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CANADA

## **Standing Committee on National Defence**

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**EVIDENCE**

**Tuesday, November 27, 2018**

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**Chair**

**Mr. Stephen Fuhr**



## Standing Committee on National Defence

Tuesday, November 27, 2018

• (1135)

[English]

**The Chair (Mr. Stephen Fuhr (Kelowna—Lake Country, Lib.)):** Good morning, and welcome to the national defence committee clause-by-clause study of Bill C-77.

I'd like to welcome Colonel Stephen Strickey, Lieutenant-Colonel Geneviève Lortie and Major Karl Lacharité.

Much of this will be observation. You may get involved at some point. Many of the members here have never done clause-by-clause, so we'll be patient with those who have not. Some veterans on the other side of the table have done it many times. We'll go as slowly as we need to, to get this right the first time.

Pursuant to order of reference of Monday, October 15, 2018, this is clause-by-clause consideration of Bill C-77, An Act to amend the National Defence Act and to make related and consequential amendments to other Acts.

**Mr. James Bezan (Selkirk—Interlake—Eastman, CPC):** On a point of order, just so I know the process, are we going to go through this clause by clause until we get to the appropriate amendments at each clause?

**The Chair:** That's correct.

What you'll see me do, just so you know—and I'm sure you've done it in the past as chair—where there are long chunks of clauses with no amendments, I'll probably ask you to blast through a bunch of things that no one has even asked you to talk about so we can get through this as quickly as we need to.

**Mr. James Bezan:** That's a good idea.

(Clause 1 agreed to on division)

(On clause 2)

**The Chair:** Clause 2 has an amendment. Who wants to speak to LIB-1?

Mr. Robillard.

[Translation]

**Mr. Yves Robillard (Marc-Aurèle-Fortin, Lib.):** The LIB-1 amendment proposes that Bill C-77, in clause 2, be amended by replacing, in the French version, line 36 on page 3 with the following: qui est accusé ou déclaré coupable de l'infraction ou qui

[English]

**The Chair:** Is there any discussion?

(Amendment agreed to)

(Clause 2 as amended agreed to)

(Clause 3 agreed to)

(On clause 4)

**The Chair:** There's an amendment to clause 4. I'll give Mr. Bezan a second to talk to CPC-1.

• (1140)

**Mr. James Bezan:** We're suggesting in CPC-1 that clause 4 be amended by deleting lines 12 to 16 on page 4.

As you know, we heard from a couple of our witnesses that a code of service discipline already exists. There is concern that subsection 55(2) deals with reserves. It talks about all military members, but there is no exemption provided for reserves.

Also section 60 of the National Defence Act already stipulates that a reserve member is subject to the code of service discipline when they are undergoing training or are on any vessel, vehicle or aircraft at the base.

I believe it was recommended by both the Quebec bar association and retired Lieutenant-Colonel Perron that subsection 55(2) be deleted or be redrafted. I'm proposing that we delete it, since the code of service discipline will cover this anyway. I think it takes into consideration what we heard from witnesses.

**The Chair:** Mr. Spengemann.

**Mr. Sven Spengemann (Mississauga—Lakeshore, Lib.):** The position of the Liberal members is that this amendment essentially removes a section of Bill C-77 that codifies the jurisprudence from the Supreme Court decision in *Moriarity*. In its decision, the court supplies additional clarity. Our position is that this clarity is actually useful to have.

In fact, in Mr. Bezan's second reading speech of October 2018, he cited that decision in his remarks and said that the court “acknowledged that the behaviour of members of the military relates to discipline, efficiency and morale, even when they are not on duty, in uniform or on a military base.” We feel it is that thought, which is really captured by the *Moriarity* decision, that should be part of the bill.

**The Chair:** Mr. Bezan.

**Mr. James Bezan:** In rebuttal to that, that's talking about full-time members.

The problem is regarding reserve members, who have other lives outside of serving with the Canadian Armed Forces. We can't expect that proposed subsection 55(2) should apply to their daily lives in carrying out their work, as well as being a coach of the soccer or hockey team when they're not on duty and only parade every couple of weeks. We have to make an exemption for them.

As we heard from both Lieutenant-Colonel Perron and the Quebec bar association, I feel that this should be either redrafted or deleted. I think the cleanest way to do it is to delete it and deal with this under the code of service discipline, as well as under paragraph 60(1)(c).

**The Chair:** MP Spengemann.

**Mr. Sven Spengemann:** Mr. Chair, I will circle back briefly one more time.

The court was quite clear that its parameters applied to members regardless of whether or not they're on duty. It would include reserve members as well. We need that additional clarity from the decision to give us the guidance we need.

**Mr. James Bezan:** Do you think that's going to enhance recruitment to our reserve force when they're going to be subject to this 24-7 when they're only serving a few hours a week?

**Mr. Sven Spengemann:** I think it's just helpful guidance from our highest court. We feel that this level of detail is required in the bill.

**Mr. James Bezan:** I disagree.

**The Chair:** Is there any more discussion?

(Amendment negated)

(Clause 4 agreed to on division)

(Clauses 5 and 6 agreed to on division)

(On clause 7)

**The Chair:** We have amendment LIB-2.

Mr. Fisher.

**Mr. Darren Fisher (Dartmouth—Cole Harbour, Lib.):** Mr. Chair, I'm happy to move that.

The amendment is that Bill C-77, in clause 7, be amended by replacing, in the French version, lines 17 and 18 on page 5 with the following:

[*Translation*]

incarcérés dans un pénitencier ou une prison civile;

[*English*]

It's just a housekeeping amendment.

(Amendment agreed to on division)

• (1145)

**The Chair:** We have amendment LIB-3.

Who wants to speak to that?

**Mr. Darren Fisher:** I'll speak to this one as well.

The amendment is that Bill C-77, in clause 7, be amended by replacing, in the English version, line 33 on page 7 with the following:

“a penitentiary or civil prison; and”

(Amendment agreed to on division)

**The Chair:** Next is amendment LIB-4.

**Mr. Darren Fisher:** It's the same type of thing, Mr. Chair.

The amendment is that Bill C-77, in clause 7, be amended by replacing, in the French version, lines 1 and 2 on page 8 with the following:

[*Translation*]

condamné militaire incarcéré dans un pénitencier ou une prison civile;

[*English*]

**The Chair:** Is there any discussion?

(Amendment agreed to)

**The Chair:** Next is amendment LIB-5.

Mr. Fisher.

**Mr. Darren Fisher:** I move that Bill C-77, in clause 7, be amended by replacing, in the French version, line 19 on page 10 with the following:

[*Translation*]

contre d'une personne accusée de cette infraction.

[*English*]

**The Chair:** Is there any discussion?

(Amendment agreed to on division)

(Clause 7 as amended agreed to on division)

**The Chair:** We have NDP-1, which is new clause 7.1.

Mr. Garrison.

