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Chair

Mr. Art Hanger

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● (1620)

[*English*]

The Chair (Mr. Art Hanger (Calgary Northeast, CPC)): I'd like to call the Standing Committee on Justice and Human Rights to order. It is Monday, October 16, 2006.

Here are the orders of the day: pursuant to the order of reference of Tuesday, June 6, 2006, Bill C-9, An Act to amend the Criminal Code (conditional sentence of imprisonment).

Appearing before the committee are a number of witnesses. I'll just refer to the organizations they represent: the Probation Officers Association of Ontario; the Canadian Council of Criminal Defence Lawyers; the Native Women's Association of Canada; and the Canadian Association of Elizabeth Fry Societies. We also have one individual, Mr. Julian Roberts.

First of all, I want to apologize to the witnesses sitting before us. We had some committee business that we had to contend with, and unfortunately it ran a little longer than anticipated. I know you were inconvenienced by having to stand out in the hallway. I apologize. The committee apologizes to you.

I would ask that we now proceed according to the order that appears on the orders of the day. The Probation Officers Association of Ontario can begin.

Mr. Donald Larman (President, Probation Officers Association of Ontario): Thank you, Mr. Chair.

My name is Don Larman, and I'm the president of the Probation Officers Association of Ontario. With me today is Ms. Cathy Hutchison, past president of the association.

The Probation Officers Association of Ontario is a not-for-profit organization representing the professional interests of the probation and parole officers in Ontario since 1952. In addition to many other functions, POAO provides policy and legislative positions on relevant criminal justice topics and is separate from the bargaining agent.

We thank you for the invitation to share the perspectives of those working on the front lines in the supervision of offenders.

The POAO supports the appropriate use of community supervision in the rehabilitation of offenders and protection of communities. The mandate of the probation officer is to protect society from offender recidivism through assessment, supervision, and enforcement. In Ontario, officers supervise approximately 53,000 offenders on probation and approximately 5,000 on conditional sentences each year. In light of the varying circumstances of each offender and each offence and the amount of information we have pertaining to the cases, we fully understand and appreciate the concept of individualized sentencing; that is, this offender, this offence.

When conditional sentencing was introduced in 1996, we understood the intent, as did all others who heard the messages about its purpose. The language in section 742.1 indicating that conditional sentencing was to be used in accordance with the sentencing principles, and in cases where the offender serving the sentence in the community would not endanger the safety of the community, certainly served to emphasize this point.

The reason for our testimony today, and undoubtedly the reason for attempts to amend conditional sentencing legislation, is the great concern surrounding the fact that in some cases very serious offences are resulting in conditional sentences. The traditional system of judicial discretion has been questioned by many as the conflict between the original description of this regime and the reality of its use is apparent.

While some may say that it's easy to criticize decisions made by judges who are not able to speak out in defence, we are not here with the purpose of criticizing. Perhaps, as suggested previously, the principles with regard to use of this sentencing regime are too broad, and perhaps the results of case law such as Proulx have given such direction. Regardless of the reason, our association has spoken out for many years on the inappropriate use of conditional sentencing in the cases of the most serious offences.

While there are other issues of concern, such as enforcement, resourcing, and monitoring, we are speaking today about the issue of appropriate offenders and offences for conditional sentencing. For the reasons already stated, we are in support of Bill C-9, which, although not perfect, as some have pointed out, certainly makes an attempt to address the grave concerns regarding which offenders should be eligible for this option. Examples of these, such as causing the death of a child, serious violent and sexual offences against children, driving offences resulting in death, manslaughter, and others, are certainly not the ones that we or the public ever imagined would be used for this house arrest sentence.

In cases involving serious violent and sexual offences, as well as those resulting in loss of life, it is our submission that the principle of proportionality is not met by using this imprisonment in the community. How is it proportionate that the offender in such cases does not serve one day in jail for their actions, and how does this meet the sentencing principles of denouncing unlawful conduct, deterring the offender and others, separating offenders from society where necessary, and promoting a sense of responsibility in offenders? It seems that in such cases the only principles being prioritized are rehabilitation and the principle of using the least intrusive measure. In such cases, we do not believe that the gravity of the offence is acknowledged sufficiently by a jail-at-home sentence. In addition, we submit that more attention needs to be given to the suitability of offenders for this sentence, particularly their history of opportunities for community supervision and compliance with these.

Such information can be conveyed to the sentencing judge through a pre-sentence report, and we submit that this information should be requested with greater frequency if a conditional sentence is being considered.

A professor who testified to this body a few weeks ago made a point with which we concur. He stated:

> 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.

He went on to say "In my respectful submission, this inflates the impact of a conditional sentence."

We agree with the statements of this professor, who noted that conditional sentencing is an appropriate response "where the offence is not so serious that permitting the offender to remain in the community provides an unjust response to the offence", and further, "will not pose an appreciable risk to the community". Finally, he noted that conditional sentencing is appropriate "where priority should be given to rehabilitation or restorative justice".

Cathy.

● (1625)

Ms. Catherine Hutchison (Past President, Probation Officers Association of Ontario): I'm just going to continue from there.

The reality that we have come to speak about today is that a conditional sentence is not a term of imprisonment; it's in fact closer to a term of probation than to incarceration. It is a community-based sanction that can be used appropriately for certain offences.

The aspect of this sentencing regime that we have noticed disturbs many is the lack of honesty around the description of the sentence. In fact, offenders serving this sentence are not in jail. They live at home; they go to work, school, and appointments and shop for necessities; they attend religious places of worship and have other types of outings. Many such offenders have the house arrest condition or curfews, except for these defined purposes. However, for many offenders, the exception to house arrests are quite numerous. Aside from the house arrest or curfew conditions that may appear, many of the offenders have conditions that would also commonly be found on probation orders.

To state that these offenders are in jail in the community is misleading, in our submission. The main difference from probation in the offender's eyes, where there is no house arrest on the order, would be the enforcement mechanism. Where there is a house arrest condition on the order, the primary difference is the removal of spontaneity in the offender's life, in terms of the ability to plan outings—and obviously they have travel restrictions—and there's a lack of ability to attend non-essential outings, such as for strictly recreational or entertainment purposes.

While we acknowledge and appreciate that some offenders are most diligent in adhering to the terms of their order and are working towards rehabilitation, we also acknowledge that many aspects of the sanction depend upon an honour system. When the offender is at home serving his or her jail sentence, he or she may enjoy the freedoms that the rest of society enjoys, including having friends over, having parties, watching television, using the Internet, having unlimited telephone use, enjoying time with their families, etc. This is not jail, and calling it such is undoubtedly one of the contributors to the erosion of public confidence in the justice system. Further, for victims who may feel threatened by the presence of the offender in the community, advising them that the offender is in jail, and yet at home, may not address their fears or needs for safety.

