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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)): I call the meeting to order.

Good afternoon, everyone. I welcome you all to meeting number 65 of the Standing Committee on National Defence and our study on Bill C-15, An Act to amend the National Defence Act and to make consequential amendments to other Acts.

For our first hour, we're being joined by Michel Drapeau, a professor at the University of Ottawa, and by Clayton Ruby, a lawyer from Toronto.

Mr. Drapeau was born and raised in Quebec and served 34 years in the military. He served as the director of National Defence Headquarters Secretariat as well as secretary to the Armed Forces Council. He graduated from the civil law program in 2009 and the common law program in 2000, and he has clerked at the Federal Court of Appeal under the supervision of Justice Gilles Létourneau, from whom we will hear in the next hour. He was called to the bar in 2002 and is an adjunct professor at the University of Ottawa. We are very pleased to have him with us today.

Monsieur Drapeau, please proceed with your opening comments.

Colonel (Retired) Michel W. Drapeau (Professor, University of Ottawa, As an Individual): Thank you, Mr. Chair. Thank you, members, for giving me the honour to appear before you.

Over the past decade I have watched our army transform itself into a world-class organization whose performance in Afghanistan has gained the unrestricted admiration and respect of both our allies and Canadians. This is due, in my estimation, to two interconnected factors: a second-to-none field leadership and the unremitting performance by the rank and file who serve above and beyond the call of duty.

At the end of the day, I hold a firm belief that we owe our soldiers an immeasurable debt of gratitude for bringing glory to the Canadian flag, for bringing unflinching solidarity to our allies, and for impeding a global threat to national security.

In deploying to Afghanistan, our soldiers carried with them our rights and values. In the process, they put their lives at risk so as to give the Afghan people a taste of democracy and the rule of law. Sadly, many did not return.

I believe that Bill C-15 should in many ways be in recognition of, and be the incarnation of, their courage, their commitment, and their sacrifices. Out of gratitude as well as justice to these soldiers, Bill C-15 should be first aimed at protecting their rights, not creating more bureaucracy, military lawyers, and military judges. It should be written from the perspective of soldiers and their commanders, not the military legal staff serving in the safe enclave of National Defence Headquarters.

I have five major concerns with Bill C-15.

First is the summary trial system. Although they are by law part of the criminal process, these trials are heard not by a judge, but by a member of the chain of command. There are close to 2,000 such trials each year. Since summary trials had an average conviction rate last year of 97%, this means that one out of every 30 Canadian Forces members ends up each year with a record of conviction by a quasi-criminal tribunal, yet Bill C-15 totally ignores summary trials.

However, so does Canadian jurisprudence. Why? It's because someone accused before a summary trial has no right to appeal either the verdict or the sentence. This is despite the fact that the verdict and sentence are imposed without any regard to the minimum standards of procedural rights in criminal proceedings, such as the right to counsel, the presence of rules of evidence, and the right to appeal.

In Canada, these rights do not exist in summary trials, not even for a decorated veteran, yet a Canadian charged with a summary conviction offence in civilian court, such as Senator Patrick Brazeau, enjoys all of these rights. So does someone appearing in a small claims court or in a traffic court.

I find it very odd that those who put their lives at risk to protect the rights of Canadians are themselves deprived of some of these charter rights when facing a quasi-criminal process with the possibility of loss of liberty through detention in a military barracks.

If Britain, Australia, New Zealand, and Ireland have seen fit in the recent past to overhaul the summary trial process when it was found to be non-compliant with universally recognized human rights, it raises the question of why Canada is not at the very least considering the same sort of overhaul.

My second concern is grievances. If Bill C-15 is enacted in its current form, the Chief of the Defence Staff will become almost totally disengaged from the grievance system. I believe that the CDS, the most senior officer in the Canadian Forces—not the minister, not the ombudsman—has a moral and legal duty to look after his people and become personally interested in and aware of what is causing disgruntlement and why an individual soldier finds it necessary to use a grievance process to receive a modicum of justice. This is what leadership, at least in the armed forces, is all about.

My third concern is military judges. I am surprised at the amount of beneficial attention being paid in Bill C-15 to military judges. Currently the four military judges handle a total of 65 courts martial per year. In 2011-2012, this required each military judge to spend approximately 4.5 days per month in court. In my estimation, this is by far the lowest caseload of any criminal court of record in Canada. Perhaps the time has come to have the Auditor General conduct a performance audit of this military justice system. Canada and the military simply cannot afford such extravagance.

● (1535)

Be that as it may, one would think that government should be reducing the number of military judges or transferring that function to the Federal Court of Canada. Instead, in Bill C-15, there is a call to appoint a deputy chief military judge and, worse, to form a reserve force military judges panel. The only ones who could possibly benefit from this would not be the military at large, but a very small handful of senior military lawyers who would qualify for such extra appointments in the first place.

My fourth concern is the military police. During the past year I have acted as counsel for Mr. and Mrs. Fynes concerning their allegation against, *inter alia*, the alleged lack of independence of the military police and in particular the National Investigation Service.

In its investigation, the Military Police Complaints Commission conducted 62 days of hearings, during which disturbing evidence was presented on that very subject. The proposed new subsection 18.5(3) in Bill C-15 would, in my estimation, make the current lack of independence worse by granting authority to the Vice Chief of the Defence Staff to issue instructions or guidelines in respect of a particular investigation.

Keep in mind, please, that already the CDS and the VCDS have the power to call in the NIS to conduct an investigation on any issue that is of concern to them. Quite frankly, under the existing command arrangement it is most unlikely that the NIS would ignore such a request. Also, the CDS does not feel inhibited about commenting publicly on an open NIS investigation, but to now give the VCDS the authority to issue instructions or guidelines in respect of a particular military police investigation will remove any pretense that the military police are independent from the chain of command.

Lest we forget, the CDS, the VCDS—and, for that matter, the Judge Advocate General—are each subject to the code of service discipline. None of them should have the power to direct or influence either the initiation, the suspension, or the conduct of a particular police investigation, let alone to issue instructions or guidelines as to the conduct of a specific examination.

Fifth is the civilianization of the military justice system. There are growing worldwide concerns regarding the compatibility of the military justice system with international human rights standards. In Europe, the European Convention on Human Rights has had an impact on national military law, particularly in the United Kingdom, Germany, and France, to name a few. These countries have concluded that the presence of a civilian judge in military tribunals would reinforce the principle of civilian supremacy over military justice and also the impartiality as well as the independence of such tribunals, since they are no longer part of the military hierarchy.

Would this work in Canada? Absolutely. All one has to do is to look at what happened to Sub-Lieutenant Delisle last Friday in a Halifax sentencing courtroom. In the vernacular, the civilian judge got it right. Moreover, the United Kingdom, Australia, and New Zealand have gone one step further: they have now civilianized the positions of the Judge Advocate General and the Director of Military Prosecutions and moved their offices outside the military headquarters to the corresponding civilian department or ministry. We should do no less.

In closing, Mr. Chair, let me say that it is an honour for me to play a part in your examination of this bill. In my respectful submission, both as a former soldier and as someone who reads military law day in and day out, I urge you to balance the proposition being made to you by the proponent of this bill against the rights of ordinary Canadians serving our Queen and country in uniform.

I appreciate your attention and I am now available to take your questions.

● (1540)

The Chair: Thank you, Mr. Drapeau.

Our next witness is Mr. Ruby.

Mr. Ruby is a graduate of both the University of Toronto and the University of California Berkeley campus, and he is a partner in the law firm Ruby and Edwardh in Toronto. He was awarded the doctorate of law degree by the Law Society of Upper Canada in 2006.

Mr. Ruby, you have the floor.

Mr. Clayton Ruby (Lawyer, As an Individual): Thank you, sir.

It is an honour to be here to try to assist your understanding of this legislation. I want to bring two perspectives from my own work to bear on the summary trials issue, which is the one that concerns me in particular.

The first perspective is that of an author and a life-long student of sentencing. The leading textbook in the field is the one that I wrote; it's now in its eighth edition, and God knows how long it will go on. It just seems to be endless. It means I think a lot about what a sentence is. It seems to me that the leading case in the last century on sentencing from the Supreme Court of Canada, R. v. Gardiner, had it right. The judges quoted Sir James Fitzjames Stephen, who was, incidentally, the author of Canada's first Criminal Code. Stephen said:

> The sentence is the gist of the proceeding. It is to the trial what the bullet is the powder.

I think that's true. It reflects the fact that this is a matter of fundamental importance. In fact, in one sense, it is the whole point of the exercise: what is a sentence and who do we punish with it? When we use the word “sentence”, it means that we are dealing with deserved punishment imposed for a public wrong at a fair and public hearing that respected all constitutional rights.

In our democracy that last phrase, “respected all constitutional rights”, is quite crucial. It's that respect, reflected in our law and practice, that produces the respect people have for the sentences arrived at in the justice system, or in any justice system. It's different from employment sanctions, RCMP discipline hearings, regulatory offences, and dismissal or other work-related penalties. None convey that same meaning. The meaning implies justice under law. It implies the rule of law, as does our Constitution, and therefore it implies all constitutional rights pursuant to the supreme law of Canada. The supreme law is, of course, the Constitution and the Charter of Rights and Freedoms.

