HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on National Defence

NDDN • NUMBER 069 • 1st SESSION • 41st PARLIAMENT

EVIDENCE

Monday, March 4, 2013

Chair

Mr. James Bezan

Standing Committee on National Defence

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● (1530)

[*English*]

The Chair (Mr. James Bezan (Selkirk—Interlake, CPC)): Good afternoon, everyone. We're going to continue on with our study on Bill C-15. This is meeting number 69.

When we last met we finished with carrying clause 67. We are starting at clause 68.

(On clause 68)

The Chair: Are there any questions or comments on clause 68? It starts on page 43 and continues right through to the top of page 46.

Mr. Harris.

Mr. Jack Harris (St. John's East, NDP): I have a general question. Perhaps Colonel Gibson can elaborate a little bit.

This is a rather long and elaborate provision that mostly deals with the sentence of imprisonment for life.

Colonel, how often has such a sentence been contemplated or carried out in the military, using the system of military justice as opposed to the ordinary courts? Treason is obviously a pretty serious offence, and there were circumstances up until 1998 where the sentence of death was in the National Defence Act, even though it was removed from the Criminal Code.

Why is it necessary to have such an elaborate provision here for the sentence of life imprisonment and the possibilities of parole? Wouldn't a serious crime, as we recently saw with Sub-Lieutenant Delisle, be tried in the civil courts as opposed to being reserved for court martial?

Colonel Michael R. Gibson (Deputy Judge Advocate General of Military Justice, Office of the Judge Advocate General, Department of National Defence): The answer to that question is no. The military justice system requires the full panoply of sentencing options to deal with the cases that come before it.

The answer to the question of how frequently would one see a sentence of life imprisonment would be “very rarely”.

Lastly, I would add that clause 68 doesn't really introduce anything new. It just shifts it from one portion of the act, where it already is, to another, for the purpose of greater clarity and better flow in the structure of the act.

Mr. Jack Harris: Thank you.

The Chair: Are there any other questions or comments?

(Clause 68 agreed to)

(Clauses 69 and 70 agreed to)

(On clause 71)

The Chair: Shall clause 71 carry?

Hon. John McKay (Scarborough—Guildwood, Lib.): I had my hand up.

The Chair: Mr. McKay.

Hon. John McKay: This clause is directed to the director of defence counsel services. Is there a director of Crown counsel services? Is there a parallel section? Does it bring this in line?

Col Michael R. Gibson: The answer is yes. There already is an existing provision in the act respecting the director of military prosecutions.

This clause is actually in furtherance of the Lamer recommendation to introduce symmetry between the security of tenure provisions for the director of defence counsel services and the DMP.

That's the intended purpose of the clause.

Hon. John McKay: Thank you.

(Clause 71 agreed to)

(Clauses 72 to 74 agreed to)

(On clause 75)

The Chair: We have a few amendments for clause 75.

The first one is G-2 from the government, reference number 5973364.

Mr. Alexander, could you move it on to the floor, please.

● (1535)

Mr. Chris Alexander (Ajax—Pickering, CPC): I so move, Mr. Chair.

Would you like me to say a few things?

The Chair: Yes, please speak to your amendment.

Mr. Chris Alexander: This one doesn't require too much introduction, because we heard about it in previous Parliaments. We heard about it from the minister on the floor of the House of Commons.

With this amendment we're making good on a commitment of the government to change the range of service offences that would result in a record under the Criminal Records Act for convictions that are at the lower end of the scale of punishments, such as a minor punishment, a relatively small fine, a reprimand, or a severe reprimand.

As well, where the person is convicted of an offence that would be a contravention under the Contraventions Act, this provision will allow that there no longer be a record generated within the meaning of the Criminal Records Act. That would free the person who is convicted of this offence of having to apply for a record suspension, what we used to refer to as a pardon.

This would increase the number of service offences for which, if the offender is sentenced to one or more of the specified punishments, the offence would be deemed not to constitute an offence for the purposes of the Criminal Records Act.

Let's be very clear that there are still service offences at the higher end of the scale, such as assault, or assault causing bodily harm. I think members are aware of the full panoply of those violent offences that would still result in a record for the purposes of the Criminal Records Act. That mirrors the situation in the civilian system much more closely, and therefore represents an important modernization update of the military justice system.

It would literally remove up to 95% of the service offences in recent years that have generated criminal records for the purposes of the Criminal Records Act from that category. That's quite a dramatic change. It's a welcome change in our view. It was something we were prepared to do in the last Parliament and didn't manage it, for reasons that are well known around this table. It's time to do it now.

The Chair: Madam Moore.

Ms. Christine Moore (Abitibi—Témiscamingue, NDP): I will let Mr. Harris go first.

The Chair: Okay, we'll switch you around.

Mr. Harris.

Mr. Jack Harris: Mr. Chair, we recognized that this amendment was coming forward. Obviously, it involves some changes from the bill we have before us.

We have a number of subamendments to that, so I'm assuming that we—

The Chair: You can do them one at a time.

Mr. Jack Harris: We'll deal with them one at a time, but I am just letting you know by way of introduction how we see amendment G-2. I wanted to inform you that we have a number of subamendments.

We see amendment G-2 creating a circumstance where, regardless of the mode of trial, whether it's by summary trial or by court martial, anybody convicted of these particular service offences whose sentence is beneath the threshold here would not attract a criminal record. We have amendments that would add to that list, one at a time.

We have a second amendment that would seek to modify the provision in proposed new subparagraph 249.27(1)(a)(iii), which reads, “a fine not exceeding basic pay for one month, or” to eliminate the words after “fine”. There is a good explanation, and we'll get to that.

We have an amendment that is before you for consideration, amendment NDP-20 or NDP-21—I'm not sure as I don't have the numbers here.

We have another amendment having to do with ensuring there is a practical method to see that the criminal records, particularly of past offenders, are actually given effect to by removal from the Canadian Police Information Centre computer.

Those are some suggestions to add to these offences: changing the threshold with respect to a fine; adding our amendment, which effectively says that anything tried by summary trial should not lead to a criminal record; and dealing with the issue of retroactivity and how we ensure that the criminal records are actually removed.

That's just by way of introduction, Mr. Chair, and my colleague, Ms. Moore, has some specifics to speak to.

● (1540)

The Chair: Okay.

Madam Moore.

[*Translation*]

Ms. Christine Moore: I wonder about the sections of the National Defence Act that have not been included in the amendment moved by the Conservative Party. If my understanding is correct, there is a logical progression in the sentences. We start with minimum sentences, fines, reprimands and severe reprimands, and then it goes further and includes forfeiture of seniority, reduction in rank, detention and so on.

I suppose that someone who has done something very serious will receive a sentence or sanction that goes beyond what is contained in the amendment in clause 75. There is a risk that a person may be sentenced, for example, to detention or reduction in rank. Clause 75 cannot apply to that, even if the section has been included in the amendment.

Section 83 of the National Defence Act reads as follows:

> Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.

Although this section may apply to a broad range of situations, it nevertheless concerns disobedience of a command. Yes, that must be punished, but it is possible that the person concerned did not pose a security threat and that the act may not have constituted a serious disobedience of a command.

In my opinion, section 83 should be included in the Conservatives' amendment because we can have a broad spectrum. If we start with the idea that, if the person has committed something serious, the penalty he or she receives will not be on the list of those that may be exempted in any case. This lets us divide this clause somewhat.

In addition, section 98 of the National Defence Act reads as follows:

> 98. Every person who
>
> (a) malingers or feigns or produces disease or infirmity,
>
> (b) aggravates, or delays the cure of, disease or infirmity by misconduct or wilful disobedience of orders, or
>
> (c) wilfully maims or injures himself or any other person who is a member of any of Her Majesty's Forces or of any forces cooperating therewith, whether at the instance of that person or not, with intent thereby to render himself or that other person unfit for service, or causes himself to be maimed or injured by any person with intent thereby to render himself unfit for service, is guilty of an offence...

So this is still the same thing. It may be quite serious. Someone may deliberately cut an arm or do something more moderate.

I believe this should also be included in the Conservatives' amendment. It refers to malingering and failure to comply with medical orders. We often see people in the armed forces who, for example, will march with a sprained ankle, contrary to medical advice, because they are training and do not want to have to start over. These are things that happen.

I understand that person must be punished, but I do not believe that individual deserves a criminal record because he thought that he had been taking a course for three months—the toughest course in his life—and that, if he did not walk on his ankle he would be removed from the course and would have to start it over from the beginning. That is why he decided to walk on his injured ankle. I believe some judgment must be exercised.

Section 100 of the National Defence Act reads as follows: "Every person who...is guilty of an offence and on conviction—

[*English*]

The Chair: You're moving section 83. Let's make sure we're talking only to the subamendment, and so the subamendment is on section 83?

● (1545)

[*Translation*]

Ms. Christine Moore: I want section 83 to be added. I want to move another subamendment respecting section 98.

[*English*]

The Chair: I can deal with only one subamendment at a time—

[*Translation*]

Ms. Christine Moore: That is fine; I will come back to it.

[*English*]

The Chair: —so we're speaking to the subamendment to add section 83.

Ms. Christine Moore: It's section 83.

Mr. Jack Harris: On a point of order, Mr. Chair, to make it formalized, I would then move—

The Chair: I think it was moved by Madam Moore already, and we'll circulate it.

Mr. Jack Harris: She's already moved it? If she's moved it, then we can give it a number. The suggestion has been to call it amendment G-2.1. Is that okay?

The Chair: Okay, whatever. That's just for internal use. The legislative clerk will stay on top of it. We'll take care of the numbering at our end. We'll talk about the rest of it. We'll deal with the subamendment.

So we're speaking to the subamendment, adding section 83.

I have Mr. McKay, then Monsieur Larose, and then Mr. Harris.

Mr. Chris Alexander: On a point of order, could someone remind us on which page section 83 is detailed?

The Chair: Article—

[*Translation*]

Ms. Christine Moore: It is on page 43 of the National Defence Act.

[*English*]

Mr. Chris Alexander: Oh, it is page 43. I thought it was an article.

The Chair: Mr. McKay.

Hon. John McKay: What does 83 say?

The Chair: What's the reading of section 83? If you could pass it here I'll read it, please.

Can we get a copy of the act into the interpretation booth? Does anyone have an extra one kicking around? Thank you.

So we're on page 43, section 83, and our interpreter has a copy. There you go.

Section 83 says:

> Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.

That's how section 83 reads.

Mr. McKay you have the floor.

Hon. John McKay: I'm just absorbing that. If you disobey a lawful command of a superior officer, you're potentially subject to life in prison?

The Chair: That's what it says.

Hon. John McKay: How is that minor?

The Chair: Colonel Gibson, do you want to reply to what section 83 entails?

Col Michael R. Gibson: Yes, Mr. Chair. Just for the committee to understand the ordering principle in clause 75, as I briefly explained before, it's on the basis of both the objective gravity of the enumerated offences and the subjective gravity.

Objective gravity refers to the maximum punishment that Parliament prescribes when it creates the offence. In relation to section 83 Parliament has prescribed, in respect of that offence, that the maximum punishment is life imprisonment. In other words, it belongs to the class of offences that are the most serious offences under law that Parliament can create. That is the reason it was not included in the original list.

The Chair: Mr. McKay, any further comments?

Hon. John McKay: Well, section 83 just doesn't strike me as summary conviction material. That's my quick reaction without trying to contextualize it. Maybe Mr. Harris could tell me.

The Chair: I've got Monsieur Larose, then Mr. Harris, and then Mr. Alexander.

[*Translation*]

Mr. Jean-François Larose (Repentigny, NDP): I want to make a few comments about the 95%.

I worked in a corrections for eight and a half years. In that context, I realized that mistakes unfortunately occurred, although not really frequently. When people have a criminal record, there are exhaustive and complex offsetting mechanisms.

When I was a Canadian Forces reservist, we were often told that we could not make mistakes because there were consequences if we did so. Now there are two systems: courts martial and summary trials. When we were part of the civilian correctional service—a few of us were military members—and talked about the military system, we emphasized how efficient the JAG was. Compared to the summary trial system, it was quick, exhaustive and detailed. However, some things should nevertheless be improved.

I find it hard to understand why we have reached only 95%. The mechanisms in effect in the case of a summary trial are far from perfect. Does that mean the JAG is effective and a summary trial is not? Why not delete everything and make sure the right people and the right mechanisms are in place? The judgment could have serious consequences and, in particular, generate a criminal record. Why are any still outstanding?

Does the government feel—although I doubt that is the case—that summary trials will henceforth be acceptable at all levels and that it will no longer be necessary to use the system of lawyers and judges to adjudicate cases properly and to go into detail? I assume errors can occur. In the case of summary trials, the number of cases in which people wind up with a criminal record is very small. There is therefore no reason not to direct those cases systematically to courts martial.

● (1550)

[*English*]

The Chair: Okay, Mr. Harris.

Mr. Jack Harris: I think notwithstanding the comments of my colleague, Mr. McKay, and the colonel, the offence itself can attract a maximum sentence of life imprisonment, but if I could refer you to the commentary in the text *Canadian Military Law Annotated*, by Justice Létourneau and Colonel Michel Drapeau, they said:

> The offence of disobedience of a lawful command covers a wide variety of behaviours, acts, or omissions ranging from very serious to petty offences.

They refer to the 1983 case of Lucas v. the Queen. The court martial appeal court, CMAC, heard the case:

> The accused was ordered to report the following day dressed in his S-2s, with name tag and medals. He was found guilty of disobeying a lawful command and sentenced to detention because his collar insignia were improperly installed. The CMAC noted at p. 250, "nothing in the appellant's service record explains the matter escalating to the disciplinary level that it did".

I take it from this that they changed the sentence.

The point is if that's an offence that can be charged for something as petty as that, then there ought to be some threshold, and I guess the threshold is what the government has chosen to put in this legislation, as to whether it's something deserving of having a criminal record for not having your insignia on properly, for example, in this particular case.

There's another case where someone was accused of disobedience for which the accused received a sentence of severe reprimand and a fine of $3,000. This is a 2004 case that consisted of his refusal to remove headdress at a division parade where at one point a short prayer was pronounced. In this case the conviction was overturned on appeal. This guy was fined $3,000.

The commentary goes on to say of course that is a very important aspect of military justice, and in fact lawful commands can justify the giving of many orders that might otherwise result in charter breaches, such as an order to advance under fire. So someone who is ordered to advance under fire and refuses to go is in breach of a lawful order. That's a rather severe circumstance. That comes under what we've been talking about here, the distinction between military justice and the ordinary law, and that's to be recognized. But when we have an offence that in its statement is so broad as to attract both the pettiness and the most severe type of particular order such as that, then there's clearly a range not only of disobedience, or a range of severity, but also a range of punishment as reflected in the range and the scope of sentencing going from life imprisonment to some of these minor offences, such as confinement to barracks.

● (1555)

I think what we're trying to do here with respect to the scheme proposed by the government in G-2, there are some offences regardless of how they're tried that ought not to attract penalties of a criminal record, and sorting them out, as the amendment does, by the severity of the punishment. As the scheme shows—and I'll say more when we get to another amendment—there is a hierarchy of penalties in the military that is spelled out in the National Defence Act. They determine which ones are lesser penalties or more serious penalties. It's our submission that if you're going to have a scheme which says there are two aspects of it, one is the offence itself, and the other is the nature of the penalty that is given for a breach of that, then someone who is convicted of a breach of that section, of disobeying a lawful order, if it's obviously a serious breach, there's going to be a serious consequence. The consequence would result in a criminal record if it in fact is of the serious type. If it's a petty offence, even though it involves disobeying an order, then it ought to be included in the scope of the amendment that's proposed.

The Chair: Mr. Alexander.

Mr. Chris Alexander: Mr. Chair, we don't agree with that analysis. The nature of military operations and the imperative that military justice has to strengthen discipline and allow for the operational capacity to do difficult things under difficult circumstances doesn't allow us to detail different categories of sentences for different categories of commands not followed. That is why this provision is at the very core of the military justice system, not just our military justice system but those of our allies as well.

I think we're much more inclined to agree with Mr. McKay—and let me repeat that, Mr. Chair, we agree with the Liberal Party of Canada representative on this committee—that this provision can represent a very serious spectrum of criminal acts that need to be punished accordingly and where there needs to be flexibility in the sentencing. Of course in wartime, in combat, the gravity of the offence can be much greater than the same offence in peacetime because it can have such an effect on people's lives.

[*Translation*]

This concept of a lawful command is really central to our system of justice. That is why we cannot limit sentences that go as far as life imprisonment, but that are imposed solely in exceptional circumstances in which the situation is very serious.

Mr. Larose discussed the need to retain subsection 2(2) and to ensure that none of these offences can attract a criminal record. We are not prepared to accept that either because there are various serious crimes such as assault, for example. Threats of assault and attempted murder may be considered this way by the military justice system. This must reflect what goes on in the civilian system, where they will attract a criminal record because this class of crime involves a serious degree of violence.

[*English*]

The Chair: Mr. McKay.

Hon. John McKay: I just have what are points of clarification more than anything else.

There's quite a range of offences between wearing your hat backwards and refusing to advance under fire. If a soldier is charged with disobeying a lawful order, whose election is it to proceed either summarily or by court martial? Whose choice is that?

Col Michael R. Gibson: Mr. Chair, the answer to that question is found in a combination of reading of articles 108.07 and 108.17 of the Queen's regulations and orders, and the short answer is this. Except for five minor offences for which the accused is not entitled to an election, for every other charge in respect of an offence over which the summary trial has jurisdiction, and that list is set out in 108.07, the accused must be offered an election. Even if, in respect of the five most minor offences, the presiding officer considers that he or she would be likely to impose a punishment beyond a certain threshold in the event that they were to find the person guilty on the facts as alleged, then they must offer the person an election as well. That threshold really has regard to the concept the Supreme Court of Canada elaborated in the Wigglesworth case of what's called the “true penal consequence”. In other words, to make a long story short, except in respect of the most minor offences that are punishable by the most minor punishments, the accused is always offered an election.

● (1600)

Hon. John McKay: So if a soldier is wearing his hat backwards and refuses to turn it around, presumably he's going to elect to go under a summary conviction process?

Col Michael R. Gibson: Mr. Chair, that election is up to the accused person taking advice from his assisting officer and DDCS counsel. That's their choice.

Hon. John McKay: I suppose you could make a really stupid choice.

Col Michael R. Gibson: When one has a choice, one is entitled to make a choice on the criteria one considers appropriate, Mr. Chair.

Hon. John McKay: I want to clarify. Now we know it's a soldier's election, and if the soldier chooses foolishly, that's another issue altogether. If that's true, then it still strikes me the inclusion of section 83 in the government's amendment is unnecessary.

Col Michael R. Gibson: That's ultimately a judgment for Parliament, but I've explained the ordering principle that was on the basis of objective gravity.

Hon. John McKay: Yes. I'm just trying to arrive at some set of circumstances under which a soldier may end up in a bizarre situation of having a court martial for wearing his or her hat backwards.

Col Michael R. Gibson: Mr. Chair, very briefly, in the case that was actually cited, the accused wanted a court martial because he considered he had a charter argument. In fact, he was ultimately successful on that. That's one of the primary purposes of the election, to provide a safety valve from the summary trial system in the event the accused considers they have a charter argument or there is some aspect of their case for which they want to have the full panoply of procedural protections and access to an appeal.

It's there as a safety valve.

Hon. John McKay: The final question is this. Is there some set of precedents as to what constitutes a minor punishment?

It seems to me you're quite precise with respect to severe reprimand, or reprimand, a fine. All of those are relatively calculable, but we're arguing here as to whether somebody should or shouldn't have a criminal record. A minor punishment to me may be quite a bit different from a minor punishment to someone else.

Col Michael R. Gibson: Mr. Chair, I think the answer basically is that it is tied, in large part, to the threshold for our offering an election in article 108.17, which provides that when the presiding officer is considering this question of whether to offer an election, if I may quote:

> the circumstances surrounding the commission of the offence are sufficiently minor in nature that the officer exercising summary trial jurisdiction over the accused concludes that a punishment of detention, reduction of rank or a fine in excess of 25 per cent of monthly basic pay would not be warranted if the accused were found guilty of the offence.

Those criteria are essentially tied to the assessment of what constitutes a true penal consequence.

Hon. John McKay: So they tie in what you're going to get paid and the potential exposure you have to a reduction in rank.

Col Michael R. Gibson: Yes. In terms of principle, it goes back to what the Supreme Court said in the Wigglesworth decision, in terms of, to put it extremely colloquially, what constitutes really getting whacked and what doesn't.

Hon. John McKay: Thank you.

The Chair: Madam Moore.

[*Translation*]

Ms. Christine Moore: I would like to go back to the Conservatives' amendment and to what I requested with regard to section 83.

Generally speaking, it is being stated that no criminal record will be generated for a minor punishment such as a fine, reprimand or severe reprimand. It must be understood, however, that it will be impossible to enjoy the exemption from a criminal record even though provisions are already included in the amendment, as in the case of a prison term or reduction in rank, for example.

I thought it would be a good idea to include section 83 in the amendments for that reason. I believe it is impossible for a person who has seriously disobeyed a lawful command not to be reduced in rank or detained.

I would like to know your opinion on that point.

● (1605)

[*English*]

Col Michael R. Gibson: Mr. Chair, clearly, as has been indicated already, it's possible to commit an objectively grave offence in a very broad set of circumstances. You may have a garden-variety disobedience in which the corporal tells his sergeant to take a hike. Clearly one would not expect to be reduced in rank or given a sentence of detention for that. That would be something that would attract a fine or a minor punishment.

The Chair: We'll have Monsieur Larose and then Mr. Harris.

Mr. Jean-François Larose: I'm giving my time to Mr. Harris.

The Chair: Mr. Harris.

Mr. Jack Harris: I think it might be helpful, Chair, if members had before them a copy of chapter 104 of the Queen's Regulations and Orders. I have copies in both English and French for everybody. It quotes subsection 139(1) of the National Defence Act, which reads as follows:

> The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:

Then it lists them from (a) to (l), starting off with "imprisonment for life" and ending with "minor punishments".

Interestingly, (i), (j), (k), and (l) are the four that are set out in amendment G-2, those being "severe reprimand", "reprimand", "fine", and "minor punishments", although the fine is qualified in amendment G-2 by saying "a fine not exceeding basic pay for one month".

What is important here is that the definition in subsection 139(2) of the National Defence Act says:

> Where a punishment for an offence is specified by the Code of Service Discipline and it is further provided in the alternative that on conviction the offender is liable to less punishment, the expression "less punishment" means any one or more of the punishments lower in the scale of punishments than the specified punishment.

Hon. John McKay: Mr. Chair, on a point of order, I don't want to interrupt my friend, but it's hard to follow his argument unless we have the document in front of us.

Mr. Jack Harris: Okay, well let's wait until everybody gets it and then we can be on the same page here.

Hon. John McKay: Is it just that there aren't enough copies? Is that the problem?

Mr. Jack Harris: They're being spread around.

The Chair: There weren't enough copies and we've sent to have them copied.

Mr. Jack Harris: There aren't enough copies?

The Chair: How many copies were there, four or five?

Mr. Jack Harris: We had 20, so I don't know where they've gone.

Mr. Chris Alexander: Is this being tabled, Chair?

The Chair: Yes, he's tabled it in both official languages.

Mr. Jack Harris: I have one more that can be used, because I can use the...

The Chair: Can we continue with the discussion?

Okay, go ahead, Mr. Harris.

Mr. Jack Harris: The point being, when you look at section 83, which we just talked about, it says that the punishment for section 83 is—

Mr. Chris Alexander: —imprisonment for life or lesser punishment.

Mr. Jack Harris: It says "imprisonment for life or to less punishment", and that means any punishment on the list that's lower than imprisonment for life. So if someone is sentenced to imprisonment for two years or more, or dismissal with pay, or reduction in rank, or forfeiture of seniority, etc., all of these things are lesser punishments than what's provided for in the code.

As Colonel Gibson said, while there is an objective severity here because it can attract life imprisonment, it also can attract lesser punishment. We're looking at a scheme of suggesting that those offences that attract the lesser punishments specified here, "severe reprimand", "reprimand", "fine not exceeding basic pay" and "minor punishments" don't attract a criminal record in the list of offences stated.

Our argument is basically that when we recognize that disobedience of lawful order can be very severe or it can be petty, then for those petty ones or those ones that don't attract any higher discipline or penalty than that of a severe reprimand ought not to attract a criminal record.

That's what helps explain it.

In this particular case all those offences listed in amendment G-2 don't attract a criminal record, whether they elect to go to court martial or whether they stay with the commanding officer. In amendment G-2 the government is recognizing that these listed offences, regardless of the mode of trial, whether it's commanding officer, superior officer or court martial, will not attract a criminal record if the penalty is severe reprimand or less.

What we're suggesting is that the scope of that be broadened to include disobedience of a lawful order, which is considered less serious. I don't like the word “petty” because not all offences that could be called“disobedience, which might attract a severe reprimand or a reprimand, might not fall under the petty category but might not lead to a reduction in rank or “dismissal with disgrace from Her Majesty’s service”, as specified in (c).

That's essentially the argument. I think it has merit and it's quite in keeping with amendment G-2 itself, which is designed to set forth a scheme of including all of these offences where the penalty is a severe reprimand or less and should not attract a criminal record.

● (1610)

The Chair: Okay.

Mr. McKay.

Hon. John McKay: Just let me follow the logic through with Colonel Gibson and see whether I understand it here.

If a soldier is charged with a failure to obey under section 83 and he or she, for whatever reasons, good, bad, or otherwise, chooses to proceed by way of a court martial court, then that's not part of this discussion. That's over there. But if he or she chooses to go summary and is convicted, don't they therefore still expose themselves to a Criminal Code conviction?

Where you're going with this thing is that this person doesn't want to have a criminal record. Are you therefore differentially treated when you elect to get into the summary trial system as opposed to being in under sections 87, 89, or whatever?