To indicate that such a sentence has a great deterrent value for serious offences and offenders is not accurate, in our opinion, and continues to ignore the many resources and bodies of research revealing that the public, front-line professionals and the victims are not supportive of community-based sentencing for very serious crimes of violence. Professor Roberts is here today, so I don't need to go into much of the research, but to ignore these bodies of research and the Department of Justice's own fact sheets is to ignore those who are key constituents in the justice system.

Aside from these issues, we've also observed the comments made during some of these hearings that jail does not serve as a deterrent. While some of the most recidivist offenders may not respond to any sanction or attempt at rehabilitation, there are some for whom jail is a deterrent. If jail did not have any deterrent capacity, then why are offenders, for example, cautioned that non-compliance with various types of sentences will result in a jail term? If no deterrence existed, why do we not have line-ups of offenders at our doors to tell us of all the undetected offences and breaches they have committed? The reality is that conditional sentences carry less deterrence than true incarceration, and this further explains the frequency with which offenders will plead guilty in exchange for this opportunity to be in jail at home.

In addition to these issues around the transparency of the description of the sentence, there are issues frequently mentioned and questions raised, including the level of monitoring, resourcing, and enforcement of conditional sentence orders. We do have comments on each of these, if time permits, but we may have to leave those for later.

We are relieved that the very frequent practice we were seeing of using conditional sentencing in child sexual offences, both child pornography and contact offences, will diminish somewhat due to the passage of Bill C-9. The concerns we would still have related to this bill is that some of the hybrid offences that could have child victims, such as sexual assault or assault causing bodily harm, could still result in a conditional sentence. So without an amendment to this bill, we would hope that the sentencing principle related to abuse of children would be closely adhered to, and we would hope those offences wouldn't result in a conditional sentence.

For those who are concerned that the passage of Bill C-9 would result in excessive sentences of incarceration, a lack of community supervision, and/or a lack of restorative justice opportunities, we do have some comments of relevance or points to remember. We probably don't have much time to get into them here, but there are, as people know, the aggravating and mitigating factors remaining, and judicial discretion to determine the sentence would remain, so we would still be going from the range of a suspended sentence plus probation, up to, obviously, incarceration.

● (1630)

It's been recognized that in many conditional sentences the term is longer than the period of incarceration would have been. Also, taking into account that offenders serve only two-thirds of the sentence in jail, the term of actual incarceration would be less than the conditional sentence.

The reality is that if the circumstances of the offence and the offender were so compelling as to warrant a more lenient sentence, this would be the situation as it stands now. We note that some offenders wouldn't go into custody at all. They would get straight probation.

Note, too, that some of these offenders, first offenders with one of the potentially excluded offences, would be eligible for Ontario parole. The rates of provincial parole in Ontario fell from about 59% in 1993-94 to about 22% in 2003-04. One of the significant contributing factors was conditional sentencing. Some of these offenders will in fact be suitable. In such cases, if they were given a term of incarceration, they might become eligible for parole at one-third and then go on probation. So there was still adequate opportunity for community supervision of these offenders.

The Chair: Thank you. I know your presentation is somewhat longer and your information is valuable, but we have to hear from some other witnesses.

I want to ask one question for clarification. You represent the Probation Officers Association of Ontario. You have an arrangement with the federal government. Do you monitor conditionally sentenced individuals?

Ms. Catherine Hutchison: Yes, probation officers are the conditional sentence supervisors.

The Chair: Does that apply to all probation officers in every province?

Ms. Catherine Hutchison: Yes, as far as we know.

The Chair: So it's not any special kind of arrangement then. You monitor them according to the conditions laid out.

Ms. Catherine Hutchison: Yes.

The Chair: I'm going to have to adjust the schedule slightly. I'm advised that one of the presenters has a commitment. So I'm going to turn to Jolene Saulis of the Native Women's Association of Canada.

Ms. Jolene Saulis (Team Lead, Policy and Research, Native Women's Association of Canada): I'm from the Native Women's Association of Canada in Ottawa.

The proposed change in conditional sentences undermines the fundamental principles of sentencing, which emphasize elements of restorative justice. This is especially true for aboriginal populations, for whom restorative justice is rooted in a healing world view.

Aboriginal women, children, and families understand fear. But to see a fear-based approach to changing legislation and to blame it on conditional sentencing seems a regressive measure. The following quote from a parliamentary publication indicates such a fear-based rationale:

> The fear is that to refuse to incarcerate an offender can bring the entire conditional sentence regime, and hence the criminal justice system, into disrepute. In other words, it is not—

[*Translation*]

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): With all due respect, we are going to have to call upon the translation service, because you did not submit...

Ms. Jolene SaulisOh, pardon me, I am speaking too fast......

Mr. Marc Lemay No, the same comment can be made for everyone. I am going to say this once and for all. Since you did not submit your document in both languages, our poor interpreters cannot keep up with you. Therefore, if they are unable to interpret what you have to say, we will be unable to take notes and have interesting and intelligent questions to ask you.

I would suggest that you speak slowly. If necessary, opposition members will ask fewer questions. I see that Mr. Petit agrees with me and that he is also willing to ask fewer questions.

Thank you.

[*English*]

The Chair: Thank you, Mr. Lemay.

Ms. Saulis, please continue.

Ms. Jolene Saulis: Okay, I'll slow down.

> In other words, it is not the existence of conditional sentences that is problematic, but, rather, their use in cases that seem clearly to call for incarceration.

We would not like to see a fear-based response to crime that would eventually hurt especially vulnerable populations, such as aboriginal women and youth.

Aboriginal women are often convicted of crimes that are related to poverty and crimes that are related to their own victimization. Many of these crimes are currently eligible for conditional sentencing under sections 742.1 to 742.7 of the Criminal Code. More emphasis should be placed upon providing the resources necessary to ensure the safety of aboriginal women and their children within their homes and communities and within society in general. Initiatives are also needed to improve the standard of living conditions for aboriginal women and their children. Without first resolving these issues, Bill C-9 will further compound the issue of overrepresentation of aboriginal women in the prison system.

Aboriginal women play an integral role within our communities. They are the givers of life and are central to aboriginal traditions, government, community, and our ceremonies. They are responsible for maintaining a collective efficacy of our communities. Given that Bill C-9 will result in an increase in the incarceration of aboriginal women, it is predictable that these communities will suffer culturally as collective efficacy diminishes.