Yes, court martial proceedings also produce a criminal record, as do some summary trials. There's no anomaly in having the same offence produce different results, one a criminal record and one not, which is what I'm arguing for, because the court martial process preserves the full meaning of “sentence” as I have discussed it with you: a public hearing, constitutional rights, and respect for the rule of law. They mean the same thing. However, if the same offence is tried in a process that does not have those qualities, then we shouldn't be thinking of it as a sentence at all.

If you don't get counsel, you don't get disclosure and you don't get the right to an unbiased tribunal that doesn't know the witnesses or that isn't a friend with the witnesses. That is a very different procedure than one we think emanates ultimately in a sentence.

The section 75 proposals in the bill that you are looking at, in my submission, are inadequate. Some 30-odd out of perhaps 2,500 trials in summary matters result in any form of imprisonment. It is unacceptable that any of them should, but what is important as well is that this is a very tiny number. Each one, however, is a violation of the right to liberty under section 7 of the charter that I believe cannot be justified.

No member of the armed forces, whatever the offence, should have any criminal record, and that's the consequence: there's a criminal record attached to these summary trials in some cases where the penalty is higher than $500 or $600 or any liberty is involved.

● (1545)

Justice Pat LeSage, now retired, referred to that as “a grossly disproportionate result”, and it is, because a criminal record, by and large, as I'll come to, does not go away.

The second perspective I bring is that of a constitutional litigator and editor of the *Canadian Rights Reporter*, a journal that prints all of the worthwhile constitutional cases that appear in our courts.

It has been said that when you enlist in the military, you waive your constitutional rights. This is nonsense. It is legal nonsense, because the charter has its own provisions for exempting certain laws, and each one must be justified on an individual, focused basis. You can't have a blanket exemption for the military about anything as general as that. The look at the legislation and the particular practice is fact-specific, and it can't be based on general concepts like the need for discipline in the armed forces, because that attracts every aspect of armed forces life.

Let me give you an example of how you apply the charter in a focused way. It may be acceptable to say that you're not going to have any counsel in a summary trial, no right to counsel as guaranteed by the charter in all other cases. You restrict it to minor cases so that you have a hope of justifying it. The government can try to do that. That may be okay. I have doubts about it, because as long as some persons can be subject to imprisonment, to confinement to barracks, I doubt that it's satisfactory.

However, assume that it is. You can't, if you've done that, attach all the consequences of a criminal conviction and criminal record to it, because that follows you forever. Pardons, by and large, no longer exist. We've replaced them with new wording. The RCMP makes no resources available to get them, but that's just bureaucratic hatred of pardons. By and large, you're never relieved of this, yet it could be imposed for a very minor offence, such as refusing to report for duty on time on three occasions. That's not a criminal offence the way we think of it. As long as this is drawn so badly, my submission to you is that you have to remove the criminal record consequence.

This charter justification matter is not a small issue. If one of our major institutions doesn't draft its provisions in a way that makes sure the liberty of someone who is serving his country is not inappropriately taken, then it's not his failure to obey orders or whatever it might have been: it's our failure as legislators who drafted it and signed on to it, and as citizens who allowed it to happen.

Thank you, sir.

● (1550)

The Chair: Thank you very much, Mr. Ruby.

We're going to move on to our first round of questions. It is a seven-minute round.

Mr. Allen, you have the floor.

Mr. Malcolm Allen (Welland, NDP): Thank you very much, Chair, and thank you to our witnesses for being here.

I'm someone we call in the vernacular a “layperson”, since I'm not a lawyer. I was on a jury once, mind you, as a foreperson, but that's as close to the court system as I would care to be: the jury box.

It's interesting to listen to both of you from the perspective of what we've been talking about to a certain degree—summary trials, and our concerns with them. In debate at second reading in the House there was this issue about there being only a small number, and I believe, Mr. Ruby, you articulated a number around 30.

I'd like both of you to comment further on summary trial.

Colonel Drapeau, thank you very much, obviously, for your service. I couldn't agree with you more, by the way, when you talk about the service we ask for and get from our personnel in the forces. As legislators, we ask them to do certain things, and they simply perform. That is a duty that we owe back to them, it seems to me, in getting this legislation right. Since we are always asking them, this is one opportunity for us as legislators to give something back in return, besides our thanks after the performance of their duty, which they always give. There's never a question of whether they do or don't; they always just do it—to steal from Nike, if you will, which I think is so inadequate.

Let me ask you to go back to the summary conviction aspect, because I'm intrigued by how a summary trial could give someone a conviction with a criminal record when it couldn't happen to a civilian, and how we would impose that on someone simply because they wear a uniform and they happen to be in one wing of the armed forces or another. How is it possible for that to happen and that we wouldn't want to find a way to clear that up?

Can you help me understand how we can actually do that? it seems to me we owe them no less than that.

Col Michel W. Drapeau: Thanks for your question.

I need to comment on your opening comments. You said you're a layperson. Please, that's exactly what I'm looking for, to have laypersons interested in it. Why? Your sons and daughters and nephews and nieces are serving in the military—symbolically, but whatever. You have to have an interest in what's happening in the military.

When young men and women sign on the dotted line to volunteer their services and eventually their lives, they don't, as Mr. Ruby said, give away any of their rights. In fact, as a former leader in the armed forces, a commissioned officer, I don't want them to do that. I want them to incarnate what's best in our nation, our youth. I want them to be aware of what their rights and freedoms are so that when I put rifles in their hands and send them on a peacekeeping mission or a mission abroad, they not only know that their rights are respected but they will also act as people who flow from our society and will transpose those rights and freedoms. We don't make them better soldiers by saying, “Park your charter rights at the door, and now do as you're told. I don't care about your rights.”

To me it's very important that they know and understand that the military justice system respects their rights. Why? They're Canadian, first and foremost.

Second, when it comes to the summary trial itself, there's such a simple solution before us that it's not even funny, and Mr. Ruby has alluded to it. All you need to do is decriminalize the summary trial system.

I'm not advocating that the summary trial system be done away with; I'm not. Keep it. If you're deployed on a ship or you're deployed in the field in Afghanistan and you want to have immediate justice and military discipline in play, then maybe, but don't criminalize it. Do not import, as we do now, the Criminal Code into the code of service discipline and then go as far as sending someone to detention, deprivation of liberty, for up to 30 days. You don't have to do that.

It could be a disciplinary process. It leaves no criminal record, and it is decriminalized. This you could do very simply, and that would be the end of the discussion.

If you don't want to do that, then do something like what is done now in the U.K., Australia, and Ireland: create a summary appeal court where there is a right to counsel, there is a transcript, there is rule of evidence, and someone can appeal a decision by the summary trial. This is what the U.K. has done as a result of being told to do so by the European Court of Human Rights, because the system in the U.K., which was identical to ours, was non-compliant with the European Convention on Human Rights.

So we have two examples before us.

● (1555)

Mr. Clayton Ruby: Some people talk as if a Canadian soldier, when he enlists, loses his rights to the kind of procedural fairness that takes some time and that may be difficult or awkward in the field. That's not the right way to think about it. Wherever a Canadian soldier goes on a mission, he carries the charter with him in the same way that someone carries the flag. The charter is flexible. If there's an enemy engagement going on and you can't have a full trial, you can make exceptions, but you can't make a blanket rule that because you're in the military, all or some summary trials are going to result in criminal records that follow you forever. That's not the way the charter operates.

We'll get better soldiers if we give them the respect of having them know they have the same rights as everybody else, as adapted to the particular exercise they're engaged in, and not some blanket notion that they waived their rights when they enlisted. That's disrespectful.

The Chair: You have time for one very brief question.

Mr. Malcolm Allen: I thought guests got extra time, Mr. Chair. No?

Your point, Colonel Drapeau, regarding judges was that somehow they're underutilized—that we have military judges who are seeing such few court hours that perhaps we ought to have the AG or someone else take a look at that situation. Did I capture that correctly?

Col Michel W. Drapeau: You did. I think the time has come to have a wall-to-wall performance audit. It's not only the judges but the military justice system that is separate and apart from the civil penal system. Is it worth our while? Why is there some difference?

The global trend is to civilianize these tribunals. Why do we have judges who wear the uniform and have a military rank? The chief justice of the military is two ranks under that of the Judge Advocate General. Why? Why does he have a rank to begin with? Do we need four separate judges to handle 65 trials a year? As I said, it's the lowest caseload in Canada. Why don't we civilianize them and put them in a military division as part of the Federal Court? The Federal Court judges are quite able to do that.

I'll give you one example, which happened last Friday in a provincial court in Nova Scotia. They could do it. It's the same law, the same jurisprudence, the same sentencing principles, and you have an available law, a court that is mobile and can travel about and so on.

The Chair: Thank you. Your time has expired.

Madam Gallant, you have the floor.

