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# Standing Committee on Justice and Human Rights

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## Monday, October 2, 2006

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## Chair

**Mr. Art Hanger**

# Standing Committee on Justice and Human Rights

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● (1530)

[*English*]

**The Chair (Mr. Art Hanger (Calgary Northeast, CPC)):** I call to order the Standing Committee on Justice and Human Rights.

In accordance with the orders of the day, we're still in debate on Bill C-9, an act to amend the Criminal Code, conditional sentence of imprisonment.

We have a number of witnesses before the committee. From the Church Council on Justice and Corrections, we have Ms. Berzins and Ms. Griffiths. We have one individual, Professor David Paciocco from the University of Ottawa. From the Mennonite Central Committee, we have Mr. James Loewen. As well, Rosalind Prober is here from Beyond Borders; I would call them a special interest group in the sense that they are representing the victims and would like to see changes in legislation in various areas.

Thank you to all for being here today.

I'm going to follow the order in which the witnesses are listed on the agenda, which means we will start with the Church Council on Justice and Corrections.

If you could keep your comments to approximately ten minutes, that would get us through all of the presentations and allow a lengthy examination by the committee members.

Begin, if you would.

**Mrs. Jane Griffiths (President, Board of Directors, Church Council on Justice and Corrections):** Thank you, Mr. Chair. Good afternoon.

I'm speaking here today as one representative of the Church Council on Justice and Corrections, which is a national coalition of eleven Christian denominations with multi-faith and other community partners. It is well known as an NGO in the criminal justice field, nationally and internationally, for its work since 1974 to bring public attention to more socially responsible approaches to crime and justice. Recent council activities have included educational conferences, supporting local community restorative justice projects, analyzing public policy, and partnering with the arts community in public education about justice.

CCJC was created by eleven founding churches: the Presbyterian Church in Canada, the Religious Society of Friends—the Quakers, the Roman Catholic Church, the Salvation Army, the United Church of Canada, of which I am a minister, the Anglican Church of Canada, Canadian Baptist Ministries—we have a representative from them today as well—Christian Reformed Churches, Disciples of Christ, Evangelical Lutheran, and the Mennonite Central Committee.

We realize that our own faith tradition has had some negative influence in fostering a culture of justice and legal institutions that have been steeped in retribution in ways that have worked to further marginalize often some of the most vulnerable citizens of our Canadian communities. We take responsibility for helping to undo the harm this has done.

Our primary mandate is to assist our own faith constituencies to reflect upon this and to become aware of the people in their midst who are suffering from the causes and effects of crime and the fear of crime. Our educational resources encourage citizens to reach out to each other with responses and services that can help us all come to grips with the evil of crime when it happens, to survive and to heal, to discover that life can still be good and worth living, and that we can learn better ways to live together in safety and peace.

The focus of CCJC are the human realities that people in our communities are struggling with related to crime, its causes and effects, and the repercussions of how our legal system, the justice system, and society generally deal with crime. We do not expect our legal system alone to be able to do this for us. The job of justice is also a community responsibility, reaching far beyond what any law or justice system of the state can accomplish.

Long years of experience have taught us that how the state carries out its responsibilities, the laws it enacts, the financial resources it allocates, and the public statements it makes can either assist community effort or undo community initiatives by giving the problems of crime a twist for the worst. It will either assist efforts based on sound evidence to transform attitudes and criminal justice practices or perpetuate prejudices and understandings of the true realities of crime. This is what we wish to discuss with you today.

We believe that the changes in law that these two bills are proposing will make what is already a bad situation even worse. There are other, better ways to remedy the concerns that these bills seek to address. We would all be safer if the resources that would be needed to support the implementation of these unhelpful changes were put toward some of the effective new approaches that have emerged in recent years.

Our book, *Satisfying Justice*, has documented over 100 of these initiatives. One example is the collaborative justice program, which is here in Ottawa in the courthouse. We have representatives here today, Tiffani Murray and Kim Mann.

● (1535)

The proposed legislation will severely restrict the ability of judges to make use of these programs. We want to take our time with you to explain why we have come to the conclusion that the proposals in Bill C-9 and Bill C-10 would not contribute to better justice for our communities and would make things worse.

The distress of Canadians, the trauma and anguish and fear of crime, is a very compelling force. We are all united in our desire to make changes that will make Canada a safer place to live, and the key challenge is to know what will bring the desired results. It may seem that all that is required would be a simple shifting of words here and there—more time for more crime. We believe, however, that what is being proposed is bound to lead to many unintended consequences, consequences that have been unforeseen because the changes proposed are not strategic in any informed way. Our purpose here today is to bridge the two realities: the words, and the human realities that will be impacted by these words.

We urge you to vote not on the words in a battle of rhetoric taken in a vacuum, but with a meaningful reference to their impact on people's real lives.

**Ms. Lorraine Berzins (Community Chair of Justice, Church Council on Justice and Corrections):** My name is Lorraine Berzins and I've been on staff with the Church Council for 22 years. Before that I worked for 14 years in federal corrections. When I worked in federal corrections I was the victim of a hostage taking. I say that because I really want to impress upon you that the issues coming before you today, while they may seem a mere matter of words, matter a great deal to the people whose lives are going to be affected. They are going to affect people in several communities whom I know very well. So I bring a real, personal commitment to trying to let you know what we know because we are there with people in the community.

I want to make three particular points about the two bills. We will be discussing Bill C-9 and Bill C-10 together because both bills propose changes that are going to affect judicial discretion, and that's the most important issue for us. They're going to result in greater limits on a judge's ability to impose sentences that fit the specific circumstances of a crime and the offender regardless of actual risk assessment in a particular case and regardless of the real interest of the victim and the community as a result of a particular criminal incident. These changes would tie a judge's hands. They would enforce some new mandatory minimums and they would remove the possibility of a conditional sentence that exists for many offences, even though conditional sentencing is already specifically designed to allow only offenders who do not pose a danger to serve a prison sentence in the community. Any such decision that is deemed inappropriate can be appealed. We believe judicial discretion in sentencing is too important to let this happen. I'm going to come back to this at the end of my remarks.

The second point is about the research evidence about harsher sentences. The design of the changes proposed by both bills shows they are based on the belief that harsher sentences will keep us safer from crime. We acknowledge the real need to protect ourselves from certain offenders who pose immediate risk to the community. But harsher sentences do not translate into increased public safety. Research has clearly shown for years that imprisonment as mere punishment, regardless of actual risk, just to send a message to other potential lawbreakers, is clearly ineffective as a deterrent. The level of recidivism for specific offenders is actually higher if they go to prison. Nor do harsher sentences meet the needs of victims for healing and safety in any individually meaningful way.The changes proposed, upping the tariff of the punishment regardless of individual circumstances and needs, is going to make that courtroom experience for victims even worse by making the legal system even more adversarial than it already is in ways that can deal very hurtfully and disrespectfully at a very highly vulnerable time for a victim. That's the way it works. That's not likely to change.

We agree with the conclusions of credible scholars like Doob and Webster who state that despite a minor study or two that may appear to show signs of some small area of controversial findings in this field, the support for the proposition that harsher sentences work is very weak. Canada's public policy should be based on reflective experience and sound research and not on any single study that is contradicted by a host of other better studies. To do otherwise is irresponsible, and this is especially the case when we can also anticipate the new laws are going to result in higher correctional costs and in more prison time for our most vulnerable groups, like first nations people, other visible minorities, people with psychiatric disorders, and members of the poorest sectors of society. Women, particularly, are going to be affected by a lot of these changes.

Finally, we are particularly distressed about the inconsistencies in the proposed legislation. One example of the inconsistencies in mandatory minimum sentencing provisions proposed, Bill C-10, is what could happen as a result of what's proposed. For example, an individual can rob a corner store, while armed with a fully loaded long gun, such as a shotgun. Let's say he or she has a lengthy criminal record, including numerous prior convictions for other firearms-related offences. He or she faces a mandatory minimum sentence of four years, as proposed. Another individual commits a robbery under similar circumstances but is armed with an unloaded handgun. He or she is a first-time offender with no criminal record. He or she faces a mandatory minimum sentence of five years, as proposed. The same would apply in several other kinds of cases.

● (1540)

In other words, the length of the mandatory minimum in the proposed legislation is based on the legal status of the firearm in question rather than the extent of the actual danger to the public presented by the situation. An unloaded handgun is more serious than a loaded long gun, regardless of the actual circumstances of the crime and the offender or the actual harm done and victim considerations.

**The Chair:** I know you're prepared to discuss both Bill C-9 and Bill C-10, but I would like you to keep your comments to Bill C-9, because this is the bill that is before the committee right now. Bill C-10 is coming up at a later date.

If you could separate that information from your presentation, I'd appreciate it. Your time is running out, so I encourage you to put your conclusion forward.

**Ms. Lorraine Berzins:** The inconsistencies are of great concern to us. They're going to result in several kinds of offences that do not seem so serious being lumped in for the same serious treatment as those that call for a maximum sentence of ten years or more. We think it is not the right way to proceed on the basis of maximum time. It might sound good on paper, but it's going to result in several offences, like break and enter in a residence, fraud or false pretenses over $5,000, and many cases of welfare fraud being treated more seriously than other things that Canadians would consider very serious.

So the real-life implications of the proposed changes, in practice, are bound to defy the notion of justice held by most reasoning Canadians, if they realize that these are the kinds of results that these proposals will and will not give us. Most Canadians don't know that, but you do know that. You have this information in front of you, and we've elected you to make those decisions responsibly on our behalf.

We think that judicial discretion is extremely important. There's a process of human discernment and judgment that should not be removed from the actual knowledge of the case; no general law can give us the equivalent of that. To do it on the basis of the meaningless criteria proposed is to degrade us as a society. It debases the very noble human aspiration to justice, which is very important.

If there's concern that the existing provisions have been applied inappropriately, those decisions can be appealed. Policy directives and guidelines can be given, but the simplistic blanket solutions proposed are not appropriate.

In conclusion, we urge you to withdraw Bill C-9, and we'll talk about Bill C-10 another time. We know it may be difficult to find the political will to do that. It's so important, and there's one amendment that you might want to consider, and that's to make it presumptive rather than absolute. If you do not find the political will to withdraw the bill completely, at least leave a door open so that even though it's presumed that certain offences will likely not be eligible for a conditional sentence, there is room for a judge to make an exception to the contrary if the case is put before him.

● (1545)

**The Chair:** Thank you, Ms. Berzins.

Now I would like to turn to Mr. David Paciocco.

**Prof. David Paciocco (Professor, Ottawa University, As an Individual):** Thank you, Mr. Chair. It's a privilege to have the opportunity to address this committee.

I am in a bit of an awkward position because I have sympathy for the ultimate goal of the government in Bill C-9. There's no question that the imposition of conditional sentences for extremely serious crime has a dispiriting effect on public confidence in the administration of justice. On the other hand, I'm here to urge that Bill C-9 not be passed in its current form, and I say that for three reasons.

