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Chair

Mr. James Bezan

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● (1535)

[*English*]

The Chair (Mr. James Bezan (Selkirk—Interlake, CPC)): I call the meeting to order.

Good afternoon, everyone. From an entertaining question period, we're glad to have everyone here for meeting number 66, as we continue with our study on the order of reference from December 12 on Bill C-15, An Act to amend the National Defence Act and to make consequential amendments to other Acts.

Joining us for the first hour today is Mr. Peter Tinsley, who is the former chair of the Military Police Complaints Commission, and from the Canadian Criminal Lawyers' Association, we have Eric Granger and Anne Weinstein.

Our first presenter is Mr. Tinsley. We appreciate his coming in on short notice, since there was an inability to get some witnesses here for today. As most of you know, he has a long, distinguished career in the Canadian armed forces, serving not only overseas but also as a military police officer. He was in the Office of the JAG, and more recently served as the chair of the Military Police Complaints Commission.

Mr. Tinsley, perhaps you can bring us your opening comments, and if you can keep them under 10 minutes, we'd appreciate that.

Mr. Peter Tinsley (Former Chair, Military Police Complaints Commission, As an Individual): Mr. Chair, thank you very much. Members of the committee, good afternoon.

Thank you very much for this opportunity to speak to you today, albeit it was a little late. I've scrambled to put notes together, which the clerk has, and which I'm not going to get through in the 10 minutes. The clerk has kindly indicated that he will have them translated and distributed so that you might at some point see all of my thoughts, and I appreciate that.

I'm very appreciative of participating in this process concerning a very important matter regarding the military justice system. As the chair has indicated, I come at this not just based on being the former chair of the Military Police Complaints Commission but having a career-long history in military justice, first as a military police officer, then as a military lawyer, and subsequently, both nationally and internationally, in matters of police management and governance.

I'm going to focus the few minutes I have with respect to one small provision of Bill C-15, namely subclause 18.5(3). I will proceed on the assumption that the contents of that proposed subclause are well known to the members of the committee. It is specifically with respect to the new-found statutory authority for the Vice Chief of the Defence Staff to direct the Canadian Forces provost marshal in respect of specific military police investigations.

Proposed subsection 18.5(3), as I've indicated, is very small, but in my view it is very large in terms of its negative impact on both the independence of the police, both real and perceived, and the oversight mechanisms, specifically the oversight mechanism in the military police commission oriented toward the prohibition of interference with police investigations.

It's my respectful submission that if realized, this small provision could be a retrogressive step and serve as the single most significant contribution to Bill C-15's short title of strengthening the military justice system.

The strengthening of the military justice system, of which the military police are a critical component, has been an evolutionary process since the Somalia commission of inquiry report in 1997 and the subsequent passing of Bill C-25 in 1998. Prior to that, Canada's military justice system, as embodied in the National Defence Act, had remained largely stagnant and largely unchanged for half a century, from the mid-1950s, when the first National Defence Act was passed, until 1998.

In fact, in 1992 there was a collective sigh of relief when the military justice system survived its first significant challenge under the Canadian Charter of Rights and Freedoms when the Supreme Court of Canada found the centrepiece of the system, trial by court martial, to be charter-compliant as a result of regulatory changes that were made, such as tribunal independence.

What could not be foreseen was that just over the horizon events occurring in Somalia in 1992 and 1993 would result in the Canadian Forces, including the military justice system, being subjected to public scrutiny, the likes of which had never been experienced before. Notwithstanding that the conduct of the Canadian Forces members in Somalia was investigated by the military police and charges were laid, including those of murder and torture, and notwithstanding that trials by court martial took place and that appeals were made to the Court Martial Appeal Court as well as to the Supreme Court of Canada without judicial criticism of the process, the court of public opinion was not so satisfied.

I appreciate that the committee has already heard extensively about this evolutionary process, but in that so much reliance seems to be placed on the very worthy opinions of former chief justices of Canada in respect of issues of constitutionality, I want to invite your attention very briefly to their specific and equally worthy advice in respect of matters of police independence and oversight.

First, the Somalia commission examined in detail the institutional response to the events in Somalia, including that of the military police. In so doing, it was particularly critical of the positioning of the military police within the military hierarchy and the influence of commanding officers as well as the chain of command over police operations, which vitiated any notion of independence and gave rise to the potential for the perception of improper influence being exercised. Accordingly, one significant recommendation was that the head of the military police be responsible to the Chief of the Defence Staff for all purposes except for the investigation of major disciplinary or criminal conduct.

● (1540)

Bill C-25 was also significantly informed by the 1997 report of a special advisory group, called the SAG on military justice and military police investigation services, chaired by the late Right Honourable Brian Dickson.

Concerning the military police, the SAG report dealt with many of the same themes as those probed by the Somalia commission, including the competing or conflicting imperatives of command and control for the military police role in support of military operations and those for the purely police investigative function.

In order to meet the requirements of both roles, the Dickson SAG report recommended a bifurcation of the process, with military commanders retaining command and control over military police personnel employed in operational support or intelligence roles, while all others would be under the direct command and control of the head of the military police. In the latter regard, the report stressed at length the importance of the independence of policing to ensure the integrity of the justice system.

An additional significant feature of the SAG report was that in the vein of ensuring confidence and respect for the military justice system, it recommended the establishment of an independent office for complaint review and oversight of the military police consistent with the established norms for the civilian police.

The subsequent Dickson report, the report of the military police services review group, received in 1998, found that the accountability framework signed by the VCDS and the provost marshal in 1998 conformed with the recommendations of the SAG report in respect of the independence of the policing function. A key feature of the accountability framework was that the VCDS would have no direct involvement in ongoing investigations and would not direct the CFPM with respect to operational decisions of an investigative nature.

As you're well aware, the first statutorily mandated review of the NDA was completed by the late Right Honourable Antonio Lamer in 2003. Of particular note, regarding the highly connected matters of military police independence and oversight, were two significant observations made in the report.

One was in respect of the role of the provost marshal, where Justice Lamer observed that it

> ...is largely governed by the *Accountability Framework* that was developed in 1998 to ensure both the independence of the Provost Marshal as well as a professional and effective military police service...

"This legislative omission", he then observed, was in an accountability framework, like a memorandum of understanding, but was not within a statutory framework as existed for those such as military judges, the JAG, the director of military prosecutions, etc.

He went on to say that

> Support has been given to the military police through the creation of the MPCC, a quasi-judicial civilian oversight body and operating independently of the Department...and the Canadian Forces. The MPCC was established to make the handling of complaints involving the military police more transparent and accessible

—and most specifically—

> to discourage interference with military police investigations....

My submission is that Bill C-15 does comply with Lamer's recommendation to fill the legislative void concerning the responsibilities of the CFPM by proposing they be codified in the NDA. However, in so doing, and notwithstanding the consistent recommendations of the Somalia commission, the Dickson report, and Lamer in respect of the necessary independence of the military police from the chain of command in respect of police operational decisions and investigations—as well, it is in stark contrast to the accountability framework—it includes a provision that specifically authorizes the VCDS to

> issue instructions or guidelines in writing in respect of a particular investigation.

Justice systems must continuously evolve to meet the ongoing changing circumstances, standards, and expectations of the societies that they are intended to serve. The military justice system has experienced a long overdue and rapid period of evolution over the last two decades, including recognition that the military police are a Canadian police service—in fact, the seventh-largest in Canada—with a public expectation that they will enforce Canadian law at home and abroad at the highest standards.

Bill C-15 is part of that continuing process. What is under discussion here is whether a significant part of that evolutionary process and the consistent recommendations in terms of the key issues of police independence and the associated matter of effective oversight of military policing will be inexplicably disregarded and the clock, in fact, turned back.

● (1545)

My very brief summary submission is that if Bill C-15 is passed into law in its present form, inclusive of the new subsection 18.5(3) authorizing the VCDS to interfere with police operations and investigations, it will be inconsistent with the principles of police independence as recognized by the Supreme Court of Canada at late as 1999 as underpinning the rule of law, as well as run counter to the norms of police-government relations, certainly in Canada, and I can tell you internationally in developed countries, which recognize the importance of police independence and prohibit police service boards or similar executive bodies from giving directions regarding specific police operations.

It would also effectively contradict, even repudiate, the notion of improper interference by the chain of command as established in the oversight jurisdiction of the Military Police Complaints Commission and thereby effectively eliminate oversight by statutory authorization of such interference by the VCDS, a person not subject to the jurisdiction of the complaints commission.

I'm here to answer your questions as you may have them, but I leave off by asking you one: why?

The Chair: Thank you, Mr. Tinsley.

Our next presenter is Eric Granger, who holds a law degree from McMaster University and the University of Ottawa Law School, where he graduated as the silver medallist in 2004. He practises here in Ottawa with Greenspon, Brown and Associates, where he focuses on criminal defence as well as on defending the civil liberties of his clients in both criminal law and civil litigation contexts.

He's joined by Anne London-Weinstein, who is also a criminal defence lawyer in Ottawa. She is at Weinstein Law and is also a professor at University of Ottawa Law School, teaching evidence, criminal law, and trial advocacy.

Mr. Granger, if you want to bring your opening comments....

Mr. Eric Granger (Lawyer, Criminal Lawyers' Association): Thank you, Mr. Chair, and I would like to thank the committee for the opportunity for us to appear before you today on this important piece of legislation on behalf of the Criminal Lawyers' Association.

The Criminal Lawyers' Association is an association of criminal law professionals. We're here as part of our mandate, which includes running representations on issues relating to criminal and constitutional law and civil liberties more generally.

We want to be up front about the fact that neither Ms. Weinstein nor I am a practitioner in the military justice system. We're not military law experts. Some members of our association do practise in the area; we do not, but we're here on behalf of our association more generally on issues relating to provisions of Bill C-15 in which there are parallels between the civilian criminal justice system and the military justice system. We're offering our insights into the possible charter and civil liberties implications of those particular provisions of the bill.