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): Mr. Drapeau, you stated in a recent article that you're not opposed to summary trials and you said that again today, but you had concerns regarding their constitutionality.

In fact, you had the opportunity to make this submission to Chief Justice LeSage during the second independent review of Bill C-25 and Bill C-60. In rejecting your point of view, he stated:

> ...regarding the constitutionality of the summary trial process, I am satisfied, as was former Chief Justice Dickson, that "the summary trial process is likely to survive a court challenge as to its constitutional validity".

Given that two former chief justices of Canada and the former chief justice of the Ontario Superior Court of Justice have assessed Canada's summary trial process as constitutional and compliant with the Charter of Rights and Freedoms, can you explain why the committee should not follow the opinion of these respected Canadian jurists?

● (1600)

Col Michel W. Drapeau: Yes, Mrs. Gallant, with pleasure.

Very respectfully, I have respect for both jurists, and certainly I value their long careers and their opinion, but that's what it is. I happen to have a dissenting opinion on it.

My opinion is based, among others, primarily on the quite abundant jurisprudence from the European Court of Human Rights. They have said that according to the European Convention on Human Rights, to have a trial of a quasi-criminal or criminal nature whereby you can sentence somebody to a loss of liberty when that individual goes before a tribunal that is not chaired by someone who is legally trained, has no right to counsel, has no transcript, and has no right to appeal is not constitutional. It's the only place in Canada where this exists.

If retired Chief Justice LeSage arrives at a different opinion, I will be as respectful of his opinion as I certainly think he would be of mine.

My opinion is that it is not constitutional. I've written about it extensively. I've testified under oath that it is my honest belief it is not. We are shortchanging our soldiers, and there's a quick solution to it.

In other countries, France has gotten rid of military tribunals in peacetime, and I could mention others. It would cost very little. Providing them with tribunals that meet the bare minimum would enhance respect for the rule of law and enhance the respect the military has for the military justice system, but there is a minimum to make a tribunal constitutional.

I stand and rest my case. I believe despite and in spite of Justice Lamer's or Justice LeSage's opinions, these tribunals are not constitutional.

Mrs. Cheryl Gallant: Through you, Mr. Chairman, summary trials have been the chosen forum for the vast majority of Canadian Forces members who need to appear before a tribunal. Would you not agree that this shows their faith in the system?

Col Michel W. Drapeau: Heck, no. Heck, no. Heck, no. The chain of command that is wearing a rank and controlling their future —their promotion, their posting, their whatever it is—suggests to them, without counsel, that it would be best to go into a summary trial, nod, nudge, and you want me to sign up to this? No way.

The fact that many of them have elected to have a summary trial as opposed to a court martial is perhaps indicative of the fact they've done so not with the presence of independent legal advice or the right to counsel, but in isolation from it. As a result—not always, but potentially—the perception is that it is as a result of pressure from the chain of command, so I don't agree that this is indicative of their choice or of respect for the process.

Mrs. Cheryl Gallant: Mr. Chairman, as summary trials prove fair and effective and prompt justice with respect to minor offences, the objective is to deal with those offences expeditiously and fairly within the unit and return the member to service as soon as possible, so that a unit's discipline is quickly restored and the soldier can carry on with his mission. As it is a less formal tribunal, the possible punishments are limited and are designed to maintain military discipline and efficiency, both in Canada and when they're deployed abroad.

With this in mind, don't you agree that summary trials keep the best interests of the member in mind while maintaining discipline, efficiency, and morale?

Col Michel W. Drapeau: Mrs. Gallant, if you read my text and you see that a conviction rate in summary trial is 97.68%, if you want me to conclude that it is fair when the 97.68% conviction rate was arrived at without presence of counsel, rules of evidence, transcript, or the right to appeal, then we have a different standard as to what fairness is.

If we are to be fair and just with our soldiers, it does not hurt us and will not hurt military justice to provide them with a full panoply of their rights so they can exercise them, and if someone is proven guilty at the end, he will get a just sentence.

You say "minor offences". For somebody to be sentenced to 30 days' detention—and it's not a walk in the park—is not the result of minor offences—at least, the sentencing officers did not have that particular view.

● (1605)

Mrs. Cheryl Gallant: Mr. Drapeau, you also mentioned military judges in your presentation. You've advocated for civilian judges to replace the current structure whereby military judges preside over courts martial.

Now, despite the fact that Chief Justice Dickson did not make such a recommendation, nor was it adopted in Parliament in 1998, and neither Lamer nor Chief Justice LeSage felt that the current system required such changes, why do you disagree with these former chief justices and why are they wrong?

Col Michel W. Drapeau: First of all, I don't think they're wrong. I happen to be dissenting on it. I don't see them being wrong and I certainly don't see myself as being wrong.

There is a good reason, and there are in fact precedents. There is movement. I alluded to it and I'm saying it again. There's worldwide movement across the globe to civilianize military tribunals. The U. K. is a case in point, but it's not the only place. That did not exist when retired Chief Justice Dickson wrote his report then. I cannot speak to whether or not retired Chief Justice LeSage looked into that, but there is a requirement, as I explained, for two overarching but contributing concepts. One is to ensure civilian supremacy and one is to show an independence from the military chain of command, to have a civilian judge in military tribunals.

I'm not advocating to do away with military tribunals; I'm advocating making those judges civilian. There are in fact occasions to do that. It's been done in the U.K., it's been done in Australia, it's been done in New Zealand; do the same.

The situation today is quite different from what it was when Mr. Dickson wrote his opinion a number of years ago, almost two decades ago.

Mr. Clayton Ruby: Can I just add something?

The Chair: Our time has expired. We'll just keep moving on.

Mr. McKay, you have the last of the seven-minute round.

Hon. John McKay (Scarborough—Guildwood, Lib.): Thank you, Chair, and thank you both for your very articulate presentations. I was thinking when I was listening to both of you that there is a golden rule of justice: we should expect for our military the same level of justice that we expect for ourselves.

I've never been to a summary trial, but I'm given to understand that a soldier is literally double-marched in, made to stand for the entire process, and has access only to other members of the chain of command. The soldier has no real counsel, and your 97% or 98% conviction rate would seem to indicate that they really put the summary in summary. It is a system designed to gain convictions rather than to do justice to the individual soldier.

My question is whether the rule should be that it should look as civilian as possible—that is, whether it should be a parallel system. Given that the military is unique and that military culture is unique, what is the justification for no rights of appeal, no rights to counsel, and the casual regard for rules of evidence? You, sir, have been in and around this system for a long time, and I find your argument quite compelling.

Col Michel W. Drapeau: My short answer is that it works. You have before you someone who has been commanding on two occasions, and I presided over summary trials. From a chain of command perspective, a military perspective, it's the best system there is: there are no arguments, no rules of evidence, and you don't have to be trained for it. It's very efficient—in walks the individual, and out walks somebody who's been sentenced. That's it.

But that was then. We're not at war now. This is not the 1900s, it's the 2000s. We've progressed. We didn't have a charter then; we do now. Our soldiers are more educated, more sophisticated, and they demand to be treated equally with civilians, their brothers, in civilian court.

● (1610)

Hon. John McKay: If this legislation goes forward unamended, as it appears to be doing, it strikes me that the government has served up its head for a charter challenge by none other than Clay Ruby, eminent counsel, or some other as soon as a charge goes forward.

Why would you not minimize your chances of a successful charter challenge by addressing these issues, both generally and with respect to section 18?

Mr. Clayton Ruby: I think you're right in general: if you take away the criminal record aspect from where it doesn't belong, your chances of a judge's striking it down are greatly diminished. There's been reference to the military justice system being constitutional; it is constitutional, in my view, in the sense that having a separate and different justice system for the military is constitutional. That's all that anyone is saying.

No one has ever examined these provisions one at a time for constitutional compliance. It's right to say that it's expeditious. It works well for the guys in charge, but it really is beyond any rational thought to call this fair. The judge may not be impartial; he could be friends with the witnesses. No transcript is kept, and there is no right of appeal or to full disclosure of the case against you. You're made to stand like a child in front of the tribunal for its entirety. This is demeaning and unfair. We should not hesitate to acknowledge that and change it.

Col Michel W. Drapeau: The reason it has to be challenged is that one doesn't have the right to appeal. There is no transcript. Even if today somebody had the means, mental and financial, to challenge this, it would be very difficult. We have gone through 2,000 trials a year without a challenge in court. You cannot challenge, since you have no right of appeal.

Hon. John McKay: So even if I were to be convicted and I retained Mr. Ruby, I'd be dead in the water?

Mr. Clayton Ruby: That's not necessarily true, but there's no clear way to challenge it. I think you could apply for declaratory relief if you were the subject of this kind of trial, but you're going to have to pay for it and have the courage to stay in the military afterwards, which is not going to be an easy thing.

Hon. John McKay: No. It's not going to be a happy time retaining Clay Ruby to sue the system.

Mr. Clayton Ruby: The last time I did it was when the armed forces discriminated against gays and lesbians. I was counsel in the case in which the judgment was signed to say that it must stop because it's a constitutional breach.

