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Tuesday, June 5, 2007

Chair

Mr. Bernard Patry

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● (1645)

[*English*]

The Chair (Mr. Bernard Patry (Pierrefonds—Dollard, Lib.)): It's meeting number 3 of the legislative committee on Bill C-27.

[*Translation*]

Pursuant to the Order of Reference for Thursday April 5, 2007, the committee is considering Bill C-27, an Act to amend the Criminal Code (dangerous offenders and recognizance to keep the peace).

Today we have, as individual, Mr. Lorne Goldstein,

[*English*]

who is a barrister from Webber Schroeder, and Mr. Ian Lee, a professor at Carleton University. Welcome, both of you.

We'll start with Mr. Goldstein, please.

Mr. Lorne Goldstein (Barrister, Webber Schroeder, As an Individual): First off, if I may, I thank the chairman of the committee for the opportunity to speak to this important piece of legislation.

The brief that's before this committee was actually prepared as an article for the Criminal Lawyers' Association, to be published in their newsletter. Please accept the article in that light.

Permit me to set out the limits of the evidence I'll be giving today. I did not come prepared to speak at large to the constitutionality of this piece of legislation, although I would certainly be happy to return to do so.

As I said in the article, and as I'd happily expand on if you have any questions, it's my opinion that this provision, these amendments to the Criminal Code, are subject to significant frailties, perhaps not under section 11 of the charter, but under sections 7 and 12. I note of course that most of the comments from the preceding witness refer to the presumption of innocence. That of course is enshrined in section 11. My greater concerns are with respect to sections 7 and 12, but I did not come prepared today to expand on that at large with an analysis of Lyons and Johnson, etc.

Today, what I hope to speak to are the practical applications in respect of this legislation. The chill effect is the way I've characterized it in the paper, and I'll be talking about that very briefly and then I hope to answer all of your questions as completely as possible.

I know of course that this committee is well aware of the history of this legislation, dating back to 1947, but of course there's preceding legislation dating back to the previous century in other countries. We have a great deal of experience, then, with respect to this type of preventative detention legislation.

As I say, dangerous offender legislation is considered to be one of the very few pieces of law that provide for preventative detention. That is to say, not detention or incarceration for wrongs done, but detention and incarceration for wrongs that may be done, wrongs that are predicted to be done. The sentencing provisions allow for incarceration, detention for wrongs done. But only this piece of legislation—only part XXIV and the bail provisions—contemplate putting a person in jail for things that we believe they may do. That concept, the concept of putting someone in jail for something that they may or may not do at some point in the future, is reprehensible to a fair-minded society. It is entirely un-Canadian. It is, however, necessary in certain circumstances.

In some circumstances, the nature of the individual justifies the concept of preventative detention. The most common of this, indeed, contemplated in every single charged individual, is the concept of bail. Under section 515 of the Criminal Code of Canada, a person can be detained in jail pending the disposition of their case. This is preventative, since it detains not as punishment nor as correction, but it incarcerates to prevent flight or the commission of a further offence, or in the tertiary ground, if the offence is such that the conscience of the community requires it.

There should be no comfort for this committee in the fact that the bail provisions permit preventative detention. You see, in the bail situation, the period is necessarily finite. The passage of time is governed by section 11 of the charter, which makes both reasonable bail a constitutional right and the reasonable time for trial, so we know that the bail is coming to an end. At the end of this case, the person will either be released back into the community as acquitted or sentenced. This is not the case for part XXIV of the Criminal Code. Indeed, we look further and we see that where the bail is such that the person has been incarcerated, there is a detention order and the trial is delayed, there's an entirely separate section dealing with a detention review. I note, for your consideration, that the detention review is a crown onus, even if the person is incarcerated and a detention order is made by a justice of the peace or a judge, for the detention review the onus rests on the crown, even in the situations where the onus had earlier rested on the accused. That is how seriously we take the concept of preventative detention.

Part XXIV is not preventative detention as a form of punishment; it is a preventative detention for unknown acts, things that we think the person will do.