I'm going to start by offering a few brief comments on a few of the provisions of this legislation that the CLA is supportive of and that in our view are steps that strengthen the procedural fairness of the act and implement charter values within the act. Following that, Ms. Weinstein is going to add some brief comments on one particular area of the legislation where, in our view, the legislation doesn't go far enough. This is essentially the interaction between the summary trial process and the lack of procedural protections that particular process offers, balanced against the consequences that can arise from that process. This effectively can be consequences identical to what you would see in the civilian justice system, in particular the imposition of a criminal record.

I will start briefly with some of the provisions of this legislation that the CLA is very supportive of.

The first are clauses 24 and 62, which are the two clauses particularly dealing with modernizing the sentencing provisions of the act. Certainly we're quite supportive of those, as they add additional procedural protections into the sentencing regime, in particular the introduction of a number of statements of principles of sentencing that are to be followed in the military justice system. This brings it more in line with the principles we have under the Criminal Code for the civilian system, and we'll likely be able to borrow from some of the case law that's developed in common law and civilian justice to help animate those principles as they're introduced within the military justice system.

As well, there is the notion that what we call aggravating facts, which are more serious facts that are particular to a case and can be used against somebody on sentencing, need to proved beyond a reasonable doubt. That requirement is an important procedural safeguard, because obviously the more serious the facts, the more serious the appropriate sentence. We're in favour of that particular introduction into the sentencing regime.

As well there is the introduction of additional sentencing options, including the absolute discharge, which means there won't be a criminal record imposed in some of the offences that are dealt with at the low end of the spectrum. We think that's an important sentencing option so that, as is the case in the civilian system, the punishment can be more precisely tailored to the circumstances of the offence and the realities of the offender.

The introduction of intermittent sentencing as an option is also important. Certainly the unavailability of an intermittent sentence was an issue that had been highlighted by Chief Justice Lamer, particularly with respect to sentencing of those who were in the reserve forces or of civilians under the act when there could be serious concerns that a jail sentence could be imposed. A jail sentence would have to be served consecutively, and it could cause serious prejudice in terms of possible loss of employment for individuals who were being sentenced in that manner.

I note, however, that in what is being proposed there is a limit of 14 days placed on intermittent sentences. Under the Criminal Code in the civilian system, the limit is 90 days; any sentence of 90 days or less is up to the discretion of the judge in the civilian system to impose intermittently. We would certainly encourage a longer period of sentence be eligible for an intermittent sentence.

● (1550)

In particular, under the summary trial regime a sentence of up to 30 days in prison can be imposed, which is supposedly for a less serious matter. It would be beneficial if that sentence was an option for a judge as a sentence to be served intermittently.

Those were the areas I was going to focus on in terms of the areas we support. Certainly there are many others in our brief.

I'll turn it over to Ms. Weinstein to address the particular area of concern.

Ms. Anne London-Weinstein (Lawyer, Criminal Lawyers' Association): Thank you, committee members, for having us here today. It is my first time appearing here, and it is a distinct pleasure.

I have provided notes as well. Unfortunately they were prepared at the last minute. They will be translated and made available to you at a later time.

My concern this afternoon is ensuring that members of our Canadian Forces, who, it is recognized, make great personal sacrifices on behalf of all Canadians, are not afforded lesser constitutional protections than other Canadian citizens.

It's recognized, of course, that the purpose of military law is to ensure discipline is maintained in order to ensure the defence of our country remains strong. We know from the Somalian report that habits of obedience are critical when soldiers are deployed to areas of the world where law has broken down.

However, as General Westmoreland once said in another context:

> A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline.

Former Justice Lamer confirmed for us in his report that while a separate form of justice is necessary in a military context because of its unique purpose in our society, every effort should be made to ensure that constitutional values are protected and members of our Canadian Forces are not deprived of the protection that the rest of us enjoy.

We know, for example, that judicial independence as articulated by paragraph 11(d) of our charter is a constitutional principle that has been upheld by our Supreme Court and that was decided in the case of Regina v. Généreux. It was to this end that Chief Justice Lamer recommended the creation of a permanent military court as a means of reinforcing the ideal of an independent tribunal of military judges, which he said would be consistent with charter values.

It is understood that summary trials are meant to deal with matters that are of the least significance—minor offences and that type of thing—but the primary concern of the Criminal Lawyers' Association in particular is that an individual who is undergoing a summary trial procedure can be subject to the stigma and the long-lasting effect of a criminal record that may follow that individual outside of their life in the service, affecting their mobility, their ability to travel, and their employment, when the procedural safeguards that a person accused in the civil system would normally enjoy are not in place.

Some of those concerns are that a person who is in a summary trial and who could receive a criminal conviction at the end of it does not have the right to counsel; they have an assisting officer, who does not have formal legal training. The trial is presided over by a commanding officer, and the assisting officer is the subordinate of the commanding officer. That, in my respectful submission, could create a possible appearance of the apprehension of potential unfairness towards an accused person in those circumstances.

Despite the need for summary trials as a mode of ensuring discipline, the imposition of a criminal record when the commanding officer acts as the trier of fact—the prosecutor—and has been briefed prior to actually hearing the facts in the trial himself or herself by a sergeant major gives rise to the possibility that the trier may not be perceived as being free of the potential for bias because of the circumstances of his or her position. The commanding officer also has a competing interest in promoting the efficiency of the unit, in addition to making sure the trial is a fair one. In my respectful submission, these are competing ideals that may give rise to the appearance of potential tainting.

While it's perhaps arguable that this practice is saved by section 1 of the charter for offences that do not attract a criminal conviction, it is my respectful submission that where a criminal conviction can flow, this is not constitutionally sustainable.

In just some of the brief research I did prior to attending here today—and as Mr. Granger said, I'm not a military law expert—I did note that in a JAG annual report from 2008 to 2009, there were strong feelings expressed by members of the Canadian Forces in a survey that the outcome of summary trials is predetermined and the chain of command maintains influence over the process.

If that is the case, if that is how Canadian Forces members are feeling, and there is a potential for a criminal conviction and the stigma associated with that at the end of the trial, that is not acceptable constitutionally, in my respectful view.

● (1555)

It is of concern as well that the training course to be a presiding officer at a summary trial is just two days in length. By any measure, this is rudimentary training, but it is of particular concern if that individual can then impose a criminal conviction that may end up being a wrongful conviction in law.

Justice must not only be done, but it also must be seen to be done. It's recognized that the Queen's Regulations and Orders recognize that a summary trial procedure is meant to promote prompt but fair justice in respect of minor service offences.

Our recommendation would be that if these trial procedures are not in place, then criminal convictions should not ensue no stigma should associated with a finding of guilt as long as the normal procedural safeguards are not in place.

In making these comments, I'm echoing the submissions that Justice LeSage made in recommendation 15 of his report.

Subject to any questions you have, those are my submissions. Thank you.

The Chair: Thank you very much. I appreciate those opening comments.

Mr. Harris, you have the first questions. This round is seven minutes.

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

I want to thank you all for coming today. I realize sometimes we have people coming on short notice.

Mr. Tinsley, your opening remarks reminded me of a speech-maker who said, "I have a long speech; I didn't have enough time to write a short one. If I had more time, I would have given a shorter one."

You did a very good job, I must say, in outlining a strong argument against what you call turning back the clock, based on the submissions we've had from Chief Justice Lamer and Chief Justice Dickson and what was put into an agreement, a practice, that was given high regard by Mr. Justice Lamer when he talked about it.

This has been dismissed as just a policy, but it seems to me to be much stronger than that, particularly since Mr. Justice Lamer said it should be put in legislation.

Can you suggest circumstances under which this should be allowed to be interfered with? It's not as if this couldn't happen. When I was in Afghanistan a couple of years ago, while our defence committee was actually there, the commanding officer of all of our forces in Afghanistan was actually removed, sent home, and charged for conduct prejudicial to good order and discipline. Presumably that involved the military police and an investigation, which in theory under this legislation could have been halted, or stopped, or directed some other way. Do you find that possibility disturbing?

● (1600)

Mr. Peter Tinsley: Mr. Harris, I hope my comments make it clear that I find it not only disturbing but somewhat frightening that we would take that step back. The independence of the police, to me, is the same in the civilian context, where the Supreme Court, in the Campbell decision, found it was an underpinning of the rule of law.

We've come a long way in the military police context. At one point the function of the police in the military context was often largely a matter of force of personality.

I'm going to share with you one anecdote. When, as a lieutenant, I was first made the officer in charge of the military police unit at CFB Kingston, within my first couple of days I was taken aside by a senior officer in the administration and informed that the local base custom was that if an officer was stopped, having been drinking and driving, he was to be driven home. He was not to be run for impaired driving. That was for officers, not non-commissioned officers.

I couldn't live with that. Thankfully, I had a base commander who was brand new to this base, and when I went to see him in what could have been a career-stopping move, I asked whether this was his custom. I said it wasn't mine and I couldn't work with it. It was not career-stopping, because he agreed with me.

On the Somalia cases themselves, when the death of a 16-year-old boy occurred in Somalia, there were only two military policemen in that Canadian Forces contingent, the sergeant and a very young corporal. The sergeant was out on R and R. The corporal didn't know what to do. The commanding officer started a summary investigation of a death by torture. The sergeant came back. He was older and more experienced and had a very forceful personality. He put his hand up and said, "Something's wrong here. This is a criminal offence. This is a police matter." He had what's referred to often in the military as "the brass" to communicate directly back to NDHQ, to military police headquarters. Then what sealed the deal was that when one of the perpetrators attempted suicide the following day, there was a kerfuffle in terms of administering medical aid, and there just happened to be a contingent of visiting press on scene. The cat was out of the bag.

Mr. Jack Harris: In fact, then, both of these instances that we're talking about—the one in Afghanistan and the one in Somalia—were combat circumstances, yet the importance of the independence of the police was still relevant despite the fact that we were in combat, in the field, etc.

Mr. Peter Tinsley: Yes. As I said, I don't see a distinction. If there isn't that independence, there is a risk that the police are going to be used for improper purposes.

We can look at Canadian examples, such as the public's criticism of the Ontario government's actions in directing the Ontario Provincial Police in 1995 in dealing with the Ipperwash situation. There were improper purposes and some attributed political motives, etc. Unless there is an insulation of the police to ensure that they are working independently, there is a very real risk that sort of thing will occur.