Hon. John McKay: The irony is that what precipitated this bill and an associated bill, Bill C-16, is that the Supreme Court said, "Your system of the chain of command supervising judges is not constitutional, so we're going to throw out what is otherwise a legitimate case against Leblanc by virtue of the fact that the system is not parallel with a civilian system."

Am I done?

The Chair: You have one minute.

Hon. John McKay: We talked about the military system of judges and prosecutions, etc., and a lot of the conversation has been around the CDS's or VCDS's ability to give direction to the police investigation of any incident.

As a similar question, it seems to me that if the police investigation ultimately leads to charges or whatever, the defence counsel is first and foremost going to ask for the emails setting out the directions of that investigation. I'd be interested in your observations with respect to the accessibility and the potential use by defence counsel of those emails or directions.

Mr. Clayton Ruby: I'd have asked for it, but I don't know the military system enough to deal with it.

Col Michel W. Drapeau: And I don't do defence work, so I cannot really say. We have an internal police, the military police, who wear a military rank. They are subject to orders and subject to the code of service discipline; it's difficult enough for them to be seen and perceived as independent, and now we have the head of the military police, a provost marshal, receiving instructions in an investigation from the Vice Chief of the Defence Staff, who's one step away from the Chief of the Defence Staff. Do you want to pretend that it is independent when they are investigating...who knows? They could be investigating the CDS, who's also subject to the code of service discipline.

To me it makes no sense. I wouldn't even know where to begin to argue that this in fact is compatible with the notion of independence. It's not.

● (1615)

Hon. John McKay: Thank you.

The Chair: We're now moving to a five-minute round. Again, I remind everyone to keep their questions and replies very brief.

Mr. Opitz, you have the floor.

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

Thank you both for appearing here today.

Mr. Ruby, I think you were on the immigration committee not long ago. Great.

Mr. Ruby, clause 75 of Bill C-15 in the amended version that will be proposed will result in approximately 94% of the offences tried by summary trial not resulting in the creation of a record within the meaning of the Criminal Records Act. Would you not agree that it's a positive development within that?

Mr. Clayton Ruby: It's only a positive development if you don't attach a criminal record to any of it, because then it becomes arbitrary. It becomes unreasonable. You ask, “Why is this guy getting a criminal record for failing to show up on time, and that guy not?”

If you're going to make a law that's an improvement, it cannot be arbitrary. The Constitution protects against that.

Mr. Ted Opitz: With respect to that, sir, if you are late, you're not going to carry a criminal record for that—because I just got out not that long ago—but there are eight Criminal Code offences that can be tried by summary trial. One example is assault. Wouldn't you believe that should carry a criminal record?

Mr. Clayton Ruby: No. I think if you want to have a criminal record with the consequences that follow a person forever in life now, with not ever a pardon in the ordinary layperson's sense—which this government has made worse, not better—and you want that consequence, you have to give protections for the procedure. Otherwise, you haven't complied with the Constitution, in my view, and it must be for everyone, not just some at the discretion of some charging officer.

Mr. Ted Opitz: As for that, would you acknowledge that a separate military justice system is provided for in the Charter or Rights and Freedoms?

Mr. Clayton Ruby: Yes. I did concede that. I think that's what those judges were talking about when they said this is all constitutionally compliant. You can have a separate justice system, but each part of it needs to be examined to see if it complies with the charter on a one-by-one incident basis. A blanket exemption doesn't exist. That's not the way our Constitution works.

Mr. Ted Opitz: Were you aware, sir, that no sentence by the way of imprisonment can be given without the accused being given an option to select a court martial? That's in section 108.17 of the Queen's Regulations and Orders, I think.

Mr. Clayton Ruby: Sure, but there have been studies of exit interviews with people who had experience with summary trials. They were referred to before this committee when you were here the last time. What they show is that with regard to those rights—being told of the option, for example, to choose military advice or to seek civilian legal advice—the people who are subject to these trials either have no memory of it or are very bad soldiers because they can't remember these crucial things, or else the system didn't offer it in practice. I would guess it's a mixture of both.

It's inadequate. It's not acceptable.

Mr. Ted Opitz: On what grounds specifically are you arguing that the military justice system is unconstitutional? Is there any case law to support this, sir?

Mr. Clayton Ruby: No, because no one, as we've discussed, ever gets to challenge it. I narrow it, as the Constitution requires, to one aspect at a time. Giving criminal records, in my respectful submission, to some of the people who go through a summary trial proceeding is unconstitutional. I'm not in much doubt about that.

Justice LeSage, who understands the Constitution and accepts the generality of the constitutionality of criminal justice being different for the military, called it consequences that are totally disproportionate to the violation. That, for any lawyer, is language that says “can't pass the constitutional test”, because that is the constitutional test: you have to show that it is justifiable.

Mr. Ted Opitz: But Chief Justice Dickson, seconded by Chief Justice LeSage, did say that the summary trial process is likely to survive a court challenge as to its constitutional validity.

I hear you disagreeing with that, but can you specify what element of their particular analysis you disagree with specifically, sir?

Mr. Clayton Ruby: Sure.

As long as imprisonment is a possibility—and I don't go to other serious concerns as well—you must provide more fairness, so you get rid of that possible punishment or you provide the same standards that you and I are subject to in ordinary Canadian trials.

Again, if you're in the middle of a war theatre, exceptions can be made; you could draft legislation that would do that. Generally speaking, you can't impose, for example, a denial of liberty without more procedural fairness than you have in this stuff, because you will have people wrongfully convicted left, right, and centre. Second, even if I'm wrong in that, you can't saddle somebody who doesn't have that kind of protection with a lifelong criminal record.

● (1620)

The Chair: Thank you.

Your time has expired.

[*Translation*]

Ms. Moore, you have five minutes.

Ms. Christine Moore (Abitibi—Témiscamingue, NDP): Thank you very much, Mr. Chair.

Mental health and social situation are elements we have to be able to take into account in the justice system. We know that members of the armed forces with mental health problems, for various reasons, are more likely to end up in the military justice system.

A recent American study of 90,000 soldiers revealed that those diagnosed with PTSD when returning from missions were 11 times more likely to end up in the military justice system than those who return from missions without any mental health problems.

Let's talk about summary trials. In summary trials, the sentencing officer takes into account social factors, family situation and other factors. When you go see a nurse, a medical assistant or a social worker, these people are bound by medical confidentiality. You can therefore be sure that your medical condition will not be disclosed.

If you are put on summary trial, you may end up in front of your commander, and maybe you don't want to tell him about your mental health problems because it is confidential information. This can lead to difficult decisions, where you may wonder whether, in order to get a fair sentence, you should disclose your medical condition or social situation to someone you would rather not disclose it to. However, if you keep it to yourself, you risk getting a harsher sentence.

Doesn't having to stand trial before someone who will continue to monitor you create a risk of breach of medical confidentiality?

Col Michel W. Drapeau: You have just put your finger on the issue. People suffering from mental or medical problems, or both, are probably not in any physical or mental position to defend themselves. However, that is what they are required to do under the current rules.

Not only do these people not have the right to counsel or to any representation, they also do not necessarily know the rules of procedure. There really aren't any. Even if they wanted to use their medical condition in their arguments before their commander, who would be acting as judge in this situation, they would not be able to present these arguments very effectively.

Does the commander who is acting as judge have to take medical condition into consideration in sentencing? There is nothing set out about this, because there are not really any rules of procedure. It will depend on the circumstances and how the judge is feeling. It will depend on the witness, who is standing at attention while being escorted. Is he or she going to sit down and start disclosing the medical condition?

These are not trials with normal rules. The normal rules you are alluding to do not exist in these situations.

Ms. Christine Moore: Does Bill C-15 contain provisions to the effect that mental health will be taken into account? Were provisions on mental health added?

Col Michel W. Drapeau: I do not know of any.

Ms. Christine Moore: Okay.

Let's go back to what Ms. Gallant mentioned earlier. Is it possible to keep summary trials efficient and effective, to give a ruling expeditiously while resolving the situation and ensuring that members do not end up with criminal records?

Is it possible to keep the process effective and efficient without saddling people with criminal records?

● (1625)

Col Michel W. Drapeau: The answer is yes. Let's look at the example in England. When an appeal tribunal was set up for summary trials, the number of these trials went down considerably. In fact, often, the decisions under appeal were deemed to be invalid.

A good military leader does not simply use disciplinary measures to impose discipline. It can be done through leadership and other means. Do they need this tool to impose discipline immediately, especially when this leads to detention, for example? Is this necessary? I believe a number of other countries have said no.

In France and Belgium, for example, there are no military tribunals in times of peace. Is the French army therefore less disciplined than it used to be? I do not believe so. I believe military leaders use summary trials because it is a very effective tool for the chain of command. There can be absolutely no appeals and no questioning of the decision. They impose their will, whether it is fair or not, and that is that.

However, there are other ways of doing things. We have come to this point where you, as legislators, have to look at this to find a better way, one that is fairer and more respectful of human rights.

[*English*]

The Chair: Mr. Chisu, you have the last set of questions in this round.

