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Chair

Mr. John Maloney

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● (1105)

[*English*]

The Chair (Mr. John Maloney (Welland, Lib.)): I'd like to call the meeting to order.

This is the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, and we are discussing Bill C-53.

Our witnesses today are Mr. Copeland, from the Canadian Council of Criminal Defence Lawyers; and Ms. Bercovitch and Ms. Perkins-McVey, from the Canadian Bar Association.

The routine generally is roughly a ten-minute presentation from each of the two associations, to be followed by questions and answers by our committee. The first round will be seven minutes, and then we will go to five minutes.

I'll ask Mr. Copeland to start, if you're prepared.

Mr. Peter Copeland (Representative, Canadian Council of Criminal Defence Lawyers): Thank you.

First, on behalf of the CCCDL, let me start by thanking the committee for providing the opportunity to make submissions on this bill.

If I can start with this observation, this bill relates to a rather technical area of the criminal law that makes for dry reading at the best of times, so I'm thankful this meeting is taking place on a day when things are otherwise very quiet politically in the capital.

Voices: Oh, oh!

Mr. Peter Copeland: There are three areas I'd like to address. Time permitting, hopefully I can reach them all.

The first area is the discussion of the reverse onus provisions generally, in proposed subsection 462.37(2.01). The second is issues with respect to the legislation that could have a significant impact on innocent third parties, particularly issues regarding matrimonial property and issues regarding, for example, small businesses in which there's an innocent partner whose property may get swept up in the legislation. And then there are a couple of specific provisions that I'd like to address at the end.

The new proposed subsection 462.37(2.01) requires three things for the prosecutor to take advantage of this reverse onus. First of all, the prosecutor prepares a list of property of the accused person, and that list falls within the unfettered discretion of the prosecutor. More importantly, there's no requirement that the amount of property put on the list be at all proportional to the proceeds of crime that may be suspected from underlying offences.

The second requirement is that there be a pattern of criminal activity within the past ten years. In reading the other proposed subsections of the bill, that pattern doesn't have to be particularly extensive. At the low end, what would be caught by this legislation is a small, personal-use marijuana growing operation being the predicate offence for someone who, within the last ten years, has had a minor assault conviction, which would be considered a serious offence because the penalty under the Criminal Code is a maximum of five years or more. And the prosecutor must then show that the income of the offender from sources unrelated to designated offences cannot reasonably account for the value of all the property of the offender.

With respect to this last portion, there are some real difficulties that arise, in my submission. It's unclear whether this is going to be an exceedingly low standard that will amount to no standard at all or whether it's going to be a very high threshold that's going to require the prosecutor to educe a very substantial body of evidence to reconstruct the financial picture of the offender over the preceding ten years.

Let me make another observation. That proposed subsection requires a comparison between income and assets, which to some extent is like comparing apples and oranges. It's a question of the income of the offender versus the value of all of the property of the offender. What you don't have as part of the consideration is what the net worth of the offender was before this period of alleged pattern of criminal activity. One observation I would therefore make is that it may make more sense to compare income to the accumulation of assets and to compare income to a change in the lifestyle of the person that cannot be accounted for by other sources.

Turning to the more fundamental problem in the proposed subsection, if the predicate offence actually results in profit for the accused person, then it would seem that the proposed subsection, on a very broad interpretation, would always be satisfied. But if the single offence, independent of any past pattern of criminal activity, gives rise to profit, then his income from known sources would not account for his assets.

In the alternative, if you're going to be excluding any income from the predicate offence, then it becomes a very high threshold for the prosecutor to meet, because you then have to reconstruct the entire financial picture of the accused person. Strangely, although it's the Crown's onus to try to prove this, they have to go out and essentially find every source of income of the accused person in order to show that it's unrelated to designated offences.

● (1110)

Rather than being a simplified procedure that's going to make it easier to get forfeiture of assets, what would likely happen under that interpretation is that the situation would be very much like what occurs under the current legislation: the prosecutors go out, the police get search warrants for financial institutions, they do property searches, and over a period of time they attempt to put together a net worth analysis of the individual. It's a very involved process rather than a simple one.

If the prosecutor meets the standards in proposed subsection (2.01), then we get to the reverse onus provision, whereby the offender can attempt to show that specific property is not proceeds of crime. One difficulty that may arise is a situation that's not unusual, and it's what happens if you have a property that's not entirely proceeds of crime but may be tainted by proceeds of crime. As an example, what if a home that's worth $200,000 has been purchased and mortgage payments have been made over a number of years, but as a result of some recent criminal activity, $20,000 in ill-gotten gains is then used to pay off the final portion of the mortgage? Under proposed subsection (2.03), is the individual able to demonstrate that the property is not proceeds of crime? If the answer to that is no, then it would seem that, based upon a very small amount of criminal profit, as long as it's distributed and flows into other properties, an individual could stand to lose a very disproportionate portion of their assets. That disproportionate effect could have adverse impacts on third parties, such as spouses, for example, if it were a matrimonial home that was at issue. Or if the funds were to have flown into a small business, a family farm, or something like that, then there could be a very serious disproportionate effect.

The final piece of the puzzle in the reverse onus provision is proposed subsection (2.07), which provides a very open-ended power for a presiding justice to provide relief from forfeiture where it's in the interests of justice. I think it's salutary to have a provision of that sort, but in the proposed bill it's unclear what factors a court would be required to take into account. For example, if proposed subsection (2.07) is directed toward the situation in which there is going to be a substantial disproportionality between the ill-gotten gains and what would otherwise be forfeit, in my submission that's something that ought to be incorporated into the legislation in order that it's clear exactly in what areas a court should be considering applying that exemption power.

The current legislation with respect to forfeiture after conviction contains provisions to provide relief from forfeiture for innocent third parties. Under the bill, those provisions would be amended to make the relief from forfeiture provisions available as well in the reverse onus situation.

I pause to make the observation that given the nature of the new regime, there would likely be many more situations in which third-party interests would get swept up into the mix. I say that because, based upon the new forfeiture provision, the special search warrant powers and the restraint in management order powers would provide a power to the police to essentially freeze every asset an individual owns. Upon the execution of the order, in the usual course the person would then be charged, and as is not unusual in these cases, they can drag on for several years.

● (1115)

Under the new provisions, that restraint in management order or special seizure order would not require any showing that the seized property is at all tainted as proceeds of crime. You might therefore have matrimonial property or innocent third-party business partners' property frozen in this scheme for a lengthy period of time, until the matter works its way through the courts.

I recognize that there are provisions in the code currently to provide for interim relief from restraint in management orders. In practice, it does take some time for orders of that sort or reviews of that sort to make their way through the court, because they won't be heard until the prosecutor and the police have ended what ends up being a very extensive financial investigation. It may be a year or more before you're in a position to even bring the review.

The Chair: Could I ask you to wind up in perhaps thirty seconds or so?

Mr. Peter Copeland: There are two very specific provisions in the relief from forfeiture provisions in proposed section 462.42 that require some substantial reconsideration. Under proposed paragraph 462.42(1)(a), one category of people excluded from applying for relief from forfeiture is people who are charged with the offence that has resulted in the forfeiture. A person who is charged may ultimately be acquitted, and we normally don't have people lose their rights and lose their interests based only upon the fact that they're charged. In my submission, that clause in proposed paragraph 462.42(1)(a) should be removed.

As well, proposed paragraph 463.42(1)(b) is really a section directed toward fraudulent conveyances to avoid forfeiture. The standard the section applies is one of circumstances that give rise to a reasonable inference that the title or right was transferred from the person for the purpose of avoiding the forfeiture of the property.

Giving rise to an inference is a standard generally not known to our criminal law for rights being affected. There may be any number of inferences that reasonably arise. The question really should be whether a trier should in fact draw that inference. In my submission, the standard in proposed paragraph 463.42(1)(b) should be changed to a balance in probabilities.

● (1120)

The Chair: From the Canadian Bar Association, will you both be presenting?