First, this bill is too blunt. It is going to prohibit not only inappropriate uses of the conditional sentence but also the application of conditional sentences in cases where it is not only appropriate but the preferred response for the criminal justice system. Secondly, it will add appreciably to the financial costs of the administration of justice, and it will do it without reducing the amount of crime that occurs in Canadian society. Thirdly, and I say this based on my experience both as a defence lawyer and as a prosecutor for more than seven years, part-time and full-time here in Ottawa, strategies will be adopted by judges and lawyers that will avoid the rigidity of Bill C-9, and I'll give you some illustrations later.

If this government chooses to act on its perception or conviction that conditional sentences are being applied inappropriately, I don't want to come empty-handed. I'm offering two alternative methods of attempting to deal with this difficulty. The first is to create an additional prerequisite for conditional sentencing that would make it appropriate solely in those cases where priorities should be given to rehabilitation or restorative justice. Secondly, I would encourage the government to provide a presumptive provision. It could identify offences that are most troubling, such as sexual assault or causing serious bodily harm, and in those circumstances it can be presumed that priority in sentencing should be given to denunciation and deterrence. I'll speak more about these at the end of my presentation.

In theory, conditional sentencing is treated as a jail sentence. Its virtue is that it does reduce reliance on imprisonment and it does, according to the theory, decrease the risk of reoffending by some offenders. I'm urging this committee to accept the validity of both of those propositions in appropriate cases. Imprisonment is far more expensive than the administration of a conditional sentence, and as Ms. Berzins has explained, locking offenders up together with those who are criminally disposed in a criminal subculture tends to make many offenders worse, not better. To the extent that we can assist in rehabilitating Canadian citizens, we know we can do it far more effectively when they're not incarcerated.

Having conditional sentences in appropriate cases makes both common sense and financial sense. It makes sense where appropriate principles are respected. I would put forward three principles where conditional sentencing is an appropriate response. The first is where leaving the offender in the community will not pose an appreciable risk to the community. The second is where the offence is not so serious that permitting the offender to remain in the community provides an unjust response to the offence. The third is where priorities should be given to rehabilitation or restorative justice.

The current law is appropriate with respect to ensuring that dangerous offenders are not released into the community. As the committee I'm certain is aware, judges are not empowered to give a conditional sentence if in their judgment the offender poses a risk to the community if allowed to serve the sentence in the community. It would be inappropriate, in my respectful submission, for the government to assume that judges cannot make that determination at the same time we're putting forward a bill to allow judges to use their discretion to declare offenders dangerous on the basis of evidence and to lock them up indefinitely. It's quite clear that mistakes can be made in the exercise of discretion, but the alternative to removing discretion entirely and having fixed sentences or removing sentencing options is to result in erring on the side of incarceration, which, in my respectful submission, is not an appropriate response.

If there is a problem with conditional sentencing, it relates to the second two principles I have identified. The reality, in my opinion, is that we tend to overestimate the denunciatory and deterrent effect of a conditional sentence. This is because of what I would consider to be a questionable assumption that is made in the case law dealing with conditional sentencing. That assumption is that a conditional sentence is more like a jail term or a period of incarceration than it is like a period of probation.

● (1550)

In my respectful submission, this inflates the impact of a conditional sentence. Individuals subject to conditional sentences certainly have the stress and impact of being under a court order, but that stress is certainly far less than actual incarceration, and the deterrent impact has to be, to the extent that deterrents may exist, less if an offender is permitted to serve the sentence in the community.

I think if there is a difficulty with the conditional sentencing, it's in the tendency to overestimate the deterrent or denunciatory impact of that particular provision, and that's why I'm putting forward the principles that I am.

There's a related concern, and that is that sentencing does so many different things. We sentence people to try to accomplish protection of the community by deterring offenders. We sentence people trying to achieve justice. We sentence people in order to try to restore them or reintegrate them into the community. Those objectives are often at opposition to one another in a particular case, so the priorities a judge gives in a particular sentence are going to have a huge impact on the way that judge chooses to impose conditional sentences.

What I'm going to ultimately suggest is that if there is a problem, it is in the tendency to overestimate the deterrent and denunciatory effect, and the proposals I put forward address those specific problems, rather than the blunt tool in Bill C-9. Bill C-9 is blunt because it would remove conditional sentencing as an option entirely for offences with a maximum sentence of ten years or more.

The fact of the matter is that our Criminal Code is not a coherent instrument. We've never had a scientific study of the seriousness of offences. It is historical accident as to whether a particular provision in the code carries a maximum sentence of ten years or more. It not only includes the offences that we as a society are most afraid of; it also includes things like theft of cattle, theft of a credit card, unauthorized use of a computer, possession of house-breaking instruments, uttering forged documents, uttering counterfeit money. None of those things are acts that flatter the offender, but I doubt that Canadians would identify them as being among the more serious or more feared offences in our community.

The second problem is more profound, and it is that the seriousness of offences depends far more on the circumstance of the offence than on the specific offence in question. Sexual assault, for example, can include everything from an unwanted kiss to the most reprehensible violation. A break and enter can be a young person committing a home invasion under very dangerous circumstances or it can be an estranged spouse violating a court order giving possession of the home to another party by going in to try to reclaim what they think are their goods.

It is inappropriate and wrong, in my respectful submission, to have a lumped-in category of offences and assume that should be the break-off for conditional sentencing.

Conditional sentencing is cheaper than incarceration, and it would not be, in my respectful submission, appropriate for the government to act on the assumption that if we remove conditional sentencing it will deter offenders and that will reduce the costs of incarceration.

I'm not going to get into the studies that have been referred to by the previous speakers, but I ask this committee to approach this as a matter of common sense. How realistic is it to think that people who choose to drink and drive or break into homes or commit sexual assaults do it because they know they have a chance at perhaps getting a conditional sentence if and when they're apprehended? All of those offences carry very heavy penalties. Do you really think that's going to be the difference in their decision as to whether to engage in criminal conduct?

Secondly, what we do know about deterrents is that if an individual doesn't know what the sentence is, they're not going to have any way to measure the cost-benefit analysis. This is a complicated piece of legislation. Are offenders really going to understand what the impact of this particular bill is, and will they take that into account before they engage in their conduct?

If this committee decides to recommend or the government decides to act on this legislation, it must be in the firm appreciation that it will increase the costs of the administration of justice, not decrease them.

Finally, history teaches us that when the law becomes rigid, lawyers find their way around it, and so, too, do judges. If this bill is passed you are going to see probationary sentences given in cases that now attract conditional sentences. In other words, inappropriately lenient sentences will be imposed in an effort to get around these restrictions. In addition, you will see tokenistic periods of incarceration followed by probation where a conditional sentence would have been used in the past. So in some respects it's going to backfire.

It's going to give prosecutors tremendous power, because, as you know, this bill applies only where the prosecution elects to proceed indictably, and they can therefore remove a sentencing option from a judge. Sentencing decisions should be made by judges, where they are reviewable, rather than in the unreviewable discretion of prosecutors.

● (1555)

The solution I'm putting forward focuses on the very problem that I think I have identified with conditional sentences. Some judges think they are far more deterrent or denunciatory than I think they are. Our Supreme Court of Canada authority reinforces this characteristic of conditional sentences consistently.

I would ask that the committee consider recommending, and the government consider acting, on different principles. Add an additional prerequisite if you feel the need to deal with conditional sentences. Make sure that those conditional sentences should be ordered solely where the sentencing priority is rehabilitation or restorative justice. If you do that, you will save this vehicle for cases where it is needed, and where you do have a real need for deterrence or denunciatory sentencing, it won't be an appropriate sentence.

Add to that a presumption that in cases where there is sexual violation or serious bodily harm—or even, if you feel the need, significant property damage or interference with property rights—the appropriate sentencing priorities are denunciation and deterrence. If you do it in the form of a presumption, that puts the onus on the accused to show some special circumstances as to why a conditional sentence is appropriate in that case, whereas it may not be appropriate in typical applications of those same principles.

It will also provide an error of principle if a judge who believes in or articulates or recognizes an important need for deterrence and denunciation chooses to try to express that through a conditional sentence. It would be grounds for appeal.

I'm asking the committee to take a hard look at Bill C-9. While the objective behind it is understandable, this is a blunt tool. It is not an effective and, in my respectful submission, carefully tailored way to deal with the problem that I think the government is trying to identify.

**The Chair:** Thank you.

Next we will hear from the Mennonite Central Committee.

Mr. Loewen, the floor is yours.

**Mr. James Loewen (Coordinate, Mennonite Central Committee Canada):** Thank you very much.

My names is James Loewen, and I come from the promised land of Langley, British Columbia. I'm glad to come all this way. It's lovely here.

I'm here on behalf of the Mennonite Central Committee Canada. It is the service, development, and relief agency of the Mennonite and Brethren Churches in Canada. There is a family of MCC organizations in Canada with provincial offices in five provinces. Collectively, we have a wide range of programs that include walking with aboriginal people, helping refugees resettle, supporting people with mental illness, working with victims and offenders involved in the criminal justice system, and working directly with people in poverty. This diversity has helped shape the brief on sentencing issues that we share with you today. I want to acknowledge immediately that the brief associated with this presentation and this presentation do not directly address the insights and concerns that reflect aboriginal wisdom and experience. I do know that this wisdom and experience is important and ought to have a place here.

One part of MCC Canada's work involves the development and support of restorative justice programs across Canada. We take an interest in not only the practical grassroots development but also on creating a sustainable environment of growth for restorative justice programs. Currently, MCC Canada has a network of over 35 restorative justice programs, ranging from well-established internationally regarded programs to cutting-edge pilots seeking to increase their capacity.

It is with this foundation that MCC Canada and its network come before you with this brief. We appreciate the opportunity to be heard and to have a voice in this discussion of Bill C-9. In particular, we will speak to the concern that serious crimes be dealt with seriously, the concern that victims have more input into the justice process, and the concern around the effects of the increased use of incarceration.

In particular, we are recommending that the government expand the use of conditional sentencing. In this it will be necessary to expand the role of the victim throughout the justice process and expand the resources available to victims and to the programs that provide necessary justice processes, such as restorative justice programs. As this bill responds to issues raised in the news media, I thought it would be helpful to reflect on these issues in the context of a story. The following story can be found on the CBC website.

In August 2001, Michael Marasco was attacked in a case of mistaken identity. His attacker, Erron Hogg, beat Marasco into unconsciousness with a metal rod. After undergoing extensive brain surgery, 25-year-old Marasco now suffers speech and memory impairments and has had to give up his dream of becoming a lawyer. Queen's Bench Justice John Scurfield gave Hogg, who is also 25, a conditional sentence of two years less a day and ordered him to write an apology to Marasco. He must complete 400 hours of community service and abide by a strict curfew. His sentence would be followed by three years of supervised probation. The victim's sister, Maria Marasco, says her family was shocked by the sentence. She read her mother's thoughts: "This experience has left my family with a shattered belief in the Canadian justice system. It is solely based on money and politics. The justice system has wasted our time, not to mention taxpayers' money, over the past two and a half years that it took to come, finally, to a decision to let this criminal go free."