I'm currently working in countries in transition, as you'll see from my resume—in Brazil, in Uganda, and, I might mention, in the former Yugoslavia. In the war crimes cases that I prosecuted, a surprising number of them involved military police units because, with a misguided logic, the military police units of the Serbian army were often used to run the camps. They were, in fact, concentration camps. It was done, as I say, in a perverted view that this was law enforcement, so we used the police, and the police were directed to do it.

I did see in one of the hearing transcripts a suggestion that the VCDS might need this power in order to stop military policemen, as I understood it, from killing themselves by going to crime scenes to investigate in operational circumstances that did not permit that kind of investigation. Through the years, I've noticed that there are some common personality traits among police officers and military police personnel, but believe me, suicide has never been one of them.

● (1605)

Mr. Jack Harris: Thank you, sir.

I have 30 seconds left.

Mr. Granger and Ms. Weinstein, thank you for your presentation. Have you read the transcript of Monday, or did you hear Mr. Ruby testify to a similar effect on Monday regarding the constitutionality of the summary trials?

I take it from what you said that you agree with his position, which fairly strongly stated, that these are unconstitutional and ought not to attract a criminal sentence. Mr. Justice LeSage said that there should only be criminal records in exceptional circumstances.

Do you agree with those statements?

Ms. Anne London-Weinstein: I did not hear Mr. Ruby's testimony, but I do agree that a criminal conviction that flows in the absence of constitutional protection and procedures is something that should be avoided.

The Chair: Thank you.

Mr. Alexander, you have the floor.

Mr. Chris Alexander (Ajax—Pickering, CPC): Thank you.

Mr. Tinsley, you mentioned that Canadians are entitled to have a military police system that enforces Canadian law. Do our military police by and large enforce Canadian law?

Mr. Peter Tinsley: If they don't, Mr. Alexander, they're not doing their job.

Mr. Chris Alexander: But in your experience, have they had success in enforcing Canadian law?

Mr. Peter Tinsley: Yes. I believe by and large they have. There are certainly some exceptions, but yes.

Mr. Chris Alexander: Thank you.

If, on an operation in Bosnia, Afghanistan, or some other country involved in combat, our military police were undertaking an investigation in an area that operational commanders knew to suddenly be under threat by suicide bombers or roadside bombs, would the operational commander not have the duty to inform the military police of that fact?

Mr. Peter Tinsley: I think he would have a duty.

Let's look at it at a practical level. In an operational circumstance like this, the military police would not have the capacity to move out unaided by operational troops. If the operational commander says it's too dangerous and they're not providing support, at that point, under the current legislation, the military police members involved could perhaps raise an accusation or an allegation of interference, but presumably not. As I said, and I didn't mean it to be trite or tongue-in-cheek, I have never known military police or a police officer generally to be suicidal.

Mr. Chris Alexander: But they might very well not have knowledge of an operational circumstance that operational commanders did know about.

Mr. Peter Tinsley: Realistically and in a practical sense, in an operational formation like that, there would be a sharing of information.

Mr. Chris Alexander: Might the sharing of information, though, without the legal warrant provided for in 18.5(3), possibly be construed as interference in a police investigation?

Mr. Peter Tinsley: As I said, it could, but it would be resolved then by an independent investigation.

Mr. Chris Alexander: How would it be resolved without legal grounds?

Mr. Peter Tinsley: Was the operational commander in fact accurate in the information, or did he have some improper motive? That's what the present accountability framework is intended to—

Mr. Chris Alexander: Would he not have stronger grounds for saving those lives if the amendment contained in 18.5(3) is implemented?

Mr. Peter Tinsley: We don't seem to be communicating here. I've said to you that I have never witnessed military police officers or police officers who intentionally, for no good reason, put themselves in harm's way.

Mr. Chris Alexander: Mr. Tinsley, have you ever operated as a serving military member in a combat zone?

Mr. Peter Tinsley: If you consider Somalia a combat zone, I was deployed there.

Mr. Chris Alexander: Was it as a serving military officer on a combat mission?

Mr. Peter Tinsley: Did you hear me say Somalia? I was deployed there. I was the lead counsel in the Somalia trials.

Mr. Chris Alexander: Were Canadian Forces engaged in combat at that time?

Mr. Peter Tinsley: Well, it certainly was a danger zone.

Mr. Chris Alexander: Thank you, Mr. Tinsley.

You've noted in your own biography, which I assume is from your own hand because it was on a Liberal Party website, that most notably you were a senior prosecutor and appellate counsel in the high-profile prosecutions of Canadian Forces members stationed in Somalia accused of murder and torture.

Would you consider that to have been the highlight of your career so far?

● (1610)

Mr. Peter Tinsley: I really don't understand the relevance of the question, but I would say to you that in fact, quite frankly, it was one of the low points in terms of the sadness of the events. None of us who lived through that, Mr. Alexander, were proud of it. We did what we had to do.

Mr. Chris Alexander: Do you consider it the most important work you've done so far?

Mr. Peter Tinsley: It was important in the sense that the public demanded an accounting and we provided that accounting.

Mr. Chris Alexander: Moving on to your role in the MPCC, whose mandate will be changed by these amendments, you initiated on February 9, 2007, an investigation and public hearings into serious allegations of the possible abuse of defenceless persons in CF custody. Two years later the finding was that there had been no abuse or mistreatment by Canadian Forces.

Is that correct?

Mr. Peter Tinsley: Which Afghanistan investigation was it, the public interest one?

Mr. Chris Alexander: It was the one in 2007 and 2008.

Mr. Peter Tinsley: Was it by hearing or by investigation?

Mr. Chris Alexander: I'm referring to your final report following a public interest investigation pursuant to section 250.38 of the National Defence Act, a complaint by Dr. Amir Attaran.

Mr. Peter Tinsley: Okay. Yes, indeed, at the end of that investigation....

I did commence that investigation. It was thoroughly conducted. There was no finding of mistreatment of the three Afghan prisoners involved. In fact, I think it could be interpreted that I complimented some of the military personnel involved for the quality of treatment that was received. In fact, there was one remark with respect to the receipt of an MRI within less than an hour, as I recall, and it was suggested that residents of Canada, citizens of Canada, would appreciate that quickness of treatment in their own medical facilities.

Mr. Chris Alexander: But you did review 5500 pages of evidence, witness interviews conducted by the CFNIS for 54 witnesses, and interview 34 people in your capacity as MPCC chair, through your investigators.

Was it worth the resources and time, given the results?

Mr. Peter Tinsley: In terms of public confidence, Mr. Alexander, I don't think a finding of no fault is necessarily the appropriate measure. As a matter of fact, I certainly don't think it's the appropriate measure.

As you would see from my resume, I was the director of the Ontario Special Investigations Unit for almost five years, and there were numerous investigations. In terms of percentages, criminal charges were only laid against police officers in approximately 5% to 7%, as I recall, of the investigations in question, but if you're suggesting to me that the devotion of public resources isn't required in the maintaining of public confidence, I beg to differ.

Mr. Chris Alexander: Mr. Tinsley, over that nearly two-year period, there was a doubt about whether abuses had been committed by military police. Do you not agree with that because you hadn't submitted your findings?

Mr. Peter Tinsley: Could you repeat your question in a less convoluted fashion?

Mr. Chris Alexander: In 2007 and 2008, as you were compiling your findings, the fact of these hearings, their scale, and the level of media attention did create a doubt in the mind of the public about whether military police were treating detainees properly.

Are you aware of the fact that over the period when the people of Canada were awaiting the findings from your report, 62 Canadian soldiers were killed in Afghanistan?

The Chair: I'll just say to Mr. Alexander that your time has expired, so, Mr. Tinsley, could you be brief in your comments?

Mr. Jack Harris: I object to that question. They were during the same period. It is not in order to suggest that this witness carrying out an investigation under law had anything whatsoever to do with 62 Canadians dying.

During that whole entire period there were also all kinds of allegations being made as well, and we were very happy to see that there was something going on, that there was a proper investigation actually taking place, because this committee couldn't do it.

This is just argumentative. It has nothing to do with this business.

The Chair: Order. I think that is debate.

I'll leave it up to you, Mr. Tinsley, how you wish to answer that question put by Mr. Alexander.

Mr. Peter Tinsley: I'm not sure it was a serious question on his part, but I'll try and treat it as a serious question.

Mr. Chris Alexander: Mr. Chair, I have a point of order.

It was a serious question. The lives of 62 Canadians is a serious matter.

The Chair: Mr. Tinsley, if you could respond....

Mr. Peter Tinsley: I think Mr. Alexander is talking about apples and oranges.

The fact is that very publicly an allegation was raised that involved a number of military personnel, including several military police personnel, about the mistreatment of those prisoners. As I said several times during my role as the MPCC chair, that placed a dark cloud over members of the Canadian Forces. My function was to investigate and objectively determine whether there was fault or whether that dark cloud should be totally removed, and in the Attaran complaint, that's what we've done.

● (1615)

The Chair: Mr. McKay, you have the last of the seven minutes.

Hon. John McKay (Scarborough—Guildwood, Lib.): Thank you, Chair, and thank you to all of you. I'll try to refrain from playing junior lawyer here.

Mr. Tinsley, I actually thought your testimony was quite clear. Essentially there was an MOU in March of 1998 which, to bring it right down to the guts of it, prohibited the VCDS or anybody else interfering in a police investigation. That was the understanding in 1998 right until now. Is that correct?

Mr. Peter Tinsley: That's my understanding. It was an initiative from within the CF, having understood the comments, the advice, and the guidance provided by both the Somalia commission and Justice—

Hon. John McKay: So we kind of learned. We learned that the chain of command shouldn't be interfering in a police investigation. Had we done absolutely nothing, if proposed subsection 18.5(3) didn't exist, we wouldn't be having a conversation. That memorandum of understanding would still exist, and we wouldn't have any statutory reference to interference by the chain of command. Am I correct on that?

Mr. Peter Tinsley: Yes. I think we can probably lay some blame at Justice Lamer's feet. He made a recommendation—I believe it was number 56—

Hon. John McKay: To be put in statute—

Mr. Peter Tinsley: In the code, in statute—

Hon. John McKay: But the government didn't get it. They said they'd put it in statute, but then they put the wrong thing in statute.

