House of Commons
CANADA

Legislative Committee on Bill C-35

CC35 • NUMBER 009 • 1st SESSION • 39th PARLIAMENT

EVIDENCE

Wednesday, May 16, 2007

Chair

Mr. Bernard Patry

Legislative Committee on Bill C-35

Wednesday, May 16, 2007

● (1535)

[*Translation*]

The Chair (Mr. Bernard Patry (Pierrefonds—Dollard, Lib.)): Good afternoon, everyone. Welcome to the ninth meeting of the Legislative Committee on Bill C-35. The committee is meeting pursuant to the Order of Reference of Tuesday, March 27, 2007, to study Bill C-35, an Act to amend the Criminal Code (reverse onus in bail hearings for firearm-related offences).

[*English*]

As a witness appearing as an individual this afternoon, we have Madam Isabel Schurman, who is a lawyer at Schurman Longo Grenier.

Welcome, Ms. Schurman.

Ms. Isabel Schurman (Lawyer, Schurman Longo Grenier, As an Individual): Thank you very much.

The Chair: We are waiting for your presentation, please. The floor is yours. Thank you.

Ms. Isabel Schurman: Thank you for the invitation to address you here today.

For those of you who don't know my background, I would presume the reason I've been invited is the 23 years of criminal law practice, the fact that I teach criminal law part-time at McGill University's Faculty of Law, and that I have been heavily involved over the years with the Canadian Bar Association, which represents both prosecutors and defence counsel across the country, as well as being involved with various defence organizations.

I hope that perhaps these representations may be of some help to you.

The problem with the proposed law is not that it's going to change criminal law in Canada irreversibly. The problem is that it will change nothing in the day-to-day reality that we live now.

From the practitioner's perspective, if the law passes, there are compelling reasons to believe there will not be one more person detained tomorrow who would not have been detained today, because the reality is that bail is not being given for serious violent offences.

The reality is that Crowns are not having trouble meeting their burden to show why someone should not be freed on bail. The reality is that bail is a fact-driven process and judges are the best people to evaluate the evidence before them.

The reality is that Canadians don't like firearms. Canadians don't like firearms unless they're hunting rifles on hunting territory in hunting season.

The reality is that judges, prosecutors, and defence lawyers are just ordinary Canadians, like all of you, with elderly parents, with small children, with all the same safety concerns as other Canadians.

The reality is that when a firearm shows up in the evidence, the Crowns don't like it, the judges don't like it, and the defence counsel don't like it. Through my contacts with Canadian Bar Association members and various defence organizations, I verified that what is the case in Montreal is also the case elsewhere in the country. If a firearm shows up at the stage of a bail hearing in the evidence the Crown possesses, the judge will generally look to defence counsel or the defendant and say, “Well, what have you got to say?” It's a kind of de facto reverse onus, because Canadians don't like firearms. And we can't be compared to our American counterparts when it comes to firearms, because for our American counterparts the right to bear those arms is constitutional. We simply don't like them.

So three questions come up when looking at this proposed legislation. If on the street bail is not being given easily for these offences, then why are we changing the code? Will the changes improve the code, or create confusion and lead to arguments of arbitrariness? And will the changes achieve the goal of making Canada safer, a goal with which we are all in agreement?

On the first question, why change the code, you have an excellent brief that's been submitted to you by the Canadian Bar Association in writing on May 9, 2007. That brief explains that perhaps we shouldn't be changing the Canadian Criminal Code unless there is a gap or a deficiency that we wish to remedy. That brief asks you, where is the gap or deficiency that Bill C-35 is intended to address?

The present law gives judges ample room to refuse bail when society is in danger. Even when the Crown does have the burden in the present system, the Crown is having no trouble meeting that burden.

So the second question I ask is, will the changes improve the Criminal Code? Before dealing with that, you have to know and ask, what is a reverse onus anyway? A reverse onus is an exception to a rule. Bail is constitutionally guaranteed. No one should be denied reasonable bail without just cause. Bail is the rule. The Crown must show cause why the person should remain detained.

Reverse onuses used to be restricted to those who had failed to show, who had breached conditions, etc., and also, traditionally, for most serious offences—murder—all listed in section 469 of the Criminal Code. Over the last few years, reverse onus in bail matters was expanded to include drug trafficking and related offences, some terrorism offences, and security information offences.