Col Michael R. Gibson: Mr. Chair, if I may briefly respond, I think there's perhaps a fundamental misapprehension that's underlying this discussion that I'd like to address in a moment. But the point of departure for the analysis is yes, section 139 of the National Defence Act prescribes what is called the scale of punishments, and it is indeed hierarchical, as Mr. Harris has pointed out, and that's amplified in regulations.

When a punishment provision that Parliament has created specifies it's punishable by up to life imprisonment or less punishment, then you can go down the list, and that's the task of sentencing, for the court to determine the appropriate sentence.

The fundamental misapprehension that I perceive here that I hope I can assist the committee with understanding, perhaps, is this. What clause 75 is about is not creating a record within the meaning of the Criminal Records Act. That is distinct—it's linked, but it's distinct logically—from an entry on CPIC, and I have the sense that not everybody appreciates that.

In practical terms, when one speaks about the adverse consequences of a “criminal record”, really what that means is there is an entry on the Canadian Police Information Centre data bank—in fact, on one of the four data banks, because that's an important point too—that is accessible by a court, by police, by CBSA officials at the border, by other people. The National Defence Act already provides, in essence, at section 196.27 that if a person is convicted at summary trial, it doesn't go on CPIC, and I have the sense that not everybody appreciated that.

What we're really talking about here, the policy intent of clause 75, is to alleviate the consequence of persons having to apply for a record suspension if they wish to seek civil employment afterwards and they have to fill out the normal questionnaire, the question which almost always reads, “Have you been convicted of an offence under an act of Parliament for which you have not received a record dispension?” It's record dispension now; it used to be a pardon. What clause 75 will provide is, if you fall within that threshold of the objective gravity of the enumerated offences and—it's a conjunctive requirement—the subjective gravity, you don't have to go through that.

If you're tried by summary trial, the effect of section 196.27 is you don't get on the relevant CPIC database, which is the identification database, unless that's supported by fingerprints. What section 196.27 provides is they're only supposed to have fingerprints taken, and there's a list of what are called designated offences, and even if fingerprints were taken, they're destroyed. So the dire consequences that have been suggested as flowing from conviction at summary trial shouldn't actually occur.

I had the sense that perhaps not everybody appreciated that because it's not the same thing. They're two different concepts: a record within the meaning of the Criminal Records Act, which is really relevant for applying for a record suspension, or getting put on CPIC.

One last point that I think is relevant for the committee to understand is that Parliament already, at section 4 in the Criminal Records Act, when it sets out the procedure for applying for a record suspension, prescribes a waiting period of either ten years or five years, and in the civilian context it does that by category. If it's an indictable offence, you have to wait ten years, and if it's a summary conviction offence, five years.

I would suggest Parliament has already legislated to the same effect, in terms of categorization by the gravity of the offence, in that case, distinguishing between indictable and summary conviction. So the concept of distinguishing by basis of objective gravity the offence that's in clause 75, I suggest, is analogous.

I hope that's of assistance to the committee in understanding. Thank you.

● (1615)

The Chair: Thank you.

Mr. McKay, do you have anything else?

Hon. John McKay: I'm not sure it is, but I'll take your word for it. I appreciate the distinction you're trying to draw here. To be candid about it, frankly, I just assumed that if you were under the Criminal Records Act, you were automatically on CPIC. That's helpful in that respect.

Having said that, the fact that I can respond to "Do you have a criminal offence?" and an employer actually can't check me out because I'm not on CPIC, as opposed to actually having a criminal record, may be one for lawyers, but not entirely for the rest of us.

Col Michael R. Gibson: May I briefly respond, Mr. Chair?

I think the rubber hits the road here very practically. What this provision would do is it would not punish honest people.

Right now, if you get out of the forces and you're filling out that employment questionnaire, and you're asked, "Have you ever been convicted of an offence under an act of Parliament for which you haven't received a record suspension?", the odds are that if it's tried by summary trial, there won't be and shouldn't be a record on CPIC. But if you were honest, what you would actually have to do is get a document from the forces to prove to the national Parole Board that you had been convicted so they could give you a pardon, which is almost an absurdity.

Hon. John McKay: Yes.

Col Michael R. Gibson: It's a practical absurdity that happens to our people all the time. That's what we were trying to relieve.

The Chair: Monsieur Larose, please.

[*Translation*]

Mr. Jean-François Larose: I am trying to understand what you said.

If a person is charged with an offence that is tried by summary trial and that attracts a criminal record, it will not be in the CPIC system. Is that what you are telling me? I am trying to understand.

[*English*]

Col Michael R. Gibson: Mr. Chair, if I may briefly respond, I'm not trying at all to be pedantic, but this is a really important point to understand.

The Criminal Records Act is really misnamed. It's not about criminal records. The term "criminal record" is not defined in the Criminal Records Act. If one is "convicted of an offence under an Act of Parliament", which is the language in the Criminal Records Act, clearly that captures an offence created by Parliament in the National Defence Act.

That's what we're really talking about, but it means that if one has that record.... It can be a notional record. It doesn't mean a concrete actual piece of paper or electronic record; one has, in a legal sense, a record that one can apply for a record suspension for. But that's different from an actual entry on CPIC.

The way our system is structured now, you should only end up on CPIC if you're convicted at court martial, first of all, and second, if it's a designated offence that's listed in section 196.26.

Mr. Jean-François Larose: That summary trial can give or...?

Col Michael R. Gibson: No, absolutely not.

The practical reason, Mr. Chair, is that you're not supposed to get on one of the four relevant CPIC databases, the identification data bank, without fingerprint records to support that. What section 196.27 in the act already says—the law says this now—is that if fingerprints are taken and you're tried by summary trial, they have to be destroyed without delay. There's no practical mechanism in the law that stands now that a summary trial conviction should get you an entry on CPIC.

I'm not saying that it would never ever happen, because mistakes happen, but what the law provides right now is that it should not happen.

I hope that's of assistance, Mr. Chair.

The Chair: Mr. Harris, please.

Mr. Jack Harris: I think that debate may be for another amendment. We have provisions, for example, in the Criminal Records Act that suggest that even with an absolute discharge or conditional discharge there is instruction to remove criminal records from the CPIC computer. As I say, we'll get to that argument, and when we get there we'll be talking about the retroactive effect of this and whether the Criminal Records Act...whether there needs to be a further amendment. I won't address that right now.

But I'm not sure, Mr. McKay, you are seeing—

Hon. John McKay: The light?

Mr. Jack Harris: I'm not trying to enlighten you, I'm just hoping that you understand at least my argument. Amendment G-2 in that section of clause 75 that is being amended provides that there would be no criminal record whether it's a court martial or a summary trial for the offences listed in that section if the penalty is one of those four that are listed there. That's why, despite that, we have our other amendment that says that any matter brought by summary trial should not attract a criminal record. That's a second category, or a second set.

Our aim in adding section 83 to this government amendment is to say that in addition to all of these other ones—and you'd have to go through what they are, it could be AWOL or even escaping lawful custody, all sorts of offences that are there, which you might think in other contexts.... They're listed as service offences, but they won't attract a criminal record no matter what the mode of trial is, as long as the penalty is one of those prescribed there—severe reprimand, reprimand, fine of a particular type, or minor punishment.

I think your questions about whether he chooses a court martial or not aren't particularly relevant to this subamendment or this government amendment, because regardless of whether you're in a court martial or you're not in a court martial, if the offence for which you're being tried is one of those listed there—and they cover a lot of things that sound criminal, like falsifying records, etc.—they don't attract a criminal record if the punishment is one of those four listed.

I wasn't sure where you were going with the questions about choosing a court martial or having an election. None of that would have any effect on whether an offence of disobeying a lawful order attracted a criminal record. What would matter is the nature of the punishment, whether it met that threshold or whether it was below that threshold that's spelled out there for all of the offences set out in the amendment.

● (1620)

The Chair: Mr. McKay.

Hon. John McKay: I'm trying to understand this a little better. What I understand you're saying, Colonel Gibson, is that the Criminal Records Act is not really criminal records. You shouldn't be calling it "criminal records", you should simply call it the "records act".

Col Michael R. Gibson: I think in my very humble opinion it might be better described as the "pardons act" or a "record suspension act", because what it's about is how you go about getting a record suspension. It's not how you create a record.

Hon. John McKay: So you and I can agree on amendment. We'll call it a "record suspension act". Okay.

Disaggregating Mr. Harris's argument for a second, in the event that the soldier under section 83 chooses to go the summary route, there can be two consequences to a conviction. The first consequence is that there will be no entry under the records act if it's a severe reprimand, reprimand, fine, or minor punishment. The other route is that there will be a record if it's a forfeiture, a reduction in rank, dismissal, etc.

● (1625)

Col Michael R. Gibson: Mr. Chair, no, that's not accurate in terms of how the proposed amendment would operate, because you'll recall it's a conjunctive requirement for both the objective and subjective gravity. Right now, since 83 isn't on the list on the basis of objective gravity, then the person would, if they wished to obtain a record suspension, be obliged to apply for one. They wouldn't be exempted.

The thing to remember, I think, is the conjunctive requirement between both objective and subjective gravity.

Does that answer your question, Mr. McKay?

Hon. John McKay: It might. I'm not sure I understand it, but it may answer it.

I'm going back to the core argument as to the inclusion of 83 in this. The government rightly says that they've done 95% of the job, so what's the argument as to why you wouldn't do 100% of the job?

Col Michael R. Gibson: Mr. Chair, the argument really goes back again to recognize the distinction between the meaning of a record suspension and the obligation that Parliament has imposed for applying for a record suspension under the Criminal Records Act and putting something on CPIC. They're there for different purposes. Really, what the Criminal Records Act reflects is Parliament's judgment about the severity of offences and how long one must wait before acquiring the benefit of a record suspension.

CPIC is really a tool for law enforcement. It absolutely has collateral consequences for a person to be included in the identification data bank, but they're there for different purposes. One is meant to reflect Parliament's and society's judgment about offences and how long you have to wait to get a record suspension. The other one, in terms of CPIC, is a tool for law enforcement, so they're meant for different purposes.

The Chair: Mr. Harris.

Mr. Jack Harris: I do have to say this. The point is—and I guess we're asking if Mr. McKay is with us or not—regardless of whether or not someone chooses to go by court martial or by summary conviction, all those listed offences, and they include resisting arrest, escaping custody, connivance at desertion, false statement in respect of leave, making false accusations or statements or suppressing facts, setting free without authority or allowing or assisting escape—oh, I'm sorry, I read number 100, but I meant 101, which is escape from custody—regardless of how they're tried, as long as the sentence is one of those four, it doesn't attract a criminal record.

What we're simply saying is that we think the same condition should apply to disobeying an order if the sentence is regarded by the sentencing authority, whether it be court martial or whether it be the commanding officer, as one of these four sentences, because that would determine whether it was something petty or it was something that is so serious as to be considered a breach to attract more serious offences.

Part of the reason I say that is that you can have the same set of facts attract an insubordination charge and a disobeying a lawful order charge. For example, if some senior officer says "Come here", and someone says "Shag you" or something else to that effect, the charge could be insubordination or refusing a lawful order. One attracts life imprisonment as a maximum, and the other one has a different offence, but the same set of facts exists.

What we're saying is that if you have that sort of circumstance and you have this threshold determined by whether you get a reprimand, whether you get a fine, or whether you get confinement to barracks, well, if it's one of those, then you don't attract a criminal record. If it's considered so serious that you end up in detention, say, or you end up losing your stripes or whatever, then that's considered a serious offence and it's treated differently. That's only in this section here. It has nothing to do with whether it's a court martial, whether it's a commanding officer, or whether it's a superior officer under other modes of trial.

I guess the question I'm asking is, are you with us on that or are you not? Initially the government liked your answer. I wasn't sure you understood what we were doing here, and I hope you do now.

● (1630)

Hon. John McKay: I've never been more wanted in my life.

Mr. Jack Harris: It's going to push us over the top. There's a weakling over there now.

Hon. John McKay: You mean, so that you can lose 6 to 5 as opposed to 6 to 4?

The Chair: We're voting on subamendment 1 from Mr. Harris by adding section 83 to the government amendment.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Mr. Harris, how many of these do you have?

Mr. Jack Harris: I think there are four of them.

The Chair: Since that took almost an hour just to do that one, in the interest of time let's stand clause 75 and the amendments and subamendments, and move on to the rest of the clauses. Then we'll come back to it.

Agreed?

Some hon. members: Agreed.

(Clause 75 allowed to stand)

(On clause 76)

The Chair: Mr. Strahl.

Mr. Mark Strahl (Chilliwack—Fraser Canyon, CPC): Might I suggest that we seek some cooperation. I can't move a motion on a point of order, I know that, but I guess we have several more pages of these. I'm wondering if we can agree on the ones that we'll carry and then come back to all of the contentious ones instead of slowly picking our way down the list.

The Chair: We don't have any amendments from here until clause 117. Taking your direction, Mr. Strahl, I don't have a problem in grouping.

Mr. Mark Strahl: I'd like to move—

Mr. Jack Harris: No, I don't agree with that. I agree with the approach that you've suggested that we stand clause 75, and that we carry on. There are some clauses we may wish to comment on as we go through.

The Chair: Let's just continue on it. It was working well before. Let's go back to it then.

(Clauses 76 and 77 inclusive agreed to)

(On clause 78)

Mr. Jack Harris: Clause 78, is that—

The Chair: Clause 78 is a French correction.

Mr. Jack Harris: Subclause 78(2), is that a—

The Chair: That's a correction in the French.

Mr. Jack Harris: That's a correction in the French is it? There are two subclauses.

The Chair: Then subclause (2) is adding—

Mr. Jack Harris: That's the one I'm talking about.

The Chair: Do you have anything you want to say on that? It's about no penalty for complaint.

Mr. Jack Harris: No penalty for complaint, that's the interference complaint. That relates to a conduct complaint in relation to what Colonel Gibson—

The Chair: Colonel Gibson, can you comment on subclause 78 (2)?

Col Michael R. Gibson: Colonel Dufour will comment on this, Mr. Chair.

The Chair: Colonel Dufour, please, on proposed subsection 250.18(3), at the bottom of page 45.

Lieutenant-Colonel André Dufour (Director, Law Military Personnel - Office of the Judge Advocate General, Department of National Defence): Subclause 78(2) with respect to 250.18(3) is new. Basically, we are saying that a person may not be penalized for exercising the right to make a complaint, so long as the complaint is made in good faith. This is in relation to a conduct complaint. We have the same amendment in clause 78 with respect to interference complaints.

Mr. Jack Harris: Could you explain what a conduct complaint and an interference complaint are please? Who will decide whether it is being made in good faith or not?

LCol André Dufour: A conduct complaint is defined in section 250.18, and an interference complaint is defined in section 250.19.

Basically, a conduct complaint is any person, including an officer and non-commissioned member, making a complaint about the conduct of a member of the military police in the performance of any of the policing duties and functions that are prescribed.

An interference complaint would be a member of the military police who conducts or supervises a military police investigation or who has done so and believes, on reasonable grounds, that any officer or member of the department has improperly interfered. He can then make an interference complaint.

For those two sets of circumstances of two types of complaints, there's a scheme that says what we should do with this in part IV.

● (1635)

Mr. Jack Harris: So you are just setting up good faith as a defence to someone being penalized? Who decides it's good faith?

LCol André Dufour: It's a safety valve to make sure that if a complaint is made in good faith there will be no repercussions or consequences as a result of that.

Mr. Jack Harris: Who decides whether or not there's good faith?

Col Michael R. Gibson: Mr. Chair, I might address that.

I think it operates in two fashions, first of all as a statement of principle, because this follows directly from the Lamer report recommendation.

The second prong of the answer, to answer Mr. Harris's question, is that if a person felt they were penalized for a complaint they had made in good faith, they could plead that as their defence, if they were actually charged with an offence. If the penalization took the form of some sort of administrative action, then they could submit a grievance. So in terms of who would adjudicate, ultimately it would either be a court or the grievance process, just as it is for anything else that's contentious in our system.

Mr. Jack Harris: Thank you.

(Clauses 78 agreed to)

(Clauses 79 to 86 inclusive agreed to)

(On clause 87)

Mr. Jack Harris: Am I right in assuming that because only one language is being fixed, it's to bring about conformity with the English-language text?

The Chair: Lieutenant-Colonel Dufour.

LCol André Dufour: Basically all the amendments for clauses 80 to 96 include amendments to replace

[*Translation*]

the words "la personne mise en cause" with "la personne qui en fait l'objet"

[*English*]

and also to replace *prévôt* by *grand prévôt*. Those are the only amendments being made in those sections.

The Chair: Madam Moore and then Mr. Alexander.

[*Translation*]

Ms. Christine Moore: Can we group clauses 80 to 96 together since they involve changes in language?

[*English*]

The Chair: I was going to suggest that.

Mr. Alexander.

[*Translation*]

Mr. Chris Alexander: These are historic amendments, but perhaps we could group them together.

[*English*]

The Chair: Mr. Harris.

Mr. Jack Harris: I'm satisfied to have them grouped, but I will note that when we suggested that the English language ought to conform to the French at our last meeting and we made numerous arguments about it, it seemed to be totally unacceptable to the government for some strange, odd, and very disagreeable reason. But we're quite happy to ensure that the French and English work together and say the same thing.

The Chair: I wanted to make sure we had conformity.

(Clauses 87 to 98 inclusive agreed to)

(On clause 99)

The Chair: Mr. McKay.

Hon. John McKay: Again, as a point of clarification, this is essentially a limitation clause, so you can't actually sue Her Majesty after two years.

What's the reason for that?

● (1640)

Col Michael R. Gibson: Mr. Chair, this clause is essentially changing the limitation period that's already in section 269 of the act from six months to two years. So it's more generous and beneficial to potential plaintiffs.

That's being done largely in an attempt to harmonize the limitation period with the period of two years, which has become more or less standard across all the provinces in Canada.

As Mr. McKay may know, there used to be wild disparity among the provinces with regard to the limitation period, so this is in essence an attempt to create harmony across the country and also to ensure that the limitation period under the NDA is congruent with other limitation periods and fair to potential plaintiffs.

Hon. John McKay: Is this a realm of torts?

Col Michael R. Gibson: Proposed subsection 269(1) is in the realm of torts. Proposed subsection 269(1.1) provides a limitation period in respect of prosecutions under other acts. For example, under the Fisheries Act, if there were an allegation that there had been an oil spill into a body of water that was protected, as is already in the act, there would be a limitation period in respect of prosecutions under the other act, but the exceptions carved out there in that section are, first of all, the NDA itself, so this doesn't create a limitation period in respect to the NDA, and also for civil prosecutions under the Geneva Conventions Act or the Crimes Against Humanity and War Crimes Act.

The Chair: Okay, are there other questions?

Mr. Jack Harris: I'm sorry, it goes into the next section. I don't know what—

The Chair: Clause 100 is the next section.

Mr. Jack Harris: No, but on the next page, page 55, proposed subsection 269 (1.1):subsection (1) may not be commenced after six months from the day on which the act, neglect or default occurred.

The Chair: What's the question, Mr. Harris?

Mr. Jack Harris: The question is, how does that compare to the six months to two years? It seems very odd. Is that a typo? What is that at the top of page 55?

The Chair: Colonel Gibson.

Col Michael R. Gibson: No, it relates to proposed subsection 269 (1.1) I know the brackets in subsection 269(1) are confusing but it's just a continuation of proposed subsection 269(1.1). It's a six-month limitation period for prosecutions other than the ones that are specified, in other words, the NDA and Crimes Against Humanity and War Crimes Act.

The Chair: That is referring to subsection 269(1). It's not a new subsection.

Col Michael R. Gibson: That's right. It's not a new subsection. I know it's confusing but—

The Chair: You have to continue to read—

Col Michael R. Gibson: —it just flows on with the text from 269 (1.1). It's part of proposed subsection 269(1.1).

Mr. Jack Harris: It's six months for a prosecution, except for the war crimes or the Geneva Conventions Act. Then it's two years for the civil—

Col Michael R. Gibson: That's correct.

The Chair: Okay, are we good?

(Clauses 99 and 100 agreed to)

(On clause 101)

The Chair: Mr. Harris.

Mr. Jack Harris: Clause 101 is the provision—this amendment increases it from five years to seven. We have some serious concerns about that. We've had significant evidence brought before this committee, and I refer in particular to the evidence of Mr. Justice Létourneau, who complained about the piecemeal approach being taken to the amendment to this act. Also at one point he talked about the resistance to change within the legal structure of the military justice system. He expressed some grave concerns about how long it takes for the system to respond to things like the Charter of Rights, the evolution of the law, and the failure of military justice to keep up with it.

He made a very strong argument from his perspective about the necessity for a fundamental review of the National Defence Act. I know Colonel Gibson has very different views because he's the one, or his department is the one, that Mr. Justice Létourneau feels ought to have a more significant independent review. Our argument joins with Mr. Justice Létourneau in saying that by just referring to certain sections, for example, in clause 101—

● (1645)

The Chair: Make your arguments on clause 100.

An hon. member: We are on clause 101.

The Chair: Okay, I'm behind.

Mr. Jack Harris: The sections that are there, specific sections would be examined sometimes seven years from whenever this comes into law. That's a long time for this to take place. We've heard significant constitutional arguments before this committee on certain provisions, such as clause 75, and we haven't finished that yet, but also concerns about the grievance procedure and how the grievance procedure is inadequate. We've heard concerns about the whole structure of military courts and the necessity of examining them in connection with the worldwide trend in western countries of further civilianization of the act.

I think implicitly in these comments, one would suggest that the independent reviews that we've had, in particular the last one, wasn't supported by the kind of resources that one might need to have a thoroughly independent review such as you might have, and Mr. Justice Létourneau's previous experience with the Law Reform Commission having adequate resources to do that.

We don't think that this is adequate at all. We think that there ought to be a significant independent review, not just of particular sections, some of which may be being amended now, but that there, in fact, be a thorough and fundamental review of the entire National Defence Act.

If I may quote from Mr. Justice Létourneau's evidence before this committee, he said:

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

That's a very broad statement, but it requires in order to follow it a broader review than one that suggested that might take place some seven or eight years from now.

It's not clear from looking here, and maybe Colonel Gibson can enlighten us.... It says “seven years after the day on which this section comes into force”. When that might be, I don't know. The bill has to go back to the House. It has to go to the Senate. It has to be promulgated in force by some act of the Governor in Council. So, some seven years from that date, whenever it is, we will see another supposedly independent review of the provisions that are specified here.

I don't mean that in a flippant way when I say an independent review of the nature that Mr. Justice Létourneau was talking about, one that is fully resourced and fundamental in nature as opposed to a review of a particular section.

We don't support clause 101. We think it's inadequate and that it, in fact, prolongs the possibility of reform to this legislation, prolongs the possibility of fundamentally re-examining this. As we've seen already we didn't, and couldn't, attempt to re-write the National Defence Act by making amendments to this particular bill. Even some of the very modest recommendations that we had were deemed to be outside the scope of the legislation, and we accept that. That's the nature of dealing with an amending act. It is not a full act and you can't re-write an entire act in committee; you can only make amendments within the scope of the act. Therein lies some of the problems.

● (1650)

We've only gone so far as, in this case, the government was willing to go. Based on the criticisms that we've seen, based on the recommendations of Mr. Justice Létourneau and Colonel Drapeau and others who appeared before the committee, we think there are some substantial flaws in the scheme of the act, in the scheme of military justice, in the over-militarization of even matters such as grievance procedures, the failure to adequately address the concerns that have been raised about the inadequacy of grievance, and all sorts of things that are consequential upon that, and the failure to examine the international trends that see greater civilianization of the military justice system in other countries such as the U.K., Australia, New Zealand, Ireland, and other countries that have been mentioned.

The Chair: Mr. Alexander.

Mr. Chris Alexander: Chair, this is one amendment, one clause, in our bill to which we are particularly attached. I simply wanted to put on the record here a question directly relevant to this clause, though, in the context of Mr. Harris's previous remarks, which, for the record, we on this side find disagreeable. I haven't been called that in committee, or elsewhere, before. I regret the use of such language. We're trying to have a technical discussion of an important issue and at long last complete committee stage of consideration of an important bill.

This bill, in one form or another, has been before Parliament for the better part of a decade. We are now reviewing this bill in the context not of one review that has been put before the government, not of two reviews by senior members of the judiciary that have been put before the government, but of three reviews. This bill, because of those successive reviews, does not capture all of the recommendations, it's true. LeSage has not fully provided for it here. There will have to be further legislation almost certainly to respond to LeSage.

But would our colleague Mr. Harris not agree that the weakness, if there has been a failure to modernize the military justice system, is not in the number of reviews, the lack of reviews, or in the time period of those reviews; it is in the failure of successive Parliaments to legislate in this area. We all know the circumstances. I didn't hear it during the debate at second reading. I haven't heard it in debate at committee here, but will he not, for once, accept, as one of the long-standing members of this committee, some responsibility for the fact that Parliament has not yet acted and that this is the reason, if any, why our military justice system is not as modern as we would like it to be?

The Chair: Mr. Harris.

Mr. Jack Harris: In a word, no. I accept absolutely no responsibility for the fact that it's taken, as you suggest, nearly a decade to get to where we are. This legislation has been before this House on a number of occasions for a number of reasons, and I can detail them as to why. The House was prorogued by your Prime Minister. An election was called earlier than legislation required it. There were all sorts of reasons that the previous versions of the legislation never got through.

One of the reasons, of course, was that the matter was debated and we just passed off and put aside one of the significant consequences, and that had to do with the summary trial matter, which took, I suppose, six or seven months after the debate on Bill C-15 started and took place in the House. The government finally acknowledged that perhaps they were prepared to agree to put back an amendment that was passed in the last Parliament.

In the last Parliament we had numerous amendments. We had a very thorough discussion, and I don't think the speed at which this bill passed in the last Parliament left anything to be desired. We went through clause-by-clause study fairly rapidly, in three or four days at the most, with witnesses and the clause-by-clause.