Mr. Corneliu Chisu (Pickering—Scarborough East, CPC): Thank you very much, Mr. Chair, and thank you very much, Colonel Drapeau, and you, Mr. Ruby, for appearing at our committee.

I have a question for Colonel Drapeau.

You mentioned or claimed that no training was required to preside at a summary trial. I served in the military and I know that I needed to do that course, actually. Are you aware that training is required now?

Col Michel W. Drapeau: Yes, I am aware, sir. There is now training given to those presiding either in a capacity as an officer presiding at a summary trial or as a delegate officer, but that doesn't make them lawyers and it doesn't make them trained in law.

Mr. Corneliu Chisu: Well, they are not lawyers, but the summary trial is to simplify things for those who don't have lawyers, isn't that right? That is the meaning of a summary trial. Not everybody can be a lawyer, just as not everybody can be an engineer.

I would like to ask kindly, Mr. Ruby, this question. I understand that you have a long and interesting history in the civilian court system, and you are in fact an authority. Thank you very much for your contribution.

Could you please explain to the committee about your interest in Canada's military justice system and outline any past experience you have had with it? Can you please advise the committee of your experience in relation to military law, such as the number of courts martial you have appeared before or how many military members you have ever advised in relation to a court martial or summary trial?

I just want to say that when you are signing on the dotted line.... For example, we have in the army an age limitation. I'll bet I would have stayed in the military, but I was not allowed to stay anymore. It is the Charter of Rights and Freedoms that gives an exception to the military.

If you could, please answer my question.

Mr. Clayton Ruby: If your question is meant to imply that I have very little connection with the military, you are absolutely spot-on. You have intuited that quite correctly.

I acted in the one case that prohibited the armed forces from discriminating on grounds of sexual orientation. I'm proud of that. I defended a captive in front of the Court Martial Appeal Court who was the principal person punished under the Somalia inquiry. Beyond that it's minor, if any.

That said, bear in mind that you have someone here with a great deal of experience, and you're going to hear my colleague and friend Gilles Létourneau, who has vast experience as a judge in military matters as well as otherwise, so you're going to get a lot of help.

You won't get that kind of help from me, but I hope what I have said about what the nature of sentencing is and what the Constitution provides is helpful.

Mr. Corneliu Chisu: Thank you very much.

Mr. Drapeau, you have cited changes to the summary trial system in the U.K., Australia, and New Zealand as much fairer judicial processes. While comparison can be useful and can be extended to other countries—also to NATO members or others—it is important to consider that each nation has a unique legal structure and tradition. For example, the U.K. is bound by the European Court of Human Rights, and Australia is bound by its Constitution.

However, in an independent review, Chief Justice LeSage of the Superior Court of Ontario stated that the Canadian summary trial system is vital to the maintenance of discipline at the unit level and is therefore essential to the life-and-death work the military performs on a daily basis. In dismissing your concern over constitutionality, he stated that the summary trial system was constitutionally sound.

Given that former Chief Justices Dickson and Lamer of the Supreme Court of Canada and former Chief Justice LeSage all supported the current structure of the summary trial system as constitutionally compliant, why make changes to the system based on other countries' specific constitutional requirements? I understand making it here, but—

● (1630)

Col Michel W. Drapeau: It's quite simple. You have two experts in two separate fields telling you it needs to be changed, to be addressed, and to be more sensitive to and compliant with our charter itself.

You've alluded to tradition. Our summary trial is a carbon copy and flows from the U.K. military law, which was transported to Australia and New Zealand. The European court said they needed to change, and the U.K. has changed it. In the process, they've also changed not only the summary trial but the military justice system by civilianizing the Office of the Judge Advocate General and making sure a senior member of the bench now takes that position. Every judge in a military tribunal court martial in the U.K. is now a civilian judge.

I think we can learn a thing or two from our mother country. Their tradition that was passed on to us has changed recently. I am suggesting not to adopt it, but to at least look at it, be sensitive to it, and see why we should not follow suit. Maybe there is a good reason for not following suit, but I don't see it anywhere.

The Chair: Thank you. Time has expired, and our hour with these witnesses is up.

I want to thank both Monsieur Drapeau and Mr. Ruby for joining us and for providing their expertise and input into our study on Bill C-15.

I'm going to ask you to leave the table and for our other witnesses to come forward.

We will suspend.

● (1630)

(Pause)

● (1635)

The Chair: Let's bring this meeting back to order.

We're going to continue with our study on Bill C-15.

Joining us for the second hour is Mr. Glenn Stannard, who is the chair of the Military Police Complaints Commission.

Appearing as an individual is recently retired Justice Gilles Létourneau.

I want to welcome both of you to our study.

Mr. Stannard has a long and distinguished career with the Windsor Police Service, serving for 37 years, nine of those as chief. He was appointed to the commission in 2007 and became the chairperson in 2009.

Mr. Stannard, could you bring us your opening comments first?

Mr. Glenn Stannard (Chair, Military Police Complaints Commission): Good afternoon, Mr. Chair and members of the committee.

I'd like to thank you for inviting us today to testify relative to this study of Bill C-15.

I'm accompanied today by my general counsel and director of operations, Ms. Julianne Dunbar, who has been with the commission virtually since the beginning of the commission.

I'm not going to bore you with issues relative to the mandate. Many of you will know it, or it's written in our brief. I'll simply say that the Military Police Complaints Commission's mandate is to review and investigate complaints concerning military police conduct and complaints of interference in military police investigations.

Today we're here on one issue, and it's the proposed authority of the VCDS to direct military police investigations, in particular the proposed new subsection 18.5(3) in clause 4. The provision would create a new NDA subsection that would expressly authorize the Vice Chief of the Defence staff to direct the Canadian Forces provost marshal, the head of the Canadian Forces Military Police, in the conduct of specific military police investigations.

The commission takes no issue with the general supervisory role of the VCDS vis-à-vis the CFPM as set out in proposed subsection 18.5(1), nor with the authority of the VCDS to issue general instructions to the CFPM in respect to the discharge of his responsibilities as provided in proposed subsection 18.5(2). These provisions merely codify the existing relationship as set out in the 1998 accountability framework between the VCDS and the CFPM.

The proposed subsection 18.5(3) is an important departure from the status quo, and it runs counter to the present-day accountability framework. On March 2, 1998, the accountability framework gave the authority to the VCDS.

To quote a bit of it:

> The VCDS may give orders and general direction to the CFPM to ensure professional and effective delivery of policing services.

It specifically stipulated:

> The VCDS shall not direct the CFPM with respect to specific military police operational issues of an investigative nature.

It goes on to say:

> The VCDS will have no direct involvement in individual ongoing investigations but will receive information from the CFPM to allow necessary management decision making.

Further,

> The CFPM has a duty to advise the VCDS on emerging and pressing issues where management decisions are required.

What is prompting the reversal now?

The accountability framework was reviewed and endorsed by the Military Police Services Review Group in 1998. It was developed the same year that Parliament made amendments to the NDA in Bill C-25, following the troubling incidents during the CF deployment to Somalia in the early 1990s. Also, part IV of the NDA was established, which created a complaints regime for the filing of interference complaints.

You've heard in previous testimony that the independence and integrity of military policing has been further supported through changes to the military police command structure effective April 1, 2011, with all military police members, other than those deployed on military operations, under the command of the CFPM.

The proposed authority for the VCDS in proposed subsection 18.5 (3) is thus out of step with the efforts over the past 15 to 20 years to recognize and support the independence of military police within the Canadian Forces, particularly when conducting law enforcement investigations.

In its 1999 decision in R. v. Campbell, the Supreme Court affirmed that when engaged in the investigation of offences, police officers are answerable only to the law and do not act on behalf of the broader government.

You have as part of our brief an independent opinion commissioned by the military police commission from Professor Kent Roach of the University of Toronto Faculty of Law. He concluded that the proposed new clause “violates core concepts of police independence” and that the proposed authorization of interference in particular military police investigations could well run afoul of the Constitution, specifically the unwritten constitutional principle of the rule of law.

● (1640)

As commission chair and as a past serving member in policing for 38 years, with 14 years as chief and deputy chief of an organization, I well appreciate there are differences between military and civilian policing. However, the authority proposed to be conferred in the new subsection is specifically and exclusively aimed at the heart of military policing duties, i.e., the investigation of offences.

The dual role of MPs in the CF as police officers and as soldiers does not, in the commission's view, diminish the applicability of the legal principle of police independence to the military police when conducting law enforcement investigations. If it were otherwise, one must question why Parliament created the interference complaint mechanism in the 1998 NDA amendments that established the commission.

The 2003 report of the first independent five-year review of the 1998 amendments to the NDA, conducted by former Chief Justice Lamer, is said to provide the basis for many of the proposed amendments to Bill C-15, yet it should be noted that this report contained no recommendations for conferring such power on the VCDS. To the contrary, Justice Lamer's only concern with the 1998 VCDS and CFPM accountability framework was that its non-legislative status provided insufficient protection of the CFPM's policing independence.