**Mr. Randall Garrison (Esquimalt—Saanich—Sooke, NDP):** I'd like to move that Bill C-77 be amended by adding after line 10 on page 11 the following new clause:

7.1 Paragraph 98(c) of the Act is repealed.

We have heard testimony from families of those who have lost loved ones to death by suicide within the Canadian military. We continue, despite some very good actions on the part of the military and its suicide prevention strategy, to lose one member of the Canadian Forces per month.

One of the things the suicide prevention strategy sought to do was to remove barriers to seeking treatment. In my discussions with the family, and the testimony we heard in particular from the Fynes family, making self-harm a disciplinary offence in the military code of conduct has an impact on the psychology of those who are suffering from mental illness in the sense that it sends a message to them that even though this has not been used recently with any frequency, they risk the loss of their military career if they seek help.

We certainly had the example of Corporal Stuart Langridge, who twice attempted suicide before the third attempt was successful—it's a strange word. He died by suicide. Even though we did hear testimony again about the lack of frequency with what's used, it's very presence in the code of conduct, to which people are trained, creates this idea that self-harm is in fact a disciplinary problem rather than a mental illness.

What we heard also as testimony is that taking this paragraph out does not take away the powers the military needs to maintain discipline and order within the military, because paragraphs 98(a) and (b), which deal with malingering and exaggerating illnesses, would remain in that code of conduct. Any of the other situations people can imagine with self-harm are covered by other points in the code of conduct.

We have very few opportunities to amend the military code of conduct. Parliament was tasked in the last Parliament with Bill C-15, and Bill C-77 completes that task of reforming the military justice system, a very large and broad review of the system. It's taken over 15 years to come to this point.

If we do not use this opportunity to amend the bill as I'm suggesting, there will be no opportunity for the foreseeable future—and by that I'm talking about within the next two, three or four years—to actually remove this from the code of conduct.

I think there is urgency. I would cite again the testimony of Ms. Fynes, that if this removal causes only one person to seek help or prevents one death, then this is timely and worth doing.

I would urge the committee to take this opportunity to take a step towards getting better treatment for those who suffer from mental health issues that result in self-harm.

• (1150)

**The Chair:** Mr. Bezan.

**Mr. James Bezan:** Mr. Chair, I want to thank Mr. Garrison for his amendment. I think this is very timely. I think it is necessary.

If we're going to reduce the stigmatization of mental health, especially for those who are dealing with suicidal thoughts, we need to let them come forward and get the help they need and not be concerned about getting charged underneath the military justice system.

As we heard in testimony from former Lieutenant-Colonel Perron and a court martial judge, there are other avenues to make sure that those who are harming others, those who are malingering, are taken care of. Paragraphs 98 (a) and (b) are very clear about making sure that those who are trying to get out of active duty by literally shooting themselves in the foot will be dealt with in the criminal justice system within national defence. I think this is something we want to support.

I know that Minister Sajjan just sent a letter to committee saying that he would love to have a study on this and brief us on the steps the department is taking, but this is a “once in a Parliament” opportunity to make this amendment. If we don't do it now, it's not going to happen for years.

**The Chair:** Mr. Spengemann.

**Mr. Sven Spengemann:** Mr. Chair, I want to start by thanking Mr. Garrison for raising this issue. I think it goes without saying that everybody around this table is concerned about mental health in our Canadian Forces and elsewhere across the public service and Canada. We take suicide prevention very seriously.

That said, it's my understanding that we received advice from the clerk that this is beyond the scope of the bill. Mr. Bezan mentioned a letter we received from the minister asking us to study this. There are conversations that need to happen and solutions need to be found.

Mr. Chair, for the purposes of this morning, I would ask you to sustain a ruling that this amendment is beyond the scope of the bill, but with the strong understanding that we need to further explore this issue and come to solutions that are acceptable.

**The Chair:** Thank you, Mr. Spengemann.

Although this is not easy, I did spend quite a bit of time on it. We've talked about this in committee, both on and off the record, and we all care about this, but the reality is that it's outside the scope of this committee.

There are a number of ways...and I'll give you a chance to speak to this, James.

We could always rest on the fact that committees are masters of their own domain and they can do whatever they want. However, we're still bound by the book that I saw on your desk for the first year, which you kept referring to. That's *House of Commons Procedure and Practice*. Very clearly, on page 771, it addresses this. It is inappropriate for the committee to amend parent documents outside the scope. I could read you the ruling, but it's there. I think we all know what it says.

There are other ways we can deal with something that we all care about, but this is not the way, so I'm going to sustain that ruling. Amendment NDP-1 is out of order.

Mr. Bezan, and then Mr. Garrison.

**Mr. James Bezan:** Mr. Chair, I respect the ruling that's based on the rules. However, we are able, through unanimous consent, to do anything. If we all believe that this is necessary to do, I think we should do it now. I know that when we get it to the House, it will have to go through the same process. But again, through unanimous consent in the House, we can all agree to it.

I would suggest we set the tone to take it to the House. I respect that you've already ruled it inadmissible.

**The Chair:** It's out of order.

**Mr. James Bezan:** I regret that we're missing an opportunity, and hopefully we'll have that opportunity in the House later.

**The Chair:** Although technically we should move on from this, I want to hear from Mr. Garrison. I want to be fair to him.

**Mr. Randall Garrison:** Technically, I'm going to challenge the ruling of the chair.

**The Chair:** I fully expected that.

**Mr. Randall Garrison:** I believe the way this proceeds is that I have a brief time to state my reasons for challenging the chair.

**The Chair:** Proceed.

**Mr. Randall Garrison:** I understand the section you're citing about scope of the bill, but scope of the bill is not a very narrow concept, and in this case we're reforming the entire military justice system. This bill makes multiple amendments to the code of service discipline, and in particular, my amendment amends the service offences and punishments section. The government bill that's submitted amends service offences and punishments nine times. It amends the very section of the National Defence Act that this amendment deals with. Either large segments of this entire bill are beyond the scope of the bill, which is of course nonsensical, or this amendment has to be in order.

I'll try to summarize fairly briefly. The task we've been given is to reform the military justice system. The task is not to look at the code of service discipline or service offences and punishments section by section. Bill C-77 as originally submitted amends sections of the code of service discipline. That's the normal standard in every committee on which I've sat, for whether a parent act can be amended. It's whether that parent act and the sections of that act are already before the committee. They clearly are before the committee in this case, and then more specifically, the division—I guess division is the right word in legal terms—of the code of service discipline is already amended.

I fail to understand how this can be beyond the scope of the bill.

What we're trying to do is make the military justice system, in general terms—and that's part of what scope of the bill means—more fair and more just, and to create a more effective system for the military. Certainly what I'm trying to do in removing the section that defines self-harm as a disciplinary offence is make it possible for members who suffer mental health issues to remain within the military, to get the treatment they need and to do what they signed up to do, and that's to serve their country.

This stands in the way of doing that. It seems to me, therefore, clearly in order.

