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Mr. Rick Casson

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● (1530)

[*English*]

The Chair (Mr. Rick Casson (Lethbridge, CPC)): I call the meeting to order.

Today we are meeting pursuant to the order of reference of Monday, June 16, 2008, on Bill C-60, An Act to amend the National Defence Act (court martial) and to make a consequential amendment to another act.

Appearing as witnesses in the first hour are General Kenneth Watkin, judge advocate general; Colonel Patrick Gleeson; and Colonel Michael Gibson.

Sir, I will leave it up to you to proceed, and then there will be a round of questions. I'm sure you're familiar with the process at the committee, and hopefully any questions that our committee members have of you, you'll be able to respond to.

Brigadier-General Kenneth W. Watkin (Judge Advocate General, Department of National Defence): Thank you, Mr. Chairman and members of the committee. Good afternoon. *Bonjour.*

I would like to start by thanking you for the opportunity to appear before the committee today. As judge advocate general, I have the statutory responsibility for the superintendence of the administration of military justice. This appearance provides me the opportunity to explain the contents and intended operation of Bill C-60.

As judge advocate general, I am not only concerned with the efficiency and effectiveness of the military justice system; my obligation is also to ensure its fairness. That responsibility extends to addressing the effect that individual cases have on the system of military justice as a whole. As the late Chief Justice Antonio Lamer stated in his 2003 review of the military justice system, "Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence". This bill is designed to strengthen that military justice framework.

[*Translation*]

Mr. Chairman, the distinctive nature of the military justice system has been acknowledged by the Supreme Court of Canada and the existence of a system of military tribunals with jurisdiction over cases governed by military law is constitutionally recognized in the Canadian Charter of Rights and Freedoms.

The National Defence Act establishes the Code of Service Discipline which provides for a two-tiered system of military tribunals: summary trials and courts martial. Summary trials are presided over by officers in the chain of command and are limited in terms of the types of offences that can be tried, and the punishments that can be awarded. Summary trials are as their title suggests: "summary" in nature. Lawyers are normally not present and the trials involve less serious disciplinary incidents. These incidents most often relate to training, drill and deportment, but can also include assault, minor drug and other offences related to unit level discipline.

[*English*]

While the vast majority of service offences are dealt with by summary trial, it is clear that some offences must be dealt with by the more formal court martial system. Serious military offences can be sent directly to court martial, which you would recognize as similar to a civilian criminal trial.

There are presently four types of courts martial; however, Bill C-60 would simplify the structure and reduce the types of courts martial to two. Military judges preside at courts martial. A court martial may be composed of a military judge sitting alone or a military judge sitting with a panel of members similar to a civilian jury trial. At such trials, there is an independent prosecutor, and the accused is defended by either a military or civilian defence lawyer.

The court martial serves another essential function in our system of justice. For most service offences, the accused must be offered an election to be tried by court martial. This crucial safeguard for the accused's rights permits a service member to choose a trial presided over by a military judge and to be represented by fully qualified lawyers. At the same time, if a commander commences a summary trial and subsequently determines the matter should be sent to court martial, he or she can do so. The option of proceeding to court martial therefore provides an essential mechanism to ensure fairness to the accused, and it protects the broader interests of the military in Canadian society.

Court martial decisions can be appealed to the Court Martial Appeal Court, consisting of civilian judges from the Federal Court and superior courts of criminal jurisdiction. Court Martial Appeal Court decisions can be appealed to the Supreme Court of Canada.

An essential attribute of the military justice system is fairness. Again quoting the late Chief Justice Lamer, we should strive "to offer a better system than merely that which cannot be constitutionally denied".

In order to ensure that members of the Canadian Forces continue to be dealt with fairly, it is necessary to make adjustments to the system from time to time in response to judgments from appeal courts.

● (1535)

[*Translation*]

Mr. Chairman, on April 24th, 2008, the Court Martial Appeal Court found in the case of R. v. Trépanier that the exclusive power of the Director of Military Prosecutions to choose the type of court martial violates an accused person's constitutional rights under the Charter. The Court also struck down the section of the National Defence Act which authorized the Court Martial Administrator to convene courts martial. The convening of a court martial is an essential step in bringing a matter to trial. Most significantly the Court held that these provisions of the National Defence Act are of no force and effect. The Court was not willing to suspend the effect of its decision.

This Bill has thus been developed and introduced on a priority basis to address the urgency of the situation which has been created by the striking down of these sections of the National Defence Act.

[*English*]

While efforts have been made to continue with courts martial that were already convened, there have not been any new courts convened in the past seven weeks. Left unaddressed, an inability to conduct trials by courts martial will adversely affect the administration of military justice and, with it, the maintenance of discipline, efficiency, and morale upon which the operational effectiveness of the Canadian Forces depends.

In addition, important societal interests are at risk because accused persons will not benefit from the right to trial within a reasonable time, a right to which they are constitutionally entitled. As a result, serious offences may go unpunished in which victims and society would not see justice done.

Leave to appeal the decision in Trépanier is being sought from the Court Martial Appeal Court, along with a stay of execution of the decision. The courts provide the forum through which to address important constitutional issues. However, it should be appreciated that an appeal is unlikely to provide the timely and certain answer to the challenges created by the Trépanier decision. A legislative solution will provide this required certainty in a timely manner.

[*Translation*]

Mr. Chairman, I would like to directly address an issue that may be of concern to members of the Committee. That is why is Parliament being asked to pass Bill C-60 on an urgent basis, while leave to appeal to the Supreme Court of Canada is being sought concurrently. It is important to appreciate that while the proposed legislation and the appeal flow from the judgment they are two separate and distinct matters. If Leave to Appeal is granted the Supreme Court of Canada will deal with the constitutional legal issues raised by the Trépanier decision.

The Bill on the other hand is about making the military justice system work now and into the future. It ensures that both the effects of that decision and associated broader policy issues are addressed. Put simply, Bill C-60 will bring clarity, certainty and stability to the court martial convening process.

● (1540)

[*English*]

I would like to outline briefly for you the contents and effect of the bill.

The bill simplifies the court martial structure, establishes a comprehensive framework for the selection of the type of court martial to try an accused, and enhances the efficiency and reliability of decision-making. Specifically it will, as has been noted, reduce the number of types of courts martial from four to two, expand the jurisdiction of the standing court martial to include all persons subject to the Code of Service Discipline, increase the powers of punishment of a standing court martial from imprisonment for two years less a day to imprisonment for life, and limit the powers of punishment of a court martial that tries a civilian to imprisonment, a fine, or both.

[*Translation*]

In terms of the type of court martial to try an accused person, it will set out the serious offences that must be tried by General Court Martial; prescribe when relatively minor offences must be tried by Standing Court Martial; and, in all other cases, permit the accused person to choose between trial by military judge alone or a "panel" court.

Respecting Court Martial decision-making, it will provide military judges with the authority to deal with pre-trial matters at an earlier stage in the process, and enhance the reliability of verdicts by requiring a unanimous vote by panel members for findings such as guilty or not guilty at a General Court Martial.

[*English*]

Mr. Chairman, the proposed amendments are intended to respond clearly and decisively to the concerns expressed by the Court Martial Appeal Court. Bill C-60 responds directly to the issues identified in the Trépanier decision, but it is not limited to the narrower questions that arise from the facts of that case.

For example, the Trépanier decision focused on a military offence under section 130 of the National Defence Act, which incorporates civilian criminal offences. The ability to deal with section 130 service offences, such as trafficking in drugs, is essential to the maintenance of discipline. However, a military law does not distinguish between those incorporated offences and other specifically enumerated offences such as disobedience of a lawful command, which can attract a punishment of life imprisonment. As a result, this bill does not limit itself to the incorporated offences, but rather provides the same expanded rights to all accused persons, whether they are charged with an incorporated offence or one specifically enumerated in the National Defence Act.

In keeping with the objective of providing clarity in the system, the bill also provides an opportunity to clarify certain provisions of the National Defence Act following the judgment of the Court Martial Appeal Court in R. v. Grant. Unlike the Trépanier decision, the court in Grant did not find a breach of the charter, but ordered a matter that was statutorily required to be tried by court martial due to the passage of time be retried by a summary trial. The court noted it was providing a remedy tailored to the specific facts and circumstances of that case.

As superintendent of the military justice system, I must not only look at the outcomes of specific cases, but also address their effect on the larger system of military justice. For example, the direction in Grant that a new trial be conducted by summary trial instead of at court martial has created considerable uncertainty in respect to the accused person's election rights and the ability of a commander to refer a matter to court martial prior to or during the summary trial. The importance of these mechanisms in ensuring fairness to an accused and protecting the broader interests of military and Canadian society were noted earlier in my remarks.

Bill C-60 will clearly indicate that the power of the Court Martial Appeal Court is to order a new trial by court martial. The duty to act expeditiously under the Code of Service Discipline arises upon the laying of the charge, and the one-year limitation period is a jurisdictional provision reinforcing the summary nature of those proceedings.

Mr. Chairman, the court martial tier of the military justice system constitutes an essential tool with which to accomplish the fundamental purpose of the system. It is my assessment as the judge advocate general that amending the National Defence Act on a priority basis is required to bring the needed clarity, certainty, and stability to this situation. This bill will enhance the fairness of the military justice system from the perspective of accused persons and the Canadian public by reinstating a statutory provision authorizing the convening of courts martial. It will ensure that justice can continue to be done for accused persons as well as for victims.

Mr. Chairman, in order to allow sufficient time to address any specific concerns you have, I will now conclude my introductory remarks. Two members of my staff, Colonel Pat Gleeson and Lieutenant-Colonel Michael Gibson, are present with me here today to assist you in the review of Bill C-60.

● (1545)

[*Translation*]

Thank you. I would be pleased to answer any questions that you may have.

[*English*]

I would be happy to respond to any questions you might have.

The Chair: Thank you very much, General.

We'll start the seven-minute round with Mr. Wilfert.

Hon. Bryon Wilfert (Richmond Hill, Lib.): Thank you, Mr. Chairman.

Thank you, General, and your colleagues, for being here today.

As you know, we also have Bill C-45, which was introduced in the House in October 2007. In the decision that was made in the Trépanier case, the court noted at the time that this issue—which has been around for a while, and certainly came up again in the Nystrom case on fairness in section 165.14—could have been addressed at that time.

Are you able to respond to the issue of why we wouldn't have simply dealt with it at that time, given that there's now some urgency to the passing of this legislation?

BGen Kenneth W. Watkin: I'd be happy to do that, and thank you for the opportunity to clarify that issue.

I'm taking reference in the decision to four and a half years to refer to the 2003 Chief Justice Lamer independent review that was statutorily required from Bill C-25 in 1999.

First, I think it is important to outline that the military justice system has been under extensive review in the past decade. In the post-Somalia period, we had the Somalia inquiry and its recommendations. We had two reports by Chief Justice Dickson. These resulted in a number of recommendations, the vast majority of which were accepted by the government. Bill C-25 was passed and came into force in 1999.

Interestingly enough, one of the recommendations from the second Dickson report was on setting out the role of the new convening of courts and the role of the DMP. It suggested that the DMP advise...at that time the report said the chief military judge, but as the legislation was drafted, it became the court martial administrator of the type of trial. Of course, this is one of the sections that was struck down.

In 2003 we had the review by the late Chief Justice Lamer. To put that review in context—obviously an extensive review—his comments were, as I noted in my opening remarks, that "Canada has developed a very sound and fair military justice system in which Canadians can have trust and confidence". He noted there were a few areas that could be improved, and termed them as "a few changes".

There was nothing in his report that indicated those recommendations were constitutional in nature—in other words, advances on the system of justice and recommendations. There was an extensive review of the recommendations in the Lamer report. There were 57 recommendations that dealt with the court martial and discipline system per se, and 52 of them were accepted in whole or in part. Two of the recommendations that were not accepted were recommendations 23 and 25, which are caught in the present Bill C-60.

The reason they weren't accepted was that there was a belief that the system of having four types of courts was working well. It provided flexibility that better met the needs of discipline of the different types of courts and powers of punishment—numbers of panel members, for example. A disciplinary court martial has three panel members, where a general court martial has five.

The Nystrom decision in 2005 of the Court Martial Appeal Court was a non-binding decision. It did not settle the issue of its review of some of the challenges that were presented by offering accused the type of court. Specifically, the court indicated it wasn't addressing the constitutionality, but it did express deep concern over this issue and the provision, and it set out its preference in its decision for this type of process, similar to what was in the Lamer report. However, at that time there was a previous unanimous binding decision of the Court Martial Appeal Court. It upheld in the mid-1990s that the chain of command—in other words, someone who wasn't as independent as the director of military prosecutions—could choose the type of court, and this did not violate the charter. So we had a non-binding decision in the Nystrom case, and an earlier binding case.

In addition to that, shortly after that case was yet another case where the Court Martial Appeal Court indicated that there were good reasons administratively why there might be a problem having a general court martial with five members in a remote location. When this was argued at the trial level—when Trépanier came forward and the judge at the trial level accepted the binding case from the 1990s, not the non-binding decision in Nystrom—that got appealed to the Court Martial Appeal Court, and we have the decision.