It is clear from the Minister of Justice for Saskatchewan that the concerns of compounding the problem of overrepresenting aboriginal populations in jails and prisons is a factor to be considered in this legislation. Mr. Frank Quennell, Minister of Justice for Saskatchewan, has said many times that measures that limit conditional sentences could put at risk the province's unique justice programs aimed at its large aboriginal population. Aboriginal people now make up one in five admissions to the Canadian Correctional Service system, while they represent only 3% of the general population. The justice minister from Saskatchewan stated that Saskatchewan has the highest percentage of aboriginal residents in the whole country, and it has had some success in encouraging the use of penalties focused on native traditions, known as restorative justice, rather than prison time. The programs encourage native communities to find alternatives to jail, such as providing restitution to the victim of the crime, volunteering with a charity, or attending counselling or an addictions program.

These proposed changes may also be problematic for Nunavut, where, in 2005, territorial judges handed down 203 conditional sentences compared to only 189 jail terms.

It is clear, therefore, that there is a need to develop more community-based resources to ensure that aboriginal women who are criminalized are able to successfully complete their sentences within their communities. Ensuring that women are able to maintain their role within their family and community throughout the course of their sentence is integral to the sustainability of our communities.

Canada's judicial system is premised upon Eurocentric values and is at its heart an adversarial system. When an individual commits an act, it is seen as criminal. It is considered a crime against the state, and reparations are generally made to the state by way of punishment. In contrast, aboriginal traditions dictate that wrongs are committed against individuals and the community. Reparations are made as a way of restoring balance to the community and restoring relationships among community members. In an era when people are becoming more disenfranchised from each other, these community-based efforts would go a long way to building much sought after social capital.

In recent years these ways and beliefs have been acknowledged for their effectiveness and have garnered a great deal of support from both within and outside the aboriginal communities. Conditional sentences are well suited to the concept of traditional justice, as they allow offenders to be supervised within the community while giving them the opportunity to work towards restoring the imbalance that resulted from their actions.

● (1635)

Restorative justice initiatives are intended to add cultural relevance to the mainstream criminal justice system, but aboriginal men and women have not shared equally in this experience. Rather than focus on increasing rates of incarceration through the elimination of conditional sentencing, efforts should be made to ensure criminalized aboriginal women are given the opportunity to participate in restorative justice practices.

In addition to being overrepresented in the charging and imprisoning processes of the criminal justice system, aboriginal women are also overrepresented as victims. This victimization is often centred upon sexualized and racialized violence. Bill C-9 does nothing to address the root causes of this victimization and criminalization, nor does it address the sexualized or racialized violence that many aboriginal women face throughout their lives.

No in-depth examination of the impacts of conditional sentencing on aboriginal women, families, children, or communities has been done, and one is needed. This research must capture how conditional sentencing practices are currently applied to aboriginal women and how the criminal justice system, both federally and provincially, can better address the needs of aboriginal women.

The Government of Canada has failed to consult with relevant stakeholders, including the Native Women's Association of Canada, with respect to Bill C-9. In failing to do so, they have not considered the broader social or cultural impacts that this bill will have on aboriginal women, children, and our communities.

The Government of Canada should concentrate on building more diverse community-based programs, such as restorative justice initiatives. By diverse, we mean diversity in settings, since aboriginal people exist in all sorts of settings—rural, urban, remote, and far north. There should also be an examination of how changes in conditional sentencing interrelate with other social and global developments in the areas of social, health, education, and traditional culture for indigenous populations, since Canada's indigenous population is in relationship with other worldwide indigenous populations.

There has been a significant amount of effort put forth by aboriginal populations, in partnership with government, that is meant to deal with the deep-rooted causes of crime. These should not be overlooked by a policy that seeks to send more people to jail. People in jail do their time, and they are not afforded development opportunities. They are burdened with labels and records that stunt their development potential.

Merci.

● (1640)

The Chair: Thank you very much, Ms. Saulis. I understand you have an appointment you have to reach. Thank you for your presentation.

I'd like to turn now to the Canadian Council of Criminal Defence Lawyers, Mr. Bloos and Mr. Rady.

Mr. Marvin Bloos (Honourary Chair, Canadian Council of Criminal Defence Lawyers): Thank you, Mr. Chair.

The Canadian Council of Criminal Defence Lawyers was formed in November 1992 to represent the voice of the criminal defence bar across Canada on issues of national importance. We have representatives on our board of directors from every province and territory. I'm the immediate past chair of the Canadian Council. I've also been going to the Uniform Law Conference with the federal Department of Justice as part of its delegation when we look at changes to the Criminal Code each year.

I was asked to come today because I could bring a perspective from the west. I practise in Alberta, but before practising there I was with the Saskatchewan Legal Aid Commission for 12 years, where I had a large aboriginal caseload. I now just do appellate work. A good portion of my work concerns appeals on conditional sentences. I work in Alberta, British Columbia, and Nunavut. I have a perspective from Nunavut, because Nunavut, as we've just heard, is very concerned about this legislation—the defence bar, I suspect the crowns, and judges I've talked to.

I've been doing defence work for thirty years, so I have some experience in this area. The Canadian Council of Criminal Defence Lawyers is opposed to Bill C-9. In our view, the wheel isn't broken, so why are we trying to fix it? We have difficulty understanding where the hard evidence is that indicates there's a problem. We know about the individual cases that have been raised, and we don't disagree. Bad decisions are made, and that will happen every day because we have a human justice system. I've spoken to judges across the west, Alberta, Saskatchewan, and the north. I've spoken to defence counsel, I've spoken to crowns, and I've spoken to one probation officer. I don't think the probation officer I spoke to in Edmonton shares the view of the Ontario probation department.

Here are the main themes. I bring about ten points to you from the various individuals I have spoken to. The concern we have and that I bring today is that there will be a great increase in the costs associated with building more prisons, housing more prisoners, and the associated legal proceedings if Bill C-9 passes. We heard earlier that last year in Nunavut there were something like 250 conditional sentences, I believe, as opposed to 180 jail sentences. There is only one jail facility in Iqaluit and it was built to hold 44; it has 64 beds, and there are now 85 inmates. If the CSOs are unavailable, inmates will have to go to Ontario, the Northwest Territories, and possibly to Quebec facilities.

The other difficulty for Nunavut is the number of small communities. I'm not sure how many circuit points there are—five, six, or seven—that the court travels to. If individuals are sent to jail from that circuit point they are sent 1,000 to 1,500 kilometres away from home, in some cases. They are cut off from contact with their families and their support.

