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Chair

Mr. Bernard Patry

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● (0905)

[*English*]

The Chair (Mr. Bernard Patry (Pierrefonds—Dollard, Lib.)): *Bonjour, tout le monde*. Good morning, everyone. Welcome to the meeting of the legislative committee on Bill C-35, pursuant to the order of reference of Tuesday, March 27, 2007, Bill C-35, An Act to amend the Criminal Code (reverse onus in bail hearings for firearm-related offences).

As a witness this morning, from the Criminal Lawyers' Association,

[*Translation*]

we are pleased to welcome this morning

[*English*]

Mr. Michael Lomer, the treasurer.

Welcome, Mr. Lomer. The floor is yours for your remarks, please.

Mr. Michael Lomer (Treasurer, Criminal Lawyers' Association): Thank you very much, Mr. Chairman. I want to thank the committee for inviting the Criminal Lawyers' Association to be present at the hearing on this piece of legislation.

It's a relatively narrowly focused piece of legislation. We have been familiar with reverse onus provisions in our Criminal Code for some years and have learned to live and work with them and understand their rationales. The Supreme Court of Canada, I think, has probably spoken on them about three different times. They've been constitutionally approved.

In the past, our problem, as an association representing individuals charged with offences, was not the reverse onus or anything of that nature, until the tertiary ground came along, and it was so broadly brushed that it was essentially "maintain confidence in the administration of justice". And this was something we just couldn't get a handle on in terms of exactly what was being got at by the legislation. Was it confidence that we lock up all criminals? Was it confidence that everybody is entitled to bail unless it was reasonably withheld?

Then there was a challenge to that, and the end result was that Parliament then enacted specific examples of what was meant by that. I note that this legislation, the legislation that is being proposed here, does that as well, but in the context of firearms and the firearms being used to commit other criminal offences.

I have to say that this legislation will undoubtedly face constitutional challenges. I think, quite frankly, it will pass them, and it will pass them because the specificity with which it is drawn will direct any court deciding the constitutionality of the legislation to what it was that Parliament was getting at and why.

So I think the end result for the Criminal Lawyers' Association—you have to understand, I only was able to consult with our committee at this point, because it came up so quickly—is that we don't have any particularly strong quarrel with this legislation. If you invited us here today thinking we would be the ones to tell you it was problematic and wrong-headed, or it was way too broad, or any of those things, I'm afraid it's not. It's actually fairly specific.

What one has to understand with respect to bail in general is that it is fact driven, and that's regardless of whether there is a reverse onus or not.

Let me give you an example. If a young kid is charged with trafficking in marijuana by selling $30 or $20 worth of marijuana to a friend, whether there's a reverse onus or not, he will get bail. If he's charged with 10 kilos of heroin, the reverse onus is there, but even if it weren't, it would in all likelihood trigger a detention order because of the nature of the offence, the nature of the drug, the quantities of the drug, and that sort of thing.

So what I'm trying to say is that reverse onus does nothing more to courts than point them in the direction that Parliament is saying they want them to look. I also have to tell you that I think, quite frankly, at least in the courts in Toronto, they're already looking extremely carefully at any cases that come up where firearms are involved. While there is no legislated reverse onus, there is what could be called a de facto reverse onus when guns are involved.

Mr. Chair, those are my opening comments with respect to your legislation. I welcome any comments or questions.

The Chair: Thank you very much.

Now we'll go for seven minutes, starting with Mrs. Jennings, please.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): I'm pleased to hear that the Criminal Lawyers' Association has no fundamental objections to Bill C-35. As you may know, the Liberals support Bill C-35 and offered several times to have it fast-tracked by the government. The government decided not to take us up on it, but it was finally debated at second reading and is before committee now.

You talked about the fact that Bill C-35 meets the test of specificity. Can you expand a little more on that in relation to the decisions that have been made by the Supreme Court of Canada on reverse onus cases?

Mr. Michael Lomer: I tried to give the example of when the original paragraph 515(10)(c) came down. It had just the "maintain confidence in the administration of justice". The difficulty was that confidence in that administration depended on, quite frankly, the point of view of the person looking at it—judge, police officer, crown attorney, defence lawyer, or defendant. There was that difficulty in trying to get a focus on it.