As you may know, this sentence was appealed and overruled, with Hogg being sentenced to a three-year term of incarceration.

On the surface, this story seems to support the approach of Bill C-9, as there were no further cries of injustice from the Marascos or the Ministry of Justice in Manitoba regarding the sentencing. However, if we look deeper into stories like this, we begin to see common themes. It seems clear that one key problem with this sentence and other conditional sentences involving more serious crimes is that they convey a message that these crimes are not taken seriously. Another issue is that victim input and consideration in the sentencing process is inadequate, to say the least. There is also concern that the conditional sentences are not a useful deterrent. The obvious assumption here is that crime plus time equals justice. Anything less is soft on crime and lenient.

● (1600)

Bill C-9 is an attempt to respond to stories like the Marascos'. MCC Canada fully affirms the view that serious crimes need to be dealt with seriously and that victims and communities ought to feel safe.

We agree that there have been conditional sentences that are disturbing; however, they are disturbing primarily because victims were disempowered and further harmed by the way that conditional sentences were handed down. The primary concern here is not with conditional sentencing per se, but with the failure to respond meaningfully to victims' concerns and issues. This failure is endemic to the system and is a natural outcome of an adversarial system of laws, one which has little room for the victim or their painful experience and complex needs. This reality is recognized in many reports, one even pointing out that justice professionals recognize and recommend more involvement of victims in decisions that affect them.

If we are to take serious crime seriously, then we need to take the needs of its victims, all of them, seriously. As studies have shown, these needs are complex and variable and often have little to do with incarceration for the sake of incarceration.

With regard to victims' needs, the *National Consultation with Victims of Crime* has illuminating insights, some of which are relevant to Bill C-9. One is the need for victims' rights to be elevated in importance to at least parity with offenders' rights. Another is input into decisions that affect them, such as plea bargains, charges, sentencing, and parole. A key need is respect, something that is occasionally experienced as a result of individual efforts of staff but is not present at a systemic level. A significant and primary need is for safety and reduction of fear associated with the offender and potential reprisals.

Bill C-9 only superficially responds to two of these needs, one for respect and the other for safety. This bill appears to send a message of respect, of hearing and taking seriously the needs of those victims who have experienced conditional sentencing as a travesty of justice. However, this bill does not address the needs of victims who support the conditional sentence given to their offender, those who believe the reports of the ineffectiveness of incarceration, and those who understand that the true travesty of justice is a failure to attend to the needs of the victim.

Bill C-9 does seem to offer temporary safety to the victims by removing the offender from the community. Sadly, as has already been mentioned, this is not the case. Bill C-9's efforts at change end up providing for neither the increase of respect for victims within the system nor for their safety in the medium or long term. This bill only responds to the surface needs of a few and does not take the stories of anger and betrayal as an opportunity to look deeper and address root concerns. Ultimately, then, by failing to respond to the known substantive needs of victims, we fail to protect and respect those who cry for change.

This bill will likely diminish our already limited ability to provide meaningful justice options for Canadians. The significant increase in resources that provincial jails will require will, of necessity, reduce opportunities for justice.

The CCJA brief clearly indicates that any restriction of conditional sentencing will, of necessity, restrict the restorative opportunities available to offenders and victims. An offender who stays in the community has an opportunity to maintain an income, a portion of which can be used for restitution towards the victim. As there are few unlimited resources for victims from government, it is doubly damaging when extra resources are used to incarcerate an offender.

It is worth noting that restorative justice has been mentioned quite a few times in relation to conditional sentencing. Let me assure you that conditional sentencing is not necessarily restorative justice; it is not consistent with restorative justice to order someone to apologize or to serve time. Offenders best understand and value the consequences of their crime when they have worked through the impact of their behaviour in mutual processes with the victim and the community impacted. Conditional sentencing merely removes some of the barriers that incarceration puts up.

● (1605)

One of the claimed justifications of incarceration is that it provides specific safety for communities and victims. There are, however, significantly less expensive and highly effective alternatives to incarceration even in cases of high risk, an example of which are circles of support and accountability. Circles of support and accountability have been so successful at reducing recidivism of high-risk offenders that they have proliferated across Canada and have begun to appear in other nations, including the United Kingdom, with increased interest from the U.S. I can refer you there to a report of a circle of support and accountability in Toronto.

● (1610)

**The Chair:** I ask that you bring your presentation to a conclusion.

**Mr. James Loewen:** Certainly.

It is particularly troublesome that there is such a significant interest and effort put into the development and carrying forward of bills, such as this one and Bill C-10, that are based firmly on an outmoded paradigm of justice. It is as if we are looking at a black and white reel-to-reel movie that the Minister of Justice is trying to tell us is state-of-the-art, yet we can go home and watch a high-definition full-colour movie on my big screen. In MCCC's experience and in the experience of the programs MCC Canada works with, Bill C-9 is a reflection of a failure to see justice in full colour.

MCC Canada recommends that the government expand the use of conditional sentencing. In this it will be necessary to expand the role of the victim throughout the justice process and expand the resources available to victims and to the programs that provide necessary justice services, such as restorative justice programs.

MCC Canada calls on the Government of Canada to actively work towards a criminal justice system that moves beyond an adversarial legal system to one that will deliver justice through active mutual processes that involve victims of crime, their offenders, and their communities.

We call you to a creative and courageous response that will honour the rich faith traditions of Canada's citizens, the best in our legal tradition, the wisdom provided by first nations, and the academic knowledge developed as a result of the harsh lessons we have been confronted with. Stories like the Marasco's demand no less from us.

Thank you.

**The Chair:** Thank you, Mr. Loewen.

Ms. Prober, please.

**Mrs. Rosalind Prober (President, Beyond Borders Inc.):** Good afternoon.

My name is Rosalind Prober. I'm the president of Beyond Borders, which is a volunteer, non-profit organization dealing with global child sexual exploitation.

Beyond Borders is part of a multinational NGO, a non-governmental organization, called ECPAT, End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes. ECPAT is based in Bangkok, Thailand, and I'm on the board of directors.

To be transparent, a criminal lawyer with the same last name as mine has been ultra-vocal in the media, ranting against a fellow Manitoban, Vic Toews, and this legislation. That would be my husband. We disagree when it comes to “home sweet home” jail sentences. Incidentally, I'm not a lawyer, but I'm not apologizing for that.

I'm here today to speak on behalf of children who are sexually victimized by adults. Holding perpetrators accountable is certainly not easy for children. Many abused children do not live in Canada. Many are victims of Canadian child sex tourists. Many are totally incapable of withstanding punishing cross-examination on the intimate details of their sexual victimization in our “win at all costs” adversarial system. Many are found to be not credible.

As we all know, sex crimes can be life altering, and they have a heavy impact, especially on the most vulnerable in society, who are the easiest to abuse, in many cases. The disconnect between victimization statistics and criminal justice statistics shows all too clearly that most sex crimes are not reported.

On behalf of these children and children who do manage to successfully prosecute abusers, Beyond Borders supports Bill C-9. We support the removal of conditional sentencing for sexual assaults or other sexual offences against anyone under eighteen when the state has prosecuted by indictment for a crime that carries a maximum sentence of ten years or more.

Tough laws on paper are nothing more than lip service when they are constantly ignored. This is an egregious violation of children's rights to justice.

Should Canadians be reluctant or hesitant to use the justice system to denounce sex crimes against children? In Beyond Borders' view, the answer is a clear no. Society has a right and a duty to children, as documented in all the international conventions and protocols we sign, to condemn conduct that it finds intolerable. Surely sexual activity with children is such conduct. Surely the message from the justice system to the public should be that these crimes are abhorrent and very serious.

Has the judicial branch failed in its duty to protect the most vulnerable in society by giving slap-on-the-wrist sentences for serious sex crimes against children? Yes, it has. Conditional sentencing has been abused and overused. The fundamental principle that a sentence must be proportionate to the gravity of the offence has gone out the window.

Aside from leaving the age of consent at fourteen, Beyond Borders supported Bill C-2, which was brought in by the previous government. That bill imposed on the judiciary mandatory minimums for those convicted of sex crimes specifically against children. Bill C-9 will ensure that those who sexually assault children, commit incest, and so on, will not escape incarceration. It should be pointed out, however, that unlike Bill C-2, which imposed specific minimum sentences, this bill still leaves the door open to judges to impose suspended sentences and probation for sex crimes against children.

Is jail in the community, or house arrest, equivalent to incarceration in prison? Clearly not. Crime victims have the right, especially children, to be treated respectfully in the court and told the truth about sentencing perpetrators. A person's home should never be equated to jail; that is preposterous. Sex offenders against children who get house arrest are going home to their own beds. Because there are so many sex offenders against children from upper-income brackets, many return to luxury. It is not credible to refer to homes as jails. It is disrespectful of everyone to pretend that going home after being sentenced is the equivalent of real jail. House arrest is an undeserved soft touch; if it weren't, it would not be so sought after by criminals.

● (1615)

In 2001, a young 12-year-old first nations child in Saskatchewan had the enormous misfortune of being spotted by three adult men. When any 12-year-old ends up hysterical, dead drunk, and has to be hospitalized due to clear evidence that she was sexually assaulted, one would think that a sentence of house arrest for a perpetrator of this crime would be impossible. However, not only did Dean Edmondson get house arrest, he also became the victim in this case as the 12-year-old was portrayed as not just a consenting and willing participant but as a sexual aggressor as well. As precedents go, this is one Canadians should not look to with pride.

Sex crimes against children are often premeditated, with some involving elaborate planning and manipulation of not just the kids but their parents as well. Sex crimes can leave long-term scars and, as we all well know, can lead to destructive lifestyle choices and suicide.

There are strong societal sanctions against sex with children. Millions of tax dollars are sadly going into teaching kids how to protect themselves. So when an adult chooses to cross that barrier into behaviour that harms society's most vulnerable and cherished members, he or she should have no possibility of what is in reality just an inconvenient curfew. House arrest should not be an option in sentencing child sexual exploiters.

Bill C-9 closes that option, is in the best interest of children, and should be supported by this committee.

Thank you.

**The Chair:** Thank you very much, Ms. Prober.

We've had some new points presented to the committee. I'm going to open up the discussion.

Ms. Barnes, you're first to question.

**Hon. Sue Barnes (London West, Lib.):** Thank you very much.

I'll start with Ms. Prober, since she went last.

Thank you all for your input. It's important for us to hear diverse stories.

Ms. Prober, you only really talked about the sexual parts. Are you making comments on any other parts of the bill?