● (1540)

The key case in Canadian jurisprudence that dealt with whether or not reverse onuses were constitutional when they were expanded to drug trafficking was the case of Pearson. In the case of Pearson, our Supreme Court said this is really going to apply to a small number of offences, this reverse onus, and there are specific characteristics to these offences—drug trafficking—they're systematic, they're sophisticated, they're commercial, they're lucrative, and that incites people to keep going even once they've been arrested and released on bail. Because of these qualifications or characteristics of the crime, the Supreme Court decided that the reverse onus was constitutional because there was a need to discourage repetition and because there was a marked danger the accused would abscond, because importers and traffickers have organizations and means to help them abscond. But the Supreme Court of Canada said the reverse onus is only going to be okay if it's not arbitrary, if it's not purely discretionary—and I'd like you to keep that in mind for a moment, because we might just take a peek at the Criminal Code in a moment.

The Supreme Court also had difficulty with the fact that the reverse onus for drug trafficking took into its net the small fry, the little traffickers. Justice McLachlin, dissenting in Pearson, would have struck it down for that very reason, because it made the exception too large.

So now, to the second question: will this addition improve the Criminal Code? Will it withstand constitutional challenge? More particularly, in terms of Pearson, will it be arbitrary or not? Looking at the text of the proposed law, we see that the law proposes to amend paragraph 515(6)(a) to include offences under section 99, 100, or 103 of the Criminal Code.

If we look at 99, that's an offence of weapons trafficking. Weapons trafficking, as defined in that section, includes much more than firearms. It includes a whole series of weapons that are not firearms. So there would be a reverse onus, for example, for trafficking in brass knuckles, which are a restricted weapon in Canada, but there would be no reverse onus under article 102 for assembling an automatic firearm. There would be no reverse onus for carrying a concealed weapon, for pointing a firearm, for possession of a firearm for a purpose dangerous to public peace. Would the courts say this is arbitrary?

There would be, according to this proposed legislation, a reverse onus for assault causing bodily harm with a firearm, but there would be no reverse onus for a section 268 aggravated assault with a machete. There would be a reverse onus for a section 239 attempted murder with a firearm, but no reverse onus for criminal negligence or manslaughter with a firearm. In addition, section 239, attempted murder, would only imply reverse onus if it was with a firearm, but if there's a reverse onus for a firearm, could not an attempted murder be just as brutal with any one of a number of other weapons that we see on the streets today?

Sexual assault and aggravated sexual assault—these are interesting ones, 272, 273. The reverse onus would be when the weapon used to commit the sexual assault or aggravated sexual assault is a firearm. Sexual assault or aggravated sexual assault with any other weapon would not bring the reverse onus.

Using a weapon to coerce children into prostitution—would the courts say this looks arbitrary? Would it withstand constitutional challenge?

There's a reversal of the onus for kidnapping, but not for forcible confinement. You may say that's okay; there's a reversal of the onus for hostage taking, but not all forcible confinement is hostage taking. Anyone practising in criminal defence law knows the number of domestic violence incidents that imply or include at least one count of forcible confinement.

Robbery—again, is it potentially arbitrary to say there would be a reverse onus but only if the robbery is with a firearm? I come back to my machete example.

Extortion with a firearm...what about extortion with a bomb threat?

● (1545)

In light of all of these sections, what are we doing about breaking and entering a private home in the context of a home invasion with a firearm? That doesn't include a reversal. Would a court be swayed by defence arguments that these are arbitrary? Would we meet the Pearson test? I'm not sure that we would.

There's a very logical connection between subsection 84(1)...that is to say that there should be a reverse onus when the person who is up for the bail hearing has been accused while under a prohibition to possess firearms. That's a very logical connection. It makes a lot of sense. It's not necessary. The judges sitting in bail courts are already saying, “Well, for goodness' sake, you were under a prohibition, why should I give you bail?”

The reality is that bail in violent offences is extremely rare. Even without reverse onus, the courts apply 515(10)(a), (b), and (c) rigorously. They look at risk of flight, they look at guarantees, they look at the strength of the case for the prosecution. The judges do this on a daily basis, based on the evidence before them and because they are concerned with safety in Canada.

Again, if I look at the bill that you have before you, in subclause 1 (5), you have a proposed amendment to 515(10)(c), and I draw your attention to (c)(iii), where you would be asking the courts to look at the circumstances surrounding the commission of the offence, including whether a firearm was used. Well, do you know what's going to happen with that? It's not going to be very long before counsel is going to be pleading, "This offence isn't quite as serious the weapon used wasn't a firearm." This section is going to be turned around.

There is the same potential problem with proposed subparagraph (iv), right after. Taking away the availability of bail because there's a mandatory minimum sentence is dangerous when mandatory minimums apply only to a restricted category of offences that are not necessarily the offences with the highest objective gravity. Bail should be evaluated in light of the objective gravity of the offence and the likelihood of conviction. Without this, the mandatory minimum is meaningless.