● (1550)

Hon. Bryon Wilfert: Through you, Mr. Chairman, to the general, the government is proposing these legislative amendments. They are also seeking leave to appeal to the Supreme Court of Canada. We support, obviously, the intent of the legislation. We're going to be proposing a mandatory parliamentary review at the end of, say, two years—and again, you can comment on this. This has been done in other cases. In fact, depending on the state of the appeal to be heard by them, it would be mandatory for either the House or Senate, or both, to review the legislation rather than having a sunset clause, because we think it is important that, if it hasn't been heard, we at least give Parliament the opportunity to exercise its right in terms of review.

Could you comment on that?

BGen Kenneth W. Watkin: The military justice system does exist under a system of review. In Bill C-25, obviously there was a requirement for a review every five years, and that resulted in the recommendations by Chief Justice Lamer. I also review annually the military justice system and report to the minister, and the minister then files that report in Parliament. So in terms of there being a system of review—

Hon. Bryon Wilfert: It's not anything new.

● (1555)

BGen Kenneth W. Watkin: —that's not unique or problematic overall, depending upon how—

Hon. Bryon Wilfert: Our concern obviously is that if there were a sunset clause and the legislation were to expire, we'd be back at square one. So that's why we wanted to do the review.

And if in fact the government gets leave to appeal, would the status of this legislation or these reforms be affected in any way? I guess it wouldn't be. The government would still move forward with its appeal. The legislation would be on the books. And then I guess it would depend on what the courts say.

BGen Kenneth W. Watkin: Well, of course I can't comment on the appeal and what the courts might ultimately say.

Hon. Bryon Wilfert: Yes.

BGen Kenneth W. Watkin: The amendments are not intended to be a temporary measure, I guess is the way to put it.

And of course, what we're confronted with is that the Court Martial Appeal Court in Trépanier clearly said that the constitutional provisions were of no force and effect.

From a policy perspective, clearly it was not the preferred choice in 2003 in terms of the options that were available. However, we have before us the 2003 Lamer report. We have the clear indication from the Trépanier decision itself—first from Nystrom and now from Trépanier—in terms of a preference there.

We've also had more contemporary experience with panel courts, and I think this is one of the things to set out and to clarify for the record. The Trépanier decision indicates that there haven't been any panel courts, and it was relying on the information from the Lamer report. But indeed there have been. In 2006 and 2007, 9% of all our courts martial were panel courts. And last year, 20% of all our courts martial were, in effect, jury-type trials.

I have attempted to determine a similar statistic from the civilian justice system. The closest I can get is that it is somewhere around 2%, but the statistics are hard to determine. I think I'm on safe ground to say that it's significantly less than 20% of the proceedings.

Hon. Bryon Wilfert: Thank you for that.

The Chair: Thank you, sir.

Mr. Bachand.

[*Translation*]

Mr. Claude Bachand (Saint-Jean, BQ): Thank you, Mr. Chairman.

I want to welcome the entire Canadian Forces legal team. I want to tell the colonel and general that the threat I made earlier, to speak only in the presence of my lawyer, wasn't serious.

[*English*]

I have to repeat that in English. The threat that I wouldn't—

Some hon. members: Oh, oh!

[*Translation*]

Mr. Claude Bachand: General, earlier you explained at length the difference between your appeal to the Supreme Court and the bill before us today. The latter concerns an urgent matter. That moreover was quickly demonstrated to us. We agree that there are various degrees of urgency and that the Trépanier decision requires more specific applications of the National Defence Act. I also agree that you have provided more clarity, certainty and stability.

As regards the Supreme Court, I didn't understand why a bill was being tabled and why these steps were being taken with the Supreme Court. You said that the Trépanier decision raised constitutional issues.

What constitutional issues has the Trépanier decision raised?

[*English*]

BGen Kenneth W. Watkin: The issues were raised primarily to the question of full answer and defence by an accused person. The military justice system is constitutionally recognized in paragraph 11 (f) of the charter. That provision sets out the right to a jury trial in the civilian justice system, set to where the penalty would attract five years of imprisonment or more. There's an exemption in that for offences under military law being tried before military tribunals.

When the Court Martial Appeal Court looked at the question of the difference between military panel courts—if I can use that term—and civilian jury trials, it said the right to full answer and defence depended upon section 7 of the charter and specifically paragraph 11(d), "full answer and defence". The court determined that giving the accused person the ability to choose their mode of trial went to their ability to properly defend themselves.

So the focus relied on this broader argument of a right to a jury trial under a military system rather than as set out in the exemption in paragraph 11(f). That's the heart of the decision. In the analysis, it paralleled the right to choose trial in the civilian justice system to indicate that an accused under certain circumstances could choose a jury trial or a trial by judge alone.

[*Translation*]

Mr. Claude Bachand: Can a Supreme Court decision result in a partial rescinding of the bill under study? Could the Supreme Court go so far as to decide that a given clause of Bill C-60 does not apply? In other words, can the decisions we make today be amended by the Supreme Court?

● (1600)

[*English*]

BGen Kenneth W. Watkin: I'm answering a hypothetical; that's one of the problems. On a matter that's put before the Supreme Court, they can look at the existing legislation as well as the previous legislation. But that's for the court, and people argue it before the court in terms of how that—

[*Translation*]

Mr. Claude Bachand: However, you are the complainant. If you withdraw your appeal from the Supreme Court, we would have assurances that the bill would remain intact. But when you go before that court, it may extend its thinking to other bills or activities. I'm not yet convinced that you've done a good thing in appealing your case to the Supreme Court.

I don't want to make this a lawyer's debate because I'm not a lawyer and sometimes I find it hard to understand. I'm going to move on to something else and ask you another question.

You seemed very much in favour of my colleague Mr. Wilfert's proposal regarding a mandatory review. That's a surprise to me because I thought all opposition members were in favour of the sunset clause. A sunset clause has much more impact. If the review isn't conducted as described in the sunset clause, the bill becomes inoperative and null and void. I don't think a mandatory review requires people to amend the bill. We can conduct a mandatory review, but what will we do if that doesn't work?

I'm still thinking of the example of the Veterans Charter that was adopted in haste. A few months afterward, we realized that we had enormous problems. I support the sunset clause. In your opinion, is such a clause incompatible with a mandatory review? There may be a mandatory review, but we can then add a sunset clause as an additional guarantee. Does that make sense legally?

[*English*]

BGen Kenneth W. Watkin: On my concern, as superintendent of the military justice system, over the sunset clause, the exact intention of this bill is to allow the system to function with clarity, certainty, and stability. The problem proposed by a sunset clause is that it could put us back in the same situation again where the ability to proceed with courts is not able to happen for any number of reasons, in terms of the automatic expiration of the law at a certain time. My concern is that I'll be back here one or two years from now with the same concern, trying to make the system work.

In terms of being able to schedule courts, ensure for the accused that there's no trial delay so their rights are met, and ensure that victims see justice done, this legislation is seeking to add rights for accused members. It has a positive focus, and that's the concern it provides for me.

The Chair: Monsieur Bachand, you can have one small one.

[*Translation*]

Mr. Claude Bachand: What do you suggest we do if we legislators are mistaken today? If we are mistaken as a result of the speed with which we've passed the bill, what recourse will we have in order to try to correct our mistakes? It won't be better if we make a mistake then discover some unmanageable aspects in a few months. What will we do then?

[*English*]

BGen Kenneth W. Watkin: Certainly the bill is set out to provide the required stability to make the system work. Any legislation that's passed would be subject to challenge at court martial. It happens every day in our courts martial. Our defence counsel will raise objections if they see them, put them before the court, and of course that's how we ended up here with Trépanier. It is all part of the process.

The Chair: Thank you, sir.

We'll go over to the NDP for seven minutes.

● (1605)

Ms. Dawn Black (New Westminster—Coquitlam, NDP): Thank you very much.

I have two questions to ask, and my colleague Mr. Comartin has questions as well. I hope we can fit that into our seven minutes.

General Watkin, in the Trépanier decision the Court Martial Appeal Court said that they didn't see the need for a legislative remedy. I'll quote paragraph 117:

> ...there is also an available interim practical solution which can easily be implemented for all charges. Under section 130 of the NDA, the accused can be offered an election as to his or her trier of facts. There will be no legal impediment to that course of conduct since section 165.14 which gives the right to the prosecution is [of] no force and effect with respect to these offences.

In an earlier technical briefing, my staff was told that this part of the judgment was contradictory and that there was no way to convene the court martial at this time without amending the National Defence Act. Could you could respond to that part of the judgment—the part that I read out—and to why the interim solution that was proposed by the court is deemed to be unsatisfactory?

BGen Kenneth W. Watkin: What I deal with is obviously effects of decisions. In particular, it's clear that the judgment said that the provision that allows the convening of courts was of no force and effect, so it struck down that section. The problem it has created is that there's no other section or legislative authority in the NDA that would allow that to happen.

I did mention in my opening remarks that the system has convened courts that were already convened and have gone forward. I'll give you an example of some of the challenges this has created.

In one case, the issue of choosing trial was raised by the accused, and after hearing the case, the military judge just continued on without giving a choice to the accused.

In another case, the military judge ruled at a disciplinary court martial that he had to give the right to choose the type of trial, and then terminated the proceedings. That was at a disciplinary court martial, one of our panel courts. Then when the accused chose an SCM, he terminated the proceedings and sent it back.

In another case, what the military judge chose to do as his decision was to issue a conditional stay, and he referred the case back.

Ms. Dawn Black: Are you looking for certainty?

BGen Kenneth W. Watkin: I'm looking for certainty. My concern with all this is that there's no clear legal authority for DMP, the director of military prosecutions, to offer the choice. My concern is that what we're setting up has a lack of consistency, a lack of clarity. Our courts are struggling with this issue, and eventually you're inviting appeals. That's my concern.

Ms. Dawn Black: Thank you very much.

There is another thing I would like you to do. We were told originally that we would only be dealing at this amendment stage with the Trépanier decision, and now we're dealing with Grant. Could you briefly give a more extensive explanation of why you've decided to throw in the Grant decision as well?

BGen Kenneth W. Watkin: The Grant decision was an adverse decision. Leave to appeal to the Supreme Court was sought in that decision, but not granted by the Supreme Court. It wasn't a constitutional issue, however, so it wasn't a matter of the striking down of sections. And in that case, the court noted that it was providing a remedy specifically tailored to that case. My challenge, as the superintendent of the military justice system, is that I have to look at the broader application of a decision such as Grant in terms of the whole legislative scheme.

So as I mentioned in my opening remarks, one of the hallmarks of our two-tier system of justice is that an accused at a summary trial can ask to have the full protections of legal counsel and an independent judge who hears the case or a panel. Or, if during a summary trial the trying officer starts to hear the case and hears the evidence, the trying officer may decide that it is a matter that really should go to court martial, that it needs to have the full hearing. Ordering it back to summary trial doesn't take into account the larger questions that might arise once the summary trial starts.

So the focus of the amendments, as has always happened—and this is the first case I'm aware of where the order was to summary trial—is that the Court Martial Appeal Court will in fact order a new court martial. And it's clear under military law that there is no right to a summary trial. So the fall-back would be that you would get the full trial with all the rights and privileges that you have to put forward.

And the other amendments are clarifying different parts of the law. For instance, one refers to "after a charge" has been laid, but in fact you can't have a charge unless it is laid. It's at that level of clarity.

● (1610)

Ms. Dawn Black: Thank you very much.

My colleague, Mr. Comartin.

The Chair: Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thanks, Mr. Chair.

I just want to go back to something Mr. Bachand raised. Did you get leave to the Supreme Court for Trépanier?

BGen Kenneth W. Watkin: No, not yet.

Mr. Joe Comartin: Has it been applied for?

BGen Kenneth W. Watkin: It's been applied for.

Mr. Joe Comartin: So assuming it's granted and goes ahead, is it correct there's no way that Bill C-60 is going to apply to the Trépanier case? This is not retroactive; we cannot use Bill C-60 to try to upgrade Trépanier.

BGen Kenneth W. Watkin: They might order a new trial, for instance. That might be the outcome.

Mr. Joe Comartin: But even then, Bill C-60 will have come into effect—

BGen Kenneth W. Watkin: Yes.

Mr. Joe Comartin: —after facts that arose or led to the charges in Trépanier. Can you make it retroactive to the statute as proposed? Bill C-60, as it is right now, is not retroactive.

BGen Kenneth W. Watkin: Yes, we'd have to look at that to see if they'd be tried under the laws at the time. But I'd have to go back, to be honest with you, and look at that in terms of the outcome.

Mr. Joe Comartin: If the appeal is successful, the Supreme Court would have to make a finding that, in effect, Bill C-60 is not necessary.

BGen Kenneth W. Watkin: No, not necessarily. Well, not at all. I don't believe it would have to do that at all. It would look at it and determine the—

Mr. Joe Comartin: But it would have to make a determination, General, that the charter does not apply to the extent that the individual accused has the right of election.

BGen Kenneth W. Watkin: They would look to see whether there was a constitutional issue at all, first of all. And so the answer may be in fact that it is a non-issue. So the trial would continue under the previous provisions.

But there are transitional provisions in the legislation that deal with existing trials. And the reason I'm hesitating a little bit is that some of those transitional provisions would allow for things like majority verdict and some of those other protections. So that's the—

Mr. Joe Comartin: Okay, so the Supreme Court could say to the legislature, you have in effect time to correct this; you've done it, so we're going to allow it to apply. So that's possible.

I'm just answering my own question, Mr. Chair.

