. Jack Harris: Everything in the charter is subject to section 1.

Dr. Ian Holloway: Yes, but—

Mr. Jack Harris: Hold on now. Section 1 is not for military; section 1 is for everybody. So you would agree that by pointing out specifically the exclusion of trial by jury in a court martial situation —and I won't go into the Latin, because we both know the Latin phrase—and by accepting that, the implication is that the charter actually does apply.

Dr. Ian Holloway: Of course the charter applies to everyone.

Mr. Jack Harris: That's my one question. Thank you.

The Chair: Thank you.

Mr. McKay.

Hon. John McKay: Going back to this whole business of *ex gratia* and your view that it's maybe a step forward, I might suggest to you that it's a step sideways rather than a step forward. If I look at your recommendation, it says:

> The board recommends that the statutory authority of the CDS as Final Authority be amended in such a way so as to ensure that he/she has an appropriate financial delegation. This will enable him/her to make a decision on financial compensation where this form of relief is sought as redress.

The way I read that, and maybe you can correct me if I'm wrong, is that the CDS can take your recommendation and make a decision and write a cheque.

So what is different about this order in council from June of last year?

Mr. Bruno Hamel: There are two sets to this. That was last year's annual report, and at the time that order providing the CDS the *ex gratia* payment was not out yet. That remedy was not available at the time, so that recommendation has to be put in that context.

Also, when the CDS finds that a member meets the conditions of the regulation, he does not write a cheque, but in fact entitles a member to a benefit. It has to be very clear that if the chain of command finds that a member does not meet the condition and it denies a benefit, but the CDS by being the decision-maker and making a finding of fact finds that the griever meets conditions *a*, *b* and *c*, then entitlement to the benefit will open up. In fact, he has entitled the member to the benefit. That's something that needs to be separated out.

In those cases where something goes wrong and the member does not meet the policy and you cannot use *ex gratia* but fundamentally the right thing to do would be to compensate the member, this is what I believe the CDS is currently lacking, which falls short of the Lamer recommendation. So he does have that part of *ex gratia* when nothing else applies, but when something does apply and the member does not meet the conditions but something must be done financially, the Chief of the Defence Staff is still limited to referring the case to the director of complaints and civil litigations for him or her to review and assess the claim. The CDS cannot—

Hon. John McKay: And he regularly denies that. He denies everything.

Mr. Bruno Hamel: It can be that the member does not meet the regulations.

● (1715)

Hon. John McKay: From what I understand, he has a perfect record. He denies everything.

Let's go back on this. What has been accomplished by virtue of this change?

Mr. Bruno Hamel: I'll give you an example. It's one of my cases. I'll give you a brief summary. The member does not fit within a particular policy. He was a reservist who was denied some services. The policy did not apply to him given that his service—I'm going to call it a contract although it's not a contract—had not started. We cannot apply the policy of the 30 days in that particular case. However, the member was denied his opportunity or was told less than 24 hours before he started employment that his employment was going to be delayed. It enabled us to say it's not part of the policy; it's not part of anything.

There is no other remedy possible, because as a reservist, if you do not serve, you do not get paid. We could apply in this particular case the *ex gratia* payment to say that the right thing in this case—no fault was admitted, and no tort was admitted—was to give you potentially up to *x* amount of money to compensate for the short delay you had. This is one example where that particular piece of legislation will actually potentially help a griever.

The Chair: Thank you.

The bells have started to ring. We know it's a 30-minute bell.

I will ask the committee to give us unanimous consent so we can continue on with this meeting.

We'll give one last question to Mr. Alexander, and then we'll go in camera.

Mr. Chris Alexander: Thank you, Chair.

Very briefly I'd just like to say how impressed I am—and I think some of my colleagues are—by the general level of confidence that you all show in the military justice system and the prospects for improving it through Bill C-15 and subsequent improvements. I would like to reassure you that the government maintains its commitment to amend clause 75 relating to criminal records, which would have the effect of excluding approximately 95% of convictions from summary trials if you take a recent sample from trials resulting in a criminal record.

Given that we intend to make that improvement as well and given that the LeSage recommendations are still under review, do you—I guess I'm putting this to Dean Holloway and Mr. Dugas—agree that the changes in Bill C-15 will constitute a substantive improvement to the summary trial system?

Mr. Jean-Marie Dugas: Definitely. It's a very good improvement from what we have now.

And if I may, I will take 10 seconds to say how proud I am to see how well you've done your homework. It's always a pleasure to be here just because of that.

The Chair: Thank you very much.

I want to thank all three of our witnesses for appearing today, for helping us with our study of Bill C-15 , and for providing recommendations and advice. We appreciate that counsel.

I also want to thank all three of you for your military service and your service to our country. Thank you for the personal sacrifices you have to make in serving in the Canadian armed forces.

With that, I want to entertain a motion to suspend the meeting, and when I drop the gavel, I'm going to ask everyone who's not with a member of Parliament to vacate the room.

Is there a motion to suspend?

Mr. Chris Alexander: So moved.

The Chair: The meeting is suspended.

[*Proceedings continue in camera*]