The last thing I will say is that when the judge advocate general was here giving her testimony on this bill, I asked her whether the committee could do this. She gave a very careful response in her testimony that should the committee choose to do so, this would be the opportunity.

I'm going to stress again that if the committee sustains the ruling that it's beyond the scope, this will not happen for years to come. It took 15 years for most of these sections to get to this point and to this committee today, so it is very unlikely.

Now, I have two things to say about the minister sending a letter. One, I welcome his suggestion that we do a study on mental health, and I certainly welcome further briefings on the suicide prevention strategy. Those are all very good things. However, to receive a letter from the minister suggesting indirectly that we not do something in committee is a level of interference in our deliberations that I haven't seen before in either Parliament I've served in.

I respect what the minister is saying, that he believes we have a problem and he would like to solve it. I respect that. I don't think it's appropriate for him to weigh in just minutes before the committee comes to deal with this and suggest that we shouldn't do this.

We are the masters of our own fate in this committee. I believe this clearly is within the scope of the bill, and therefore, the section you have cited for ruling it out of order does not apply.

This is really a debate about what the scope of the bill is, and the scope of the bill, for me, is improving the military justice system in general. I believe this amendment fits within that.

• (1155)

**The Chair:** I've already ruled it out of order. I understand what you're saying.

Are you challenging—

**Mr. Randall Garrison:** I'm challenging the chair, and I'll ask for a recorded vote.

**The Chair:** That's dilatory.

Shall the decision of the chair be sustained?

(Ruling of the chair sustained: yeas 5; nays 4)

**The Chair:** All right.

There were no amendments put forward by anyone for clauses 8 through 15, so shall clauses 8 through 15 carry?

(Clauses 8 to 15 inclusive agreed to on division)

(On clause 16)

**The Chair:** We have amendment LIB-6. Does someone on the Liberal side want to speak to that?

**Mr. Darren Fisher:** Yes, Mr. Chair. I move that Bill C-77, in clause 16, be amended by replacing, in the French version, line 1 on page 14 with the following:

• (1200)

[*Translation*]

b) de s'abstenir d'aller dans un lieu précisé dans l'ordonnance;

[*English*]

**The Chair:** Is there any discussion?

(Amendment agreed to on division)

(Clause 16 as amended agreed to on division)

(Clauses 17 to 23 inclusive agreed to on division)

(On clause 24)

**The Chair:** We have amendment CPC-2.

Mr. Bezan.

**Mr. James Bezan:** Mr. Chair, I move that Bill C-77, in clause 24 be amended by adding after line 19 on page 17 the following:

161.2 (1) Except in the circumstances prescribed in regulations made by the Governor in Council, a person charged with having committed a service infraction has the right to elect to be tried by court martial.

(2) If a person charged with having committed a service infraction elects to be tried by court martial, the charge must be referred, in accordance with regulations made by the Governor in Council, to the Director of Military Prosecutions.

As we know, in the summary hearings, service members have the potential to receive penal consequences. That could be a violation of charter rights if there's no right for a service member to choose to be tried by a court.

We heard from a number of witnesses, in particular, the briefing documents that we received from Lieutenant-Colonel Perron and from the Quebec bar association, that there is no way summary convictions would allow soldiers to opt for that court martial or to exercise that right.

Even though there's no offence under the National Defence Act that could be considered a criminal offence, there are some of these service infractions that should be considered by court martial. I think this is a concern in that there are no definitions in here, and maybe we're going to do this under regulation later, as to what actual service infractions will fall under summary hearings versus court martial.

The big concern is that if some of these are of a penal nature, such as, confinement to quarters, confinement to barracks, reduction of rank, reduction in pay by up to 25%, those are pretty serious charges and if you look down the road at some of these amendments we have, there are no recordings. There are at least half a dozen service infractions that could actually end up on a criminal record; even though civilly they're not criminal infractions, they're going to end up on the service member's criminal record when he or she leaves the military.

We need to start providing the options to make sure that we're in compliance with the charter. I believe that the amendments that were suggested by both Jean-Guy Perron and the Quebec bar association provide that opportunity to make things correct.

I just state that because of the penalties that are in place, the Supreme Court has already stated that a conditional sentence is a form of imprisonment. House arrest is a form of imprisonment. Confinement to barracks would be a form of imprisonment. We have to make sure this stands up before the Supreme Court if this ever gets to that court.

**The Chair:** Mr. Spengemann.

**Mr. Sven Spengemann:** Chair, thank you very much.

The fundamental objection we have to this amendment is that it flips on its head the logic of the bill in the first place, which is to create a tier of administrative offences that are being tried and dealt with in a much more expeditious manner. Those are non-penal or less penal offences that would not be subject to the criminal justice standard. It also goes to the burden of proof, which subsequent amendments speak to beyond reasonable doubt versus balance of probabilities.

The Canadian Forces in terms of the volume of disciplinary incidents that it has to deal with needs an administrative justice system that is more efficient than that which the court martial system would allow.

That's the reason we would oppose this essential conflation of the two standards of administrative and criminal justice.

•(1205)

**The Chair:** I'm going to MP Garrison and then back to Mr. Bezan.

**Mr. Randall Garrison:** Thanks very much, Mr. Chair.

I'll be supporting Mr. Bezan's amendment. While I understand the purpose of the bill is to expedite things, when you expedite things to the point that you take away the rights of those serving in the military, I think you've expedited a bit too far.

Mr. Bezan's amendment says that those who feel that they are sufficiently at risk because of a more expedited procedure should have the opportunity to request using the court martial procedure. This is not saying that every case will go through that more complex and lengthy procedure. It's saying that those who legitimately feel their rights are at risk, the punishment is too severe, or the consequences will be too severe can request to have theirs handled through the court martial system.

I believe it defends the fundamental rights of those who are serving within the military. It will not provide any kind of large-scale, administrative or other costs to the military to allow people to have that choice to defend their rights through court martial rather than a summary conviction.

**The Chair:** Mr. Bezan.

**Mr. James Bezan:** I'll just add to that, Mr. Chair.

We already have a system in place that respects the rights of the member of the armed forces, while balancing off that we need to maintain good order, discipline and morale within the forces.

I fear that by going too far overboard on some of these summary hearings, which could potentially be penal in nature.... It's one thing to try someone through summary hearing because they didn't polish their boots, or their hair is too long or whatever, but when we start making decisions that really impact that member and are penal in nature, they have to have the right to bring it forward, if we're going to respect their charter rights.

No one deserves to have their charter rights respected more than those who serve in uniform. I would think that we wouldn't want to throw away those rights in expediency of administration of military justice. Until we actually see what's going to be underneath the regulations versus what's defined in the act, I think we have to err on the side of charter rights of individuals rather than the expedience of carrying out disciplinary action within the Canadian Armed Forces.

The other thing, as I was thinking through this, is what if you have one CO who is really hammering down hard? There isn't the opportunity for the member to say they'd rather go through court martial because they think they'll have a fairer trial than going before the CO who's going to be overly harsh in the way they're going to discipline.