It was subsequently amended to actually give focus to it, and that passed constitutional muster. It's for the same reason I say that when you look at paragraph 515(10)(c) and its amendments, you'll see that they're all focused. That focus will give specificity and will point out to the courts why Parliament feels a reverse onus is appropriate in those circumstances. They will also say that, looking at our recent history, it's probably justifiable.

Hon. Marlene Jennings: Thank you.

If there's any time left, I'll share it with Mr. Lee.

The Chair: Okay. We'll get a second round.

Mr. Murphy is next.

Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.): Thank you for coming, and thank you for your comments.

We had a presentation from the Canadian Centre for Justice Statistics at the last meeting, and I would like your comment on the role of statistics generally. We tend to rely on them quite a bit because they're empirical, but what we found in the presentation—nobody's fault—was that the Canadian Centre for Justice Statistics did not keep track of the number of times bail was granted.

I think we're all in favour of this legislation in principle, yet as legislators—not necessarily as lawyers from your point of view, but as legislators—perhaps we would like to have the support of statistics that show the number of bail applications that were granted and the number of bail conditions that were broken, leading to incarceration, etc. There's a piecemeal way of doing it in the last slide that we were given, by extrapolation, but it's a bit inexact and can lead any side of the argument on people being at large when they shouldn't be.

What I'd like to know from you is how your organization relies on statistics. Would you see a need for improvement in the gathering of statistics to help you in arriving at your positions?

● (0910)

Mr. Michael Lomer: There's that old truism by Mark Twain about statistics, but I won't bore you with it.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): It's already on record.

Mr. Michael Lomer: It probably is. There's always a kernel of truth in anything that man said.

As a practical matter, when you are dealing as a defence lawyer in what I call the micro as opposed to the macro view of legislation—in other words, when I'm acting at a bail hearing for an individual—I'm looking at what is the law, how does it affect that individual, and what is the outcome? Rarely, and really only in forums such as this and in other legislative initiatives, do members of the Criminal Lawyers' Association sitting on the committee get a chance to debate what I call the macro.

So as a general rule, we don't use statistics in our arguments in court, because a judge will say, "What do I care if 1,000 people were released? I'm looking at this individual; this is his background, these are my concerns, and statistics won't help you with that."

With respect to gathering statistics, that's a much larger question, because there's a clear cost-benefit analysis that has to go on for anybody collecting that sort of statistic. There were various local initiatives in statistics gathering in Toronto. We didn't find them terribly helpful, because you really have to look at the gatherer.

Statistics—and I think this is the reason Mark Twain was so circumspect—really depend on who's asking the question and gathering the information. They can be skewed, even subconsciously, by the types of questions you ask and the information you're looking for.

So this is the long way around to say that statistics are not necessarily helpful, leaving aside such things as the homicide rate, which tells us that this country is not, contrary to the headlines above the fold across Canada from time to time, going to hell in a handbasket. We don't have crime rampant in the streets. We have some problems here and there, and we've probably had them since I was a child—I would probably remember headlines—but I don't think the headlines drive the issue. That's why I think perhaps that one statistic is of some value in terms of keeping us centred.

I hope that answers the question.

The Chair: We'll go to Monsieur Ménard, *s'il vous plaît.*

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Good morning, and thank you for coming to join us today.

You know that we are debating Bill C-35 in a climate where crimes committed with firearms as well as the crime rate in general are going down. Of course, I am skipping over the reality of the street gangs in some large urban centres, above all Toronto and Vancouver, and we should not be afraid to say Montreal too. I do not want to be complacent, and I would be rightly criticized if I were.

But I am a little taken aback by your evidence. We were looking at two factors. First, reverse onus, that already exists at the judicial release or release on bail stages, does not seem to be based on a specific number of cases. It would add to the list of offences where reverse onus would apply, that is, cases where the accused and not the Crown would bear the burden of proof.

In your testimony, you said one thing that shocked me a little, and I would like you to give me some more details about it. You seem to be saying that when a case involving firearms comes before a judge, or a justice of the peace in Quebec, a kind of reverse onus already exists. The practice seems to have been alive and well before legislators made the decision to write it into law. Could you explain that? I assume that you are basing your remarks on those of the lawyers who are members of your association.