Finally, and I terminate on this, will these changes make Canada safer? You had some very interesting and thought-provoking comments by Anthony Doob, who spent a great deal of time on that, and I will not.

I would say, ladies and gentlemen, that there are compelling reasons to believe that it will not result in one more pretrial detention, but more importantly it will not result in one less crime. Will the person about to commit a crime, who reaches for a firearm, say, "Wait a minute, I'd better think about this: if I get arrested, I'm going to have to show cause to get bail, so I'd better not do this"? I'm being facetious, obviously, but this will not produce that kind of effect.

We are concerned about the safety of our society here in Canada, and we need useful changes towards this goal. Studies have indicated for decades that the greatest deterrent is the certainty of apprehension. We should be focusing our creativity, our intellectual and financial resources, on developing solutions there.

What we have here is a piece of legislation that I respectfully submit to you is not necessary and will change nothing. Sooner or later Canadians will say that this wasn't the answer and ask what we should do. We should be identifying the problem that's leading to firearms offences with data, with statistics, and targeting a solution, instead of eating away at constitutional values with incremental changes that risk being judged arbitrary and ineffective.

Thank you.

The Chair: Merci, Madam Schurman. Thank you very much.

We'll go to questions and answers. It will be seven minutes.

We'll start with Mr. Lee, please.

● (1550)

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Thank you very much. Your positioning on this is quite refreshing, and it has raised a couple of issues that I have been trying to mine into myself—earlier.

I want to focus specifically on the constitutional rights of those who are charged with an offence to have access to reasonable bail. That's an explicit charter right under section 11.

In this particular case there are two things I want you to comment on. You've alluded to them already, but I'd like you to comment further, if you can.

First, the government has chosen in this case, notwithstanding their plan to push back or alter an explicit charter right, not to include any kind of preamble to explain why Parliament is doing what it's going to do and to couch it in a way such that if this thing has to be charter-proofed, it could be seen to be reasonably justifiable in a free and open society.

Second, in the absence of that preamble, the bill includes reference to sections of the Criminal Code that arguably, in and of themselves —just seen by themselves in isolation—might not be regarded by the average person as involving dangerousness.

I'll use the example—you've referred to some—of the guy with a couple of bullets in his pocket, but no gun, who's charged under one of these sections included in the bill and who, by virtue of the fact that he has a couple of bullets in his pocket, has the reverse onus applied to his case. He's lost the right to bail; the onus has been reversed.

My gut tells me that just doesn't fit within the charter paradigms I'm used to seeing and reading about. We can't arbitrarily turn the tables on a citizen because they might have a couple of bullets in their pocket. It has to be reasonably justifiable and it has to be thought through.

So in relation to those categories of offences that are not normally in and of themselves seen to be really dangerous stuff, are we on thin ice here, in terms of the charter acceptability of these reforms?

Ms. Isabel Schurman: The concern I would have is if we look at the case of Pearson from the Supreme Court of Canada and at the dissent of Justice McLachlin at the time, whereby she would have struck the section because it was too all-encompassing and went too far.... Reverse onus is an exception, and the Supreme Court was very clear that if we were going to do this sort of incremental whittling away at a charter value, it had to be done on a most exceptional basis.

The criteria that saved the reverse onus in Pearson do not appear to apply here. It's not the highly commercial big money concerns about leaving the country—all of those things that were in the drug trafficking context.

One fear is, yes, bringing in people who normally shouldn't have been caught in such a wide net.

The second—and I think it's a very real concern—is that the reverse onus in Pearson was saved because it was not arbitrary. There will be arguments made—I think it's foreseeable that there will be arguments made in every jurisdiction in this country—that the boy with the bullets is arbitrarily being asked to show why he shouldn't remain detained, while the next person in the prisoner's box is accused of a much more serious crime with a weapon, and that has no burden.

So I think the arbitrariness is a concern there. That was one of the key reasons why Pearson saved the clause.

As far as the preamble goes, I'm afraid I may not be the best person to speak about whether there should be a preamble, why there isn't, whether the preamble really would do anything or not to save... when the specific sections fall afoul of what the court has decided in Pearson and what our courts have decided in other constitutional law decisions.

Mr. Derek Lee: You focus on vulnerability to challenge based on arbitrariness, but I'm asking you to refocus on the issue of the removal of the absolute, unfettered right to reasonable bail that a person has under the charter, to its being altered by this statute because the guy has a couple of bullets left over from a hunting trip.