Some hon. members: Oh, oh!

Mr. Joe Comartin: With regard to the process, I'm not clear on it. You're saying that we could have got around the concern that was expressed in Trépanier at the appeal level by allowing for the right of election, but we could not do that with regard to establishing the court martial court.

BGen Kenneth W. Watkin: I'm sorry, could you repeat that?

Mr. Joe Comartin: Lieutenant-Colonel Gibson is agreeing with me.

There were two parts to it in terms of the constitutional challenge. One was to establish a court martial court in the first place. So they struck that provision down. But it would appear that they would have allowed the prosecutor to build the system—I guess a practical system—to allow for the accused to have their election. Am I right?

The Chair: Very briefly. We're out of time here.

BGen Kenneth W. Watkin: It's clear that the Court Martial Appeal Court anticipated the matters going ahead. I'll give you the practical example that it created.

Because we have the different powers of punishment that attach to different courts, if an accused is charged with an offence that would attract more than two years less a day as a punishment—let's say, manslaughter that occurs outside of Canada—if the prosecutor were to offer that choice to the accused, the accused could self-limit the punishment that he or she would receive by choosing a standing court martial, which obviously is problematic from the view of broader societal interests and from the view of a victim's concern about process. This then sets you down the road to equalizing a standing court martial with a general court martial in terms of punishment and jurisdiction, which moves us down the road to....

Because we've had some history of accepting representations from accused for courts, one of the things the director of military prosecutions did in the wake of the Nystrom decision was issue a policy that said they would take in representations from accused concerning the type of court they wanted. That happened with the deputy director seven times, and each time the accused was given the type of court they wanted.

● (1615)

The Chair: Thank you. I'm afraid we have to move on.

Mr. Hawn.

Mr. Laurie Hawn (Edmonton Centre, CPC): Thank you, Mr. Chair.

Thank you, General and panel, for being here.

I just want to correct one thing my honourable colleague Mr. Wilfert said. Bill C-45 was actually introduced in March 2008, not October 2007—just for editorial purposes.

Bill C-60 is not intended to be a temporary measure. Bill C-60 is intended to be a permanent measure. Is that correct?

BGen Kenneth W. Watkin: It's certainly intended to be.

Mr. Laurie Hawn: Is there any particular reason we wouldn't proceed with necessary legislation because of an inability to predict Supreme Court hypotheticals? If we're trying to pass something that is permanent and we think it's good, why would we worry about what some Supreme Court might do somewhere down the road?

BGen Kenneth W. Watkin: Exactly, Mr. Hawn. We cannot predict that.

Mr. Laurie Hawn: We can't predict that, obviously. Laws are living documents and are always going to be open to question and review, challenge, and so on, whether it's through the charter, through the Supreme Court, or whatever. The veterans charter might be an example where something gets passed with all good intentions and is a good piece of legislation but is always open to review, and that's just a fact of legal life in Canada.

Is that a fair statement?

BGen Kenneth W. Watkin: As I mentioned in my opening remarks, this legislation is broader than Trépanier. Trépanier was limited to one type of offence. This would extend the same rights to accused charged with serious offences that would attract life imprisonment, for instance, or for other offences that weren't under the section 130 offences in the National Defence Act: the ability to choose the type of court martial.

Secondly, my goal is to have as fair a system as possible. As I've said to folks around my office, I've been subject to the Code of Service Discipline for 31 years, and my goal as a member of the forces is that Canadian Forces members have a fair system that they will be tried by.

Mr. Laurie Hawn: And I have to say it has always been fair, even when I didn't deserve it.

With respect to a mandatory review or a sunset clause, and so on, can you comment on what might be the impact of a sunset clause in terms of unintended consequences, consequences to wording in other acts or reference to other acts? What is the danger in a sunset clause?

BGen Kenneth W. Watkin: It has the danger of bringing a system to a halt.

One of the effects of Bill C-60, obviously, is that it's fundamentally changing the system. If those effects of Bill C-60 come to a halt, you won't have the ability to convene courts martial. Those provisions in fact will disappear. It has in it questions about the extent of the jurisdiction, the type of punishments of the various trials, and the ability for an accused to choose the type of trial. So we'd find ourselves back in a situation where in fact you would have a larger question in terms of the ability to function with a court.

Mr. Laurie Hawn: We've talked about Bill C-45 and that it maybe didn't move ahead because of some of the procedural challenges there, and so on. What will be the relationship between Bill C-60 and Bill C-45 as we attempt to pass Bill C-60 and as Bill C-45 gets addressed down the road and presumably passed?

BGen Kenneth W. Watkin: Bill C-45 clearly deals with those parts of the Lamer report that were accepted and put forward as legislation. Bill C-60 deals with the provisions that have arisen as a result of the Trépanier decision. There are some overlapping provisions. Two in particular are the requirement for a majority vote by the panel members and the ability of a judge to deal with pretrial matters. There's a process set out in the legislation that whichever one gets passed first will deal with those issues that overlap.

In particular, the importance of the unanimous vote is that it's tied to the whole issue of having a jury trial. Our existing system has a majority vote. Chief Justice Lamer's recommendation was that it go to a unanimous vote, and that was accepted. With Bill C-60, there's the potential to have even more panel trials to ensure that fundamental protection for the accused is captured. The two are very integral to one another.

● (1620)

Mr. Laurie Hawn: At some point in the fall we will proceed with Bill C-45. Assuming we pass Bill C-60, is it going to make it easier for parliamentarians to understand how this works? Will it make it easier to get Bill C-45 passed, just because people will understand it better? I know I'm asking for a pretty subjective opinion here.

BGen Kenneth W. Watkin: I find it difficult to answer that question, other than to say we will have a fully functioning justice system and courts proceeding. This committee will have had a hand in making that happen.

In terms of learning about the operation of the system in Bill C-60, we'll provide the type of background influence that will affect any legislative initiative.

Mr. Laurie Hawn: Just to emphasize what I get out of the whole process, it's to make the military justice system—whether it's with Bill C-60, Bill C-45, or other things—more compatible with the civilian justice system and have equal justice for all. But we understand that the military justice system is always going to be a little bit different for reasons of discipline, and so on.

BGen Kenneth W. Watkin: On the process of review and the regular reviews, clearly the desire set out in the 2003 Lamer report is to parallel the civilian justice system but retain those parts that are unique requirements of the military justice system. The military justice system is fully subject to charter review, and that is another safeguard to ensure that the system keeps up with changes and values in Canadian society.

Mr. Laurie Hawn: If we just passed Bill C-60 as it is with a mandatory review after two years or whatever—either one of those solutions—from your point of view of handling the military justice file, would that be satisfactory? Please feel free to disagree.

BGen Kenneth W. Watkin: From my perspective as superintendent, it's essential that we get clarity, get Bill C-60, get the court martial system operating, provide these extra rights to the accused, and get a process that ensures that victims' needs are being met and broader military societal needs are being met.

On the question of review, we already live under various forms of review in the military justice system.

Mr. Laurie Hawn: Would passing it with the sunset clause be a dangerous thing to do?

BGen Kenneth W. Watkin: Yes. We would have the problem that it would put us back in a similar situation to where we are now.

The Chair: Thank you, Mr. Hawn.

We have just a few minutes left. We'll start on the second round and get in only one or two.

Mr. Tonks, you have five minutes.

Mr. Alan Tonks (York South—Weston, Lib.): Thank you very much, Mr. Chairman.

Thank you, Brigadier-General.

When you use the terms “pretrial” and “summary trial”, are they the same?

BGen Kenneth W. Watkin: A summary trial is a type of trial. In our two-tier system of justice we have courts martial and we have summary trials. You can think of summary trials as occurring at a unit level in front of the commanding officer, for example. The court martial, of course, is like a criminal court.

When I say “pretrial”, it's a question of time. It's the events that happened before the court martial was convened, for instance, as opposed to post-trial, when there might be an appeal.

Mr. Alan Tonks: You'll have to pardon me. I don't sit on this committee, I'm not aware of the background, and I'm certainly not a lawyer.

Does this bill change the summary trial in terms of one who is alleged to have created a crime, or whatever, under the orders? Does it take away any of that person's rights with respect to what constitutes summary trial criteria?

BGen Kenneth W. Watkin: No, the summary trial stays intact. This bill is focused on the court martial system and, when a court is being convened, on the ability of an accused to then be able to choose the type of trial in the various circumstances set out in the bill.

● (1625)

Mr. Alan Tonks: I was intrigued by the question from my colleague Mr. Hawn with respect to the principles of natural justice that are entrenched in our Criminal Code and our Civil Code. Do the same principles apply at summary trials?

You said there are no lawyers at summary trials. Granted, they deal with less serious issues and so on, but was there ever any consideration given that Bill C-60 attempts to bring into sync those legal principles? I suppose that wasn't implicated out of the Trépanier decision, but has it ever concerned the department from a justice perspective?

BGen Kenneth W. Watkin: The focus in Bill C-60 is a result of the urgency of the situation. That's why it's so narrowly focused in terms of the way ahead.

On the broader issue of representation, I did my master's thesis in 1989 on the constitutionality of the summary trial system. There was a review in 1994. It was subject of review by Chief Justice Dickson post-Somalia. He had two reports; the first report looked at some length at the summary trial system.

The goal is to be summary. There's no prohibition on lawyers being present; however, it rarely happens. As to the question of getting legal counsel, we have a fully funded legal aid system in the military, so an accused who is being dealt with at court martial will have defence counsel provided. That can be military counsel or there's also provision to provide civilian defence counsel so that their rights are protected.

Mr. Alan Tonks: Thank you.

The Chair: Thank you very much.

We've just got a couple minutes left. We'll go over to the government and Ms. Gallant.

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): I have a brief question. If Bill C-60 does not pass, what will happen to the cases awaiting court martial? Will the charter provisions for the right to a timely trial be triggered?

BGen Kenneth W. Watkin: I'm sorry, will the charter provisions...?

Mrs. Cheryl Gallant: Will the charter provisions to the right to a timely trial be triggered? What will happen to the people awaiting their courts martial?

BGen Kenneth W. Watkin: That is the concern we have right now. Time is running. The issue was raised in the judgment itself that perhaps there's another way to do this; the problem is that specifically the judgment said the ability to convene a court without those provisions has no force and effect.

I've explained the challenges this is presenting in the operation of even the courts that are convened. It's that in the system, even when the courts have gone forward because they were previously convened, they are running into these procedural issues in terms of trying to get them to go forward. We're left with the clock ticking, in effect.

Mrs. Cheryl Gallant: So the people will go free?

BGen Kenneth W. Watkin: Well, under our system, just as under the civilian justice system, the prosecutor will decide in terms of individual cases what the situation is in terms of the passage of time. The advantage of Bill C-60 and moving expeditiously is that it will limit that as being an issue. From our perspective, acting with urgency will put us back on a playing field where accused are getting their opportunity to have their cases heard and larger society and victim interests are ensuring that persons who have breached the Code of Service Discipline are having—

Mrs. Cheryl Gallant: Okay, so as I understand this, if Bill C-60 does not pass, the accused who are awaiting courts martial risk going free without being subject to the law.

Thank you.

The Chair: Thanks, Cheryl.

There's one minute to wrap up.

[*Translation*]

Mr. Jean-Yves Roy (Haute-Gaspésie—La Mitis—Matane—Matapédia, BQ): Thank you, Mr. Chairman.

I don't agree with what you say about Bill C-60. Ultimately, you're short-circuiting the case that is before the Supreme Court by trying to pass a bill before the decision is made. That seems clear to me.

[*English*]

BGen Kenneth W. Watkin: Of course, sir, the Supreme Court is dealing with constitutional legal issues. The focus, necessarily, before the courts is on the legal issues.

What this legislation is doing is dealing with the effects of the decision, that is, with issues concerning the preference to have a system that would allow the Canadian Forces members charged with certain service offences that are dealt with by court martial to have the opportunity to choose the type of trial; and for more serious offences, to have it go to a panel trial, and then have a process to allow the individual to choose again.

So one is dealing with the question of the functioning of the system, accepting that the focus has been on providing this additional right—and not all rights have to be charter constrained, as I mentioned in my comments regarding Chief Justice Lamer. We shouldn't just be driven by what's in the charter; we should be driven by doing the right thing. That's the purpose of the legislation.

● (1630)

The Chair: Thank you. That brings us to the close of our first hour.

Thank you very much, sir, for being here and offering that testimony to us.

We will suspend for one minute while we change panels. Thank you.

● (1630)

(Pause)

● (1635)

The Chair: Okay, we're going to start with our second panel this evening. Appearing as individuals, we have Mr. Drapeau and Ms. Guzina.

Do you both have statements, or only one of you?

Okay, Mr. Drapeau, the floor is yours. After you're finished with your statement, there'll be a round of questions from the committee.

Colonel (Retired) Michel Drapeau (As an Individual): Thank you, Mr. Casson.

Let me open by thanking the members of this committee for permitting me to appear before you this afternoon to present my analysis of Bill C-60.

[*Translation*]

Also allow me to introduce Zorica Guzina, who, like me, is interested in Canadian military law, both in her everyday practice and in her teaching at the University of Ottawa.

[*English*]

Given the very short notice to conduct this analysis and the short amount of time for my appearance this afternoon, I thought it would be best for me to present the results of my review in a booklet, which you have before you.