As far as the commission is aware, there have been no problems with the accountability framework that justify its revocation at this time, and proposed subsection 18.5(3) runs counter to various efforts over the years to shore up public confidence in the independence of military policing.

If we equate this to civilian policing—and I know there are differences, and maybe during questions some of that may be discussed—the VCDS could be said to be analogous to a police services board. Both are involved in general policy matters, budget, and administrative issues.

There are examples across this country in provincial legislation that prohibit members of the board from interfering with policing investigations. This is not new. I've dealt with this during the last 14 years. Board members, mayors, government officials, and I cannot imagine any of you as government officials wanting to direct the policing investigations in your communities.

There are many precedents. It's provincial, federal with the RCMP, and internationally there is one in New Zealand, but let's just stay in Canada.

The Ontario legislation, as an example, provides all the steps for all the issues that can be dealt with by the board—in this case, the VCDS. The one thing that they can't do is give orders and directions on policing investigations or on day-to-day operations of the police organization.

Knowing that the independence of the police is paramount for them to do their job free of interference, what is the rationale to now include subsection 18.5(3) and apply it to the VCDS? What is the interest in having this provision and then still say that the CFPM is independent?

The commission is recommending at this time that proposed section 18.5, as it is written, be deleted, as it would be a step backwards, in our respectful submission.

Finally—and I'm only going to touch on it briefly because it's in the brief—there's an issue at page 5, as outlined. There is an additional item to correct the French version of the act. As you know, Bill C-15 includes many corrections in the French version of the act to better align it with the English version; however, one correction is overlooked, and I'll refer you to paragraph 250.42(c), which just needs to be.... We see it as a housekeeping item.

Those are my submissions. I look forward to any questions that anyone may have.

● (1645)

The Chair: Thank you, Mr. Stannard.

I'll just remind committee members that the brief the chair of the commission is referring to was distributed to everyone on January 16, so you have that. I think it was distributed electronically, so if you don't have it in your binders, it's probably in your email.

With that, we're going to move on to our next witness, the Honourable Gilles Létourneau, who is a graduate of Laval University and the London School of Economics and Political Science in London, England. He has worked in provincial court in Quebec and served at the Law Reform Commission of Canada as vice-president for five years. He was appointed Queen's Counsel back in 1991.

He is the author or co-author of some 80 texts, reports, or articles connected with law, legislation, the administration of justice, and reform. He was appointed judge of the Federal Court of Canada, Appeal Division, ex officio member of the Trial Division, and judge of the Court Martial Appeal Court of Canada back in 1992. Back in 1995, he was chair of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia. Since 2003, under the Courts Administration Service Act, he has been working as a judge of the Federal Court of Appeal.

Your Honour, you have the floor for 10 minutes.

Mr. Gilles Létourneau (Retired Judge of the Federal Court of Appeal and the Court Martial Appeal Court of Canada, As an Individual): Thank you, Mr. Chair and members of the committee. I am proud and honoured to share my knowledge in Canadian military justice with this committee in the context of Bill C-15.

Let me open, Mr. Chair, by noting that I have already provided the clerk of the committee with five copies of a bilingual book, which I recently authored, on Canadian military justice. It is entitled *Introduction to Military Justice: An Overview of the Military Penal Justice System and Its Evolution in Canada*. I will make reference to the contents of this book as a complement to my remarks today.

I have followed, with much interest, the discussions that have taken place within this committee on Bill C-15. While I acknowledge some of the improvements the bill contains and proposals that have been made for changes to the bill, I have to deplore the lack of a wall-to-wall review of the National Defence Act, which, in my considered opinion, leads to a short-sighted, if not distorted, view of the Canadian penal military justice system.

Hence, my first point is that there is a need for a fundamental wall-to-wall review of the National Defence Act, a review that has to be conducted outside the control of the Department of National Defence so that Parliament can be provided with a legislative proposal that addresses not only the wishes of the military leadership but also, first and foremost, the expectations of our civil society, who demand that our soldiers who serve in uniform be afforded rights equal to those provided in the civilian penal system in Canada and other militaries abroad. This is currently not the case.

In the short period of time I have, I can only give you an overview of some of these problems. In fact, both from a constitutional and a practical perspective, I would like to draw your attention to the shortcomings of this piecemeal approach taken so far by the military to the reform of the military justice system. I shall provide a few examples that will help you understand what I mean by its structural shortcomings and that will highlight the resistance of the Canadian military to real substantive changes that would actually strengthen the military justice system in Canada.

Let me begin with the prolonged struggle to bring about the constitutionality of the courts martial, as an example. In 1990, the Court Martial Appeal Court of Canada—I'll refer to it as the CMAC—found the standing court martial unconstitutional. In 1992, while it recognized the constitutionality of separate military tribunals, the Supreme Court of Canada, in the Généreux case, ruled that the general court martial also was unconstitutional. Since nothing whatsoever was done to amend the National Defence Act to remedy this, it should come as no surprise when six years later, in 1998, in the Lauzon case, a unanimous Court Martial Appeal Court concluded that the standing court martial was unconstitutional.

After the Lauzon case, the case law with respect to the independence of courts in general continued to evolve. Military judges' security of tenure became, along with administrative independence and financial security, a component of judicial independence. However, it seems this jurisprudential evolution never reached the Canadian military, because nothing was done to review the status of the courts martial on the issue of security of tenure, so in 2007, in a unanimous and powerful *obiter dictum* in Dunphy, the Court Martial Appeal Court made a certain number of observations on the issue of renewable terms for military judges. This reconsideration took place in the case of Leblanc, a decision handed down on June 2, 2011. This led to the passage of Bill C-16 last year.

In retrospect, it is interesting to observe that despite the ruling of the Supreme Court of Canada with respect to the independence of provincial judges, in spite of the excellent *obiter dictum* of Justice Hugessen of the CMAC in Dunphy, and despite decisions handed down by courts martial holding renewable terms for military judges to be unconstitutional, the military prosecutor strenuously objected to the making of a declaration of unconstitutionality requested by the appellant in the Leblanc case. Instead, speaking for the crown, he argued that the security of tenure of military judges, if desirable, was not constitutionally required.

● (1650)

Meanwhile, not to be forgotten is that military judges enjoyed unparalleled powers and dealt with crimes of a most serious nature. Consider this: they were, for instance, the only judges in Canada who, operating under renewable terms, could until 1998 sentence an offender to death.

They were also the only judges not having security of tenure who were called upon to try the most serious offences in our criminal law or to preside at general courts martial.

Also, they have tried offences including murder and manslaughter committed outside Canada. Examples include the Deneault case in 1994, for murder committed in Germany; the Brown case in 1995, for manslaughter and torture in Somalia; and recently the Semrau case, for second-degree murder and attempted murder in Afghanistan.

To sum up, as a result of legislative inaction and military resistance to changes required by the charter, it took nearly 20 years of legal challenges in a civilian appellate court to achieve—although not completely, as we shall see—the judicial independence of the courts martial and their incumbents.

Let me give you another example. Contrary to the Criminal Code, the National Defence Act gave the right to choose the mode of trial to the prosecution rather than to the accused. In 2008, in the case of Trépanier, the CMAC found the provision unconstitutional. Again, notwithstanding a Supreme Court of Canada decision to the effect that the choice of the mode of trial is a tactical advantage that belongs to the accused as part of his right to full answer and defence under the charter and the CMAC's serious concern expressed about the constitutionality of the provision in the Nystrom case in 2005, some three years before Trépanier, the military prosecution again showed no willingness to confer to a soldier facing criminal proceedings this advantage granted to him by the charter. It bitterly fought the Trépanier case, and the court had to intervene to ensure that a military accused's rights were equal to those under the civilian penal system.

With this background information, allow me to bring to your attention concerns l have about some of the provisions of Bill C-15 in respect of either their constitutionality or the unwarranted unequal treatment they afford to a member of the armed forces charged with a service offence based on the Criminal Code.

Let me start with the summary trial. I won't repeat here what has been said by the two previous speakers. I endorse their submissions and their fears. I think the system is unconstitutional, and it is still in place only because there's no means of contesting it other than a declaratory relief in the Federal Court, at the expense of the soldier, with two layers of subsequent appeals.

It has been mentioned that the British have changed the system. I won't repeat the fact that there's a right to counsel and so on, but as a general rule, imprisonment or service detention cannot be imposed when the offender is not legally represented in the court of appeal in a summary trial or in a court martial. There can be no imprisonment or detention unless he's represented by counsel.

Mr. Drapeau has alluded to the fact that changes have taken place in Ireland, Australia, New Zealand, France, Belgium, Austria, the Czech Republic, Germany, Lithuania, and the Netherlands, and despite the fact that the requirements of independence, impartiality, fairness, and justice are the same in Canada as they are in England—and if anything, they are more compelling here, because in Canada they are entrenched in the Constitution—our soldiers in uniform are still denied fair treatment at a summary trial. I'll be pleased to answer questions on that.