During that particular Parliament I was where Mr. McKay is. We brought forth a dozen or more amendments, of which eight or nine were passed. They were stripped out of the bill the last time, so I guess we have to argue them again. So I take no responsibility for the fact that Mr. Justice Lamer was asked to make some recommendations back in 2003, and that we're here now in 2013. I only came here in 2008, and we had an opportunity to debate Bill C-41, and we made improvements to it. It was actually sent back to the House in good time to be passed, but the government chose not to call it for debate in the House of Commons. That's not my doing.

So we don't accept any responsibility for that. The government chooses when legislation is called.

To suggest that all of these reports are being taken into consideration, I would refer you to your own comments about Mr. Justice LeSage. Whereas that was only tabled in the House in June, well, that may be, but the government had it in December because it was tabled with the government in December, and the government had plenty of time to incorporate Mr. Justice LeSage's recommendations into this report and also to deal with amendments that had been proposed the last time and which the government didn't agree with, only because they thought the wording needed to be improved. Yet they didn't take any steps to improve the wording and bring them back some two years later.

So let's not be too sweeping about these remarks. What I'm suggesting here, with what we now have from this government, after recognizing that it took some time to get to where we are, is that there'll be another seven years before we even look at what needs to be done to this legislation. That's what's wrong.

If we are here now still dealing with the LeSage recommendations going back to 2003—

A voice: It's Lamer.

Mr. Jack Harris: —then there's something significantly wrong with the process.

Thank you for correcting me.

We're still dealing with Lamer and a number of Lamer's important recommendations that this government is still refusing to put into place. And now we're being asked to put into legislation that we should wait another seven years before some of the specific sections that are dealt with ought to be considered.

I don't think that's good enough. I think if this does get passed in the near future, which I assume it will, if the government decides to call it for debate in the House and bring it through, then whatever progress is contained in this legislation—those aspects of this bill that are progress—will actually take place.

What clause 101 says is that we're going to wait another seven years before we have another go at it. Does that mean the next changes we're going to expect to see are going to come in 15 or 16 or 17 years from now? If the same pace of legislative change that you're suggesting continues, then I don't think that's good enough.

● (1655)

The way to deal with that is starting now. Having gone through this process, having exposed the problems that we see with this legislation, can we not actually have a fundamental review of this legislation to see where we need to go to actually bring our military justice system into the 21st century? We're just scratching the surface in terms of some of the changes that are being made here.

I recognize that to have the list we're debating in the government amendment to clause 75—a watered-down version of an amendment that I made in the last Parliament on behalf of my party, and we reached that result back in the last Parliament—is progress. If 95% of the service offences that go to court do not result in a criminal conviction, as has been suggested by the government, that is some progress. I think we recognize that. Instead of feeling blame, I take some credit for that. I say this not to boast, but to counter your suggestion that I should somehow share the blame for taking 10 years to get to this point, when it was the efforts that were made two years ago in this very room that got us to the point where we are now, and another six months in the House of Commons to get us back to there, at least on clause 75.

No, I don't share the blame for that. I think we're making a mistake here to limit the review of this legislation to something that's going to commence in seven years from the day on which this particular piece of legislation, Bill C-15, receives royal assent. That's going to mean that any further changes could be put off as late as 10 years from now.

What I do want to say, though—and I acknowledge your slight detour there to the LeSage report, which we've heard many times wasn't available in time to make changes to this legislation, which I disagree with—is you did indicate that the LeSage recommendations will require some legislative change. I wonder what kind of commitment the government is prepared to give, in terms of when the LeSage recommendations might be addressed in legislation. I'm assuming that's not going to wait seven years, and that we may have a timetable already in mind. If there is a timetable with respect to that, please let us know.

(Clause 101 agreed on division)

(On clause 102)

● (1700)

The Chair: Clause 102 is a French amendment.

(Clauses 102 to 105 inclusive agreed to)

The Chair: Clause 106 is amendments to the—

Mr. Jack Harris: Chair, can I ask a question? I know we just carried it, but I'd like to have some clarification here from Colonel Gibson on clause 105, if that's acceptable.

The Chair: Since I'm such an accommodating individual, Colonel Gibson, if you can—

Mr. Jack Harris: Clause 105 requires the disclosure of a conviction. It is specific to offences in proposed paragraphs 249.27 (1)(a) or (b), and it creates an offence for someone who is dealing with that in terms of employment in departments of government, employment by a crown corporation, employment in the Canadian Forces, or in any work or undertaking within the legislative authority of Parliament. That refers only to federal government employment. Is that correct?

Col Michael R. Gibson: Just a moment, please, Mr. Chair.

Mr. Jack Harris: It creates the offence of asking someone whether they've been convicted of a particular offence.

Col Michael R. Gibson: Mr. Chair, this defence provision was modelled after an existing one in the Contraventions Act. There are actually two parts to that scheme, as we've discussed in a fair bit of detail, in relation to clause 75. That was modelled after a section in the Contraventions Act. This creation of an offence provision under part VII, in other words, one triable in a civil court, even though it's created under the National Defence Act, is meant to fulfill exactly the same policy purposes as those which Parliament has already created in the Contraventions Act, which is to say that it gives some teeth to a prohibition against people improperly asking questions about a conviction in respect of which a record wasn't created.

● (1705)

Mr. Jack Harris: That's if a record was not created.

Col Michael R. Gibson: Right. This is meant to back up clause 75. This is an adjunct to clause 75.

Mr. Jack Harris: I hear what you're saying and why it's there, but what is the practicality of that if the rules here are so arcane, as is being suggested, that specific offences are tied within the threshold of a punishment?

How is one to know, shall we say, if one has an application form and is asking questions about the type of record that a person might have or a record of conviction that a person might have, in terms of whether you were AWOL and got less than one of the four punishments that we talked about here, or your fine was less than a month's pay, which is the current wording of the amendment to clause 75?

How does someone who wants to comply with this actually know what to do?

Col Michael R. Gibson: Mr. Chair, the answer is that they wouldn't make an inquiry about the specific facts of the individual applicant. They would structure their question in an employment questionnaire on the basis of the criteria set out in the provision; that is to say, if they were asking about a military conviction, the question would have to be structured in such a way that it didn't cross that line. That's how you do not require them to know the facts of a particular applicant. You set out a general provision.

In respect of how one gains notice of that, of course the answer is the same as it would be for any other offence created through an act of Parliament, whether it's in the Criminal Code or any other act.

Mr. Jack Harris: I'm just trying to think what the application would say: "Were you convicted of an offence under the following sections where you got a fine greater than a severe reprimand or a punishment greater than a severe reprimand or any other offence under the Code of Service Discipline?" Is that the kind of complication we'd have to see in an application form?

Col Michael R. Gibson: Mr. Chair, through you to Mr. Harris, one would look at the specifics of the provision. What would be prohibited would be use of an application form that required the applicant to disclose a conviction offence described in proposed subsection 249.27(1) of the act.

So if in presuming—

Mr. Jack Harris: Would you leave it to the applicant to figure out what that meant?

Col Michael R. Gibson: No, it would not be the applicant. It would be the prospective employer, and it's confined, as you've noted, to the federal sector.

One presumes a sufficient degree of sophistication and availability of legal advice to employers in the public sector to be able to comply with the law. It's the same as what I said before about the current provision of the Contraventions Act or any other offence created by Parliament.

Mr. Jack Harris: I don't think they have as complex a scheme as we're devising here in relation to that. Whether someone is convicted under the Criminal Code or another act of Parliament offence, normally that's the kind of provision you see in an application form. I just think there are complications, and the practicality of that particular section seems to me to be questionable, in terms of the difficulty in complying with it, particularly when we're looking at the two thresholds here, the listed offences, plus the requirement that the penalty itself be of a particular type.

It seems to me that would have to be included in the form itself, if someone were to devise an application form to ask that particular question of an individual. From a practical point of view, I don't know how useful clause 105 would be.

[*Translation*]

The Chair: Ms. Moore, you have the floor.

Ms. Christine Moore: Could we group clauses 106 to 108 together?

[*English*]

The Chair: That's what I was thinking. Good idea. Clauses 106 to 108 are all linguistic for conformity.

(Clauses 106 to 108 inclusive agreed to)

● (1710)

The Chair: Clauses 109 to 114 are transitional provisions. Can we deal with them in one group?

(Clauses 109 to 114 inclusive agreed to)

(Clauses 115 to 117 inclusive agreed to)

The Chair: We will proceed to NDP-22, reference number 5995913.

Mr. Harris.

Mr. Jack Harris: This particular amendment is a consequential amendment to the Criminal Records Act. As we know, clause 75 is by its own terms intended to be retroactive in its scope. We look at the numbers that have been suggested by the Judge Advocate General's office in terms of the number of convictions that have occurred in the last few years, upwards of 2,000, and it is suggested that about 94% of them would no longer have criminal records. This amendment would ensure that any reference to these offences would be removed from the automatic criminal records retrieval system. I guess that's code for CPIC.

By way of background, I would like to pass around a paper that was provided to us by way of explanation from the Library of Parliament.

The Chair: I'm going to stop you right there, Mr. Harris, before you start circulating papers. I'm going to rule this as inadmissible. As you guys know, chapter 16 of O'Brien and Bosc deals with the legislative process. At the bottom of page 766 and the top of page 767 is the issue of relevance as it refers to amendments to a bill. Since this is an amendment at second reading, this amendment that you're proposing is inadmissible, and I'll just quote:

> ...is inadmissible if it proposes to amend a statute that is not before the committee or a section of the parent Act, unless the latter is specifically amended by a clause of the bill.

Since you're quoting section 6.1 of the Criminal Records Act and it's not being amended by Bill C-15, your amendment is inadmissible. So, I'm ruling it out of order.

Mr. Jack Harris: The Criminal Records Act itself—

The Chair: It is, but not section 6.1.

Mr. Jack Harris: —is being amended by this bill.

The Chair: Yes, but not section 6.1.

I've made a decision and I'm supported by the head of the table here on that decision, so we're ruling it inadmissible.

Mr. Jack Harris: Well, that same argument can be made in relation to our amendment to clause 75.

The Chair: Clause 75, we can go back to that.

Mr. Jack Harris: This was sort of a backup plan, I guess.

The Chair: That one is out of order.

We're going to continue on after clause 117 which is the Criminal Code.

We have clauses 118 all the way through to 135. I'm hoping we can group these together because these are all consequential amendments to conform Bill C-15 and the National Defence Act with all these other acts. Can we do that right up to 135? Then we'll come back to the stood clauses.

We'll let Mr. Harris quickly go through. They're all consequential amendments. They're all about conformity of Bill C-15, the National Defence Act, and all associated acts.

(Clauses 118 to 135 inclusive agreed to)

The Chair: We stood two clauses that we need to come back to first.

(On clause 11)

The Chair: Clause 11 was—

● (1715)

Mr. Jack Harris: We resubmitted ours.

The Chair: You resubmitted amendment NDP-15.

We'll circulate the new and improved amendment NDP-15, which is an amendment to clause 11. That is reference number 5997131. The improved version is being circulated as we speak.

Mr. Harris, would you move that onto the floor?

Mr. Jack Harris: I so move. There was a change in the reference to lines and sections here, so we've fixed the numbers.

I don't know where we had got to with respect to debating this.

The Chair: We started debating it, and then I think there was some—

Mr. Jack Harris: I think we stood it down because there was—

The Chair: We stood it down because there was some confusion, so let's pick up from where we were.

Mr. Jack Harris: If I may, then, I'll discuss the concern about the grievances. The fact is that we've had a situation whereby the existing legislation allows for civilians to be participating as part of the grievance board, and it is intended and specified. In fact, we're actually renaming it an “external” grievance board, and the matters that are dealt with are primarily related to benefits.

It's a circumstance where the experience has been that at one time it was a mixture of civilian and military people, but for some reason, in the last five or six years we're getting all military or ex-military people put on the board. We think that's wrong, so we think some legislative change has to take place to ensure that the grievance board is not simply another military board, and that there is a significant civilian presence on that board, and in fact, a majority. That's why we want to see at least 60%—that's what we've chosen—be members of that board, for the sake of ensuring that we truly have an external review board, in conformity with the notion in the legislation.

As I say, the kinds of judgments this group must make are interpretations of policy and rules, and the group must apply fairness to those grieving within the military. Obviously, in regard to having people with military knowledge and experience there, in addition to the advice they would have from counsel to the grievance board and staff, as well as the representations made to the grievance committee by the military themselves, a substantial and significant representation by people with military experience is appropriate. But there appears to be a need to ensure that there be non-military people there. This is why the recommendation and the amendment are put forward.

The Chair: Thank you.

This is adding a new paragraph to subsection 29.16(2).

Mr. Alexander, please.

Mr. Chris Alexander: Thanks, Chair.

We'll be opposing the amendment for reasons that will not surprise anyone at the table, because we made them clear during the debate at second reading in the House. We understand the intention that the opposition has behind their amendment, but we think the form the amendment is taking is misguided, and indeed would create a different kind of perhaps unintended injustice, in that it would discriminate against members of the military. Of course, they could still fill the 40% of the grievance committee, but they would be ineligible for forming a larger part of the membership of the committee.

We just don't think that there are grounds for filling a committee like this on the basis of anything other than merit, professional qualifications, and professional achievement. Yes, military members have shown that and have furnished a large number of the members of the grievance committee, but that need not necessarily be the case if others with similar forms of expertise who have not worn the uniform wish to put their names forward and be considered in the future.

For charter reasons, for reasons of not discriminating against the candidacy of anyone to be a member of this board, and for reasons of not wishing to fetter the Governor in Council in making such appointments on the basis of the very best advice and on the basis of the widest possible consideration of the expertise available in this country, we will oppose this amendment.

● (1720)

The Chair: Just so everyone knows, the difference between this new version and the first one we stood is just a small drafting error. In the first version of NDP-15, it was proposed new subsection 29.16 (2.1). The subsection we're adding is actually 29.16(2.01).

Mr. Harris.

Mr. Jack Harris: Briefly, Chair, in rebuttal, some of the comments of my colleague, Mr. Alexander, would actually be reasonable if, in fact, the experience of this grievance board had been different. To suggest the reason they are all military is that they are the ones most qualified flies in the face of the fact that we're talking here about the grievance board.

There are thousands of people throughout the country and in the federal public service already with experience in managing grievances, dealing with human resource issues, dealing with benefits, applying benefits, interpreting policies and legislation, who could well have been appointed if the government was taking the view this was a board that was open to them and was intended to be an external review board. It seems clear that anybody who isn't in the military is being—Mr. Alexander uses the word "discrimination"—discriminated against by the actions of this government.

So this wouldn't be moved if it wasn't necessary, and it certainly appears it is, given the actions of this government. We don't see any indication that they are going to change.

The Chair: Mr. McKay.

Hon. John McKay: I think this amendment is supportable primarily because the grievance board deals with concerns that actually operate outside of the military, i.e., wages, pensions, benefits, and all that sort of stuff. I think the more soldiers are treated in the same fashion as civilians, in that area at least, then the better off we are. I think it will generate a more consistent application of decision-making across the spectrum of decisions and the various forms of people who end up working for us in one way or another.

I think Mr. Harris's amendment is supportable.

(Amendment negatived [See *Minutes of Proceedings*])

(Clause 11 agreed to on division)

(On clause 75)

The Chair: We're back to clause 75. We have on the floor amendment G-2, moved by Mr. Alexander. Are there any further comments on it?

[*Translation*]

Ms. Moore, you have the floor.

Ms. Christine Moore: Since you want us to deal with them separately, I will briefly discuss section 98 of the National Defence Act because, in this case as well, I believe that—

[*English*]

The Chair: You can move that on to the floor, and then you can speak to it.

[*Translation*]

Ms. Christine Moore: That is what I am going to do.

[*English*]

Mr. Jack Harris: Chair, on a point of order, on that amendment, just to avoid confusion, I've underlined in pen section 98. This is a drafting issue to replace a particular line with another line, a list of numbers. The only one that's different is 98. That's added into the list in line 2.

● (1725)

The Chair: Okay, so we're at a proposal to add section 98.

[*Translation*]

Ms. Christine Moore: Once again, the spectrum is broad. It can concern something not very important or something quite serious. I find it hard to accept that. This states: "malingers or feigns or produces disease or infirmity."

I have seen a number of cases. For example, body piercings are prohibited in the Canadian Forces. Members may not have them according to disciplinary rules. I have seen people with body piercings that had become infected. Consequently, they had to be absent from work in order to take antibiotics. They were subsequently charged under section 98 and elected summary trial. Since this was a minor offence, they were merely sentenced to a fine, but that was nevertheless under section 98.

People will be charged with quite minor offences under section 98. I also know of people who have been absent from work as a result of a sunburn. They had shaved off all their hair and suffered a sunburn that had slowed down the service.

Other behaviour related to injuries suffered during very long courses is often not discouraged by commanding officers. I have previously spoken about this. It frequently occurs that someone becomes injured three or four days before the end of a master corporal training course. A military member with a sprained ankle who obeys medical orders not to walk will miss the final exercises and fail the course. Military members will often ask personnel to tighten bandages so that they can walk, even if it means paying a fine.

Unfortunately, commanding officers do not necessarily discourage members from disobeying medical orders or aggravating injuries. They prefer that members not retake their training courses, in which a great deal of money has been invested. This behaviour is not widely discouraged.

I understand that we are talking about an entirely different kind of offence when someone deliberately cuts someone else's arm to prevent him or her from serving. As was the case a little earlier, I believe this does not seem logical in certain cases. Consider the example of someone who has disregarded medical orders and has aggravated a sprained ankle.

Consider as well the example of a 16-year-old military member who has a body piercing that has become infected and therefore has to be absent from work. I believe it is somewhat excessive not to include that in clause 75, particularly considering that, if someone cuts someone else's arm to prevent him or her from serving, that person will be sentenced only to a fine.

I believe there is a logic in the punishments that will be imposed, as a result of which we can readily include this in the Conservatives' amendment in clause 75. The logic behind the punishments will determine whether or not it applies.

That was the comment I had to make on section 98.

[*English*]

The Chair: Are there any other comments?

(Subamendment negatived [See *Minutes of Proceedings*])

The Chair: We're back to the main motion.

[*Translation*]

Ms. Christine Moore: No, I have other subamendments.

[*English*]

The Chair: If you want to move another amendment, please do.

[*Translation*]

Ms. Christine Moore: Now the purpose of the subamendment I want to move is to add section 100 to the Conservatives' amendment.

● (1730)

[*English*]

The Chair: You're adding section 100—

Mr. Jack Harris: Mr. Chair, I'm looking at the time here. The meeting was set from 3:30 to 5:30, so....

The Chair: There's a motion to adjourn.

An hon. member: A recorded vote.

The Chair: Okay, the committee would adjourn by the adoption of a motion to that effect, per chapter 20 of O'Brien and Bosc.

(Motion negatived: nays 6; yeas 5 [See *Minutes of Proceedings*])

The Chair: Okay, so we're not adjourned.

We're on government amendment 2 to clause 75.

Madam Moore, you were saying that you were moving another subamendment by adding section 100. Do you have that in writing?

[*Translation*]

Ms. Christine Moore: Yes, we have it in writing. We would like to add section 100 to the list of provisions. I am going to wait until people have a copy before making my comments.

[*English*]

The Chair: You have the floor.

[*Translation*]

Ms. Christine Moore: There are two questions regarding section 100. First, it refers to helping set someone free from prison, whether negligently or wilfully. There is the idea that it may be done negligently. For example, someone could be extremely tired or have improperly closed the lock and would be charged under this section.

Now the other aspect where I do not understand the logic—

Some voices: Oh, oh!

[*English*]

The Chair: Order, order. We're trying to hear debate here.

Okay, Madam Moore.

[*Translation*]

Ms. Christine Moore: There is another aspect whose logic I do not understand. Section 101 is included in the Conservative amendment. Someone who escapes from prison on his own will not attract a criminal record. However, when someone helps another person, out of negligence by poorly closing a lock, for example, even if that is not really done wilfully, whether the individual has acted too quickly or because he was fatigued, he may attract a criminal record. I do not understand why a person who escapes falls within the amendment, whereas a person who has helped another individual, either negligently or wilfully, is not. I do not consider that logical. I would like members of the government party to explain that logic to me because I do not understand it.

[*English*]

The Chair: Colonel Gibson, do you want to reply to that?

Col Michael R. Gibson: Mr. Chair, just to explain technically why that particular offence isn't in the list, Parliament, in creating the offence under section 100, provided that the person who committed it would be liable to imprisonment for seven years. Once again, that goes back to the objective gravity of the offence criterion.

I should just point out, in case members are not aware, that this scheme is meant to exclude minor offences. “Serious offence” is a defined term in section 2 of the act. It provides for “an offence under this Act or an indictable offence under any other Act of Parliament, for which the maximum punishment is imprisonment for five years or more”. So in the terms of the NDA itself, by definition section 100 deals with a serious offence.

Thank you, Mr. Chair.

The Chair: I've got Mr. Harris and Mr. Alexander.

Mr. Jack Harris: Mr. Chair, I'm dealing here with a section of the code which, as my colleague has pointed out, we are talking about whether or not a person first of all is in lawful custody. Sections 101 and 102 provide for someone escaping lawful custody, somebody who was in lawful custody who actually takes off. It's not someone who's AWOL and doesn't show up after a night on the town, but someone who is in lawful custody as a result of being arrested by military police, someone who has committed any number of offences and otherwise ought not to be in custody, someone who could be a danger to the public, but escapes from that and is committing an offence. That person somehow or other is treated more leniently, at least in connection with a criminal offence, than someone who actually allows that person to escape, or doesn't lock the door properly, or somehow fails in their duty as a result of which the person is actually gone.

We do have, I guess, in the argument or scheme presented by the Judge Advocate General some theoretical notion that the particular offence may be in one category. But it's pretty clear looking at the section itself, aside from the maximum penalty, that setting free without authority or allowing or assisting the escape can actually be something that's not worthy of significant penalty. It's pretty clear, once again, using the chapter that we put forward, chapter 104, which lists the scale of punishments, that imprisonment for any number of charges lesser than imprisonment for two years or more could result in a sentence for someone charged under section 100.

The provision here, if you read down through section 100, it talks about every person who “without authority sets free or authorizes or otherwise facilitates the setting free of any person in custody, negligently or wilfully allows to escape any person who is committed to his charge, or whom it is his duty to guard or keep in custody”—so somebody who is guarding that is not doing a proper job—“or assists any person in escaping or in attempting to escape...”. Surely I don't know how they could be treated as offences for which the punishment they might receive is greater than that for the person who is escaping.

We do recognize that some attempt is being made here to remove the consequence of a criminal offence on individuals who are charged with specific offences, but how we can have a scheme which has two things in place, one, a particular offence, and two, the severity of the punishment, well, surely the severity of the punishment itself determines whether or not something is so serious. If someone is going to lose their rank in the service, someone is going to be dismissed from the service, someone is going to be held in detention for....

● (1735)

If you let somebody out who shouldn't be out and they do something horrible, that's likely to end up with someone being treated very significantly by a tribunal, whether it's a court martial or a service tribunal in the form of a commanding officer. You let this guy out and he went and did something notorious. That's going to result in some significant penalty. People for whom the consequences are serious are going to get serious punishments. They are not going to be considered in the category that the scheme of the act has created.

We have listed here a severe reprimand, a reprimand, a fine, or a minor punishment. These might apply to somebody who mistakenly allows someone to escape. Maybe he didn't have proper authorization. Maybe the person who was held in custody was simply confined to barracks or was in a car on his way somewhere and he thought he was allowed to go. There could be any number of ways in which someone could negligently allow someone to escape without doing anything that would get them more than a minor punishment. Maybe the person wasn't fully informed or was passed on to somebody else. One can easily come up with circumstances where somebody's charged with an offence and his degree of blameworthiness is rather minor. As a result of this rather minor blameworthiness for what is a service offence, a person could end up with a criminal record. What we're trying to do is ensure that fewer offences attract a criminal record, and we're trying to do it in such a way that we reach the most people possible within a reasonable scheme.

I don't think that this is the only provision. There are other amendments to clause 75 that we'll be discussing, but right here in the scheme proposed by the government in clause 75, as amended by G-2, we're listing offences that could be a problem. This could be true regardless of the mode of trial, whether it involves a court martial or not. You could have a court martial, or you could have a matter going before the commanding officer. But if you were on this list and attracted a minor punishment, you wouldn't get a criminal record.

We haven't come up with the whole list. I could go through the list of all of the offences under the National Defence Act that are considered service offences in that they're related to and directed at service. We haven't listed every single one of them. We're not certain that every single one of them is appropriate for this list, because some of them are quite serious.

● (1740)

You'll see when we get to it sometime later on our suggestion that any offence that's tried by summary conviction or trial, we think that the proper solution to the circumstances here is that those offences would not attract a criminal record for the reasons that have been argued strongly before this committee and in the House and by significant, experienced legal counsel and academics and, in one case, a former judge. We have the testimony and submission from Justice LeSage in relation to that as well.

We have to understand that we're here trying, in our different ways —ours with our own amendment that we'll get to later, and the government with this one—to expand the number of offences that won't attract a criminal record. We think that the arguments that are being presented here by my colleague Ms. Moore are quite compelling, as she has done in the argument on the malingering case, and as she has done in the argument on the disobedience of a lawful command.

● (1745)

The Chair: Okay, Mr. Alexander.

Oh, you're not done.

Mr. Jack Harris: I was just in mid-sentence, sir. I had to get out the glass of water to be able to continue with my voice.

The Chair: Should I order some supper?

Mr. Jack Harris: I have a lot to say. I think maybe supper might be in order, sir. It seems that without any notice or consideration of anybody's schedule, the government has decided that we're going to be here all night, and if that's the case, we may as well settle in.

The Chair: Okay, we have one clause to go. Let's keep going and let's be relevant and have no repetition. I do have other people on the speaking order who want in, Mr. Harris.

Mr. Alexander and Monsieur Larose and then maybe Madam Moore.