I may be pushing the narrative here a little bit in terms of factual probability, but it could happen. Would such a person be charged with having ammunition unlawfully? Well, maybe or maybe not, but I'm pushing the hypothetical to point out the problem.

So on that issue, does yanking the absolute right, or the arguably absolute right, without sufficient justification, hit any nails on the head for you as someone on the defence counsel side?

● (1555)

Ms. Isabel Schurman: The reason I focused on the vulnerability was precisely the same line of thinking. That is to say, the constitutional right is part of the law of the land, the constitutional right to reasonable bail, not to be deprived without just cause. It should not be able to be altered, left, right, and centre, by statutes that do not have constitutional status without an amendment to the Constitution. That's where the fear is, I think, that there's an idea that maybe we can do incremental changes, as if they're not important. When those incremental changes encompass what they called in Pearson the small fry or the person, as you say, it is possible that someone who has very little criminal responsibility compared to certain other crimes, where the crime is relatively minor compared to certain others, will be caught in the net of this change. Yes, it is possible. That's precisely what we wish to avoid, and that's precisely where defence counsel would be attacking it as being arbitrary. It would be in a case or cases like that.

The majority in Pearson had said the small fry were caught by this law, but they'd have no trouble showing they deserve bail. But they only said that because the decision was that the provisions in Pearson were not arbitrary because of the very particular context of drug trafficking. They were very careful to state this was not a decision they were going to approve for every type of reverse onus change one could think of.

[*Translation*]

The Chair: Mr. Ménard, you have the floor, please.

Mr. Réal Ménard (Hochelaga, BQ): Thank you, Mr. Chair.

Welcome. This is not the first time that you have appeared before this committee. You always bring perspectives that are very useful for our understanding of the bills that the government sends us for study.

We have been dealing with this bill, but the Canadian Centre for Justice Statistics has not been able to provide us with conclusive evidence on bail requests at bail hearings. As a result, the bill has no scientific basis to it. It is motivated by ideological concerns. That may be fine when you are forming a government, but it seems to me that the role of legislators is to decide on laws based on conclusive evidence. The same thing happened with Bills C-9 and C-10.

Mr. Petit reminds me that it was more the case with Bill C-10, but we did not have much information with Bill C-9 either.

You have stated that, in actual fact, when people are before the courts, it is wrong to believe that bail is granted to those accused of firearm-related offences, more particularly when the offences are serious, such as the nine proposed in the bill. This seems a reasonable view. It is important that it appear in the minutes.

Can you confirm that, in practicality, this bill is useless because it does not achieve any concrete objective?

Ms. Isabel Schurman: I certainly agree with you there. There is indeed a lack of data. As the Canadian Bar Association said in the brief it submitted to your committee, why undertake an initiative that seeks to fill a void when we do not even know which void we are trying to fill? This is why I took the time to consult with colleagues whom I have known for years, and who come from all provinces of Canada. I told myself that perhaps it was only in Montreal that judges asked us what we had to say in cases like that, because our client had a firearm. It is not only in Montreal. I believe that other witnesses, including those from Toronto, told you the same thing.

In reality, a kind of de facto reverse onus already exists when a firearm is involved. The only times that I have seen bail granted when a firearm was involved were when a case showed a clear potential defence.

I will give you an example. A lady hears someone enter her house. Thinking that she is the victim of a break-in, she picks up a gun and fires. Now, the intruder was her ex-husband. He thinks that she tried to kill him; she claims that she was just trying to defend herself. The file shows that the person has a valid defence. In a case like that, bail is possible, and you do see such cases. But they are rare. In all other cases involving firearms, the likelihood of obtaining release on bail is very slim.

● (1600)

Mr. Réal Ménard: So, what you are telling us is that if the government wanted to be logical, reverse onus, the fact that you cannot be granted bail at a pre-trial hearing, should apply to other types of offences. It is not logical to do it for these offences. You seem to be saying that there are cases that are at least as troubling in terms of their severity.

You said that simply pointing a firearm would not trigger the reverse onus provision, just like assaults with a machete, making a semi-automatic weapon, etc. Did I understand you correctly? I would like you to come back to that. There are types of offences, just as troubling as the nine listed in the bill, for which reverse onus should perhaps have logically applied. But this is not the case.

Ms. Isabel Schurman: Right. But, to be logical, the constitutional right needs to be overturned. There would be so many equally serious offences that you would almost have to ask for a kind of amendment to the Charter.