It's very important to look behind the legislation at the way in which these dangerous offender hearings occur. People from the National Parole Board testify; people from Correctional Services Canada testify; psychiatrists and psychologists testify. These medical experts do so with a view towards predicting the recidivism of the individual, and we always get into this wonderful game: What is the statistical probability of this person recidivating? If they do recidivate, will it be violent or non-violent? If it is violent, what scale will it be on? Is it the simple push, or is it the homicide that everyone fears? When will this person recidivate? Within the seven years, within the fifteen years, within the lifespan of that person? None of these answers are available by any of the psychiatrists, by any of the CSC or National Parole Board personnel. None of these answers are available at all. The preventative detention under part XXIV is for something the person may do, or may not do, at some future point.

What Bill C-27 seeks to do is strip the criteria that I've just set out for you from the process. If Bill C-27 passes, and the person has these preceding offences, and the onus shifts on him, now the National Parole Board does not testify; Correctional Services does not testify; a psychiatrist may or may not testify. The judge is left with nothing but this presumption.

How does the judge then satisfy himself that this person is a risk? Is he a risk because of the legislation? Has the legislation taken the place of the doctors who testify and the statisticians who can explain the patterns of behaviour? The criteria are what have saved part XXIV from charter scrutiny in the past, because the person has the right to respond; the person has the right to full disclosure; the person has the right to his own psychiatrist; the person has the right, not so much to the presumption of innocence—because he's been convicted—but to a fair trial proceeding. Bill C-27 takes away the fair trial proceeding.

As I indicated earlier, I'd be happy to talk about section 7 and the fair trial rights, cruel and unusual punishment, but for today I would turn to part three of the article that I provided to the committee, which is what I've titled “The chill effect”. This is going to be more of a pragmatic approach to what happens when you're in a dangerous offender proceeding.

I've had the privilege of appearing for the defence either as lead counsel or co-counsel in ten of these proceedings. I've met with, dealt with, all of the experts who were called in these matters, both by the crown and by the defence, and of course with the offenders themselves. I've had the opportunity, then, to look at Bill C-27 from the perspective of how this is going to impact upon my job. While I realize that the crown attorneys have been consulted, and the Department of Justice has done its analysis, the people who are actively engaged in defending these applications do not seem to have been mentioned in any of the honourable minister's recitations of those with whom he's consulted.

If the onus is reversed, it suddenly becomes my application. One of the things that I'm going to set out for you today—and take your questions on, of course—is how I would go about executing my obligation on what would become my application to try to keep my client out of jail for the rest of his natural life.

I present for you a hypothetical situation at the second paragraph. I chose a very interesting, I hope, charge, and that's a sexual assault. Unlike in the United States, where offences are graded—you have first- and second-degree assault, first- and second-degree battery, etc.—in Canada we've chosen to characterize offences more broadly. So a sexual assault, for instance, under section 271 of the Criminal Code of Canada could be anything from a simple touching—colloquially referred to as groping, if you will—to what had been in the old code referred to as a rape. That's how broad section 271 is.

● (1650)

In the example that I've given, of a sexual assault trial, which might have been a plea—

The Chair: Mr. Goldstein, I just want to remind you it's already been ten minutes, and we'd like you to conclude, because we still have Mr. Lee. We need to finish by 5:30, because we'll have some bells for votes this evening. If you don't mind, we'd also like to have Q&A from the members. Please conclude.

Mr. Lorne Goldstein: Thank you, Mr. Chair.

I'll skip by the hypotheticals, which are all included, of course, in the article, and simply say this: the opportunity for an application to be made and the onus to be reversed for an individual, as was pointed out earlier, who could have but a single prior contact with the police, in which he or she exerted no physical force whatsoever but was a party to two or three of the primary designated offences and got the requisite sentence, would then make this person a presumptive dangerous offender on the next occasion.

As a defence counsel, it would be incumbent upon me to spend your taxpayers' dollars to explore every single possible avenue of refuting what he is now presumed to be, including all of the records, all of the witnesses, and all the things that we now entrust to the police and to the crowns. I hope to be able to expand on that in the questions.

● (1655)

The Chair: Thank you, Mr. Goldstein.

Mr. Lee.

Professor Ian Lee (Professor, Carleton University, As an Individual): Thank you very much for inviting me here to speak today and to testify today.