● (0915)

[*English*]

Mr. Michael Lomer: I think what we're getting at here is the practical versus the theoretical, or perhaps more accurately, it's the practical versus the importance that legislators have in directing to the courts that which they perceive to be important. It's for that reason...even though I understand that the statistics tend to indicate there has been a lowered incidence of firearms, you can't tell that to the people living in Toronto. We had the year of the gun; everybody's heard about it. It was rather shocking.

But there is still a role, not driven by statistics, but driven by the public perception and the need to know that the situation has been taken in hand with legislation. I'm not talking about being tough on crime, because there are a lot of issues with that type of phraseology. What I'm talking about here is a much more specific nuanced approach that tells the courts and the public that firearms and offences committed with firearms are particularly problematic and that we have to deal with them. I think it's for that reason that even though you can make statistical arguments, and as a practical matter the courts have already dealt with it and reversed the onus, if you will, in a de facto way, legislatively there is nonetheless some value in pointing out that this is a concern.

[*Translation*]

Mr. Réal Ménard: Of course, this committee is not doubting your word. Like all those who have appeared before the committee, your association has always provided clear and considered views. When we draw up the list of witnesses, your name is accepted by both the government and the opposition side and your authority is clear. We do not even have to make a case for you to appear, because of the extent to which your authority is almost universally recognized.

You are saying that the courts already apply reverse onus in firearms-related offences. Do you have any statistics on that, or are you reporting what the members of your association tell you? This is an important statement for the direction of our work. So I would like to know how you support it.

[*English*]

Mr. Michael Lomer: I'm thinking now particularly of a court in Scarborough that has, perhaps oddly enough, one of the highest incidences of gun crimes and has the justices of the peace dealing with them.

You will see that the inevitable position of the Crown is that whether or not there are other outstanding charges, if there's a gun involved, whether it's a Crown onus or not, they will be asking for a detention order. They will require persuasion. That mindset is probably reflected in the way justices of the peace look at it when they see gun cases come up. The net result, in my experience and certainly that of my colleagues, is that if there are releases on bail, they are on much more rigorous terms. They are much less likely to get released. They will require not merely a surety but a whole program in place to ensure there will not be another offence, especially involving guns.

Monsieur Ménard, I hope that has answered your question. It's difficult to try to get statistics out of the day-to-day workings of court. We operate completely anecdotally as a reality. You hear stories; you know from those stories...and I don't mean they're fabrications.

● (0920)

The Chair: Thank you.

We'll go to Mr. Comartin, please.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chairman.

Thank you, Mr. Lomer, for being here.

In terms of the practical approach that's been taken by our judiciary in the Toronto area, is it your belief that this is true of the judiciary across the country?

Mr. Michael Lomer: I would suspect, although I certainly can't know, that it is undoubtedly going to be the judiciary's experience that tempers the way they look at something. In other words, if you don't get gun charges in, say, rural Alberta, except for somebody who has failed to get a licence—

Mr. Joe Comartin: They don't charge them there anyway.

Mr. Michael Lomer: I don't know what they do, but I'm absolutely sure that it will be dealt with differently than drive-bys in the city, or something of that nature.

As I said, bail is a particularly fact-driven case. Quite frankly, the best parliamentarians can do in their job as legislators is point to where they have concerns, and certainly reverse onus does that.

Mr. Joe Comartin: My party supports this legislation as well, but let me play devil's advocate for a moment.

Do we pose a risk of constraining the judiciary too much by imposing this, in particular imposing this around gun crimes? Then the problem with gun crimes eases over the next while, as it did dramatically in Toronto in less than 12 months, but now we've handcuffed the judiciary with the reverse onus, specifically on gun crimes.

Mr. Michael Lomer: Reverse onus has never meant that people who should otherwise get out won't get out. I have to say that at the outset. If somebody is a worthy candidate for bail, all things being equal, the onus does not particularly influence the outcome. So I don't think that as a general rule I would be too concerned about it.

Where I might encourage the legislators to look is at the reverse onuses that presently exist, for example, trafficking in a narcotic. That was a reverse onus from the time we had the Narcotic Control Act, well before the present legislation, which has many different levels of trafficking, depending on the drug. I question whether, as a practical matter, it makes sense to have a reverse onus in trafficking in marijuana but no reverse onus up until now in robbery with a firearm. You know, it's one of those disconnects that existed.