Mr. Jack Harris: I can get back again, maybe, but just to conclude for now, on the arguments that are being made here in relation to this, we're not talking about something that is so serious and so egregious that it ought to attract a criminal record. In this scheme, and I think this is the point here, this is a particular way of looking at it. It has nothing to do with our other argument about mode of trial, whether we're going by courts martial or not, but it has to do with whether or not it's so severe as to require that there be.... You know, when we look at a criminal record, we're talking about do we have a circumstance where the public, i.e., employers, whether it be people who are going to hire somebody to do a job, whether it's crossing the border to the United States, whether some consequence of having a charge.... You know, when you look at it on the surface, assisting someone escaping sounds pretty terrible. It's like jailbreak, the guy who in the cowboy movies attaches a rope to the doors of the jail and drives off on his horse and hauls the door of the jail off.

The Chair: You don't have a horse.

Mr. Jack Harris: I don't have a horse, but I have a pony and it's a pretty strong pony. They're tough ponies, these Newfoundland ponies, but I can't ride them.

We're talking about escaping custody, meaning breaking out of jail, jailbreak. This is the image. And you can imagine yourself as a United States border guard and Mr. Chisu comes to the border and they check him out and find out that he has a record for helping someone escape. What do you think? Do you think Mr. Chisu would have great luck getting into the United States with that kind of thing on his record? Frankly, I think he would, and I think he would because it sounds pretty terrible, that you're assisting someone escaping, setting someone free without authority, allowing or assisting escape. That sounds like something that might be taken pretty seriously at a border. What we're looking at here is the question of whether or not this is necessary. Well, in my view, it's certainly not.

The Chair: Mr. Alexander.

Mr. Chris Alexander: Thanks, Chair. It's good to see that we're down to one last clause and a few amendments. We look forward to dealing with them expeditiously, but I have one question, to clarify this particular point, for Colonel Gibson.

Are we correct in understanding, Colonel, that when we speak of setting free without authority or allowing the escape of any person under this section 100, that any person in this case could be an enemy, as defined under the act, which is to include an armed mutineer, an armed rebel, armed rioters, pirates, or indeed the member of a terrorist group, if they're considered an enemy, in the context, which would obviously almost certainly be an operational context to which this particular section might apply?

● (1750)

Col Michael R. Gibson: Mr. Chair, Mr. Alexander is correct.

"Any person" in the act literally means any person; it's not confined to a member of the armed forces.

The Chair: Okay.

[*Translation*]

Mr. Jean-François Larose: Thank you, Mr. Chair.

As you know, I was a correctional officer for eight and a half years, during which time we had riots. We were responsible for accused who were suspected of committing heinous acts and for other persons. Escape attempts were made.

I see a danger here. People were responsible for keeping other people in prison, whether they were accused, convicted persons, people serving an intermittent sentence or even escorts. As a result of all kinds of circumstances, those individuals were not always in prison. We were also in the civilian world because it also includes people under house arrest. The danger is that, if a person responsible for supervising another persons can receive a stiffer penalty than the one he or she is supervising, that can have an impact on their relationship.

As you know, a convicted individual has rights. The individual in charge of that person has a responsibility to ensure that that person has what belongs to him or her, but also to supervise that individual so that he or she can serve the sentence. If the individual who has that responsibility loses control—whether as a result of negligence, fatigue or any other reason—and risks receiving a harsher sentence than the person who has escaped, the relationship will change. I have seen this. That relationship will be affected because, then, regardless of whether the rights of the person for which he or she is responsible are respected, he or she will be punished more harshly. This is a serious problem. I do not believe an exception is made for that in the armed forces, regardless of the person for whom that individual is responsible.

There have been sanctions in the past. People were negligent in the correctional sector and were punished. However, those punishments were not more severe than those imposed on the Hell's Angels, for example. That would have made no sense.

There is a serious danger that this will have a negative effect on the relationship between those individuals. In that case, would it be desirable to fire on the individual because the supervisor risks receiving an excessively harsh sentence because the prisoner escapes? The person in a position of responsibility would lose control and risk being fired upon. At what point do we encourage a removal of responsibility from the person who has to ensure control, through either a prohibition from acting or any other measure?

I have seen them all. I have not necessarily seen them all in the armed forces, but I have seen all the types of control and responsibility one can have. A person who already has the courage to supervise someone who is potentially dangerous should never run the risk of receiving a harsher sanction than that of the person he or she is supervising.

I am telling you that you are entering very dangerous territory.

[*English*]

The Chair: Thank you.

Madam Moore.

[*Translation*]

Ms. Christine Moore: I would like to return to section 100 and discuss it in a general way. The question arises as to what the basis was for determining which sections should be included in the amendment moved by the government party and which should not.

I believe that, at the outset, that party relied solely on sentences. We have been told that, if a situation might involve a serious sentence, it would not be included. I believe there is something logical in that. Ultimately, the amendment was moved to determine who should not attract a criminal record on the basis of the offences that would not attract a criminal record in the civilian system. In the civilian world, a person who helped a terrorist escape from prison would be convicted. However, if an individual improperly locked down the system as a result of fatigue or negligence—we agree that some prisoners can be real Houdinis, real experts, and that all procedures must be properly followed—I believe there would be a problem.

Coming back to what we said earlier, it is illogical for an individual who escapes not to attract a criminal record. A military member could escape without being penalized but would be punished if he improperly locked the door out of negligence. That is absolutely illogical. We have to agree on that in the context of this clause.

You said that the percentage of people who would not attract a criminal record for the same offences committed in the civilian world was currently about 95%, but I believe it is reasonable to consider increasing that figure. So the idea is to avoid all that. I think we can contemplate a better objective. With regard to the sections I have identified, including section 100, no criminal charges would be laid in civilian court in certain cases. As regards the sentence imposed by the authority responsible for trying the case, by either summary trial or court martial, a sentence is provided for under clause 75. This discrimination is therefore already in effect.

For example, if an individual who deliberately released a terrorist who had killed a number of people was sentenced only to a fine, I believe that would really constitute a problem. That would definitely call into question the way in which sentences are imposed, the logic of the process and the way in which people design the justice system. It would not be normal for that individual not to be reduced in rank or imprisoned. That would indicate that something is not working in the justice system.

Since these sentences are part of a graduated scale, the relative seriousness of the offences has already been determined. In the context of the amendment, the four most lenient sentences are the only ones that have been selected. In my opinion, the logic behind all that is to distinguish what is more serious from what is less so.

I have taken the time to reread all the sections of the National Defence Act. I have not presented those offences that attract a criminal record in the civilian system. Theft, for example, attracts a criminal record in both the civilian and military systems. Sincerely, the offences I have presented here concern cases in which individuals convicted under these sections would not be given a criminal record in the civilian system. So there is a logic in this. I did not do it for fun. I really targeted those sections that did not apply.

As I have already said, I find it hard to understand why an individual who has escaped from prison should receive a more lenient sentence—or at least one that will have a less harsh impact on his or her life—than another individual who failed to check to see whether the lock was properly closed, not out of gross negligence but because he or she failed to comply with certain procedures, for example.

● (1755)

That makes no sense to me. I think we have to find a way to correct this. We do not have to do much. We need only add section 100 to the amendment, and that will be enough.

In any case, if someone did that deliberately, he would receive a sentence harsh enough—I hope so, in any case; otherwise there would be a problem—that the provisions contained in section 75 could not apply because a sentence harsher than a reprimand has been imposed.

Thank you, Mr. Chair.

[*English*]

The Chair: Thank you.

Mr. Harris.

Mr. Jack Harris: Chair, I was intrigued by my colleague Mr. Alexander's somewhat innocent question to Colonel Gibson as to whether this would apply to allowing a terrorist to escape. Now, I guess that's sort of known....

I was intrigued by it. I guess I'm not surprised by it, because it's the kind of thing that—

● (1800)

Mr. Chris Alexander: Or the enemy.

Mr. Jack Harris: Or the enemy, or terrorist, or whoever. Does it apply to anyone? Yes, of course it applies to anyone, because that's what it says, “anyone”.

This is sort of the bogeyman argument, I suppose, right? We have to make sure to take all possibilities that could possibly be interpreted as saying, “Oh, the opposition wants to let people who allow terrorists and enemies to escape to go unpunished, and to be treated—”

Mr. Chris Alexander: Sometimes you do, though.

The Chair: Order.

Mr. Jack Harris: “—with kid gloves.” That's the kind of argument we hear in the House all the time. It seems to be part of the talking points that we hear from the government.

What I would wonder, I suppose, and I don't need to ask Colonel Gibson this, is that if someone were to wilfully let go the people in their custody who were enemies of Canada, who were prisoners of war, who were captured, who were soldiers, if they were just to say, “We're going to let them go”, would there be any reasonable expectation that such a person would be called before a superior officer and simply reprimanded? You know, “Don't do that. Don't do that. Sir, you shouldn't be doing that. You're hereby reprimanded. Don't let the enemy escape. You're not supposed to do that. We're at war.” Somehow I don't think so.

Mr. Opitz over there, who's spent considerable time in the Canadian Forces in command positions, would have to agree with that.

You know, the chances of them forfeiting seniority, having a reduction in rank, being put in detention, being dismissed from the service, being imprisoned, being dismissed with disgrace, any of these sentences that would be applied here would apply to any of these punishments.

The Chair: Order over there.

Mr. Harris has the floor.

Mr. Jack Harris: Any of these punishments that are within the scope of the scale of punishments set out in subsection 139(1) of the National Defence Act that are above the level of severe reprimand would no doubt obtain, if someone were guilty of allowing the enemy to escape either wilfully or through negligence, during wartime, or if one was charged with the defence or guarding of a known terrorist.

I do want to enlighten my colleagues as to what exactly is included if someone breaches section 100 of the National Defence Act. It's not simply someone who lets the enemy go after being charged with the requirement of retaining a prisoner of war, or retaining some known terrorist in order to prevent them from committing acts of terror or violence. That's not what this is specifically aimed at. This is a very broad offence, the purpose of which, according to *Canadian Military Law Annotated*, is to prohibit people from facilitating the unauthorized release or escape of a person in custody. Custody is not specifically defined in this act, so there is a very broad definition. It applies to anyone who is subject to the code of service discipline, in other words, the people who can be charged, or the people being charged under this, armed service people, or it could be civilians in certain circumstances, but the person whom the accused assists, sets free, or allows to escape, is not limited to a person subject to the code of service discipline nor must that person be a Canadian citizen.

So, yes, Mr. Alexander, you're right, as is indicated by this annotation as well as by Colonel Gibson. But in fact, not only is it limited to a particular jurisdiction, it could happen anywhere in the world. But the phrase “authorizes or otherwise facilitates the setting free”, indicates that the accused—

Mr. Jean-François Larose: Mr. Chair, on a point of order, I'm having a hard time hearing.

The Chair: Order. Keep the sidebar conversations down, please. I'm partially deaf myself.

Mr. Harris.

Mr. Jack Harris: Thank you, Chair.

The word “facilitates” is very broad and it could include even such acts as providing information. You could provide information about certain things to someone who is in custody, or let them know or give them access to information, or let them look at some document that might assist them in escaping.

The Queen's regulations and orders uses the term “without authority”. That's broad enough as well to signify that the accused did or omitted to do something without the approval of his superior officer or without the sanction of law, practice, or custom. It could be something rather minor that they neglected to do, or actually did, but it wasn't authorized by either the approval of an officer, or with a legal sanction, or with a custom. Again, that's very broad and allows for all sorts of things to run one afoul of the law.

When you look at paragraph (b) of section 100 of the National Defence Act, where one “negligently or wilfully allows to escape any person who is committed to his charge, or whom it is his duty to guard or keep in custody”, that offence is committed when the person actually escapes as a result of the act or omission. So you not only have to do something, you have to be negligent or wilfully allow something to happen.

For example, if a person were in a cell and you failed to lock the cell, or if you left the keys on a hook next to the door and the person reached through the bars and took the keys, by being negligent you would have run afoul of this. Assisting anyone in custody also deals with someone who is attempting to escape custody, and if there is an attempt to escape, there has to be a definition of how that works. Even something such as diverting the attention of the person who had the custody of someone, thus enabling him to leave his room in the detention barracks in an attempt to escape, is an example of this offence. The same charge is suggested for leaving unlocked a cell door used to hold a person in custody, which constitutes an offence. Even if you divert somebody's attention while some guy who is confined to barracks is able to get out without being seen, that's considered to be assisting someone escape lawful custody.

When we talk about custody here, it doesn't have to be someone who is in detention. It doesn't have to be someone who is a prisoner of war. It doesn't have to be someone who is a known terrorist who has been arrested and is known to be about to commit an offence of some sort. It can be anyone who is... It's not defined, and it says here that, “A required element of this offence is that the person being assisted must be in custody.”

The definition of custody is essential in order to determine the scope of the offence, so the broader it's defined, the broader the offence. There being no definition of “custody” in section 100 or elsewhere, it then goes to the *Oxford English Dictionary* , which defines it as “protection”, “care”, “guardianship“, or “imprisonment”. It could be any one of those that could be talked about here.

● (1805)

Again, the reason for the custody would itself reflect on the significance of what kind of punishment one would get. If someone is in protective care or guardianship and some careless act occurs and they wander out of the place where they are, and then they wander out of a barracks into the parade grounds, and somebody says, “Hey, what's he doing out here? He's supposed to be in his room for his own good.”... If he's brought back there five minutes later and somebody has carelessly allowed him to escape—“escape” is not necessarily the word, but “wander off”. If someone is there and they say, “Look, keep an eye on so-and-so, and don't let him go out”, he's in custody.

An hon. member: How do you know all these tricks?

● (1810)

The Chair: Mr. Harris has the floor.

Mr. Jack Harris: I guess one might wonder how I do know all these tricks. I'm not thinking of tricks. I did practise law for 30 years and I saw a few tricks in my time. I've been inside many prisons as a visitor and in my capacity as a lawyer, and obviously you learn a lot of things.

But in terms of what we're doing here, we're talking about an offence that has many ways of being committed, particularly when we're talking about the possibility of many different kinds of custody, as I just pointed out. The degree of moral turpitude, which is a word that gets used in law—someone whose offence has a high degree of either moral turpitude, moral responsibility, or consequences, and consequences even though they may not be intended. Someone who is driving carelessly and doesn't have an accident attracts a sentence by law. Someone who's driving carelessly and kills someone attracts a much more serious penalty.

The Chair: Let's keep the focus on the amendment to section 100.

Mr. Jack Harris: What we're talking about, Chair, with respect, is how it is that certain offences are treated more seriously by the law, and in this particular case we're talking about what sounds like a significant offence, because it does have a maximum penalty or a range of sentences broader than some other offences. We're talking about this in the context of a scheme that has been devised, which says, “Okay, we have this offence here”, and we just list them. There's no principle put in place; there's no principle guiding this law.

If we look at clause 75, it doesn't say “less serious offences”, or anything like that. It says, “the following” listed “offences”. It simply provides a list. It provides no articulation of any principle. It's a list using numbers, which suggests that if a person is convicted of any of the following offences and a list is then produced and they receive a punishment of those four particular types of penalty, that person won't have a criminal record. I don't disagree with that—I think that's fine—but we're just adding to the list. If we add to the list something that can be petty, or, as we pointed out with disobeying an order, something that can be a very minor thing, then why should it attract a punishment in another context?

The Chair: I'm just going to interrupt you for a minute, Mr. Harris, because I want to make sure you're staying relevant to the subamendment. You're talking about section 100 of the National Defence Act, falling under the government's amendment.

As well, just so you know, there are other speakers who want to get on the floor.

Out of kindness, as I'm not hearing any questions being put to our witnesses, I think we should allow Colonel Gibson and Lieutenant-Colonel Dufour to leave. Or do you feel that we need them at the table?

Do you have a question, Madam Moore?

[*Translation*]

Ms. Christine Moore: Yes, we are talking—

[*English*]

The Chair: Just a question on what I'm saying here.

[*Translation*]

Ms. Christine Moore: We are talking about section 100, but if we look further on I will have another amendment respecting section 113, and I will therefore need them. If they have to leave, I believe we should adjourn the meeting because we will not be able to continue. I will need them to clarify a number of points.

[*English*]

The Chair: I have a feeling that we're not going to get the adjournment, but, Colonel, are you available?

Col Michael R. Gibson: Mr. Chair, Colonel Dufour and I will be here for as long as it takes to assist the committee to come to an appropriate conclusion. Thank you.

● (1815)

The Chair: Thank you very much.

Just for the committee's information, we have ordered some sandwiches and salad from catering. I know that some wished to have other food, but we're going to stick with what's simple.

Mr. Harris, you have the floor, but you have Monsieur Larose waiting for the floor.

Mr. Jack Harris: Thank you.

I just want to assure the chair that what I have to say is totally relevant to section 100 and the subamendment we're talking about, because when we're looking at the offence that we're dealing with here, we have such a broad definition of assisting or facilitating, because it says, “authorizes or otherwise facilitates”. One can authorize something by making a mistake or reading an order negligently or not understanding the rules, or thinking that something is authorized when it's not. But when you say “negligently or wilfully”, that clearly indicates that you either have to do it intentionally or you just do it by failing to show enough care. Facilitating, as indicated here, could be any number of possible things.

When we're talking about assisting or enabling escape, especially in the context when the person who actually escapes, who could be anybody subject to military discipline.... I don't imagine that's anyone, because I don't think you can charge anybody else for escaping under section 100. Maybe you can do something else with them, but under the code of military justice here, the code of service conduct, I think we are talking about charging an individual who is a member of the CF who was in custody and escapes. If you're under arrest or confinement or in prison or otherwise in lawful custody, escaping or attempting to escape makes one guilty of an offence. Well, the person who escapes or is allowed to escape can be charged, and if he's given a severe reprimand or fine or minor punishment, he doesn't get a criminal record. But the person whose negligence or inadvertence and lack of attention, shall we call it, allowed him to escape, gets a criminal record. Meanwhile, the person who escapes, the primary culprit, if you want to call him that, is not treated that way. There's an unfairness here.

What we're trying to achieve is fairness. I think that has to be understood. I understand Colonel Gibson's theoretical scheme where because the maximum sentence is so high, it's therefore more serious. Well, it can be treated more seriously depending on the circumstances. But pretty clearly, it's intended, and any sentencing court would say that this is reserved for the most egregious and serious offence one can imagine under that particular section. If you look at the Criminal Code, for example, if you break and enter into a dwelling house, it attracts life imprisonment. Most people charged with a first offence of break and entry—or it used to be so when I practised law—would get a suspended sentence. Maybe they shouldn't, but that's what they got. They didn't get life imprisonment. The sentence for break and entry into a dwelling house is different from break and entry into a commercial premises.

So, yes, as Colonel Gibson said, they're objectively treated more seriously in the sense of the maximum sentence being higher, but that doesn't mean in the application of the law that anywhere near that occurs with respect to an individual who commits that offence. When we're talking here of fairness, we're talking about having a list of offences that, provided the person is treated with the kind of sentence that we're talking about here, will not attract a criminal record. Fairness demands that like circumstances attract like penalties.

● (1820)

If you have a very minor offence in a circumstance where one would never receive any of the more serious penalties here, then why should that person, particularly when you juxtapose section 100 with section 101, particularly when the person who escapes doesn't, and in fact can't, get a criminal record if one of these sentences applies.... The guy who allowed him to escape, regardless of the penalty, even if his own behaviour was so minor that he simply got a reprimand because he wasn't paying enough attention, and the guy he was supposed to be looking after, because he wasn't in closed custody and locked up, wandered out into the parade ground and was spotted by a senior officer who asked, "What's he doing out here? You're supposed to be looking after him." The guy responds, "Oh, I didn't see him go. I was getting a cup of coffee." That doesn't sound too serious, and it may not be serious if the kind of custody wasn't so important and it was in a circumstance where the consequences were relatively minor, where there was no real danger and nothing occurred. Why would that person get a criminal record?

That's what we're talking about here. I don't know why we have to be religiously devoted to the notion that because there is the possibility of a more serious version of that offence to attract a criminal record, that there should be a criminal record imposed here.

We looked at this with Madam Moore, particularly from her experience in the military, and we think that 83, 98, 100, and we think we have another one, ought to be included in the list of offences that ought not to attract a criminal record. It's as simple as that.

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

[*Translation*]

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

First of all, I want to thank Mr. Butt, who is helping us and attending this meeting.

I have the same questions as my colleagues regarding section 100. I have two questions for Colonel Gibson.

The first concerns the fact that a person may be charged and receive a sentence greater than what might be imposed on an inmate, even if there was no criminal intent to allow him to escape. Reference was made to a terrorist, but we are not necessarily talking about a terrorist. It can be any person. It may simply be a private who has made a mistake in carrying out his duties and obeying orders given to him. I am not a lawyer, but I have a few notions, particularly relative to what lawyers call *mens rea*. I believe some lawyers here will be able to confirm that for me. I have a more general question as to whether it is possible to convict someone who has no criminal intent.

That is my first question for Colonel Gibson. Is this situation different in the military justice system? Do you accept something that would not be acceptable in the civilian justice system? It has previously been said that we want one thing from this bill: we want to do what has been recommended by witnesses who said they wanted military justice to be more similar to civilian justice because that is a global trend. We want to have the same degree of equity in the treatment of criminals, as other countries such as Australia and Great Britain are doing.

Would this difference between the treatment an accused might experience in a trial in a military court and the way he would be treated in the civilian justice system pose a problem, knowing the consequence—this is what we are interested in today—he would experience upon leaving the military? In the civilian system, he would attract a criminal record with all the consequences that has for his ability to find a job and to travel outside the country.

I am not a lawyer or a specialist, but how can we justify this difference in treatment?

● (1825)

[*English*]

Col Michael R. Gibson: Briefly, Mr. Chair, first of all I would point out that it's Parliament that has prescribed the objective gravity of these offences, and all this commentary, of course, relates to Parliament's judgment in creating those offences, which is, as far as I can tell, not relevant to the discussion of this bill.

But to answer your question directly, it partakes simply of prejudice to assert that somehow the military justice system convicts people on a different standard. If it's a criminal offence or an offence involving deprivation of liberties, section 7 of the charter requires, and our system requires, that the person have the requisite *mens rea* as an element of the offence.

I would simply observe that I don't think the interpretation you have given to the evidence you have heard in other fora would actually be correct.

Thank you, Mr. Chair.

[*Translation*]

Mr. Tarik Brahmi: My next question concerns the case of an inmate who takes off and escapes. Once again, this is hypothetical because we cannot assume what sentence would in fact be imposed on an inmate who managed to escape. Whatever the case may be, this does pose a moral problem, and my colleagues in fact previously mentioned this.

If an inmate who has committed a crime or a wrongful act and has been committed winds up in a situation in which he escapes, he could receive a lesser sentence than the one that would be imposed on the person responsible for guarding him and who paradoxically did not allow the inmate to escape out of criminal intent but rather out of mere negligence. As was previously said, he might simply have fallen asleep. That could also be the result of an illness. For example, that person might suffer from sleep apnea, which might have made him fall asleep, thus allowing the convicted criminal to escape.

I think back to my military training in considering this difference in treatment. Like several permanent members of this committee, I have military training. I have course did not acquire it in Canada, but rather in France. That is a different system, but one that is based on the Napoleonic organization of the military code. That system has spread to many countries and not just those conquered by Napoleon in the 19th century. Some other countries have simply drawn on that Napoleonic vision of the military code. So I remember that it was explained to us in one of the basic military training courses that every soldier who was imprisoned by the enemy had a duty—I repeat that this is not an option, but rather an obligation—to escape.

So here is the question that comes to my mind with regard to Parliament's intent in drafting this article not to criminalize this act. We are talking about criminalizing this act not only from a military standpoint, but also from the standpoint of the potential consequences for the military member in civilian life when he leaves his military life to enter civilian life. That moreover is what we imagine for most of our military members who serve our country nobly by wearing their uniform. Is it possible that this intent derives precisely from this moral obligation of every soldier who has been imprisoned by enemy forces to escape? Is that not the origin of section 100? It must be said that it is possible for our fellow citizens to misunderstand that section. That is a paradox that my colleague, of Abitibi—Témiscamingue, raised.

That is my question.

● (1830)

[*English*]

Mr. Jack Harris: Colonel Dufour, did you get a question there?

[*Translation*]

LCol André Dufour: I would simply like to repeat what Colonel Gibson said earlier. The decision and policies related to objective seriousness are less than two years old. The National Defence Act defines what a serious offence is and prescribes the maximum punishment for it. It is five years or more. That is what I can say in addition to your comments. Now it is up to Parliament to decide whether or not that offence is included.

Mr. Tarik Brahmi: In fact, I was speaking more specifically about the paradox that may exist. Once again, this is a matter of perception. As legislators, we have a moral obligation to give the people who have elected us a clear interpretation of what is just, proper and acceptable.

My question focused more specifically on what might seem paradoxical to people who are not experts, lawyers or judges. If the individual escaped, the person who is charged and detained would receive a lighter sentence than the person who was responsible for guarding him and who let him escape. That would not have been done intentionally, but rather in a manner entirely beyond his control. Is this not a paradox? Is there a connection with the fact that every soldier who is captured by enemy forces has the will, or rather the obligation—in most countries in the world—to escape and to free himself from his status as a prisoner?

LCol André Dufour: I have no other comment to add on that question.

Mr. Tarik Brahmi: Thank you.

[*English*]

The Chair: You have to remember our witnesses are here just to provide technical expertise and not to extrapolate on hypothetical situations.

Monsieur Larose.

[*Translation*]

Mr. Jean-François Larose: Thank you, Mr. Chair.

This question respecting section 100 is a problem for me because it directly affects troop motivation. Although this is not its intent, the government gives the impression that it believes the troops are affected solely by punishment, not by motivation. And yet when I was in the Canadian Forces, I was motivated by results, not punishment. When I took my recruit course, I was charged because other recruits and I had done something stupid. We had forgotten to secure our weapons, which happens to a lot of people when they are very tired. We had no legal knowledge. Our first reaction was to want to run away to Mexico because we did not want to suffer the foreseeable consequences, particularly since we were unaware of the principles involved.

A voice: Oh, oh!

Mr. Jean-François Larose: I am happy I can make madam laugh.

I have another question for you, Lieutenant-Colonel Dufour.