Ms. Joan Bercovitch (Senior Director, Legal and Government Affairs, Canadian Bar Association): I'll start.

On behalf of the Canadian Bar Association, thank you for allowing us to appear before you today.

[*Translation*]

The Canadian Bar Association represents over 36,000 members of the legal profession from across Canada. Part of our mandate is to improve the law and the administration of justice. Our remarks today are consistent with that mandate.

[*English*]

The submission will be presented by Heather Perkins-McVey, who is a defence counsellor here in Ottawa. Ms. Perkins-McVey is a former chair of the national criminal justice section of the CBA and is currently a member of the executive of that group.

I should add that the national section brings together both defence counsellors and crown prosecutors, who work together collaboratively in the development of our policy positions.

Ms. Heather Perkins-McVey (Member at Large, National Criminal Justice Section, Canadian Bar Association): Thank you.

As indicated, our organization is slightly different from Mr. Copeland's inasmuch as our executive consists of both crown attorneys and defence lawyers, and on occasion we do have input from the judiciary.

Looking at Bill C-53, while we share some of the concerns raised by Mr. Copeland and his organization, we'd like to highlight some other areas of issue and concern.

The first area is the definition of designated offence, which has now been expanded. One has to look through the entirety of the bill and all of the related proposed subsections in order to see the significant impact that may occur as a result of the expansion of the definition of designated offence to include all hybrid offences. I'm sure the members of this committee are well aware of the expansion that has occurred over a period of time so that most of the sections of the Criminal Code are now hybrid offences and would thus be caught by this broader catchment of designated offences. Our concern is that this should be closely monitored to ensure that the powerful seizure and forfeiture provisions that will now affect designated offences—this broader area of offences—operate fairly and are consistent with the broader objectives of the legislation.

The other area of concern is the area of the expansion of search warrants under proposed section 462.32. This of course allows a judge to issue a warrant to search "any building, receptacle or place" where there are reasonable grounds to believe that the property that's subject to forfeiture for any designated offence—once again we're looking at a much broader group of offences than previously—may be present. In addition, of course, the officer can seize any other property if he has reasonable grounds to believe it could be subject to a forfeiture order.

One of our concerns is that the legislation, as it's presently drafted, does not specifically exclude locations where privileged information may lie. Our concern is that the section should be amended to specifically exclude a location where privileged information is held or confidential information might reasonably be expected to be located.

Alternatively, the section should be amended to specifically require the judge to impose rules and procedures to protect that privileged or confidential information where the target location of the search is a place where that confidential information is held. Obviously, this may be directed at solicitor-client privilege, and of course you must be aware that the courts in the Lavallee decision and related decisions have found that there should be strict protections to ensure solicitor-client privilege and at other locations where privileged information is held.

As it pertains to the reverse onus section or the sentencing regime that comes about by this legislation, we do share some of the concerns that are raised by Mr. Copeland and his organization.

We want to ensure, first of all, that the penalty of forfeiture is linked to the crime for which the offender is convicted. We appreciate that the existing section of the code does allow such forfeitures, but only at the higher standard of beyond a reasonable doubt. With the current amendments that are proposed, and while it's recognized that it does only apply to those specified offences under proposed subsection (2.02), we have to be aware of the fact that the definition of criminal organization is sufficiently broad, as are the other offences that are caught under the Controlled Drugs and Substances Act, such that these reverse onus provisions that are set out will include a wide catchment.

We have several concerns about the proposed regime; for example, that proposed section 462.37 deals with the forfeiture application after conviction of any designated offences. So of course now those forfeiture applications can be brought for any hybrid offence or any offence for which the Crown can proceed by indictment, not just simply an indictable offence.

In addition, of course, we have this additional fine provision, that a fine can be consecutive to any other penalty. We recognize that is currently an existing condition. However, when you look at these provisions, and as they compound now with the existence of the reverse onus sections, we have serious concerns about the compounded effect and whether or not this section would withstand constitutional scrutiny.

● (1125)

The other concern is that criminal law has always been built upon the premise that a person is presumed to be innocent and that guilt must be proven beyond a reasonable doubt. That high standard applies, and even at sentencing, each aggravating factor in sentencing must be proved beyond a reasonable doubt. That, of course, would be subject to change under this sentencing regime, where there is a lower standard, allowing the Crown to prove on balance of probabilities.

These are not just empty words. These principles have been upheld, not only in the long-established case of Regina v. Gardiner; it's also been a principle that's been upheld in the Supreme Court of Canada in the decision of Regina v. McDonnell.

In that decision, the court held that if an aggravating factor were to be presumed, then the burden would be improperly lifted from the Crown and shifted to the accused to disprove. That's exactly what's occurring in this subsection of the sentencing regime that's set out by this proposed legislation.

Another area to look at, which has not been raised by Mr. Copeland, is section 462.46. This allows the Attorney General to retain a copy of any document that the court has ordered to be returned. Our view is that such documents may come into the possession of the Attorney General as the result of the arrest of the individual, the discovery of documents pursuant to a search, or an execution of a search warrant. If they're allowed to keep and copy those documents, then what is the effect of an order that those documents be returned? These documents may contain highly personal or sensitive information and may involve a significant erosion of privacy interests.

The section that's proposed, which permits the Attorney General to copy and retain those documents with no prohibition on the use they may be put to, and not even requiring the Attorney General to justify why those copies need to be made or kept, takes away the purpose of the section under which a judge orders documents to be returned.

We believe section 462.46 represents an unwarranted and unconstitutional attack upon privacy interests. It's quite extraordinary, in fact, that the court might order documents to be returned on the basis of an acquittal of charges or on the basis that the search was found to be unconstitutional, and yet the Attorney General is allowed to continue to take advantage of the seizure of those documents by retaining copies.

The recommendation we make to that effect is contained in our brief, but clearly it's our recommendation that the Attorney General and any investigative agency that possesses the documents or information that have been ordered returned must return all the documents and copies, destroy any recordings of the information contained in the documents, and be prohibited from making any use whatsoever of the information contained.

Furthermore, the Attorney General or the related investigative agencies should be required to provide an undertaking to the court that they will comply with those requirements.

This is, of course, a consistent point of view and philosophy. In our submissions to various government committees, we've been increasingly concerned about the growing acceptance of the ability of the state to collect personal information without a demonstrated need. We believe this is something we should safeguard against, this continued erosion of privacy and weakening of safeguards to protect individual privacies against the state.

As it pertains to third-party interest, clearly this is an area of concern. We recognize that the current provisions of the Criminal Code allow, prior to an order of forfeiture, for notice to be given to third parties that have a valid interest, as long as those assets will not be dissipated or disappear as a result of the prior notice being given.

● (1130)

Our concern is that this is a very complex procedure under the Criminal Code. Most individuals find it difficult to keep track of the proceedings, when the order is going to be made. As indicated, often this property can be held for significant periods of time—years. Sometimes cases have gone on through appeals for 10 or 15 years, but even five years is a considerable period of time to have your assets caught up.

In addition, there are costs to those third parties trying to pursue their interests. We believe there should be legal aid given for third parties who have valid interests so that they can pursue them. That would not currently be something funding would be given for, and we believe all third parties should be able to fully and effectively advance their rights in interest to property.

In conclusion, we appreciate that the bill's incentive is to try to remove profit from criminal activity. If you look back at our initial submission to this committee many years ago when this bill first came into effect, that indeed was the focus of our submission. However, we do believe Bill C-53 should not be passed without amendments to address the significant flaws, particularly as it pertains to this reverse onus provision as outlined in sentencing.

We have not made a specific recommendation as it pertains to the sentencing regime. We've not done so because this isn't a drafting issue; this isn't a point of clarification or one requiring further specificity: this is a broad-based concern, and we believe that specific portion of the bill should be returned for further consideration.

The Chair: Thank you, Ms. Perkins-McVey.

Mr. Warawa.

Mr. Mark Warawa (Langley, CPC): Thank you, Mr. Chair.