I just want to bring to your attention that I'm not a lawyer; I'm not trained as a lawyer. I'm a professor at Carleton University in the business school. However, I did my doctorate in political science in Canadian public policy and my minor field was political philosophy. So I'm much more interested in the logic of the public policy and the underlying values expressed in that. That's the level at which I am focusing.

What I'm presenting today is based on an article that's being published August 1, in just over a month. It's the annual edition of *How Ottawa Spends*, published through McGill-Queen's University Press. My article is entitled “Righting Wrongs: Tory Reforms to Crime and Punishment—Locking Them Up Without Losing the Key?” The article really focuses on Bill C-9, Bill C-10, and Bill C-27.

One of the premises of the article is that Bill C-27 contemplates incapacitating violators of human rights—that is, repeat, violent, dangerous offenders—because I make the assumption in the article, following the late Dean Lederman from Queen's Law School, that criminal justice concerns human rights and that, as in his famous phrase, the most fundamental human right is the right to be left alone in peace. So violence against a human being is a violation against their human rights. That's the premise that drives through the entire article.

I have some background information in front of you. Some of it you'll be familiar with. I have the principles of sentencing reproduced from the Canadian Sentencing Commission because I think it's clear that the second-last, the incapacitation, is the basis for Bill C-27. I testified last fall before the justice committee, and there was some debate about the amount government spends on prisons, so I put that in the slide, showing that the government spends a very small amount—it's about $1.7 billion annually. I also have the crime funnel there, just as background, and we can talk about that later.

However, one thing I did want to bring out before I talk about the California example as a case study—essentially three strikes and you're out—is I did provide data from Statistics Canada and I called it “the industry of crime”. I have the data there, showing that—this is 2003 data—the annual data cost of crime is about $80 billion and the victims carry the burden of about 65%, so about two-thirds. This is something that is quite serious and people don't always focus on that.

I also have the stats, again from Statistics Canada—and I'll come back to this—showing that the majority of victims of violent crime are under 30 years old, while most of the people who analyze crime, such as academics, criminologists, and parliamentarians who pass the laws, tend to be middle-aged, affluent, middle-class people who aren't bearing the price. They have the lowest levels of victimization. There's something that I want to bring up later on that issue.

I have some stats in there about the average offence, the average length of sentence, and the changing profile of the federal offender. Of all offenders now in a federal penitentiary, 75% are there for violent crimes. I noticed that in the previous debate you were debating what the number of annual designations were under dangerous offender, and I have the chart on slide 18 showing that it was a low of eight in the last 20 years, and peaking at 29 in 2001. So there's a very small number of people designated under the dangerous offenders. Of course I have the overall incident rate of violent crime per 100,000.

I'm very aware of the fact that I only have a few minutes, so I just want to pick up on a couple of things dealing with rehabilitation and recidivism and then deal with California, and then I guess we'll go to questions.

I do have some interesting data from the Correctional Service Canada showing the rehabilitation metrics for the last five years, and these are the number of offenders in our federal prisons who are completing their rehabilitation programs. It's only about 60%, which means four out of ten—40%, almost half—of all offenders are not even completing their rehabilitation programs. I did discuss this more extensively in the article, because it points to some serious problems. In terms of the recidivism, my colleague here suggested that there aren't stats. CSC, in the 2005 report, estimated that 36% of all federal offenders will be convicted with a new crime within two years of being released from a federal penitentiary. So that's there.

● (1700)

I'll just finish up now on California, because I know this subject has been debated in the media. I think your committee has discussed it, and I would like to suggest to you that there's an enormous amount of misinformation and disinformation about the California three-strikes laws.

I think I read that one member of Parliament said someone could go to jail for stealing pizza three times in California. This is false. This is absolutely false. Jennifer Walsh was a district attorney in California, in Los Angeles. She went back to school, to Claremont College, got her PhD, and wrote her thesis on this. She has the data in there. There's an amazing set of empirical data.

There are two things about the California law. Two of the strikes must be for a designated serious felony, a violent act. The third crime that can trigger the life sentence can be any felony, but she actually wrote an article called “In the Furtherance of Justice”, because the California law has a sentence saying that the judge or the DA cannot count the third offence if it was not a violent offence.