A number of offences that are more serious, or perceived as such by Canadians, are not included in the bill. I suppose the reason is simple: to go further, we would have to go a lot further. This shows how dangerous and potentially useless it is to bring forward eight amendments for eight types of offences. How many types of offences are there in the Criminal Code? You have to act in accordance with the basic philosophy of the Canadian Charter of Rights and Freedoms. This philosophy was established by Canadians: it calls for reasonable bail, and it should not be overturned unless the prosecution can show just cause.

Mr. Réal Ménard: Do you not have the impression that the problem lies in the fact that this government does not have confidence in its judges? If it had confidence in the judges' ability to weigh the facts, to tailor each decision to the individual and to satisfactorily assess the seriousness of each offence and decide on the appropriate course of action...

The root of the problem, that started with Bill C-9, continued in Bill C-10 and is now found again in Bill C-35, is that this government, its Minister of Justice and its Prime Minister, do not have confidence in the judiciary. Does that not make you a little sad?

Ms. Isabel Schurman: If it is the case, it is extremely sad. We have excellent judges in this country, who are also citizens who take very seriously their duty to ensure the safety of all Canadians. If you could see the work done day in and day out by judges in all jurisdictions, you would realize that we have every reason in the world to have confidence in the judiciary. Unfortunately, the committee does not hear evidence from members of the judiciary because their duty of discretion discourages them from appearing before you.

It would be extraordinarily useful for everyone if any committee could gather the opinions of judges who face these situations every day. They have parents and children. They must live in their communities, and they are just as concerned about the safety of Canadians as you or I. They make their decisions based on evidence and on the rules of evidence that we as a nation have approved.

● (1605)

The Chair: Thank you, Ms. Schurman.

Mr. Comartin.

[*English*]

Mr. Joe Comartin (Windsor—Tecumseh, NDP): I wasn't going to ask questions, but I guess my law school background prevents me from staying silent.

I want to challenge you, Madame Schurman, on the argument you're making about the charter liability of this bill. We have I think pretty conclusive evidence from a number of different lawyers and defence groups that this type of reverse onus practice is in fact going on now—and I think you're confirming that—right across the country.

That reverse onus, though, to my knowledge is generally, without many exceptions, being restricted to those crimes that in fact have involved guns. From that I conclude that we have a systemic reverse onus that's been built in by the judiciary in the country.

So if all of those assumptions are correct, why do the judges get to have a systemic reverse onus—and presumably, from your arguments, a breach of the charter—and the legislature is not allowed to do that?

Ms. Isabel Schurman: What I would say would be the following. When we say that there's a de facto reverse onus going on, as Mr. Ménard pointed out, there are no statistics available to know if it's really as common as we think. So somebody like me, with 23 or 24 years, phones everybody I know in the country and says, “Listen, what's happening out there?” That's a far cry from Statistics Canada or any other structured group, but maybe it's time someone looked at it, number one, to see if that is the case. Because I'm not the first person who's said it here before you, nor am I the first attorney who's lived it in a courtroom with an attitude from the judiciary.

Number two, if that is the case, then I think perhaps the government has to look at what needs to be done so that the law reflects what's going on. Because you're quite right that judges should not be reversing the charter, any more than anybody else should be reversing the charter. But we should be looking first at finding out what's happening, why it's happening. Is it really only firearms, or is it machetes? Is it the worse the weapon, the less the chance? Because that just might make perfect common sense with paragraphs 515(10)(a), (b), and (c).

So this may be what's going on. It may not be what we are calling here a de facto reverse onus at all, but it may just be the proper application of 515(10)(a), (b), and (c).

Finally, if there is going to be some kind of change in the law to reflect what's going on, then it has to be done in a way that won't leave us open to years of legal wrangling over whether it's valid or not. I'm not by any means pretentious enough to say that I believe this will or will not pass constitutional muster. I'm only asking the question. I'm only reading the Criminal Code and saying if any of you were sitting on the bench and you had the argument, “Is this as bad as this?”, would it look arbitrary?

I don't know the answer, and I don't pretend to at all. But I do think it's a question that's going to rear its head at some point, and how many years will it be before we actually have a decision saying yes, this is valid or it's not? If the decision is that it's not, then how many people will have had their constitutional rights violated by a law before the courts have gotten around to saying, “Well, wait a minute now, this wasn't right”?

Mr. Joe Comartin: I guess the obvious comeback is that if the courts themselves are doing it, how can you imagine there's going to be a judge anywhere in this country who's going to say, "I know what the practice is that's going on. Why would I agree that this is a breach of a person's charter rights when in fact I've been doing it and my colleagues on the bench have been doing it for years?"