There isn't that appeal process provided here, and I think this is a way we can probably give the member the chance to elect which way they wish to be tried.

**The Chair:** MP Spengemann.

**Mr. Sven Spengemann:** Mr. Chair, I hear the comments from both Mr. Bezan and Mr. Garrison.

It's important to ensure that charter rights aren't being infringed. On the other hand, the answer doesn't lie in how a particular service member feels about the penalty. I think the answer lies very correctly, as described in the very first line of the amendment, in the scope of regulations.

I'm wondering if officials could answer this. What's the extent to which a good regulatory definition of a penal offence is and what an administrative offence is...? How much of a safeguard is that, with respect to ensuring that charter rights aren't actually being violated, not on the perception of the person subject to them, but by a national standard that everybody can agree to?

**Colonel Stephen Strickey (Deputy Judge Advocate General, Military Justice, Department of National Defence):** Thank you for that question.

Certainly as you stated, sir, the hallmark of the summary hearing system is to create a non-penal, non-criminal administrative tribunal, and that the regulations would set forth the summary infractions, which is set forth in new section 2.

Mr. Bezan is quite correct that it is not in the act. The regulations will set it forth, as they currently do, in volume II of the QRs and Os in relation to summary trials.

In terms of things as stated by Mr. Spengemann—standard of proof, beyond a reasonable doubt, whether it's the right to be tried by an elect court martial or an appeal process—the very nature of this process is administrative with a bright line between the non-penal, non-criminal and the court martial, which would entail service offences and then all of those requisite rights according to the charter.

When one starts with a premise that's certainly within the regulations.... We will develop those regulations with a view that the government's intent in the bill is to develop a non-penal, administrative tribunal.

• (1210)

**The Chair:** Thank you.

Mr. Garrison.

**Mr. Randall Garrison:** Mr. Chair, with regard to Mr. Spengemann's remarks, it's not the member's perception of the penalty; it's the perception of the process that preserves morale within the Canadian Forces. To be treated fairly and to be perceived to be treated fairly are what is at question, I think, in this amendment. The reason the possible penalty comes up is that fairness becomes, I think, exponentially more important as the penalties increase. If we're going to maintain good morale, then this amendment, which allows people to choose a process that they feel is more complete and more fair, if they feel they are at great risk, is one we should put into the bill.

**The Chair:** Go ahead, MP Gallant.

**Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC):** In reply to Mr. Spengemann's question, Colonel Strickey made reference to the standard of proof. It's my understanding that the standard of proof is being changed to a probability. Given that we're changing the standard of proof, or burden of proof, to something that

is intangible, I wonder whether the argument made holds true, and if Mr. Bezan's amendment is therefore very much in order.

**The Chair:** It's not a function of whether it's in order or not. It's in order. We're discussing the standards of this—

**Mrs. Cheryl Gallant:** But is it the way to go?

**The Chair:** It's for you to decide as a committee.

Go ahead, Mr. Bezan.

**Mr. James Bezan:** In looking at the briefing document which we received from Mr. Perron, he says, "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing a wrong done to society at large rather than to the maintenance and internal discipline within [a] limited sphere of activity." That's on page 2, paragraph 46. He goes on to talk about the Supreme Court ruling in Guindon, which said, "With respect to the process, the heart of the analysis is concerned with the extent to which it bears the traditional hallmarks of a criminal proceeding."

If it is a criminal proceeding that results in the potential for a criminal record as well as penal fines, even the confinement to barracks, as the Supreme Court has already stated, in a conditional sentence, is a form of imprisonment. Anything that would be seen as house arrest would then be considered imprisonment.

I think we need to err on the side of caution here and make sure that this is in line with previous Supreme Court rulings and that charter rights aren't being violated. That's not to take away from the administrative side of trying to deal with things in a more expeditious fashion, but we don't want to undermine the rights of our soldiers, sailors and air crew.

**The Chair:** Go ahead, MP Gallant.

**Mrs. Cheryl Gallant:** Again, the fact that we are removing the burden of proof, shifting beyond a reasonable doubt to a balance of probabilities makes Mr. Bezan's amendment that much more important. The burden of proof is not as substantial whereas beyond the balance of probabilities is much less clear. There's a much greater uncertainty in the case of summary convictions.

**The Chair:** Go ahead, MP Spengemann.

**Mr. Sven Spengemann:** Mr. Chair, I think there's some confusion here that probably extends into the subsequent amendments.

The bill aspires to create parity between the civilian world and the military world.

Colonel Strickey, could you roughly sketch what the parallel would be on the civilian side? When we interact with administrative law, even tort law or any other kind of law in the civilian world, we're not subject to a burden of proof that is beyond a reasonable doubt. We're subject to a burden of proof that is on balance of probabilities anywhere else, other than in the criminal justice system.

That's the logic this bill is putting forward: to define, by regulation, a set of offences that are non-criminal in nature in order to deal with them expeditiously.

If you could make another comment on that, it might be helpful for colleagues on the other side.



**Col Stephen Strickey:** Certainly as was discussed, by its very nature, a non-penal, non-criminal administrative tribunal would have a different standard of proof than would a criminal tribunal such as a summary trial or a court martial. The Supreme Court is clear that there are two standards of proof in terms of tribunals: the criminal standard, beyond a reasonable doubt, and the civil standard, on the balance of probabilities.

As was stated generally, the hallmark of this bill is to create a non-penal, non-criminal disciplinary tribunal.

I'll make a couple of points for clarity, in terms of the discussion on the confinement to barracks. I did read Lieutenant-Colonel (Retired) Perron's submission as well as the Barreau du Québec submission. I believe I stated when I was here previously that the minor sanctions are not put forth in the bill. Those minor sanctions will be put forth in regulations. If you are suggesting that confinement to barracks will be a feature of the new system, that is to be determined in regulations. Certainly, from a regulatory development perspective, the office of the JAG and the department clearly welcome all of these submissions in terms of different ideas and of moving forward with the regulatory package, and we'll certainly take those into consideration.

• (1215)

**The Chair:** Mr. Bezan.

**Mr. James Bezan:** Will you be taking members of this committee's concerns into consideration as you draft those regulations?

**Col Stephen Strickey:** Sir, I can say, as the deputy JAG, military justice, that we take all considerations very, very seriously when we develop the regulations. As you know, sir, from your experience, Queen's Regulations and Orders, Volume II contains a vast array of very, very detailed regulations, including notes that set out the current summary trial system. Not having gotten into, of course, the details of creating that system from a regulatory standpoint, certainly one would say, from an analogous perspective, that we would work to the same degree in the summary hearing system.