If we added section 100—this is a hypothetical question—would there be any other provisions and tools that we could consider? I understand that tools are necessary in order to punish. That is absolutely necessary in an operational context. Having worn the uniform in the civilian world for a long time, I know there are other provisions. It is not because a subsection is repealed or set aside that there are no other tools that can be used to punish the individual based on the seriousness of the acts committed. We all acknowledge that, if the act is serious, punishment is necessary. We cannot tolerate very serious acts in the Canadian Forces because there are consequences. Are there any other provisions? If we deleted section 100, would there be any other provisions under which a person who committed an offence could be punished? I am talking about a very serious offence in this case.

● (1835)

LCol André Dufour: I have not studied that question in detail. It is conceivable that other clauses might apply, but that would have to apply to the case in question. I believe that section 100 is clear. There are three categories. The matter will have to be interpreted at that point based on the facts in issue.

That is the answer I can give because your question is somewhat hypothetical.

Mr. Jean-François Larose: It is nevertheless the question we are considering. We are asking that it be deleted. We can understand that the Canadian Forces want to keep it as a way of preserving tools. We agree on that. However, the question is whether there are any others. We are addressing a question that, as you said, is very specialized. It can apply to a lot of situations. The government obviously takes a position by saying that it might involve terrorists, but the fact is that civilians working in operations in Afghanistan, for example, are also subject to the code of service discipline.

It may happen that an individual who has committed an offence during an operation is in detention and does not understand the mechanisms involved. He may panic, which is normal in a situation like that, in which people do not get a lot of sleep and regularly hear gunshots and explosions. Given a host of circumstances, the psychology can change and the individual in detention may decide to escape. It may be due to panic. Regardless of the reason, however, the person in charge may act out of negligence, respect or the fact that the individual is a civilian. This is really a matter of context and an extremely special case in the circumstances.

I would like to believe that the Canadian Forces have other tools because not everything is applicable in this case. What troubles us is the fact that the consequences may be equally serious for actions that must be handled on a case-by-case basis, particularly in the case of a summary trial.

I am going to ask my question once again. You were not ready for it. It is obviously hypothetical since these matters are handled on a case-by-case basis. You said so yourself. Would it be possible to use other means? Would it be easier if we deleted section 100?

[*English*]

The Chair: I want to clarify because I think with interpretation—

Mr. Jean-François Larose: Was I speaking too fast?

The Chair: No, no, just that you wanted section 100 deleted, and —

Mr. Jean-François Larose: No, no, no, no—

The Chair: —it's going to be added—

Mr. Jean-François Larose: But by being added, it becomes....

The Chair: Right now, it would be part of the criminal records. That is what you're suggesting under clause 75.

I'll turn it over to Colonel Dufour.

LCol André Dufour: What I may add is this.

[*Translation*]

I am going to respond in French.

The authority responsible for laying charges will be able to do so under section 100 or possibly section 129. Section 129 is included in the list of exemptions. Once again, this is a hypothetical case. The authorities who lay charges—particularly the Director of Military Prosecutions—will have to be allowed to make that decision. It seems to me there will be some flexibility in the act, under which the authorities responsible for laying charges will be granted that discretion.

Mr. Jean-François Larose: All right. Thank you.

[*English*]

The Chair: I'll just ask everyone to try to keep the background noise to a minimum.

● (1840)

[*Translation*]

Mr. Jean-François Larose: Mr. Chair, that has a considerable impact on the principle that, in the armed forces or in any other professional body that has responsibility for a person, people are not motivated to be there by potential consequences. In this case, we are talking about the consequences for people who will be victims of the actions of the person for whom they have responsibility. What is more, this point is made after the fact, not before it.

I do not understand why the government is so bent on not including it. We are proving very clearly, with everything that has been put on the table today, my experience and that of other people, that there is a genuine danger in applying this in the field, from both a legal and practical standpoint. In fact, this sends a strange message. If a person for whom you are responsible escapes, he may or may not be punished, but, as the individual responsible for that person, you will definitely be punished, and very seriously. I do not see the point.

This is not a matter of troop motivation. Their actions are not shaped by the thought that they will wind up in prison if they do not act properly. I do not understand the logic behind this. We are all in favour of the Canadian Forces wanting to have an appropriate management tool. We all agree that certain actions are absolutely intolerable. In this case, it is much more a matter of the management principle or of negligence. There are other equally effective tools that can help. I would think that the attitude would be to help improve the way the troops function. There is the stick, but there is also the carrot. In this case, we are talking about a stick that is virtually a bazooka. It really sends a strange message.

I used to belong to the armed forces, and this is honestly the first time I have heard this point discussed. If I had known about it, I would definitely have had the opportunity to discuss it, particularly since I worked in intelligence. I would have made people understand that this has a direct impact on motivation. As I mentioned earlier, in the relationship between the incarcerated individual who is under your responsibility and you, the danger lies in knowing that you will be punished to a greater degree.

There are consequences even in the civilian correctional system, but there are other provisions. If an employee is negligent, his negligence will have consequences. He may receive an administrative sanction, which is virtually equivalent in the civil system, depending on the consequences. However, when events become very serious, investigations will often be conducted, and the individual will wind up with a criminal record and lose his job.

In this case, that will become automatic. This sends a strange message and has a direct impact on people's motivation. They are there for the right reasons. All the military members I have ever met, when I was a reservist and on other occasions, were all very proud of the work they did. They never did it so that they could be punished harshly.

I do not see why the government is prepared to add this. What is the cost, if it is only to improve this point? The arguments have been laid on the table.

Thank you.

[*English*]

The Chair: I have Mr. Harris, and Madam Moore.

Before you start, I'd like everyone to know there is a light supper, for those who are hungry.

Mr. Jack Harris: Thank you.

We're talking here about the will of Parliament. Well, the will of Parliament is being expressed in the legislation that we're passing now, whatever that will happens to be.

When the legislation was put before Parliament this time out, the only offences listed were ones that were "described in sections 85, 86, 90, 97 or 129". Five offences were listed. The sentence was either "a minor punishment or a fine of $500 or less".

If we look at the scale of punishments that we talked about before, where there's (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), and (l), the only ones able to be dealt with are minor punishments. I don't have the list in front of me, but minor punishment includes confinement to barracks.... Does anyone have that list? Someone is going to get me that list of what constitutes minor punishment, but they're less than any of the ones that are here, by definition, and the fine was $500.

Now we have an amendment that says that in addition to 85, 86, 90, 97 and 129, we also have an additional list, and I don't have a count of the numbers, but the list includes, 87, 89, 91, 95, 96, 99, 101, 101.1, 102, 103, 108. All of these are added to that. I could carry on, but in the interest of time, I won't.

● (1845)

The Chair: We are talking about the subamendment here, not the entire amendment. We're talking about the subamendment.

Mr. Jack Harris: The subamendment merely seeks to add another to that list.

I don't know how we can get all caught up in principle here when what we're talking about is how to achieve a fair result in relation to section 100 as compared to sections 101 or 101.1, and the others that are included here.

There are various theories we can apply to it. Our application is based on fairness.

My colleague, Mr. Brahmi, talked about the need for *mens rea*, and he got an answer that yes, *mens rea* is needed, and it is the same. I would agree with Colonel Dufour that in either civilian criminal law or in the case of this kind of offence there is a mental element required.

But because it's either wilful or negligent.... And we're not talking about the kind of negligence that's called criminal negligence in criminal law, just ordinary negligence, which is made criminal here because the offence is to, in the case of allowing an escape, negligently or wilfully allow escape. The kind of negligence we're talking about here is not the criminal negligence. The word "negligently", according to the commentary found in *Canadian Military Law Annotated*, signifies that "...the accused either did something or omitted to do something in a manner which would not have been adopted by a reasonable capable and careful person in his position in the Service under similar circumstances", which is quite a lot of qualification.

In other words, simply being careless is enough to attract a conviction under section 100, which is totally different from what in criminal law is called criminal negligence, where somebody has to be acting with wanton disregard for the life and safety of others. But to have this particular offence, the mental element is so minor in terms of carelessness or doing something in a manner that would not have been adopted by a reasonably capable and careful person in that position under similar circumstances.

It's not so egregious as to attract a criminal negligence charge, but it's something that's simply either wilful.... Well, wilful may be pretty obvious, but wilful indicates that the accused knew what he was doing, intended to do it, and wasn't acting under any compulsion. So that's the mental element. It's wilful: you wanted to let this guy out; you opened the door; you took him out or you attached a rope to the bars and rode your horse away—as in the cowboy movies—and you did it on purpose. Or it's the other sense of being careless or negligent. That is enough to attract this.

But it's not enough, and I submit that if the circumstances are such, and all of the sentencing provisions relate to the circumstances of the individual: the seriousness of the offence, yes, but also the seriousness of the consequences of the action, the degree of blameworthiness of an individual, and all of that....

If we had Clayton Ruby here, who is the guy who has written the book *Sentencing*, which is used throughout the country, he would tell us that. In fact, in Bill C-15 that we have before us today, we're putting a list of the purposes of sentencing.

All we're saying here is that if those purposes of sentencing can be achieved by the imposition of either a minor punishment or a fine, in this case a month's pay, or a reprimand or a severe reprimand, then that ought to apply.

● (1850)

On offences that are considered minor offences, by the way, with minor punishments—because that's in our list of the least of the punishments that can be granted—those minor punishments include confinement to a ship or to quarters or to barracks, so you're confined to your ship if you're in the navy, or to your barracks or quarters if you're in one of the other forces. The second thing that's included in minor punishment is work or extra exercises, which would be telling someone to jog around the military base five times or whatever. Prohibiting someone from taking a vacation and keeping him on duty is considered a minor punishment. The last of the four matters listed in minor punishments is a warning.

For any of these lesser punishments, if somebody did something that was so minor as to only require a warning, is that something we would want to see involving a criminal offence? What if it were so minor as to only attract a warning, or some disciplinary matter such as a work detail, or giving someone an order to perform extra exercises, or confinement to barracks for a weekend or whatever? For those kinds of punishments, if these were the consequence of violating this act, even though the maximum penalty is quite high, if the level or degree of culpability were so minor and the consequence so minor as to attract a punishment up to and including a severe reprimand, then there ought not to be a criminal record.

We must have some compassion for the individual who is affected by this and recognize that if we can start off here with a bill that only has five offences listed and only talks about minor punishments and a fine of $500, an amendment submitted by the government, obviously upon reconsideration, that lists perhaps another 15 or more—

The Chair: I just want to warn you that you're getting outside of what the subamendment is.

Mr. Jack Harris: No, no, but if we can have—

The Chair: I just want to stick on topic here—

Mr. Jack Harris: Well, I think we've been told, Mr. Chair, with respect, that it's all about the will of Parliament. The will of Parliament is being determined by the people who are here. If the will of Parliament is to move from clause 75, as submitted in the second reading version of the bill, to a proposal to the committee by the government in amendment G-2, then surely the will of Parliament can be expanded in an amendment to G-2 to add another section, and we're proposing section 100. Even though it potentially attracts a large punishment, the possibility is that any lesser punishment, including the four listed in G-2, ought not to result in a criminal record.

As Colonel Gibson has said, the will of Parliament has been expressed in the past by giving the maximum punishment. That's an objective gravity. Well, I can't imagine what circumstances would attract life imprisonment for an offence of this nature, but I suppose you could consider the most extreme circumstances. Almost an act of treason would be required to allow enough people to escape or to organize the escape of enough people in the wrong circumstances that it ended up causing a major disaster where people lost their lives.

You'd have to have something that you would have to pile on, detail after detail of aggravating factors to end up with the possibility of a life sentence for something like this. But if you wilfully let someone out who then committed an act of terror or an act of murder or caused that kind of mayhem, I can see that there might well be circumstances that could be strong enough to attract significant sentences beyond what we're talking about.

But it's the kind of offence that could have a small amount of actual harm being done. It could be a very minor escape. If someone is not in custody for a few minutes because he got out of one room and was grabbed by the fellow officer and returned to his cell, that wouldn't necessarily be serious. It might well involve someone being negligent in the performance of his duties. As Mr. Larose said, quite often there can be an administrative response to something like this that wouldn't require someone having a criminal record.

I like the fact that Mr. Larose is here to provide us with the reality of life for soldiers. He helped us out by saying that they don't always think of all of these things. They're thinking in the moment. There was the idea that the best thing to do was to try to get to Mexico to avoid the consequences. I'm assuming they never made it to Mexico. But that gives you an idea of the state of mind of people who end up being confronted with the kind of law we're making here today. I'm asking that we try to make that law as fair as possible, and one of the ways of doing that is by adding section 100.

● (1855)

It is very easy to see how the person who is actually doing the escaping is far more culpable than the person who is actually found guilty of carelessly allowing them to escape or admitting to doing something that ended up in somebody getting out. That seems to me to be wrong and we should try to fix it. If the circumstances are such that that's the case, then this law should allow that the person who, through some omission, maybe a minor omission, ends up being guilty of this offence should not get a criminal record.

When we're talking about punishment, especially when we are having a scheme like this, where certain offences with certain levels of punishment attract a criminal record and some do not, we have to regard the criminal record as part of the punishment.

So, in case A your punishment is a severe reprimand and in case B your punishment is a severe reprimand plus a criminal record. If that's the consequence, if it's possible that there can be an A and a B, then there must be a level of fairness associated with that.

If we have a situation, as we're talking about here, particularly with section 100, where offender A, who commits an offence and gets a severe reprimand, has no criminal record, and offender B, who instead of a severe reprimand just gets an ordinary reprimand, or who gets a fine, but also gets a criminal record in a related circumstance—it could even be the same incident, where the escapee gets a severe reprimand and the person who is found guilty of assisting in the escape or facilitating the escape negligently ends up with a criminal record—then that's wrong.

This is why we're opposing this, Mr. Chairman. We think that this particular provision ought to be included and that we ought to add section 100 to G-2, as proposed.

● (1900)

The Chair: Thank you.

[*Translation*]

Ms. Moore, you have the floor.

Ms. Christine Moore: First I would like Colonel Gibson to clarify two points.

Someone may be charged with accidental discharge, even if it involves a blank round. That is often under section 129.

With regard to section 100, could someone be charged with negligently helping to set a prisoner free, even if it was done as part of a training exercise?

[*English*]

Col Michael R. Gibson: I'm sorry, the question wasn't very clear, Mr. Chair. I wonder if I could ask it to be clarified.

[*Translation*]

Ms. Christine Moore: That is not a problem. It will be a pleasure.

When I was a reservist, 2,000 people took part in a major medical exercise at the end of every year. Everyone was there. Often there were prisoners, but they were in fact false prisoners since it was simply a training exercise. The military police had to monitor them.

If a military police officer did a poor job and those false prisoners escaped as a result, would the police officer be charged under section 100?

[*English*]

Col Michael R. Gibson: Again, Mr. Chair, it's hard to see the relevance of that. But since this section hasn't been judicially interpreted, I would say, given it's a *mens rea* offence, the circumstances would be such that the court, in order to convict, would have to be persuaded that the relevant *mens rea* applied.

The Chair: Thank you.

Madam Moore.

[*Translation*]

Ms. Christine Moore: Pardon me, but I am not sure I understood the answer.

I would really like to know whether this applies only to real prisoners or whether it can also apply in the context of a training exercise. If someone can be convicted under section 100 of having negligently assisted in setting free a person who was in fact a false prisoner in a training exercise, I believe it is even more serious that this section not be included in the amendment. That is why I would like to know whether it applies solely to individuals who have actually committed an offence or whether it can also apply in the context of a training exercise.

● (1905)

[*English*]

Col Michael R. Gibson: I think again it's not a very clear question, but by definition one only convicts somebody of an offence involving a potential penal sanction if the relevant *actus reus*, that is the guilty act, and the *mens rea* have been made out.

What that would constitute, since it hasn't been judicially interpreted, is in the realm of speculation. But what isn't in speculation is that clearly Parliament has envisaged circumstances in which an offence could be committed that would warrant a punishment of up to seven years.

[*Translation*]

Ms. Christine Moore: In short, you have never heard of people being charged under this section for acts committed during a training exercise.

[*English*]

Col Michael R. Gibson: I'm not aware of that, but I don't purport to have comprehensive knowledge on that point.

[*Translation*]

Ms. Christine Moore: All right.

Section 100 reads in part as follows:

> 100. Every person who...is guilty of an offence and on conviction, if he acted wilfully, is liable to imprisonment for a term not exceeding seven years or to less punishment and, in any other case, is liable to imprisonment for less than two years or to less punishment.

If my understanding is correct, to decide what sentence applies, the person who renders judgment, whether it be a military judge or a commanding officer in the case of a summary trial, will really have to determine whether the accused acted wilfully.

[*English*]

Col Michael R. Gibson: Parliament, in structuring the essential elements of the offence, has specified certain such elements, one of which is, if one is going to apply the full potential for seven years, whether the person acted wilfully. So that would be an essential element of that particular mode of charging the offence.

[*Translation*]

Ms. Christine Moore: I see.

Consequently, to be able to sentence the accused, the person trying him under section 100 will always have to determine whether he acted intentionally.

I wonder whether it would not have been simpler to refer to section 100 in the cases of individuals who did not act wilfully. Would that not make it possible to rule out the most serious cases in which people might be exempted under clause 75?

[*English*]

Col Michael R. Gibson: We don't convict people of offences who don't have the requisite *mens rea*, which would include voluntariness. If you're suggesting that there's a defence of duress, then that could be pleaded.

[*Translation*]

Ms. Christine Moore: From what you say, you do not charge people if there has not been a conviction. However, paragraph 100 (*b*) clearly states "negligently or wilfully". If something was done negligently, it is automatically not done wilfully. In other words, the person never intended to set the prisoner free. There may be something that I do not understand about the way the act is enforced.

Can you give me some details on that subject?

[*English*]

Col Michael R. Gibson: Parliament can prescribe different elements to the offence, including different *mens rea* for different modes of commission of the offence, one of which is wilfully, one of which is by negligence. In prescribing what would constitute negligence, one would rely on judicial interpretation. In this case, contrary to what was suggested earlier, it would be a marked departure from the norm.

In any event, one doesn't convict or sustain a conviction of anyone of a criminal offence, including offences for the service offences, without all the essential elements being made out beyond a reasonable doubt.

[*Translation*]

Ms. Christine Moore: All right.

If a procedure indicates what must be done to check that the prisoner is in fact locked down, but the employee does not do things properly, the latter may be charged with negligently helping the prisoner to escape. Is that correct?

● (1910)

[*English*]

Col Michael R. Gibson: I don't see the relevance of the question once again. We're not, as I understand it, here to comment on whether Parliament got the objective gravity of the offence correct. We're here to avoid ad hoc application of this exemption.

The Chair: I agree that we want to make sure our discussion isn't based on hypotheticals and that we're dealing with the subamendment that is before us. Rules of relevance apply. We have to make sure that we're very concise. Also, we don't want to be repetitious in our comments. Rules and orders of decorum in O'Brien and Bosc are quite clear on this. So let's make sure that we stay very focused on the subamendment.

[*Translation*]

Ms. Christine Moore: I know we have to stay focused on the subamendment. However, the actual cases will help us understand whether this should apply. Actual cases help determine how it can apply. I am talking about examples or descriptions to determine whether section 100 applies in such cases. All that is related to the subamendment. The purpose of a bill is, as it were, to express in legal terms the images we have in mind. Those images reflect actual cases.

We are talking about actual cases in which individuals might attract a criminal record. It is therefore important to know and to determine a logical limit so that people who do not deserve a criminal record have one. Consequently, Mr. Chair, when we use specific examples to determine whether section 100 applies, I believe that is entirely relevant.

[*English*]

The Chair: I'm just saying, though, that we have to remember that our witnesses are here specifically to help with the technical background on Bill C-15 and to provide us with the background information we need as to how these amendments are affecting the National Defence Act. They aren't here to provide hypothetical information. That's where we come in, as members, to determine what might possibly occur because of the bill.

Are you done, Madam Moore? Mr. Toone wants the floor.

[*Translation*]

Ms. Christine Moore: Yes, that is fine.

[*English*]

The Chair: Mr. Toone.

Mr. Philip Toone (Gaspésie—Îles-de-la-Madeleine, NDP): Thank you, Mr. Chair, and thank you, witnesses, for indulging us.

Regarding this particular section regarding releasing without authority, I wasn't here for the beginning of the discussion, so I'll ask your indulgence.

Could you please describe for me what kind of examples you have? Has this ever happened? What kinds of examples can you bring forward that would illustrate for me what kind of impact this section would have?

Mr. Mark Strahl: On a point of order, Mr. Chair, I think, given that we are bringing in substitutes to deal with the longer meeting today, we can't expect the witnesses to recount the testimony we have heard over the last number of weeks. To do so obviously would be disrespectful to the witnesses and to the other members of the committee as well. If we want to continue.... I understand the tactic, but frankly, the transcripts are available, if Mr. Toone wants to bring himself up to speed.

An hon. member: On that point of order—

The Chair: I have Mr. Toone first on that point of order, and then you, Mr. Harris.

Mr. Philip Toone: First of all, I resent the supposition that this is a tactic.

Some hon. members: Oh, oh!

The Chair: Order.

Mr. Philip Toone: The simple fact is that this witness is testifying now. I'm not asking him to repeat what any other witness has presented to this committee. I'm asking a question regarding the section that is on the table right now, and in order to go forward with the line of questioning, I'm asking him for illustrations from his experience. I don't think this has been testified about. I don't think there are any such examples in the record.

The Chair: Mr. Harris.

Mr. Jack Harris: Mr. Toone is absolutely right. We haven't had debate about section 100. He's asking for examples from his experience as to the application of this law.

We were discussing before he came the consequences of not including section 100 in amendment G-2. I think it's a fair question to ask for examples of actual cases in which section 100 has been applied. What we're trying to figure out here is whether or not it's fair to insist that in every case of a breach of section 100 there ought to be a criminal record. We know that the maximum sentence is life in prison, but we also know that any other lesser sentence can be applied, and so he's looking for examples.

I think it's a fair question.

● (1915)

The Chair: I have Mr. Alexander, then Mr. Norlock, on the same point of order.

Mr. Chris Alexander: Chair, asking our witnesses, who have extended their hours to be here with us, to give examples of cases in which section 100 has been applied is not fair to them and it is not relevant to the amendment we are discussing. If the opposition wishes to prolong this discussion this evening, let them do it under their own steam and not use our witnesses, to whom we have a duty to be courteous, as props in their technical exercise.

The Chair: I'll hear Mr. Norlock on that same point.

Mr. Rick Norlock (Northumberland—Quinte West, CPC): My comment is very similar, but I'll make it to the point.

I don't know why we're putting these witnesses through this charade that's simply designed to slow this piece of legislation down. This is a public hearing and I think my constituents need to know that the government has a responsibility. This piece of legislation has been around for 10 years—

An. hon. member: No, it hasn't.

Mr. Rick Norlock:—or for quite some time. It's obvious that the opposition wants to slow it down. I don't know why we are doing this. These fellows are soldiers. They'll stay here until the rest of us rot in here or until they can no longer do it. I think it's wrong what we're doing with them.

If you want to filibuster this, fill your boots. Go ahead. We'll play the parliamentary game, but don't insult these people. They're here to advise us on this piece of legislation, not to go through every possible case that could have ever come up in the Criminal Code. My god, this place would never function if we did that sort of thing.

So please, let's respect the witnesses. If you have a technical question, ask it, and I beg the chair to take that into consideration when we begin down this road of frivolous questions and frivolity, because that's just exactly what it is.

The Chair: A last comment to you, Mr. Toone.

Mr. Philip Toone: Frankly, first of all, they're witnesses at this committee. I don't think we should be playing games as to whose witnesses they are. They're here on the public dime to testify on public bills and it's up to all of us as parliamentarians to investigate every possible aspect.

The Chair: I'm just going to make a ruling here. I'm referring to chapter 20, pages 1068-9, of O'Brien and Bosc, which I've read to you guys many times before. When it comes to witnesses, particularly when we're dealing with public servants, we have to remember the following:

> The role of the public servant has traditionally been viewed in relation to the implementation and administration of government policy, rather than the determination of what that policy should be. Consequently, 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,—

—although we are dealing with military legal matters here—

> —which may be perceived as a conflict with the witness' responsibility....

Further, let's make sure that we're talking about repetition and irrelevance. So as we know in chapter 13 of O'Brien and Bosc, it states:

> Repetition is prohibited in order to safeguard the right of the House—

—and in this case the committee—

> — to arrive at a decision and to make efficient use of its time.

As well, I'll remind committee of the rule of relevance as written by J. G. Bourinot back in 1882. He was the Clerk of the House and is quoted on page 623 of O'Brien and Bosc:

> A just regard to the privileges and dignity of Parliament demands that its time should not be wasted in idle and fruitless discussion; and consequently every member, who addresses the house, should endeavour to confine himself as closely as possible to the question under consideration.

Now we have been talking for two hours on section 100, and I think the witnesses have answered numerous questions about the aspect of section 100 in question and adding it to clause 75 through the subamendment proposed by Mr. Harris.

So I would think that we have already flogged this horse to death and that it's time to get towards the question.

Mr. Harris.

Mr. Jack Harris: On a point of order, Mr. Chair, I accept your reading of everything you've cited. It is totally accurate. However, the question that was asked is, first of all, new, and second of all, it's relevant to our discussion here because the discussion has to do with the fairness of including section 100 of the National Defence Act in this list of offences that ought not to attract a criminal offence if these punishments are given out.

When my colleague Mr. Toone asked the Judge Advocate General's representatives to give us some examples of circumstances around charges of this nature, I think that's totally relevant. I say so because we know that the range of sentencing can go anywhere from life imprisonment to a minor charge, and whether or not this offence has been used and how often it has been used and what the circumstances are is relevant. I don't know what the answer is and I don't think it's abusing the witness. Mr. Norlock is impugning motives here. If someone came to the committee as a lawyer practising in the province of Quebec, that would be a reasonable question to ask of a witness here to assist the committee.

I think it is relevant, Chair, and related to the work that we're doing. I don't see any reason why it can't be asked and why we can't proceed.