Ms. Isabel Schurman: I don't think the judges would say that they believe it's a breach of the person's charter rights because I believe in their heads they would be saying—if the statistics were being kept—that they were properly applying paragraphs 515(10)(a), (b), and (c). That's where I think they would say it.

Mr. Joe Comartin: The intellectual arrogance that goes with... behind the bench.

Those are all my questions.

● (1610)

The Chair: Thank you, Mr. Comartin.

We'll go to Monsieur Petit, *s'il vous plaît*.

[*Translation*]

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

Good afternoon, Ms. Schurman.

I need clarification. You mentioned that, in almost all cases, when an accused has been arrested by a peace officer, when he has been charged, and when he comes before a court, the judge, after having discussed the matter with defence counsel or at least with the crown prosecutor, will not grant bail if a firearm is involved. Is that what you said? Is that what happens as a general rule?

Ms. Isabel Schurman: As a general rule, it is extremely difficult to obtain bail when a crime has been committed with a firearm, yes.

Mr. Daniel Petit: Not too long ago, a police officer was killed in Laval and another was wounded. I know that the individual was released quite quickly. Could you explain why?

Ms. Isabel Schurman: Yes, I certainly can.

The Chair: It was in Brossard. It was Laval officers who were in Brossard.

Mr. Daniel Petit: Excuse me.

The Chair: I want to be sure that we are talking about the same case.

Ms. Isabel Schurman: It is the same case, I think.

Mr. Daniel Petit: Your firm was not involved, I hope.

Ms. Isabel Schurman: No. I would not have answered if that had been the case.

I have absolutely no connection to that case, but I am glad of that you brought up the question, because it is a case where a reverse onus exists in the Criminal Code. Because someone was killed, it is a murder. So reverse onus already applies. According to what I saw and read in the media—I do not know the file—it seems plain and obvious that the defence is going to claim self-defence.

I have the honour of teaching each year in the criminal law program of the Federation of Law Societies of Canada. Strange as it may seem, this was exactly the example that we used in our workshops last year. We had to decide if someone is guilty of the murder of a police officer if he believes that he is the victim of a home invasion. Life is strange sometimes: a very similar event happened a few months later.

I am happy that you raised that question, because it is a case where a reverse onus applies. The person was released on bail, because it was shown that he deserved to be released under paragraphs 515(10)(a), (b) and (c) of the Criminal Code. But this is extremely rare. Reverse onus does not mean that the person will not be granted bail. It just means that the accused must show why he should be released.

Mr. Daniel Petit: So, if I understand correctly, without referring to this case specifically, no one will be deprived of their freedom if reverse onus is correctly applied. For example, in this case, the individual got out immediately because he claimed self-defence. He was not forcibly confined.

Ms. Isabel Schurman: As I understand it, he provided a good deal of evidence. But the answer to your question is found in Madam Justice McLachlan's comments in the Pearson decision. She set aside the reverse onus for drug trafficking because she feared an unjust result if it was too widely applied. That is not what we want to do in constitutional law.

Mr. Daniel Petit: Agreed. Thank you.

I have no further questions.

[*English*]

The Chair: Mr. Thompson.

Mr. Myron Thompson (Wild Rose, CPC): Thank you.

I appreciate hearing from you this morning. I have to say right off the bat that I'm not a lawyer, and I'm sorry that I get lost in a lot of the lingo that goes on between you lawyers. You and Mr. Lee lost me totally.

It's hard to keep up with that. I don't quite understand where you get the idea that in reality it would change nothing. There are communities in this country that are actively seeking this kind of legislation because of the high rate of gun crime in their neighbourhoods. So the reality is they say we have to do something. You're saying in reality it will do nothing.

You're also saying the reality is that Canadians don't like guns. I live in a basically rural Alberta riding, and I would say that kind of statement would bring on a loud boo as a response. People there are quite active in their ranching, farming, hunting, and everything else they do. We have world contests like the fast gun draw. You wear a sidearm and try to be the fastest to draw. Last September I was there when a 14-year-old girl from California was the fastest gun in the west, and the crowds were cheering. So the reality is that what you said is not necessarily true. You make it sound very wide-sweeping and it isn't.

Another reality is that I've talked to a lot of police officers on the front lines. We don't have the stats, but they will say they are well aware of many individuals who were released on bail after being jailed for gun crimes, including my friend on my right here who is an ex-policeman. He will vouch that that's been going on and is still happening. The reality is that Canadians are worried about their safety and feel we must do as much as possible to protect them.