**The Chair:** Is there any further discussion on CPC-2?

(Amendment negated)

(Clause 24 agreed to on division)

(On clause 25)

**The Chair:** There are a couple of CPC amendments.

**Mr. James Bezan:** I'll move the first one, amendment CPC-3, that Bill C-77, in clause 25, be amended by replacing lines 13 to 16 on page 21 with the following:

- (a) the person charged is an officer who is at least one rank below the rank of the superior commander, commanding officer or delegated officer, or is a non-commissioned member;

This is a direct link to Lieutenant-Colonel (Retired) Perron's brief, which talks about jurisdiction on page 13. Right now, the way it reads, it talks about "commanding officer or delegated officer". It does not mention non-commissioned members, because non-commissioned members are not one rank below a superior commander, commanding officer or delegated officer. Of course, they are below the lowest-ranking officer, but sometimes they are

present and have to act in the absence of an officer. Non-commissioned members and non-commissioned officers should be mentioned in the legislation in the event that they have to carry out a summary hearing.

**The Chair:** MP Spengemann.

**Mr. Sven Spengemann:** Mr. Chair, Liberal members will support the amendment.

**The Chair:** Is there any further discussion on CPC-3?

Did you want to speak to that, Colonel Strickey?

**Col Stephen Strickey:** Yes, sir; sorry.

Just with regard to that point, there's a slight technical amendment, if that amendment should pass, that my colleague Lieutenant-Colonel Lortie would like to speak to with respect to the French version.

**The Chair:** All right.

[*Translation*]

**Lieutenant-Colonel Geneviève Lortie (Director of Law, Military Justice, Policy, Department of National Defence):** The amendment reads as follows:

manquement d'ordre militaire est un officier dont le grade est d'au moins un grade inférieur au sien ou il est un militaire du rang;

In French, the word "il" isn't required.

[*English*]

If it is because you absolutely want a pronoun there, that's not required in French, but the beginning of the sentence starts with "*la personne*", so it would be "*elle*". However, from a French drafting perspective, the word "*il*" is not required.

**The Chair:** Are you okay with it, James?

**Mr. James Bezan:** Yes, I'll agree with it. It is a technical matter with the French version. I'll leave it to the legislative clerk to make sure it works.

(Subamendment agreed to)

(Amendment as amended agreed to)

**The Chair:** Now we have amendment CPC-4.

**Mr. James Bezan:** I move that Bill C-77, in clause 25, be amended (a) by replacing lines 1 and 2 on page 22 with the following:

163.1 (1) A superior commander who is satisfied beyond a reasonable doubt, at a summary hearing, that a per-

(b) by replacing lines 6 and 7 on page 22 with the following:

(2) A commanding officer who is satisfied beyond a reasonable doubt, at a summary hearing, that a person has

(c) by replacing lines 11 and 12 on page 22 with the following:

(3) A delegated officer who is satisfied beyond a reasonable doubt, at a summary hearing, that a person has commit-

I'll speak to that again. We heard from the Quebec bar association, as well as from Lieutenant-Colonel (Retired) Perron, that because this bill reduces.... This, actually, is a big difference to our original Bill C-71, as well, because we talked about "beyond a reasonable doubt" and now we're talking about this "balance of probabilities", which doesn't have any jurisdiction under the charter or the Supreme Court rulings in the past. I still think that even though we're trying to make this administratively more simple, it's the right of the accused that they be proven beyond a reasonable doubt of any service infractions.

Section 2.3 of the Quebec bar association brief talks about the subject of Lieutenant-Colonel (Retired) Perron's recommendation number 3 on page 12 of his brief, which says:

Under C-77, the accused is liable to be sentenced to a more severe punishment ("fine") based on a lower threshold of conviction. The summary hearing under C-77 offers less protections to the accused than what was present in C-71 and what is actually present in the summary trial process.

We prefer that we go back to the terminology "beyond a reasonable doubt", which is accepted in a court of law.

•(1220)

**The Chair:** MP Spengemann.

**Mr. Sven Spengemann:** Mr. Chair, in part, this conversation intersects with what was previously discussed. This is conceived as a system of administrative justice, if you will, and therefore has a—

**Mr. James Bezan:** It's justice and it's beyond—

**Mr. Sven Spengemann:** The entire conversation is about justice, but it's not criminal justice. It's administrative justice.

Mr. Chair, in the civilian world, if we were to draw the parallel, once again, of trying to achieve parity with respect to labour relations, if there are some employer discipline issues and union disciplinary issues, these are adjudicated on a standard of the balance of probabilities. The bill attempts to create parity between the two systems and succeeds in doing so. If we reintroduce the criminal justice standard of "beyond a reasonable doubt", it would create an asymmetry not only in terms of the burden of proof, but also the resulting logistics and requirements that are associated with it.

**The Chair:** MP Garrison.

**Mr. Randall Garrison:** I'm a bit divided on this one. Had we accepted Mr. Bezan's earlier amendment that would allow members to elect trial by court martial, then I wouldn't think it was necessary to replace the standard of balance of probabilities with reasonable doubt, but having not accepted that amendment and not given them that choice, I will be supporting this amendment.

**The Chair:** Mr. Bezan.

**Mr. James Bezan:** I would just remind everyone of what the Supreme Court has also said in the case of somebody who is confined to barracks as a minor punishment:

Even if their liberty is restricted by the conditions attached to their sentence, they are not confined to an institution and they can continue to attend to their normal employment or educational endeavours. They are not deprived of their private life to the same extent. Nor are they subject to a regimented schedule or an institutional diet.

If they're confined to barracks, they have restriction of movement. If they are confined to barracks, sometimes COs can confine them to a ship or barracks for up to 21 days. If that is still the minor

punishment that's allowed under the current rule, then you're talking about a penal sentence. A penal sentence requires that people be proven beyond a reasonable doubt to be in the wrong.

Again, I think we have to be as fair as possible on this. This is the way we can actually bring in some balance by adding in burden of proof respecting rulings around the military justice system, what minor sanctions are and what we're trying to do in administrative duties, but at the same time, there needs to be some consistency in how we are determining these things from a matter of burden of proof. If we're not going to give them the elective of being tried by a court martial, we definitely need to make sure that the burden of proof is proved beyond a reasonable doubt.

**The Chair:** I have MP Spengemann and then MP Gallant.

**Mr. Sven Spengemann:** Mr. Chair, I accept Mr. Bezan's argument, but my submission is that the right answer, the right mechanism, is good regulatory definition of what confinement to barracks entails. If that is deemed to be an outcome akin to criminal sentencing, then a higher burden of proof would be appropriate. If it is an administrative sanction, then the balance of probabilities burden would be required or applied.

Really, it's a question again of having the right regulatory definitions consistent, transparent and accessible to all members of the Canadian Forces.

•(1225)

**The Chair:** MP Gallant.

**Mrs. Cheryl Gallant:** Mr. Spengemann equated the punishments or summary trials as equitable to the punishments that unions dole out with labour infractions, or labour infractions by employers, for that matter.

Confinement to barracks amounts to house arrest. I don't see how you can equate the two. On that basis, I reject Mr. Spengemann's argument. We should go forth with this amendment.