I can see how under Bill C-15 the provost marshal is appointed by the Chief of the Defence Staff and removed from office by the CDS. However, for example, if you look sections 56 and 58 of the Quebec Police Act, you will see that the director general of the Quebec Police Force is appointed not by the Minister of Public Security, who is responsible for the police, but by the government. The director is removed by the government only pursuant to a recommendation of the Minister of Public Security after an inquiry.

● (1655)

This process provides not only an actual and better guarantee of independence to the incumbent but also increases in the general public and in the individuals subjected to the police powers a perception of real independence, as well as their confidence in the administration of justice.

According to section 6—

The Chair: Can I get you to sum it up? Your time has expired, so if you want, please just make a closing comment.

Mr. Gilles Létourneau: You want a closing comment?

The Chair: Yes, please.

Mr. Gilles Létourneau: Okay.

At present in Canada a soldier is a soldier before being a Canadian citizen. Why? By prosecuting him before a court martial, the military justice system deprives the soldier of his fundamental and precious right to a jury trial. When he appears before a summary trial, he is deprived of a right to counsel as well as a right to have his verdict or sentence reviewed on appeal.

As a proud member of the Canadian society, a society devoted to the promotion of equality of all before the law, I would like to close by reiterating some of the proposals found in the book that I filed with you today. Foremost, I urge this committee to study the international trends towards the civilianization of military tribunals to promote equality of all before the law, which can be achieved only by conducting a fundamental structural and organizational revamping of the National Defence Act in order to enhance its access, consultation, and legibility as well as its structure, internal arrangement, and form; and on a substantive level, to correct the flaws in the National Defence Act resulting from an imperfect duplication of the Criminal Code provisions, by taking into consideration the charter and military needs and by reviewing the provisions that attract constitutional criticism.

We as a society have forgotten, with harsh consequences for the members of the armed forces, that a soldier is before all a Canadian citizen, a Canadian citizen in uniform. So is a police officer; he is a Canadian citizen in uniform, but he's not deprived of his right to a jury trial. Is that what we mean by "equality of all before the law"? Is not the soldier who risks his life for us entitled to at least the same rights and equality before the law as his fellow citizens when he is facing criminal prosecutions? I make a distinction between "disciplinary proceedings" and "criminal prosecutions".

Thank you, Mr. Chairman.

● (1700)

The Chair: Thank you.

In the interest of time, knowing that we only have about 20 or 25 minutes left, I'm going to go to five-minute rounds.

Leading us off will be Mr. Allen.

Mr. Malcolm Allen: Thank you, Chair.

Thank you to both the witnesses.

Mr. Létourneau, my friends across the way have referenced both Justices LeSage and Lamer around the issue of constitutionality from their perspective. There are two parts to my question here. I don't disagree that they said it—I think I actually read that—but were they actually sitting in a position of authority and deeming it? They're eminent jurists, there's no question of that, but were they actually ruling at trial stage, or is this simply their opinion?

The other question is this: has the Supreme Court actually given us an opinion as to constitutionality vis-à-vis what we might call a "summary trial"?

Mr. Gilles Létourneau: You must bear in mind that Chief Justice Dickson's and Chief Justice Lamer's opinions go back quite a number of years. Since then, the law has evolved tremendously in the Supreme Court of Canada itself, where they have strengthened the independence of the courts and the need for fairness in prosecutions. We cannot be ruled indefinitely by past assessments of the law as it stood in those days; we have to look at the law as it stands now. As I said—and I know I'm repeating myself—the charter has evolved tremendously in terms of expansion, scope, and protection afforded to the accused.

I was a very close friend of Chief Justice Lamer, but I'm not sure he would hold the same view today if he were to look at the law as it has evolved as a result of his contribution and subsequent contributions after he was gone.

Mr. Malcolm Allen: I appreciate that.

Mr. Stannard, on the issue of an independent police, I think we take that as an absolute necessity, at least on the civilian side. I've never served in the forces, but on the civilian side, when one gets charged and there's a certain body of evidence coming forward that's been generated by a police department—and I'm drawing now on your decades of experience, sir, working for the police department on the civilian side as well as all the way to the chief of police, and now your sense of oversight in the MPCC—is it your view that the independence of that police force has to be sacrosanct and not only has to be viewed from the perspective of seeming to be independent but must also actually be independent if those who are being tried are to perceive themselves to be judged in a "fair justice" sense of the word?

Mr. Glenn Stannard: Certainly there's an old adage that justice must not only appear to be done but must actually be done, and in terms of policing, the whole aspect of maintaining the independence of policing investigations is paramount. We're not talking here about the management of the police service or the numbers of police officers or how they're deployed or a variety of other aspects, but the day-to-day operation and the investigations.

Whether police investigations are conducted by street officers—or in this case, NIS officers—or police detectives, that information is gathered, and if charges are laid and the charges go forward, the information is then in the control of the crown attorney or the assistant crown or whoever is handling that case. They are responsible at that point for carrying it forward, so it's paramount that police have to remain independent.

Does that mean you don't have conversations with your superior, in this case the VCDS, or in my previous life maybe the mayor or even the board member or another board member? You keep them informed as to what's happening so they are aware of the public aspects of things, but you're not receiving directions from them as to how you're going to do your investigation. That's absolutely out of the question; they are not to get involved in it. Not only that: they are not to get down into the organization. That is the responsibility of the chief of police.

In this case, the CFPM is ultimately responsible for the investigations conducted by their members, both domestically and internationally, which is a whole other story. The issue of investigations is his or her responsibility.

● (1705)

The Chair: Thank you.

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 today.

My questions will be for Justice Létourneau.

I know that you have been intimately involved with the military justice system for many years now and that you have made many public comments with regard to the potential for reform.

There is a preamble to my questions, which are two.

The bill currently before this committee proposes several changes to improve this review and reform cycle; specifically, Bill C-15 proposes to fulfill the Lamer report recommendation to entrench independent review provisions in the National Defence Act.

Bill C-15 also proposes to move beyond the limitations of Bill C-25 review mechanisms by permitting a greater focus and in-depth review; by allowing a given review to focus on specific thematic issues, such as military justice grievances, the Canadian Forces provost marshal, and the Military Police Complaints Commission; and by changing the review period to seven years between reviews as opposed to the current five years. This will increase the likelihood that any review would be conducted only after a sufficient period of time has elapsed to provide an adequate track record upon which to base subsequent assessments of the operation of provisions.

My questions are these: first, do you think that this iterative approach is a prudent way to approach military justice reform? Second, do you think it is a good idea to implement the recommendations of the Lamer report on strengthening and entrenching the independent review of the military justice system in the National Defence Act?

Mr. Gilles Létourneau: Thank you.

I'm willing to acknowledge that there are substantial reforms proposed in this bill, which I accept. To show you how it's sometimes hard to understand why they stop at that, for example, if you take the civilian court, the judge who gets an offender in front of him can decide to suspend a sentence for two years and allow a monitoring of his behaviour. If at the end of the two years he's been of good behaviour, he can grant an absolute discharge or conditional discharge, which means he has no criminal record.

We don't get that here in the military. They can suspend the execution of the sentence, but the sentence is passed. What I'm talking about here is the suspension of the passing of the sentence to monitor.

Unless I've missed something because I was still sitting on the court, I see that there is an absolute discharge mechanism in Bill C-15, but there's nothing about conditional discharge. Conditional discharge ends up with the same result, except that you have the sword of Damocles hanging over the head of the guy: if he's of good behaviour, then everything is wiped out, but if he fails, then he gets a sentence.

Why do we stop at that? I don't know. If you look at the bill as a whole, there are a number of provisions like that.

I'll give you another example. There's a provision dealing with the power to arrest. If you go back to the bill, you'll see that the police have the power to arrest, but a duty not to arrest if it's a less serious offence and you know the identity of the person and there's no likelihood that the offence will carry on, and so on. This is borrowed from the Criminal Code, no doubt about it, except that they have not borrowed the code entirely.

If you go back to sections 495 and 496 in the code, you will see that this duty not to arrest applies to less serious offences and to hybrid offences. What's a hybrid offence? A hybrid offence, like sexual assault, is an offence that can be prosecuted summarily—we have summary trials in civilian courts—or as an indictable offence. If the person is arrested for sexual assault, because it is a hybrid offence there is a duty not to arrest unless the conditions of the code are fulfilled. What we are importing here is a duty on the military police officer that is less stringent than what we have on the civilian police. I'm not sure this is constitutional, and I'll tell you why.

In the Gauthier case in 1998, the Court Martial Appeal Court was facing an abuse of police power to arrest. The unanimous Court Martial Appeal Court ruled that the guarantees found in the Criminal Code were imported by the charter into the National Defence Act and found that the arrest was unlawful because there was a duty not to arrest.

In the Du-Lude case about six or seven years later, the Federal Court of Appeal gave $10,000 to a soldier who had been unlawfully arrested when there was a duty not to arrest, as a result of the Court Martial Appeal Court decision in the Gauthier case, on the basis of a violation of his constitutional rights.

However, here we have a provision that gives less than the Gauthier and the Du-Lude cases have been giving to a solider.

I'm sorry if I took too much time.