I personally know of one case of bail that ended up in the death of three people. I was acquainted with those people. Others don't want to talk about it today, even though it happened 12 or 14 years ago—I can't recall the date exactly—because of the tragedy that happened to them as victims.

All this lingo concentrates so heavily on legislation—legal this and legal that—that we forget about the victims who are real people. The reality is that people are not satisfied with the way things are—the status quo. On the gun crimes that happen, the communities want something to happen. They're asking for this kind of legislation. They've been here testifying to that. Police are asking for this kind of legislation.

You make blanket statements about reality, but the reality is, "Government, get off your tail and start fixing things to put an end to the tragedies that are happening amongst us." I'm thinking of Mayerthorpe, where we lost four policemen in Alberta. I'm thinking of the Boxing Day incident in Toronto. We can name one after another. We can't sit back and say this is a useless piece of legislation that will do nothing. I don't agree with that at all.

You can comment any way you like on my response.

● (1615)

The Chair: Thank you, Mr. Thompson.

Do you want to comment?

Ms. Isabel Schurman: If I may.

I'm sure that communities are asking for legislation to make their communities safer. It's happening all over the country. The reality is that the statistics that are available do show that crime rates are dropping and that violent crime is going down. But I'm sure that as politicians you're getting this all the time from communities, saying, please make our communities safer.

The way for us to do that is to listen to what we've been told by the professionals for so many years, that if we can create a certainty of apprehension, crime will go down. The biggest deterrent is the certainty of detection and apprehension. So when it comes to gun crimes, let's put our efforts there.

My comments—and I didn't mean to insult anybody from any province or from any native community; obviously there are contexts where Canadians do like guns, when they're in their proper context. When somebody is using a firearm for sustenance for himself and his family in a native community, nobody has a problem with that. The competitions you're talking about, nobody has a problem with them.

I think I tempered my comments with the fact that Canadians don't mind them in their proper context, a hunting rifle in hunting season on hunting territory. When I say Canadians don't like guns, I mean that in any courtroom in this country, when a bail hearing comes up and the evidence goes in before the judge and you see that somebody had a firearm, it makes everybody nervous. It makes everybody nervous. I think that's the way we are, perhaps as a people, without meaning to put down, in any way, shape or form, anyone in this country.

There will always be examples, I'm sure, of people who had a previous conviction and committed another crime, of terrible tragedies ending in death. Yes, of course, there will always be those examples. That's for sure. What we need is a plan to look at reducing gun crime across the board, if that's where the problem is, and not simply saying, well, there are going to be two or three offences for which we're going to change the burden, but in some much more serious ones, we're not going to go there. It will only create legal wrangling, which will leave out most of the Canadian population and take years to get to a settlement.

That's my fear. I may be right, I may be wrong, but that's my fear, and I'm only here to tell you my fears.

Mr. Myron Thompson: My sense is most Canadians don't like criminals. It's not that they don't like guns.

Ms. Isabel Schurman: You have consensus on that.

Mr. Myron Thompson: I would say that's reality, not that they don't like guns.

The Chair: That's a different opinion.

We'll go to Madam Jennings, please.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Thank you, Chair.

Thank you, Ms. Schurman, for your presentation and for some of the information you've provided us.

What I'm taking from a lot of what you've explained to us is that rather than possibly putting a reverse onus for certain offences, and in this case Bill C-35 targets offences involving the use of a firearm, for instance, it might be more appropriate to look at subsection 515 (10), and look at the possibility of maybe strengthening that. The strengthening may codify existing practices, but we don't have the statistics on that.

Right now, if we look at paragraph 515(10)(c), where it gives some of the conditions under which the judge, in determining whether or not this detention is necessary, the apparent strength of the prosecutor's case, the gravity of the offence—obviously if we're talking about offences where there's violence, where there's the use of any kind of weapon, that would obviously be part of it—the circumstances surrounding the commission of the offence...I would say instead of including whether a firearm is used, include whether a weapon was used. That weapon could be a blunt instrument. Getting hit over the head with a baseball bat can be just as a violent and just as repugnant as being hit by somebody's fist, or being threatened with a knife or a machete or a firearm.

Then if we look at subparagraph (iv), where it says "the fact that the accused", and this is added on, and I think we wouldn't have a problem with that, the fact that the accused is liable on conviction for a potentially lengthy term of imprisonment.... I think judges probably already look at that, and if they don't, they should, but I don't think there would be any harm, and it might actually be beneficial, to have it codified.

As well, there is the fact that if on conviction the offence may, under the Criminal Code, lead to a minimum mandatory sentence. That may be a factor that the judge should be looking at in determining whether or not detention is necessary.