[*Translation*]

On page 1 of the booklet is a summary table outlining the existing structure and organization of courts martial. There are four types of courts martial. I give you a description of their powers and of the rights of the accused, among other things.

On page 2, I provide a very brief decision by the Court Martial Appeal Court in Trépanier v. Her Majesty the Queen, rendered April 24 of this year, which gave life to Bill C-60.

I draw your attention to the fact that, in its decision, the Court Martial Appeal Court also referred to the recommendations made by the late Chief Justice Antonio Lamer upon his review of the National Defence Act in 2003. The purpose of those recommendations, which were pressing at the time, was to simplify the structure of the courts martial in order to create a permanent military court. The recommendations echo, at least in part, the amendments proposed in Bill C-60.

On page 3, I present a table on the essential aspects of Bill C-60.

[*English*]

In response to the recent decision by the CMAC declaring unconstitutional a provision by which the director of military prosecutions, not the accused, could choose the type of trial—either a panel and a military judge, or a military judge alone—Bill C-60 repeals that provision. At the same time, Bill C-60 simplifies the current system from four courts martial—a general court martial, a disciplinary court martial, a standing court martial, and a special court martial—down to two. This is something that late Chief Justice Lamer recommended in his 2003 report following his review of the then National Defence Act.

Bill C-60 then makes a fairly good number of other minor amendments, many of which are already included in Bill C-45, which I presume will receive, in the fullness of time, a more substantial discussion because this has yet to take place.

As for my general assessment, I do not have any major issues with Bill C-60. Above and beyond providing an accused with the right to elect the type of trial, it also simplifies the structure of the court martial, as first recommended by the late Chief Justice Lamer, and that is a good thing. The other minor amendments are also aimed at improving the military justice system, and on the whole, they are very apropos .

My concern—and it's reflected in the documents you have before you—is twofold, and some of it was addressed, at least in part, during the earlier part of the meeting when General Watkin was testifying.

The first one has to do with the tabling of this bill coincident with an application for leave to appeal before the Supreme Court of Canada in Trépanier. One of the documents that I'm giving you from the Supreme Court says that in fact an application to stay the execution of the Trépanier decision has been put before the court, and also an application for leave. Neither of these two has been heard so far.

My second concern deals with a transitional provision in clause 28 of the bill. It specifies that courts martial commenced but not completed by the time Bill C-60 comes into effect will be conducted under the old law. I heard some of the explanation for that, but it leaves me with a certain degree of doubt as to what the real impact will be of the operation of this particular clause. What do you mean? You may have the answer to it, but I don't.

Having said that, those are my opening comments, and I'd be pleased to take your questions.

● (1640)

The Chair: Thank you, sir.

Mr. Wilfert, do you want to get started—or Mr. Rota, or whoever? It's a seven-minute round.

Go ahead.

Mr. Anthony Rota (Nipissing—Timiskaming, Lib.): Very good, Chair.

Thank you very much for the table. It's very helpful and it's nice to see it in graphic form, and your explanation was very helpful.

On clause 28, you mentioned that's one of the areas that concern you, that if a trial is already in process, it has to continue under the old system. Is that not the way the system works already?

Mr. Michel Drapeau: It does, but we have the intersection of two factors here.

First of all, the Department of Justice has gone to the Supreme Court and asked for appeal. We don't know what the Supreme Court will do in either one of the two cases.

Based on this recommendation, we could see, in fact, this act enacted in no time at all.

As to how many of these trials are there and what process the trials are at, I don't know. What we do know from the Trépanier decision is that, at most, if we look back over the past four or five years, there have been a total of 200 trials. We're not talking about a whole lot of trials, but 200 trials; on average, 60 trials a year.

As to how many of those are in suspense as we speak, those trials that have commenced and that we'll be carrying out, I don't know even what type of trial they are under. Is it a general court martial, a special court martial? I don't have that kind of detail. But to say that it will continue under the old law when the Court Martial Appeal Court has said—unless it's reversed—the old law is unconstitutional, at least that very provision, you would in fact give cause to continue something that is not only unfair but unconstitutional at this stage.

That's my reading of it.

Mr. Anthony Rota: Like you, I'm looking at clause 28 and I'm thinking, why would you put that in there if it's already part of the system or already works that way? Would adding something like that cause any kind of mistrial somewhere along the line, or cause a call for a mistrial?

Mr. Michel Drapeau: I thought Trépanier was clear on that. It's an expansive decision, but nevertheless written by the court. It would seem to me that it addressed that kind of contingency and said that if a trial is ongoing, and this court has declared this provision as being unconstitutional, it would not be constitutional for you—excuse the play on words—to continue with it.

Now, you may have to go back to square one and stop this trial and recommence. I don't know, because as I say, I don't know which trial would fall under that particular clause and what's involved. But it seems odd to me.

Mr. Anthony Rota: So the trials that are pending right now or that are just waiting or suspended would be tried under Bill C-60, not under the old law. Is that clear?

Mr. Michel Drapeau: That's my understanding of it, indeed.

● (1645)

Mr. Anthony Rota: Okay, and the ones that have already started have to finish, as you say, under—

Mr. Michel Drapeau: I would have to have an explanation. What do you mean by "has started"? Has the charter been read in, or whatever? Is it not possible to go back and provide the accused with the right to elect? I don't have a full memory of the Trépanier decision, but that's one aspect of it. It may well be that in some cases the accused may elected to have the very trial that he or she is being faced with at the moment. That doesn't necessarily mean you're going to turn the clock back in every instance, but I'm posing the question.

Really, I don't have the full deck of cards. Maybe you do. It hasn't been provided to me.

Mr. Anthony Rota: When I first looked at Bill C-60, it looked pretty straightforward, and I would still imagine the bulk of it is fairly straightforward.

One of the main questions that hit this committee is that we're basically looking at three choices or three decisions to make. Do we accept it as is and hope for the best and allow Parliament to take its route down the road and review it? Do we put in a sunset clause, which is one of the proposals that have come up? Maybe one of the concerns with the sunset clause is that if we get to a certain point and the law created by Bill C-60 falls at the time it expires, then we're right back where we started, I would imagine. The other option that has come up is to review the law in two years. So the committee would put together a task force that would look at the law.

Which would you prefer, or which would you think is the best way to go on this?

Mr. Michel Drapeau: I wouldn't say all of the above, but somewhere in between. The Trépanier decision is crystal clear. It has been said with a high degree of care that this decision did not come about all of a sudden; it was a unanimous decision by the court. There have been several previous instances where the court has signalled its uneasiness about the significant difference between the civilian criminal system and the military criminal system. It served due notice in a previous decision and has now declared this provision unconstitutional.

Bill C-60 enshrines into the National Defence Act the concept that an accused will have the right, and that will make it equal to the civilian criminal system. The only grey zone is those who are in the system now and came after Trépanier. There may be three or four, but there are certainly not 100, because there's a maximum of 60 a year.

So those are cases of exception that you may need to look at. But I don't think you need to have a sunset clause if we limit our discussion to having it right in the National Defence Act that an accused, from this point onward, would have a right that is not unlike that enjoyed by a civilian criminally accused individual. That will remain on the books for a long time.

So I don't see any sunset clause being required there. I cannot second-guess what the Supreme Court would do and whether it would be reversed on appeal. Even if it were reversed by the Supreme Court, it's a still a good thing to give our military men and women facing criminal trial under the codes of discipline a right at least equal to that enjoyed by civilians. So even if you as legislators weren't pushed by the lack of constitutionality of that provision, in fairness there ought to be some form of equity between the two.

The Chair: Thank you.

Thank you, Mr. Rota.

Monsieur Roy.

[*Translation*]

Mr. Jean-Yves Roy: Thank you, Mr. Chairman.

I would like to go back to clause 28 because I don't think the discussion on the subject went far enough.

Ultimately, if clause 28 is maintained, trials that have already begun will have to continue. If a judgment concerning those trials is rendered after the bill comes into force, any accused judged under the old act will be able to challenge the decision.

Mr. Michel Drapeau: Absolutely. He'll be able to challenge it under the Trépanier case, first of all, as well as under the new act, which frames that principle. I don't know much about betting, but I think the accused will have very good chances of success.

In the context of Trépanier, section 117—you'll pardon me for having only the English version—states the following:

● (1650)

[*English*]

In any event, there's also an available interim practical solution that can be easily implemented for all charges under section 130, which is really the case in point. The accused can be offered an election as to his or her trier of facts. There will be no legal impediment to that course of conduct, since section 165.14 gives the right to the prosecution, and that right is of low force and effect with respect to the offences.

[*Translation*]

I admit I'm surprised by these provisions. Following a long period of reflection—48 hours, in fact—I'm still trying to understand, but I can't.

Mr. Jean-Yves Roy: With respect to the sunset clause, it indicates that people are afraid the review won't be conducted in time and that Parliament won't have the time to come back to pass amendments, if there are any. Ultimately, the motion before us is equivalent to the sunset clause. As for future trials, if the new act comes into force but all trials underway are not subject to it, that's a problem for me. On the other hand, the only consequence of the sunset clause would be that we would go back to the old system if the new act didn't come into force in time.

Mr. Michel Drapeau: In my opening comments, I also mentioned that the department had filed a motion for stay of execution with the Supreme Court. What that in fact means is that the Supreme Court is being given all the time it wants to come to a decision on the appeal application, but, in the meantime, leave has been sought from the court to seek a stay of execution of the Trépanier decision. There are three things. If the execution of the Trépanier decision causes so much difficulty because accuseds would be... It must be understood that only a few accuseds would have had the choice at the outset. There are 60 in a year, so let's suppose that five per month are in the system and are directly affected for that. A stay of execution is now being sought. It may be obtained or not. If it is obtained, this discussion is pointless. If it is not obtained, we wait for the appeal decision or we change the act.

Mr. Jean-Yves Roy: In fact, passage of Bill C-60 would be in contradiction with the motion for a stay. Ultimately, it's a contradiction.

Mr. Michel Drapeau: I didn't want to say it, but my colleague did. If there is a contradiction, it is hard to reconcile the two elements because we're moving forward and backward at the same time.

Mr. Jean-Yves Roy: I said earlier—you were in the room—that we get the impression the Department of National Defence is short-circuiting the Supreme Court's decision by tabling this bill and seeking a stay.

Mr. Michel Drapeau: I don't think it wants to short-circuit the court's decision, but it is going before the Supreme Court in order to defy the Trépanier decision, not its very broad, universal and constitutional application. It's very technical. I wouldn't have favoured that tactic, but we really must focus on it. What is a concern for me are these two applications together: a leave application and an application for a stay of execution at the same time. Now we're here and we want to change the act.

Mr. Claude Bachand: I want to continue in this vein. From the outset, I've been saying that I don't see the point, if Parliament considers a bill and passes a bill, of going before the Supreme Court of Canada to challenge part of the court martial's decision. I would add to that—and the brigadier-general confirmed it for me earlier—that the Supreme Court could examine Bill C-60 and say that it thinks things that we passed in it are bad. It could withdraw part of the bill.

Mr. Michel Drapeau: That would surprise me, Mr. Bachand. That's not the Supreme Court's role. What the Supreme Court can do is not allow the appeal application. It's an application. If you're asking my opinion, I will tell you that I have read and reread the Trépanier decision and that that decision is very strong and very well put together. It is a court decision, not that of a judge or two in particular. It is a very well thought out decision. It is a decision that substantially advances the law, not just with respect to that, but with respect to other things as well. The Court Martial Appeal Court of Canada is the expert court in Canada.

Before the Supreme Court overturns anything and, in ruling, decides to say that there will be two-tiered justice, two justice systems, the one military and the other civilian... I would tend to believe that's not what will happen, but we'll see. However, the first decision the Supreme Court will make will be whether to allow the appeal application.

● (1655)

Mr. Claude Bachand: What do you think of our fear that mistakes will be made, in view of the haste in passing this bill? That is why we want a sunset provision. You'll remember that the Veterans Charter was passed quickly and that we subsequently had problems. That's why we're insisting on having a sunset provision.

Mr. Michel Drapeau: I'm going to repeat myself, Mr. Bachand. Bill C-60, as it is written, does not cause any problems for me. It entrenches a principle that should be there and that a court has unanimously recommended. It's not Bill C-60 that's the problem for me; it's Bill C-60 together with the decision to appeal from this decision.

Mr. Jean-Yves Roy: It doesn't work.

Mr. Michel Drapeau: It's a tug of war.

[*English*]

The Chair: Thank you, sir.

Thank you, Claude.

Mr. Comartin is next for seven minutes.

Mr. Joe Comartin: Mr. Drapeau, I've been trying to figure out whether clause 28 of Bill C-60 is an endorsement of the government's position in their appeal. Does it open the door? Should we perhaps delete subclause 28(1) and, as Mr. Rota was suggesting, rely on the existing law or practice? Do you have any comments on that?

Mr. Michel Drapeau: I hesitate to give you a comment, because it's made in a vacuum. I simply don't understand the logic.

There has to be logic, and maybe I'm being not unfair but simply don't understand. Maybe the wording is not quite as tight as it ought to be, or maybe the wording leaves an aspect that I'm not seeing and you are not seeing. But for me, Bill C-60, until I read that....