As it turns out, in her thesis she found that 98% of all the people being convicted under California's three-strikes law are in fact going to jail for really violent, vicious acts—murder, attempted murder, rape, and so forth. They are not going to prison for life for stealing bubble gum. That's a great urban myth in our country. It feeds into, I suppose, the anti-Americanism in Canada that I talk about in my classes.

So I really want to put that on the table, into the debate today. You have the data from California showing the impact of ten years of three-strikes. Regarding violent crime only, it collapsed; it went down by half. This wasn't a mistake. This has been studied over and over. Jennifer Walsh has done, I think, the most empirical research on that. So the data is there.

Finally, I just want to conclude, because I'm probably going to be out of time any minute. I'm arguing, and I argued in my article in “How Ottawa Spends”, that if Bill C-27 passes, it will incarcerate the worst human rights violators in our country, those who violate the human rights of the most vulnerable members of our society. Those are defined by Statistics Canada as people who are young, female, and with low income. If we're not concerned about that, then maybe this bill isn't such an important bill. But if we are concerned with the rights of the most vulnerable members of our society, it's something we have to take heed of.

I just want to close by reminding everyone that the late Prime Minister Trudeau, who was a political scientist, by the way, did say that societies are judged by the way they treat their most vulnerable members. When we don't incarcerate these violent people who are preying on young, female, low-income, vulnerable people, we are not looking after those people.

Thank you.

The Chair: We'll go now to questions.

We'll go for seven and a half minute rounds by political party.

We'll start with Mr. Murphy, please.

[*Translation*]

Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.): Thank you, Mr. Chairman.

[*English*]

Mr. Lee, thank you for your presentation. I was here when you were at another committee when you presented, and I'm aware of your viewpoint. With respect to MPs and professors not being subject to crime and so on, I think you've offended the parliamentary secretary, who is not middle-aged. The rest of us perhaps are, but maybe Ms. Davidson isn't. Ms. Jennings clearly isn't.

In any event, I do want to concentrate on Mr. Goldstein, because it's not often that we get somebody who's from the trenches, so to speak, and you've been involved in ten hearings. I want to state from the outset that Bill C-27 affects a provision of the Criminal Code that is in existence. You've worked with it; it works; there are dangerous offender designations made. There have been cases to the Supreme Court that have dealt with it.

This is an attempt, in my view, to work with the system and the designation system to improve it for the betterment of our society. But I am interested, since you put a hypothetical forward. I like hypotheticals in criminal situations, because they give us an insight as to what might happen, which is what we're doing here. Now, in your case, I have to say—and I'm talking about part three, "The chill effect", second paragraph—I get what you're saying. I am a lawyer, and I have never been involved in a dangerous offender hearing, but I talk to prosecutors and criminal defence attorneys. I find it unlikely in your hypothetical that the DO—What's sort of missing there is that discretion in the prosecution to make the application, which remains in the new amendments.

I'll ask you bluntly: Are you are not sort of lathering it up a bit to make your argument? Isn't your hypothetical a little weak on the idea that these facts would lead to the crown making such an application?

The groping in the pool is a serious offence. And your answer is probably going to depend on what the first two offences are. I notice in your footnote you talk about how somebody who was just driving their car on the way to an armed robbery, with two counts, might catch that, and I understand that. Let's take that situation, since you put it in your footnote. Do you really think most prosecutors would go for the dangerous offender application?

● (1705)

Mr. Lorne Goldstein: Do I think most would? No, probably not, but some would, yes.

I've seen some remarkable things. I've seen some remarkable applications. And we don't have time for war stories, but it's not so absurd a hypothetical that I thought it did an injustice to the committee to put it down on paper.

What I have as a problem is that it's possible. There's nothing in the legislation that protects the reversal of onus in this situation. It is entirely incumbent upon the discretion of the assistant crown attorney; it is entirely incumbent upon his or her goodwill at this point. That discretion ought not to be wielded by one individual under these circumstances to turn around and say, "Disprove you're a danger, sir". It's simply not something that ought to be contemplated by legislation. That discretion is too broad.

Mr. Brian Murphy: I am interested in war stories, but we have seven minutes for the whole team. I look forward to talking to you again, and having you come back on the legislative aspects of the charter challenge, which you're not prepared for.