Thank you to the witnesses for being here this morning.

My question is for all the witnesses, and it relates to your position on the principle of reverse onus. From your presentations, to summarize what you've said, it appears to me that you do not support the principle of reverse onus. That's my first question, and I have a follow-up question. Am I hearing you correctly?

Mr. Peter Copeland: I didn't address the constitutionality issue in my initial submissions, but I do support Ms. Perkins-McVey's concerns raised with respect to the constitutionality of essentially presuming an aggravating factor on sentence as opposed to requiring it to be proved in the usual course beyond a reasonable doubt.

Ms. Heather Perkins-McVey: That is our position, indeed, and not only does the McDonnell case support this, but there's been considerable case law that's been upheld in the Supreme Court of Canada that holds that the charter applies throughout proceedings, not simply up to the point of conviction.

Mr. Mark Warawa: Coming from the premise that you do not support the principle and foundation of Bill C-53, which is the reverse onus, that's helpful to understand where you're coming from.

I'm going to be using two examples in my riding of Langley, British Columbia, that will help guide us to a principle. I'm not arguing pro or con on the specific cases. They are just to support a principle.

The first example is of a permanent resident in Canada who came to Langley, who resides in Langley and was on social assistance. Within two years he owned three houses but still was on social assistance. He was convicted of grow ops in all three of these houses. With Bill C-53, there would be a reverse onus in that this individual would have to prove he or she got these three homes legally. How would somebody on social assistance be able to totally pay off three houses in two years?

The principle of reverse onus would be a very reasonable approach to this because a reasonable person would question how somebody could legally pay off three houses.

Another example that made the news this last summer was a drug tunnel in Langley, British Columbia. It's the first known tunnel to go between the U.S. and Canada. There may have been others, but this is the first one that's ever been found. It was built through organized crime dollars to smuggle whatever you wanted across the border—primarily drugs. But it's well known it was advertised as a tunnel that could be used to transport whatever you wanted. This house was purchased approximately a year before the tunnel was closed down. There was a third party involved with this, where the family actually held a mortgage on the house. Did that third party know where the person was getting the money, or where they were working for the last year to be able to make payments? We have a close-knit example here where a reasonable person would expect they should have known, and I would agree with that.

The purpose of Bill C-53 is to go after organized crime. The principle of reverse onus is that upon conviction, the person would have to prove he or she has those assets legally. If not, he or she would have to forfeit them, and any third party attached to that. That principle is sound and reasonable.

May I have your comments, please?

● (1135)

Ms. Heather Perkins-McVey: Well, it's always difficult when you're dealing with specific examples. The specific example you gave seemed to suggest that there was an offence and there was correlation of property. I would suggest that if we look at the current section of the Criminal Code that deals with forfeiture of proceeds of crime, there wouldn't be any need for an amendment because it would be easy to prove on balance that there was a correlation between the offence and the property.

Bill C-53 goes, of course, beyond that. I think the real question is, why do you need to go beyond that? The current provisions allow a lower standard for forfeiture initially on balance, if there is a link between the property and the offence for which they've been convicted. The higher standard of beyond a reasonable doubt is what applies if indeed the prosecution is seeking to seize property they cannot specifically link to the offence before the court but they believe is proceeds of crime. Those are the constitutional standards that have been upheld by the courts because of the charter and the applicability of law to all persons.

In the example you gave at the outset, I would suggest there's no need to go to this further constitutional intrusion, that indeed the existing provisions would apply and would easily link the two.

As it pertains to your second example of the third party who may hold a mortgage, it's an interesting day to talk about wilful blindness, but of course wilful blindness is something that's dealt with in the Criminal Code. Judges know how to apply whether or not a person knew or ought to have known, or whether or not there was specific evidence such that clearly they were wilfully blind to the effect. So once again, I don't believe we need to go as far as reversing the onus, shifting the burden in that impermissible way.

The current sections of the code, as they're presently defined, have safeguards, but at the same time allow a lower standard for designated offences, which is now going to be broader. So it's going to catch a lot more offences, if we look at section 462.37.

In addition, I think the current safeguards are those that are permissible, and I don't think they should be further eroded. If the evidence is there, the current sections are more than adequate and provide that lower threshold for use by the Attorney General in obtaining seizure and forfeiture of those properties.

● (1140)

The Chair: Mr. Copeland, a comment.

Mr. Peter Copeland: Just very briefly, in relation to the first example, I share my friend's comments that the new provisions really aren't required to get at that issue at all. If the Crown were able to show that the person was on social assistance and that was the only source of legitimate income this person had, and if they were then engaged for a short period of time in several grow operations, including in the houses that they actually owned at the end of the period, first of all, the houses could be forfeit as instrumentalities of crime, leaving aside the whole question of proceeds of crime. There's certainly a recent case from out west where the grow house was itself forfeit.

As well, it's not that difficult a stretch for a court to be able to conclude on the facts, if those are the only facts involved, that the houses were a result of the proceeds of other crimes. That could be dealt with under the current legislation.

Similarly, in the second example with respect to the third party and what they knew or ought to have known, it depends entirely upon what the facts were and what the relationship was with the individual who was actually committing the offence. To say simply because you have a third-party interest and someone's doing something wrong, you must have known, in my view offends our standard of justice. It's a leap to guilt by association, just simply through a mortgage document.

The Chair: Thank you, Mr. Copeland.

That's it, Mr. Warawa.

Monsieur Marceau.

[*Translation*]

Mr. Richard Marceau (Charlesbourg—Haute-Saint-Charles, BQ): Mr. Chair, thank you very much. I want to thank the witnesses for coming this morning to share their very interesting positions with us.

Here is my first question. In your opinion, is the reverse onus of proof for offenders who have been convicted, as set out in Bill C-53, constitutional?

[*English*]

Ms. Heather Perkins-McVey: No, that wasn't our position. Our position was that it was questionably constitutional.

[*Translation*]

Mr. Richard Marceau: Why exactly?

I do not have the decision with me but, if I remember correctly, the Supreme Court of Canada had ruled in 1989 that the reverse onus of proof, in a case prior to a conviction, was constitutional.

For example, if an individual is found with house-breaking instruments, such as a crowbar, at 2 a.m., it would reasonable to infer that this individual intends to commit an offence. The Supreme Court ruled that this reverse onus of proof, prior to and not after a conviction, was constitutional.

So, why would a reverse onus provision after a conviction not be constitutional?

[*English*]

Ms. Heather Perkins-McVey: It is not on all occasions that the courts have upheld reverse onus provisions as being constitutional prior to conviction. There are very specific sections, as you're well aware, where they have been upheld, because there are certain rebuttable presumptions that are allowed to an accused at a lower standard.

Looking at post-conviction, I appreciate that many would say the person has already been found guilty and why should they be concerned.

Mr. Richard Marceau: Beyond a reasonable doubt.

Ms. Heather Perkins-McVey: Beyond a reasonable doubt. The person has already been found guilty beyond a reasonable doubt. Now that they're guilty, we need to continue to protect their charter rights, and that is exactly what the issue is.

Sentencing is something that is equally as important as the finding of guilt. People still have to be treated fairly throughout the process, and that is why when the courts have looked at these provisions—in the Gardiner decision, which I think has been around since the 1970s, and then most recently in McDonnell—if there's an aggravating issue to be determined, it is still the Crown that bears the burden of proving that, because the interests of the state and the resources of the state are so much more significant than the resources of an accused.

We're talking about fairness and an even playing field—and a fairness that continues even after guilt. When you look at the McDonnell decision, the citation that's contained in our brief, and you read it through in its entirety, that's what we're talking about: an equal playing field.

● (1145)

[*Translation*]

Mr. Richard Marceau: Exactly, once the person has been found guilty beyond all reasonable doubt and had the opportunity to change that, his property is not immediately seized. The reverse onus of proof is a presumption of sorts. Who would find it hard to legally prove that he has an annual salary of *x*, received an inheritance from *y*, won the 6/49 or who knows what?