The native or Inuit communities in the north by and large embrace the restorative justice model. It is difficult to get a CSO, a conditional sentencing order, there. Defence counsel has to present a plan in advance. There has to be a responsible guilty plea. There has to be an agreement on the part of offenders to work with the elders, take appropriate counselling, and exist within the community.

House arrest is enforced, so they don't get to go out on the land with the rest of the community, which is a very important tradition in the north. That is a very painful experience for the individual. In the small communities everybody is aware who is on a CSO. Any breaches come to the attention of the authorities very quickly. The breaches are brought to the attention of the court. If there's not a good reason, the sentence is collapsed, and the community supports that because they see individuals as having been given the opportunity. If they don't want to take it, then they're removed. Predators are not given CSOs.

● (1645)

If an individual is simply bad news in the community, that is generally known to the sentencing court—there aren't any favourable reports—and the person is not available for a CSO order. Those concerns are reflected by the judges I've spoken to in Alberta who are working on reserves. In small communities, CSOs have a place. There is rehabilitation, education, treatment potential and availability, and the community is aware of the individual, so any breaches get reported. And of course from the aboriginal and the Inuit perspective, when the individual is serving their sentence in the community, they're confronted with the shame of their wrongdoing. Through that we get a rehabilitative, a remorseful, a cathartic effect as they reintegrate.

There is concern brought about the Crown being able to choose whether a CSO is available or not, simply by deciding to proceed by indictment, thus taking away the option of a conditional sentence in some cases. The concern is there will be a disproportionate effect on aboriginal people and people in the north. Some persons have mentioned to me that in close cases the inclination on the trial court, on the sentencing judge, will be to sentence down rather than up. If it's a question of whether or not the person ought to go to jail, it being a human system—judges are human, they hear that human story—the inclination may be to sentence down rather than up, and not necessarily make available the treatment that's necessary.

CSOs are seen to be better for educating and certainly much better in terms of rehabilitation purposes. Recidivism rates, it's generally felt, are lower with a CSO than with jail.

There is a serious concern that there has been a lack of consultation by the government with the relevant groups, such as judges, defence counsel, crown counsel, women's groups, aboriginals, and others.

Conditional sentences also have the benefit of avoiding having youthful first-time offenders or first-time offenders go to jail where they can learn a better trade. They can learn how to hot-wire a car, how to properly break into a house, how to cover their tracks. They can learn all of those things in jail. They won't be learning those things if they're at home.

It is my respectful submission to you that appellate courts in this country are doing their jobs. On the opposite side of defence counsel who are requesting a conditional sentence sit crown counsel, and if a mistake is made, crown counsel can recommend an appeal. These matters go up to the appellate courts. This is one area where I disagree with Professor Paciocco. I think appellate courts are doing an excellent job. In the west—and I can speak of Alberta, Saskatchewan, the Northwest Territories, and Nunavut—the appellate courts are not easy on conditional sentences. You have to earn the right. And if they've been given out improperly, the court wastes no time in reversing that sentence and sending the individual to jail. I can speak from personal experience on that.

My submission is that trial judges are exercising their discretion properly. They're doing it effectively. They're considering the myriad of circumstances that they have before them, such as the aggravating, the mitigating circumstances, the impropriety of the individual—should they have known better or not?—and then they're imposing a sentence that is appropriate to the circumstances. I've seen conditions on conditional sentences that limit who can go to the individual's house to visit. I've had people who have been given a conditional sentence who live in an apartment and have called me up to appeal. They would like to do it on straight time because it simply became too difficult. A conditional sentence is a prison of the mind. You know you can't go out of your house. You know you are limited. You know you can only go to work and come home right after; you can't attend birthday parties; you can't go out with your friends. You're going to get checked on. They can come at any time and ask you for a urine sample or what have you, if that's a condition. So they're not easy to obtain, and in my respectful submission, for the people who are serving them, they're not an easy sentence.

Bill C-9 fundamentally will shift the law and it will put more people in jail, which we regard as a regressive step. We've made great progress.

● (1650)

Initially there was difficulty in 1996-97 in sorting out how they should be imposed. With the Supreme Court decision in Proulx, a lot of that confusion was taken away. Four or five years after Proulx, I believe we now have a good sentencing regime in Canada. In the west there are clear appellate cases that set the guidelines.

In our remaining time, I'm going to turn the matter to Mr. Rady, who comes from Ontario and can speak to the Ontario experience.

The Chair: Mr. Rady, you have approximately two minutes.

Mr. Andy Rady (Executive, Canadian Council of Criminal Defence Lawyers): Thank you, Mr. Chairman.

I too am a member of the executive of the Canadian Council of Criminal Defence Lawyers. I've been practising as a criminal defence lawyer in London, Ontario, and southwestern Ontario for the past 25 years.

I note that it would appear that this committee in the past has considered statistics and graphs concerning not just conditional sentence rates but sentencing in general, and I don't propose any further statistical analysis but speak from the point of view of one who is in court almost every weekday dealing first hand with our criminal justice system. But I would ask this committee to give careful consideration to the statistical analysis and extreme care, because without first carefully looking at how the statistics were compiled and upon what base, really the analysis gets us nowhere, in my submission. Similarly, care must also be taken in the analysis of anecdotal evidence, which you have no doubt also heard and will hear more from me.

As has been stated, our association opposes this bill. That's perhaps not a surprise. It is simply too broad and unnecessary in its current form. If clarification is required as to when conditional sentences ought to be imposed, then that can be done otherwise. The appellate courts, the courts of appeal, do it; the Supreme Court of Canada does it. Professor Paciocco also made a suggestion to this committee as to how that can be done through a change to the preamble of section 742.1

No doubt judges must take their cue from the Criminal Code, which is the word of Parliament. But as in all matters, there must be support and confidence in their exercise of discretion, and that discretion should not be unduly fettered or eroded or minimized. Despite the fact that criminal law is a public law—crimes are prosecuted by the state, crimes are against the state—all crimes have an individual component. The individuals concern the victims of crime, the accused persons, the criminals once they've been convicted, the crowns, the judges—all of the people coming to the table. Judicial discretion in criminal matters can be fairly dealt with, and must be fairly dealt with, in our democratic society.

Judges are the ones who can deal with those individual elements before them. A robbery is not a robbery is not a robbery. A sexual assault is not a sexual assault is not a sexual assault. What do I mean? A robbery is someone who goes into the bank with a loaded weapon. A robbery is also the 19-year-old who pushes someone off a bike and takes his bike. They must be dealt with on an individual case basis. To just exclude the offence of robbery would go to both extremes. Sexual assault is similar, and you've heard examples of that, I'm sure, in the past.