So I'll yield some of my time.

The Chair: Ms. Jennings.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Yes. This follows the question that my colleague Mr. Murphy asked.

As it stands right now, the crown has the discretion—and we're very concerned about the whole issue of the reversal of presumption—to make an application for remand and assessment. Once the assessment report is filed, and copies given to both the crown and the offender's counsel, the crown then has to make an application for a dangerous offender hearing.

So in the case you're talking about, I don't believe that even if the crown exercised his or her discretion to apply for the assessment, it would appear with the convictions that you're using. The assessment report would come back and not support that the offender is a dangerous offender, given the examples that you gave.

At that point, the crown would have to exercise his or her discretion again to file the second application of a dangerous offender. I'm talking about if Bill C-27 becomes law.

So you might want to rethink your example, because it's not automatic. Even with my concern about the reverse presumption, I still want to have solid fact. I don't think your example is a good one, because there's no mandatory assessment on third conviction.

Once the assessment happens, if the crown exercises his or her discretion to make an application for remand and assessment, and the judge believes there are reasonable grounds that the offender might be a dangerous offender, the judge orders the remand and the assessment. Once the report comes in, the crown again has to exercise his or her discretion to apply for an application.

Am I correct?

● (1710)

Mr. Lorne Goldstein: I believe you are, yes. If the crown is seeking a dangerous offender designation in the first instance, or even contemplating one, the number of times that that crown needs to exercise his or her discretion is of no comfort. Whether this is the first or second time, before or after the assessment, prior to the application—

I see nothing in Bill C-27 requiring a threshold. The way the system exists now—and I wanted to say this at the very beginning, when the first question was posed—it works. Cases are identified, crowns make applications, judges sit in judgment, and people who are dangerous are designated dangerous offenders. Those who fall below that threshold are designated long-term offenders.

I'm not happy to say, but in the cases I've done, I've lost in some instances. Why? Because there was evidence, and I had recommended against an appeal. Why? Because it was appropriate.

So the tinkering that Bill C-27 seeks to do serves no purpose, as far as I'm concerned, from a legal perspective. From a political perspective—and I don't want to comment on the political perspective—I can see where it might have some efficacy. But from a legal perspective, it does nothing except create potential for charter scrutiny, and create an almost unbearable burden on the defence. This will deplete the legal aid resources and quite probably create a very invasive situation to prior victims and other people in the community who will be touched by such a broad defence onus.

[*Translation*]

The Chair: Thank you very much, Mr. Goldstein.

We will now move to Mr. Ménard.

Mr. Réal Ménard (Hochelaga, BQ): Mr. Chairman, time is running out.

I'd simply like to understand, Mr. Goldstein. The issue has been raised as to the relevance of this bill. I believe the minister was unconvincing. If he were to be evaluated at the University of Ottawa for a law court, I think he would get either a C- or a D+. I don't feel he has really answered our questions.

The Chair: I think they use percentages now.

Mr. Réal Ménard: Mr. Chairman, we are in Ontario.

All this to say that I'm trying to understand what it is that does not work with respect to dangerous offenders.

One of the explanations brought forth by the minister was that young offenders who are the subject of assessments and who should be seen by a professional—he referred to a psychiatrist—are not compelled to participate.

You seem to be saying that the National Parole Board, Correctional Services Canada and other bodies of this nature will not be further involved through this bill.

What will these bodies' role be if Bill C-27 is adopted? What do you think of the minister's explanation when he says that it is difficult to obtain dangerous offender designation in situations where young people or not-so-young people—it's as though people over 35 were old in this society—refuse to submit to an assessment and for all practical purposes it was impossible to obtain a designation?

[*English*]

Mr. Lorne Goldstein: The two questions posed by the honourable member are, if I understand them correctly, to address the minister's comments in respect of the accused's lack of participation right now and what barriers it poses.