Mr. Peter Tinsley: I think it's somewhat short-sighted to read the recommendation and take it literally without reading the preceding paragraphs that justify it.

Hon. John McKay: Exactly.

The government lays great store in the idea that they're combat situations and the MPs can't go out and do a proper investigation and therefore we need this ability, but just reading the section, I see there's no reference to a combat situation or anything close to it. It could be happening in Trenton, for goodness' sake.

Mr. Peter Tinsley: I agree. It's part of my point. It's totally unlimited, and even when you transport it into the combat context, as I said to you, I don't think it's necessary. Police officers are not fools, whether it's combat circumstances or it's a situation in Canada where there's a burned-up body in building that's been demolished by fire. I think that in most cases, the police will wait until the fire marshal says it's safe to go into that building.

Hon. John McKay: That's a good point.

May I turn to Mr. Granger and Ms. Weinstein on this concern about summary trials?

You make very valid points and you reinforce previous witnesses who have been supremely articulate on this point.

Certainly I did not understand. I've never actually participated in or observed a military summary trial. From what I understand, the conviction rate is about 98%. They certainly put the “summary” in summary trial. It appears that this whole thing is set up so that you're guilty until proven innocent. You are literally, if not frogmarched, then double-marched into a situation facing either service offences or possibly also criminal offences such as, say, possession of marijuana, for which you could actually get a Criminal Code conviction.

It strikes me as fundamentally unfair to not have access to counsel, to not have any appeal ability, to in effect be humiliated in front of your peers, to have your commanding officer there, to have the prosecutor be both the trier of fact and the prosecutor, and to have virtually no access to pardon procedures and no ability to appeal.

Does this whole process strike you as fundamentally unfair?

Ms. Anne London-Weinstein: There are aspects of the procedure that respect the charter in that the presumption of innocence does prevail until the evidence dispels the presumption of innocence beyond a reasonable doubt. That is the criminal law standard.

The problem, particularly for us, is that the process itself deprives a person of the right to counsel when there is a possibility of a criminal conviction, which can follow a person beyond their career in the military into their regular life afterwards, and we don't want to punish people for being part of the military. We don't want to afford them less constitutional protection than John Smith who lives in Kanata would have under the circumstances.

● (1620)

Hon. John McKay: If you joined the military, you shouldn't have to give up your rights as a Canadian citizen.

Ms. Anne London-Weinstein: No, but we recognize that it has to be a flexible approach, because military justice is different from civilian justice.

Hon. John McKay: There's no hiving off military offences from criminal ones.

Ms. Anne London-Weinstein: There should not be.

It should also be noted that in a trial, an accused person has to stand throughout with their assisting officer, and they're not even able to take notes. There's no record of this proceeding, so if a review is requested by a supervising officer, there is no record of what actually transpired. In terms of constitutional principles, having an inadequate record when there's a possibility of a criminal conviction is problematic.

Hon. John McKay: We were given this book by Justice Létourneau on Monday.

He says in it that:

> Although there is no empirical research to substantiate it, it is not unreasonable to think, on the one hand, that it is easier to obtain a unanimous verdict from only five, as opposed to twelve, people and, on the other hand, that such unanimity ought to be more readily achievable from five people trained in the same mindset and having the same institutional baggage than from twelve people.... In addition, there is the institutional pressure at work, as well as that exerted by the chain of command....

Both of you operate across the street, I assume. If you walked into a situation such as that in your court, would you think that justice was going to be done?

Ms. Anne London-Weinstein: Justice must not only be done, it must appear to be done, and in order to have procedural fairness, you must have an impartial tribunal that also appears impartial, particularly to an accused person.

Hon. John McKay: It strikes me that our men and women in uniform should expect no less. They should not receive treatment in a criminal justice situation that is inferior to treatment anyone at this table would receive.

Ms. Anne London-Weinstein: They deserve no less.

Hon. John McKay: Thank you.

The Chair: Mr. Opitz, you have the floor for five minutes.

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

First of all, I just want to address something: nobody is frogmarched. The characterization is insulting to soldiers and also to those who preside at summary trials and courts martial. Troops are not humiliated. If they're charged for an offence, they're charged for an offence. Nobody's humiliated by going to court, depending on what they've done, and nobody is certainly made to be humiliated at a summary trial. That's a false characterization and one that, on behalf of soldiers, I'm offended by.

I'll address Mr. Granger and Ms. Weinstein. In the summary trial itself, an accused, by the way, does have an option to hire a civilian lawyer. That can be allowed as a possibility in a summary trial. As an assisting officer—and I've been an assisting officer—you familiarize yourself with the charges and all the relevant sections in the QR and Os, and you advise the accused of what his or her options and rights are.

As an assisting officer, if you do find there's some sort of conflict over those presiding, then the fellow presiding—the delegated officer or the CO—could recuse himself in favour of somebody more impartial. There is a lot of common sense built into that system. I just wanted to put that on the record.

We have learned that, of course, as we're talking about summary trials, which are the most commonly used form of service tribunal, that they are a very prompt way of dealing with those minor offences to instill discipline, because it is a society within a military. Conduct that prejudices good order and discipline is something that is foremost in their minds. Because of what soldiers do and are asked to do sometimes, in the most extreme cases, it's required.

Could you please comment on the assessment made by Chief Justice Dickson, and seconded by Chief Justice LeSage, that the summary trial process is likely to survive a court challenge as to its constitutional validity? If you disagree with that, can you specify what particular element of the charter analysis you disagree with?

Ms. Anne London-Weinstein: Thank you for not asking me whether I thought my legal knowledge exceeded those two gentlemen's, because I would say that no, it definitely does not. I know that was a question in a prior hearing within this forum that I was dreading.

I can say that the problem with the summary trials, from my perspective, is the possibility of a criminal conviction and the stigma that is associated with that. I think that when Justice Lamer was directing his comments, and I know that when Justice LeSage was directing his comments, they did indicate that the provision of summary trials would be saved by section 1 as being a necessary part of military life.

The problem occurs when you're faced with the stigmatization of a criminal record and detention, even though it is military detention and we recognize that the purpose of military detention is to promote discipline and is more geared towards rehabilitation than jail is in the civilian context.

The problem would be a section 7 problem, I would say, in that you have the ability to be convicted on a criminal level and face that stigma without having the full procedural protections that would be afforded an accused person at a trial in a civilian context. That is the issue.

● (1625)

Mr. Ted Opitz: Okay.

You're familiar with the Queen's Regulations and Orders.

Ms. Anne London-Weinstein: I would not say that. I know what they are, but I would not in any way say I'm familiar with them, no.

Mr. Ted Opitz: Yes, but you have an understanding of what they are.

I'll quote from section 108.20 of the Queen's Regulations and Orders.

Subsection 108.20(1) says:(1) At the commencement of a summary trial, the accused, accompanied by the assisting officer, shall be brought before the officer presiding at the trial.

In subsection 108.20(3) it says: (3) Prior to receiving any evidence, the presiding officer shall

a. confirm with the assisting officer that he or she has ensured that the accused was made aware of the matters contained in paragraph 108.14(5) (Assistance to the Accused) prior to making an election under article 108.17 (Election to be Tried by Court Martial);

b. ask whether the accused requires more time to prepare the accused's case and grant any reasonable adjournment requested for that purpose; and

c. ask whether the accused wishes to admit any of the particulars of any charge.

As well, at the end of the summary trial, the presiding officer must inform the offender of his or her right to request a review authority to, and I quote:a. set aside a finding of guilty on the grounds that it is unjust; and

b. alter the sentence on the ground that it is unjust or too severe.

Especially if it's detention, it has to be reviewed by the superior officer. That's immediately set aside and detention is reviewed, but the accused can then ask for a review of that sentence that is set aside, and then it is reviewed by the next superior officer. If it's a delegated officer and it's a major, it will go to the CO. If it's a CO hearing, it will go up to the brigade commander.

These would appear to be fairly good provisions for a person undergoing a summary trial. Could you please identify any specific issues you have in relation to these articles I just described?

The Chair: Mr. Opitz, your time has expired.

Ms. Weinstein, if you could be very brief, I'd appreciate it.

Ms. Anne London-Weinstein: You're asking a lawyer to be concise. I'll do my best.

The Chair: Brevity is key.

Ms. Anne London-Weinstein: I would say that the problem is, yes, there is a right of review by a superior officer. The same problems with perception of fairness would exist, given the chain of command. None of the individuals reviewing what might potentially be a wrongful conviction—and it's a criminal conviction that I'm talking about—have formal legal training. That would be my objection.

The Chair: Thank you.

Madame Moore, you have the floor.

[*Translation*]

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

The biggest challenge when it comes to drafting a bill is articulating its intent in a legal text using legal jargon. Since we began studying this bill, I believe a consensus has emerged among the Conservatives, the Liberals and the NDP on the principle that an individual should not have a criminal record if the same offence would not have resulted in a criminal record in civilian court. That principle makes sense. I don't think I'm mistaken in saying that everyone is in agreement on that.

We don't agree, however, on other aspects. Let's discuss clause 75. I do realize that the proposed amendment—I am referring to what was set out in the previous legislation, Bill C-41—would mean that, in most cases, the offender would not acquire a criminal record. But the fact remains that some people could, even in cases where that would not have happened in the civilian system. So there are still a few holes.

How do you think Bill C-15 could be fixed to plug those holes and ensure that no member of the military winds up with a criminal record for an offence that would not have resulted in the same in civilian court? What can we do to rectify that?

● (1630)

[*English*]

Ms. Anne London-Weinstein: I would endorse the recommendations Justice LeSage made in his report.

The complication is not just a criminal record but, as I understand it, the information that is put on CPIC, which can be prejudicial to an individual. I would endorse the recommendations that he made at the time that a person in the Canadian Forces not be subject to a criminal record in instances where they would not be in civilian life, and further, that if a person is going to be subject to the stigma of a criminal record, that they be afforded the full procedural fair trial rights as guaranteed by our charter as would be the case if they were in civilian life, so that they not be placed in a position of inequality and would not be prejudiced by their service to our country.