Judges are left with assessing all of the aspects of individual cases. Bill C-9 takes away some of that individual assessment by simply stating that no conditional sentence for indictable crimes with a 10-year or more maximum sentence is available. It's too arbitrary. The maximum sentence for a crime is not a good guideline to use in determining the seriousness of the particular crime before the court, probably save and except the case of murder. Also, the fact that Bill C-9 still permits conditional sentences for those hybrid crimes prosecuted by summary conviction is no answer. A minor hybrid offence, as Mr. Bloos has said, may still be prosecuted by indictment as a result of prosecutorial choice or in cases in which the charge is laid more than six months after the offence. You may have a minor sexual assault that may be historical. If it's laid seven months afterwards, it has to be by indictment. It cannot be summary procedure. It may be the kind of offence to which a conditional sentence would apply, but it cannot be.

There also appear to be some myths about conditional sentences, in my experience. They are not granted to repeat offenders for the same crime. They are much less likely to be granted if an accused is convicted after trial, and in the majority of cases they are granted only if the crown prosecutor concurs by way of a joint submission—at least in my part of the province, that's the policy. The fact that they exist does not mean that judges cannot and moreover do not impose sentences of conventional jail for serious crime. They are merely an option in the list of sentences a judge can impose, and my experience is that they are not handed out lightly; when they are, the conditions are restrictive.

● (1655)

There may be disparity across the country in their use, even within the provinces, but Bill C-9 is not the answer. Further guidelines may be required, but that can be done in other ways. Professor Paciocco talked about that.

My clients don't commit crimes because they know that a conditional sentence is available. No one believes that we should not be tough on serious, violent crime, but Bill C-9 is not the answer to that. In fact, it bluntly takes away the option of rehabilitation and restorative justice for less serious, non-violent property crime. It is a halfway mark between the suspended sentence and a conventional jail sentence. It is something in the judge's arsenal when they have to impose a sentence on convicted persons in front of them, and it is not done lightly. It should remain the way it is.

Thank you.

The Chair: Thank you, Mr. Rady.

Mr. Roberts.

Dr. Julian Roberts (Assistant Director, Reader in Criminal Justice, Centre for Criminology, Oxford University, As an Individual): Thank you very much, Mr. Chairman.

I want to point out that although I've just come from the University of Oxford, I'm not some presumptuous British academic coming to give some opinions. I lived in Canada for 35 years. It's a great country and I miss it greatly. I'd like to put that on the record.

I've been following the debate about conditional sentencing for 10 years, since its inception in 1997, and I'm quite sensitive to the question of circumscribing the ambit. In fact, the first paper I wrote in 1997 talked about ways you could reduce the scope of the sanction.

Is it a good idea? I think I'll go straight to the question of ambit and Bill C-9 by saying that it may be a good idea, but I think you want to have a more compelling case before you than just a few cases: “Did you hear about the sentence in Windsor? Did you read about the conditional sentence that was imposed?” I think it would be nice to have a really good research record. You don't have that. Unfortunately, we don't have that. The CCJS presentation from a couple of weeks ago raised more questions than it answered. So before you take the step of curtailing judicial discretion, in quite a radical way I'll argue, I think you might want a better case.

However, if we accept for the moment that it is a good idea to circumscribe the ambit of the conditional sentencing regime, the question then becomes, well, is Bill C-9 the appropriate vehicle? And here I'd argue that no, it's not. It's not going to get you what you want, if you want to circumscribe the ambit of the sanction; it's going to create a lot of problems.

Let me explain. The first point has been made by many witnesses, so I won't say much about it. It really is over-broad. I have the document here from a Mr. MacKay of the Parliamentary information research service. If I'm counting right, there are 162 offences there. That's a lot of offences. If the purpose of the bill is to reassure the public or to ensure that victims don't get demoralized when this sanction is imposed, then you want to focus on those cases and only those cases. If you take a conditional sentence off the table for uttering a fraudulent document, I don't think too many members of the public are going to be picketing Parliament Hill. They're concerned about a much smaller range of offences. Unfortunately, Bill C-9 paints a very broad brush—it's very broad.

The second thing is that it attempts to screen out the most serious cases, and it does so with two very questionable and curious filters, as I would call them. The first is the statutory maximum penalty. The statutory maximum penalty is a very unreliable guide to the true seriousness of an offence, as we've just heard. In the report of the Canadian Sentencing Commission, discussed in this very room twenty years ago, the commission made the point that the maximum penalty structure is thoroughly chaotic and needs overhauling. So to pick out offences on the basis of the statutory maximum penalty is not a good idea.

The second point about the statutory maximum penalty takes me to the issue of proportionality. A lot of people have come here and said we need more proportionality in sentencing. These judges have lost sight of proportionality. That's fine. I'm a big fan of proportionality, and I'm very glad that Parliament codified the principle in 1996. What people seem to forget is that proportionality has two branches. The first branch is how serious the particular crime is. The second branch is the culpability of the offender for the offence. That's not me talking; that's section 718.1 of the Criminal Code. If you identify an offence by the maximum penalty, or even by the name of the offence, you have an idea of the seriousness of the crime but no idea of the culpability of the offender. In fact, you're losing proportionality by that route.

The second filter is the decision by the prosecutor to proceed by way of indictment. That is a very bad way of filtering cases, for two reasons. First of all, the prosecutorial decision to proceed by way of indictment will be based upon the file communicated to the prosecutor by the police. That's evidence that has not been tested in an adversarial proceeding. You're only getting half the battle, as it were. You're getting a version of the facts based upon material that has not been subject to an adversarial proceeding. That's number one.

● (1700)

Number two is there's no comparison with the degree to which a prosecutorial decision is going to be subject to review. In order to have a prosecutor's decision reviewed, the standard is very high. This decision will be made out of the public arena. You will not be able to review it; it will be in the shadows. That's one of the things we've always talked about: bringing justice out of the shadows and into the daylight.

The prosecutorial decision to proceed by way of indictment is based upon one version of events that hasn't been subject, for example, to cross-examination and is not really subject to review in the same way that a court can review. The person best placed to determine the seriousness of an offence and the degree of culpability of the offender is a sentencing judge, and he or she should make that determination.

This doesn't mean you can't give a judge or a court some steer. And that's why I think the presumptive approach that Paciocco and other people have suggested is probably a much better one.