I would welcome the opportunity to submit transcripts of testimony on which I have been lucky enough to be the cross-examiner, in which Dr. Hucker, Dr. Bradford, and Dr. Gojer and others have repeatedly commented on the lack of necessity for the involvement of the offender in their psychiatric assessments. We know these psychiatric assessments are very much the basis of the prediction of recidivism. Well, the PCL-R, or the "Psychopathy Checklist—Revised", which is the fundamental tool for that, does not require the participation of the offender in ranking him as a psychopath or not a psychopath, or ranking him on that range. In fact, Dr. Hare, who created the PCL-R, recommends great diligence if you're going to interview the offender, because one of the criteria —

● (1715)

[*Translation*]

Mr. Réal Ménard: Mr. Goldstein, I simply want to make sure I have understood correctly.

You're saying that a court may declare someone a dangerous offender even if the individual refuses to participate in his psychiatric assessment. Am I understanding you correctly?

[*English*]

Mr. Lorne Goldstein: Yes, sir.

Such a situation arose recently in the Federal Court of Appeal and it was upheld, because the offender need not participate. The discussion of prediction of recidivism is predicated on past behaviour, and past behaviour is captured in Correctional Service Canada records, school records, criminal records, and other places.

As for what the offender says or does not say in the hearing, you should note they almost never testify. And he's presumed to be deceptive in what he says to the doctor. All of the people from Correctional Service Canada will tell you that when dealing with offenders, the latter are presumed to be deceptive. All the psychiatrists will tell you that when dealing with them from an analysis perspective, they are presumed to be deceptive. The offender's participation is utterly irrelevant and the Federal Court of Appeal has recently upheld, I believe, a dangerous offender designation where the offender simply refused to participate.

So there is no requirement that any legislation be tabled to mandate the accused's participation. Their participation is entirely secondary to the present system, and the present system is working, if you look at the crime rates.

In terms of what we would do as defence counsel if Bill C-27 were passed, frankly, I don't know. We would immediately apply to legal aid. You should know that I've never heard, even anecdotally, of an accused funding his own defence of such an application. We would immediately apply to legal aid for funding to review all of Correctional Service Canada's materials, all of the psychiatric materials, the school records, and all of that. We would also need some type of clearance to go into the police records so we could look at what witness statements we would need to disprove a pattern.

What would we need? How would the defence deal with its onus under Bill C-27? It would require a great deal of legwork, a great deal of money, and a great deal of access to the institutions, all of which is readily available to the crown as it stands now.

[*Translation*]

The Chair: Thank you.

Mr. Comartin.

[*English*]

Mr. Joe Comartin (Windsor—Tecumseh, NDP): I think I'm going to pass, Mr. Chair.

The Chair: Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): Thanks, Mr. Chair.

Thank you to both the witnesses for appearing.

Professor Lee, I found it interesting. It's sometimes rare that witnesses come to committee to talk about the cost of crime from the perspective of the cost to society. So often we hear what it is going to cost if someone who should be in jail actually winds up in jail. Of course there is a cost to taxpayers, to governments, in that respect. I note that you've also set out the cost of crime to society in the form of victims.

We've heard from the minister. We've heard from individuals around this table today that we are dealing with what a layperson would describe as the worst of the worst. These are people who certainly, to come under the effect of this bill, have shown themselves to be recidivists; to have a propensity to commit serious violent and sexual crimes. So we're not talking about break and enter, shoplifting, or some of the things on a more minor scale. We're talking about individuals who repeatedly have committed the worst offences.

Sometimes the terminology can be confusing, but for someone to be designated a dangerous offender they're not required to commit two or even three offences. A prosecutor can make an application, even on the first offence, for someone to be a dangerous offender.

Mr. Goldstein, when you were questioned about your fact scenario you said you didn't necessarily trust the judgment of a crown prosecutor or their discretion not to proceed. But you also said that the system as it is now is working okay. In fact there is discretion even now among prosecutors to proceed with a dangerous offender designation. That in fact doesn't change under this bill; there is a discretion there. So perhaps you can comment on that.

With the time remaining, Professor Lee, perhaps you could comment on how you came up with some of the measurements on the cost of victims to Canadians. I agree that what we've seen as evidence bears out some of your analysis that the most vulnerable in many cases are being targeted, and we need to have a balance in our system. This bill in my opinion strikes that balance in a very responsible way.

Perhaps you can comment on those two questions.

● (1720)

Mr. Lorne Goldstein: Thank you.