In my opinion, it is always possible for the person convicted to quite easily overturn the decision. I do not know many people making an honest living who are unable to quite easily prove where their property came from.

[*English*]

Ms. Heather Perkins-McVey: But the standard isn't "quite easily". If the standard was "quite easily", I might agree with you. But on balance of probabilities, as a legal standard, it is reverse onus after the presumption is already that that the goods are to be forfeited. So it's not a "quite easily" standard; it's a balance of probabilities, which is the civil standard. It is something that is still difficult for an individual, who doesn't share the resources of the Attorney General, to meet.

[*Translation*]

Mr. Richard Marceau: I did not say that it is on the balance of probabilities. I said that it is not hard for an honest person to prove where his property came from. You do not agree. Do you not believe that an honest person, who works and has a job, can easily prove where his property came from?

[*English*]

Ms. Heather Perkins-McVey: It's not always that easy.

If you stand in the shoes of some of the accused before the court, some individuals don't necessarily have all the paperwork. They don't necessarily have the banking documents and the accountants to go to. It's an aggravating factor. It is easy for the state to use all of their resources against an individual. We believe that the accused person should not be required to be placed in the position of proof, even on balance.

Mr. Richard Marceau: Well, it's not an accused person; it's a convicted person.

Ms. Heather Perkins-McVey: Or discharged.

Mr. Richard Marceau: Discharged or convicted.

[*Translation*]

You say that it is easy for the state to prove this, thanks to its tremendous resources. Some individuals who appeared before us have said almost the exact opposite, meaning that it is extremely difficult. There are not enough resources, and organized crime is increasingly adept. This is becoming a global problem.

Incidentally, you must know that France, Great Britain, Switzerland and Australia, all model democracies with regard to human rights protection, have adopted similar provisions. You are telling me that it is not so easy. I would say the same to you. The state does not necessarily have the means or the ability to prove that. People often say, "I do not have the time; it makes no sense; it is taking too long", thereby making it possible for the criminal, someone who is a member of an organized criminal network, to go to prison for so long, get out and resume the same lifestyle as before, with three boats, two sports cars, a cottage in the Laurentians and one in Muskoka. Ultimately, nothing has been resolved.

[*English*]

The Chair: That's the last question, Mr. Marceau.

Thank you.

Mr. Peter Copeland: Could I respond to your first question?

With respect to the reverse onus, the constitutionality would clearly be in play, because reverse onuses generally offend paragraph 11(d) of the charter. The question is whether the legislation is tailored specifically enough to allow the reverse onus to be justified under section 1 of the charter. Given some of the concerns that have been raised in terms of the disproportionality of the potential forfeiture, based upon the low factual premises that the Crown has to prove, it may not be able to pass that section 1 analysis.

With respect to the difficulty for the state in actually putting together a financial picture of an accused person and the difficulty in showing what the proceeds of crime are, sometimes it's not a question of where the person's income came from, but a question of where the money went, so if all the assets of an accused person have been frozen under the new legislation, then they have to show what is clean. That goes back to the comment I made earlier about what to do in a situation in which there's been commingling of funds such that a very small amount of proceeds of crime is tainting a larger property. Legislation doesn't deal with that at all; it would appear, on the face of the matter, that everything that's tainted gets forfeited, so you have a very serious disproportionality.

Finally, in terms of the costs involved, let's say the accused person does have a substantial amount of proceeds of crime and that those have been moved through different assets. They are difficult to trace, and the accused person doesn't care to undertake the vast expense that you're presuming to do that. What position are third parties going to be in, in order to validate their interests? They don't have access to search warrants in order to try to get at the accused's records. The accused isn't assisting them in any way in proving the point. In the case of small businesses or a modest family home, it may just not be worth the cost of hiring the financial experts and undertaking what's involved in hiring lawyers in order to try to prove this.

Innocent third parties will very clearly have their interests at risk under this legislation.

● (1150)

The Chair: Thank you, Mr. Copeland.

Next is Mr. Comartin, please.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Ms. Perkins-McVey and Mr. Copeland, was either one of your associations approached by Justice about the constitutionality of the reverse onus provisions?

Ms. Heather Perkins-McVey: The Canadian Bar Association was not—not that I'm aware of.

Mr. Peter Copeland: I'm not aware of that, but I'm not in a position to answer. I can undertake to seek the answer to that question.

Mr. Joe Comartin: With reference to your suggestion about legal aid, that's really beyond the scope of this committee. That's a provincial responsibility.

Ms. Heather Perkins-McVey: I wouldn't agree with that comment. It's clearly more than just a provincial responsibility. Indeed, there are initiatives by the ministry of justice as it pertains to the giving of legal aid for immigration, as well as for family law and civil proceedings. As it pertains to criminal proceedings, it is more focused. It goes through transfer payments.

Mr. Joe Comartin: I understand the funding formula, but I'm asking if you are suggesting that we amend this provision. I know you don't want the provision at all, but if we're going to pass it, do we amend the provision to include some specific clause that says the third party is entitled to legal aid? Is that constitutional? I think you're into, not the charter, but other parts of the Constitution.

Ms. Heather Perkins-McVey: Obviously, there are currently cases before the court as it pertains to access to justice. I think the issue for the Canadian Bar Association is to ensure equal access to justice by all parties. As indicated by Mr. Copeland's submissions, it's very clear that there may be some innocent third parties who are small businesses, who have interests in matrimonial homes, or who are persons who don't have the resources, and we simply want to ensure equal access to justice by all third parties who have valid interests that should be pursued. We don't feel people should be precluded from pursuing their valid interests because of a lack of funding that removes the ability to go against the interests of the state.

Mr. Joe Comartin: I've heard from a number of police officers and prosecutors and certain politicians that they really don't care if the innocent third party is affected, because they believe they knew, or ought to have known, of the criminal activity by their business partner or spouse or life partner.

Do you have any comments on what the attitude of our courts will be to that expression—that they really don't care, because they should have known? Is that going to have any sway in our courts?

Second, what is the reality? Can you point to specific cases in which the third party—the business partner or life partner—in fact clearly didn't know of the criminal activity?

Mr. Peter Copeland: I'm not in a position to answer in terms of specific cases. What I can make as an observation, first of all, is that under the reverse onus provisions, I expect third-party interests will be much more significantly raised than currently occurs.

In terms of whether the courts will respect third-party interests, if the police and the crowns don't care about actually having evidence to show whether a third party knew or ought to have known, I certainly hope the courts will still apply a presumption of innocence with respect to third parties who may get tangled up unknowingly with unsavoury individuals.

● (1155)

Ms. Heather Perkins-McVey: I have a specific example I can give you, and it's this. It was a young man, 21 years of age, who was convicted of growing 58 marijuana plants in the basement of a home that was rented. The house was possibly subject of a forfeiture order, and the landlord had difficulty in getting compensation for the damage to the property. They were seeking that. In addition, they wanted a return of the property, and the issue that was before the court was whether or not the landlord, who had a duty to attend and inspect the property, should have done so and should have taken greater interest in what was going on in his property. Ultimately, the landlord gave up. The prosecutor determined that they would not forfeit the property, but this case went on in the courts for about a year and a half, and it wore the landlord down and it wore the Crown down, and ultimately the property was returned to the landlord in a damaged state, so nobody won.

Mr. Joe Comartin: We had that reality without the reverse onus.

Ms. Heather Perkins-McVey: We had that reality without the reverse onus.

Mr. Joe Comartin: I have another one. I'm going to ask you if you've run across this kind of thing in terms of, really, an abuse. This is the provincial legislation. In a similar type of situation, a young woman was originally charged with being part of this drug operation. They eventually dropped the charge. She in fact, it turned out, was simply in attendance on the day when they raided the house to collect the rent. She was a university student and was doing this as a part-time job, but they charged her because she happened to be there on that day and found her with money in her possession of some $400 or $500, which actually was the rent that she had already collected but was owing to the landlord.