So there is some value in going back to the legislation as it presently exists and asking if there is still justification for it.

Mr. Joe Comartin: This legislation was being driven by the headlines. It's difficult to comment on a specific case, but we just had one in Montreal with a police officer being killed and the individual accused of that crime being released on bail.

Are there in fact cases that are going to be affected by this legislation above and beyond what the practice has become?

● (0925)

Mr. Michael Lomer: I know very little about the facts of the Montreal case, but what I do know indicates that there certainly is a viable defence. Whether it's a winnable defence, I have no clue. But it struck me at the outset that there was a certain viability that probably stems from the no-knock warrants, which we are so fond of using. I won't get into that.

In answer to your question, I don't think the onus alone is going to affect the outcome.

Mr. Joe Comartin: Mr. Lomer, let me interrupt you, because my time is just about up. Is this legislation actually useless?

Mr. Michael Lomer: No, I don't think so at all.

Mr. Joe Comartin: Is it going to change any practice? In courtrooms across the country, is it going to change anything?

Mr. Michael Lomer: No, it's going to justify a practice that to a large extent is probably already there.

Mr. Joe Comartin: Thank you, Mr. Chair.

The Chair: Thank you, Mr. Comartin.

Go ahead, Mr. Dykstra, please.

Mr. Rick Dykstra (St. Catharines, CPC): Thank you, Mr. Chair. I just have a couple of questions.

You mentioned that the whole issue of gun crime was particularly problematic and not necessarily based on statistics, and also that from your perspective there's some value in pointing out that there is a concern. Could you expand on that a bit?

Mr. Michael Lomer: As everybody here is aware, Toronto went through, in the words of the Queen, an *annus horribilis*. It was just a terrible year for gun crimes, culminating in Jane Creba's murder. It was shocking to the population in general, and I think it was particularly shocking because it was a complete and utter waste of lives—not only of the deceased, but also of the young men who are involved in these types of crimes.

I'm going to try to be as blunt as I can. The difficulty I see with legislation like this is that although it points in the general direction of what society's concerns are, it's a relatively cheap fix to a problem that really should be addressed elsewhere, and I'm not talking about the soft social services type of thing.

I can draw you a profile of the children who become the young adults who are doing this. It would be focused enough that you could actually aim particular programs, identify individuals, and deal in a much more focused way. There's a culture that you have to get out and dig out. It's unfortunate, when we see it, that the answer is more inclined towards legislating more penalties rather than seeing if there is something we can do to get at the culture that creates it. I know there are people in certain communities in Toronto who have identified it and actually are starting to speak out about it.

Mr. Rick Dykstra: We debated in the House yesterday on another bill, and one of the pushbacks we received on the legislation was that there weren't statistics necessarily to support the legislation. Obviously I'm drawn with great interest to your points about moving legislation forward that obviously has more than just statistics involved in terms of making it sometimes not great legislation and other times very good legislation.

I don't mean to put this out of your bounds or ask a difficult question, but at the same time, I think it may be helpful. When we are working towards this type of legislation, aside from whatever role statistics may play—and from your perspective, it isn't necessarily a major one—what other issues do you think we should put on the table when we talk about creating this type of legislation, in terms of making sure it's the right material to move forward?

● (0930)

Mr. Michael Lomer: It's not an easy question to answer.

I suppose my previous answer indicates one of the areas I would go to. If you're talking about really getting after crime and dealing with the fallout of it, you're asking me to put myself out of business, but there is one area I would go to. We've seen it in Toronto. It's starting, and it's not necessarily that effective yet. It's treating drug crime and drug addiction with a medical model as opposed to a policing model. I've even heard whispers that the Canadian Association of Chiefs of Police is thinking that maybe that's not the worst way to go. It's quite a bit different from the model used in the United States, which is harshly punitive.

If you're looking at going after crime, then go after its roots and deal with heroin addiction on a medical model. Maybe you can move forward so that the addict is not perpetrating crime in order to deal with his habit. As I said, it's not in my self-interest to be advocating that sort of thing, but it's something that I think is worthy of consideration across the country. And this is not something new at all.

The Chair: Thank you.

Mr. Lee, please.

Mr. Derek Lee: Thank you. I have four questions, but three are quite related.