I trust the discretion of the crown, insofar as it has been exercised for literally hundreds of years, to engage in a process that is then reviewed by a judge and to which there is an adversary, the defence bar. I cannot say the same in a situation that has never risen to date, which is the power to engage in a process that reverses everything onto the defence bar. In other words, it's not the discretion of the crown to commence an application that he knows will tax his office, the police, and the court, to prove what they have to prove. If Bill C-27 passes, the discretion will be whether or not to task me, the accused, with all of that.

It's not the same discretion by any means, because one has the price of the effort as a balance, and under Bill C-27 it's whether or not to engage in the process. That latter discretion is much too broad, in my respectful submission.

The Chair: Mr. Lee.

Prof. Ian Lee: Thank you.

That's why I emphasized at the beginning that I'm not a lawyer qualified to speak on the technical issues. But there are some important policy issues here, and I think that in the discussions or the debates I've read over the past several years dealing with criminal justice, the focus is very narrowly on the Department of Justice and the costs of the correctional service, rather than looking at the larger picture—which Statistics Canada does, and which is where this data came from, so it is very reputable—showing that the costs are much larger.

I put the data in for the Government of Canada expenditures because last fall I testified before the justice committee, and a law professor was testifying, talking about the enormous amount spent by the Government of Canada on jails. Well, we'll spend $1.87 billion this year, 2007, by the Correctional Service. That's nine-tenths of 1% of government expenditure, of the total federal budget. It's two-tenths of 1% of GDP, which is the number you use when you want to do cross-national comparisons. So the amount we spend on security expenditures at the federal government level is trivial. But when you look at the cost of crime to the larger society, it's very large.

This is 2003 data. Unfortunately, I made a mistake and put 2005 in the heading, but it's 2003 data from the Department of Justice and StatsCan. It was estimated at $80 billion. Now, $80 billion is an enormous amount of money, and as I pointed out, it falls disproportionately—and this again is Statistics Canada data—on young people under the age of 30.

Mr. Rob Moore: Thank you, Professor. I appreciate your pointing that out.

Mr. Goldstein, to go back to what you said, I'm not quite getting it; what you're saying is not quite holding water. Under the current system as it is, where you've already said you trust the discretion of the crown prosecutor, and under the system as it will exist if Bill C-27 passes, there's still a discretion for the crown prosecutor. In fact, the actual process we're going to go through as to whether someone is or is not a dangerous offender will look very similar. You're going to have one side saying, "No, my client is not a dangerous offender, and here' s why", and you're going to have another side saying, "No, the person is a dangerous offender, and here's why." That exists now and it will exist under Bill C-27.

What Bill C-27 does, number one, is prevent applications from falling through the cracks, because it puts an onus on prosecutors to say whether or not there's going to be an application; and two, it puts that onus on the offender, who only after being convicted of a third violent or sexual offenc, must show—not whether there should be a dangerous offender application, not whether they're guilty or innocent.... The onus is now on them, after a third violent or sexual offence, and the only onus on them is, to show why they shouldn't be designated a dangerous offender.

I fail to see how this in any way is taking away discretion. I don't think, once the DO process is under way, there's going to be any seismic shift in the role of defence counsel and of prosecutors.

● (1725)

Mr. Lorne Goldstein: The honourable member says he trusts the crown discretion and goes on to talk about applications falling through the cracks. I fail to see where Bill C-27 advances us in that regard. He further states that applications would look the same. If the applications are going to look the same and be the same, then why table this aspect of Bill C-27 at all?

If they're going to be the same, let's exist with the system that is presently working. If the honourable member is worried about applications falling through the cracks, he can speak to the crown attorneys about creating a policy. But he need not table legislation in Canada's Parliament to make sure they're doing their job.

The Chair: Thank you, Mr. Goldstein.

Mr. Rob Moore: Mr. Chair, I would like to make a clarification.

The Chair: You may have a clarification.

Mr. Rob Moore: It wasn't my comment that I trust—although I do—the discretion of the crown prosecutors. That was a comment that you, Mr. Goldstein, made; that you, as it is currently, trust the discretion of crown prosecutors when they proceed on these.