[*Translation*]

Ms. Christine Moore: The majority of people choose summary trials, and I have a question about reservists. A reservist has another job. If a reservist chooses to go the court martial route because they feel it is more suited to their case, they may have to take time off from their civilian job and tell their boss that have to miss work to attend a court martial.

Will reservists suffer any hardship? Is there a way to fix that problem? Reservists may opt for a summary trial, not because it's the best option but because it will mean fewer problems for them in the civilian world.

[*English*]

Ms. Anne London-Weinstein: Yes. As I said, I'm not an expert in this area, but based on the reading that I did prior to my attendance here, my understanding is that the court martial provides many more procedural protections in terms of the rights of the accused; however, an individual is deployed in order to attend a court martial, and it does result in economic hardship.

[*Translation*]

The Chair: You have one minute left.

Ms. Christine Moore: Thank you.

I may be wrong, so perhaps we could check, but I was under the impression that there was some financial compensation provided to make up for the drawbacks of having to attend a court martial. But a person may be somewhat embarrassed to have to tell their civilian employer that they have to miss work to attend a court martial. That person might choose a summary trial to avoid having to speak to their employer and to opt for a quicker process.

Would you say reservists suffer hardship? Is there a way to rectify that?

[*English*]

Mr. Eric Granger: On that particular issue, sure, there's a short-term prejudice that could arise in terms of issues with employment by going through the court martial process. If I were to look at it from the perspective of a criminal lawyer, if somebody were coming into my office saying, "What should I do here? Which process should I elect?", I would say that in the short term, in terms of the court martial process, you're going to have potential prejudice in terms of having to take time off work that maybe you will or won't be able to get adequately compensated for.

However, I would certainly be urging a client to take more of a long-term view of the situation, in that a criminal record at the end of the process is a much greater consequence than the potential short-term gains you get by going through a process that may not prejudice you with your employer.

I would say if you can take the short-term pain of employment-related issues, then you want to put yourself in a situation where you have the most procedural protections available to you in terms of being able to avoid that criminal record at the end of the day, because it's really going to have implications in all aspects of your life. Whether it's potentially travel, losing employment and then needing to get another job, potential employment opportunities down the road, or getting involved in a regulated profession such as law, there's simply no end of possible implications that can arise from a criminal record or from information being entered on the CPIC system as a result of involvement in the criminal justice system.

Certainly I would be urging that if you can absorb whatever short-term prejudice there may be in putting yourself through a system like the court martial system, essentially the ends justify the means.

● (1635)

The Chair: Thank you.

Time has expired for this segment of our meeting.

Mr. Jack Harris: I have a point of order, Mr. Chairman.

Before our witnesses are excused, I would like to put on the record that I've never seen a person with a 28-year career in the Canadian armed forces treated like Mr. Tinsley was treated today by members. Mr. Alexander—

The Chair: That's not a point of order, Mr. Harris.

Mr. Jack Harris: Normally people are commended and thanked for their service to the country; instead we have him being treated as if it was a bribe.

The Chair: That's not a point of order. I'm going to close off debate on that.

We do ask that when members are questioning witnesses, they do so with respect, but it is their time to ask questions, and witnesses are expected to answer all questions put to them.

I want to thank Mr. Tinsley for your service and for being here today, and for your service also on the Military Police Complaints Commission as well, and for the work that you've done over the many years in writing your reports.

I also thank the representatives from the Criminal Lawyers' Association for joining us and helping us with our study today on Bill C-15.

I'm going to ask our witnesses—they are excused—to leave the table in a timely manner so our next witnesses can come forward from JAG.

With that, we're suspended.

● (1635)

(Pause)

● (1635)

The Chair: I call the meeting back to order.

We're going to continue on with our study on Bill C-15. Joining us from the Department of National Defence, from the Judge Advocate General's Office, we have Colonel Michael Gibson, who is deputy judge advocate general of military justice. We have Lieutenant-Colonel André Dufour, who is director of law ,military personnel, and we have Lieutenant-Colonel Stephen Strickey, who is director of law, military justice—strategic, Office of the Judge Advocate General.

Gentlemen, I welcome you all to the table. I know you've been following our hearings closely, and I understand that Colonel Gibson will be leading off with your opening comments.

Colonel, you have the floor.

● (1640)

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

I would like to thank the honourable members of this committee for this opportunity to appear before you today to speak to Bill C-15.

[*Translation*]

As Deputy Judge Advocate General for military justice, I, together with my team, have a played a significant role in the preparation of this legislation. I am very glad to have the opportunity to appear today to assist the members of the committee in their consideration of the bill, for two reasons.

[*English*]

The first is that we are lawyers and members of the Canadian Forces. The system we assist in constructing and that we endorse is one that applies to ourselves. We live it every day.

My 32 years of service in the Canadian Armed Forces have taken me to over 60 countries around the world. Between us, Lieutenant Colonel Strickey, Lieutenant Colonel Dufour, and I have multiple operational deployments, including to Bosnia, Afghanistan, Congo, and Sudan. We thus understand first-hand how the military justice system must possess certain functional attributes, including portability, in order to fulfill its purpose. We are fully committed to both the effectiveness and the charter compliance of the military justice system.

The Canadian military justice system has two fundamental purposes: to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency, and morale, and to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. It thus serves the ends of both discipline and justice. These purposes are stated in the statutory articulation of purposes, principles, and objectives of sentencing in the military justice system set out at clause 62 of Bill C-15.

Simply put, an effective military justice system, guided by the correct principles, is a prerequisite for the effective functioning of the armed forces of a modem democratic state governed by the rule of law. It is also key to ensuring the compliance of states and their armed forces with the normative requirements of international human rights law and of international humanitarian law.

The second reason is that having listened carefully to the testimony of the witnesses who have appeared before you, there is a concern that there may be some misapprehensions about some of the provisions of this bill. I would like to briefly address two of them now.

The first relates to clause 75, concerning the creation of records within the meaning of the Criminal Records Act arising from conviction for minor service offences.

The origin of clause 75 was our concern that although it is necessary to maintain stringent discipline in the Canadian Forces and that this may require trying persons for what could be seen as relatively minor offences, it was not necessary for the maintenance of discipline to have the collateral effect of creating a record within the meaning of the Criminal Records Act to achieve this purpose.

This could have an adverse impact on service members seeking other employment following their release from the Canadian armed forces and, as you've heard in some detail, other consequences as well. In order to relieve what could be seen as the potential for an unintended and unnecessary harshness, we adapted the scheme that Parliament has already put in place in the Contraventions Act.

The effect of clause 75 would be, employing certain thresholds relating to both the objective and subjective gravity of the enumerated offences, to preclude the creation of a record for conviction of the enumerated offences, under the threshold of the specified punishments, and thus obviate the requirement for Canadian armed forces members to have to later apply for a record suspension.

The minister has undertaken that an amendment will be introduced matching the provisions of the one adopted by this committee during its consideration of Bill C-41.

In order to assess the impact of this proposed version in terms of dealing with convictions at summary trial, we conducted a detailed statistical analysis using statistics from the JAG annual report for 2009-10 as a representative sample. This assessment indicates that if the provisions of the amended version of clause 75 are applied for that year, 94% of the offences tried at summary trial would not have resulted in the creation of a record.

Taken together with the introduction in Bill C-15 of absolute discharges as a sentencing option, we would thus predict that approximately 95% of cases tried at summary trial would not result in the creation of a record under the proposed provisions. The remaining cases would be largely made up of the eight Criminal Code offences triable by summary trial. This version of clause 75 should thus be highly effective in achieving the desired policy intent.

● (1645)

[*Translation*]

The second issue relates to summary trials.

The purpose of summary trials is to provide prompt but fair justice in respect of minor service offences. Summary trials are also intended to contribute to the maintenance of military efficiency and discipline, in Canada and abroad, in times of peace or armed conflict.

[*English*]

Summary trials are vitally important to the operational effectiveness of the Canadian Forces. They are the workhorse of the military justice system, consistently trying about 96% to 97% of cases. They exemplify the attributes of promptness, portability, and flexibility.

It must be pointed out that some of the most eminent constitutional jurists of the charter era in Canada, former Supreme Court of Canada Chief Justices Brian Dickson and Antonio Lamer, and former Chief Justice of the Ontario Superior Court Patrick LeSage, have conducted independent reviews of the military justice system and have supported the importance and constitutionality of the summary trial system.

The portrayal of summary trials that has recently been advanced by some is, at best, a very partial depiction of the full picture that must be taken into account in making a responsible and accurate assessment of the fairness and constitutionality of the summary trial system.

I would be glad to amplify later on other factors that should be taken into account. It does bear repeating at this point, however, that no Canadian court has in fact ruled that summary trials are unfair or unconstitutional.

A major reason that there are not a large number of amendments concerning summary trials proposed in Bill C-15 is that Chief Justice Lamer, having reviewed them, did not identify a significant number of problems and did not recommend any changes.

Legislative reform of the military justice system involves a process of continuous improvement over time, just as is the case with the civilian Criminal Code. Bill C-15 provides important updates as well as a statutorily mandated regular independent review to help ensure that this is accomplished.

Bill C-15 will not be the last word on military justice. To borrow a phrase famous in legal circles, the military justice system is a living tree. Further legislation will be necessary in the future to respond to the recommendations of the LeSage report and to other issues, but this overdue Lamer response bill needs to be passed in order to get on with addressing the next series of improvements.

To coin a metaphor, Mr. Chair, it is necessary to move the Lamer response train out of the station so that we can bring the LeSage response train in, load that one up, and deal with the next set of improvements.

Thank you, Mr. Chairman. l would be pleased to assist the members of the committee by answering your questions.

The Chair: Thank you, Colonel. I appreciate that.

We're going to go with the seven-minute round. Leading us off is Mr. Harris.

Mr. Jack Harris: Thank you, Chair, and thank you, Colonel, for your presentation.

We'll have to leave the disagreement about the effect of the charter challenge to the evidence that we have before us from both yourself and the others.