There are a couple of things I'd rather not be part of because we're introducing things that are above and beyond Trépanier, but when I come to that, what does it mean? I almost have to play a bingo card and say, if I move this, this happens, and if I move that, that will happen. I don't get a satisfactory answer. In fact, it muddles the issue instead of clarifying it. The purpose of a transitional provision is to make it clear so that you know where you stand as you move from one regime to the next.

Now, this says, as we move from one to the next, you guys are going to be subject to the old regime. Yes, but we have declared the old regime unconstitutional. What do you mean?

Not only that, I know you're challenging it in court, but the court may well go along with it. If it does, if the court says "appeal denied", then if you gentlemen and ladies pass this act, it would mean that you have said—if I read this correctly—that the old law applies.

Excuse me, but I shake my head.

Mr. Joe Comartin: So by passing this, we may actually be giving some authority to the current practice, some authentication to the current practice.

Mr. Michel Drapeau: In those very limited three, four, five, or six cases—I'd venture a number of five at the most—why are we doing this?

Mr. Joe Comartin: Mr. Drapeau, if I could interrupt, I think it's actually more than that, or it will be more than that, because we already have a list of four cases just since April, whatever date Trépanier came down, that have been suspended or terminated.

Mr. Michel Drapeau: But I would submit to you that if those have been terminated, they are no longer "commenced".

Mr. Joe Comartin: Okay, good point. But there are another 50 in the works, we've been told.

Mr. Michel Drapeau: And that is fine. What the Trépanier decision says is—in a simplistic way because it's the only way to look at it, is—fine, you don't have to wait until Bill C-60. They know about Bill C-60. You don't have to wait until there is a decision to change that; you can make the offer now. You can seek consent.

● (1700)

Mr. Joe Comartin: But this is precluding, then, those cases that have been commenced. If we pass it this week and it gets through the Senate next week and is given royal assent a few days later, by the end of June, for any of the cases that have come up and commenced, they don't get the opportunity to use Bill C-60. And then they're going to be into the possibility of challenging them under the constitutional provisions.

Mr. Michel Drapeau: Precisely, and what do we do with them? We're playing on two claviers. We're saying, yes, it's unconstitutional, but by the way, some of you guys will have to wait for the second coming of....

Mr. Joe Comartin: The Federal Court of Appeal?

Those are all my questions.

The Chair: Thank you.

We'll now go over to the government. Mr. Blaney.

[*Translation*]

Mr. Steven Blaney (Lévis—Bellechasse, CPC): Thank you very much, Mr. Chairman.

Mr. Drapeau and Mrs. Guzina, thank you for being here today.

Mr. Drapeau, your record is impressive and your knowledge of military law extensive. I listened to your comments on the bill. As legislators, we are always interested in hearing the opinions of an expert such as you. I heard you say that the bill entrenched certain aspects that referred to the Canadian Charter of Rights and Freedoms and that you didn't see any problem as such with the bill. It's always comforting to hear things like that. We say to ourselves that someone who knows this has prepared a comprehensive document, with a good summary.

If I understand correctly, the Trépanier decision is one of the factors that led to the bill's preparation. An accused could not have full answer and defence in view of the fact that he could not choose how he would be judged.

Would you like to add any comments on the Trépanier decision relative to the bill? In your opinion, how would this situation play out under the new act?

Mr. Michel Drapeau: You've given a good summary of my position. Bill C-60 offers no major difficulties for me. It timidly addresses a few other aspects that are part of the Trépanier decision, in which reference was made to the late Mr. Justice Lamer, who had suggested simplifying courts martial. Here we find that suggestion, and I think that's a good thing. The judge also recommended, five years ago now, that there be a permanent military court. There is no court. There is no military court anywhere here in Ottawa.

If we establish a court martial today to judge an accused, a judge is then appointed and a court is convened, but it dissolves as soon as the trial is over. Before a trial is held, before the judge is sworn in, before the accused appears before the court, there is no court. Five years ago, Mr. Justice Lamer said that there should be a permanent military court.

There should also be a court of record. What does that entail? That definitely entails some minor expenses here and there, but the word is there.

With this bill, we're putting three toes in the water and saying that we're going to give a military judge, or a number of them, the power to hear pre-trial motions. This is a step in the right direction. Mr. Justice Lamer proposed it, but he went further than that. Mr. Justice Lamer also proposed that a task force be established to study what that would entail, what it would cost and what the problems would be. I can't speak for Mr. Justice Lamer, but I can certainly approve the wisdom of his recommendation with all the vigour I can summon. Why don't we find it here or in Bill C-45?

Mr. Steven Blaney: However, as you just indicated, there are three toes in the pool, because a judge can receive instructions.

Mr. Michel Drapeau: That's good.

Mr. Steven Blaney: That's a good step. Very well. I'm pleased to know your point of view. It's an outside point of view that seems to indicate that Parliament and parliamentarians are on the right—

● (1705)

Mr. Michel Drapeau: I don't know whether you've had the opportunity to read the Trépanier decision.

Mr. Steven Blaney: I'm not a lawyer.

Mr. Michel Drapeau: It's really hard-hitting. The court ruled with considerable rigour. From reading it, I think it revealed a certain impatience in saying to pay detailed attention. It discussed the detention process, the punishment process, differences between courts, that is a civilian court, criminal court, military court and everything else. It also recalled—and this is where I see impatience —that it had mentioned this in previous judgments. That day, it was given the opportunity—and it had to do so—to rule this provision unconstitutional.

I think the court is also talking to you in certain respects. It wants you to know its point of view so that you can make other changes to the act.

Mr. Steven Blaney: The judgment was rendered on April 24 of this year.

Mr. Michel Drapeau: On April 24.

Mr. Steven Blaney: That's nevertheless quite recent.

Mr. Michel Drapeau: It's very recent, indeed.

Mr. Steven Blaney: If I understand correctly, that would eventually lead Bill C-60... The committee will conduct a clause-by-clause consideration of the bill and there can definitely be a few changes. But on the whole, you're ultimately recommending that the committee move forward quite quickly.

Mr. Michel Drapeau: With the exception of clause 28, which I find opaque or obscure.

Mr. Steven Blaney: That clause concerns the coming into force of the act for existing cases.

If, for example, we moved forward and if Bill C-60 came into force, how do you think the practice of military law in Canada would change?

Mr. Michel Drapeau: I think it will evolve in the right direction. I think we've been given a slap on the wrist. By "we", I mean those who practise military law. They've been slapped on the wrist by the court and its resounding decision urging us to make this change. That's good. I think it's also very good, at last, to apply some of Mr. Justice Lamer's other suspended recommendations. Reducing the number of courts martial from four to two is a very good thing. The various jurisdictions, the various powers are all Greek to most military members. I think this makes a contribution to the military justice system in the twenty-first century. I think it's very good.

Mr. Steven Blaney: Would parliamentarians be betraying your thinking, Mr. Drapeau, if they said that you're recommending this bill be passed without delay?

Mr. Michel Drapeau: That wouldn't be betraying my thinking, but don't forget that I have expressed some reservations. I don't understand clause 28, and I understand even less why, at the same time, you're going to knock on the door of the Supreme Court for it to declare what you want to do now unconstitutional.

Mr. Steven Blaney: Wouldn't that be because, in the Trépanier decision, there are distinct legal and constitutional aspects to the bill?

Mr. Michel Drapeau: I think that the constitutional aspect in the Trépanier decision is the one we're all talking about here. It's also easy to support it.

I also think that the central aspect of the Trépanier affair, although I don't know the arguments the department presented before the court, is that that point was ruled unconstitutional. That's what the court was examining at that time.

[*English*]

The Chair: Thank you, Mr. Blaney.

That ends our opening round. We'll start a five-minute round with the official opposition, and then we'll go back to the government, and then the Bloc.

Mr. Rota, do you want to start?

[*Translation*]

Mr. Anthony Rota: I'll be very brief. I have another question to ask on clause 28, which very much intrigues me.

If clause 28 were deleted, what problems would that cause for the bill? Could we easily delete that clause and still proceed? I imagine that any bill passed by Parliament can be put before the Supreme Court. There's no doubt about that. If we deleted clause 28, would it be clear enough? Would that be good? Could we continue?

Mr. Michel Drapeau: This bill raised no problems for me until I read it. Reading it simply made me jump. As I told you, perhaps something is escaping me or I don't understand the logic underlying this point. Perhaps, but I don't understand it. Without clause 28, Bill C-60 would not be a problem for me and would have my full approval.

What problems can that hypothetically cause in the four or five potential cases, if there are four or five? Would that deal a death blow to military justice? I don't think so. I'd be surprised if it would mean that an accused would not face the rigour of military justice in those circumstances. I would be even more surprised after reading the Trépanier decision, which anticipates this problem.

● (1710)

Mr. Anthony Rota: Does this clause constitute a precedent? Do we see its content in other bills or acts?

Mr. Michel Drapeau: I haven't examined any bills that might contain this kind of provision, no.

Mr. Anthony Rota: Thank you, Mr. Chairman.

[*English*]

The Chair: Thank you very much.

We'll go back over to the government. Are there any questions?

Go ahead, Mr. Lunney.

Mr. James Lunney (Nanaimo—Alberni, CPC): Thank you.

While we're looking at the requirements here, one of the things I wanted to ask about has to do with this transition period as well. One of the requirements is that it would bring in what's required with civilian courts, which is the unanimous principle, rather than a majority vote, for judges. In that transition period, does that second clause add some measure of comfort? It seems to me you have to have a set of rules that apply during a trial, so while we're in transition, in order for any proceedings to go ahead, you have to have a set of rules that apply. Does the unanimous provision help during that transition period?

Mr. Michel Drapeau: Let me go back a step.

I don't have the figures, but in Trépanier we provide the figures on how many trials there have been over the past five or six years and how many of those have been with a panel—that is, with a military judge and a panel. I think there are only one or two. The number of these panel trials there would be in this transition, I would submit to you, would not be very many as we speak. Of course that number will likely go up in the months or years ahead, but as we speak, it is a very small number, and these unanimous provisions would apply with a panel trial, and not a judge alone.

Mr. James Lunney: Thank you, Chairman. That covers what was on my mind right now.

The Chair: Go ahead, Mr. Bachand—

Mr. Michel Drapeau: In Trépanier, paragraph 82 says that between 1999 and 2003—that's four years—for general courts martial with a judge and panel there was one, for disciplinary courts martial there were three, for standing courts martial with a judge alone there were 216, and for special general courts martial there were zero, for a total of 220. That's one out of 220. That's the core of Trépanier, which says an accused before a court martial ought to be able to elect to have a trial either by a judge alone or with a panel. If he does, those numbers may change, and they likely will change, but we've had one over the past four years.

Mr. James Lunney: A provision of Bill C-60 provides for the dissolution of a general court martial where the military judge is satisfied the panel cannot make a unanimous finding. I wonder if you would care to comment on how that would affect the court proceedings. Would that be a plus? Would that speed up procedures where it was obvious they weren't going to come to a unanimous finding?

Mr. Michel Drapeau: I've read it in this wording and I don't have any difficulty with it.

Mr. James Lunney: Thank you.

The Chair: Is that it, Mr. Lunney?

Mr. James Lunney: Yes, thank you.

The Chair: Thank you.

Mr. Bachand.

[*Translation*]

Mr. Claude Bachand: I want to go back to the protection measures concerning the amendments that may escape us. Personally, I hadn't noted clause 28. So if you had come to tell us about it, that might have escaped us. However, I had noted that the matter pertaining to the Supreme Court was a fairly significant problem. You also mentioned that you would like to see a permanent military court established. All that leads me to believe that we need protective measures in this act, to review it.

I don't know whether you are an expert in parliamentary terms, but there are two schools that propose terms. One talks about a mandatory review, and the other proposes the term “sunset clause”.

First of all, do you know the difference between those two terms?

● (1715)

Mr. Michel Drapeau: No.

Mr. Claude Bachand: I'm going to give you my opinion on those two terms. One refers to a mandatory review, which does not mean that that will be conducted, but nor does it mean that changes would be made if a review were conducted.

Furthermore, the sunset clause requires that the act be reviewed; otherwise it becomes null and void. I'm wondering whether the two concepts are incompatible. I don't think so. I think that there could be a review of the act, first of all, but that there should always be a sunset clause to provide assurance. In other words, I'm talking about a belt and suspenders. I think there is a dangerous precedent in front of us. As I mentioned earlier, the Veterans Charter was quickly passed, and we subsequently saw that there were problems. And it is subsequently difficult to correct them.

Do you think my belt-and-suspenders approach is a good approach, in view of the fact that we could make a mistake and that it's better for us to take more precautions than not enough?

Mr. Michel Drapeau: I agree with you that there should be more protection and definitely more knowledge not only about the workings, but also about the implications, the ins and outs of the matter. It is your committee's job to ask these questions, and I would appreciate it if you would do it. More often than not, it was taken for granted that the wise people had first thought about these things when they introduced the bill.

What happens if Parliament doesn't understand the clauses it approves? We have a problem. So not only is it up to you to do so, but I think it's your duty to ask questions and to be satisfied with the answers. I think that military members and their relatives are relying on you to pass an act after gathering as much advice and opinion on the subject as possible. It must be kept in mind that, particularly in a military context, the law follows military members overseas, whether it's in the context of a summary trial or a trial before the court martial held thousands of miles from here, without the military member being able to have access to lawyers or all the other rights that we take for granted in Canadian society.