I also did not say the application process would be the same, but that the process as to whether someone is or is not going to be designated, at the end of the day, a dangerous offender would be very similar: there are two sides making arguments, and ultimately, a judge will decide whether that individual is a dangerous offender.

In that regard, the only change is the shift in onus on the offender. We feel, and I think most Canadians feel, when you're dealing with someone with a third violent or sexual offence, that this onus shift is abundantly appropriate.

The Chair: Thank you.

Mr. Moore, you can discuss that with Mr. Goldstein.

We'll finish with Monsieur Bélanger, *s'il vous plaît.*

[*Translation*]

Hon. Mauril Bélanger (Ottawa—Vanier, Lib.): Thank you, Mr. Chairman, and thank you Mr. Lee and Mr. Goldstein for your written material. I imagine you will make sure to send us the publications so we can see the final product.

Mr. Goldstein, I'm going to ask you a question in the same vein as Mr. Ménard. Mr. Hoover in his testimony suggested, in answering a question, that one of the reasons why the government was tabling a bill on reverse onus is that since the Supreme Court decision in that regard, people who have been found guilty, could withdraw into total silence and refuse to answer questions. You made a statement which would completely refute those grounds, the basis of which led to this bill. I would like you to expand on your answer, I am intrigued.

And if you could forward to the committee documents on this issue of convicted individuals refusing to speak, perhaps you could tell us whether it is of no significance or whether it has an effect on the decisions made by the courts, I would appreciate it.

I was asking the minister questions regarding the resources which will be needed if this bill were to be passed because at the moment, when the time comes to convict an individual, designate him a dangerous offender and incarcerate him for an indeterminate time, the government has the necessary resources to do so and it has the onus of proof. However, if the onus is handed over to the individual, we may end up in the same situation as described earlier on. If a young aboriginal woman, for reasons beyond her control, ended up in this type of situation she would be incarcerated indefinitely. That is what I would like you to explain.

There is one thing that we have not yet addressed and which is in the notes.

As an aside, I should commend our researchers for the excellent document I received and which provides a very good overview of the matter.

Is there a concern about the effect this bill may have on aboriginal people? We know that there is a disproportionate number of aboriginal people that are incarcerated in our jails. What effect would this bill have on aboriginal people, if it were passed?

[*English*]

Mr. Lorne Goldstein: As a practitioner, not a researcher, I can't speak across the board or for different communities. I can only tell you what I've read in the case law and with regard to the practice I have.

I can indicate from case law—and I'm certainly referring now to R. v. Neve as one of the cases that jumps to mind—that when we're looking at aboriginal offenders and other things and young women caught up in the system, Bill C-27 and the reversal of the onus would have a wholly detrimental effect on anyone who was in any way classically marginalized at the beginning of the process. Aboriginals, people of any kind of ethnicity, people who are not the linguistic majority in their communities, and anyone who's marginalized at the beginning is going to find themselves hopelessly lost when the onus is placed on them and they are acting and not reacting, with the balance of their lives as the stakes in the game.

I'm happy to send you any material I can find in respect to that first part.

● (1730)

The Chair: Go ahead, Mr. Lee.

Prof. Ian Lee: Thank you. I'll respond to that.

You are right, Monsieur Bélanger. The incarceration rate right now for aboriginals in Canada is approximately 17% of our prison population, and they are only 2.5% of the Canadian population.

This is something that has been looked at very seriously in the research, and I would not want anyone to skate too quickly by this, because most violent acts by aboriginals are against aboriginals. It's aboriginal-on-aboriginal violence, and it would be, I think, most inappropriate to say that it's less important and let's not prosecute it. That's the risk.

I'm not suggesting that you were saying that. I'm saying that the risk when we go down that road is that we then start to ignore violence in certain minority communities because it's often minority-on-minority violence.

Hon. Mauril Bélanger: My question was about, in the thinking behind the bill—and I know you can't answer that, because it has to be from the government—what considerations were given to the effect of the bill, if it ever becomes law, on such communities. I think that's something the committee will have to obtain from the government.

The Chair: Thank you very much.

Thank you very much, Mr. Lee and Mr. Goldstein, for your appearance. It was very much appreciated.

Now we'll go and vote.

The meeting is adjourned.

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