**Mrs. Rosalind Prober:** Absolutely not.

**Hon. Sue Barnes:** So you're not concerned with property sections or anything like that?

**Mrs. Rosalind Prober:** Absolutely not.

**Hon. Sue Barnes:** Mr. Loewen, the restorative justice principles are already in the sentencing principles under section 718 of the Criminal Code, as I'm sure you're well aware. A section in this bill does talk about those sentencing principles of the Criminal Code still being in effect, but quite literally you're going to have a judge sitting there with his hands tied and discretion gone.

I'd like a very brief comment on what you think will happen to the balance of the sentencing principles, especially with one of them being restorative justice that you're so concerned about.

● (1620)

**Mr. James Loewen:** When I think about the sentencing options that come before judges and the further restricting of the options they can engage in, I remember a conversation I had with a friend of mine who is also a judge in northwestern Ontario. He shocked me when he looked me in the face and said, “James, I can't tell you how unhappy I am and how unsatisfied I am with the sentencing options I have available to me. Any option brought forward by the community that this crime has affected will be better than any sentencing option I have in hand right now.”

**Hon. Sue Barnes:** Thank you very much.

I'd like to go to David, please.

In the last Parliament it was never debated, never got as far, but there was Bill C-70. The intention of that bill—I'm not sure if you're familiar with it; I think the other witnesses are.

That was a presumption. It narrowed it down that the presumption was no conditional sentencing would apply in a certain list of offences. Those offences were terrorism offences, and that is defined in the Criminal Code, and actually would, I believe, go further than the delineated crimes here in the terrorism area; the criminal organization offence; serious personal injury offence, as defined in section 752; and any offence—and I picked this up from your evidence today—in respect of which, on the basis of the nature and the circumstances of the offence, the expression of society's denunciation should take precedence over any other sentencing objective. It also gave an extra clause that said if a judge wanted not to utilize that—in other words, to go against the presumption—the judge would have to put in writing before the court and justify why he took that away.

That seems very close to the testimony you've given here today. It certainly would stay within the principles of sentencing that I think are going to be very difficult under the current paragraph we have.

But before I ask you to comment on that, I will also say that the way...and the minister has come before committee, and I take him at his word that he's allowing us to figure out other ways to do this catchment if we so find an appropriate way. He's basically admitted this is a fairly arbitrary way. Short of listing things, as you actually go through the way it's set up in this bill, many of the offences would be captured. They're just listed differently. Then, because of the way the current bill is set up, it excludes the hybrids, so you take out a whole other set of potential things.

So to a certain extent they're similar, but they don't have the same quality of rationale, if I can put it that way, and I would think the Bill C-70 approach, or the approach you've come up with, would be one that would be more able to still leave the discretion with the sentencing judge. I believe your interpretation that we will have the prosecutors doing the discretionary work behind closed doors, not in a transparent manner, and there have been numerous studies to show that, despite the minister's own evidence saying no, no prosecutor would do that. They do it all the time, and the empirical data is there in the studies showing that it happens. It happens in every courtroom.

On that, I'd like David and maybe Lorraine's group to comment on those two things. We're only two to three weeks away from having to sit down seriously in this committee and work on some amendments to this, because I think there is some appetite for closing the door somewhat. Even though I'm a great believer in conditional sentencing, I'm saying we have to come up with something that's workable, not arbitrary.

**Prof. David Paciocco:** Thank you very much. I think that really is the key. As I say, I have sympathy for the objective behind this initiative, because conditional sentencing can I think be dispiriting to the Canadian public, who need to have faith in the administration of justice. Notwithstanding the comments we've heard to the contrary, I have tremendous respect for those views. The reality is that conditional sentencing can be an inappropriate response, in the view of those the criminal justice belongs to.

But the result of having an absolute prohibition on conditional sentencing for a long list of offences based on the maximum period of incarceration is not an effective way to deal with the problem. There are cases where conditional sentencing is the most sensible, economical, and appropriate response.

You have to leave the sentencing discretion with the judge. The problem right now, in my respectful submission, is that our appellate courts have taken the view that conditional sentencing is a significant deterrent and has a significant denunciatory impact. Even in cases where you need to have a denunciatory sentence, it can still be an appropriate response.

My feeling is that it is an appropriate response when you need to keep the offender in the community for purposes of rehabilitation and when it's not so serious an offence that the public will be outraged that someone gets to go back to their home. That's why I favour the discretionary approach you have described, which is very close to the position I'm putting forward.

If you put presumptions in the hands of a judge, the judge will be obliged to act consistently with those presumptions unless the judge is dealing with a particularly specialized case where there's some compelling reason to depart from the norm. I can assure this committee that if it provides clear presumptions with respect to the impropriety of conditional sentencing in cases where deterrence or denunciation require priority, judges will respect that. In those cases where they don't, that will give the prosecutors appropriate grounds for appeal.

Right now the discretion in sentencing is extremely broad, and in the absence of that kind of guideline, appeals are very difficult to bring from these kinds of cases. So rather than take what I think is a "throw the baby out with the bathwater" approach, as I describe it in my paper, where you just say we're not going to have conditional sentences in any of these cases, even if they might make sense, because we just want to have a clear line.... That's not the way sentencing operates. We sentence the offender and the offence and we look at all of the circumstances. As I said, there's such a huge range in seriousness in the way offences occur. If you take away the conditional sentence option absolutely, you're going to get some cases where judges give a lesser sentence than they would have given under the current regime, just because the alternative is not an appropriate or rational response.

● (1625)

**The Chair:** Thank you, Ms. Barnes.

**Hon. Sue Barnes:** They wanted to comment.

**Mrs. Jane Griffiths:** I would like to respond to the aspect of how conditional sentencing affects victims of crime, because it can also be a very useful response.

Can I ask someone to speak specifically to that, who is sitting...?

**The Chair:** I'm sorry?

**Mrs. Jane Griffiths:** I have somebody who can speak specifically to that approach.

**The Chair:** I'm not quite sure what you're referring to. Your approach...?

**Hon. Sue Barnes:** She has somebody in the audience whom she'd like to have talk.

**The Chair:** About what?

**Mrs. Jane Griffiths:** Are there people here who can speak?

**The Chair:** Is this someone with your group?

Okay. What would they be speaking of?

**Mrs. Jane Griffiths:** It would be responding to the conditional sentencing. I'm thinking of a particular program that is happening in the courthouse here in Ottawa that uses restorative justice principles. A lot of the cases we receive are cases involving conditional sentencing, the resolution of which has been very satisfactory to victims as well. Statistically, when we look at the cases we've received under what is being proposed, 94% of the cases we have used would be excluded from the work we do. Considering how positive victims have been to that approach, I wanted to look at it as well.

**The Chair:** We'll permit a couple of minutes of presentation, then, on the court program you're speaking of. I have other witnesses who have testified here.

**Mrs. Jane Griffiths:** It's just that, for that specific question, we could find out from Tiffani Murray.

**The Chair:** If she would present quickly....

Would you please identify yourself? We'll give you a very short opportunity to present.

**Ms. Tiffani Murray (As an Individual):** Sure. Thanks very much.

My name is Tiffani Murray, and I am with the collaborative justice program. It's a restorative justice program here at the Ottawa courthouse. I'm also a lawyer.

The program has been in operation since 1998, and as one of the witnesses stated, it works on principles of restorative justice, which have been given paramountcy in the Criminal Code. We have seen that conditional sentences have benefited all the participants of our programs—offenders, victims, and the community.

We've been through our cases, compared them to the proposed legislation in Bill C-9 and the offences that would be affected by the removal of conditional sentences, and we've come up with a figure of 94% for cases that would be affected. In those cases, what I'm saying to you is that the victims would be affected as well.

Those cases would not be permitted to have a conditional sentence. They are cases where we've worked with the offender, the victim, the families, and the community in order to come to a resolution, which has included a recommendation presented to the judge, the Crown, and the defence to allow a conditional sentence that also allows restitution for the victim.

For example, it can be some meaningful community service, having the offender contribute to an organization that has personal meaning for the victim, or having the offender contribute a donation to a charitable foundation that has personal meaning for the victim. It can include having the offender do work in the community. All of this gives a great deal of control back to the victim and allows the offender to take responsibility.

None of this would have been possible had the offender been given a period of incarceration or, in 94% of our cases, had the conditional sentence option been removed.

We're talking about cases that include fraud over, theft over, or even impaired driving causing bodily harm. These are cases in which the victim and the community have benefited.

● (1630)

**The Chair:** Réal.

[*Translation*]

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

[*English*]

I'm going to speak in French.

[*Translation*]

I must say I particularly appreciated today's panel. Even though it was on video, I would watch it again because it seems to me to be such a combination of wisdom and alternative methods.

I will start with Mr. David Paciocco, professor at the University of Ottawa. As a civil law student myself, enrolled in the André Jodoin program at the University of Ottawa, I must say I enjoyed your presentation.

I have always thought it would be a better idea to amend section 718 and provide judges with some guidance. If it is felt that conditional sentencing is a tool that has been misused, we should not, as you say, throw the baby out with the bath water; we should limit its use to purposes that are considered socially acceptable.

Would you be able — I do not know whether you can do this right now, but if not you could send it to our clerk — to suggest some wording to us? I suppose the first and second suggestions you made to find a concrete application would require an amendment to section 718. Did I understand correctly? Have you thought of any wording that could be used in a very elegant amendment that the more progressive among us could take up?

[*English*]

**Prof. David Paciocco:** Thank you, Monsieur Ménard.

I am not a legislative drafter, and I wouldn't propose to give language that I would ask the committee to take verbatim.

What I do know is that before a conditional sentence can be provided, there are listed conditions that are to be in place when conditional sentencing is appropriate. I think one of them needs to respond to the sentencing goals.

Right now, the focus is to simply ask the general question as to whether a conditional sentence would be consistent with general principles of sentencing.

What I'm suggesting is that the Criminal Code spell out when a conditional sentence would be consistent with general principles of sentencing by specifying that it would be appropriate only in cases where restoration or rehabilitation are the priority in those circumstances. This should be coupled with another provision that gives assistance to judges in identifying when they should give priority to rehabilitation and restorative justice sentences, in particular identifying presumptive areas where denunciation plays a significant role in the sentence. The lawyers would have to show why their case has some unique feature that makes it appropriate to have reference to a collaborative justice project or some other sentence that focuses on the needs of the offender.

There is a huge difference, as I said, in the range of offences and in the range of offenders. It would be unsafe to be too precise. If a judge understands that a sentence really must present deterrent and denunciatory impact, then they should think long and hard before giving a conditional sentence. There must be something particularly special in that case.

● (1635)

[*Translation*]

**Mr. Réal Ménard:** I want to make sure I understand your objectives. If you do not want to give in to your legal drafting impulses, that is okay; there are others who can that.

If I understand correctly, you suggest that we amend section 718 so that when a judge has to determine what the sentence should be, like a conditional sentence, he will be able to propose other sentences. You want judges to be guided by criteria spelled out in section 718.

Is that what you are suggesting? That is the section of the Criminal Code that deals with sentencing. I imagine that is something you already look at in one of your courses. Is that what we are talking about?