The other problem with Bill C-9 is that it creates a clear anomaly: you take the conditional sentence off the table, but you leave probation on the table. What's a member of the public supposed to think of that? The court can't impose a conditional sentence of imprisonment, with curfews and strict reporting requirements and an expeditious procedure to respond to breach, but it can impose probation. That's a real anomaly that's going to play very poorly in the newspapers.

I fully agree with a previous witness that what courts are going to do, in some cases, is say: “Before Bill C-9 I could impose a conditional sentence of imprisonment. I can't do that now, but I don't want this individual to go to prison, so how about a pretty lengthy probation order? I was thinking of a conditional sentence in the range of six to eight months, prior to Bill C-9. Well, we'll have a long probation term of three years. There's no statutory bar to the imposition of a curfew as a condition of a probation order. Well, I'll put a curfew on the guy and extra reporting requirements.”

So the court will turn the probation order into a de facto conditional sentence order, and the effect of Bill C-9 will be to disturb and distort a perfectly good rehabilitative sanction.

There is a place for both sanctions in the sentencing tools available to a court in Canada. You need both.

My last point is, I think it's important not to intrude into judicial discretion unless and until you really have to. Parliament, of course, took away judicial discretion with respect to the offence of murder, where we have a mandatory penalty. But for lesser offences, to take a sanction off the table and tell the judges of this country that you know better than they do what kind of sentence is appropriate in which particular cases is I think a mistake. It's an expression of non-confidence in the judiciary, and I think probably you should be aware of conveying that message.

Thank you very much.

● (1705)

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

From the Canadian Association of Elizabeth Fry Societies, Ms. Pate.

Ms. Kim Pate (Executive Director, Canadian Association of Elizabeth Fry Societies): I'm the national director of the Elizabeth Fry Societies. I'm pleased to be here along with my vice-president Lucy Joncas, who is also chair of our social action committee.

I want to start by apologizing for not being here earlier. We hadn't anticipated that the Minister of Public Safety would table the report of the correctional investigators. I had to attend to some business there, and I hope to be able to speak to a couple of issues that have come up around that particular report today that directly interact and intersect with some of the issues you are concerned with today.

I also want to start by acknowledging the Algonquin people, on whose territory we have the privilege of meeting. Whenever we talk about criminal justice issues, particularly issues that are likely to increase the imprisonment of people, we know that disproportionately they will be aboriginal people, as has again been borne out by the report of the correctional investigator just today.

You have heard from some excellent people who preceded us. I wish to merely summarize, and I apologize that our brief apparently has not been finished being translated. I was out of town, and it was delayed getting to the clerk. My apologies for that. You will have it in both official languages, hopefully within the next couple of days.

In summary, the issues that we see that Bill C-9 raises have already been covered: the fact that it's not the least restrictive measures that should be available, as has been pointed out; that there is a lack of community resources, period; and that to impose this kind of measure will likely only further mean a draw and drain will be placed on those existing community resources, both in terms of trying to provide alternatives, as Julian Roberts has just pointed out, and also in terms of when those individuals are released from prison —the drain on resources to try to reintegrate them after their life in the community has been interrupted.

We also suggest that when it comes to some of the principles of sentencing—denunciation, proportionality, and deterrence—we believe there is a reason that the judge, and in some cases juries, are made the triers of fact. It's because they have an opportunity to hear and balance all of the evidence that is available in a case. We think this discretion, the ability of the courts to hear all of the information, is not something that should be interfered with lightly, and in this case we feel it would not be the most effective way to proceed.

In addition, in terms of deterrence, there is sufficient evidence—most recently, admittedly, looking at the Young Offenders Act—that the Supreme Court of Canada talked about as being purposeful that deterrence was not included in the act. Part of the reason for that is linked to some of what we know and has already been mentioned by some of the members of the defence bar here: that in fact most people don't think of the penalty. Many people don't even know what the penalty is prior to their involvement in an offence. To argue that deterrence is a principle of sentencing that's applicable, that Bill C-9 reinforces.... Already there is some controversy about the application. Clearly Bill C-9 would only exacerbate it.

In terms of rehabilitation, reparation, and restoration, we've already had cases such as the Supreme Court of Canada's decision in the Gladue case, in Proulx, and in others where we've seen again that in fact those principles of sentencing were not put lightly into the Criminal Code, and that we should be looking at utilizing them and not merely abandoning them in favour of something like the suggested repeal of conditional sentences for so many of the offences, as has been already outlined.

One of the things we're very concerned about related to this bill is the human and fiscal costs the bill will create. It's already been acknowledged through the report that has already been alluded to done by Mr. MacKay that this bill could result in another 5,500 people per year being jailed.

Provincial and federal corrections across the country estimate the cost of imprisoning each person at anywhere between $50,000 and $250,000 per year, depending on the level of incarceration, the nature, the placement, how far they are from other communities. We're talking at the very least about a fiscal increase of between $275 million at the most conservative and $1.3 billion as the increased costs of incarceration that this bill could result in, based on the figures produced in Mr. MacKay's report.

In addition, to talk about women in particular, we know that women are the fastest-growing prison population worldwide.

● (1710)

We just heard across the street that more than 80% of Corrections' budget is used to jail people, and anywhere between 10% and 20%, depending on the jurisdiction, is used for community corrections. Clearly that is not a mechanism that assists people to integrate into the community, and it is therefore not a mechanism that increases public safety.

The reason why women are the fastest-growing prison population has nothing to do with any increased risk they pose. Almost everybody will recognize, and all the research shows, that there isn't a crime wave of women internationally or in Canada, yet they are the fastest-growing prison population.

The correctional investigator's report just released today shows that over the past several years there's been a 75% increase in the number of aboriginal women jailed. Canada is now jailing aboriginal people at the rate of 1,024 people per 100,000, which is between seven and eight times the rate at which we jail other people in the country. Women are disproportionately being jailed as well. The estimate is that in another five to ten years, about 25% of all jail populations will be aboriginal. We're well beyond that already when we talk about aboriginal women in the federal system; they already comprise one-third of the jail population.

So we're talking about a mechanism that will not only deplete resources in the correction system itself, but will also lead to a further depletion of resources in the community. Contrary to Minister Day's assertion today that there is no empirical evidence that the system already discriminates against aboriginal peoples—and I would say women as well—there is abundant evidence when you look at those sorts of figures.

It seems that the only evidence being put forth in favour of this bill is based on American evidence. Everywhere I could find...every academic, every person working in the system who I could speak to in the United States, has reaffirmed that although the U.S. jails from six to seven or more times the rate we jail in Canada, their crime rate has not been significantly reduced, and they still have five times the crime rate we have in Canada.