We're into two things there. They refused to give it back. They eventually dropped the charges because they finally found out she wasn't involved in the criminal process. They eventually dropped the charges but refused to give the money back and told her she could go to court. Obviously, for that amount of money she couldn't afford to as a student. Second, and I could quote the prosecutor, but the prosecutor's representative said if she just signed this piece of paper she could just forfeit the money to them and forget about it.

I'm looking for other experiences of what we've seen with the provincial legislation in the three or four provinces that have it now.

Have you any comments?

Ms. Heather Perkins-McVey: I'm going to tell you that I don't have any personal experience with the use of the provincial legislation. I appreciate that there have been some limited reviews by the courts of the provincial legislation, but this still concerns me, the very mechanics of the provincial legislation, and obviously the Criminal Code protections provide some greater protection for both third parties and persons who have been convicted of offences. It is different from the civil process used in the provincial legislation.

I know that as an organization there have always been concerns about the constitutionality of the provincial seizure powers, and even though the Chow decision did look at some of those issues, I would like to see it reviewed by higher courts before I would comment further. I still have concerns about the constitutionality and the mechanics.

The Chair: Very briefly, Mr. Copeland, please.

Mr. Peter Copeland: To the extent there are concerns about the exercise of discretion of prosecutors where third-party interests are at stake, in my submission that really does raise a concern with respect to the unfettered discretion given to prosecutors in proposed subsection (2.01) to come up with the list of property without having any nexus to be shown between that list of property and criminal offences.

● (1200)

The Chair: Thank you.

Mr. Cullen.

Hon. Roy Cullen (Etobicoke North, Lib.): Thank you, Mr. Chair.

Thank you to the witnesses.

As I understand it, on the question of reverse onus, the Minister of Justice, before tabling this bill, would have to assure himself to the best of his ability that this legislation would pass muster with respect to the charter. I can understand why lawyers from time to time would agree to disagree, and humans would tend to agree to disagree from time to time. Is that what we're up against? In your judgment, you would agree to differ with the Minister of Justice that the reverse onus provision will not pass muster with respect to the charter, or is there something else at play here?

Ms. Heather Perkins-McVey: No, I think it's clearly our position that we agree to disagree with the Minister of Justice as it pertains to the reverse onus provisions, not only the provisions in and of themselves, but the compound effect of the various provisions in their totality, the effect they would have, and whether or not indeed it would pass muster under section 1 of the charter.

It's appreciated that other countries have passed legislation where there are reverse onus provisions; however, I think we have to be mindful that many of those countries, France and Belgium in particular, have a continental system with a different standard and onus and they do not have legislation such as our charter for which comparison can be made.

Hon. Roy Cullen: Thank you, and I'll agree to disagree with the Canadian Bar Association as well.

I think what we're up against here, in case you haven't noticed, is a war against organized crime, which is making inroads into our society in a way that is disrupting the way our society can operate. I think this would be my judgment on it.

In your brief you mention the forfeiture as a component of sentencing. This is something that piqued my attention, because a lot of parliamentarians here in Ottawa and a lot of citizens believe—and I'm not trying to be critical of judges because I know they have a tough job to do—that judges are not really applying the laws that are currently on the books. I don't know if that relates to plea bargaining. I don't know if it means they believe the sentences are inappropriate.

It's somewhat off topic, Mr. Chair, but to the Canadian Bar Association, I wanted to take this opportunity to ask—and you may not be privy to this—whether you have similar concerns about sentencing, the way the courts are interpreting the laws, whether plea bargaining is a problem, and whether the lack of prosecutorial assets are a problem. Is this something the Canadian Bar Association is looking at, is seized with, or is concerned about as well?

Ms. Heather Perkins-McVey: First of all, the words you used were "judges are not really applying the laws", but don't forget, as it pertains to this section of the code, the Attorney General has to make the application in order to trigger the judge to make the determination. Perhaps it's that the prosecutors are not making those applications so that the judge can thereafter be required to make those considerations. It's not up to the judge to initiate the forfeiture procedures; it's up to the Attorney General and their representatives to do so.

As it pertains to whether or not judges are doing their jobs, applying the laws, or whether or not there needs to be resources, clearly the entirety of the justice system is underfunded. The position of the Canadian Bar Association has always been that there should be an independent judiciary. There should not be minimum sentences. We have increasing concerns about minimum sentences that are coming into effect through bills that have been before this House, as it takes away the discretion of judges. We believe in the independence of the judiciary and the fact they should be allowed to have all the information before them and take into account all of the circumstances in coming to a proper determination.

Clearly, it's too broad a topic to really address in these limited proceedings.

Hon. Roy Cullen: Thank you.

Mr. Peter Copeland: With respect to judges not applying the law, it's very easy from reading a media report of a case that's been high profile to seize upon a few sensational facts and then see ultimately what the sentence was and say, how could the judge have possibly arrived at that answer? But one has to keep in mind that the details are everything in the criminal justice system. We spend a lot of time establishing a factual basis and then the judge considers all of the evidence. It's evidence that can't possibly be included in any sort of media report, and much of it may not be very interesting reading.

I am not of the view that there's any problem with our criminal court judges not applying the law, and our courts of appeal certainly are not making a point of regularly sending back cases on that basis.

● (1205)

Hon. Roy Cullen: While I respect what you're saying, I can assure you my analysis goes beyond media articles. Nonetheless, it's somewhat outside the scope of what we're talking about.

I think one of the reasons you're seeing—in case it hasn't occurred to you—more minimum sentences is because.... The feeling of parliamentarians is that the courts are not responding by using their discretion as wisely as they might. It's certainly my opinion, and I know it's shared by many other MPs.

Finally, in the context of solicitor-client privilege, you raised a point in your submission. It may be somewhat off topic as well, but in the context of proceeds of crime and anti-money laundering, I know there was an issue with respect to solicitor-client privilege and lawyers sharing information with FINTRAC. The problem with that, of course, is that while 99% of lawyers are law-abiding citizens, the 1% who perhaps aren't are exempted. The criminals, and that's who we're talking about here, will launder their money through those types of lawyers, and that's why the government took a very broad-scope approach.

I know there are discussions with the Bar Association, FINTRAC, Finance, and the government. Could you report? Do you know where that's at?

Ms. Joan Bercovitch: Discussions are under way. We're not at liberty to discuss the status at this time.

The Chair: Thank you. Thank you, Mr. Cullen.

Mr. Toews, five minutes for questions and answers, please.

Mr. Vic Toews (Provencher, CPC): Thank you.

As I understand the position of the witnesses, Mr. Chair, they're saying that when an accused is convicted of an offence beyond a reasonable doubt, a subsequent reverse onus on a balance of probabilities that would deprive that person of their property interest may be unconstitutional. I think that's a fair summary of what I've heard from these witnesses.

Yet the courts, Mr. Chair, have consistently upheld the rights of the state to deprive someone of their property interest automatically on conviction for certain offences. There isn't even a question of a reverse onus. There isn't even a question of balance of probabilities or going beyond a reasonable doubt. There are many situations in our Criminal Code today where property interests are automatically lost upon conviction beyond a reasonable doubt.

A licence to drive is a property interest. You don't have a hearing to say there should be a discussion as to whether or not someone should lose this property interest. It is done automatically, and it's not only in the court system, where there's a prohibition against driving under the federal legislation. The provincial legislation says if you're convicted in a court under federal legislation, you lose the licence we issue you provincially.

So I'm having a really difficult time with this after decades of the courts upholding the right to deprive an accused who's convicted beyond a reasonable doubt—they've said it's all right to automatically deprive them—of a property interest. Now we say, let's give them a chance to explain where they got the property, and they can explain it on a balance of probabilities. How is that situation worse than what the courts are doing every day?

Mr. Peter Copeland: With respect to the driver's licence, first of all, I'm not sure it's been considered a property interest. The right to drive, in our jurisprudence, is not a right at all; it's a privilege.

Mr. Vic Toews: I never said it was a right. I said it was a property interest.