[*English*]

**Prof. David Paciocco:** I would put the provisions directly into the conditional sentencing provision rather than in section 718. It would make it very clear that instead of the current three prerequisites, a conditional sentence has four prerequisites.

It wouldn't be available where there is a minimum sentence. It wouldn't be available if putting the offender back in the community would cause harm. It wouldn't be appropriate if it is inconsistent with the principles of sentencing, and it will not be appropriate with the principles of sentencing—

[*Translation*]

**Mr. Réal Ménard:** So you would amend section 742.

I know something about restorative justice as advocated by aboriginal people. You mentioned circles of support and accountability. I would like you to give us some more information about these alternative justice practices. I think that James raised these issues.

[*English*]

**Mr. James Loewen:** Thank you.

Yes, I specifically referred to a program called Circles of Support and Accountability, which is not specifically an aboriginal justice manifestation but one that is consistent with principles I have heard from them. It is a program of the Mennonite Central Committee in Ontario. I consider it a restorative justice program because it brings restoration to perhaps the least approved of offenders in Canada. These are sex offenders, and not just any sex offenders, but high-risk sex offenders of the nature that Mrs. Prober was referring to.

They provide a place in the community where offenders are held accountable for their past and for the risk they present to community. But they are also supported in that they are given the opportunity to change, to move forward, and to become contributing members of society so that there are no more victims and no more horrible stories, as we heard just a few weeks ago about that man who stole two children.

If that man had had a circle of support and accountability, that would not have happened. I can tell you that with some assurance. The success rate, as seen in the study done of the Toronto circles of support and accountability, indicates they are highly effective in stopping recidivism.

But in the government's eyes, and in the eyes of most academics, that would not be considered a restorative justice program, simply because it only deals with the offender and making sure they don't offend again.

● (1640)

**The Chair:** Thank you, Mr. Ménard.

Did you want to respond, Ms. Prober?

**Mrs. Rosalind Prober:** With regard to whether or not Mr. Whitmore would offend again, I mean, really; Whitmore is a hard-driven pedophile with a sexual interest in children. I just find it difficult for someone to come here—as much as I respect the view, especially around victims—and to judge someone like Whitmore, who in my view is a hard-wired pedophile who's going to sexually abuse children until you lock him up. He has proven that himself.

Whitmore is also highly manipulative. As you know, it started in Manitoba, where he literally conned a family out of their son. This is a highly skilled individual in terms of lifestyle. He was able to get jobs and to move across the country. He went out to Newfoundland and rented an apartment. He told the Newfoundlanders he was coming back with two boys. He rented a car out there, or bought one, left it there, and then came to Manitoba and started working. He in fact conned the father out of his son. The three of them—the son, the dad, and Whitmore—went off in a car. They were supposed to go camping or something. Then all of a sudden, after a week or so, the father was sent back to the city, at which point Whitmore then used this young boy to help kidnap another young boy.

Really, there are people in society who are hard-wired pedophiles. We have to accept that. In terms of conditional sentencing or anything to do with this kind of individual, this type of bill is just one little piece of what we have to do in Canada to protect children from sex offenders. I'm not saying this is the be-all and the end-all. This is just one little piece. But I don't want this committee to have any naivety at all about what a sex offender wants to do, will do, and too often does do in this society.

In terms of recidivism rates, there is a dark side to these statistics about recidivism rates: basically, children don't tell. Sexually abused kids are not the ones who are represented in these recidivism rates at all. So I also find it very difficult to hear that individuals are not sexually offending again. How do we know? You cannot rely on criminal justice statistics, absolutely not. If you're talking about the hard-core pedophiles—and not everybody who sexually abuses kids is a pedophile, for sure—some of those individuals have hundreds of victims.

In reality, then, although I respect that view, let's be real about sex offenders against children. And let's be real about the type of society we live in, which is highly sexualized. It presents children as available to be abused.

**The Chair:** Thank you, Ms. Prober.

Mr. Comartin.

**Mr. Joe Comartin (Windsor—Tecumseh, NDP):** Professor Paciocco, as I understand your position, you would not preclude the use of conditional sentences, as the bill contemplates, at all, for any offence. That's correct?

**Prof. David Paciocco:** Correct.

**Mr. Joe Comartin:** So when you hear of a fact situation like the Marasco case, and of the abuse he suffered, even that you would leave to the discretion of the judge.

**Prof. David Paciocco:** That would be one of the cases where there would be a presumption against a conditional sentence. There would need to be something particularly unusual about the background of the offender or the circumstances of the offence to make it appropriate to have the sentence served in the community. If that wasn't the case—if there were a presumption against it, and a conditional sentence was given—that case would be appealed and the appeal would be successful, just as it was in that particular circumstance.

The point is you cannot have hard and fast rules when it comes to sentencing without catching cases that shouldn't be caught. We should have enough confidence in judges, who are constrained by articulated principles that reflect the will of the people of Canada, to respect those principles. If we don't, we have a very serious problem.

If we start having listed offences saying, never for assault causing serious bodily harm, or never for this offence, or never for that offence, you're going to see a fairly extensive shopping list of offences, including sexual assault against children.

One of the cases I teach in my class involved sexual assault against children, but it occurred thirty years ago and involved fairly modest touching. I know that every sexual assault is significant, but it was not a case where there was anything productive to be gained by taking someone who was an active participant in the community, who engaged in charitable activities, who was a father of young children, and against whom no complaints had been made for thirty years. I do take the point that we don't know with absolute certainty whether that person offended again. But in all of those circumstances, it would not have been a productive response to put that person in jail for what in truth were long ago events.

That's why I think an absolute prohibition is a dangerous thing. There are circumstances behind all kinds of offences. We have a revulsion to impaired driving causing death, but there are circumstances with respect to that offence where a conditional sentence might be an appropriate response. Someone could kill a spouse or a brother in an impaired driving accident, and there may be absolutely no need to send any type of deterrent message to that person or the community because of the nature of the tragedy. If we dumb down the law of sentencing, we're going to incarcerate people unnecessarily, without the benefit of having the opportunity to try to do something productive when the opportunity is there.

● (1645)

**Mr. Joe Comartin:** Yes, Ms. Prober, I'm going to give you a chance.

I agree with you. Judge Nosanchuk, in that case where the death was caused by the close friend.... In fact, the parents supported the conditional sentence in that case. Again, you always have those kinds of circumstances.

Ms. Prober, if I understand you, you don't accept that. You say that absolutely there should be a prohibition against the use of conditional sentences where it's a sexual offence.

**Mrs. Rosalind Prober:** Yes, and I want to comment on historical victims, because that sort of touches me personally. The only reason why cases are historical is because of the damage done.

So although I agree with David on many of the things he's saying, and really with the other folks across the room, I don't think historical cases should get any sympathy. I don't think the court should look at the person doing charitable work, being a good guy, or having children, whatsoever. I think this should actually play against them, because that's the last type of person who should have been sexually involved with children.

It's sort of a reversal in the courts. You have these individuals come to the courtroom, and in my view the mitigating circumstances should really be the aggravating circumstances. That is, oh yes, you have a job, you have children; oh yes, you're a wonderful guy; oh, you do charity work; oh yes, and you're sexually abusing children—hello! That guy should get a larger sentence, and the person who for whatever reason gets involved in sexual activity with children and is marginalized, or whatever, should be looked upon with a lot more sympathy.

So there's an odd thing that goes on in the courtroom when you see...and you're hearing it just there. This is a nice person; therefore thirty years later we shouldn't incarcerate him. I totally disagree. Besides, for thirty years this person has known he was criminally involved with a child and hid it.

So I have very little sympathy for those individuals in historical cases.

**The Chair:** Mr. Comartin, please continue.

**Mr. Joe Comartin:** Let me just challenge you on that. You're making the assumption that every pedophile or act of sexual abuse... and equating that to pedophilia.

**Mrs. Rosalind Prober:** No, I'm not.

**Mr. Joe Comartin:** Let me finish, Ms. Prober. You heard the evidence that we took before the committee on Bill C-2 last time, from I think probably the three leading experts in the country. They made it quite clear that there were gradations. So taking the factual situation that the professor put before us, I think he was saying that sexual abuse occurred in that case thirty years before, it was discovered now...no other evidence of any other sexual abuse. Let me add another factor to that.

Assume that after that first incident there was treatment and the person responded to treatment, because, again, those experts told us that in the low-end cases treatment was in fact viable—not in the hard-wired cases, I'll accept that, but in the low-end cases. Given that factual situation—the treatment was given, the person did not reoffend in any way over the balance of that thirty-year period—would you still prohibit the use of conditional sentences?

● (1650)

**Mrs. Rosalind Prober:** Yes.

**Mr. Joe Comartin:** Would anybody from the rest of the panel like to comment?

**The Chair:** Very quickly, please.

**Ms. Lorraine Berzins:** Yes. I think there is a big difference between deterrence and denunciation, and I heard you mention both. Deterrence, we know, is simply not something that happens as a result of the application of the criminal law. We shouldn't even be talking about it anymore, but denunciation is very important, and I think that's what Mrs. Prober is talking about. And I think that has to happen in personally meaningful ways or in meaningful ways to a community.

So when you say there's an appetite out there to do something that will provide for denunciation, I think you have to remember that there's a large body of research on public perceptions of crime that show that Canadians, when they only read the headline in the newspaper, may be shocked at the lack of denunciation of a sentence. When they are given information that brings them closer to the reality of exactly what the circumstances are—and I do not mean empathy for the offender, necessarily, but what the victim is experiencing, what kinds of things are being done that make sense to the victim, that are a denunciation, that this is taken seriously and the needs are being taken seriously—Canadians want that. We know this.

So I think it's important that you be aware of that body of research and not assume that Canadians want just the simplistic answer that is not going to give them the real result we all want.

**The Chair:** Thank you.

If the committee would bear with me, I'd like to ask one question, given that it pertains to information I've accumulated over a long period of time as a police officer dealing with, in many cases, abuse, and even low sentences. I've seen communities outraged by the fact that a sexual predator in their midst who had actually babysat many a child in the community was given a conditional sentence. The reaction from the community was very substantial. There was no appeasing what had happened there because, as so often has been expressed here, predators don't just stop—they keep on going and they keep on going. However, that's one reaction from the community on a conditional sentence. I see it as absolutely astonishing that anyone would consider wanting to put an offender right back into the midst of those whom he has offended.

Secondly, I've talked to a number of victims—and as a police officer you usually end up doing so—who have been touched sexually, especially the youngsters, and sometimes this may be by prominent members in the community. We'll even pick on one of the clergy as an example, but it doesn't have to be. It could be a person who goes around raising charitable funds for organizations. This is just touching ever so slightly, sexually, with the intent of doing it sexually. Those victims come back and say afterward, you know, I felt like I should be more promiscuous. If it's a girl maybe 12, 13, or 14 years old, it would trigger something within them and they would actually become more promiscuous because of the involvement with these adults, as they manipulated them into the positions that they, the adults, chose to go. The girls in particular would end up being more promiscuous as a result of it, and even state that, because it was part of what was encompassing them at the time. They were very, very vulnerable to that type of response.