● (1920)

The Chair: Mr. Alexander, on that point.

I thought I'd already made a ruling, but go ahead.

Mr. Chris Alexander: Thanks, Mr. Chair.

Your ruling is obviously supported by many of us on this committee, and I hope eventually by all.

In the meantime, the NDP members should really, when they propose an amendment relating to an important article, do their own research. That's part of the preparation that we as parliamentarians must do.

If they don't know of cases in which section 100 has been applied, why is it part of a significant amendment that they're proposing in a clause-by-clause consideration of this bill? It is not the responsibility, and it is not a display of respect, for our witnesses to be playing the role that the Library of Parliament, that staffers, should be playing in support of the NDP members of this committee.

I take grave exception to the way that Mr. Toone has sidled in here and treated our witnesses, who are here as a technical resource for clause-by-clause discussion, as if they were bringing him up to speed on the issue for the first time. That is a mark of disrespect, and it is a waste of the committee's time on a scale that has been discouraged since at least the 1880s.

The Chair: Mr. Toone, you have the floor. Do you have anything else you wish to add?

Mr. Philip Toone: On the point of order?

The Chair: No, you have the floor. I made a ruling and you still have the floor. You can still talk to the subamendment, which is adding section 100 to the list that was proposed by Mr. Alexander.

Mr. Philip Toone: All right.

Going back to the proposed subamendment, this does require, or so it would seem, a degree of *mens rea*. I'm wondering, for example.... I'm not going to use examples. Let's go on to a definition of *mens rea* and the possibility that the *actus reus* would need to be brought forward during the particular hearing that would be in place.

Is this an example of where there would be questions of strict liability, for instance?

Col Michael R. Gibson: No. It's an offence subject to penal sanction. There's a *mens rea* requirement.

Mr. Philip Toone: How would that *mens rea* be determined?

Col Michael R. Gibson: As with any other offence, one looks at the specification of the elements of defence that Parliament has described and as they have been traditionally interpreted. In this case, clearly it's without authority, negligently, or wilfully.

Mr. Philip Toone: I'm sorry, there was a bit of background noise. Could you repeat that?

Col Michael R. Gibson: It's without authority, negligently, or wilfully, as specified in the offence provision that Parliament has created.

Mr. Philip Toone: Has this particular clause ever been used in the history of court proceedings?

Col Michael R. Gibson: I'm not aware that this particular offence has been recently charged. Obviously, if and when it were to be prosecuted, then it would be incumbent upon the court to define or interpret the particular *mens rea* requirements of this offence provision.

I would reiterate, the general principle being applied here is that the offence provision that Parliament has stipulated is called the threshold of five years, and would constitute by definition, under section 2 of the act, a serious offence.

That is the policy basis upon which this clause 75 provision is presented.

● (1925)

Mr. Philip Toone: When we have these kinds of hearings held, what is the general duration of such a hearing?

Col Michael R. Gibson: I'm sorry, I didn't quite catch that.

Mr. Philip Toone: What would be the normal duration of such a hearing? How long would it take?

The Chair: That's outside the relevance of the subamendment, which is talking about the offence itself, not the hearing. We've already gone through that in other parts of the bill dealing with the hearings themselves.

Mr. Philip Toone: Okay, fair enough.

The Chair: I have no other speakers on my list, so let's put the question on subamendment three.

This essentially is adding section 100 from the National Defence Act to the amendment proposed by the government.

(Subamendment negatived [See *Minutes of Proceedings*])

The Chair: We're back to the main amendment.

Madam Moore.

[*Translation*]

Ms. Christine Moore: Now I would like to introduce a subamendment, if possible. I would like us to add to the Conservative amendment section 113 of the National Defence Act, which reads as follows:

> 113. Every person who wilfully or negligently or by neglect of or contrary to regulations, orders or instructions, does any act or omits to do anything, which act or omission causes or is likely to cause fire to occur in any materiel, defence establishment or work for defence is guilty of an offence and on conviction, if the person acted wilfully, is liable to imprisonment for life or to less punishment and, in any other case, is liable to imprisonment for less than two years or to less punishment.

The problem, as it were, is the same here too. I understand that the act is really harmful when wilfully committed. In any case, I believe that if it is done wilfully, we will go beyond the sentences included in the amendment to clause 75 of the bill, that is to say severe reprimand, reprimand, fine or minor sentences. We should logically tend toward a harsher sentence. I cannot understand why, if someone wilfully caused a fire—

[*English*]

The Chair: If I could interrupt you for a quick moment, do you have that subamendment in writing?

[*Translation*]

Ms. Christine Moore: Yes.

[*English*]

The Chair: Could you please have it circulated?

[*Translation*]

Ms. Christine Moore: Of course.

[*English*]

The Chair: It's subamendment number 4.

Mr. Jack Harris: I didn't underline section 113.

The Chair: It's section 113 that we're dealing with in this subamendment.

Madam Moore, you have the floor.

[*Translation*]

Ms. Christine Moore: The problem here is the same once again. We are talking about cases of negligence and violation of regulations, orders and instructions.

For example, I remember an event that occurred at the time of my recruit course. No, it was not my own recruit course. Sorry. It was the recruit course of someone with whom I subsequently entered into a professional relationship in the armed forces. Whatever the case may be, here is what happened, and I believe that the person did not really do it wilfully. That person put kerosene in a camp stove instead of naphtha, and that caused a fire since it was not the proper fuel. It was not a wilful act or anything like that. I would consider it excessive if someone who caused such a fire, out of ignorance or whatever, were liable to acquire a criminal record as a result.

Once again, no distinction is being drawn between someone who commits an act as a result of a failure to comply with regulations and someone who commits that act in a wilful manner. I believe that serious military discipline problems arise when someone wilfully causes a fire.

I believe this section of the act should be included in the Conservative amendment. In that way, we would be able to draw that distinction and to avoid unjustly punishing someone who made quite a minor mistake. That is why I believe this section should be added to the amendment presented by the Conservatives.

[*English*]

The Chair: Are there any comments?

Mr. Harris.

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

Given the comments, particularly those of Mr. Norlock and others opposite, about the length of this meeting, I'm assuming unless told otherwise that we came here, along with Colonel Gibson and Colonel Dufour, and anybody else who's here, for a meeting from 3:30 to 5:30 today. We came here prepared for that. We had other plans. That's why some people actually had to leave; they couldn't change their other plans. We came for a civilized meeting of the committee from 3:30 to 5:30, as per the notice that was provided.

The people who are here now are here because nobody made any arrangements to go beyond 5:30. There was no consultation, no suggestion, no question, no seeking of cooperation, no attempt to do things in an ordinary, civilized, and reasonable manner. It was just, "No, it's 5:30, but we're going to carry on."

I want it on the record that this is what happened here, and that's why we're here, because there's been no attempt to do anything in a reasonable, civilized way. I also want it on the record that when this happened, the Liberal member of the committee voted with the government to continue the meeting, yet the Liberal member was the first one to leave.

● (1930)

The Chair: As you know, it is in the rules of the House and the Standing Orders not to recognize anyone for being absent in the House, so I'd ask that you—

Mr. Jack Harris: I apologize for that, sir, but there's no rule that's stopping me from mentioning it outside this committee.

The Chair: Yes, go ahead outside, but in the House and in this committee, we live and die by the rules.

Mr. Jack Harris: We have here another subamendment to G-2, which adds the sentence in section 113. In fact, this one is even more so a case where this ought to be added because, as my colleague has pointed out, causing fires normally is associated with arson, which sounds pretty bad. But when you look at the provision itself, again, we've got this maximum of life imprisonment, but only in the case of wilfully causing fires. In any other case than wilfully, the maximum penalty is two years or to less punishment.

We've got a situation where, and I'll read out the section:

> Every person who wilfully or negligently or by neglect of—

I'm not sure what the difference is.

> —or contrary to regulations,—

So you neglect to carry out a duty contrary to regulations.

> —orders or instructions, does any act or omits to do anything, which act or omission causes or is likely to cause fire to occur in any materiel, defence establishment or work for defence is guilty of an offence and on conviction, if the person acted wilfully, is liable to imprisonment for life or to less punishment and, in any other case, is liable to imprisonment for less than two years or to less punishment.

Now, this could be a serious offence or it could be something done in violation of a regulation. If some regulation or some rule or some instruction requires a certain thing to be done, or suggests you ought not to do something, then you can find yourself with a criminal record if it causes or is likely to cause a fire.

So, if somebody tosses a cigarette butt on the ground and it's contrary to a regulation to do that—if the ground happens to be near dry grass or something like that—but doesn't do anything, doesn't cause a fire, but may be likely to cause a fire to occur in any materiel, defence establishment or work for defence, so on a base somewhere, then that's enough to make you guilty of an offence.

Or there may be other kinds of technical rules or instructions, or regulations that are avoided that will make you liable for an offence. But if it attracts something less, again, than the list and the scope of punishments, starting with minor punishments, fines, reprimands, severe reprimands, any of those four particular punishments for wilfully or negligently causing or likely to cause a fire in any defence establishment...well, it doesn't have to cause a fire to anything in particular, it just has to cause a fire in a defence establishment. A defence establishment is a pretty broad place. That could be in any part of any base in the country.

● (1935)

Again, I don't know what examples there are of this in actual practice. I don't know whether or not the experience of the military is such that this is something that ought to attract a criminal record in every case. Somehow I doubt it, if we're looking at a list here of things that have far more serious consequences than something that may cause a danger or even be likely to cause a danger of causing a fire by failing to follow instructions.

I'm looking here at the list of things that are contained in amendment G-2 and seeing all sorts of things that are apparently serious, that are included in the list of things that would not attract a criminal record. Yet here there is no exception for something that might be a very minor breach of a regulation but that could give rise to an accidental fire. I think once again we're seeing a situation where we're trying to make amendment G-2 more complete, more fair, and have it treat similar types of seriousness similarly.

Now, we've heard from Colonel Gibson before that the characterization of these groups have to do with the scheme that I believe was referred to as the objective gravity and the subjective gravity. I disagree with that characterization because it's not objective gravity versus subjective gravity. I think the maximum sentence gives rise to Parliament saying that yes, there are circumstances where, if this offence is committed, it could be so grave as to attract a large sentence of life imprisonment.

But in the case of the threshold for sentencing, that's not about the subjective gravity of the offence. Surely sentencing has to be objective as well. It's about the objective gravity of the particular offence that the individual is being sentenced for, the circumstances of the offence and the offender. So in fact it's an objective assessment of the punishment that's due to an individual.

He says that the two conditions that have to be met are the objective gravity of the offence and the subjective gravity of the offence. But the objective gravity of an offence by virtue of saying what the maximum sentence is only indicates what the maximum seriousness of the punishment can be in the worst possible event under that particular definition of the offence.

What we're dealing with in clause 75 is a list of offences that are objectively determined by the sentencing court, whether it be a court martial or whether it be a commanding officer, the one who determines in a judicial manner how serious it is. So we know we're dealing with how serious an offence is in relation to the actual offence that was committed, the actual circumstances of the offence, what the offender did, what the consequences were, what the state of mind of the individual was. It's related to the individual and that's not subjective; that's just different. That's different from the general notion of the offence itself.

Even using the understanding we have from Colonel Gibson as to how serious Parliament has taken the offence, it is very clear in relation to section 113 that when Parliament looked at that offence and designated a penalty for that offence in terms of the potential gravity of the offence, it actually has two separate understandings of how serious the offence is.

● (1940)

If someone wilfully did an act, and is convicted of this offence, the one in 113, and if that person acted wilfully, he is liable to imprisonment for life or less punishment, and in any other case, in other words, either negligently, or by neglect of, or contrary to regulations, orders or instructions.

Mr. Chris Alexander: Chair, on a point of order, I'd like to ask, through you, whether anyone in this room thinks that Mr. Harris's comments are relevant to the amendment at hand.

The Chair: I'll ask Mr. Harris to make sure that his comments are to the subamendment, which is the addition of section 113 as it relates to an offence to property under the National Defence Act.

Mr. Jack Harris: Thank you, Chair.

Perhaps I need to explain to Mr. Alexander how it is relevant because we're talking about whether or not we should add section 113 to the amendment proposed by the government. Consideration of that has to do with whether or not the circumstances of a person convicted of section 113 are such that they ought to be included. We've got the scheme suggested—I don't mean scheme in a negative way, but a scheme of understanding—suggested by Colonel Gibson that you look at the objective gravity of the offence as determined by Parliament, and it's the maximum sentence, and then you look at what he calls the subjective gravity of the offence, based on what the sentence is.

Well, I don't think that is what we're talking about.

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): Point of order, Mr. Chair.

Mr. Chairman, our colleague opposite continues to repeat what he has already said. These pontifications and hypotheticals have gone beyond absurd. He has even stated that Colonel Gibson has explained objective and subjective gravity offences and how they apply to sentencing.

You have referred to the rules of order, and yet you continue to allow the opposition to abuse these witnesses, and I respectfully request that you exercise and apply the rules of relevance.

The Chair: Relevance and repetition.... As you know, as I stated earlier, Mr. Harris, relevance has to be at the core of our debate, so I ask that you make sure that you are relevant and that you do not repeat yourself.

Mr. Jack Harris: Thank you.

Well, first of all, I resent any suggestion that my actions or words are abusing the witnesses. That's totally—

A voice: They are.

The Chair: Order.

Mr. Jack Harris: —unfounded.

The Chair: Let's get back to the amendment.

Mr. Jack Harris: I won't repeat that again, but they're totally unfounded.

What we're dealing with here is trying to make the argument that when you look at section 113, when you look at the ways of committing the offence, there are more than two ways spelled out there, but it's only in the case of wilfully setting a fire—or wilfully causing a fire, let's call it—by your actions that it attracts the potential of a life imprisonment sentence. In all other cases, punishment is two years or less.

That's the category of offences that are included—that and less than that—in all of the numbers that are listed. I'm suggesting that makes it clear that whatever arguments can and have been made about the other ones ought not to apply here, because section 113 clearly recognizes that there are two categories of seriousness, one that involves wilfully committing an offence, and the other that involves any other way of committing the offence.

So it can easily be seen, I submit, that the kind of penalty we see in amendment G-2 involving a severe reprimand, reprimand and fine, or minor punishments could apply. What are we talking about here? We're talking about a situation in which there's a possible danger to property. This seems to be more interested in property, but there is the potential damage to military materiel or a defence establishment or work. That's important. Obviously, you don't want to have your buildings burnt down or your equipment damaged by fire. If someone does it because they fail to follow a regulation, if they didn't properly handle a spark suppressor and that caused a fire —some regulations say you have to do that—or is likely to cause a fire, they're going to get charged. So-and-so gets charged because they have neglected to follow a regulation. The maximum sentence is two years. The person gets a reprimand or gets a fine, or whatever —

● (1945)

Mr. Chris Alexander: On a point of order, Chair, we heard exactly these remarks five minutes ago—

Mr. Jack Harris: No, you didn't.

Mr. Chris Alexander: Yes, we did, about the nature of the charge, the nature of the offence, the two-year penalty.

Mr. Harris is repeating himself explicitly and in flagrant defiance of your ruling and of the rules.

The Chair: Okay, Mr. Harris.

There are other speakers who want on the list as well.

Mr. Jack Harris: Okay.

Well, you know—

An hon. member: You're sure that your amendment may not work, but ours does.

Mr. Jack Harris: Sorry?

The Chair: Order, order.

Let's get back to the subamendment.

Mr. Jack Harris: I didn't hear that particular insult, but I think the example that I just gave shows how this could easily be within the same kind of category.

One analogy could be negligent discharge of a firearm. I know of cases where a person received a fine for that. That's something serious enough to cause loss of life, someone negligently discharging a firearm, for example. It happens—

An hon. member: Whatever.

Mr. Jack Harris: —and people get fines. So if a fine can be a sentence for discharging a firearm and potentially endangering a life, then, surely something that attracts a maximum of two years for negligence or for causing a fire contrary to regulations could easily be in the same category, which is an additional argument as to why section 113 ought to be included in amendment G-2 under clause 75.

That's all I have to say for now.

● (1950)

The Chair: Thank you.

Madam Gallant.

Mrs. Cheryl Gallant: I've already spoken.

The Chair: You spoke? Okay.

Seeing no one else, I'll put the question.

(Subamendment negatived)

The Chair: We're back to government amendment G-2.

Are there other comments on the amendment?

Mr. Harris, please.

Mr. Jack Harris: We do have a number of other possible arguments to add additional sections here, but I think—

The Chair: You do have two more amendments after we deal with amendment G-2. There are amendments NDP-20 and NDP-21.

Mr. Jack Harris: Yes, we do, and we'll get to them and fully argue them.

Briefly, I just want to say that we brought forth the amendments that we did to amendment G-2.... We're going to support passage of amendment G-2 because it makes a significant improvement to what was here. It's certainly not broad enough. We brought forth the four that we've just finished arguing because I think they do illustrate that amendment G-2 does not go far enough in terms of what it sets out to do.

What it sets out to do is eliminate the criminal record in specific offences based on a threshold. The threshold that's provided there is not adequate. In fact, there is another amendment that we want to move on amendment G-2. I'm going to have to ask someone to find it for me. It's the one that seeks to amend...is it item (iv) of amendment G-2?

Mr. Chris Alexander: Mr. Chair, on a point of order, if there's no amendment at the moment, could we proceed with the vote on the motion at hand?

Mr. Jack Harris: I have an amendment here, Mr. Chair.

The Chair: And Mr. Harris has the floor as well, and I can't put a question as long as there's anybody on the list for speaking, and Mr. Harris has the floor.

Mr. Chris Alexander: They have to be speaking, Mr. Chair.

Mr. Jack Harris: Yes, I'm speaking, and I'm speaking to amendment G-2. I'm proposing a subamendment to amendment G-2 —

The Chair: Okay. A subamendment?

Mr. Jack Harris: It's a subamendment to amendment G-2 that would have the effect of replacing lines 2 to 4 on page 49 and amend that by substituting the following fore the portion "(iii) a fine not exceeding basic pay for one month, or", by "(iii) a fine, or". That amendment is being distributed now.

The Chair: We'll call this one subamendment 5.

Mr. Jack Harris: Subamendment 5—

The Chair: So you're speaking again to the subamendment—

Mr. Jack Harris: Yes, to the subamendment.

The Chair: —and it's very specific to portion (iii).

Mr. Jack Harris: It's very specific.

The Chair: You're taking out "not exceeding basic pay for one month".

Mr. Jack Harris: That's correct.

I'll let everybody have a copy of it.

The Chair: It's being circulated. You can begin.

Mr. Jack Harris: Okay. I think it's a pretty simple amendment. The current amendment includes four sentencing options that would preclude a criminal record: a severe reprimand, a reprimand, a fine not exceeding basic pay for one month, or a minor punishment.

Mrs. Cheryl Gallant: On a point of order, Mr. Chairman, we are not here to debate the relevant punishments for every offence. We're not here to discuss the subjective or objective gravity of the situation or the sentencing applied. We're here to discuss amending Bill C-15. This is totally out of order.

● (1955)

The Chair: No, I'd rule this in order. It is making an amendment to the existing amendment. The subamendment is amending the amendment. It's strictly wordsmithing, in my opinion, and it is relevant, so I'm going to allow it to stand.

Mr. Jack Harris: Thank you, Chair.

What we're trying to do here, is we've seen already a change from the existing clause 75 in the bill, which had as a part of the threshold a fine of $500. That's now been changed to "a fine not exceeding basic pay for one month".

The reason for removing that is to say that any fine ought to be the threshold, not the fine of "basic pay for one month". I can see why someone would choose a number like that. It's an attempt to be more fair, in the sense that $500 might be arbitrary. For somebody who's got all kinds of money, a fine of $500 would mean a lot less than to someone who depends on every dollar they get in order to support themselves.

I can see the intent here is to try to make it more proportionate. But if I look at the scale of punishment that's found in chapter 104 of the Queen's Regulations and Orders, which I think we passed out a little earlier in both official languages, it's clear that when we've got the scale of punishment going from "imprisonment for life", which is (a), to "minor punishments", which is (l), when we get to "fine", which is (k), it doesn't give any amount of the fine at all. The fact that it doesn't do that—and this is from section 139 of the National Defence Act—is that any fine is greater than any minor punishment, according to the definition here, because it says that "each of those punishments is a punishment less than every punishment preceding it". In other words, this goes in descending order from "imprisonment for life" down to "minor punishments", and any fine is considered to be less than a severe reprimand or certainly less than any of the other ones listed above it.

I think it's very logical and very reasonable to say that if your basic pay happens to be $3,000 a month and you're fined $3,500, you end up with a criminal record, and if you're fined $2,500, you're not. Yet a reprimand would be considered a more severe punishment than a $3,500 fine in those very same circumstances, or a severe reprimand as well. In fact, you have to go to three levels higher than a fine to get a sentence that's more severe to put you into the category where you'd get a criminal record.

While I recognize that the intention was certainly honourable, to try to have something that's a little less arbitrary than a fine of $500, I think we ought to go further and say that the four categories that establish the threshold above which a punishment that includes a criminal record ought to be any fine at all. It's easier to administer. You don't have a circumstance where a person giving the sentence has to consider the actual amount of the fine and someone's basic pay to determine whether or not a criminal record applies. You don't want a criminal record to apply just because it happens to be...it could even be an unintended consequence of a sentence, if it turns out that the basic pay is less than the fine that's given.

I think it makes sense, even under the scheme of the act, as contemplated by amendment G-2, that not specifying any amount of the fine makes more sense, is more fair, is more reasonable, and is more in keeping with the scheme that's proposed here of having (i), (ii), (iii) and (iv) as the possibilities.

● (2000)

The Chair: Madam Moore.

[*Translation*]

Ms. Christine Moore: Following Mr. Harris's comment, when you look at the scale of punishments, you see very clearly that it does not simply increase the fine constantly. Consequently, establishing the amount is not all that relevant. It is logical that, at some point, beyond a certain amount, we will move on to higher levels in the scale of punishments. We thought it more or less relevant to add an amount after a fine because there are very large differences in salaries. I have the pay scales in front of me. Let us take the basic pay for one month, for example. For a private, one month's basic pay is $2,751. For a major who is a medical specialist, it can be as much as $19,638. So you see the range is quite broad, depending on specialization and rank.

As I previously said, there is a scale of punishments for when you want to punish someone. Logically, the amount cannot be increased to infinity, and harsher punishments will be imposed instead. Preference will be given to reduction in rank or detention, for example. From that point, the amendments to clause 75 would no longer apply because there would be other punishments in addition to the fine. I believe that would be entirely appropriate. It would avoid certain ambiguities. Consequently, what is considered basic monthly pay for a reservist? Is it the salary he earns with the unit or the one he earns in his full-time job?

Consider the example of a reservist who has a high-paying civilian job. He could be a private and earn $200,000 in his civilian life. In that case, the commanding officer would know he has the financial ability to pay a stiffer fine than, for example, a reservist who is a part-time student and is doing that to pay for his education. I believe that, logically, and to simplify everything, we absolutely do not need to include the words "fine not exceeding basic pay for one month". Simply specifying the word "fine" would be simply logical. It would permit a better interpretation and would avoid ambiguity with regard to reservists. We do not really know what regular basic pay is.

It must also be understood that, according to chapter 108 of the QR&Os, in summary trials, a commanding officer may not impose a fine of more than 60% of monthly basic pay. When someone replaces him and he delegates his authority, the figure falls to 25% of monthly pay. I do not really know what made the government party refer to basic pay for one month when we know that these limits exist. I imagine that is based on a court martial. I therefore believe that this amendment is entirely relevant and that it would simplify the interpretation of clause 75 as it would be amended. I believe this is an entirely relevant amendment and I encourage the government party to adopt it.

[*English*]

The Chair: Mr. Alexander.

Mr. Chris Alexander: Mr. Chair, we will not be supporting this amendment for the simple reason that fines awarded by courts martial or a summary trial can go to very high amounts, and they can also be combined with other forms of punishment. To have no limit placed on the fine that would have the effect of expunging criminal records of the traces of service events would be highly inappropriate, and it would serve to make an otherwise good bill that would modernize the military justice system incoherent and unbalanced.

In reply to Mr. Harris's earlier comments about why we're here—

● (2005)

The Chair: Let's not go there. We're speaking to the subamendment; let's stick to the subamendment.

Mr. Chris Alexander: Mr. Chair, his remarks were in order; ours have to be in order as well.

Mr. Jack Harris: That doesn't justify...[*Inaudible—Editor*]

The Chair: Neither of you guys are justified. Let's not get into it. We're just going to be here longer if we keep putting stuff on the record, guys.

Mr. Chris Alexander: Mr. Chair, it's a public meeting. If we've been maligned, we have a right to reply, and we will do so simply by saying that Mr. Harris claims we're here because he was not given notice that we would be here.

We were on the last clause. We were well within range of passing that last clause—clause 75—to which he had agreed in an earlier period of debate. You welcomed the bringing forward of that amendment. Instead, he has chosen to discuss at great length, and indeed in a manner that we consider wasteful of this committee's time.... We'd like that to be on the record. The amendments he has proposed, for which we got no notice, would have made it impossible for people—malingerers, those disobeying orders, those allowing the enemy to escape, arsonists—to have their criminal records—

Mr. Jack Harris: Mr. Chair, that's not a point of order.

The Chair: Order.

Mr. Chris Alexander: —carried over into this system. That is absurd.

We had no notice of this. The Canadian Forces, and above all those responsible for military justice in the Canadian Forces, had no notice in recent years that there would be 70 speakers from the NDP on this matter, which was rehearsed in two earlier parliaments, or that we would be detaining the brain trust of our Judge Advocate General's office well into the night to discuss amendments that actually relate to an amendment proposed by the government, but which had the support of the NDP, and was indeed welcomed by the NDP, in the last Parliament. In fact, they're arguing and filibustering against their own position tonight, a practice that we find petulant, that we find cynical, and that we find extremely wasteful of this committee's time.

The Chair: I'll just say that I don't find those types of comments are helpful to our overall debate, especially as we're working on the subamendments. As I told you guys and gals in the past, my power of censure is somewhat limited.