So this act has to meet the operational needs of the armed forces and provide us with a tool to ensure good discipline. However, at the same time, we should not penalize our soldiers who are facing all kinds of risks. Military justice shouldn't be one of those risks. That justice should be established and based on a preliminary critical review. That's what you're doing, and I congratulate you on that.

Mr. Claude Bachand: Do you agree with me that the drafting of the bill by National Defence, with the assistance of the legislative drafters, didn't take much time either? The decision came out on April 24 and appeared before the committee a month and a half later. We aren't used to that. People usually take their time examining certain matters. In this case, I get the impression they quickly saw an imminent problem: courts martial could become virtually obsolete and inoperative. So they reacted quickly. They can make a mistake, and we can too. That's why I am insisting on protective measures. I think it would be wise to have them.

Mr. Michel Drapeau: The drafting was done quickly and professionally. The bill is very well constructed. The lawyers who draft this kind of text are professionals. I have no fears in that regard. If you compare it to other bills, it is not that comprehensives. It must be considered in the context of October 2001, following the events of September 11, when you and your predecessors were faced with an incredible number of legislative disruptions.

The bill is well drafted, apart from a few minor aspects that will have to be questioned. The decision to appeal is not the responsibility of the lawyer who drafted the document. That's a political decision. The departments involved wanted both to be able to make legislative changes and to appear before the Supreme Court. I don't know whether the persons responsible for those decisions will be able to answer your questions.

● (1720)

Mr. Claude Bachand: All right, thank you.

[*English*]

The Chair: Thank you.

Does the official opposition, Mr. Rota, have anything? Okay.

Ms. Gallant.

Mrs. Cheryl Gallant: Thank you, Mr. Chairman.

Mr. Drapeau, it's my understanding that at the end of the sunset period—whatever that date was—Bill C-60 would cease to exist and its the provisions would no longer be valid. Bill C-25 made amendments to the National Defence Act in 1998, and they included a requirement to complete and table a review within five years of the bill receiving royal assent. That eventually gave rise to Bill C-45. So we have quite a gap in time between the review and the actual tabling of the bill.

Given that a sunset clause and the end of the provisions of Bill C-60 could result in a gap, there being no legislation to cover the end of the sunset point to the enactment of the next legislation, can you describe what the impact of that would be?

Mr. Michel Drapeau: Before I can describe the impact, if I could, I would question the utility or sagacity of even having a sunset clause in Bill C-60. I have to ask myself the question, why we would want to do that? This bill is not a transitory provision; it's not something that we're going to try for a while and see if it works. It's a result of a constitutional challenge before a court, where the court has spoken unanimously that it has to be done.

So I would certainly not include a sunset clause in Bill C-60, which is fairly small in scope, but very important if you happen to be an accused, and very important if you going to be going through a court martial. Those changes were already proposed by Chief Justice Lamer and ought to have come forward through Bill C-45.

So the last thing I would want to do is to suggest a sunset clause. Instead of a sunset clause in Bill C-60, I would suggest that whenever you go through Bill C-45, the National Defence Act have in it a mechanism whereby there is a delayed schedule of some sort, so that it has to be reviewed from stern to whatever. And we're really talking here about the Code of Service Discipline within the National Defence Act. It's not everything, but it's the bulk of it. And it has to be in light of changes in the criminal law system and lessons that we learn, as we are in operations for the first time since World War II, or on that scale. Surely there are lessons that we are learning from applying our Code of Service Discipline in an operational setting abroad. So will there not be change resulting from it?

That mechanism ought to be enshrined in the act. Whether it's for every three years or every five years, whether there is an independent body from outside of DND, it should be looked at it and changes be proposed to Parliament, and we should not tinker with the act—for instance, a requirement to have a permanent court. Could that be set? Maybe, and certainly through Bill C-45, because I am familiar with some of it....

Allow me maybe to end on this comment, that we take into account the changes that are being made by all allies to their military justice systems. For instance, in military summary trials, as we heard recently, one doesn't have a right to representation; one doesn't have a right to records; one doesn't have a right to appeal. Yet you could be sent to detention for a long period, and the Trépanier decision told you how uneasy and uncomfortable detention can be. In other countries, some of them very allied to us, like Britain, they have introduced into their codes a review mechanism for those decisions, and administrative tribunals may be....

I think that with this mechanism in our act, we will be able to take a comprehensive and beneficial review of the act and propose not only what the military wants, but also what we as a society, and you as legislators, ought to have in order to keep it in sync—not behind, but in sync—with the civilian criminal law system and with society, because at the moment I think we're catching up.

● (1725)

The Chair: Okay. That's your time.

There's nothing further on this side, so we'll go back over to Mr. Blaney.

[*Translation*]

Mr. Steven Blaney: Thank you very much, Mr. Chairman.

From what I can see, Mr. Drapeau, you think the bill is well put together. I have two questions for you.

There is the Trépanier affair, of course, which we've discussed extensively. However, we've also mentioned a decision in the Grant affair, which contains certain incongruities, but that the bill would clarify. I would like to hear your comments on that subject.

In addition, it's sometimes said that when we compare ourselves with others, we're consoled. I'd like to know, in the event Bill C-60 is implemented, how we would position ourselves in terms of military law relative to our allies, particularly the Americans and Europeans.

Mr. Michel Drapeau: I don't think, from that standpoint, passage of Bill C-60 as it stands changes much. It will permit certain adjustments, but the grapefruit will remain a grapefruit: it won't become an orange. There's really no possible comparison between the Canadian military law system and that of the Americans. I don't think we should expect there to be one. There are certain common points, but there are a lot of differences as a result of the size of the American forces and the fact that the navy, army and air force each have their own system.

A comparison can be drawn with the British, Australian, French and New Zealand forces. As regards summary trials—and the Trépanier decision talks about this—those who are subject to the code, in France, because they have committed offences in their country, are subject to civilian, not military courts. That's how it works in France. In English and Australia, the judge advocate general is not an armed forces officer, but an officer of the highest chambers of justice. He remains completely outside the Department of Justice. In England, the director of prosecutions is a lawyer at the bar, not a military officer.

It appears that the British and Australian systems have taken another tangent that, rightly or wrongly, we have not followed. That is perhaps due to the lack of critical review by a committee such as yours. Whatever the case may be, there are an increasing number of pronounced differences.

Mr. Steven Blaney: However, if I understand correctly, without going toward a form of internationalization, we would be heading toward a definite improvement.

Mr. Michel Drapeau: Definitely. Bill C-60 represents an improvement; there's no doubt about that.

Mr. Steven Blaney: There was also the Grant decision. Do you have any comments to make on that?

Mr. Michel Drapeau: I haven't prepared myself accordingly.

Mr. Steven Blaney: That's fine, all right. Thank you.

Mr. Michel Drapeau: I don't have enough reading time.

Mr. Steven Blaney: I was told that would correct certain deficiencies in that area as well.

Thank you, Mr. Drapeau.

Mr. Michel Drapeau: Thank you.

[*English*]

The Chair: If there's no one else, that brings us to the end of our second round. It's pretty timely; we're right at 5:30.

Sir, do you have anything else you want to add before we adjourn?

Mr. Michel Drapeau: I just want to thank you, Mr. Chair, once again.

The Chair: We're not going to adjourn. We'll just suspend until 6 o'clock, when we'll consider the bill clause-by-clause.

The meeting is suspended for half an hour. Thank you.

● (1725)

(Pause)

● (1810)

The Chair: Order, please.

We're going to go to clause-by-clause study of Bill C-60.

We have some expert witnesses here. That's how we will refer to them. We have Colonel Gibson and Colonel Gleeson.

We have a legislative clerk here. Many of you are familiar with this gentleman. He's been on the Hill longer than most of us, I'm sure, except maybe for Mr. McGuire.

We should be able to zip through these quite quickly. Mr. Hawn, did you have something you wanted to mention before we start?

Mr. Laurie Hawn: Mr. Chair, just as a point of clarification or intent, presumably we're going to get through this tonight, and it would be the government's intent and desire to have unanimous consent tomorrow to do report stage and third reading tomorrow morning in order to get it to the Senate tomorrow afternoon.

The challenge will arise if we don't do that. We could still do it, but it doesn't then go to third reading until Thursday, and then the Governor General is away, and the Supreme Court is reluctant to give an oral approval to a bill on a justice matter.

The intent is to have unanimous consent for report stage Thursday and the Senate tomorrow afternoon. That's our intent.

The Chair: Thank you.

Okay, we're going to get started.

Go ahead, Ms. Black.

Ms. Dawn Black: Would it be possible to do that on division?

Mr. Laurie Hawn: I don't know.

● (1815)

Ms. Dawn Black: Could we do that by giving unanimous consent, and then doing it on division?

The Chair: You're talking about tomorrow, not—

Mr. Laurie Hawn: Yes; the clerk is nodding his head.

The Chair: You'll have to deal with that.

(Clauses 1 to 26 inclusive agreed to)

The Chair: Go ahead, Mr. Wilfert.

Hon. Bryon Wilfert: Mr. Chairman, I have an amendment that I think has been submitted, L-27.1.

The Chair: Just a second. I think the amendment you're putting forward is clause 27.1, so it will come after clause 27. Could we just deal with clause 27, and then you can make your point?

Hon. Bryon Wilfert: Oh, I'm sorry. Okay. Then we'll just slide right into it.

(Clause 27 agreed to)

The Chair: Go ahead, Mr. Wilfert.

Hon. Bryon Wilfert: Mr. Chairman, this amendment is similar to one we had on the anti-terrorism legislation. Would you like me to read it into the record?

The Chair: Certainly.

Hon. Bryon Wilfert: This is new clause 27.1:

> (1) Within two years of the day on which this Act receives royal assent, a comprehensive review of the provisions and operation of this Act shall be undertaken by the committee of either the Senate or the House of Commons or both Houses of Parliament that is designated or established by the Senate or the House of Commons or by both Houses of Parliament, as the case may be, for that purpose.
>
> (2) Within one year after the review is undertaken, or within any longer period that the Senate or the House of Commons or both Houses of Parliament may authorize, the committee shall submit a report on the review to Parliament, including a statement of any changes that the committee recommends.

As I said, this is similar to the anti-terrorism legislation, in which we also had a mandatory review. I think in keeping with the comments that we heard from the JAG today, this would be appropriate.

The Chair: Is there further debate?

I see Mr. Bachand and then Mr. Hawn.

[*Translation*]

Mr. Claude Bachand: Mr. Chairman, I would like my colleague to explain to me what the Senate has just done in this matter. I have often called Mr. Kenny the unelected Minister of Defence. So we could ask a committee of non-elected individuals to decide on an act passed by the House of Commons. That makes no sense, to my mind.

For my part, I would delete "[...] by the committee of either the Senate or the House of Commons or of both [...]" I think the passage of bills is a responsibility of the elected members of Parliament. If it were a matter of a re-evaluation, I wouldn't be satisfied with remaining seated while senators did our work.

I'd like to hear my colleagues' arguments on that subject.

[*English*]

The Chair: Very good. Thank you.

Mr. Hawn, you're next.

Mr. Laurie Hawn: Thank you, Mr. Chair.

First of all, we do support this amendment.

This will go to the Senate, so in the interest of getting it through, because senators will be interested.... Regardless of what anybody here—me included—might think about the Senate and their role, senators have a role to play under our structure right now. If we don't put that in, they will quite likely toss it back and say it needs to be the Commons, or the Senate, or both. But I think they both need to be in there. That's the way it's been done in the past, and it's standard terminology.

The Chair: Mr. Wilfert.

Hon. Bryon Wilfert: This is the reality, whether we like it or not. I could have easily left it out, but the reality is that the Senate will be dealing with it.

It was done before with both Houses there. It doesn't mean they will be dealing with it, but as a courtesy and given the current structure, I felt it was appropriate. So I would leave it the way it is.

● (1820)

The Chair: Is there any further debate?

Ms. Black is next, and then Mr. Bachand.

Ms. Dawn Black: For a couple of reasons, we will not support the motion. It could go to an unelected body for review, and we don't support that. There's already a provision within the act that the National Defence Act be reviewed every five years, so I don't see the necessity of a review within two years.

The Chair: Thank you for that.

Mr. Bachand.

[*Translation*]

Mr. Claude Bachand: I have a procedural problem. I want to table my sunset provision and I'm prepared to enter a period of two years instead of one year after the coming into force, as is currently indicated. I wonder whether my provision and this clause are compatible. I want to draw the committee's attention to the fact that an in-depth review is not as threatening as a sunset provision. I would like the committee to know that the clause I want to introduce states that the amendments made will cease to have effect after one year—and I am prepared to go up to two years. That's very strong.

The sunset provision does not mean that there is no act after a year or two. You can come and hold discussions before the end of the sunset period, and, at that point, we can table new amendments and amend the act.

Perhaps I would need a procedural expert to tell me where my amendment, my sunset provision, stands. If we adopt this clause, am I going to be told later on that I can't move the sunset provision? That's what concerns me.

[*English*]

The Chair: In my mind, calling for a review and calling for a sunset are two totally different things. The ramifications of each are quite different. Your amendment will be dealt with.

Mr. Claude Bachand: Okay.

The Chair: Is there any further discussion on new clause 27.1?

[*Translation*]

Mr. Claude Bachand: May I amend it?

[*English*]

The Chair: Yes, but it will have to be in writing.

Mr. Claude Bachand: If it's in my writing, you won't understand a word.