● (1710)

The Chair: That's all right. I know sometimes it takes a little longer to explain things. Thank you.

Mr. McKay, you have the floor for five minutes.

Hon. John McKay: Thank you, Chair.

Thank you to you both for your presentations.

I take it as a working proposition that a soldier is a Canadian first, with all the rights and entitlements of a Canadian. We should expect nothing less in terms of their rights before the law.

The government members seem to be hanging their hats a lot on the report of Mr. Justice Lamer. You have made observations that it is something of a dated report, and that quite possibly Mr. Justice Lamer, in looking at specific sections of this act, might offer a different opinion.

I want to direct my first question to Mr. Stannard. You said that the Lamer report contained no specific recommendations. Could you elaborate on that? Is that with respect to proposed subsection 18.5 (3), which seems to be thrust of your comments?

Mr. Glenn Stannard: Justice Lamer recommended that the National Defence Act be amended to define the role of the Canadian Forces provost marshal and set out the legislative framework governing the relationship between the Canadian Forces provost marshal and the military police, including the National Investigation Service. As I said in my opening remarks, his only concern with the 1998 accountability framework was that its non-legislative status provided insufficient protection of the CFPM's policing.

Hon. John McKay: Do I understand your testimony to mean that essentially the government has flipped Justice Lamer's views, in that in 1998 the status was that no one, including the VCDS, would be able to direct an investigation, and yet in proposed section 18.3 an investigation can be directed? Am I understanding—

Mr. Glenn Stannard: That's correct, yes. The 1998 accountability framework was very specific. It's a one-page document, and it lays it out as I stated in my remarks. It is not a complicated document.

Hon. John McKay: So instead of—

Mr. Glenn Stannard: It does not allow that person to give direction.

Hon. John McKay: You're saying that if that document were to be incorporated into this Bill C-15, we wouldn't be worried about section 18.

Mr. Glenn Stannard: If it were to be incorporated as it has worked for the past 15 to 20 years, or since 1998, this section wouldn't even exist; it wouldn't be there. They've made a change.

● (1715)

Hon. John McKay: Then when government members rely, as they seem to do heavily, on Justice Lamer's report, in fact they're relying on a fiction or a misinterpretation of what the justice said.

Mr. Glenn Stannard: Well, you can use the word “fiction”, but what I'll say is that the document, as it's set, if put into the legislation today, would not allow the VCDS to do what is being proposed, as it is being interpreted.

Hon. John McKay: I'll direct my second point to Mr. Justice Létourneau. I hope I can get a copy of your book, as I have a peculiar interest that way.

You cite a series of cases in 1992, 1998, and 2007 in which the military has gone up against the civilian justice system, and in each case the civilian justice system has either directly or by *obiter* suggested changes to the military justice system, but over the last 20 years, except for possibly Leblanc, there has been virtually no change. It's as though the military justice system lives in a parallel universe, free from current charter interpretations.

Am I being unfair in saying that?

Mr. Gilles Létourneau: The only legislative changes in terms, for example, of the constitutionality of the courts came as a result of the judicial decisions. Although, as mentioned earlier, we announced that we had serious doubts about the constitutionality of these provisions, nothing was done. Even when they appeared, they fought; they said it was constitutional, yet if you go back to the decisions, they were unanimous decisions of appeal judges saying that it was unconstitutional.

There was some tinkering here and there on some issues, but the fundamental issues relating to the system have never really been addressed.

There is this independent review, but what do we do here? I was at the Law Reform Commission, so I know how law reform works. We hire someone who has no staff and no knowledge of military law, and he goes to the military and asks, “What do you want me to do?” What do you think happens? What happens is what is happening, as we can see.

If I could just add something, let me say that when I came to the Law Reform Commission, I had exposure to the military justice system, and I wanted to reform the system at the time. However, you will recall that the Progressive Conservative government was in power, and there was an agreement with the provinces to revamp the Criminal Code. All the staff and the budget at the Law Reform Commission were assigned to this reform of the Criminal Code, so we put the issue on the back burner, and then eventually I left and the commission was closed, and so on and on. There has never been a fundamental reform.

I keep on losing time trying to find things in the act. It's all over the place. It's really hard to follow. For example, there is one provision that says that only one sentence “shall” be passed. This creates difficulties when a case comes up on appeal. I was trying to find it; it took me half an hour to find it. I know it exists, but where is it?

It's all mixed up; it's all over the place.

The Chair: Thank you.

Time has expired.

Mr. Strahl, you have the floor.

Mr. Mark Strahl (Chilliwack—Fraser Canyon, CPC): Thank you, Mr. Chair.

My question will be for Mr. Stannard.

Certainly from the questions that have come out here and from your testimony, we would agree that civilian interference in a police investigation would not, obviously, be tolerated, but I think you'd agree with me that military police are a unique police force in that they not only have a policing role but a soldiering role as well. The Vice Chief of the Defence Staff addressed the concerns with the particular clause we've been discussing in a March 2, 2011, committee discussion. He said, and I quote:

> In that regard, the imperatives of conducting an investigation, the expectations of Canadians, and perhaps even the responsibilities of a provost marshal may come into conflict with some of the other priorities the Government of Canada has established for its fighting force. One example would be conducting a forensic investigation in a battle scene. It goes without saying that we wouldn't send a whole bunch of military police into a live fire zone and put them at risk, but there may be a desire to send a bunch of military police into an area that will soon become a live fire zone, and there may be a requirement to balance some of that off. I cannot really foresee very many circumstances in which I would make use of this provision.

Clearly this is meant to be an exceptional power and one which, given the example provided by the VCDS, would seem to be necessary.

Do you not agree that this power can be justified, given the safeguards that are built in and given the transparency that the publication of directions received from the military chain of command to the provost marshal can be released? Why would there be a problem with that, given these safeguards and the transparency?

● (1720)

Mr. Glenn Stannard: I'm not going to disagree with the fact that there are going to be special circumstances, especially in theatre, whether it be sending a military police, an NIS officer, to deal with a KIA the field and do the forensics. There's no question that there will be circumstances. Quite frankly, the VCDS isn't going to have to give direction to the military police or the NIS. They're experts in their field, and they should know when it's safe to go and when it's not.

But the whole issue relative.... You say that this is “exceptional”; that's not how it's written here. It's a very general statement that says, “The Vice Chief of the Defence Staff may issue instructions or guidelines in writing in respect of a particular investigation.” It doesn't say an “exceptional investigation”. It doesn't say anything about “in combat”, and it doesn't say anything about “in theatre”. Who's going to do the interpreting? Is this going to be the interpretation of the VCDS? It might be one interpretation today by one VCDS, a different one tomorrow, and a different interpretation of the instruction coming back from the CFPM.

I don't know if the CFPM is going to appear at this hearing, but as a former chief of police, I would not want a broad statement that my boss could tell me what to do on a “particular” investigation. It doesn't make sense.

Mr. Mark Strahl: The CFPM did appear at the same meeting on March 2, 2011, and he said,

> I think if I were just to take the legislation as written, without the safeguards that are present, I would have a lot more concern, but due to the transparency clauses that exist—the interference complaint process under part IV of the NDA—those types of safeguards certainly make it more robust. It allows me to make sure that there is an avenue of approach, should there be a conflict.

He didn't seem to have the same concerns that you do. Why do you think that is? Why does the person this is supposedly going to affect the most, through the interference that theoretically could be applied to his position, not share the same concern you have?

Mr. Glenn Stannard: When we go across the country and talk to military police officers, it's an interesting discussion we have about interference complaints. One of them is that we don't get very many. Some people are of the opinion that maybe we don't get very many because the chain of command in the military police is not unlike the quasi-judicial system that policing has. It's a little bit stronger, but in policing it is much the same.

With all due respect to the CFPM, I can see the provision is there, but that still isn't going to stop a VCDS from giving instructions on a particular investigation. That is problematic. It is giving up an independence that has been in place for 15 to 20 years, or even beyond that.

Yes, this provision is there, and proposed section 18.5 says he can only issue instructions and guidelines that have been made available to the public. It doesn't mean he can stop the VCDS from giving instructions; it just says that they're going to be made public, not that they're going to be stopped. Then he would have to follow those instructions. He doesn't even have to release them to the public, according to proposed subsection 18.5(5), if he doesn't think it's in the best interests of the administration of justice.

There is a lot danger in the way this is worded. Changes need to be made. Either repeal it or make changes that will give a provision for that exceptional circumstance that can't be misinterpreted as a “particular” investigation. Don't disagree with the exceptional circumstance. There's always a special thing that can be there.

The way it's written, the CFPM does not have the independence you would think that a police organization should have.

● (1725)

The Chair: Thank you.

Unfortunately, our time for this part of our meeting has expired.

I want to thank both of our witnesses for appearing this afternoon and for providing input.

At 5:20 we're supposed to move into committee business. We have to suspend and have the room cleared so that we can discuss our future committee business.

I thank you again for your input.

Anyone not tied to a member of Parliament should vacate the room as quickly as possible so that we can continue with our meeting in camera.

With that, we're suspended.

[*Proceedings continue in camera*]