Mr. Peter Copeland: Well, property interests are rights people hold. Driving is a privilege as recognized in our jurisprudence, so it's not an activity that has constitutional protection.

It's not a question of it being something affecting property. It's a question of proportionality of sentence, which is a fundamental principle that animates all sentences under our law.

● (1210)

Mr. Vic Toews: Oh, I understand. So proportionality of sentence says you can automatically deprive somebody of their right or their interest in a licence that gives them the legislated right to drive a motor vehicle; proportionality says that's all right. But saying to someone after he's been convicted beyond a reasonable doubt that we want an explanation as to where he got this property, putting the onus on him to explain where he got that, that response from the government, isn't a proportionate response to the conviction?

Mr. Peter Copeland: In my view, their real concern is about the proportionality. The way the forfeiture provisions act is really, effectively, as a fine provision, so it's a presumption that there will be a massive fine disproportionate to the offence unless the accused can displace the presumption of aggravating factors.

Mr. Vic Toews: Where is the case law that it is a fine?

Mr. Peter Copeland: That's the effect of it.

Mr. Vic Toews: No, but where's the case law defining it as a fine?

Mr. Peter Copeland: I don't have that reference, and I'm not sure there's case law saying that.

Mr. Vic Toews: No, there is none.

Mr. Peter Copeland: But that's ultimately the effect of it in terms of the effect on an individual. It's a penalty provision; it's not about a property interest. It's a penalty provision that should bear some proportionality to the wrongdoing of the individual.

Mr. Vic Toews: Thank you.

I have no further questions.

The Chair: Mr. Lemay.

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): I want to thank our witnesses for coming. I have two questions. I think that we are talking to very experienced criminal lawyers, so I want to speak as one criminal lawyer to another.

I had not necessarily paid attention to a particular point when I read the bill. I want to thank you for having drawn our attention to this issue. I have difficulty with the amendment set out in section 462.46. The Canadian Bar Association has a recommendation. I am trying, but have failed, to understand why this was put here. I am referring to the fact that the Attorney General may make copies of documents before returning them to you, despite an order to destroy them. I want to draw your attention to this. I agree that there is, in fact, a very serious problem with regard to section 462.46.

Why not suggest that it be struck? Under the Identification of Criminals Act, when a person is acquitted of an offence, his fingerprints, photos and other documents are returned to him. No copies are kept, and they must be purged from police databases. That said, why not do the same thing here? Do you believe that this would be a good solution? That is my first question.

Second, as a criminal lawyer, I am having a little trouble following you with regard to the reverse onus of proof. For the most part, I agree with my colleague, Mr. Marceau. However, section 462.37 is the heart of the bill, and I want to talk about point 2.03. Perhaps I am not reading it properly, but I would really like you to explain it to me. You are saying that, when a person has been found guilty, he is no longer presumed innocent. So far, we agree. Then, you say that, even at this level, the crown prosecutor should have to prove that the goods obtained, or the property acquired, are the proceeds of crime. Have I understood correctly?

When I read page 5, I have a little trouble with this passage because I am no longer innocent. The Supreme Court was clear with regard to the presumption of innocence. I agree with you because I went back to look at the Gardner decision, which stipulates that, following a conviction, a person is no longer presumed innocent.

Are you saying that there is still some presumption of innocence until that person has been sentenced? I want your comments on these two points. However, the first relates, clearly, to section 462.46. I will stop there, Mr. Chair, because I want to hear the answers.

● (1215)

[*English*]

Mr. Peter Copeland: If I may, I'll start with the presumption of innocence. Yes, the presumption of innocence in relation to the offence the person has been convicted of has now been set aside. The reverse onus provision, first of all, seems to be based upon an assumption of guilt of other offences that have never been proved, and that's part of the concern.

As to whether there's still an onus on the Crown to prove aggravating factors, the Supreme Court of Canada in the Gardiner decision made very clear that the onus rests upon the Crown to prove any aggravating factors beyond a reasonable doubt. Mitigating factors are to be proved by an accused on a balance of probabilities, and those principles have been incorporated into the Criminal Code in the recent amendments dealing with sentencing proceedings. They're codified and they're long established, and it is my submission that they're also protected by section 7 of the charter.

Ms. Heather Perkins-McVey: The only comment I would say is obviously we agree with that, and it's set out on page 5 of our submission. As I said, the principles of the Gardiner decision have been entrenched within the provisions of the Criminal Code, but simply, the McDonnell decision builds on that and clearly reaffirms those principles that, even after conviction, if it's an aggravating factor, it's something that should be proven by the crown attorney. She or he bears the burden, either one.

[*Translation*]

The Chair: Thank you, Mr. Lemay. Your time is up.

Mr. Marc Lemay: Already? We will have to invite them back, because I did not get an answer, Mr. Chair.

[*English*]

The Chair: Well, you've got an answer. It may not be the answer you want.

Ms. Heather Perkins-McVey: As it pertains to the other question, your first question, we agree with you that indeed that section should be repealed or should be removed from the bill.

The Chair: Thank you.

On the government side, any indication?

Mr. Macklin.

Hon. Paul Harold Macklin (Northumberland—Quinte West, Lib.): Thank you very much, Chair, and thank you, witnesses.

I want to come back to the linkage and proportionality arguments that you're advancing on sentencing. Clearly we have an extraordinarily serious problem, as was outlined by Mr. Cullen, that we're trying to address. The question for me is, if the sentence is an appropriate sentence—meaning that it has the relationship established between the crime and proceeds—does it really matter when it talks about the amount? In other words, when you talk proportionality, it sounds to me like you're talking about the amount of money or property that is actually being seized as a result of and part of the sentencing process. Surely that isn't an argument to discard this process, that in some cases you might find millions of dollars and in other cases you might find a small amount of money that was invested in a neighbour's home that you had purchased with your down payment. I would like to hear you advance the argument that would settle this for me as to how you can make the linkage that is proportionality—in other words, the size of what you ultimately can seize as to whether or not it should be an appropriate sentence.

Mr. Peter Copeland: In terms of proportionality, it's not just the amount that can be seized, but the amount that can be seized should be compared to what the gain was from the criminal activity, and just because a person happens to have a large amount of property and engages in a small amount of criminal activity, they could stand to lose the entire amount, unless they were able to show that all of their property wasn't in some way tainted. So if there is a proportionality between the criminal gain and what is ordered forfeit, then the concerns don't arise. But if the amount of forfeit could be vastly in excess of the criminal activity, then the proportionality concern does arise, and in those circumstances, I think the excess amount, the amount not tainted by criminal activities that could be forfeit, really does operate as a fine provision.

● (1220)

Hon. Paul Harold Macklin: That may be so if you're linking it to a very specific offence, but in some cases you're convicted of a criminal organization offence, which is a rather broad offence, and I'd like to get your response to that, when it isn't a specific one-element offence.

Mr. Peter Copeland: It's easy to imagine how these provisions might operate against the head of a large, established, traditional-style criminal organization. The difficulty is that not only are these provisions very broad, but the definition of criminal organization is very broad. So if you have three people in a business who on two occasions engage in a commercial fraud, they fall within the definition of criminal organization, and you may have all the assets of the company being frozen and seized.

So it's a question of broad definition upon broad definition upon broad definition. I think it's easy to see the concerns motivating the legislation in relation to the traditional understanding of top organized crime figures. But the legislation has much broader effect, and it's really with respect to those more expansive applications of it that the concerns arise.

Hon. Paul Harold Macklin: So you wouldn't necessarily have the same concerns if it was more limited, let's say, to an organized crime offence?

Mr. Peter Copeland: The problem is that there are other provisions of the Criminal Code that have been drafted broadly. I can't comment on some other more narrow legislation without seeing the terms of it.

Hon. Paul Harold Macklin: Does the Canadian Bar Association have any commentary?