**The Chair:** Mr. Bezan.

**Mr. James Bezan:** Well, as we continue to talk about this, the one thing we don't want to have is a situation where some of these things become subject to charter challenges. I'm looking through the definitions in Bill C-77. I don't even see a definition in here—maybe you can—for what's that term again...the balance of...?

**The Chair:** Probabilities.

**Mr. James Bezan:** Is it there?

**LCol Geneviève Lortie:** There's another definition per se, but the word.... The standard of proof is in the provisions, but there's no definition of the word itself.

**Mr. James Bezan:** You're using burden of proof to prove the balance of.... I would say that without a proper definition of what that means, I think we have to stick to what we know, and burden of proof is what we know.

**The Chair:** Is there anything else?

(Amendment negated)

**The Chair:** We move to amendment CPC-5.

**Mr. James Bezan:** Mr. Chair, I move that Bill C-77, in clause 25, be amended by adding after line 29 on page 22 the following:

163.21 (1) A summary hearing may not be conducted unless the superior commander, commanding officer or delegated officer has taken the necessary measures to ensure that a recording or a transcript of the summary hearing is made and that any document or information relating to the hearing and all exhibits filed with it are preserved.

(2) The superior commander, commanding officer or delegated officer shall give reasons for his or her finding."

What we have here is even though these summary hearings are supposed to be administrative in nature and hopefully not penal, we do know that currently certain service infractions show up as criminal records down the road for our service members.

If we're not going to provide proceedings of those hearings or the rulings, how does that individual, when they release from the Canadian Armed Forces, who then goes out and applies for a job... All of us get criminal record background checks now. That record is going to show that the individual had a criminal record while serving in the Canadian Armed Forces. In civilian life, offences like drunkenness would most likely not be a Criminal Code violation and insubordination would not be a Criminal Code violation, but they would show up on the criminal record.

To expunge that criminal record, they would need to have evidence of what the rulings were and if we're not taking any proceedings at the summary hearings or providing written findings by the COs they would have a big problem down the road as they transition to civilian life.

Without the opportunity to appeal—maybe it doesn't matter—but if we provide an appeal process, those findings are required to provide information to the higher delegated officer or a court martial.

**The Chair:** Colonel Strickey.

**Col Stephen Strickey:** Sir, just to delineate, as you know, the current system as outlined in the National Defence Act, outlines service offences. You're quite correct that certain service offences at summary trial could entail a criminal record.

The very nature of the proposed legislation before this committee is to create that non-penal, non-criminal system whereby there would be a bright line between the summary infractions, which section 2 says will be set forth in regulations. We talked about that. We go through this process in which on a balance of probabilities is non-criminal, non-penal, and therefore would not result in a criminal record because it would be administrative in nature. You're quite correct that the current system has summary service offences. You know our system very well.

The system that's proposed in this legislation would have an entirely different suite of summary infractions that were not offences, that would, yes, have a different standard of proof, as I mentioned before, but would not entail a criminal record. That's just to clarify.

• (1230)

**The Chair:** MP Spengemann.

**Mr. Sven Spengemann:** I have a supplementary question for Colonel Strickey.

I don't imagine those service offences that show up as a criminal record or record of conduct would become Criminal Code offences. What is the attached reasons requirement for those offences as it currently is framed, or as it will be framed under Bill C-77, with

respect to potential avenues of appeal? Presumably it's more elaborate than what would be the case for disciplinary offences of a minor nature.

**Col Stephen Strickey:** That's an excellent question.

Currently, there's no requirement in the regulation for the presiding officer at summary trial to give reasons for the decision. That decision is encapsulated in a record of disciplinary proceedings, whether the member is found guilty or not guilty. Certainly, as I talked about the last time I was before this committee, there are a number of mechanisms that a member who's found guilty can pursue: a review under Queen's Regulations and Orders 108.45 and another mechanism under Queen's Regulations and Orders 116.02 that a commanding officer can initiate a review.

The penultimate review, if you will, would be for the Federal Court to review that decision. Those are the steps in the current system.

**The Chair:** MP Gallant.

**Mrs. Cheryl Gallant:** First of all, we're removing the burden of proof. There's no definition for the balance of proof—

**A voice:** The balance of probability.

**Mrs. Cheryl Gallant:** Yes, the balance of probability. Penalties have yet to be determined. Now the ability to appeal a summary conviction is being removed in essence because there's no record of it. I think that, should we have a record of it, at least that person would have a foundation upon which to appeal.

**The Chair:** MP Bezan.

**Mr. James Bezan:** I'd like to go back to Colonel Strickey with his answer just now to Mr. Spengemann.

You talk, Colonel, about the current QRs and Os. There is an appeal process for those in summary trials. There's always the opportunity for a commanding officer or the ability of an officer to take it up to the next level.

What about the members, the serving members? Do they have an opportunity to say they disagree?

**Col Stephen Strickey:** Yes, sir. The review process is set out in QR and O article 108.45, where there's a number of steps that a member can take to have the next level, if you will, review the decision when that member feels he was aggrieved by that decision. Decisions are made by the chain of command. Ultimately, as I said, if that member is aggrieved and wishes to have that decision judicially reviewed by the Federal Court, well, it's certainly open to that member to do so.

**Mr. James Bezan:** Then it becomes even more important that we have a record of what the summary hearing said and what the decision was by the delegated officer.

**Col Stephen Strickey:** I will say that there have not been many cases that were judicially reviewed in the summary trial system, to my knowledge—again I'm going off memory. But a recent case, Petty Officer Thurrott, was heard before the Federal Court, as you probably know, sir. Generally speaking, although the case didn't fall on the constitutionality of the summary trial system, the court suggested strongly that there were no charter issues in terms of Petty Officer Thurrott's concerns.

Generally speaking, just in terms of the structure of the current summary trial process, that's how it would work. I did mention as well QR and O article 116.02, which is a commanding officer review. If for some reason it's brought to the attention of the chain of command that there were some issues with the process, then that is a mechanism in which the chain of command can initiate a review to the next level to address any concerns.

•(1235)

**The Chair:** MP Spengemann, do you want to weigh in on this again?

**Mr. Sven Spengemann:** Yes, please, Mr. Chair.

I have two things. First of all, just to correct the conclusion by Ms. Gallant that there is no definition of the burden of proof of balance of probabilities, that burden is extremely well defined in literally tens of thousands of cases of civilian jurisprudence. It's the same—

**Mr. James Bezan:** Burden of proof, yes.

**Mr. Sven Spengemann:** Balance of probabilities is traditionally extremely well defined. Every civilian case is settled on that standard or decided on that standard. It's the same standard in the military justice system that we're proposing here as it is in the civilian world. Every judge and every lawyer knows what it means to decide a case on a balance of probabilities.

Just to give the Liberal position on CPC-5, we're proceeding from the assumption that we do need an administrative summary hearing system that is expeditious and that gives the employer the ability to make decisions in the context of the need for service discipline.