I think Colonel Gibson wishes to comment on the subamendment.

Col Michael R. Gibson: Mr. Chair, I have one point of fact that I think would be of assistance to the committee in light of the remarks that were just made. In fact, of course, for something as basic as how one computes the fine for a reservist, the Queen's regulations and orders prescribe that, and it's prescribed in subsection 203.065(6), which provides the formula for exactly how you calculate the fine for basic monthly pay for a reservist.

The second observation I would make is that there is some merit to what Mr. Harris has said, if one looks solely at the scale of punishments, but of course there's a bit more to it than that. As I mentioned earlier, the Supreme Court of Canada, in the Wigglesworth case, talked about the concept of a true penal consequence and said that a fine above a given amount—in other words, a really big fine—could certainly constitute a true penal consequence. The relevance of that in policy terms, in terms of our formulation of this, is indeed that a fine may be, and often very much is, combined with other punishments in the scale of punishment; they're not mutually exclusive. The point, one might say, of the Criminal Records Act thresholds for how long you have to wait and how big the punishment has to be is to express Parliament's judgment about societal disapprobation, and the denunciatory effect or degree of disapprobation is reflected in the quantum of a fine.

I think it is highly relevant to consider that the imposition of a very large fine by a court expresses a high degree of disapprobation. Conceptually, I think that's relevant to the consideration of where one would create an exemption under the Criminal Records Act or not. Where you should draw that line is very much a matter of policy, and very much, ultimately, a matter of judgment for Parliament to make, but I would just point out that conceptually those concepts are linked.

Thank you.

The Chair: I have Mr. Harris and then Madam Moore.

Mr. Jack Harris: I'm not going to prolong the kind of debate that Mr. Alexander wishes to engage in about what we're doing here.

The Chair: Gentlemen, please.

Mr. Jack Harris: What we are doing is seeking to improve the legislation by amendment. Having heard what you had to say, it leads me to think you're not prepared to consider improvements to legislation, which is what amendments and subamendments are all about.

The idea of using section 139 of the National Defence Act to determine what is a more severe punishment than the other.... According to the act itself, which is the will of Parliament, a reprimand or reduction in rank, detention, etc., all of these things are more serious than a fine. That's spelled out here in another section of the act itself.

In another subsection of the act, subsection 139(2)(2), it states the following:

> Where a punishment for an offence is specified by the Code of Service Discipline and it is further provided in the alternative that on conviction the offender is liable to less punishment, the expression “less punishment” means any one or more of the punishments lower in the scale of punishments than the specified punishment.

I'm not suggesting a severe or large fine is not a punitive consequence or a penal consequence, or as Colonel Gibson says, “true penal consequence”. We're not disputing that at all. What we are suggesting and disputing is that if a reprimand, and a severe reprimand, are, by law, more serious consequences, then the fact of the matter is that the section we're talking about is not appropriate.

I'd be surprised, frankly, if there is a huge fine imposed on someone that would be significantly greater than a month's pay, for example, that's not combined with something more severe than what we're talking about here, whether it's forfeiture of seniority or reduction in rank, or something that's deserving of such a significant penal consequence as being suggested by a huge fine. There might not be other consequences.

Any fine, I would submit, is by law lesser than a reprimand, lesser than a severe reprimand, and therefore, by definition, ought to be included in the category that doesn't attract a criminal record.

● (2010)

The Chair: Madam Moore.

[*Translation*]

Ms. Christine Moore: I would like to point out that it is not because we are trying to improve the amendment that this is a waste of time. We said very clearly at the outset that we were going to support the amendment that was moved by the Conservatives. That does not alter the fact that we believe certain improvements could be made to the amendment to make it more effective. That is what we are discussing. I am truly saddened to see that people believe that wanting to improve matters is a waste of time. In our view, logically, unless I'm mistaken, the fine will not be increased to infinity without other punishments being imposed, which in any case would render clause 75 non-applicable. I could never believe that a fine of $20,000 would be imposed on a private without anyone considering imposing a reduction in rank or detention. If he has committed an offence so serious that he receives a $20,000 fine, I could never believe that he would not be sentenced to detention or be reduced in rank. It was precisely on the basis of that reasoning that we said it would be much easier to use just the word "fine" for the purposes of simplifying the administration of the act.

I wanted to come back to that point and to clarify the fact that we do not want to waste time. We very clearly said that we were going to support the amendment, but the fact that we are going to do so does not prevent us from trying to improve it. We did not say that what it contained was not functional. We said that there were ways to make it more effective and to include more people. The JAG people also acknowledged that it covered 95% of cases. It did not cover 100% of cases. If they had told us that no one would have a criminal record if they did not deserve one in civilian life, we would not need to have this discussion. However, we are having this discussion because they acknowledge that this does not apply to 5% of cases. We want to improve the bill and the amendment.

This attitude on the Conservatives' part is unfortunate because we are trying very sincerely to improve the clauses of the bill.

● (2015)

[*English*]

The Chair: Let's vote on subamendment 5, moved by Mr. Harris.

(Subamendment negatived)

The Chair: We'll go back to the main amendment. Are there any speakers on amendment G-2?

Mr. Harris.

Mr. Jack Harris: I just want to make a closing statement on G-2. We do recognize that this amendment provides some significant improvement to the scheme of the military justice circumstance. We thought it could be improved, and we still think it can, and we set these amendments forward to demonstrate how it could and should be improved. We think they should have been accepted.

However, given that the government is not prepared to go farther than it has, I think we will support this amendment as an improvement to the situation, recognizing that it doesn't even deal with the question that we'll be talking about in the next amendment, and the question that was part of most of the arguments that we made in the House of Commons. It doesn't deal with the issue of mode of trial. It doesn't deal with the issue of whether the constitutional rights of an individual are recognized, the protections of the Charter of Rights, a fair trial, the impartial tribunal, etc. These things are not a part of this, because this says no matter what the mode of trial, whether it's by court martial with all the protections, or whether it's by commanding officer or by a delegate of a commanding officer, no matter what, if it is one of these listed offences, and if the consequence for the individual is one of these four things, then they are not subject to a criminal record. Given that represents a large majority of the number of people who are tried under summary conviction, and some of those who were tried under courts martial, we recognize it as a step forward so we will be supporting it.

The Chair: Okay.

Madam Moore.

[*Translation*]

Ms. Christine Moore: If no one else wishes to speak, I would like us to proceed with a recorded vote.

[*English*]

The Chair: We shall have a recorded vote on government amendment G-2.

(Amendment agreed to: yeas 11; nays 0) [See *Minutes of Proceedings*])

The Chair: We have NDP-20, amendment number 5944548.

Mr. Harris, do you wish to move it onto the floor?

● (2020)

Mr. Jack Harris: Thank you.

I move amendment NDP-20, which provides a subclause after line 7 on page 49, reading as follows:

> (1.1) A person who is convicted by summary trial of an offence, or who has been so convicted before the coming into force of this subsection, has not been convicted of a criminal offence.

This amendment would ensure that all people who are subject to a summary conviction trial can be treated as cases of military discipline, and given, in accordance with section 163 of the National Defence Act, specifically subsection 163(3), by a commanding officer, they can receive:

> a sentence in which any one or more of the following punishments may be included: (a) detention for a period not exceeding thirty days;

—and we're talking about imprisonment here in the detention centre in Edmonton for a period not exceeding 30 days—

> (b) reduction in rank by one rank; (c) severe reprimand, (d) reprimand, (e) a fine not exceeding basic pay for one month, and

—I guess and/or—

> (f) minor punishments.

All of these punishments are available to a commanding officer who, after a summary trial, can give any one of these sentences. It involves, as Clayton Ruby mentioned in his testimony, the liberty of the subject.

Detention for 30 days is a serious matter. It involves someone being imprisoned against his or her will. It's a significant punishment in the law and involves a situation where you don't have the benefit of proper procedure—the lack of a public hearing, the lack of constitutional rights, and the lack of respect for what's called natural justice. You don't know the case against you, because you don't have the same kind of disclosure that's available in a criminal trial in a civil system.

We have a very elaborate system of disclosure before our provincial courts, even when someone is charged with a minor offence. Those procedural protections are not available in circumstances where someone is facing a summary trial procedure. You don't have the right to counsel. You don't have a trained judicial officer determining your guilt or innocence. You don't have rules of evidence. You don't have an impartial tribunal in the sense of the meaning of the law for someone who not only is impartial but also is seen to be impartial.

You could have a judge, or someone judging your case, who knows you, knows the witnesses, could be a friend of the witnesses, or in many respects knows the facts before things happen. There is a whole series of matters that aren't available with respect to a summary trial, that are taken for granted, and, in fact, are the basics of an impartial tribunal and a fair procedure.

● (2025)

It's a circumstance that does not find itself in the civil law system outside of the military, and yet it's the mode by which more than 98% of the trials that take place take place in the summary trial system. That's approximately 2,000 a year. In the last year that we have records for, 97% were actually found guilty.

As has been pointed out, 94% of the people who are convicted or found guilty, after the passage of this legislation—again, going by the one year that we have records for—will be exempted from a criminal record. Some 107 Canadian Forces members in the year for which we are examining would have a criminal record, having been tried in a circumstance where you don't have the procedural rights to what's called procedural fairness, which is a constitutional requirement.

There have been some arguments about whether it's charter compliant or not. We've had witnesses come before us. Colonel Drapeau was one, a practising lawyer who practises military law and has written the text from which I've quoted. He has expressed his view about the concerns about the lack of procedural fairness and the legal difficulties from a constitutional point of view.

Mr. Clayton Ruby, one of the leading criminal lawyers in Canada, and one who has a sterling reputation, his text on sentencing in Canada is one that is most often used across the country. He is also, as he pointed out, the constitutional litigator and editor of the *Canadian Rights Reporter*, which is a law journal dealing with constitutional cases. He makes it clear that one of the reasons.... I believe Mr. Opitz asked him why there has been no challenge. I think he explained it quite well, the fact that individuals had to mount the case, to actually bring that case.

The suggestion again has been made that Justice Lamer and Justice LeSage said that the military justice system was constitutional. I think that argument was dealt with by several of our witnesses.

I guess Mr. Ruby said that we've never seen the legislation being challenged in that particular...that when you're dealing with constitutional challenges, you actually have to look at the challenge in a particular section of the code.

He said in his testimony:

> There's been reference to the military justice system being constitutional; it is constitutional, in my view, in the sense that having a separate and different justice system for the military is constitutional. That's all that anyone is saying. No one has ever examined these provisions one at a time for constitutional compliance.

When he's saying “no one” he means no court. He added:

> It's right to say that it's expeditious. It works well for the guys in charge, but it really is beyond any rational thought to call this fair. The judge....

And I guess we're talking here about judge in the service tribunal, which could be a commanding officer, or could be a delegate.

> ...may not be impartial; he could be friends with the witnesses. No transcript is kept, and there is no right of appeal or to full disclosure of the case against you. You're made to stand like a child in front of the tribunal for its entirety. This is demeaning and unfair. We should not hesitate to acknowledge that and change it.

That's his very strong opinion about this.

We've had this argument before at this committee. The last time we talked about it, it was suggested that, well, you know, you can't have people not getting a criminal record for some things that ought to attract public opinion, that the public should know about it.

● (2030)

That may be, but what is the solution? I think the solution was stated by Clayton Ruby in his testimony. He said that if you want someone to attract a criminal record, you must provide the proper procedures, or have them charged in criminal court.

One of the things that was raised the last time was sexual assaults. Right now the military deals with them under section 129, Conduct Prejudicial to Good Order and Discipline. That's a rather general section for something as specific and significant as sexual assault. But it's only been in the last 15 years that the military has actually tried sexual assaults. Since 1998 the changes to the act provide for that type of charge, as I understand it.

So if there is a sexual assault, it obviously needs to be dealt with and be taken seriously. The method should then be to bring in the civilian authorities to carry out such a prosecution. Otherwise, before someone can have a criminal record, you must ensure that the procedures and protections are in place.

We heard some suggestion in a general way that when you sign up for the military you sign away your rights. I don't think that when someone takes the oath of office in the military they are asked to give up the legal protections of the Charter of Rights and due process with respect to their liberty. They are the people who are fighting on our behalf to protect the Constitution and offering to sacrifice themselves to pursue that. Yes, there are specific issues with respect to the Charter of Rights. One of them is actually contained in the charter, but there is no suggestion that people waive their constitutional rights.

Mr. Ruby said:

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

That, I would suggest, is a proper answer to this notion that when you join the military you don't have the protection of the Charter of Rights when it comes to being treated as an offender, being sentenced to a fine and imprisonment and ending up with a criminal record.

I think we've talked about this quite a lot in our debate and argument. I think our side has clearly accepted and advanced the argument that military justice is different from civilian justice. That is constitutional in the sense that it's appropriate to have a separate system of military justice, and there are reasons why that justice system would be harsher than the civilian justice system. All of those things are accepted. The consequence might be that you might end up in a military prison for things you would not be incarcerated for in civilian society. As long as the system is fair and properly administered, that's appropriate.

Where we are seeking to draw the line is to prevent this process, which doesn't meet the constitutional standard in terms of procedural fairness and the rights of an accused person. We want to ensure that it would not leave you with a criminal record that would follow you for the rest of their life or until you are able to obtain, I would say, some kind of pardon. However, our law has now been changed to take away even the notion of a pardon, which, again, we opposed vehemently, but which the government nevertheless, with its majority in the House, passed.

● (2035)

This is a very important principle, one that we think is at a very high level of significance. It has to do with the constitutional rights of the people who join our Canadian Forces who we ask to give unlimited liability with their own lives in the service of their country. As we know from the past 10 years, we've seen quite a number of individuals lose their lives in the service of their country in Vietnam and elsewhere as a result of their being willing, in a voluntary army and air force and navy, choosing to join the Canadian Forces and serve their country. They deserve our consideration, our respect, with respect to ensuring that while military justice may be different, it's not going to stick them with a criminal record contrary to their having the constitutional protections, in the absence of the constitutional protections that they are in fact fighting for and willing to sacrifice for and joined the Canadian Forces in the service of.

That's the most succinct way I can put it, Mr. Chair. This is an extremely important amendment. It's very different from the amendment we just passed. The amendment we just passed has to do with excluding certain particular sections in a circumstance where the penalty is not high, not beyond the item set out. This is a different category. This is based on the mode of trial. If we have a summary trial resulting in a conviction, that ought not to attract a criminal record. If there are circumstances or offences or charges that need to be laid based on what happened, and it's deemed to be important enough that a conviction ought to result in a criminal record, and a public record, so that other employers and others who come into contact with that individual have means to know what they've done, then the system ought to be changed, or they ought to be tried in a civilian court.

The Chair: Thank you.

I have Mr. Alexander, Mr. Toone, and Madam Moore.

Mr. Alexander, you have the floor.

Mr. Chris Alexander: Thank you, Chair.

We'll be opposing the amendment for the simple reason that it runs contrary to fundamental principles of this bill and the military justice system. Mr. Harris says that the NDP accepts that the military justice system is different from the civilian system. Then he goes on to suggest that it is harsher. The effect of this amendment would be to make it more lenient, in a dramatic way.

If this amendment went through, and I, as a serving member of the Canadian Forces, were to commit an assault or an assault causing bodily harm and elect to be tried at summary trial rather than by court martial, my criminal record would not pass into the civilian system. Those are offences under the Criminal Code of Canada. There are eight such offences. If they are tried at summary trial in the military system, they should show up in the civilian system. That, to our mind, is common sense.

I think the real grievance, or hesitation, that Mr. Harris has, that the NDP have, is about the summary trial system itself. He raised the question of its procedural fairness, which indeed was attacked by Clayton Ruby, but by no one else among the witnesses that I remember, certainly not by those charged with reviewing the system, who think not just the military justice system but the summary trial system would stand a charter challenge, a constitutional challenge. And those are very eminent jurists indeed.

Even while proposing this more lenient approach to Criminal Code offences that if tried at summary trial would not generate a criminal record, Mr. Harris doesn't want to revise the summary trial system. There have been no amendments to that effect. They would be dramatic, far-reaching. We would oppose them, almost certainly. But he has not proposed that.

● (2040)

Mr. Jack Harris: That's out of order.

Mr. Chris Alexander: I think it is absolutely in order to mention that, because it's the context without which this amendment becomes even less coherent. We will oppose it.

I'd like to point out for the record that the summary trial system has widespread and deep support among the witnesses that we've heard, and to take the position of a Clayton Ruby, someone who is a self-described amateur on military justice issues—he said explicitly that he wasn't very familiar with the system—as the new gold standard for what should constitute a criminal record strikes us as a weak argument for this amendment. So we'll be opposing it.

The Chair: Mr. Toone.

Mr. Philip Toone: I think there's been testimony that supports Mr. Harris's position. I will quote from Colonel Michel Drapeau, a retired colonel from the Canadian Forces, who was before the defence committee on February 28, 2011. He said that he strongly believed that the issue of summary trials must be addressed because there was currently nothing more important—nothing more important—than for Parliament to focus on fixing a broken system "that affects the legal rights of a significant number of Canadian citizens every year. Why? Because unless and until you, the legislators, address this issue, it is almost impossible for the court to address any challenge, since no appeal of a summary trial verdict or sentence is permitted. As well, it is almost impossible for any other form of legal challenge to take place, since there are no trial transcripts and no right to counsel at summary trial."

On the face of it, I think it's fairly clear, and I don't think anybody here is going to disagree, that if you have a summary conviction, the appeal possibilities are significantly reduced. There's no transcript; there's no trial record. This is a significantly different process, and the weight of the consequence of that process has to be consequent. The proposal that we have before us right now would, I think, lead to a much more balanced approach to summary conviction.

It does not make sense to me that somebody who is risking their lives to defend the Canadian state would be subject to so significantly fewer constitutional rights than any other Canadian citizen. The person who would be facing the summary trial has made grave sacrifices and should benefit from what we're proposing here, seeing as it has been proposed by a number of experts. It has been supported even by the Supreme Court of Canada, which has said that when it comes to summary conviction we have to be very careful about the procedural protections that are going to be afforded to them.

I don't agree that the bill before us goes far enough. I think it really would benefit from this particular amendment.

The Chair: Madam Moore.

[*Translation*]

Ms. Christine Moore: I want to repeat that there is no subsequent written record in the case of summary trials. It is therefore very difficult to determine whether that has been done properly. It must also be understood that the accused in a summary proceeding is tried by someone who knows him. When it is the commanding officer, he knows him. In all other justice systems, the judge refuses to try someone whom he knows personally. That is even the case for a military judge. There is a legal problem in this case.

We may have to reconsider whether we are prepared to adopt the amendment moved by my colleague from St. John's East, acknowledging that the rights of our Canadian military members must be respected. Perhaps we will have to review the list of offences that may be tried by summary trial and the list of those that could not. Perhaps we will choose to exclude certain offences that may currently be tried by summary trial and that may attract a criminal record.

It is really important to respect military members here. It must be understood that, despite all good will, the fact remains that very little is known about the consequences, particularly by our military members who may have been in the system for a shorter period of time, especially the privates. Members often choose a summary trial because they think it will be simpler and will resolve the matter quickly. They may have the wrong impression. They feel they will undergo a summary proceeding, pay their fine and serve their punishment and that the matter will be resolved and put behind them. However, when they realize, years later, that they will have a criminal record as a result, they will not be able to turn back the clock. What has happened is recorded nowhere. If they realize the actual consequences 5 or 10 years later, it will be very difficult to go back to the situation and to be tried again.

Furthermore, as nothing is written, every time we adopted a retroactivity clause, now or later, we would be unable to consult the written record to determine whether the retroactivity clause might apply in a criminal case. That complicates administration.

I really believe this must be adopted. We must help our military members avoid attracting a criminal record.

If the government party is prepared to adopt this amendment, we may subsequently have to consider determining whether we should exclude certain offences that may currently be tried by summary trial. We can think about that. Whatever the case may be, we owe it to our military members, particularly considering everything that might be retroactive. Even now, some provisions of the bill could apply retroactively. However, as there is no written record, it is very difficult to determine whether this could apply in this specific case. It thus becomes difficult for a military member to argue.

The idea here is really to prevent negative consequences for our military members. If the government party is open to this idea, some other steps may subsequently be taken to ensure that we exclude certain offences from these provisions and ensure that they can no longer be tried by summary trial. My colleague Mr. Alexander referred to offences such as assault, for example. I believe we really owe it to our military members. They do not necessarily understand the consequences. As there is no written record, it is very difficult for them to mount subsequent challenges.

● (2045)

The Chair: Thank you.

[*English*]

Mr. Harris.

Mr. Jack Harris: Thank you.

I just want to respond to some of Mr. Alexander's comments.

Clayton Ruby is not the only one to raise concerns about this. The Criminal Lawyers' Association expressed grave concerns about it. They were opposed to the giving of a criminal record to people who were charged and convicted under a summary trial, objected to the procedures and to the constitutionality of it.

Mr. Justice LeSage, himself, in his report, said:

> ...I have very real concerns about obtaining a criminal record from a summary trial conviction. The issue of criminal records flowing from convictions at summary trial must be reviewed. The very damage that flows from a criminal record and the potential effect on a person's life is far too severe a consequence for most offences tried by summary trial. I am fully supportive of the summary trial as an efficient and effective method of maintaining discipline. However, because the summary trial, although constitutional for its purposes—

—and I think he's again talking in the general way—

> —does not provide the panoply of safeguards of a civilian criminal trial, the unintended consequence of acquiring a "criminal record" at a summary trial should occur only in exceptional circumstances.

Now we're not talking about exceptional circumstances here. I suppose one might argue that if we're getting 94% out of 100%, the other 6% must therefore, by definition, be exceptional. I don't think that's the case. There's no particular special circumstances. For example, the mere shoving of a person is an assault. If one decided to charge someone with assault, you could get a conviction, possibly even in a criminal court. But I doubt very much that every shoving match that occurs in the military is dealt with by a charge of assault, just as every time something like that happens in a school yard or a school, the police are called. But I think it could be recognized that this kind of behaviour could be a discipline issue; fighting, shoving, even striking someone could be a discipline issue, but not necessarily one that ought to attract a criminal offence.

Mr. Alexander referred to the eight offences that we're talking about that are Criminal Code offences. If there are only eight offences that we're talking about, then you make a choice.

You invoke the police in a civilian trial system to ensure that what is regarded truly as a criminal offence ought to be treated as such, handled by the civilian authorities. A person gets all of the rights that they're entitled to under our Constitution and under the law, and if they're convicted, they end up with the consequences of that.

If it's going to be regarded as a disciplinary matter, we've all agreed that it's important to have a military discipline system, one that is, as Justice LeSage said, “an efficient and effective method of maintaining discipline” through the summary trial process. It's fast; it can be dealt with in a matter of days, not in the kind of time that a civil trial might take. It can restore unit cohesion, restore morale, restore discipline in a swift way and an appropriate way, and the punishment might be greater than one would get for the same offence in society.

● (2050)

We understand that may be required to maintain that discipline and efficiency. It's not being done because it should be. No one says soldiers should be punished more than civilians. That's not the purpose of it, not to provide a greater punishment.

Mr. Alexander's argument about treating them more leniently by not getting criminal records doesn't hold water in this context. Because the purpose of making it tougher on the individual is to ensure that the unit cohesiveness, the discipline, and the morale is maintained, not to punish them for the rest of their lives with a criminal record.

That's not the point here at all. The issue is the punishment that you're given, the process by which you get there, doesn't have the same constitutional protections, and therefore as Justice LeSage says, ought not to attract the unintended consequence in many respects of having a criminal record. Clause 75, with the G-2 amendment, goes some way to recognizing it, and it has taken a couple of years. It's taken the last iteration of this bill, Bill C-41, Bill C-15, and two years of arguments to get to the point where it was accepted. It was accepted in the last Parliament mainly because it was a minority Parliament. I would venture to say, given the makeup of the last Parliament and the makeup of this committee, there's no possibility that the changes to clause 75, which are now there, would have got through. If they didn't get through then, they'd be unlikely to be passed by this committee.

It's all very well to talk about ten years to get here, or six years or seven years or three iterations or whatever, but we would never have got here if it wasn't for the arguments that were made in the past two years. We're now here, but we're here obviously because the recognition of the consequence of a criminal record is a serious matter and the government and Parliament has now decided to do something about that, not everything, but something about that, and that something is contained in Bill C-15, clause 75.

We are putting forth the proposition or the argument that we must go further, that we must prevent people from getting a criminal record when they don't have due process of law, which every other citizen outside of the military has access to if they are going to obtain a criminal record. That's the distinction we're making here. We're saying to the men and women who sign up to the military that they could come out of here with a criminal record without due process of law. Every other person in our society who is going to end up with a criminal record has the constitutional guarantees, has the ability and the right to a fair and independent tribunal with the right procedural protections that are enshrined in our Constitution, and the procedures, laws, cases, and all the things that have been put into our law as the law progressed.

As retired Justice Létourneau said, the law has changed. The law changes as time goes on. There's been a development in the law and in the application of the Charter of Rights to our criminal law and our system. He suggested that the military justice system has not kept up with that. I have to agree with him; we are trying here to help it catch up in this particular aspect. Yes, we have a military justice system that may need a fundamental review but we have an opportunity here to say we want to make sure in the meantime that we don't give people criminal records who don't have legal protection.

● (2055)

If the concern is, and I know it is, that some people who perhaps should have a criminal record are not going to have one, well then there is a solution. That solution is to have them charged in the civil system. If someone commits a sexual assault against a minor on a base or a rape, then they can be tried civilly and prosecuted to the full extent of the law, and they will have the consequences associated with that. But we don't want to have a system wherein the only people in our system of justice who don't have access, as of law, to the procedural protections of our Constitution are the people who are serving our country in the military. That's a situation we'd find ourselves in if we don't pass this amendment here today.

The Chair: Ms. Gallant.

Mrs. Cheryl Gallant: Thank you, Mr. Chairman.