The Chair: Somebody will.

[*Translation*]

Mr. Claude Bachand: I've just received it. So I can't table a written amendment. Perhaps someone can note it down as I dictate it. In fact, I'm opposed to the fact that we're involving the Senate and a joint committee. We should be talking about the House of Commons. I don't think that's complicated to understand.

[*English*]

The Chair: Mr. Bachand, the legislative clerk has indicated to me that if you have verbal text you can present now, he will write it out and present it back to the committee.

[*Translation*]

Mr. Claude Bachand: I'm going to dictate my text to him. I would like to strike out “by the committee of either the Senate”, “or” and “or both”. That would read as follows:

> 27.1(1) Within two years after the day on which this Act receives royal assent, a comprehensive review of the provisions and operation of this Act shall be undertaken by the House of Commons that is designated or established by Parliament or the House of Commons, as the case may be, for that purpose.

I don't think what I've said is clear. May I start over, Mr. Chairman?

● (1825)

[*English*]

The Chair: Yes.

[*Translation*]

Mr. Claude Bachand: I suggest the following wording instead: “[...] shall be undertaken by a committee of the House of Commons designated for that purpose [...]:

I wouldn't bet $100 that I win my bet, Mr. Chairman.

[*English*]

The Chair: The clerk will go over it just to make sure it's what you reflected.

Mr. Claude Bachand: Bring forward the proposal.

The Chair: We'll read it back and make sure it's proper.

[*Translation*]

Mr. Marc Toupin (Procedural Clerk): Mr. Bachand, the text would read as follows:

> 27.1(1) Within two years after the day on which this Act receives royal assent, a comprehensive review of the provisions and operation of this Act shall be undertaken by a committee of the House of Commons designated for that purpose.

Subsection 2 would not be amended.

Mr. Claude Bachand: Except that, in subsection 2, you say: “[...] the Senate or the House of Commons or both Houses of Parliament [...]”. Wouldn't it be appropriate to make an amendment here? Yes. Could we adopt it subsection by subsection?

[*English*]

The Chair: No. We should have both amendments to this.

Mr. Claude Bachand: Okay.

[*Translation*]

Mr. Steven Blaney: We could say: “[...] or within any longer period that the House of Commons [...]”

Mr. Claude Bachand: May I suggest this to the legislative drafter?

Subsection 2 would read:

> (2) Within one year after the review is undertaken, or within any longer period that the House of Commons may authorize, the committee referred to in subsection (1) shall submit a report on the review to Parliament, including a statement of any changes that the committee recommends to the House of Commons.

Did you follow me?

[*English*]

The Chair: Yes.

[*Translation*]

Mr. Marc Toupin: Yes.

[*English*]

The Chair: Do you have a comment? I want to read back the total amended section.

Hon. Bryon Wilfert: Read it back first.

[*Translation*]

Mr. Marc Toupin: It would read as follows:

> 27.1(1) Within two years after the day on which this Act receives royal assent, a comprehensive review of the provisions and operation of this Act shall be undertaken by a committee of the House of Commons designated for that purpose.
>
> (2) Within one year after the review is undertaken, or within any longer period that the House of Commons may authorize, the committee referred to in subsection (1) shall submit a report on the review to Parliament, including a statement of any changes that the committee recommends to the House of Commons.

Mr. Claude Bachand: That's it.

[*English*]

The Chair: Is there any further debate?

(Subamendment negatived)

(Amendment agreed to)

(On clause 28—*Continuation of proceedings*)

The Chair: Mr. Bachand.

[*Translation*]

Mr. Claude Bachand: Mr. Drapeau's arguments have marked me. I have some reservations about the fact that the trials that have started before the date on which the clause comes into force can continue as though nothing had happened.

I would have liked to know whether we have a legal advisor here, in addition to the legislative advisor. There are some here, it's true. I would ask them for their opinion on clause 28.

You were in the room when Mr. Drapeau raised the issue. I'd like to know your opinion on clause 28. Mr. Drapeau suggested deleting it, but, before saying I want to delete it, I'd like to have your opinion.

● (1830)

[*English*]

The Chair: I think we need that, because Mr. Drapeau was very pointed in the fact that he didn't have the rationale; he didn't understand the thought that went into it or the reasoning behind it. So would one of you like to clarify why clause 28 is what it is?

Mr. Gleeson.

Colonel Patrick K. Gleeson (Deputy Judge Advocate General, Military Justice and Administrative Law, Department of National Defence): Mr. Chairman, I'd be happy to speak to clause 28, and obviously my colleague will jump in if he thinks there's anything we should add.

Clause 28 deals with trials that have commenced. According to the notes to our regulations, courts martial are commenced when the accused pleads guilty or pleads to the offence. Essentially, he's placed in jeopardy at that point in time.

That's the commencement that's being referred to here. So this is to ensure that if this comes into force, trials that have actually started, that are ongoing, can continue to their conclusion. That's essentially what this is doing. It's not dealing with courts that have been convened but not yet commenced. It's not dealing with cases that are in the system that have not yet even been convened. It's dealing only with that small body of cases that may actually be ongoing at the time this comes into force.

We're repealing two types of courts martial here. For example, the disciplinary court martial is being repealed. This would ensure that a disciplinary court marital, if it were actually ongoing when this came into force, could finish without having to stop and restart. Restarting a court where somebody is in jeopardy raises a number of different legal issues with respect to whether you could retry the individual. So it's trying to provide, in the JAG's terms, the certainty that the overall bill is trying to provide. This clause is trying to provide some certainty with respect to courts that are ongoing.

From a process perspective, in the court martial process an accused is asked, before he pleads, whether he has any objection to the court that's trying him. The Trépanier decision has resulted in some accused saying, “I don't want to be tried by this court.” That's what has generated the four or five cases that the JAG referred to that have been sent back to be restarted.

In this circumstance, if the court has commenced, the individual has already, in all likelihood, indicated to the judge that he's happy to be tried by the court that has been convened to try him, and this will let the court finish its work. That's all it does.

Lieutenant-Colonel Michael R. Gibson (Director, Strategic Legal Analysis, Department of National Defence): There's just one additional point that I think is important for the members of the committee to understand.

Of course, even if all that had transpired, if an accused person were convicted and they were subsequently dissatisfied that they'd been treated fairly, it is still open to them to make an appeal to the Court Martial Appeal Court. They are not left without remedy in a situation where they're in some sort of legal vacuum. I'd just like to reiterate that point.

The Chair: Mr. Comartin.

Mr. Joe Comartin: I'm still with Mr. Drapeau, in spite of the explanation. The reality is that you're going to have maybe very few cases, as few as four, but the numbers are going to grow as this bill moves forward—assuming it gets through the Senate quickly, but if not, it's going to be even more so.

What you're really doing is denying that group of people, a short list, or perhaps a somewhat longer list once they find out about Trépanier and say, “Yes, I want to exercise my rights; I didn't think I had them before,” because the case law was on both sides of the point. In fact, the leading case law before Trépanier would have been that they didn't have this right. Trépanier has now given that to them. On top of that, now the legislature of the land, in the form of Bill C-60, is going to give that to everybody else but deny it to them. It is not logical. It's not consistent with the way law should be drafted.

Secondly, I'm very concerned about the message the Supreme Court may take from this legislation with clause 28 staying in. I don't know if you can appreciate this, but here's what we have.

We have the Trépanier decision, which says this is the model you should be following in terms of the election in the way trials should be conducted and the right of the accused to make those elections. We are now coming in as the legislature and saying, “Yes, we recognize that and we agree with the Federal Court of Appeal.” But if you're sitting there as a Supreme Court justice, you're then looking at clause 28 and saying, “Okay, you've done all that, you've recognized the Court of Appeal decision, you've carried out your responsibilities to put that into play in Bill C-60, but you're denying it to this small group of people.”

I don't want to be the lawyer acting in front of the Supreme Court to try to rationalize that on our behalf, as the legislature of this country.

● (1835)

The Chair: A number of people want to comment. Should I let them all do that, and then you can respond? Are you prepared to wait, or would you like to respond to that specifically?

Col Patrick K. Gleeson: I'm at your disposal.

The Chair: Let's go down the list. It's Mr. Bachand, Mr. Murphy, and then Mr. Hawn.

[*Translation*]

Mr. Claude Bachand: I wanted to raise the argument that Mr. Comartin just raised, that the accused at the time was under another sytem. I'll admit to you quite frankly that, if I were defending an accused under the old system and was told that the accused was to be prosecuted under the old system, not the new, as defence attorney, I would object to that and would definitely institute proceedings to correct the situation.

Another thing can poison the matter, in my opinion. Under the old system, there were four courts martial. There could be accuseds prosecuted before one court martial that, under Bill C-60, no longer exists. If I were a defence counsel, I would definitely say that Bill C-60 has just cancelled two courts martial because they thought there were too many and want to judge my client under an old court martial that no longer exists under the new Bill C-60. That's another argument for deleting clause 28. Everyone has to be governed by the same act. Otherwise, I think you'll have problems. You wanted to solve a problem, but you may be causing a bigger one, in my opinion. So, thus far, I'm in favour of deleting clause 28.

[*English*]

The Chair: Mr. Murphy.

Hon. Shawn Murphy (Charlottetown, Lib.): I just have a question. I apologize for not being here for all of the testimony.

Colonel Gleeson, you said that in the small number of cases where trial by court martial is under way, the accused has already chosen their trier of fact. So I guess you were trying to get us to think that's okay. But of course, I think Trépanier says that the discretion or choice was all that of the prosecutor, for lack of a better word; so he wouldn't have argued against it, knowing at the time that the prosecutor had that authority. That doesn't persuade me that what clause 28 is doing is right, frankly.

Maybe you didn't have enough time to explain it, or maybe I'm too new at this, or whatever, but can you get me out of the woods on this one?

The Chair: Go ahead, before we move on.

Col Patrick K. Gleeson: Yes, I'd be happy to clarify that.

Just to be clear, Trépanier was decided on April 24. The individuals accused at courts martial are represented by counsel, and they certainly are aware, through their counsel, of their rights and what Trépanier has meant for their rights since April 24.

What we're talking about here or what was struck down in Trépanier is the prosecutor's right to choose the type of court. That has been struck down. When that occurred, there were a number of courts that had been already convened, so the prosecutor had already determined what type of court would try the accused. Those courts had been convened and started in some cases.

In those cases where the courts have started, the accused are aware of their rights and are given the opportunity to object to being tried by the type of court chosen by the prosecutor. In those cases where they have objected, the courts have stopped; the accused haven't been tried. In those cases where they haven't objected—in other words, they have either expressly or implicitly waived their constitutional rights, just like you can do when you appear before the police for an interview, and have decided they're happy with the type of court convened—then the court has continued. So the accused has said, “I'm happy to be tried by this court; let's get it over with. I want this to be done.” Those courts have continued and have gone to conclusion.

So with respect to this clause—which is here to ensure that we don't put ourselves in a position where there's uncertainty or lack of clarity—when the bill comes into force, there may well be cases ongoing where the accused has essentially said they're happy with the type of court trying them. That court can then go on to completion, rather than having to stop and create more uncertainty as to whether or not it can even be recommenced. If it doesn't recommence, obviously the accused may not be held accountable or have the opportunity to put forward his position with respect to the charges. The court may never be able to reconvene again. If it does reconvene, if it legally can reconvene—and I think that would be questionable—you're delaying the completion of a trial for an accused who wants to get it over with, if you don't let the trial run its course.

So those are the things that happen if you don't let it continue. If you do let it continue, the accused, as I say, has had the opportunity, through counsel, to object to the court. To date, the judges who are hearing these objections are stopping the courts; they're not proceeding.

● (1840)

Hon. Shawn Murphy: If I may follow up on that, clause 28 says that it must be continued.

Col Patrick K. Gleeson: It must be continued if it has started. When you get to the word “commenced”, you've already had the individual given the opportunity to make his objection. The objection occurs before they plea to the charge.

Hon. Shawn Murphy: I thought you just said in your answer that any time during this trial they can object, and judges are letting them out of it.

Col Patrick K. Gleeson: No, I didn't say that.

Hon. Shawn Murphy: Okay, only at the time before—

Col Patrick K. Gleeson: At the commencement of the proceeding, they are given the opportunity to object. If they objected partway through the proceeding, I really don't know what the judge would do. He may well stop the proceeding if they objected. Again, that's a judicial decision.

Hon. Shawn Murphy: If I could briefly summarize your position on what subclause 28(1) means, if a trial has commenced, it must continue.

Col Patrick K. Gleeson: If a trial has commenced, it will continue under the—

Hon. Shawn Murphy: It “must” continue.

Col Patrick K. Gleeson: Yes, subject to subclauses 28(2), 28(3), and 28(4), which is the unanimity provision.

So it's a panel court. All those protections that come from unanimity get incorporated into the trial.

As I said, it's merely trying to provide some certainty in those situations.

The Chair: Mr. Hawn, Mr. Rota, Mr. Blaney, and then Ms. Black.

Mr. Laurie Hawn: Just to follow on with that, what I was hearing before—and I think this is correct—was that, in effect, the accused has been given the rights that will fall to people under Bill C-60, just by the process that you have mentioned. The other thing, which we haven't talked about, is that the new requirement for unanimous panel findings will apply in any case. They're getting the extra protection of that.