I'm curious about everyone sitting up front here who have had opportunities to talk to victims. How do you accept that as a way of dealing with offenders—putting them into conditional sentencing—when a community is outraged and the victims are actually impacted in a very negative way?

● (1655)

**Prof. David Paciocco:** I understand the point, Mr. Chair, and I wouldn't begin to denigrate the horrible impact that sexual offences can, and usually do, have on victims. The case I was positing involved a 21-year-old person at the time who committed the offence on boys who were 14 and 13 years old, and it was sexual touching, which no society in its right mind should tolerate. The question ultimately, though is, after the passage of all of that time, what type of reaction is the appropriate reaction, and what are we going to ultimately get out of doing it?

The point I made earlier is I don't think we can assume that if we abolish conditional sentencing for sexual assault, we're going to produce a deterrent effect. The question ultimately that has to be grappled with is whether we feel there are no circumstances under which offences falling in that or any of the other many categories that were listed would warrant a conditional sentence. You've picked one of the most reprehensible offences and one of the most offensible examples of why you wouldn't want conditional sentencing, but the bill that's currently being put forward by the government includes a whole range of offences that don't come close to sexual offence. As I say, it is a blunt tool, but even in the context of sexual offences, I would urge the government to bear in mind that while there are cases like that, where victim impact statements can put forward the context within which the offence occurred, and where presumption against a conditional sentence could provide courts with an opportunity to interfere in a case where the community would rightfully be outraged, let's not assume that there's only one appropriate response in every sentencing circumstance. That's the problem, in my respectful submission, with the bill. It is simply too generalized.

**The Chair:** Thank you.

Mr. Loewen.

**Mr. James Loewen:** Thank you.

That story you just told highlights very nicely what I thought the point of my presentation was, which was that with the way the current system operates—whether we're talking about conditional sentencing or any form of sentencing—both victims and community are largely voiceless. We have a community that has had no part in the process, except perhaps through the lawyers and judges who live in the community, in the outcome of that case, a case that directly affects them and that has impacted them as a community. Primarily, victims have not been sought out and respectfully communicated with. What that problem points out is that you come to the community with this solution to the problem of that horrible crime and they're not satisfied. Should we be surprised? It's because they had no part in the solution—nothing.

**The Chair:** Ms. Prober is next.

**Mrs. Rosalind Prober:** What can I say? I have been the wife of a criminal lawyer for many years. Some things have sunk in, and one of them is that it's a war zone; the court system is a war zone. It's win or lose. There are people leaving there with high-fives and there are people leaving there like they're the losers. I don't know; maybe David would like to comment on that. It's the reality of the system.

It's also a system that is absolutely gruelling on children. If you had to design a worse system than the adversarial system, I don't think you could—not for sexually abused children. No matter what you do—Bill C-2, which we supported, all the witness aids, and all of that—the thing is, it's still very gruelling.

I want to go back to that case in Saskatchewan. That started in 2001. That was when that young girl, age 12, ran away. That case goes on today. It's, what, coming into 2007? There were three men, right? That case was such a mess that the two last guys are just coming up for trial.

In actual fact, just to show how stacked against children the cards are, we made a complaint in 2001 to the judicial council about the fact that the accused were called “the boys”. They're all adult men; they were called “the boys” in this case. It's now 2006, and we still haven't had a response from the judicial council.

This is a very gruelling process on children. We are talking about people post-conviction. We're talking about these people once they have been found guilty and have come for sentencing. The biggest problem with sex offenders is that they have very, very strong denial processes. The reason they get into this crime in the first place is that all the enormous societal barriers that exist to tell you that you shouldn't get involved with sex with children have not sunk in to them. It's just not there, because they are thinking dysfunctionally. They are also victim-blaming, in many cases—so post-sentencing, I think these individuals should be held properly accountable.

● (1700)

**The Chair:** Thank you, Ms. Prober.

I know other offences besides the sexual offences are impacted by this bill. That is part of the discussion, and we could talk about that too.

Mr. Thompson, you have the floor.

**Mr. Myron Thompson (Wild Rose, CPC):** Thank you, Mr. Chair, and thank you all for your presentations here and your time today.

I want to say to Ms. Prober, from Beyond Borders, that in 1993, when I first came here, one of my main personal objectives was to do everything I could to get rid of this child pornography and other things that are destroying and hurting the lives of our kids. It has been a constant battle.

I'll be honest with you. For thirteen years I have not been able to understand why grown-up men and women, including judges in the courts who make certain decisions, cannot arrive at something that would really help in that area. But we always seem to run into this idea of having to be careful because it probably won't pass the charter test. In other words, the rights of some people are more important than the protection and the safety of our children. That's the way it has always come across. I don't know how we're ever going to defeat that, but that has to be done sometime in the future, because that is now a multi-billion-dollar industry. And what a shame that it has grown to that extent over these years.

So I really appreciate your work, and you keep it up. I want to state that right off the bat.

I want to say to the Church Council, I'm not sure how you arrive at your decisions and your recommendations regarding Bill C-9. I looked at the list of founding churches, and I happen to belong to one of them. I don't believe that the church I belong to, which is very huge in membership, would agree with anything you said today. I have received a lot of petitions over the years, particularly from certain church groups, that are pronouncing the very things that I think Bill C-9 is promoting. That's the part I want to get to.

When the Beyond Borders lady said you cannot rely on criminal justice statistics alone, I agree with that, but one statistic that you can rely on is the fact that, I know now, after a 2,500,000-person petition tabled in 1994, led by Priscilla de Villiers and a victim's group, and in addition, all the petitions that have been occurring over the last ten years...we're into several millions of petitions demanding that something be done with this justice system. That's from the people who pay for it, and they deserve to be safe under it.

So I'd like to know how you arrive at a decision when I really have a tough time understanding from this list that you have that much support from the group.

James, you're stressing the importance of a voice of the victims. I couldn't agree with you more. The victims are not involved in there enough.

I appreciated David's proposal, but I'll be honest with you. All the people in my riding who signed these petitions, and all that, really wouldn't quite understand where you're coming from. I would suggest that you wouldn't make a presentation like this in my riding, which is heavy cattle country, if you get my point.

**Prof. David Paciocco:** The cattle example may have been ill-chosen beyond the committee.

**Mr. Myron Thompson:** But I want to stress this: the thing that sparks this debate out there in this huge country to do something with the justice system is when things happen such as in one week, the one week I'll never forget, the one week that the perpetrator kidnapped, you may remember, Melanie Carpenter. The prison guards and the caseworkers phoned me and said he was going to be paroled; this man should never be out; why are they doing it? There was a big argument, but they let him out, and within a short time, Melanie Carpenter was found dead.

The same week, a poacher of an elk went to jail. In the same week, fourteen farmers went to jail for selling their own crops across the border without a permit. In the same week, a five-year-old girl was brutally attacked, her throat was cut, she was raped and was found in a garbage barrel, and it wasn't too long until that person was put on a conditional sentence for one of the worst, most heinous crimes.

Does that not draw a picture to any of you, or to all of you, as to why the public out there has been signing millions of petitions over the last few years? Something has to be done. And if you agree with that statement, then I hope you will understand that this government is determined that we're going to make some significant differences to try to improve the justice system, and Bill C-9, we believe, does.

Unfortunately, discretion of the judges is causing more grief. If you want to hear a comment after a judged case, the comment practically anywhere is “What in the world was that judge thinking of?” Maybe his decision was right and maybe it was wrong, but the people are not genuinely satisfied with leaving it in the hands of a judge. That's the impression I get.

So there are my words, and anything you want to say in regard to what I ask, I'd like you to respond.

● (1705)

**Prof. David Paciocco:** I can begin from this end of the table. I do apologize again for the cattle example. I'll take a closer look in future at who is on the committee.

**Mr. Myron Thompson:** I don't have any myself.

**Prof. David Paciocco:** I certainly understand the frustration that the Canadian public feels. I think we all have a responsibility to try to ensure that the criminal justice system reflects the kinds of values that the Canadian public adheres to, but I would endorse the observations that were made by the council with respect to sentencing decisions.

I've seen the studies in which you ask general questions to people on what they think about sentencing and they'll tell you it stinks. But if you give them the specific facts of situations and ask them for a range of appropriate sentences, they will typically pick a sentence very close to that which the judge gives.

I would urge this government to do what it can to try to make sure the criminal justice system is responsive to the needs of the people, but to be targeted in how it does it. To just get rid of conditional sentences for all offences listed that have maximum sentences over ten years, in my most respectful submission, is a very blunt way of just trying to show that you're going to get tough on crime. If you're going to accomplish something specific by doing that, if you're going to deter crime, if you're going to systematically produce good sentencing, then I'd be standing here saying, bravo, let's do it.

The problem is it's too generalized. You can't take discretion out of sentencing. If you're going to go that far, why don't we just list a specific sentence for every crime in the Criminal Code, a period of incarceration that has to be given for every single crime, and we'll just get rid of sentencing as a process and have an automatic outcome.

You've got to look at the context and you've got to look at the circumstance. Short of that, you're always going to have judicial discretion, and if you don't have it, you don't have judgment.

**The Chair:** I want to move the meeting along a little. I know there are other responses from witnesses to Mr. Thompson's comments, and I would like to get to them quickly, because there are other questions for some of the other witnesses.

Ms. Berzins, go ahead, please.

**Ms. Lorraine Berzins:** I think people in the churches we work with want solutions that really work. Every congregation in every church knows that it has, within its own midst, not just the people who are the victims but also the people who are the offenders, the families of both, and neighbours of both. The people who really know what's happening in a community are not satisfied with just a solution that sounds okay in the headline. When the court case is over and the headline is yesterday's news, people are still victims of crime and afraid of crime. There's a very important stake for the whole community to make sure the solutions we do get are solutions that work. The ones that are being proposed are not going to work.

**The Chair:** Thank you.

Mrs. Prober, go ahead, please.

**Mrs. Rosalind Prober:** I just want to put it on the record that Beyond Borders supports all the groups who are working with sex offenders. There are some wonderful community groups out there that work with sex offenders. I'm not taking away from what they do in any way.

**The Chair:** Thank you.

Mr. Loewen, go ahead, please.

**Mr. James Loewen:** It seems that if you're going to challenge anybody it would have been me, considering that Vic Toews is ostensibly from my faith tradition, the Mennonite faith tradition, and is responsible for this bill. Yet, here I am speaking against it.

What that shows you is the diversity that can occur within a particular faith tradition. I can say that I know hundreds of Mennonites who are putting their faith in action by volunteering in circles of support and accountability, by giving their lives to work with victims, to work with offenders, and who recognize the complexity of the issues in front of us. They have a wide range of ideas too. They would certainly expect this government to take the time to do the right thing given the evidence that is before you. That's all we can expect.