In this particular piece of legislation, we're moving the bar on bail. Bail is an explicit charter right. I would have thought that if you're moving the bar on an explicit charter right, we might have used a preamble to set the context to make sure there was no confusion, just in case the issue came up later. You've indicated that you don't see too much litigation spinning out of this, but I'd like you to comment on the usefulness, plus or minus, of a preamble.

Second, in the context of sentencing mathematics, I'd like you to explain how the bench in Toronto, if not across the country, applies pretrial custody when they're dealing with sentencing. We've heard it's two for one, three for one. Could you also explain whether or not the existence of pretrial custody impacts the propensity of an accused to plead guilty? Is there likely to be any impact on the possible increase in pretrial custodies here?

Last, also connected to that, does the existence of a mandatory minimum penalty, as is being legislated in other legislation here, preclude the application of pretrial custody credits? In other words, if you spend a year waiting for your trial and then you're facing a five-year minimum sentence, what's the impact of pretrial custody on that sentence? If there is or is not an impact, does it create the possibility of a challenge in court because we've altered the existing arrangements for the application of pretrial custody credits?

Mr. Michael Lomer: All right. I think I have them all.

The charter preamble is often helpful. In this case, I think the writing's on the wall and it's probably unnecessary. There's a clear rationale between the legislation and historical events. I don't think the courts need a road map in that regard.

Regarding the sentencing math with respect to pretrial custody, ordinarily as a rule of thumb, but not law, you get two for one because you're not eligible for parole or any programs. Often the conditions are much harsher. It has moved to three for one, because the Ontario government has neglected its jails for so long that it has triple-bunked. It has provided virtually nothing in the way of any type of recreation, so they're locked up, three to a cell. You have the choice of your feet to the toilet or your head to the toilet. So the courts are already saying, aren't you going to do that? They're going to start giving credit for that type of pretrial, “pre-finding you've been guilty” penalty.

Does it lead to a propensity to plead guilty? I think, inevitably. Before the Bail Reform Act, there were studies indicating just that. There was a statistical relationship between the likelihood of pleading guilty and pretrial incarceration. It was very significant, but I don't have the studies.

With respect to the mandatory minimums, they've already been challenged on the basis that they don't take pretrial into account . In our court of appeal, Justice Rosenberg rendered a decision saying that the constitutionality of mandatory minimums will be upheld, but only because he could read in a provision taking into account pretrial custody; otherwise they would not have. In that case, it still stands as good law.

I think those are your questions.

● (0935)

Mr. Derek Lee: Perhaps I could clarify that even with a mandatory minimum penalty, the courts can give credit for pretrial custody.

Mr. Michael Lomer: Yes, they can.

Mr. Derek Lee: So if an accused was facing a three-year minimum and a year of pretrial custody, I wonder if he would be more likely to say, what the hell, I'll just stay here. I'm not going to challenge the reverse onus. I'll stay at pretrial, I'll get three years credit, and I'll be convicted if I'm unlucky, and I'm out.

Mr. Michael Lomer: First, our courts don't give three for one as a general rule. This requires a fairly significant evidentiary basis. You don't see it on every occasion.

For example, Milton had a serious problem with lockdowns, a lot of lockdowns. That was the genesis of the three for one.

A voice: Two for ones.

Mr. Derek Lee: Two for ones. Two for ones still get you out at two-thirds. It gets you out of mandatory release—

Mr. Michael Lomer: That's correct.

Mr. Derek Lee: —in my scenario, but that logic is a bit too complex for your average rounder.

Mr. Michael Lomer: I don't see that as the logic they would necessarily use. The logic they use would be more along the lines that it's going to take a year to go to trial, and regrettably, it often does take that long. What they're going to say is, well, if I plead guilty after serving three or four months, I get that knocked off the sentence; then I'm going to go either to the penitentiary, depending on the sentence, or the upper reformatory. I want to get out of the Don—you want to get out of whichever jail you're in—because there's nothing there for me.

There are a number of benefits to being moved into either federal or provincial institutions, not the least of which is family contact.

The Chair: Thank you.

Mr. Bagnell, for a very short question.

Hon. Larry Bagnell (Yukon, Lib.): Does it happen often that people try not to get bail, so they get two for one or three for one?