Ms. Heather Perkins-McVey: I'd just simply like to comment on the fact that in the way it is drafted at present, if there is proportionality and if the property seized can be directly linked to the offence, then the lower standard applies upon balance. Where the concern arises is where you have these unspecified properties, this larger amount, as Mr. Copeland indicated. Under this new regime, the reverse onus applies.

The standard that we think is appropriate is the standard now contained in the Criminal Code that requires the Crown to prove that beyond a reasonable doubt. In those circumstances, it's not linked to the crime and the property is not specifically correlated. Where there isn't proportionality, where there is this global amount, then we believe the higher standard of beyond a reasonable doubt should apply.

That's our position.

The Chair: Thank you.

Mr. Breitkreuz, five minutes for questions and answers, please.

Mr. Garry Breitkreuz (Yorkton—Melville, CPC): Thank you very much.

I listened with great interest to your presentation, and I think you have made some valuable contributions to what's happening here. We always have the problem of unintended consequences as a result of legislation, and sometimes when we hurry things through, we later find out that maybe we should have done so a little more carefully.

I have become aware of a case in Ontario in which someone is objecting to a law that has been passed by this Parliament. His objection is that the state is collecting information that it doesn't really need. I'll tell you that the law is the firearms law. We may agree or disagree with that particular law, but the problem that he has run up against now is that the state has put a lien against his home because he objects to this law and wants to fight it in the courts.

What the state has done is it has tied his hands and his ability to fight, because now he cannot mortgage his home and get funds to fight this, and he doesn't qualify for legal aid. So already, without the law we're discussing here today, we have people who have problems with the present situation. You rightly point out that the resources of the state are so much greater than those of the accused. You have people here who feel quite upset about what's happening, and this person wants to demonstrate that this law is a bad law.

This law can be used against people who are not connected to organized crime. This is what I mean by unintended consequences. You can have the state or lawyers within the judicial system abusing the law. What can we do to protect against this? Is there something we could put in here? What compensation can we have? What penalties can we put in for people who abuse the law in this way?

This is why this person is so upset. He feels he's being harassed because he wants to make a statement about a law that he feels should not allow the state to be collecting private information that is not related to the law at all.

I don't know if you're familiar with it. It's in the lower courts here right now. Does this proposed law present even more opportunity for that kind of activity to take place?

● (1225)

Ms. Heather Perkins-McVey: I'm going to answer that first.

Quite clearly, that is one of our serious concerns, and that's why we've made the comments that we have about the ability of the Attorney General to retain copies of information that a court has ordered returned. Clearly, we think that should be removed entirely and that it's inappropriate.

This is just yet another example of what we see as the constant erosion of the privacy interests of the individual. We appreciate that there are some reasons for why these bills have been passed, but we still feel we have to be mindful of those privacy interests.

In addition to that, of course, there's the fact that search warrants can be executed without any concern about confidential information.

Those are two very key concerns of the Canadian Bar Association, and we agree with that.

What kinds of penalties can you put into place? Perhaps costs against the Crown. Those are always difficult to obtain. In civil proceedings costs are awarded in courts, but in criminal proceedings they are not. That's another avenue. In the same way that you want to hit the pocketbooks of those involved in organized crime, perhaps those who suffer the unintended consequences should be allowed to go against government officials for their costs and their consequences.

That would be my comment.

Mr. Garry Breitkreuz: So you would suggest that this should be something that's included in here to protect against this kind of thing?

Ms. Heather Perkins-McVey: It's clearly something that would be an added safeguard for those third-party interests.

Mr. Peter Copeland: Yes, and just to tie into the other part of the situation you put forward—the lien on the individual's house—which is in some way tying their house in the battle they're bringing, I think the analogy in this case is the restraint and management order. With the reverse onus provisions, it's not that they only kick into play after conviction and after someone has been proven guilty beyond a reasonable doubt. The Crown makes an application or the police make an application for a restraint and management order.

Because proposed subsection (2.01) can allow, at the end of the day, for any asset of the accused person to be forfeit, to move that back to the front end of the system, the restraint and management order, means every asset of the accused, including those where another third party has an interest, will be subject to the restraint and management order. So right at the outset of what may be a two- or three-year or more legal proceeding, just getting to the point of guilt beyond a reasonable doubt, you have an order in place that may tie up the only significant asset the third party has. It's going to take a long time and a lot of information to try to vindicate that third-party interest.

In some cases, the people with the greatest resources and access to information—the Crown and the accused—may have little interest in doing anything about that order, leaving third parties quite vulnerable in the system. In many cases, they may give up, as the landlord did in the example Ms. Perkins-McVey put forward, because it's just not worth it to sink more money into a legal battle that is going to cost you so much, for whatever modest returns you may have, to get your $50,000 interest back.

Mr. Garry Breitkreuz: People grasp at straws. How can not registering a firearm be connected to—

The Chair: Mr. Breitkreuz, you're ignoring me. Your time is up, sir.

Mr. Moore.

Mr. Garry Breitkreuz: Maybe there's another comment, sir.

The Chair: Did you have a comment, Ms. McVey?

Ms. Heather Perkins-McVey: I was simply going to say that this highlights the reason why we have to ensure there's access to justice for those who need access to civil legal aid. Furthermore, it simply highlights the fact that there should be some compensation at the end of the day for those innocent third parties, and I think costs are the answer.

The Chair: Thank you.

Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): Mr. Breitkreuz has raised an interesting angle on this.

On the discussions about proportionality, I hear what you're saying. I think the concern people have and what's driving this is that—and perhaps you on the defence bar and so on are doing your job too well—people are hearing stories about.... We'll talk about grow-ops, say, where individuals are engaged in criminal activity, and it's impacting on the community.

Mr. Copeland, I know you mentioned that sometimes we hear about the sensational cases. I think overall there is some consensus developing that there's a pattern of judges going lighter on these grow-ops than Canadians would prefer.

The other end of proportionality is that someone is found to have instruments relating to grow-ops in their house, but the value is low. At the particular time when the search is conducted, the value is low and may be equal to the person's home entertainment centre and their couch.

What we're trying to do here, in view of light sentences, is to hit people in the pocketbook. It's the only way perhaps of keeping them from engaging in criminal activity. How do we address that proportionality concern when someone who perhaps has shown a pattern of being involved in car thefts is convicted for the theft of one vehicle worth $25,000, but there's evidence on the balance of probabilities that they've been engaged in that as an ongoing criminal concern?

● (1230)

Ms. Heather Perkins-McVey: I don't think the definition you raised of car theft would necessarily fit within the definition of organized crime or a criminal organization offence, because that's the very concern we have that these provisions—

Mr. Rob Moore: There is organized crime involved in car theft rings. That's their thing in these rings. They steal cars, sell them, ship them overseas to Africa, and so on.

Ms. Heather Perkins-McVey: I'm not saying there aren't. I'm saying that one of the concerns is that by using these broad-based definitions, if you have a group of people on social assistance who are involved in shoplifting, they could become part of an organized crime ring.

The concern is that there should be limitations and that proportionality exists. We've always had the view that the penalty must fit the crime. The Crown has to get to the point of proving that crime beyond a reasonable doubt. If the only thing they've been able to prove is the theft of one car, then that is the offence for which the accused is accountable. We can't get to the point of sentencing for things that we think have happened or should have happened. The reason we have safeguards is to prevent injustices and miscarriages of justice.

Mr. Rob Moore: Right, but this talks about a pattern of criminal activity. Is that not something that should be taken into account at all? Is that what you're suggesting, that if someone has twelve prior convictions for stealing a vehicle and this is their thirteenth conviction for stealing a vehicle...?

Ms. Heather Perkins-McVey: As a defence lawyer, I can tell you that if that is the criminal record of the accused, that's going to be more than taken into account in the number of months or years they're given on sentence.

Mr. Rob Moore: I agree.

See, that's the problem. When it comes to these growing operations, obviously if what we're doing now were working, then we wouldn't all be sitting here today. But it's not working, because people are, in an uninhibited way, having these large growing operations.