I will repeat, first of all, what I said the other day, which is the fact that there are strong opinions in favour of the constitutionality of the military justice system by the Judge Advocate General and the lawyers, but that doesn't stop the charter challenges from being successful in specific individual circumstances. We've had that opinion from some of the legal experts who testified the other day.

I'd rather get to some of the technicalities here because what I'm concerned about is that with the proposed amendment.... I can't avoid saying that we did amend this the last time. We did have the assistance of the JAG. We did have an amendment accepted by this committee, and yet when it came before the House, it was gone. We were back to square one. It's only because of persistent argument in the House of Commons that we did get a commitment to put it back.

You say the only thing remaining are the eight Criminal Code offences that are still there, but that doesn't seem to jibe with leaving out a charge under section 83, for example, or section 85—sorry, section 85 is there, but section 83, for example, is basically disobedience of a lawful command.

That is not a criminal law offence. It's probably a serious offence within the military, or it could be. It might be minor or it might be serious, but in any event it's not a criminal law offence. I wonder why that's been left out. Is there a rationale for that?

● (1650)

Col Michael R. Gibson: Yes, there is, Mr. Harris.

I have perhaps a number of comments I could make in response to your question, but to address your immediate question, the way these exemptions are framed in the clause is both on the basis of the objective gravity of the offence, which is determined by the maximum punishment that Parliament prescribes for an offence when it creates the offence, and the subject of gravity, which relates to what's actually given in a particular case.

To answer your immediate question, when one looks at what Parliament has prescribed in terms of the objective gravity of the offence for section 83, it's punishable by life imprisonment; Parliament has said, in creating that offence, that this is among the most serious offences known to law. Therefore, given that objective gravity, Mr. Harris, it would seem not to be appropriate to include it in that list.

Mr. Jack Harris: That doesn't make it a criminal offence.

The fact that the maximum punishment under military law is high doesn't mean that every instance of it is serious. For example, break and entry into a dwelling house has a maximum sentence of life imprisonment under the Criminal Code, but I don't think that anyone has ever been given that sentence. It recognizes that society doesn't take it very lightly, but....

It's not a Criminal Code offence to—

Col Michael R. Gibson: To clarify so that you haven't misunderstood my remark, I didn't say that the only ones that would be remaining would be Criminal Code offences. What I did say is that in terms of conducting a statistical analysis about the likely efficacy of this provision to achieve the policy intent, you have to start with a statistical summary from somewhere, and we used that particular data set. Among that data set, which we consider to be a representative sample, that was the distribution suggesting that 94% would not have resulted in the creation of a record.

Just before I amplify that point, if one were tried for the eight remaining Criminal Code offences in a court downtown and one did not obtain an absolute discharge or a conditional discharge, one would have a criminal record. To us it seems to be important not to differentiate between being convicted of that very same offence in a summary trial from what would happen downtown.

Mr. Jack Harris: I think you're missing the point, though, that in the absence of the constitutional protections, there's a strong opinion that there ought not to be a criminal record.

Col Michael R. Gibson: I'm not missing it at all, sir. I just don't agree with it.

Mr. Jack Harris: That disagreement exists and will continue to exist, I suggest, long after this testimony.

Number one, why did you not include the possibility of a conditional discharge as another alternative? Maybe you think it's unnecessary, and I'd like to hear your comments on that.

Number two, with regard to the provision in clause 75 saying that for someone who has been convicted before the coming into force of this act or who will be in the future, the provision does have retroactive effect and the records currently held by CPIC for these offences are going to be removed?

I noticed that in the Criminal Records Act that when you go through the process, or in the absolute discharge, there's a recognition that there has to be a specific amendment to the Criminal Records Act to remove the record of conviction. Would you consider working with us at clause-by-clause consideration to ensure not only that this is given retroactive effect, but that there are very clear provisions that instruct the RCMP, as is done in clause 62, to ensure that the records that exist are removed?

Mr. Chris Alexander: Chair, I have a point of order.

The Chair: You have a point of order, Mr. Alexander.

Mr. Chris Alexander: Mr. Chair, Colonel Gibson, as an official Government of Canada witness, is not required to comment or speculate on measures that were not provided for in the government bill. If he wishes to, of course he may, but he's not required to.

The Chair: I'll just advise Colonel Gibson—

Mr. Jack Harris: To that point of order, he can comment on the adequacy of the legislation to give effect to its apparent intention of wanting to make it retroactive.

Mr. Chris Alexander: Mr. Chair, Mr. Harris specifically mentioned a provision that has not been included in the bill and asked the witness to comment. He is not required to comment on a provision that is not in the bill.

The Chair: On pages 1068 and 1069 of chapter 20 of O'Brien and Bosc, our rules and procedures, we talk about committees, and when we are talking about public servants appearing:

> ...public servants have been excused from commenting on the policy decisions made by the government. In addition, committees ordinarily accept the reasons that a public servant gives for declining to answer a specific question or series of questions which involve the giving of a legal opinion, which may be perceived as a conflict with the witness' responsibility to the Minister...

Therefore Mr. Alexander is correct. I'll leave it to Colonel Gibson to answer as he sees fit.

● (1655)

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

Mr. Harris, to address your first question, the possibility of a conditional discharge or the creation of some sort of probation scheme is very much a policy option that we have considered, and we have pursued discussions fairly extensively in the FPT forum—the federal, provincial, and territorial prosecution forum—of the possibility of creating that system. It is, however, fraught with a number of very practical concerns, particularly regarding jurisdiction over people who have left the forces or over civilians, and also funding.

A very brief answer to your question is yes, we have considered that. We are pursuing that as an option, but it isn't ripe yet to be put in legislation.

Second, with regard to your question about the effect of clause 75 as it exists in the current version of the bill, yes, I can confirm that it is meant to have retroactive effect in terms of the effect it is intended to accomplish. I would defer, I think, to the comments that have been made that it's not really up to me to speculate as to what additional elements the minister may wish to consider or not in terms of amending the legislation.

The Chair: Thank you. Time has expired.

Mr. Strahl, you have the floor.

Mr. Mark Strahl (Chilliwack—Fraser Canyon, CPC): I'll give my time to Ms. Gallant.

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

There seems to be some debate about the intended effect of the proposed subsection 18.5(3) contained in clause 4 of the bill, which would give the Vice Chief of the Defence Staff authority to provide case-specific direction to the Canadian Forces provost marshal. Can you explain why this provision is in the bill, and what it is intended to accomplish?

Col Michael R. Gibson: I'm glad you asked that question because, as someone who participates in policy analysis and in the drafting of legislation, I'm often surprised by some of the interpretations that people can seem to give to what is intended. Let me give you what our interpretation of the intent of that provision is, where it came from, and what it's meant to accomplish.

As has been briefly alluded to before, one of Chief Justice Lamer's recommendations was to put in the act the duties and responsibilities of the Canadian Forces provost marshal.

It's currently somewhat anomalous that after Bill C-25, part IV of the act actually mentions the provost marshal and specifies what his or her duties are in respect to the military police complaints scheme, but the act as it stands doesn't actually create the position, or mention what its responsibilities are or what its relationship is to the chain of command.

The provisions from proposed section 18.2 on are in response to the Lamer recommendation. In particular, you'll see set out in proposed section 18.4 the duties and responsibilities of the provost marshal position.

Of course, it's necessary to specify what the relationship of the provost marshal is to the chain of command and how he or she should interact with it. That is the intent of proposed section 18.5 and its proposed subsections. Proposed subsection 18.5(2) says that the VCDS may give general instructions or guidelines in respect of responsibilities described in the proposed section 18.4.

Then what seems to be under a little bit of discussion, or I would respectfully suggest misapprehension, are the provisions of proposed subsection 18.5(3), which provide that the vice chief may issue instructions or guidelines in writing in respect of a particular investigation. What's this about?

It's not intended to have a sinister effect. Without the transparency protections in the subsequent sections, I agree that one would definitely have a concern about investigative independence, but the actual intent here is to buttress independence of military police. With all due respect to those who've taken the contrary view, they simply have, as the British would say, the wrong end of the stick in terms of interpreting what this section is about.

It's intended to do three things. It recognizes the fact that in the unique circumstances of the Canadian Forces military police, they may operate in operational environments in which there is active potential for them to be required to conduct investigations in a zone of armed conflict. Everybody recognizes the possibility, and in fact the requirement, potentially arising for instruction or direction from the chain of command to the military police saying that, "No, you can't go and investigate that particular incident because there's going to be a fire mission put in there in 10 minutes. You just can't do it."

What this is intended to do is specify, first of all, that there will be one point of contact, so you won't have various commanders in the field telling the local provost marshal, "You can't do that." You'll have one point of contact—one dog to kick, one could say—who is the vice chief.

The second point is that he or she has to give that instruction in writing. Third, there's the very important transparency provision set out at proposed sections 18.4 and 18.5, which says that the default position is that the instruction must be made public. It gives the discretion ultimately to whether or not to release that, having regard to the impact on a particular investigation, to the provost marshal. So the provost marshal has the hammer if he or she is concerned about this, and it's transparent.

We think that if this is likely to happen in any event, it is far better to prescribe it in statute—to specify there's one person and one person only who can do it, and that it has to be transparent.

If there is a legitimate concern about investigative interference, then, of course, that is one of the provisions in part IV of the NDA, and that is one of the functions of the Military Police Complaints Commission. If the provost marshal or one of his subordinate investigators honestly felt that the instruction from the VCDS, which is transparent, was in fact improper interference, they could make an interference complaint to the Military Police Complaints Commission.

I've heard some people from the MPCC say, "Well, if it's prescribed in statute by default, we would never find improper interference." I don't agree with that assessment. It's entirely possible for a legitimate statutory authority to be abused. In fact, courts and tribunals spend a fair bit of their time actually trying cases in which exactly that has happened.

The point is that if there was a concern about improper interference, an interference complaint could be made to the MPCC, and then they would have to do their job. They would have to apply the facts and the law, exercise their discretion, and make a finding and recommendations in respect of that.

To summarize, we consider that it's important to have one authority and for it to be transparent, and also to recognize that there is in fact a statutorily prescribed ability, in the event there was a legitimate concern about improper interference, for a complaint to be made and an investigation to be conducted in a transparent form.