We're concerned that media accounts of exceptional cases seem to have driven this initiative, yet we know that those media accounts rarely describe the cases involved adequately. We also know from the research of Mr. Roberts, Tony Doob, Cheryl Webster, and others, that when you provide Canadians—the average person in the community, the average person in the street—with more information about the particular cases, very few of them differ in their decision-making from the judges. That's the case for some of the more serious offences and for some of the less serious offences.

We encourage you to not pass this, in this form or in an amended form. It's very clear that what's needed is increased investment of resources in the community to help prevent individuals from being there and to assist people to integrate once they're released from prison.

I'd like to call on Lucie to add a few comments.

● (1715)

The Chair: Make it very quick, please.

Ms. Lucie Joncas (Vice-President, Board of Directors, Canadian Association of Elizabeth Fry Societies): I'll take one minute of your time to address you in French.

[*Translation*]

First thing , I wish to underscore the importance of maintaining the court's authority. A democracy must respect the separation of the legislative, executive and judiciary branches. Bills such as C-9, C-10 and other pieces of legislation to be tabled in upcoming weeks distort judge's role by significantly restricting his discretionary power.

Canada is considered an important ally in the reconstruction and development of several countries' legal systems, countries which acknowledge and argue that our justice system is one of the best in the world. I would argue that none of the data calls for the reform being proposed. According to government statistics, 90% of cases resolved in conditional sentences of imprisonment follow a guilty plea.

The abolition of this measure will lead to a backlog in the legal system, and I would ask that you take this into account. I have been practising law for the last 14 years and can say that we agree on most of the cases, but we must have the means to carry out our work well.

Thank you.

[*English*]

The Chair: Thank you very much.

We will now begin with the committee members. They will have the opportunity to question all the witnesses.

I'm going to hold you to your time, seven minutes for the first round.

The first person is Mr. Murphy.

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

I want to thank all of you for your presentations. Obviously, what we're concerned about is creating safe communities. I'm a little concerned that the number of bills that have been submitted to us by the new government would lead the public to believe there is going to be a safer community. What I'm really concerned about is that if these bills pass in some form and do not work, we will further erode the public's confidence in the judicial system—something, I might add, that during the debate on these bills is happening anyway, because there are aspersions being cast on the judiciary, on the lawyers, on those involved in the criminal corrections system, and that can't be helpful.

To that end, I'd like to ask you all questions, but I want to narrow in on two groups of witnesses. They are, first, the Canadian Council of Criminal Defence Lawyers.

I want to compliment you, of course, on having a good New Brunswick lawyer in charge of your money as treasurer, Mr. Lutz. It shows good sense.

I want to ask you as lawyers whether you feel that your clients—and you can speak for your association, or the council, or for yourselves and from your own experience—would be better assets to the community if they spent time in prison rather than received conditional sentences.

Mr. Marvin Bloos: The short answer to that is no, and I'll tell you why.

On a conditional sentence, which is somewhere between half to two-thirds or longer than a jail sentence—and I'm talking about serious matters, about sexual assaults where they've been issued, or serious assaults with violence.... By serious, I mean there has been a punch-up and somebody has wound up with bruises, and it's not the sort of thing where there's a suspended sentence. When you have that sort of matter and a lengthy conditional sentence order is imposed, offenders know that if they don't follow the rules, the sentence will be collapsed.

Before they get that sentence, defence counsel goes in with a plan, with a program: here's the counselling we're proposing; he's going to work these hours at this place. With the curfew, he'll be out for seven or eight hours maybe—whatever the job takes—and then he's home for the rest of the night. It's 24-hour-a-day house arrest, with the exception of going out to work.

Or if it's a student...what about students? Well, if they go to jail, they don't continue their education, or they don't continue some good things that might have taken place between the time of the offence and when they're sentenced—because that can be a critical period. When they are looking ahead to the moment when they're being sentenced, it can be a very reflective time. As one person said, there's nothing like a hanging to focus your attention. They're thinking, what do I want to do with my life?

The defence counsel goes in with the program—here's the counselling, and here's what we're going to do—and the judge takes a look at all of it and sentences the individual. If they don't follow through, they're going to jail.

The kinds of programs you can get in a community are simply not available within a jail setting. They can come out as bad as they went in to jail.

● (1720)

Mr. Brian Murphy: I want to segue with this brief question—and for a brief answer—to the probation officers. In how many cases, in percentage terms, are pre-sentence reports prepared by probation officers determinative or influential in the judge's granting a conditional sentence?

Mr. Andy Rady: Are you asking the probation officers or us?

Mr. Brian Murphy: Well, I'm asking you, because you're the defence lawyers.

Mr. Andy Rady: I could answer that, because I do a lot of trial work. They're very important. A negative pre-sentence report usually results in a jail sentence; it doesn't result in a probationary sentence. It really is a very important tool for the judge to consider in passing sentence.

Mr. Brian Murphy: With that answer, I get right into the probation officer representatives. We're here to write law, and we can't really supervise every judge and every prosecutor and every defence attorney. The law would suggest—and it's not going to be changed by anything in Bill C-9—that this conditional sentence remedy is not going to be given unless the court is satisfied that it won't endanger the safety of the community.

It's been my experience, and I'm glad to hear it from people who are more specialized in the field, that probation officers—and I know you may not speak for New Brunswick and all the provinces, but it might be similar across Canada—often write pre-sentence reports that are determinative of a judge's deciding to let this or that person serve the sentence in the community.

If your association is for everything in Bill C-9, is it fair to say that all of your members haven't heard the tune yet and are not singing it? Am I off base?

Ms. Catherine Hutchison: We weren't saying we were in favour of C-9; we were referencing specific concerns we've had about the most serious offences. Then we quoted the principles of Professor Paciocco as a good measure.

Our concerns are the most serious offences, particularly serious offences against children and offences involving loss of life—severe violence.

In terms of the pre-sentence reports, what the probation officers do is assess the suitability of someone for community supervision, but they cannot dictate a conditional sentence over probation. Oftentimes, when, for example, jail is being considered, they will say what conditions would be imposed should that person be in the community, and they would look at their background, but the person could have jail plus probation. The judge would still take the information and put it on a probation order, or the judge could take it and put it on a conditional sentence order. But the probation officer doesn't determine which of those options they're looking at—the offender's history, the response to community supervision, all of their background, and which conditions should be imposed should that person be supervised in the community—so they wouldn't determine which sentence it is.

Mr. Brian Murphy: I understand that.

Thank you.

The Chair: Thank you, Mr. Murphy.

Mr. Ménard.