● (1710)

**Mr. Myron Thompson:** I didn't realize that connection between you and the minister, but I didn't get an answer. I was wondering, what group of people decide on the recommendations you've made on Bill C-9?

**Ms. Lorraine Berzins:** The church council has a board of directors that has representatives from each of the denominations that are officially designated by the denomination to work with us. We work as well with other people from those churches and from the community at large. We meet often to discern together.... On the basis of over 35 years of experience, we know the criminal justice system and we know of the work being done by a lot of people, like the Mennonites and many of our churches in the community. Our concern is what people are experiencing in the community, how life can go on, how a community can truly be a community where people can recover from what has happened and make sure it doesn't happen again. We take that very seriously.

What more do you want to know?

**Mr. Myron Thompson:** I just wanted to know the size of your board that would sit down and make the decision on Bill C-9. I expect it's a handful of people, representatives of these—

**Ms. Lorraine Berzins:** Well, there's been a process of consultation. There are ten directors on the board. There's also a larger membership, and we've been working closely with a volunteer committee of people from our board and outside our board, but affiliated with churches, to try to discern what the right direction is.

**Mr. Myron Thompson:** Thank you.

**The Chair:** Mr. Murphy.

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

I'll be fairly brief. I want to apologize for missing part of the hearing. Mr. Moore and I were in the House, disagreeing on things.

I want to thank you for what I've heard. I'll ask some fairly short questions.

At the risk of agreeing with Mr. Thompson, I have a hard time understanding that the church—the one I belong to anyway, the Catholic church, probably doesn't get out of the foxhole of morality too often into the secular world, unless it's perhaps for gay marriage issues. But I don't think I could say that this is the position of the Catholic church, could I? I think what you're saying—correct me if I'm wrong—is that the churches that are listed are saying that they're for the concepts of restorative justice, that they're for the concepts of forgiveness and rehabilitation. I'm sure that's where they are, but you can correct me if I'm wrong.

Does the Catholic church support Bill C-9? I don't know if they've made a position known on this. I'd like to know, because sometimes—

**Ms. Lorraine Berzins:** The Canadian Conference of Catholic Bishops was a co-founder of the Church Council on Justice and Corrections over 35 years ago, and they continue to support us a great deal. They count on us to help them do the analysis required around criminal justice issues. And they definitely have been in support of the positions we've taken in the past. There is a regular feedback loop to discern with them and have them come to our meetings and talk with us about these issues.

**Mr. Brian Murphy:** All I'm saying, again, is that it might be helpful if we thought—and I don't think Mr. Thompson and I in any way agree. If we do agree, I don't think we think this is necessarily the position of all the churches listed. If there's some supplementary information you have, and you get a big imprimatur from a bishop, it might have some influence. But I'm only saying I appreciate your comments.

I really do want to get to the professor here on the Criminal Code.

I read your paper, and I'm trying to understand what the cure is. The cure seems to be some simple amendments to the sentencing parts of the Criminal Code, as directions to judges. Notwithstanding your good words about their use of discretion and notwithstanding your preamble that says it's pretty much working, you're kind of saying in the back end of it that we should give judges direction that on certain offences there's a presumption that they are not to use a conditional sentence. And there's a prerequisite, or a priority triage, where these crimes are set out. How easy do you think it would be in that first step—I guess I said "last"—the prioritization of offences?

You mention sexual assault and offences causing serious bodily harm as two examples. Joking aside about fishing trawlers and cattle, we've had a lot of discussion here about how a home invasion might be something that forever frightens a person from being part of...and so on. That's my question.

It sounds very simple when you say it, when you write it, but how much better would it be than the old hodge-podge, 150-year-old Criminal Code solution that we have now? How much easier would it be?

● (1715)

**Prof. David Paciocco:** It's certainly better than taking the antiquated historical list of ten-year maxima from the code and simply using that. What it does is it requires a contextual evaluation to be made in each case, and it would be consistent with discretion, but constrained discretion, to use presumptions. That's really how the criminal justice system operates. There are times when we don't know the right answer or the wrong answer to questions, and the real issue is on which side do you want to err? Who has the burden of proof?

If you put the burden of proof on the accused to demonstrate that there's something exceptional in the circumstances to justify conditional sentencing, then in your typical case you're not going to have it. But if you remove the discretion entirely from judges—and I don't know whether that's what you're proposing or not, Mr. Murphy—then you end up with the situation where you have the absolutely same result in cases that are completely different and where it's simply not a good fit.

I'm not suggesting that what I'm putting forward is a magic bullet. What I am suggesting is if you really do feel there's a problem with conditional sentences being used in cases that are too serious, the way to deal with that is to identify principles that should animate judges in determining the appropriate sentence.

**Mr. Brian Murphy:** Okay, but in all sexual assault cases you would have a presumption against conditional sentences?

**Prof. David Paciocco:** In all sexual assault cases I'd have a presumption against conditional sentences. If the defence lawyer can demonstrate on the circumstances of that particular case why the offender can remain in the community, and still produce an appropriate sentence, then it's an appropriate outcome in the case.

The reason a presumption is important is if a judge ends up giving a conditional sentence where it's not fit, the Crown can go to the Court of Appeal and have a good basis for appeal, because the principles of sentencing have not been respected. Absent those kinds of directions, you have tremendous sentencing discretion, and courts of appeal don't like to interfere with judges' sentencing. But if you have the principles codified, then the Court of Appeal will have a foundation for interfering with inappropriate sentences.

**The Chair:** Thank you.

Mr. Lemay.

[*Translation*]

**Mr. Marc Lemay (Abitibi—Témiscamingue, BQ):** I found it interesting listening to what Professor Paciocco said. I agree with you, there is a fundamental principle. I have 25 years' experience in criminal law, and unfortunately for you, I was a defence lawyer. I did not work for the Crown, but I am able to understand the Conservative Party's position that justice is very often done only as far as the accused is concerned. Unfortunately, that is the way the Criminal Code was made.

I find this interesting because conditional sentencing is a very important issue. Surely you will agree with me that one of the fundamental principles is individualized sentencing, i.e., the individual to be sentenced by the court is a unique person and the sentence has to be determined based on the individual who is before the court. We agree on that principle. That is one of the main principles, and your brief does not question that.

However, I have a bit of difficulty understanding your text, but I really want to understand it, because it comes back to what was being said around the table today more or less. On page 10 of the French version, you talk about amending the Criminal Code. My colleague, the learned Réal Ménard, whom we hope to see called to the *Barreau du Québec* soon, says we should amend section 742 of the Criminal Code. I agree with you. I am trying to understand two paragraphs, but despite my 20 years of experience, roughly, I do not understand them.

Could you explain them to me? If I understand correctly, there would be conditions on the use of conditional sentencing in the Criminal Code, in section 742. I would like to understand what you are saying in the two paragraphs on the priorities and principles that you would like to see included in the Criminal Code to limit conditional sentencing. You have my full attention.

● (1720)

[*English*]

**Prof. David Paciocco:** If you look at section 742.1 you will see a number of preconditions listed providing for conditional sentences. What I am recommending is that there be an additional condition inserted in section 742.1 that makes it clear that the conditional sentence is a response to sentences where the priority is to be on rehabilitation or restorative justice, so that the judge should not impose a conditional sentence in a case where priority should be given to denunciation or deterrence.

So whenever a judge sets out to sentence an offender, the judge should decide what the goals of sentence are in that particular case and what the priorities are. If the circumstances are serious enough that denunciation and deterrence are required, even at the expense perhaps of engaging in a rehabilitative sentence, then a conditional sentence would not be appropriate.

[*Translation*]

**Mr. Marc Lemay:** Sorry to interrupt, but am I to take it that the court must first consider the crime and whether the individual before it is eligible for a conditional sentence? Initially, it is about a sentence of imprisonment, an individual who deserves a sentence of imprisonment.

Then, consideration is given to the conditional sentencing option. You would add a prerequisite to that. Sexual assault cases were mentioned, and you gave a very good example, impaired driving causing bodily harm, which would warrant a sentence of imprisonment.

Is conditional sentencing applicable in that case? If I understand correctly, your answer is yes, but there would be those two prerequisites.

[*English*]

**Prof. David Paciocco:** If it's a listed offence, if a serious injury occurs from the impaired driving, you would start, as a judge, from the assumption that a conditional sentence is not appropriate. You would look at the specific circumstances of the offender and the way the offence happened. If there were special circumstances in that case, and if the offender would not pose a danger to the community, you could, in your discretion, exercise a conditional sentence.

**The Chair:** Thank you.

Mr. Lemay.

[*Translation*]

**Mr. Marc Lemay:** I would like to ask one last question. There would then be a reverse onus of proof, if I understand correctly.

[*English*]

**Prof. David Paciocco:** The accused would have to establish that that is the appropriate sentence.

[*Translation*]

**Mr. Marc Lemay:** That is clear. Thank you.

[*English*]

**The Chair:** Thank you.

Mr. Petit.

[*Translation*]

**Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC):** My question is for Ms. Lorraine Berzins and Ms. Jane Griffiths, representing the Church Council on Justice and Corrections. First of all, I am surprised by the fact that the Roman Catholic denomination, which is a member of your council, has changed certain things. Like Myron, I am somewhat troubled. So I am going to ask you some questions.

My question is for both of you, so you can decide who answers. Currently, in the Montreal area, street gangs use young men to recruit young women. The young women are attracted by drugs, and using drugs is a non-violent crime, on the face of it. They then attract young men, who begin committing robbery at age 12 or 13. They put weapons into their hands and they continue. Subsequently, they infiltrate a certain social setting and resort to domestic violence. Gang rape occurs within these groups. Because of all of that, the justice system cannot provide us with the picture of safety that it should.

I am not even talking about sexual assault. I mentioned robbery and armed robbery, for example. Stealing $1,000 from a poor person is equivalent to stealing a million dollars from a rich person. It is also terrifying when someone breaks into the home of people over 65 who are alone. They just open the door, and the senior is frightened. Imagine! I do not understand your apparent desire to maintain conditional sentencing. I understand your position, but conditional sentencing has been around for a long time and those are the results.

I am going to tell you a quick story. An individual was under house arrest for one year. The first third of the sentence was 24 hours a day, with permission to go shopping, etc. The second third was from a certain time to another time, and in the last third, there was no curfew. This individual was a drug trafficker, but with no previous record. This individual was living in a $500,000 house. The sentence was house arrest, in a $500,000 house with T.V., pool, servants, meals, etc.

Do you think that this kind of sentence is a deterrent? Do not think that it does not happen. It happens more often than you think. It is not just poor people who get house arrest, there are a lot of rich people too. Do you think that this kind of sentence deters people or inspires confidence in the justice system?

● (1725)

**Ms. Lorraine Berzins:** Maybe not in a situation like the one you describe. We want it to still be an option, but that does not mean we recommend that it always be done. Currently, each situation can be assessed individually. To us, that is a very important value. I think that the Catholic Church of Quebec is particularly sensitive to this phenomenon. There is a highly developed social conscience among our Christian communities in Quebec.