Mr. Michael Lomer: I have heard of it. I just don't think that makes any rational sense. Usually when you see three for one coming up, it is purely serendipitous, if I can put it that way. For example, things happen in the jail that cause immeasurable difficulties when a person is awaiting trial that were unknown at the time the trial date was set.

As a practical matter, I really don't see, if I'm looking at a three-year minimum or four years on a gun charge, that I'm going to stay in for two years. Quite frankly, if you go to a federal institution as a young first offender on a four-year sentence, you will be moved into a halfway house in all likelihood by the end of the first third of your sentence. You will have much less restriction than in the Don.

● (0940)

[*Translation*]

The Chair: Mr. Petit.

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you, Mr. Chair.

Thank you for being with us today, Mr. Lomer.

You spoke of a very specific phenomenon. At the bail hearing, the preliminary stage that is, facts matter and the right to bail does not necessarily matter. So you have to argue on the facts of the case. Earlier, you mentioned cities, Toronto, for example, where serious events have recently taken place. Mr. Comartin told us about a police officer who was shot to death when he was visiting a house.

When the evening papers report on something like that, a lawyer knows that bail is going to be difficult to get the next morning, even without dealing with reverse onus. You have enough experience to know that if the biggest paper in Toronto runs articles for two or three days on a particular murder, the judge is going to be very reluctant to grant bail when the lawyer appears with his client, even if he is a good client. Have I understood what you were saying?

[*English*]

Mr. Michael Lomer: That's it exactly. In fact, there's also a bit of a kickback, if you will, in a judicial sense. By this, I mean that after we had some really shocking gun cases in Toronto, for a short period of time there almost became judge-made law reversing the onus on gun cases, just by virtue of the holding that a judge made regarding a particular bail. Then the crowns would use that holding and say, yes, the law is changing, even though the law hadn't changed. It was like a common law development.

The kickback was other jurists saying, no, the law has not changed; it is exactly as it was before. So this creates a debate, and we have a judicial debate. I'm sure your researchers could dig out the cases reflecting that very debate.

[*Translation*]

Mr. Daniel Petit: I now move to my second question. We are talking about reverse onus in bail cases. The Criminal Code calls for reverse onus in cases of possession of stolen goods. The lawyer has to show... We have cases where lawmakers, without any statistics whatsoever, have reversed the onus. We lawyers have to do it. We are talking about bail. It is different, we understand that.

But I would like to ask you a question that was raised by Mr. Bagnell and Mr. Lee. It has to do with the time spent in detention while bail is being considered counting double, and whether the judge takes that into account when the person in custody hears his sentence at the end of the process.

In Quebec, we have this peculiar phenomenon, and you have the same thing too. Some of our clients are asking to be sentenced to more than two years plus a day, because they know that they will serve a sixth of the sentence rather than two thirds. We have clients who want to be sent to a federal prison rather than a provincial one. Do you have the same phenomenon, and does it have an effect on bail applications?

[*English*]

Mr. Michael Lomer: We've devolved into the mathematics of what people want for sentencing when they know they're going to be convicted.

I've had clients who had previously been in reformatory say, “Please get me a penitentiary sentence”, which is one day more, or “Please, I want to go a certain area.” These are what I would describe as generally ineffectual manipulations of the system. I say “ineffectual” because they're still going to be serving a sentence. Yes, the federal system has fast-tracks for first offenders in non-violent crimes. Yes, it's sometimes harder to get provincial than federal parole. That's not always the case, though, as I keep cautioning my clients. They may be thinking that this is what they're hearing, but it's not necessarily what is in fact going on.

For example, just as a general observation, federal parole has tightened up significantly in the past 10 years or so. They'll talk—they think they're jailhouse lawyers—but they may not be correct.

● (0945)

[*Translation*]

The Chair: Thank you.

Go ahead, Mrs. Freeman.

Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ): Thank you for being here to give us your point of view, Mr. Lomer. I would like clarification on two points you raised in your remarks.

You said that you were in agreement with the bill, and its 12 new offences for which reverse onus would apply. You also said that other existing cases of reverse onus should be looked at again, for example section 469 of the Criminal Code dealing with organized crime and terrorism-related offences. Can you give us more details?