● (1700)

Mrs. Cheryl Gallant: Thank you.

It's been suggested by some that the summary trial system is outdated and offers inadequate protections for Canadian Forces members. Is the summary trial system fair, and what improvements to the system are currently being discussed?

Col Michael R. Gibson: That's an excellent question, Ms. Gallant. Thank you.

First of all, generally speaking, we do consider that it is fair, or we wouldn't endorse it. We're not in the business of running an unconstitutional justice system. It's not why we're here. We're lawyers for members of the Canadian Forces, and we have placed great weight in the independent assessment of the three very august external reviewers who have looked at the system and concluded that on balance, it is fair and constitutional.

How did they come to that conclusion? That's the part, having listened very carefully to what's going on before the committee, that has been largely absent. Of course they engaged in a section 1 charter analysis. I have to say that, unfortunately, if one is going to conduct a measured, balanced, and sophisticated assessment of this issue, you have to engage in a section 1 analysis. Having done that, they concluded that although there were certainly concerns about limitations on some charter rights, that on balance those limitations are justified by section 1, having regard to the pressing and substantial nature of the concerns that then animate the system.

There are a couple of really important things to note. Nobody is subject to what's called a true penal consequence, following the definition given by the Supreme Court of Canada in the Wigglesworth case of 1988. Nobody's subject to a true penal consequence, detention, reduction of rank, or significant fine unless they have first been offered the election between the summary trial and court martial and they've elected to be tried by summary trial.

The effect of that election is a waiver of certain constitutional rights. The Supreme Court of Canada has said that one can waive constitutional rights, in the Korponay case of 1982. Chief Justice LeSage in his review specifically alluded to that. To be effective, that waiver has to be fully informed and has to have the benefit of advice. In fact, there is a right under the QR and O article 108.18, and also a duty on the director of defence counsel services under article 101.20 to provide legal advice to the accused and his or her assisting officer in respect of that election.

One of the really key elements in ensuring that the election is properly informed is to have a competent and active assisting officer. This was one of the recommendations in the LeSage review for which we were particularly grateful: that he recognized and recommended that we have to up our game in terms of the quality and performance of assisting officers to perform that vital function.

To answer the question about what improvements are contemplated in response to the LeSage recommendation, which in fact we recommended to him, there has to be an improvement in training for assisting officers in order to ensure that they perform that very essential part of their function—that is, ensuring that the rights of the accused are protected before summary trial.

There is much more I could say, but the bottom line is that yes, we do assess that the summary trial system is currently constitutional, but of course we're continuing to look at that. We're grateful to receive recommendations, and there are things that can be done.

● (1705)

The Chair: Thank you. Time has expired.

Mr. McKay is next.

Hon. John McKay: Thank you, Chair, and thank you, Colonel Gibson.

I know you were here for pretty well the entire process. Therefore, there's no necessity to rehash what others have said.

My notes from Colonel Drapeau say that proposed section 18.53 removes any pretense of independence from chain of command. I'm sure you've heard him say that. Mr. Tinsley said that it authorizes VCDS interference, that it's against the charter, and that it's against the Canadian police norms. It's against international law and international norms. I take it that you disagree with those points.

The practice since 1992 has been that there be no interference from the VCDS, CDS, or anybody in the chain of command with police investigations. The justices who reviewed the military justice system said that it should be codified. It's probably a good idea, but the codification that you put in place doesn't say that the VCDS may under no circumstances interfere with an investigation.

If it was working from 1992 to 2011 or 2012, why mess with it?

Col Michael R. Gibson: Thank you, Mr. McKay.

First of all, I believe you were referring to the 1998 accountability framework. Is that the document you were referring to?

Hon. John McKay: It was March 2, 1998, yes.

Col Michael R. Gibson: I'd make a couple of observations. First of all, with regard to what Mr. Drapeau said, it was rhetorically excessive and I think almost entirely without foundation.

Having regard to what Mr. Tinsley said, as I said earlier, I think that unfortunately he has misinterpreted the intent of that provision. It's clear that investigative independence for military police is extraordinarily important. It's important for the credibility of the system and it's important for the functioning of the system. It's important for the sake of justice being done. If you don't have a good police investigation as the foundation, you don't really have much that is solid to work with after that. The thought that somehow it's a retrograde step or intended to be a retrograde step simply doesn't accord with what the policy intent is here.

Hon. John McKay: Isn't the burden on you to justify why you need this ability to act in a way that in all other police circumstances would be considered to be interference in a police investigation? I appreciate that we're in a military environment, but you haven't said in the legislation that it's in combat circumstances that we'll be entitled to do this; you could do it anywhere.

Col Michael R. Gibson: Well, let me respond to that, Mr. McKay, by first of all saying that the notion or the conclusion that's it's interference—or improper interference, which is a bit more accurate, I think—is an assertion. The accountability framework is a policy document; it's an administrative document. It's just an "admin document", in essence.

What Parliament is being asked to consider, and this committee in particular, is what should be required statutorily. The key point here is that this isn't somehow a reversal of previous policy. As I said earlier in response to Ms. Gallant's question, it's recognizing the reality that there will be a requirement in certain exceptional circumstances for intervention, which has to be transparent, in order to recognize the unique circumstances. Let me—

Hon. John McKay: What has happened since 1998, then?

Col Michael R. Gibson: Well, the concern would be, as a lot of people have said, that in operational circumstances there may have been intervention by the chain of command—but we don't know—and it hasn't been regulated. The point is that Parliament will say that if this has to happen, this is how you do it.

There's one really important point I'd like to make in addition, sir. It doesn't specify with exactitude exactly when this power could be invoked, because the point is that one doesn't know. Ultimately you can't legislate integrity or common sense, but as a very brief and apt quotation that I'd like to share with you, Professor Llewelyn Jones Edward, in his publication about the attorney general, said:

> I am convinced that, no matter how entrenched constitutional safeguards may be, in the final analysis it is the strength of character, personal integrity and depth of commitment to the principles of independence and the impartial representation of the public interest, on the part of holders of the office of the Attorney General, which is of supreme importance.

The goal of this is for Parliament to give as much statutory guidance and protection as it can, but the bottom line in reality, sir, is that you have to choose very carefully the people you appoint and that you have to rely on their integrity.

● (1710)

Hon. John McKay: But Colonel Drapeau, Mr. Tinsley, and Mr. Stannard—I've forgotten what his rank is—have all said that "If it ain't broke, don't fix it", and all have worked under the system.

The system since 1998, since the guidelines or MOU or whatever has been in place, has worked. At least, I didn't hear—maybe you did, but I haven't heard—any complaints about interference in police investigations since 1998. If that's true, then why put a statutorily mandated process in place by which the VCDS can insert himself or herself right into an investigation?

Col Michael R. Gibson: Well, Mr. Drapeau hasn't worked in the system. Of course, Mr. Tinsley and Mr. Stannard have, but they have a particular perspective, the perspective of MPCC.

I'd invite you to recall that the Vice Chief of the Defence Staff and the Canadian Forces provost marshal, who actually do work with the system and who are in fact the ones who have to make it work, stated in testimony before this committee, in the previous consideration of Bill C-41, that they had no concerns. The provost marshal said, to paraphrase, "If I really had a concern, I wouldn't be here supporting it." He's the guy who has to make it work, and he stood here and said that he didn't have a concern with it. The Vice Chief of the Defence Staff basically said, "I regard this as a protection for the Canadian Forces provost marshal, as a safeguard for his independence."

We may have different perspectives, but I can assure you that there is no sinister intent involved here. It's meant to be transparent and in fact a protection for independence.

Hon. John McKay: I'm not imputing any sinister intent. I am concerned, however, when senior people who have operated in the system make the effort—and sometimes considerable effort—to come before this committee to say that this is a point of serious contention.

I don't want to be accused of imputing any other motives. This is the kind of interference that no police force in Canada would ever put up with.

Col Michael R. Gibson: I suppose we've gone around the bush a few times, sir, but my bottom-line response would be that it's not improper interference.

Hon. John McKay: Well, I hope you're right.

The Chair: Thank you. Time has expired.

We're going on to a five-minute round.

I'm sorry, Mr. Strahl, that I messed up before in the order, but you have the floor now.

Mr. Mark Strahl: I'll forgive you, Mr. Chair.

To steal a page from Mr. Norlock's book, when people in my riding hear the term "provost marshal", I don't think they probably.... Well, a considerable number of them did go through CFB Chilliwack and would have an idea of what we're talking about, but I understand that he is also known as the commander of the Canadian Forces Military Police Group.

I think we have to assign fairly significant weight to his testimony when he says "...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."

If the commander of the Military Police Group doesn't see an issue here, and also Chief Justice LeSage did not see an issue here, how do we not place greater weight upon their testimony and their expertise than upon that of political appointees?

Col Michael R. Gibson: I suppose, Mr. Strahl, I would respond that obviously Justice LeSage and the provost marshal know whereof they speak, and their views should be accorded great weight.

● (1715)

Mr. Mark Strahl: I have one more question.

You mentioned that there would be improvements in training for the assisting officers. Have there been corresponding improvements in training for commanding officers who are presiding over summary trials?

Col Michael R. Gibson: One of the requirements and regulations now actually requires any officer, before he or she can preside as a presiding officer at a summary trial, to participate in a training course and to be certified by the Judge Advocate General. In other words, they have to pass the course to be able to preside at a summary trial.

One of the documents they use for that is the "Military Justice at the Summary Trial Level" manual, which is available online. I'd certainly invite any members of the committee who are interested to look at it; it's extremely instructive. I think it represents a very credible and professional and thorough attempt to ensure that those who are entrusted with this very significant task are given the training they require and achieve the level of understanding they require when they are conducting this significant duty of presiding at summary trials.

Mr. Mark Strahl: Thank you.

I'd like to share the rest of my time with Mr. Norlock.

The Chair: You have two minutes, Mr. Norlock.

Mr. Rick Norlock (Northumberland—Quinte West, CPC): Thank you very much. I'm going to try to get this out in a minute.