It would be extraordinarily onerous to require that all records and transcripts be kept under that system and that there be justifications for summary trial decisions. To the extent that those are required, we submit they should be defined in regulation but not in the text of the bill.

**The Chair:** MP Gallant.

**Mrs. Cheryl Gallant:** If the burden of... I thought we were told by our witnesses that the burden of probability definition was unavailable to us.

**Mr. Sven Spengemann:** It's traditionally extremely well defined. It may not be in the bill, but everybody in the legal world knows what balance of probabilities means.

**Mrs. Cheryl Gallant:** Can somebody give me a quick definition?

**The Chair:** Colonel Strickey.

**Col Stephen Strickey:** More likely than not, 51%... I don't have the case law in front of me, but as was stated, generally in the administrative regime, the balance of probabilities is just that. On a balance of probability, it is more likely than not that  $x$  occurred, whereas we contrast that with the criminal standard, which is beyond a reasonable doubt.

Just to clarify for the purposes of the committee and for you, ma'am, *F.H. v. McDougall*, 2008, a Supreme Court of Canada case, clarified that there are two standards of proof in Canada. The criminal standard is that of beyond a reasonable doubt, the standard applicable by a court martial and currently at the summary trial. The civil standard, the administrative standard as was discussed throughout this committee hearing today, is the standard that we

would submit is applicable to service infractions, should this legislation go forward.

**The Chair:** MP Garrison.

**Mr. Randall Garrison:** Mr. Chair, I do think in common language the balance of probabilities is often understood as “most likely” but obviously there is an enormous amount of case law that prevents us from using such a simple summary.

My concern here is something that the Conservatives have raised in subsection (2) and that's the requirement to give reasons for his or her finding. It's impossible for anyone to feel they've been dealt with fairly if they aren't given the reasons for the finding. I know that's not required now. To me, the important part of this amendment is that they be required to give reasons for that finding. How else can those who are subject to that finding decide whether they've been fairly treated? They have no reasons given for that.

I know it's a change from the current practice, but I think it would be an important one so I will be supporting this amendment.

**The Chair:** Is there any further discussion on CPC-5?

(Amendment negated)

(Clause 25 as amended agreed to on division)

(Clause 26 agreed to on division)

(On clause 27)

**The Chair:** We have amendment LIB-7.

MP Fisher.

**Mr. Darren Fisher:** Mr. Chair, this is another housekeeping amendment.

I move that Bill C-77, in clause 27, be amended by replacing, in the English version, line 4 on page 28 with the following:

the record is in the prosecutor's possession or control, but, in doing

(Amendment agreed to on division)

(Clause 27 as amended agreed to on division)

(Clause 28 agreed to on division)

(On clause 29)

**The Chair:** We have amendment LIB-8.

MP Fisher.

**Mr. Darren Fisher:** This will be a fun one and a bit of a challenge:

I move that Bill C-77, in clause 29, be amended by (a) replacing in the French version, line 23 on page 44 with the following:

•(1240)

[*Translation*]

fraction d'ordre militaire dont il est accusé, s'avoue cou-

[*English*]

(b) replacing, in the French version, line 28 on page 44 with the following:

[Translation]

dont il est accusé, déclarer l'accusé coupable de l'infraction

[English]

(c) replacing, in the French version, line 32 on page 44 with the following:

[Translation]

(8) Dans le cas où l'accusé est accusé d'une infraction

[English]

(d) replacing, in the French version, line 37 on page 44 with the following:

[Translation]

il est accusé ou, tout en niant sa culpabilité à l'égard de

[English]

(e) replacing, in the French version, line 4 on page 45 with the following:

[Translation]

(9) Dans le cas où l'accusé est accusé d'une infraction

[English]

Sorry about that to any of the French speakers in the room, but it will look fine in the blues.

(Amendment agreed to)

(Clause 29 as amended agreed to on division)

(Clauses 30 to 36 inclusive agreed to on division)

(On clause 37)

**The Chair:** We have amendment CPC-6.

Mr. Bezan.

**Mr. James Bezan:** Mr. Chair, I move that Bill C-77, in clause 37, be amended by replacing line 3 on page 48 with the following:

“37 Section 230 of the Act is amended by adding the following after paragraph (a):

(a.01) if the sanction imposed on a person found to have committed a service infraction is detention, reduction in rank or a fine exceeding 25% of basic pay and that finding has been reviewed in accordance with section 163.6, the legality of that finding and the severity of the sanction;

(2) Section 230 of the Act is amended by striking”

We've been discussing quite a bit here that certain punishments can be penal in nature but there's no real avenue for appeal to a higher authority. This amendment would allow that appeal to a judge of the Court Martial Appeal Court in the case of a sentence arising from a summary hearing that is penal in nature.

The Quebec bar association had a similar concern. They said that even though there are minor sanctions, which are not defined in the bill, as we discussed, but will come out in future regulations, they wondered whether these minor sanctions will simply continue the minor punishments under the current system, and if so, this could pose a problem. They said that in addition, these minor punishments could include confinement to ship or barracks—we've already talked about that—and that confinement could be for up to 21 days. They said that in certain cases, the deprivation of freedom is very

restrictive, similar to a suspended prison sentence under section 742.1 of the Criminal Code.

Essentially what we're saying is that these appeals would only be available to the Court Martial Appeal Court where the service member has received a penal sentence. We're talking about detention. We're talking about huge fines, 25% of their basic pay. We're talking about reduction in rank. Therefore, some of these are penal in nature. If they're penal in nature, they should have the right of appeal to the Court Martial Appeal Court. This provides that opportunity.

**The Chair:** MP Garrison.

**Mr. Randall Garrison:** Mr. Chair, I have a question about how service infractions work now, as opposed to how they're going to work after we make these changes and since our service infractions are now specified in regulation. Maybe our experts could tell us about that.

Do we have a regulation now that sets out all the service infractions, or are there a variety of ways that things end up as service infractions?

**The Chair:** Colonel Strickey.

• (1245)

**Col Stephen Strickey:** Service offences are set forth in the NDA and they're further clarified in the regulation. As I alluded to before vis-à-vis a summary trial, if I, as a member of the Canadian Armed Forces, am charged with an offence and there is a summary trial, I am found guilty and I receive a punishment, I have a mechanism for review that is set forth in regulation. I spoke about that earlier. Ultimately, the penultimate recourse that I would have would be to judicially review that. Therefore, *ab initio*, there is no right, if you will, in the current system for a member to appeal a summary trial ruling to the Court Martial Appeal Court. The Court Martial Appeal Court deals only with courts martial.

As you know, the sanctions are set out in the proposed legislation. In proposed section 162.7, in the scale of sanctions, we have reduction in rank; severe reprimand, reprimand, deprivation of pay for not more than 18 days, and the minor sanctions which we talked about before and which will be set out by the Governor in Council.

Just to draw an analogy with the current summary trial system, the summary hearing system would envision a review authority as well, which is set out in proposed section 163.6, where the chief of the defence staff and other review authorities would have the ability to conduct a review of a summary finding.