[*English*]

Mr. Michael Lomer: Regarding the example I was using, don't make trafficking in all narcotics a reverse onus, which is the way the law is now, as I understand it. But instead, look at the reversal in the context of the changes that have been made to the new narcotic control act. They have clearly identified a hierarchy of trafficking offences.

For example, trafficking in less than 30 grams of marijuana can be an absolute jurisdiction, a magistrate offence. You don't get a preliminary; you don't get anything of that nature. The question is whether that needs to be a reverse onus offence. It is presently. That's what I meant by looking at other pieces of legislation: are there presently reverse onuses?

[*Translation*]

Mrs. Carole Freeman: On the other hand, you talked about the fight against crime. At the moment, bills that fight crime often involve stiffer penalties. You talked about another way. To fight crime, you talked about designing programs to get right to the heart of the problem of crime. You said that harsher penalties are perhaps not the only way to fight crime. Fighting crime is the object of the exercise. Can you describe for us some other ways of attacking crime?

[*English*]

Mr. Michael Lomer: What I was getting at is that I have rarely had a client who has said to me, "If I knew that was the penalty, I never would have done the offence." They have little idea of what's in store for them. In fact, it was worse with the Young Offenders Act, where parts of the justice system were actively misinforming the public as to what the potential penalties were. All the little young offenders thought the Young Offenders Act was a walk in the park, only to find out somewhat differently.

It's incumbent upon the parties to the justice system to not—at least not without good just cause—denigrate the laws that we have. That's probably a good starting point.

I talked about using a medical model for drug trafficking cases. I talked about targeted programs, where you can identify the types of individuals who are at serious risk to commit particular crimes such as gun crimes. I see those as essentially inner-city, disaffected, low-functioning people. I can outline it, but I don't need to go into it. I'm sure you understand.

[*Translation*]

Mrs. Carole Freeman: I am talking about prevention. Harsher penalties are not necessarily the only way to proceed. Putting people in prison is enormously expensive. The money could be used for prevention.

Do you have any proposals along those lines?

A little earlier, you said that you could define the profile of those capable of committing certain crimes.

● (0950)

[*English*]

Mr. Michael Lomer: I am not a social scientist who could design these programs. What I can say with some certainty.... Let me back up. As you mentioned, one of the difficulties is the financing. Jails are incredibly expensive, but—

[*Translation*]

Mrs. Carole Freeman: I am going to come back to what you said in your remarks.

You clearly said that passing bills that call for harsher penalties would not necessarily mean dealing with the problem, and that other courses of action need to be designed because imposing stiffer penalties was not necessarily the appropriate way to combat crime. That's what you said.

I would like to hear more of your comments.

[*English*]

Mr. Michael Lomer: After doing this for 25 years, one of the things I have observed is that we have incredible numbers of things that we are going to make the individual who has been convicted of a crime do or not do. There are huge numbers of orders, whether it's to stay out of parks, depending on the type of offence, or it's this or that. In my view, the focus has always been after the fact. This is a little off topic of this legislation, but I was trying to direct the legislators to look at before-the-fact things that happen in our communities. I don't know if I can be any clearer than that.

It's easier for legislation to pile on things after the fact than it is for us to create something that takes place beforehand. The fact of the matter is that you never see its successes. Its successes are in the absence of headlines.

The Chair: *Merci*.

Now we'll go to Mr. Hanger and Mr. Thompson. Mr. Hanger, please.

Mr. Art Hanger (Calgary Northeast, CPC): Thank you, Mr. Chairman.

Thank you, Mr. Lomer, for appearing before us.

This is on more of a process question. An offender is picked up by the police under prior situations, often with the use of a gun in a crime. He goes before a bail magistrate, not necessarily a justice. In this legislation we're talking about his appearing before a justice, are we not?

Mr. Michael Lomer: I can only speak for Ontario, but all bails, generally speaking, are done in front of justices of the peace. Occasionally you will have a judge doing the bail, but usually because that judge is helping out the courts where there's a backlog, as opposed to.... He or she has the right to do it, but as a practical matter, we have had JPs, or justices of the peace, doing it.

I think that answers your question.

Mr. Art Hanger: Not quite.