The importance people place on the primacy of the human being is something we value highly. We hope the decisions the government makes are made humanely by human beings equipped with all of the information about the situation. Community values and the ability to judge what is truly the right option and the right result, taking into account in particular the situation of the individual accused and of the victims, are very important. What is going to make sense? To us, the community has to deal with a number of these problems. People have to solve the problems among themselves. What the government does can greatly assist us in having tools for the job. We are opposed to having a general law that prevents us from acting according to our human conscience in certain situations, because the law requires it. We do not find that to be humane. Just because we want the option always to be there does not mean that in every situation you describe, a conditional sentence would be recommended.

[*English*]

**The Chair:** Thanks very much.

Would the committee be willing to stay for an additional eight minutes? I know there are two or three questions. And I would ask the witnesses if you would you be willing to stay for another eight minutes. I really appreciate that.

Thank you, Mr. Petit.

Mr. Moore has not had a chance to speak yet, but I know Ms. Barnes has one question that she wants to put to the witnesses.

Go ahead, Mr. Moore. Ms. Barnes is going to wait.

● (1730)

**Hon. Sue Barnes:** Well, I just have the one question, but I can wait until he's finished.

**Mr. Rob Moore (Fundy Royal, CPC):** Go ahead.

**Hon. Sue Barnes:** All right, then. Mine's simple.

In the previous Bill C-70, the drug sections of the controlled drugs and hazardous products were not included. I won't go over the reasons, but I just want to get your input. I know, Ms. Prober, that you're only concerned about the sexual thing, so maybe I'll leave you out of this for the sake of time. But I'd just like to go across.

Would you think that we should be removing this from any of the schedules respecting drug use? Should we take away conditional sentencing from any of them, from the least serious to the most, right across the board?

**Prof. David Paciocco:** Well, you know my position is that we shouldn't take away conditional sentencing, absolutely, for any sentences, bearing in mind that when a judge imposes a conditional sentence, the judge has to decide that an appropriate punishment is less than two years in prison. If it's a case that requires more than two years in prison, the judge does not have the option of a conditional sentence under the current legislation. That allows the judge to evaluate the significance of the particular offence.

Our approach has to be the same with respect to drugs, in my respectful submission, as it is for other offences. Leave them on the table and let the circumstances determine it, and if you do feel the need to put a presumption against a conditional sentence for some types of offences, then do that, as opposed to simply removing it completely.

But I would just note, in passing, that we're seeing drug courts developed in places like Ottawa now, and Toronto, that attempt to deal with these types of crimes committed by individuals who are seriously addicted by getting at the roots of the addiction. I know we want to have denunciation. But do you want to do it at the cost of removing that option where it's appropriate?

**The Chair:** Go ahead, Mr. Moore.

**Mr. Rob Moore:** Okay, thank you. Oh, I'm sorry.

**Hon. Sue Barnes:** We're supposed to go across to Ms. Griffiths and Ms. Berzins. Ms. Prober didn't need to because she's not concerned about those sections. Can they answer just very quickly, please? I just want it for the record so we can refer to it.

**Mrs. Jane Griffiths:** Yes, I was just thinking that we've actually had a lot of cases in the Ottawa courthouse involving drug addiction and thefts, and that kind of thing, and using restorative justice principles in trying to get at the roots of problems. And in cases where people are willing to take responsibility, we have had a lot of success around drug problems with both offenders and victims. Putting someone in prison would not have resolved any of those issues.

**Ms. Lorraine Berzins:** I don't think the possibility of conditional sentencing should be removed for any offence.

**Mr. James Loewen:** I would second that and add the fact that it's conditional only to those two years or less. I would say we need to allow more room to broaden the use of and even remove that restriction, because it's artificial in many ways, just as other restrictions have been. Let's let judges and communities make these decisions, because we can't decide for an offender what's what; we have to let them decide.

**The Chair:** Mr. Moore.

**Mr. Rob Moore:** Thank you to all the witnesses for your input.

I have a couple of points. We've heard other testimony that when conditional sentencing was introduced—I've heard from some of the witnesses, and you're certainly entitled to your opinion, that the option of conditional sentences should never be taken away. Not too long ago there were no conditional sentences for anything. When they were introduced, the public was told in the debates at the time that conditional sentences would only be used for the least serious offences. This bill still leaves conditional sentences in place for the least serious offences.

I wouldn't want people to be misled. What we've introduced here, even for offences that have a ten-year maximum, where there is the option of proceeding by way of summary conviction or by indictment—what's called a hybrid offence—conditional sentences are still available. On the lower end of the scale, at the discretion of the crown prosecutor, they say, “We'll proceed by summary conviction. A conditional sentence is still available.” That has led people to believe this bill wipes out conditional sentences altogether.

I was interested that the Church Council on Justice and Corrections mentioned deterrence shouldn't even be a factor. Deterrence is one of the principles we use in sentencing, and you're entitled to believe it shouldn't be a factor, but that comment struck a chord with me.

Ms. Prober, since you were left out of the last one, I'll let you comment on this one. In my view, when you see, for example, sexual offenders or someone who is a repeat offender get back out on the street—or if we don't want to use the example of sexual offences, then use property crimes. I've heard a lot of people say this is too broad and includes too many offences. Look at the ones where you can proceed by summary conviction and the conditional sentence is still available. Which of these would a person pull out? We've all had a few laughs about cattle theft, but I would submit that someone who's been a victim of cattle theft or any one of these offences, including property offences, to them that was serious, and they want a message sent. They want their piece of justice and to feel justice was served.

Ms. Prober—and anyone else can comment—on deterrence, are we to believe the possibility of serving time in a penitentiary versus being out on house arrest is of no use whatsoever? Further, what about the benefit to society when someone who hasn't learned a lesson from past run-ins with the law is in jail and is not out on the streets committing either property offences or offences against children, or any other type of offence?

Does anyone have any comment on that?

● (1735)

**Prof. David Paciocco:** I don't take the view that deterrence should never be considered, because our courts have told us that for some offences it is a primary goal of sentencing and it is a reality of our criminal justice system.

The key message is you cannot expect to affect crime rates by making changes in the sentences for offences that are already carrying serious penalties. In other words, people don't commit offences because they think they might get a conditional sentence. I am just submitting to you that it would be unrealistic for you to think that if Bill C-9 passes, you're going to have a safer society, because you are not—not based on deterrence thinking.

**Mr. Rob Moore:** I would take issue with that somewhat. My feeling is that if people are in jail rather than in their homes—maybe they were arrested for selling drugs out of their homes. If they're in jail instead of in their homes—maybe they were arrested and convicted for an offence against children or for a sexual offence. Instead of being back in the neighbourhood where they committed the offence, if they're in prison, I would say we have a safer society.

But I will take issue with the statement that it is evident that the ambition behind Bill C-9 is to increase the use of actual incarceration. I think the goal for all of us here is to try to find a way where we don't put more people in jail. I don't think it's anyone's goal to throw everyone in jail.

The goal is to create a safer society and to restore balance to our justice system. The overwhelming message we've been getting is that victims feel they're left out in the cold and that people are tired of a revolving door to the justice system.

I want to put those two points on the record. Certainly, our goal is not to cram the jails full of people. It's to restore a sense of balance to the system.

You're all welcome to comment.

**Mrs. Jane Griffiths:** I have a personal comment. When you're talking about theft, in our own household we've had nine thefts of our car. On one occasion, the two young men who had stolen the car were actually apprehended and charged. We were never even notified that it had in fact happened and they had come to court.

What would have satisfied me as the victim in that case was not that these people would go to jail, but that somehow they would be called to account for their crimes and we would have had some kind of opportunity to speak with them.

Often what we're saying is there are ways of addressing these issues other than prison.

● (1740)

**Ms. Lorraine Berzins:** I'd like to clarify what I meant when I said deterrence should not be a consideration.

Of course, the desire to deter crime is a desire that we all share, and I share it too, but we have a very big body of evidence and research that shows a jail sentence is not what does it. It's such a solid body of research that it's really hard not to pay attention to it.

Deterrence is still a legal fiction. It's still in the Criminal Code, but it's a legal fiction. For people in the community who have to live with the consequences, we want solutions that will truly reduce crime.

Even when you say that when an offender is in jail, at least it prevents something from happening during that time, in fact, the statistics don't show that. The crime rate continues outside in the community because of all the other factors and conditions. Increasing incarceration does not reduce the crime rate out there in the community.

This is not theory I'm giving you; it is factual research evidence.

**Mr. Rob Moore:** I would certainly take issue with the statement that deterrence is a legal fiction. Deterrence is one of the fundamental principles that we use in sentencing.

Even through anecdotes, oftentimes with young offenders, someone will say to go ahead and do it because nothing will happen if you get caught. Implicit in the message of "nothing will happen if you get caught" is that if something were to happen if you got caught, you might be less likely to do it. There's a reason why an older person grooming someone to commit a crime says not to worry because nothing will happen if you get caught.

**Ms. Lorraine Berzins:** In fact, the research shows that greater certainty of getting caught acts as a deterrent, not the sentence that comes afterwards.

What also acts as a strong deterrent is the compelling moral influence of people who mean something to the offender. Disapproval and denunciation, coming in a personally meaningful way from the community, the family, and the victim, make sense.

But all the research says the arbitrary use of a jail sentence to send a message out there does not make any difference. It makes it worse.

**The Chair:** Ms. Prober.

**Mrs. Rosalind Prober:** There doesn't seem to be any solid evidence about how we stop people from having sex with children, whether in Canada, or whether they take off for...wherever. I don't want to say Thailand, because everyone says Thailand, and Thailand has done a good job of trying to protect their children. It's a nice place to go, and journalists go there, have a nice holiday, and always write about Thailand. But Thailand is a country that, although they've ignored adult issues, has done a good job of protecting children from sexual abusers.

Unfortunately, there just doesn't seem to be any way, in this hyper-sexualized society we live in, where.... Even I myself, going to a movie last night.... I'm very sorry I went to see the movie I went to, because the children in it were sexualized.

Somehow we have to denounce this crime. We have to stop people.... In an era where the technology allows them to be aroused by pornography and child pornography just at the touch of a mouse, we have to somehow send the message to people that we are not going to absolutely in any way do anything but denounce this crime. It has to end, it has to be denounced, and I think we shouldn't be hesitant in allowing the justice system to do that in any way. Otherwise, a lot of children are being failed in society.

**The Chair:** Thank you, Ms. Prober.

Are there any other questions from the members?

I would like to thank you very much for your appearance here and your presentation. This has added a substantial amount of information for us to examine, and I look forward to seeing what the results are overall. The debate we've had here this afternoon is going to contribute a great deal to Bill C-9.

Remember, you're still just a small part of the overall number of witnesses we have appearing. I want to thank you for staying as late as you have, and also the committee members. Thank you.

The meeting is adjourned.

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