Mr. Toone made reference to 2011 and a witness who was before this committee then, which speaks to the length of time, and the number of times this legislation, which is in the best interests of our serving soldiers, has been considered by Parliament. That same witness came back again before our committee during this rendition of Bill C-15. It's getting to the point where witnesses like this are just using this committee to troll for clients and shill their books. It's a total abuse of the process.

Now, the opposition can drag Bill C-15 out—

Mr. Jack Harris: On a point of order, Mr. Chair, that's an outrageous statement. Witnesses don't come to this committee unless —

Ms. Cheryl Gallant: That's not a point of order, Mr. Chairman.

The Chair: I think he has a point of order. I'm listening to it.

Mr. Jack Harris: I don't think it's proper for members of this committee to use their time effectively to defame witnesses called to appear before this committee. They don't come of their own volition; they don't walk into this committee room to sit down and testify. They are asked to testify. When we have a situation where a retired colonel of the Canadian Forces comes to this committee....The only person who has been here for both sets of committee hearings is a retired colonel of the Canadian Forces, aside from the dean of a law school, who is not practising law.

To use your time to defame a person like that and suggest they are coming here on their own to troll for clients is outrageous. It's an outrageous statement, defamatory, and probably an abuse of a member's privileges to speak on the public record. I object to it very strongly.

● (2100)

Mr. Chris Alexander: On the same point of order, Mr. Chair, the members opposite have questioned the motives and analyzed the testimony and commentary of many witnesses before this committee. We have done much less of that in the interests of time and expedient clause-by-clause consideration of this bill. It is mind-boggling to comprehend how Mr. Harris could take a comment like that, from my colleague Ms. Gallant, to have been anything other than a reflection of the same kind of behaviour that he has been engaged in—and in her case, it's been on a much more modest and truthful scale—since the beginning of this meeting, which is now entering its seventh hour.

The Chair: As you all know, on this point of order, the only thing that we are prevented from doing in committee and in the House, where we have complete freedom of speech and freedom from civil actions and exemption from jury duty, etc., is made quite clear by Standing Order 18:

> No member shall speak disrespectfully of the Sovereign...nor of the Governor General or the person administering the Government of Canada; nor use nor use offensive words against either House, or against any Member thereof....

Freedom of speech is the first and foremost thing here. We do have freedom of speech and are only asked to treat witnesses respectfully when they're here. So the comments are in order whether you like them or not.

Madam Gallant, you have the floor.

Mrs. Cheryl Gallant: Mr. Chairman, if the opposition can drag Bill C-15 out until the death of this Parliament, they would do the same thing the next time around, dragging back t the same witnesses after the same things have been said. To unnecessarily delay passage of the bill, they're requiring these soldiers to go through the criminal records suspension process unnecessarily. By their actions, they're doing the opposite of what they say they intend to do.

The Chair: With that said, we have no other speakers. We are dealing with NDP-20.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: Now we have NDP-21, reference number 5996241.

Mr. Harris, if you can move it onto the floor, please.

Mr. Jack Harris: Amendment NDP-21 provides that Bill C-15, in clause 75, be amended:

> (a) by adding after line 7 on page 49 the following:
>
> "(1.1) The Judge Advocate General of the Canadian Forces shall without delay transmit to the Commissioner of the Royal Canadian Mounted Police the list of convictions referred to in subsection (1) to be removed from the automated criminal records retrieval system."
>
> (b) by replacing line 10 on page 49 with the following:
>
> "purposes of the Criminal Records Act and the Commissioner of the Royal Canadian Mounted Police is required to remove without delay all references to those offences from the automated criminal records retrieval system."

I want to explain why we're putting that there. It's pretty clear from the earlier part of clause 75 which amends the National Defence Act by adding the following after section 249.26:

> 249.27 (1) A person who is convicted of any of the following offences, or who has been convicted of any of them before the coming into force of this section, has not been convicted of a criminal offence:

That's obviously welcome, that not only those who are henceforth convicted of these criminal offences but everybody who in the past has been convicted of any of these offences has not been convicted of a criminal offence.

What's the consequence of that and how do you give effect to that? That's what we directed our minds to, and in looking at proposed subsection (2) of proposed section 249.27, further than saying it doesn't constitute a criminal offence, it says:

> (2) An offence referred to in paragraph (1)(a) or (b) does not constitute an offence for the purposes of the Criminal Records Act.

So it does two things. It says it's not a criminal offence, so none of these offences that are listed there constitute criminal offences, and neither are they offences for the purposes of the Criminal Records Act. I guess that means you don't have to get a pardon for them because they're not offences in the first place. I think Colonel Gibson would agree with that. That's the intention and that's exactly what it says. The real worry, though, is what is the effect of that?

I will refer to the amendment that was ruled out of order just for the purpose of the argument here. The Criminal Records Act itself goes so far as to require a section 6.1 in order to deal with the consequences of absolute or conditional discharges. I want to circulate to the committee—I have it in both official languages—a short commentary prepared by our analyst who is sitting here, Erin Shaw, from the international affairs and defence—

● (2105)

The Chair: Can I just get clarification for my own purposes as chair here? Either Ms. Shaw or Colonel Gibson could probably clarify this for me. Is the Criminal Records Act administered through the RCMP or is it done through the Parole Board?

Mr. Jack Harris: Well, the Criminal Records Act itself, the procedure that provides for a removal of a criminal record, is administered by the Parole Board. If you're seeking a pardon or a record suspension, you go to the Parole Board to get it. It's governed by the Criminal Records Act, but the criminal records system that we're talking about, CPIC, the Canadian Police Information Centre, access to that and the keeping of criminal records, is actually administered by the RCMP. I think Ms. Shaw can confirm that.

The Chair: I'll get our analyst to respond first if she would.

Is that the correct interpretation, that it's the RCMP and not the Parole Board?

Ms. Erin Shaw (Committee Researcher): CPIC's databases are functionally administered by the RCMP, but perhaps our expert witnesses would be in a position to reply.

The Chair: Colonel, with all these lawyers sitting around here, we may as well get some legal opinions on the table and see how different they are.

Col Michael R. Gibson: I think there are actually a number of technical issues that need to be commented on, but I wanted to be sure that Mr. Harris had finished with his comments before I did that.

The Chair: As chair I just want to make sure that this is in order and that it's relevant.

Mr. Jack Harris: I certainly welcome whatever Colonel Gibson has to say.

The Chair: I'm looking for information for my own purposes right now.

Col Michael R. Gibson: By way of confirmation, Mr. Chair, the short answer to your particular question is that, yes, the Canadian Police Information Centre is administered by the RCMP. The central essence of the Criminal Records Act is for the national Parole Board to consider granting a record suspension.

The Chair: It is in order, so we'll just continue on.

Go ahead, Mr. Harris.

Mr. Jack Harris: We're distributing Ms. Shaw's paper, which was prepared in response to questions we had concerning the effectiveness of the act as it's written, in terms of having the practical effect of getting rid of the records.

I think we're all agreed here. The idea is that we don't want whatever is being excluded here to prevent people from.... You know, if all of these sections are being taken out of the criminal record provision, then we don't want people who have been convicted of these things have it show up with respect to police activity or border activity or the things that we're trying to avoid.

I want to give you a reference to section 6.1 of the Criminal Records Act, which talks about how you get rid of these records. This talks about “Discharges”. There are marginal notes on these sections in the act itself. There are various marginal notes on the side —“disclosure”, “inadequate”, etc.—on various sections. For clause 75, for example, the marginal note says, “Convictions for certain offences”. You'll see that on the outside. That's the marginal note. Well, the marginal note on section 6.1 of the Criminal Records Act is, “Discharges”.

This is on the back page of Ms. Shaw's paper, by the way, for your information. Page 3 of Ms. Shaw's paper has a reference to section 6.1 of the Criminal Records Act.

Then there's the marginal note “Purging C.P.I.C.” on the outside of subsection 6.1(2). CPIC is the Canadian Police Information Centre. It says:

> The Commissioner shall remove all references to a discharge under section 730 of the Criminal Code from the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police on the expiration of the relevant period referred to in subsection (1).

That refers to a discharge. The discharge, as you know, means that there was never a conviction. A person given a discharge is not convicted of a criminal offence, is found guilty but not convicted, and there's a certain period during which the discharge expires.

It's the same with the absolute discharge. If someone has an absolute discharge, it means they've never been convicted of a criminal offence. That's what section 730 says, that a judge may discharge an accused absolutely or with conditions.

An absolute discharge means it's done instead of convicting someone. It has the same effect as what we're saying here; you're not convicted of a criminal offence, or you've never been if you've already been, and that's what it says in subsection 6.1(1).

My argument is as follows. If it's necessary to have that kind of provision to get an absolute discharge out of the CPIC database, and that's the one that the police use, and peace officers, whether it be RCMP or local police.... I'm sure the MPs in the military have access to it as well, as do municipal police forces. We ought to have a provision here to ensure that if these records, potentially thousands of them going back, I guess, ever since they've been keeping these records and putting them in, are on that computer system with respect to these offences, then they ought to be removed.

That's essentially the question we asked: how do we ensure that as a practical matter, with the retroactive nature of these, we remove the criminal records of individuals convicted of certain offences under the code of service discipline?

● (2110)

The answer that was suggested to us was that we ought to go further, as suggested here on page 2, to accomplish the goal of Justice LeSage, where in his recommendation about reviewing the consequences he talked about:

> There ought to be a full review of the issue of criminal records flowing from convictions at summary trial. I also recommend a review of the processes and procedures for entering information into CPIC and of the relevant *NDA* sections to avoid consequences disproportionate to the violation.

Looking at that, we considered the possibility of an amendment that would ensure the records get out of the RCMP database. It was suggested that:

> ...an amendment would need to instruct the Commissioner of the RCMP to remove all references to convictions that meet the criteria set out in the proposed amendment.... Such an amendment could be modelled on section 6.1(2) of the CRA, which sets out provisions for dealing with absolute and conditional discharges....

That's the model we have here, section 6(1) of the Criminal Records Act, and there's an explanation above that saying that—

● (2115)

Mr. Chris Alexander: Chair, on a point of order, I was going to wait until Mr. Harris finished, but I think this point of order is relevant at this point.

We have heard from witnesses, and it is relevant to the amendment before us now, and I think makes it inadmissible, that all convictions from summary trials at present, and under the amended version, after Bill C-15 that we have just agreed on after amending Bill C-15 with clause 75, do not result in criminal records within the Canadian Police Information Centre. None of those convictions from summary trial do so at present. They do result in a criminal record under the Criminal Records Act, and that is dealt with by the amendment that we've already passed. I think you'll find Colonel Gibson and his colleagues can confirm that. It makes this amendment—

The Chair: Inconsequential.

Mr. Chris Alexander: —inconsequential and inadmissible, in my view.

The Chair: Colonel Gibson, can you speak to that?

Col Michael R. Gibson: Yes, Mr. Chair.

Solely from a technical point of view—and I understand I'm not here to make an argument—there are a number of significant concerns with this proposed amendment which I would summarize by saying I think it would be premature.

To address the point that was just raised, it's very important to appreciate the difference between a record within the meaning of the Criminal Records Act and an entry on CPIC. As I've said before, the purpose of the Criminal Records Act is to regulate the granting of record suspensions. In other words, it expresses society's view about, in essence, how long one has to wait and what should be captured. That is the purpose of clause 75.

An entry on CPIC is a different matter. In essence, it's a practical matter that does have profound consequences for an individual. The point is under division 6.2 of the National Defence Act—in other words it's already law—under section 196.27, if fingerprints are taken in respect of a matter that is tried by summary trial, they must be destroyed without delay. The reason that matters is that you shouldn't get on to one of the databases on CPIC without those fingerprints. So I think there's a significant misapprehension there.

The point I think it's very important for the committee to appreciate, and why I would have considerable concern with the way that proposed paragraph 249.27(2)(b) is drafted, it says "...all references to those offences from the automated criminal records retrieval system". All of them? There are four data banks on the CPIC system. One is the information data bank, which contains criminal records data. That would be the one that a court, for example, would refer to to confirm a conviction, but there's also an investigative data bank, an intelligence data bank, and an ancillary data bank that deals with a variety of stuff.

Is it the case that to accomplish the policy intent here that every reference to these things should be taken out of the investigative data bank? Maybe the answer is yes, but the problem is that hasn't been consulted. It's fine to make a recommendation if you're not responsible for running the system, but I would respectfully suggest that the appropriate way for Parliament to make law here is to be absolutely sure that the Commissioner of the RCMP and the Minister of Public Safety, who are responsible for running this system, have been consulted. There may very well be aspects of this that haven't been considered in the very short and sustained consideration this committee has given.

So I respectfully say I think it would be premature, verging on dangerous, to enact the amendment as it's drafted without the consultation and without the process that needs to be gone through to make sure that this is legislatively sound.

With respect to proposed paragraph 249.27(2)(a), I would respectfully suggest that it is probably redundant. But, again, this issue of consultation with the Department of Public Safety, Minister of Public Safety, officials of the RCMP, would need to take place so we understand all of this.

Please understand I'm not saying no way, no how, that it would always be a bad idea. I have significant concerns with how it's drafted and that it's premature, as an official would have to implement this as policy.

● (2120)

Mrs. Cheryl Gallant: I have a point of order, Mr. Chairman.

The Chair: We're on a point of order. I'm just getting clarification.

Mrs. Cheryl Gallant: Further to that point of order, then, given what our witness has just explained, it would appear that the amendment goes beyond the scope of this committee, that it would go to the public safety committee to delve this far, I believe the amendment should be ruled out of order.

Mr. Jack Harris: Mr. Chair, on that point of order, the fact that there may be, in policy, arguments why it should not be adopted, which Colonel Gibson has argued—

Mrs. Cheryl Gallant: It's not policy; it's technical.

The Chair: Mr. Harris has the floor.

Mr. Jack Harris: —is not sufficient to rule it out of order. I think it should be debated and should be considered.

We do have this very issue referenced by Justice LeSage. There's very similar existing wording that in effect deals with the actual computer itself. There's an amendment reference to the Criminal Records Act that we're just expanding on in subsection (2) and it's designed to give effect. An amendment that is designed to give effect to a provision that's there is within the scope of the act. It hasn't been ruled outside the scope of the act.

While what are raised in the point of order may be good arguments one way or the other, or against the passage of this, they're not sufficient to rule it out of order for consideration, that we're not allowed to consider it because it hasn't been considered by somebody else first. In fact, the amendment has been on the table since whenever we put these in place, two weeks ago, so there's a lot of time for consideration of it and to have arguments against it if you wish. It has been deemed to be in order, and to say that because Colonel Gibson has made some comments here today it suddenly becomes out of order, I think is wrong.

The Chair: Although as chair I can rule anything out of order at any time during debate upon any motion, I am going to call this in order because we are dealing with the Criminal Records Act in this part of clause 75. Whether or not it's redundant, or whether or not it's properly drafted from the standpoint of context and consultation, that's for the committee to decide, not the chair.

With that, Mr. Alexander, do you want to go on?

Mr. Jack Harris: I'm still in the process of—

The Chair: Yes, you have the floor, Mr. Harris.

Mr. Jack Harris: I was in the process of introducing it until we got clarifications and points of order.

Whatever can be said about it, it's pretty clear that we're trying to ensure that we give effect to what's clearly the intention here, which was confirmed by Colonel Gibson when he first appeared before this committee to talk about this. He certainly confirmed that the intention was to be retroactive. Whatever might happen now and in the future in terms of what gets on CPIC, Colonel Gibson referred earlier to some provisions regarding what does or doesn't go on as a criminal record.

My understanding is that these changes weren't made until 2002, so we have a whole area going back long before 2002 that could end up with people on there. We have a situation where hybrid offences, for example, are always there, whether or not fingerprints could be taken.

I think also there are two aspects to what Colonel Gibson said. There may well be three or four databases that are kept by the RCMP, and we agree with that, but the reference here is to the automated retrieval system, the one that's available to the police services across the country on an automated retrieval basis through their computers.

That's what section 6.1 of the Criminal Records Act deals with. It talks about purging CPIC and refers to the automated criminal conviction records retrieval system. That's the one that we were talking about, because they still keep records, obviously, of absolute discharges. They keep records of conditional discharges. They keep records of investigations, as you pointed out. But we're talking here about references to the conviction under the automated system, the one that's available to people across the country.

I want to quote from the report of the retired justice, the Honourable Patrick LeSage. He says:

> It strikes me as unreasonable that a CF member charged, for example, with "absence without leave" ("AWOL") for being late for work and who has a summary trial,—

—this is before we made these changes—

> —could have this charge and perhaps even a subsequent conviction entered on the CPIC database. Such information is often shared with the Canadian Border Services Agency, which I have been informed has resulted in some members being denied entry into the United States because of the charge and/or conviction.

He talks about the related concern of having a criminal record:

> A related concern is information regarding charges and convictions entered into CPIC.

He describes CPIC from their website as:

> a computerized system that provides tactical information about crimes and criminals…it is the only national information-sharing system that links criminal justice and law enforcement partners across Canada and internationally.
>
> CPIC is responsible for the storage, retrieval and communication of shared operational police information to all accredited criminal justice and other agencies involved with the detection, investigation and prevention of crime.

So the removal of these records from that automated access is important if we're going to give effect to what we're saying we're doing here: You don't have a criminal conviction, and if you are convicted of one of these offences in the future. you're not going to get one, and if you were convicted in the past, you're not going to have one.

We have done our due diligence in terms of finding out how we deal with this. We've consulted with the analyst. We received an opinion as to how it might be done. We prepared an amendment to conform to that and we've presented it for the consideration of this committee. If the committee has a better way of ensuring that people are not going to be stopped at the border and prevented from going to the United States because of something lingering on a police computer, then I would submit that it be produced, or if there is an amendment to the amendment, then it might be dealt with. If we need time to come up with one, then we can stand this down, and that will give us some time to amend it so that it effectively deals with what we're trying to effect here.

● (2125)

All law tries to remedy some particular mischief, and the mischief we see here is that the records that people have obtained in the past are available to any peace officer in this country, available to any border guard, available to any municipal police officer or RCMP officer who stops someone in a car. If we're going to get the full effect of this, then we have to do more than just leave it as it is.

That's the intention here; that's the attempt here. We submit it's necessary to pass this to give effect to this, otherwise we're not going to achieve what we're setting out to achieve.

The Chair: Mr. Alexander, please.

Mr. Chris Alexander: Thanks, Chair.

We're talking here about criminal records. The amendment we've already passed will have the effect of ensuring that any of those service offences that do not meet the same threshold for generating a criminal record in the civil system will no longer generate a criminal record in the military system. But still, both before and after this amendment, they are not generating an entry in CPIC. This is the point that needs to be taken on board. Trials and summary convictions do not result, according to all the testimony and information we've heard, in the fingerprinting of the offender and transfer to the RCMP that would generate an entry in CPIC.

Trials at court martial for more serious offences have done so and will continue to do so. We have not discussed doing things differently on that front in our consideration of Bill C-15, but the effect of our amendment will be to bring the military justice system with regard to criminal records to the point of reflecting the modern Criminal Code of Canada.

If the person who has a criminal record from a summary trial wishes to have that record now expunged, removed, have that record suspended as we now call it rather than a pardon, they will approach, I'm given to understand, the Parole Board of Canada and go through whatever procedure is required because they will be considered to have a criminal record under the Criminal Records Act, which says that any violation of a federal law constitutes a criminal record.

In this case they have violated the National Defence Act, so they will be applying for a suspension of that record. At no time will they need to go to the RCMP or will they need to have their record expunged from CPIC. That simply is not a relevant dimension of this particular issue. For that reason we think it's irrelevant to the policy goal we're trying to achieve. We would encourage all members to recognize that is the case and to conclude this debate as quickly as possible.

We will certainly be opposing this amendment.

● (2130)

The Chair: Mr. Harris.

Mr. Jack Harris: I'm going to ask Colonel Gibson to help us out here because he gave some comments earlier which would suggest that none of these offences ever, ever made it to CPIC in the first place.

The section you're referring to is a new section of the National Defence Act, is it not?

Col Michael R. Gibson: Mr. Chair, I'd like the members of the committee to understand very clearly what I'm saying. I would never be so bold as to say that it's impossible and that there are never any on there from a summary trial, because life isn't like that. Mistakes get made. The point is that under the current provision of the NDA, under section 196.27, they shouldn't be there.

In terms of proceeding responsibly, what I would suggest will happen is that the Judge Advocate General in his statutory capacity as superintendent of the military justice system, if, and hopefully when, the blessed day arrives when Parliament has passed this act and it has received royal assent, will certainly communicate with the Commissioner of the RCMP and consult with the Minister of Public Safety to ascertain exactly what their understanding is of what's on there. We will then be in a position to take the most effective step once we've ascertained that. That goes back to my comment about this being premature. I'm not saying that it's a bad idea. I have grave concerns that it's phrased correctly or that it actually addresses the problems that may be there.

To get back to the point that I think Mr. Harris very aptly made, section 12 of the Interpretation Act says legislation is remedial. The mischief that clause 75 is meant to remedy, as I pointed out several times before, is actually the question of employment and not having to fill out a questionnaire, not having to seek a record suspension. It's conceptually linked to what's on CPIC, but it's not exactly the same thing. It may well be that there will be additional legislation required on this point, and that was certainly in furtherance of the second prong of Justice LeSage's recommendation about review. We will look at that. Absolutely we want to ensure that this provision is given effective application, but I'm just saying at this point I can't represent to you, in terms of my understanding, that it would necessarily accomplish that.

The Chair: Mr. Harris.

Mr. Jack Harris: Thank you.

You may be right. Justice LeSage didn't seem to think so. In fact, in his report he's saying quite clearly that such information, the CPIC information, is often shared with the Canada Border Services Agency—I think they actually have access to CPIC—which I have been informed has resulted in members being denied entry into the United States because of the charge and/or conviction for being AWOL.

● (2135)

Col Michael R. Gibson: May I respond to that, Mr. Chair?

Mr. Jack Harris: That's what he said.

Col Michael R. Gibson: I understand that, Mr. Chair. I actually read that several times earlier today, that very passage. I just want to share with you my understanding of that. It's quite correct that CPIC entries are shared with CBSA. That's part of the purpose they're there for, for law enforcement.

The section 9 reference to the AWOL thing came from a submission from the director of defence counsel services, in which he was expressing a general concern that a relatively minor offence could have that effect. The part that I am quite uncertain about here is this reference to having been informed it resulted in being denied entry, and whether that flowed from a summary trial. It may very well have flowed from a conviction from court martial, in which case absolutely it would be on CPIC. I can't speak to what Justice LeSage was told or the reliability of it; all I can suggest is our view of the most effective way forward to address this concern.

Mr. Jack Harris: Again in response to that, clause 75 as amended by amendment G-2 doesn't say anything about the mode of trial; it says if a person is convicted of either of these offences.... If someone ends up on CPIC as a result of, say, a court martial, then it's there despite the fact that this legislation says there's no criminal record, the person hasn't been convicted of a criminal offence and it's not an offence for purposes of the Criminal Records Act, and yet it's on CPIC for whatever reason. How we get it off CPIC is the question. That's the purpose of the amendment. You're not going to have to remove them; if you're right and the summary convictions aren't there, then an order saying to remove them is not going to do any harm, it just may not do any good. But if those particular offences were saying to the Commissioner of the RCMP that you remove reference to those offences from the retrieval system, the CPIC system, by saying that, then you're actually giving effect to it if it happens to be there because it is was done by court martial.

However it got there, if you're saying it doesn't get there if someone is AWOL, then that's fine.

Col Michael R. Gibson: That's not what I'm saying, sir.

The Chair: Mr. Harris has the floor.

Mr. Jack Harris: But if it gets there because it happens to be another type of offence, it has gone through a court martial, then it's there and it needs to be removed.

What I'm saying is if Parliament, in amending the Criminal Records Act to add section 6.1, felt it was required to put in that section to purge CPIC of an absolute discharge, or a conditional discharge after the conditions have been met and whatever follows—an automatic removal of that, if that was felt necessary—then why wouldn't it be necessary to put in an additional step that we're talking about here? This is to make sure the CPIC records are purged and we don't have people being denied entry to the United States, or whatever other consequences flow, which Justice LeSage pointed out in saying that he wanted "...to avoid consequences totally disproportionate to the violation".

That's what we're trying to achieve. I think this section is not overly intrusive. It basically says that the references to those offences be removed from the CPIC database. That's our position.

The Chair: Okay. That's a motion from Mr. Harris for amendment NDP-21, reference number 5996241.

(Amendment negatived [See *Minutes of Proceedings*])

The Chair: We're at clause 75 as amended.

Shall clause 75 carry as amended?

An hon. member: On division.

(Clause 75 as amended agreed to on division [See *Minutes of Proceedings*])

The Chair: We're down to the short title.

Shall the short title carry?

● (2140)

[*Translation*]

Ms. Christine Moore: I request a recorded vote.

[*English*]

The Chair: A recorded vote?

Ms. Christine Moore: A recorded vote.

The Chair: On what, the short title?

Ms. Christine Moore: Yes.

An hon. member: Why?

Ms. Christine Moore: Because I want it to be recorded.

A voice: On division.

Ms. Christine Moore: It can be on division.

The Chair: Okay, shall the short title carry?

Some hon. members: Agreed.

Some hon. members: On division.

The Chair: Shall the title carry?

Some hon. members: Agreed.

Some hon. members: On division.

The Chair: Shall the bill as amended carry?

Some hon. members: Agreed.

Some hon. members: On division.

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

Some hon. members: Agreed.

The Chair: Shall the committee order a reprint of the bill as amended for the use of the House at report stage?

Some hon. members: Agreed.

The Chair: I want to thank our hard-working interpreters who had to keep up with all that very technical discussion. I appreciate that very much and for the time they put in.

I want to thank all the support staff, our analysts, and clerks who worked here.

I want to thank Colonel Gibson and Colonel Dufour for sticking it out to this late hour and to being here at previous meetings as technical witnesses. You may give them a round of applause if you wish.

[*Applause*]

The Chair: Now I'll have a motion to adjourn.

Mr. Rick Norlock: It is so moved.

The Chair: We're out of here.

The meeting is adjourned.