If the government concentrated on that section, it might actually result in safer communities and safer Canadians, simply on that one little slice that we're looking at, because it is piecemeal. But on that issue of detention, whether or not judges should be releasing or not releasing individuals who are accused of certain criminal offences, using those factors....

● (1620)

Ms. Isabel Schurman: You may be aware that a number of years ago there was a very different 515(10)(c) than the one we have now in the Criminal Code, and it was struck by the Supreme Court of Canada in a case called Morales because it did not pass the constitutional test. When it was replaced with the one we have presently—if it's of any consolation—it was criticized heavily by a lot of organizations around the country that thought it would be too broad or be too this or too that. And it has survived constitutional challenge.

It states that on any other just cause being shown, and without limiting the generality of the foregoing, where "the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances".... And it includes the weapons you are talking about, including the apparent strength of the prosecution's case, the gravity and nature of the offence, the circumstances surrounding its commission, and the potential for a lengthy term of imprisonment.

In the section we have now, to come back to the Canadian Bar Association brief, where is the gap we have to remedy? The one we have now covers all the concerns you had. The one concern I would have about making the code specify whether there's a mandatory minimum sentence is that it may be safer to be looking at the objective gravity of the offence. Canadians have decided that certain offences merit a maximum of five years, whereas others merit a maximum of 10, 15, 25, or whatever, because we want to know which, to us, are the worst offences.

It may be wiser to key bail to the objective gravity rather than to the existence of a mandatory minimum when the mandatory minimums may not apply to the crimes that have the highest objective gravity.

The fear I would have is that by concentrating on the mandatory minimums, we may forget the presumption of innocence, for starters, but also, we may concentrate on something that does not necessarily mean there is no bail for the most serious offences in the Criminal Code. So that was my only concern with that.

● (1625)

Hon. Marlene Jennings: Yes, but if you had—

The Chair: You can ask a five-second question, if you want an answer.

Hon. Marlene Jennings: If you already have a potentially lengthy term of imprisonment, if it was added on, including the possibility of a minimum mandatory.... I don't think adding that on would take away from the offences that have a potentially lengthy imprisonment involved and the object gravity of the offences, unless you're a really brilliant defence lawyer.

Ms. Isabel Schurman: Your position is definitely not without support in the bar across the country. I expressed one concern. I am not saying that your position is without support in various corners of the country.

Hon. Marlene Jennings: Thank you.

The Chair: Now we'll finish with Mr. Hanger.

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

I appreciate you reading out this point in reference to the justice system, that what we do here should maintain the confidence of the people in the country in the justice system. But we're looking at a time in our history when it's shaken at every turn. To deny that it's not being shaken, I think one has to bury one's head in the sand, because we're seeing judgments coming out of our courts, we're seeing problems in enforcement, and we're seeing law being inadequately administered. Seemingly, sometimes, the legislators have created this huge legal system that everybody argues over, and sometimes justice goes by the wayside—all too often it goes by the wayside. I just want to put that in as an aside.

You were speaking as if this is a foregone conclusion, that this law will stumble over the charter because it's arbitrary. But we heard in this committee from more than one defence lawyer that this bill will have no problems passing a charter challenge, precisely because it is specific. And that testimony has come forward on more than one occasion. So there seems to be a broad difference of opinion between you and other defence lawyers.

The Chair: Ms. Schurman, do you have a comment?

Ms. Isabel Schurman: There would be a difference of opinion between defence lawyers on any issue at any given time in this country. That's probably a given.

But seriously, I understand what you're saying, and here's what I would ask you to think of. None of those people addressed for you the question of the arbitrariness criteria as put forward in Pearson, and that's my fear. I really didn't mean to say that I think it won't pass constitutional muster. I merely wanted to raise the question for your consideration. If there's a problem, that's where it is, in my humble opinion. It's on the arbitrariness question. That's where it's going to be.

It's true that public confidence in the legal system is shaken at every turn, and there are a lot of factors contributing to that, including, sometimes, media hype, and sometimes incorrect representations of what the reality is. That's where I think we come back to the idea that if we're going to make this kind of change, and we have some good solid information and statistics about what's

actually going on, we could make a change that might make a real difference. And that was the only point I wanted to make on that.

The Chair: *Merci beaucoup, Madame Schurman.* Thank you very much for the time you spent with us. I know there's a justice meeting following this meeting.

Merci. Thank you. The meeting is adjourned.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

Also available on the Parliament of Canada Web Site at the following address:
Aussi disponible sur le site Web du Parlement du Canada à l'adresse suivante :
http://www.parl.gc.ca