Mr. Michael Lomer: This legislation will go to JPs as well. It will. That's the way I read it, because it just fits into the old legislation, it doesn't change any of the definitions of the old legislation. In other words, offences that are called 469 offences, like murder and that sort of thing, always go to a superior court judge. You have to bring an application to get there. But the reverse onus doesn't tell you that you have taken your application to a superior court judge; it just reverses the onus to the jurist sitting, and that jurist would still be a justice of the peace.

Mr. Art Hanger: This JP, then, would end up evaluating everything: the strength of the prosecutor's case, as it points out here, the gravity of the offence, the circumstances, including whether a firearm is used or was just in possession of. So that evaluation, then, would be in depth.

● (0955)

Mr. Michael Lomer: It is now. It's based primarily on the synopsis prepared by the police at the time. Often, they're getting better at it. You'll have photocopies of the interview notes, and things of that nature, that show up right at the bail hearing. As a process issue, that gets done on a daily basis, the issue of whether or not the Crown's case is overwhelming, bulletproof, or weak, or whatever.

Mr. Art Hanger: Some jurisdictions are a little different, I guess.

Going back to the purpose behind this legislation, of course, that's to hit gang activity indirectly. It could be drive-by shootings; it could be disputes within the drug world; it could be related, to some degree, to the lower end of the organized criminal chain. Would you see that as the targeting of very many people?

Mr. Michael Lomer: I am not in the SIS or the police special services, which collect that sort of information. But I don't find it at all surprising that we have in 2005, the year of the gun, a targeted area and groups targeted by the police and major projects with a number of arrests that don't involve a lot of people—my estimate would probably be less than 50—and suddenly the headlines are gone. I don't think it really is a lot of people, but I could have a chief of police beside me saying I'm talking through my hat. He has better access to better information than I'll ever have. But that's what I saw. I saw a significant police response to a significant problem, a lot of arrests—and by a lot I mean 50—and now we don't seem to have the same degree, although we still have it.

The Chair: *Merci.*

We will finish with Mr. Thompson.

Mr. Myron Thompson (Wild Rose, CPC): Thank you very much for being here.

There is a question that's been on my mind ever since we had our meeting the other night with the statisticians. It's over one particular slide they had, on which they indicated that of those arrested in relation to Bill C-35, 40% were found guilty and 60% were not.

I looked at that, and the first thing I thought was, holy cow, what's going on here? Is somebody not doing enough investigating, and they're coming up with insufficient evidence to convict on a charge? Or is Canada full of sharp lawyers like you who are able to get some of these guys off on technicalities or loopholes or whatever? If, out of all the arrests, 60% are found innocent and only 40% are found guilty, that draws a picture in my mind. According to a stat like that, we'd better be on the safe side and bail everybody out.

Yet in my riding there was one instance of a sexual assault with a weapon in which the individual was let out on bail, and as a result, two people are dead, and one is seriously injured. What kind of conclusions can you draw out of these situations?

To me, our job is to provide public safety.These statistics just blow my mind. When you have examples of a case or two in which tragedy has resulted because bail was granted, maybe we ought to be on the safe side and let society know that we will not release people, even on bail, until we're absolutely certain that they're not a threat to society.

Do you draw any conclusions from this 60-40 statistic?

● (1000)

Mr. Michael Lomer: First of all, let me say I think I'd like to see how they collected it.

It's estimated—and again, I don't even know where I got this from—that 80% of those charged get convicted of something or plead guilty to something. I think it's somewhere around there. So 20% will go to trial or have it withdrawn or something of that nature. So you're asking me to explain the other 40%.

Where I would see room for a lot of manoeuvring.... What you see a lot of is a gun in a car with four kids or four young adults. When somebody takes the gun, the other three are acquitted, unless they can prove knowledge of the gun in the hands of the others, which they often cannot do.

Mr. Thompson, I can't offer you explanations. It's sort of hard. But with respect to your saying make bail tougher, I have to tell you that you have a charter there that says you can't be denied the right to a reasonable bail without just cause.

Mr. Myron Thompson: And then my question is, isn't that a little bit irresponsible?

Mr. Michael Lomer: I guess you could always try to amend the charter.

The Chair: Thank you.

Mr. Myron Thompson: If it's okay with you, I'll not try that.

[*Translation*]

The Chair: Thank you very much, Mr. Lomer. I thank you for being with us this morning.

[*English*]

We're going to adjourn.

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