Col Patrick K. Gleeson: That's correct.

Mr. Laurie Hawn: Essentially they've already been given the rights of Bill C-60 just by the transition process that you mentioned.

Col Patrick K. Gleeson: By virtue of the process that has always been there, there has been an opportunity to object. Now one of the reasons for objecting is, “I didn't get to choose my type of court, and I don't want this court.” That's something that happens now in the process.

The Chair: Mr. Rota.

Mr. Anthony Rota: Just to clarify that last comment, are you saying they have the option under clause 28, or they do not have it?

Col Patrick K. Gleeson: They have the option currently. So under the current procedure—

Mr. Anthony Rota: No, the existing one, the ones that have commenced. That's what this deals with.

In the ones that have commenced, they don't have the option at this point.

Col Patrick K. Gleeson: They would have already exercised that option. As I said, regarding any court that has commenced since the Trépanier decision was rendered, the accused, before they pled to the charge, has had the opportunity to object on the basis of the Trépanier decision when the question is asked, "Do you object to being tried by this court?" That's what has occurred since Trépanier, and that will continue until the Trépanier issue is regulated.

Obviously if the legislation comes into force there will be no legal basis to make that objection any longer. They will still be asked the question, but they won't have an objection on the basis of the Trépanier decision. But until such time as that occurs, anybody who has been tried on the basis of a choice that has been made by the director of military prosecutions will have the ability to make that objection when that question is asked. That exists now, and it will exist for all individuals who are in that situation.

The Chair: Thank you.

Mr. Blaney, Ms. Black, and then Mr. Wilfert.

[*Translation*]

Mr. Steven Blaney: Mr. Chairman, the last few exchanges have enabled me to get a better understanding of the scope of clause 28. I would almost say that it ultimately protects the accused. We see that the military system has adjusted since the Trépanier decision and that the accused has been afforded the opportunity to accept or reject the court proposed to him. The wording makes it possible to preserve that, but, once that has started, as they say, you have to stick to it. I think this is very good in its present form.

[*English*]

The Chair: Thank you for that.

Ms. Black.

● (1845)

Ms. Dawn Black: I'm finding it difficult to understand how each of the accused could be given these options, including information about Bill C-60, when Bill C-60 has only just been drafted and the decision on Trépanier came down on April 24. It seems to me there is a time gap there. I am very concerned about some accused going through the track on a system that has already been deemed by the appeal court to be faulty, and the appeal court is asking for changes to be made.

As I hear the discussion going on, I feel more and more strongly that we should eliminate this clause.

The Chair: Go ahead, Colonel Gleeson.

Col Patrick K. Gleeson: If I may, Mr. Chairman, the Court Martial Appeal Court itself, as Mr. Drapeau pointed out, was of the view that the system could and should continue to function despite its decision. What's preventing it from continuing to function is the notion that we cannot convene new courts, but courts that are already convened—courts that were convened at the point when the Trépanier decision was rendered—have, as the JAG pointed out, continued. They've been going forward. They've been going forward with a great deal of uncertainty around them because of the ability for the accused, pursuant to this procedural step in the court martial procedure, to object to the type of court. When they object, judges are handling the objections in different ways, but in each and every case in which an objection has been made, for different reasons and on different legal bases, the court has been terminated or stopped or stayed.

That's why the accused are getting to do this. It's only the accused who are actually in proceedings that were convened prior to Trépanier who have since commenced using that term, as it means here—who have been put into a position in which they're going to plead to the charge—who are being extended these choices as part of this standard chapter 112 procedure.

If I can be clearer on that, I'm—

The Chair: If anybody who's been accused has said they don't want to be tried under that court, if they have objected, then that trial has not proceeded, pending passing or changing of the legislation.

Col Patrick K. Gleeson: That's for anyone who is brought before a judge and who objects to being tried before that court. I can't predict what judges will do in the future, but in each and every case to date they have terminated or stayed the proceedings.

LCol Michael R. Gibson: If I may add one point, Mr. Chair, I think it's important for the members of the committee to understand that the Court Martial Appeal Court did not say anything was wrong with the types of courts themselves. If the person is there and they're happy to be tried by, for example, a disciplinary court martial, there's nothing wrong with a disciplinary court martial in the view of the Court Martial Appeal Court, and that's what this transitional provision is capturing. If the accused is there and he's content to be there, there's nothing wrong with that type of court, even though it would be abolished ultimately by Bill C-60. That particular court should be allowed to proceed to its conclusion.

Col Patrick K. Gleeson: I would add that he has to be partway through the actual trial.

The Chair: Just before I go to Mr. Wilfert, do you mean that without clause 28, we would be putting this small group of individuals at a disadvantage?

Col Patrick K. Gleeson: Yes, they'd be in limbo.

Hon. Bryon Wilfert: That answers the first part of my question. They'd be in limbo.

The second part of my question is hypothetical. If we were simply to remove clause 28, would that have any implications for any other parts of the bill?

Col Patrick K. Gleeson: Well, it creates limbo and arguably creates some confusion as well, because again we're going to have judges now trying to figure out what to do in these cases, if there are any in this situation. It'll create some uncertainty with respect to the proceedings.

If judges believe they can continue, then the accused may not get the benefit of the unanimity provisions. It would be very unclear what would happen with the panel court, for example, as to how the court would deal with it. Would the judge simply shut the trial down? Would the judge try to continue? And if he tried to continue, what rules would he use when he was instructing the panel with respect to their decision?

This transitional provision is simply trying to bring some certainty to those processes if this situation arises after the bill comes into force. That's all it's trying to do. So that would be the effect: uncertainty, lack of clarity, and potential appeals. That's where we would end up here. With a large number of cases? No, but—

The Chair: Mr. Hawn, I'm sorry; you're on the list.

Mr. Laurie Hawn: I just want to make a point. To me it's clear that ultimately this is about giving the individual more protection. This is about protecting the individual, not jeopardizing him. This is about protecting him.

The Chair: Go ahead, Mr. Bachand, and then we'll wrap this up.

[*Translation*]

Mr. Claude Bachand: Coming back to my question, I'm not sure I heard an answer in what you said. As we speak, have any accuseds been brought before courts martial that Bill C-60 is abolishing?

● (1850)

[*English*]

The Chair: Go ahead.

Col Patrick K. Gleeson: I'm not sure I grasped all of that. Are you asking if there are individuals who would be before disciplinary courts martial when this bill comes into effect?

Mr. Claude Bachand: No. My question is whether there are some accused people now who have been introduced in front of courts martial that are being abolished by Bill C-60.

Col Patrick K. Gleeson: Do you mean currently, today?

Mr. Claude Bachand: Yes.

Col Patrick K. Gleeson: I expect I would have to confirm, but I am certain that DMP has probably, prior to Trépanier, directed that individuals be tried by DCMs that may not be completed yet, yes. I don't know the number; it's probably not many, but there probably are some, yes.

[*Translation*]

Mr. Claude Bachand: Don't you think that a defence lawyer could request that proceedings be terminated because the court in which he is appearing is disappearing under Bill C-60?

I think there's a fundamental risk there.

[*English*]

Col Patrick K. Gleeson: There certainly is a possibility that an individual would, but you'll note that there's a 30-day coming-into-force clause with respect to this bill, so I expect that most accused who are actually having a court commence before this comes into effect will be aware that this bill is coming into effect. They would have the opportunity in that period—when they are brought before the disciplinary court martial, for example, and when they go through those procedural steps—to say they don't want to be tried by this court. Again, that triggers the process we've seen happen four or five times already.

If a case has already commenced outside this 30-day window, then it's possible an accused may ask not to be tried by that court. He could bring that motion before the judge, and the judge would deal with it.

LCol Michael R. Gibson: May I add, Mr. Chairman, that I've been a military defence counsel, and one of the lessons I've learned is that as counsel you don't make up your own instructions. The accused has autonomy. It's up to the accused to decide how they want to proceed in that case and to instruct their counsel accordingly. With the greatest respect, it is not up to the members of the committee or me or anyone else other than the accused to make that choice for them in that circumstance.

The Chair: Hold it. We need to have one conversation at a time.

Did you have something, Ms. Black, that you wanted to put officially to him?

Ms. Dawn Black: No.

The Chair: Is there anybody else? Okay. I'm going to call the question on clause—

Go ahead, Mr. Bachand.

[*Translation*]

Mr. Claude Bachand: I'd like to ask a procedural question. If we wanted to delete clause 28, would we only have to vote against it? I imagine so.

[*English*]

The Chair: That's right.

[*Translation*]

Mr. Claude Bachand: All right.

[*English*]

(Clause 28 negatived)

(Clauses 29 and 30 agreed to)

The Chair: Mr. Bachand, your motion deals with what would be clause 31.1. If you let us deal with clause 31, then we'll deal with yours.

[*Translation*]

Mr. Claude Bachand: All right.

[*English*]

(Clause 31 agreed to)

The Chair: Go ahead, Mr. Bachand.

[*Translation*]

Mr. Claude Bachand: With regard to clause 31.1, I urge my colleagues to carefully read the amendment I am moving.

Before I introduce it, Mr. Chairman, I would like to know whether the fact that the committee retained the mandatory review after two years will have an impact. I feel uncomfortable about introducing a sunset provision over one year. In fact, if we adopt my provision, I think that of Mr. Wilfert will become null and void.

What does the legislative drafter think?

● (1855)

[*English*]

The Chair: You can propose it. We have a copy in front of us.

If you want to propose this motion saying “two years”, you're welcome to do that. It's not an amendment. It's just part of the new motion.

Mr. Claude Bachand: Okay, but I have to put “two years” in there.

The Chair: That's up to you, if you want to.

[*Translation*]

Mr. Claude Bachand: Mr. Chairman, I want to remind you of your promise. You told me I could introduce my provision, but I thought that, if I introduced it, committee members could reject it because they wouldn't accept it as it stands.

I didn't want the matter to be resolved that way. In fact, I would like to illustrate what I mean when I talk about the belt and suspenders. Mr. Wilfert provided the belt, and I want to provide the suspenders. I think that's feasible provided I'm not told it's impossible. I'm a bit embarrassed, and that's why I sounded things out on your side. You only told me that I could introduce my provision, but I'm being told it isn't acceptable because there is a review.

I'm going to introduce it, but stating two years. All right?

[*English*]

The Chair: Okay.

[*Translation*]

Mr. Claude Bachand: What do you think?

[*English*]

I'll get beaten anyway.

[*Translation*]

It's two years. The amendment reads as follows:

> The amendments made by this Act cease to have effect on the day that is two years after the day on which this Act comes into force or, if Parliament is not then in session, on the day that is 90 days after the commencement of the next ensuing session.

Some people said that, in the event of elections, we'll have to start everything over again. But that's not the case. The provision states that, if there is another Parliament, it will be 90 days after the next session starts.

[*English*]

The Chair: I'd just like to read back the amendment—wait, it's not an amendment. Yes, it is an amendment, and it's proposed by Mr. Bachand to be clause 31.1.

Go ahead, please.

[*Translation*]

Mr. Marc Toupin: The amendment would read as follows:

> The amendments made by this Act cease to have effect on the day that is two years after the day on which this Act comes into force or, if Parliament is not then in session, on the day that is 90 days after the commencement of the next ensuing session.

Mr. Claude Bachand: That's it.

[*English*]

The Chair: Is that acceptable, Mr. Bachand?

Thank you.

Go ahead, Ms. Black.

Ms. Dawn Black: I'm just waiting to see if it's in order.

The Chair: It's in order. Is there debate?

Ms. Dawn Black: I'm just having a little bit of trouble getting my head around the business of legislation that would have a mandatory review at the end of two years and also a sunset clause at the end of two years.

We've already approved the two-year review. If we're going to have both of these, should we not make it a three-year for the sunset? How can you have a review, not receive the review, and have the sunset clause kick in?

Thank you.

Mr. Claude Bachand: It could go to three years—

Ms. Dawn Black: I'm wondering if the Bloc is amenable to an amendment of three years, which I would propose as an amendment.

The Chair: You want a subamendment to the amendment to take out “two years” and put in “three years”.

Ms. Dawn Black: It would make it three years. Yes, please.

The Chair: Okay. Does everybody understand that?

Debate?

I'll call the question on the subamendment.

Ms. Dawn Black: Am I the only one in favour?

The Chair: It's defeated.

I call the question on the amendment.

Ms. Dawn Black: Are you going to leave it at two years?

The Chair: We're going to leave it at two years.

Ms. Dawn Black: Is it two years or three years?

The Chair: It's two. Three years was defeated.

Mr. Claude Bachand: Three years was defeated while I was talking to the nice lady here. I didn't hear you call the vote.

[*Translation*]

Mrs. Ève-Mary Thaï Thi Lac (Saint-Hyacinthe—Bagot, BQ): They say: “intelligent”.

Son hon. members: Oh, oh!

[*English*]

The Chair: Okay, I'll call for the vote on the subamendment again. That's to change it from two years to three years.

(Subamendment negatived)

The Chair: Now we'll deal with the amendment.

(Amendment negatived)

The Chair: Okay. There was an amendment supplied by Mr. Wilfert on new clause 31.1. It has been withdrawn.

(Clause 32 agreed to)

● (1900)

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill as amended carry?

Some hon. members: Agreed.

An hon. member: On division.

The Chair: Shall the chair 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: The meeting is adjourned.

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