I don't know whether you were at the last meeting, when former Justice Létourneau basically said, if my memory serves me correctly —I made a few notes, but I have to get this out quickly—that the members of the Canadian military should have the same protection under Bill C-15 as they have under the Criminal Code of Canada, because in his opinion Bill C-15 would not pass a charter test.

It has been my observation, having been in court—not as much as most lawyers, but as a police officer and an assistant to the crown—that the Criminal Code is challenged on a daily basis pursuant to the charter. Could you comment on that argument?

On the argument of "if it ain't broke, don't fix it", would you not agree that every law we have is constantly being challenged and that every law we have is constantly being attempted to be improved?

May we have your comments?

Col Michael R. Gibson: Yes, I heard the comments by Justice Létourneau, and with respect, I disagreed with them. It's not the first time I've disagreed with them publicly and in writing, and that is what it is.

However, the point is well taken that of course we don't live in Disneyland; we live in the real world. This is serious stuff. Just like many provisions in the Criminal Code, it will be tested by defence counsel. That's their job. It will be tested by people whose interests are engaged in the system. I was a defence counsel. I went at it hammer and tongs, in terms of challenging the constitutionality of various things, often with little success.

But you've made a good point. The system, as I said, is a living tree, just like the Criminal Code. It is part of the function of defence counsel to challenge the constitutionality of provisions and of course to assess those challenges.

There is a dialogue between the courts and Parliament, ultimately. I'm not going to stand before you and say there will never ever be a successful constitutional challenge to some of these provisions. Life doesn't work that way. What I can say is that having assessed them to the best of our ability, we are confident that they are legitimate, that they are compliant with the charter, and that they are appropriate for Parliament to consider.

The Chair: Thank you. Time has expired.

[*Translation*]

Ms. Moore, you have the floor.

Ms. Christine Moore: Thank you very much.

I want to come back to your presentation.

You said that, under the version of clause 75 contained in Bill C-41, 95% of cases tried at summary trial would not result in a criminal record. That means, then, that out of 2,000 summary trials, 100 people could still end up with a criminal record or, at least, not benefit from the provisions in clause 75.

Unless I'm mistaken, under the version of clause 75 contained in Bill C-41, when someone commits an offence that does not correspond to a criminal offence in the civilian system, there is no guarantee that the individual will not acquire a criminal record. It makes no such guarantees. All it does is ensure that an individual who would not have acquired a criminal record in civilian court for the same offence is much less likely to acquire one in the military system.

Is that correct?

● (1720)

[*English*]

Col Michael R. Gibson: Thank you. I'll respond in English, if you don't mind.

Of course there are no guarantees that somebody won't acquire a record if convicted of an offence that isn't on the exemption list. What the proposal is actually engaging is a policy assessment of where to draw the line.

Under the previous version.... We conducted the statistical analysis under the original version, if I may call it that, of clause 75, and that assessment indicated that on the basis of those provisions, approximately 81% would have been exempted. What we're really talking about, in terms of the difference between the two versions, is an increment from 81% to 94%.

As I explained earlier, the policy basis for that provision is that it looks at both the objective gravity of the offence and the subjective gravity. There are some section 83 offences that are punishable by life imprisonment—the most serious objectively grave offence Parliament can create—that aren't on the list. If you were charged with that offence, convicted, and given a very serious sentence, then yes, you would acquire a record.

[*Translation*]

Ms. Christine Moore: That answers my question.

I would now like to turn to the training given to officers who preside over summary trials.

I know they are required to undergo training before they can preside over a summary trial. But I would like to know how far that training goes and what level of understanding they have around the fact that the sentence imposed could result in a criminal record for the accused.

[*English*]

Col Michael R. Gibson: It is part of the obligation of any presiding officer or any judge to understand the consequences of the sentence they're handing out, so that point is addressed during training.

I should point out two additional things that are very important for the committee to understand.

Presiding officers at summary trial can avail themselves—in fact, if they have any doubt, should avail themselves—of legal advice with regard to any question or concern they have. It's their decision, since they're the decision-maker, but they can receive legal advice about it.

The second thing is actually one of the important elements of clause 62, which deals with the improvements that Bill C-15 intends to make in sentencing. It specifies, in fact, that the person who is going to impose the sentence—whether a presiding officer at summary trial, a military judge at a court martial, or indeed even an appellate judge of the Court Martial Appeal Court or the Supreme Court of Canada—has to consider any indirect consequences of the sentence.

That would include, in fact, a statutory obligation under Bill C-15 that the person understand that if they were to give a particular sentence that fell outside the exemptions provided in clause 75, presuming that passes, there would be the consequence that the person would acquire a record within the meaning of the Criminal Records Act.

[*Translation*]

Ms. Christine Moore: Could you send us the training documentation given to those who preside over summary trials? That would give us more detailed information on the various training objectives they are required to meet.

You probably don't have those documents with you, but I would greatly appreciate it if you could provide them to the committee.

[*English*]

Col Michael R. Gibson: I'd say two things. It's actually available online if one goes to the Office of the JAG website. It's entirely transparent. It's there online.

Also, I have a copy. Unfortunately, this is an English copy, but of course we have French too, and I'd be glad to provide the committee with this document if that would be of assistance to you.

The Chair: Thank you, Colonel.

The time has expired. I appreciate that offer. If it is available online, we'll circulate the link so that everybody can see it online, rather than knock down another tree and produce more paper for committee.

With that, we're going to go on.

Mr. Alexander, you have the floor.

Mr. Chris Alexander: Thank you, Chair.

Thank you, Colonel Gibson, and thanks to your team, for your testimony today and for your support for the committee's work throughout.

In looking back at today's earlier testimony and testimony we've had from those who see problems with the amendments to Bill C-15, it becomes clear that many of them just don't want a separate military justice system. They either question its constitutionality or would like to see the system civilianized.

It strikes me, as one observer, that they haven't fully accepted the principle on which our military justice system is based, which is that there are two objectives that need to be balanced and protected, one of which is pursuit of justice, and the other operational effectiveness in the field: discipline, morale, cohesion. That second objective doesn't exist for arbitrary reasons; it exists because our armed forces do things in the field that actually are at the foundation of our civil liberties and have been for decades and indeed centuries. This balancing act is something that we have built up over a long time, and it is fundamental.

To be fair, Mr. Ruby and the Criminal Lawyers' Association did admit that they had limited experience in the military justice system, so perhaps we simply need to take their testimony with a grain of salt.

However, I drew a contrast with the approach that Mr. Tinsley was taking, because he had claimed that when he launched his investigation back in 2007, with which we're all very familiar, it was to ensure continued public confidence in the military and the military police. In my view, those hearings and that very lengthy investigation did not serve to increase public confidence. It didn't find wrongdoing, it created doubt, and it didn't help discipline, whereas all the evidence we've had, I think from credible witnesses, shows that our military justice system by and large is functioning well, although in need of modernization and in need of continuous review.

Could you tell us how those reviews will work after the amendments take place? Because this is ultimately one of the greatest safeguards of the integrity of the system, of giving us an assurance that it will keep pace with the times and developments on the civilian side, what is proposed? How will this benefit military law and members of the Canadian armed forces with regard to reviews?

● (1725)

Col Michael R. Gibson: Thank you, Mr. Alexander.

The relevant provision of the bill—if I can very quickly turn to it—is clause 101, which will put into the National Defence Act the statutory requirement for an independent review. Now, as you're aware, two statutorily mandated independent reviews have occurred to date: the first by Antonio Lamer, the second by Patrick LeSage.

Bill C-25, passed by Parliament in 1998, contained in section 96 a statutory requirement to conduct periodic independent reviews, but that obligation doesn't actually exist in the National Defence Act at present; it's in Bill C-25, which was passed by Parliament as Statutes of Canada, 1998, chapter 35.

One of the primary recommendations of Justice Lamer that will be accomplished by clause 101 is to put into the National Defence Act a statutory obligation to conduct a periodic independent review of certain specified provisions of the act. The benefit of that will be, first of all, to have an independent review, because it's extremely useful and extremely important to have a forum for identifying issues and to have a mandated vehicle that you know is going to occur to identify needed improvements. Having such a mechanism for legislative reforms is one of the great engines of policy improvement.

In that sense, of course, having that ability available to the Canadian Forces, to the military justice system, and ultimately to Parliament would provide a great benefit, both to Parliament—by ensuring it is able to fulfill its function of ensuring that the law is kept up to date—and to the members of the Canadian Forces, because they are the ones who benefit most directly from having a military justice system that is current and compliant with charter norms and with the evolution of the law.

One last effect of the proposed provision is that it would extend the period of the review cycle. One of the problems that has occurred to date, especially given the protracted time it's taken to actually have Parliament pass this Lamer-response bill, is that you need to have provisions in place so that you can generate a track record of practice if you're going to have a meaningful review. As Justice LeSage noted, you need to have a sufficient length of time to generate that track record of practice to have a useful and meaningful review.

Clause 101 of the bill is intended to accomplish those things, in terms of actually putting that obligation into the act and specifying with precision what needs to be reviewed.

I have just one last point on that point. Perhaps given the slightly contentious nature of proposed subsection 18.5(3), those particular provisions are specified in that review provision so that Parliament would actually have the benefit of an independent review of the operation of that provision when it comes time for the next cycle of legislative reform.

The Chair: Thank you.

Time has expired and bells will start going off in a matter of seconds here. It is 5:30. I know that the clock is running a bit slow, but based on the actual time, it is 5:30 now, so there's no use starting another round of questions.

I want to remind members before we adjourn that I've asked members to be considerate by submitting their amendments to the bill this week. We've had only two come in so far. To be respectful to our colleagues as well as to our table staff, our clerk, our legislative clerk who will be assisting us, and our analysts, it would be very helpful if we could have the amendments submitted by week's end so that we can start putting together the packages and circulating them so people have a chance to look at them before we move to clause-by-clause study.

I want to thank Colonel Gibson, Lieutenant-Colonel Dufour, and Lieutenant-Colonel Strickey for joining us today and for providing their input and expertise.

With that, I'll entertain a motion to adjourn.

Mr. Corneliu Chisu (Pickering—Scarborough East, Liberal): So moved.

The Chair: We're out of here.

The meeting is adjourned.