If the government wants to send a message that we are not going to tolerate growing operations and large organized activities of that nature, how do we get that message across if people are receiving light sentences? Part of sentencing is that it is a deterrent. It's supposed to have a deterrent effect, not only on the person being sentenced, but also on society in order to keep others from engaging in that same activity. How would you send that message?

Ms. Heather Perkins-McVey: Quite clearly, there are two aspects to it. The existing forfeiture provisions of the Criminal Code are there, and I believe they're not being utilized to their fullest extent. There's no need to further erode the rights. Perhaps we should simply be utilizing the provisions that we have in existence. Those provisions do provide the ability to seize the property that relates to the offence for which the accused has been convicted, and that's proportional. There's a direct correlation there, and that's appropriate, and there's a lower standard there. The safeguard of having to prove beyond a reasonable doubt is also there to protect the individual when you're trying to seize property that's not linked to the offence. Those provisions already exist.

For serious drug offences you have to look at each case individually. There are many occasions when what you have is that the person found in the house is the gardener—and we'll call them that for lack of a better word. It's not the person who has bought the house or set up the organization or is going to profit; it's the person who is going to receive a nominal sum for the purposes of watering the plants and turning the light bulbs on and off. So you want to ensure that the offence is proportional.

If the person at the top of the organization is convicted, then I think if you were to look at the sentencing decisions, serious penalties are being imposed, meaning penitentiary sentences or more. That's why it's difficult to generalize. You have to look at each specific case and look at who it is being sentenced and what the profile is.

The existing forfeiture provisions do exist and could be used to provide an additional component of deterrence. There's no need to go further than what's there.

● (1235)

The Chair: Thank you, Mr. Moore.

Colleagues, we have to deal with a budget for Bill C-215. We have time for a few more questions, but certainly not another round.

Is there anyone who wishes to...?

I thought you indicated to me that you didn't want to speak, Ms. Sgro.

Hon. Judy Sgro (York West, Lib.): No, I didn't. I got here late and didn't want to ask questions that had already been asked.

The Chair: Ms. Sgro, would you proceed, please?

Hon. Judy Sgro: I was speaking in the House. I wasn't here because I was doing something else.

Listening to the comments is interesting. I think you're probably listening to some of us on this committee who feel that, as my colleague Mr. Cullen said, the judges aren't handing down stiff enough sentences.

I think a lot of what we're certainly focusing on is deterrence, on whether or not we can get stiffer sentences, and so on. The proceeds of crime legislation is another avenue of getting some of the goods back.

Do you think the system we have is dealing with a variety of these issues that you've just raised? Are the laws that are currently on our books tough enough in these areas? Clearly you're not supporting this to the extent that I might have thought you would.

Ms. Heather Perkins-McVey: Let's be mindful of the fact that the offences you're talking about carry significant penalties. The maximum penalties are life; there is the ability for prosecutors to ask that parole not be granted until they've served one half of their sentences; there are provisions that currently exist that would allow for judges, in addressing general deterrence, which is a codified principle under section 718 of the Criminal Code, to utilize them to impose penalties that fit the crimes.

Hon. Judy Sgro: Is the issue the fact that the crowns, the prosecutors, aren't asking for stiff enough sentences? You're telling me the laws we have on the books are currently enough, that it's a question of their not being adhered to and not being used to the maximum, that they're being used to the minimums—hence the reason we talk about mandatory minimum sentencing.

Ms. Heather Perkins-McVey: The worst offenders are those for whom the maximum penalties apply. I think you have to take into account that perhaps it's not on every occasion that we have the worst offenders such that maximum penalties should apply.

We want to ensure we don't move towards a sentencing grid pattern. The U.S. model of sentencing is such that there is no ability to take into account mitigating and aggravating circumstances. The Criminal Code provisions of sentencing under section 718 already provide for imposition of greater penalties where certain aggravating factors are found to exist.

Hon. Judy Sgro: As a Canadian citizen looking at it, if you could step back from your own capacity, are you satisfied that our judicial system has the laws and that they are being applied in a fair manner?

Mr. Peter Copeland: I could say as a citizen that I think our courts and, virtually across the board, our prosecutors take their jobs incredibly seriously. The system is based upon the good faith of all parties involved, and I think justice is done. I'm not sure I see the need for an added provision of this sort, which could have the unintended consequences that have been discussed earlier of seriously affecting third-party interests and resulting in penalties that are potentially significantly disproportionate to the criminal activity at issue.

Hon. Judy Sgro: I guess we'll differ on that one as we go forward.

Thank you.

● (1240)

The Chair: Thank you very much, witnesses, for your contribution today.

Mr. Lemay, did you have a quick question?

[*Translation*]

Mr. Marc Lemay: Yes.

[*English*]

The Chair: Okay. You have about three minutes for the question and the answer.

[*Translation*]

Mr. Marc Lemay: I will be much quicker than that.

Your second recommendation, on page 3, is to amend section 462.32 of the bill. You say that this attacks solicitor-client privilege. Do you not agree that, at present, there is some protection for solicitor-client privilege. There are very strict rules on searching lawyers' offices. Do you believe that this section attacks this privilege?

[*English*]

Ms. Heather Perkins-McVey: That's what the opinion of our executive was, that indeed there's been a lot of effort made to ensure there are safeguards given to persons when lawyers' offices are searched. We simply want to ensure it is specified by the legislation, so that there's no mistaking the fact that when such a search takes place, those provisions should come into play. It clearly doesn't mean that the client's files will not be looked at; it simply means there are those additional safeguards to ensure there aren't unintentional revelations of confidential information.

The Chair: Merci.

Mr. Comartin.

These will be brief questions and brief answers, please.

Mr. Joe Comartin: Mr. Copeland, you drew our attention to proposed subsection 462.37(2.07), and there are no specific criteria there. What type of criteria would you want to see?

Mr. Peter Copeland: I think that recognizing the principle of proportionality and other generally applicable principles of sentencing would, at least as a starting point, give some guidance to the presiding justice as to what the very general phrase “interests of justice” actually is meant to relate to.

Mr. Joe Comartin: Could we build in criteria that would protect a third party in that particular subsection?

Mr. Peter Copeland: Yes, except that if there's a discretion in proposed subsection (2.07), it's got to be exercised in accordance with other provisions in the legislation. There are those two provisions in section 462.42 that I adverted to in my original submission, which place, in my submission, unwarranted restrictions on the rights of third parties. They do so, first of all, for people who are charged who may ultimately be acquitted of the offence, and then for third parties where there are circumstances that give rise to a reasonable inference that title or right was transferred from that person for the purpose of avoiding forfeiture of the property. That's a very low standard. There may be all sorts of inferences that arise, but the question is, should you draw that inference on the balance of probabilities? The other question that arises is, was the avoidance done by the transferer or the transferee? If you really have an innocent third party who is not aware of the purpose of the transfer, that's got to be recognized. I don't think the provisions take this into account.

But yes, if proposed subsection (2.07) were to include provisions relating to third-party interest and perhaps issues of undue hardship, then there would be at least a clearer discretion as to what that section was directed towards.

Ms. Heather Perkins-McVey: The only comment I'd like to make very briefly is that the Canadian Bar Association has generally not been in support of creating lists, because we feel that then it becomes too specific. The “interests of justice” is a term that has been dealt with in the courts, but it also is broad enough that it allows for many of those areas raised by Mr. Copeland to be taken into consideration.

I think the greater concern is to ensure that those innocent third parties can have access to the courts, have knowledge, notice, access to an easy procedure, and be entitled to their costs, if they can establish such for pursuing their rights.

Mr. Joe Comartin: If I had time, I would ask you about the notice, but the chair won't let me.

The Chair: Thank you, Mr. Comartin.

Thank you again to the witnesses for your input on Bill C-53. We appreciate your appearing here today.

I will suspend for thirty seconds to allow our witnesses to leave the table, and then we'll go back into session to discuss the operational budget on Bill C-215, Mr. Kramp's bill.

[*Proceedings continue in camera*]

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