**Mr. Randall Garrison:** We're back to the question of what are classified as minor sanctions now. You were saying minor sanctions now are set in regulation.

**Col Stephen Strickey:** Yes, that is correct, sir.

**Mr. Randall Garrison:** Is it an exhaustive list of those minor sanctions or is it a sampling of minor sanctions?

**Col Stephen Strickey:** I can actually get that minor sanction for you. It would be, as we talked about, confinement to barracks, extra work in drill, stoppage of leave, reprimand, caution. I'm going a bit from memory here. I'm sure the chair, who was in the Canadian Armed Forces, might correct me.

Is there anything I'm missing?

I'm sorry; the reprimand is not in the minor sanctions, but the others are.

**Mr. Randall Garrison:** I'm just trying to establish a relationship between what you called minor sanctions and the things that are listed in this amendment.

**Col Stephen Strickey:** What I can say, sir, while not speaking to the amendment but perhaps in general, I think this may be of assistance to the committee because there was a lot of discussion by other witnesses and there's a lot of discussion here before the committee in terms of the penal and non-penal consequences vis-à-vis the minor sanctions, confinement to barracks being the key. As was stated before, and I just want to clarify that for the committee, the minor sanctions, as is clear in what I just mentioned, are in proposed paragraph 162.7(e), "minor sanctions prescribed in regulations made by the Governor in Council".

As I stated to Mr. Bezan, clearly after receiving all of the concerns from the various witnesses, from the committee, when the judge advocate general's military justice team, of which I'm a part, goes forward to develop these regulations, certainly we will take into account this debate, if you will, as to what is that line between a penal consequence, a penal sanction vis-à-vis Guindon, as Mr. Bezan noted, vis-à-vis Wigglesworth, which was the Supreme Court case before that, and what is not.

But certainly the hallmark of this system, the summary hearing, would be to create a non-penal, non-criminal, disciplinary, administrative disciplinary-type system that is, as I said before the committee before, loosely analogous to the RCMP disciplinary scheme, which has balance of probabilities, which has sanctions such as demotion, which one could loosely say is a reduction in rank.

We will look at all of these options when we move forward in regulations.

**Mr. Randall Garrison:** I would like to continue on this for a second. The problem all of us have had in trying to deal with this is going from a very extensive bill, set of amendments, and the National Defence Act, as well as regulations at the same time. We have four different things we're trying to look at at the same time.

I think what I see in this amendment is an attempt to specify some of those things that you are saying will be left to a decision later as subject to what would be perceived by rank-and-file members as fairer consideration. Mr. Bezan can correct me if I'm wrong, but it seems that we end up with what's in the act for summary, because we end up with minor infractions. We end up with several different lists, and this is an attempt, I think, to specify some of the things—I believe Mr. Bezan is correct on this—would be perceived by rank-and-file members as being severe.

•(1250)

**Col Stephen Strickey:** To assist the committee, what I would put forward is should this amendment move forward, the sanctions would presumably mirror the sanctions that are currently in the legislation. But on a principle basis, the Court Martial Appeal Court does not have jurisdiction to hear matters outside of the court martial. That's the first factual issue.

In terms of punishments—and to your point, Mr. Garrison, because you're quite correct that it's very confusing: summary hearing, summary trial, service offences, service infractions—what we're dealing with here would be the punishments at summary trial and not the sanctions that are dealt with in this bill. So you're right.

**The Chair:** We have MP Spengemann and then MP Bezan.

**Mr. Sven Spengemann:** Colonel Strickey, is there a grey zone? Is there a large area of disagreement as to what could constitute a penal offence or an administrative offence? We're looking at detention to barracks, and you start putting a time frame on that, like detention to barracks for 30 days plus. Could that be considered an offence where criminal justice appellate mechanisms would be appropriate?

If the answer is no, then I think the way this amendment is framed reinforces our concern that it injects a criminal system element into a system that quintessentially should be administrative in nature, and for that reason, we would oppose it. However, I take the points raised by colleagues. There may be some offences where there's this argument as to whether or not charter rights would be infringed or higher levels of appellate review would be appropriate.

**Col Stephen Strickey:** I think you're quite correct. What we're dealing with, from my assessment, in the proposed amendment, when we look at line 3, "service infraction is detention, reduction in rank or a fine exceeding 25% of basic pay", that tracks the language of the current offences that are set forth in the National Defence Act and further elaborated in the QRs and Os. The bill, at proposed section 162.7, outlines the sanctions.

To be clear, in the summary hearing system, the sanction of detention would not be available. The sanction of reduction in rank is available. The sanction of a fine exceeding 25% of basic pay would not be available, but one would look to the deprivation of pay for not more than 18 days.

Technically speaking, we're taking the current system with the proposed system and envisioning an appeal to another system, if I can say that.

**Mr. Sven Spengemann:** That's helpful. Thank you.

**The Chair:** Mr. Bezan.

**Mr. James Bezan:** You're saying that you're comfortable that detention will not be part of a minor service infraction that's going to be charged under the new summary hearings.

**Col Stephen Strickey:** As it's set out in the proposed legislation, sir, yes, I am. It's not in the act and it would not be a minor sanction as currently set out. It's not a minor sanction currently in the Queen's Regulations and Orders. Detention is a punishment in and of itself that's set forth in the scale of punishments in the NDA.

**Mr. James Bezan:** I think we just wanted to make sure that this was the threshold that's defined in the act. Anything to that degree or higher requires the opportunity for court martial and appeal.

**Col Stephen Strickey:** I would just like to clarify.

Within the scale of punishments, you know, sir, as well as I do, that in the NDA, we have imprisonment for life, imprisonment for two years or more, dismissal with disgrace, imprisonment for less than two years, and dismissal from Her Majesty's service. Then we get to detention, reduction in rank, forfeiture of seniority, severe reprimand, reprimand fine, and in paragraph 139(1)(l), minor punishments, which are defined in the regulations. That's the current state of law.

In terms of the proposed state of law, again, proposed section 162.7 states that the following sanctions may be imposed in respect of a service infraction: reduction in rank, severe reprimand, reprimand, deprivation of pay for not more than 18 days, and minor sanctions.

That's just to draw a rough parallel between the two.

• (1255)

**The Chair:** Is there any further discussion on amendment CPC-6?

**Mr. James Bezan:** I know that for tomorrow I will be reading the QRs and Os just to get up to speed again.

**The Chair:** I see no further discussion on amendment CPC-6.

(Amendment negated)

(Clause 37 agreed to on division)

(Clauses 38 to 42 inclusive agreed to on division)

**The Chair:** I notice there's an amendment CPC-7, which looks to insert a new section 42.1.

Mr. Bezan.

**Mr. James Bezan:** I would suggest that we're almost out of time. Why don't we leave that to start off our next meeting?

**The Chair:** I think that's probably a fair assessment.

The meeting is adjourned.

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