[*Translation*]

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

[*English*]

I'm going to speak in French.

[*Translation*]

In the train coming to Ottawa, I read the submission you tabled at the symposium held here in Ottawa, in 2000, after the Supreme Court handed down the five rulings.

You said that this bill is a product of pure ideology and that its adoption cannot be justified on any rational ground. You have made exhaustive studies and are well versed on this matter.

To your mind, in its denunciation, did the Supreme Court indicate that in cases of violent offences where there are slim chances for rehabilitation and where there is a risk for the community, common sense would lead one to conclude that a conditional sentence is simply not the preferred option.

My first question is for Mr. Roberts and Ms. Joncas. Do you have statistics, and I am not talking about ones used by conservative sensationalists, but hard data that show that the courts have handed down conditional sentences in cases the public deems as shocking crimes, either inappropriately or out of contempt?

I have two other questions, should I have time remaining, or if the dear lord permits.

● (1725)

[*English*]

Dr. Julian Roberts: Yes, it's a complicated question. But in a nutshell, what Proulx did was give trial court some direction as to how the sentence should be constructed and how breach should be responded to—and the message from Proulx is tough.

So if you breached without a lawful excuse, there was a presumption on admission to custody for the balance of time remaining on the order. Proulx said there should be a presumption of house arrest, and so on. And you see in the statistics over the period since Proulx, which was in 2000, courts responding to that, with conditional sentences getting longer and tougher.

Proulx stopped short of saying there are some offences that should never attract a conditional sentence. But as a result of Proulx and other decisions of the courts of appeal across the country, we've basically arrived at what I would call judicial presumptions that there are some offences appearing before the courts in which there's a clear judicial presumption against the conditional sentence.

[*Translation*]

Mr. Réal Ménard: Before handing the floor over to Ms. Joncas, I will clarify my question. We all agree that creating a list based on offences punishable by imprisonment for 10 years to be completely arbitrary given our overall objective.

Section 742.1 in the bill could be amended to consider the goals of deterrence, denunciation, conditional sentence, without making these the absolute rule.

Do you believe that such an amendment would be relevant, or on the contrary useless?

[*English*]

Dr. Julian Roberts: I'm not sure it's necessary, but I certainly think that would be a superior solution to having a list of offences, or this dual approach involving maximum penalty and prosecutorial discretion.

You could say that if denunciation and deterrence are uppermost in the court's mind, then the court should go against a conditional sentence. But the simple point I want to make is that there are going to be cases, even for the most serious offences, where the court will recognize relevant mitigating factors and want to impose a non-custody conditional sentence. I think taking that away from the courts is a mistake.

[*Translation*]

Mr. Réal Ménard: Would you have supported bill C-70 introduced by the liberals, legislation dealing with terrorism and generic offences? Would you have supported excluding terrorism and criminal gang activity? Could we adopt such an amendment?

[*English*]

Dr. Julian Roberts: I think that bill was superior because it contained presumptions. It didn't take it off the table entirely. I think it would have changed the practice of trial courts, and it would also have focused on these more serious offences, and things like fraud, which is a category of offence that's most likely to be affected by Bill C-9, wouldn't be there.

[*Translation*]

Mr. Réal Ménard: Do I have time to ask a brief question to Ms. Joncas? I am very much an admirer of Ms. Joncas.

[*English*]

The Chair: One question.

[*Translation*]

Mr. Réal Ménard: Ms. Joncas, my question is straightforward.

Sexual offences strike an emotional cord among people. Yet one has the impression that it is tricky for legislators to decide on generic offences, because they cover a set of diverse situations, which then result in a disparate patchwork of sentences. What are your thoughts on that?

● (1730)

Ms. Lucie Joncas: The notion of sexual offence is now very broad, to the extent that touching even through clothes could be considered harassment. This notion is not at all comparable to the former notion of what constitutes rape. As such, when a sentence is handed down, the judge not only ask you to consider the offence itself, but also the individual who committed it.

I have sat in on a few trials involving gangs and I never seen a conditional sentence of imprisonment handed down. In fact, this measure allows for a judge to make sure that at least half of the sentence be carried out. This is not really an issue in the courts.

Mr. Réal Ménard: There is never a sanction...

[*English*]

The Chair: Thank you, Mr. Ménard.

Mr. Comartin.

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

Mr. Larman, I heard Ms. Hutchison say that in fact you were... well, I'm not clear, because when you spoke, you were absolute in your support of Bill C-9 as it is before us at this point, and Ms. Hutchison was saying that's not the case.

Did I misunderstand you?

Mr. Donald Larman: Perhaps I didn't clarify it enough.

We are in support of Bill C-9. Certain aspects of Bill C-9 we do support—the serious violent offences, violent sexual offences. We also have what we call “non-violent sex offences”, although I'm not certain we'd agree that there's any such thing as a non-violent sexual offence.

We do endorse certain aspects of Bill C-9, but not its entirety.

Mr. Joe Comartin: So if you're sitting in my chair, if we can't amend this, do we vote for it or do we vote it down? We have about twenty to thirty charges here that are just straight property charges. Some are relatively minor, like possession of stolen property over $5,000, theft from mail, obtaining credit by false pretense, forgery, forged documents. I could go on.

Ms. Catherine Hutchison: What we were saying at the outset is that we've spoken out for some years about the serious violent sexual offences, especially offences against children. So as we were saying, without an amendment...we quoted the professor who talked about looking at principles. We are not at all speaking in favour of some of those offences, and we've never done anything in the media speaking and being outraged about an offence like that getting a conditional sentence, but we're happy that some attempt is being made to deal with the long-standing issues around the most serious offences.

Mr. Joe Comartin: Going to the point that Professor Roberts was just making with Mr. Ménard, in terms of not having any absolutes, are there offences that you would say absolutely you'd never give a conditional sentence to?

Mr. Donald Larman: Manslaughter, any serious violent offence, any contact or non-contact sex offence—anything against any citizen, regardless of whether it's an adult or child.

Ms. Catherine Hutchison: The caveat that we gave earlier when we were talking about offences against children was that sexual assault and assault causing bodily harm would still remain as a hybrid. The issue we were raising there was that our concern was for offences of that nature against kids; we were still concerned about those, whereas an assault causing bodily harm, not against a child, we didn't raise an issue with.

Mr. Joe Comartin: Do you see a problem with that, in terms of in effect shifting the discretionary call from the judge to the prosecutor? We've heard comments that there's basically no review of the prosecutorial discretion; at least we have review of the judicial discretion.

Ms. Catherine Hutchison: That's a genuine issue. Obviously we would hope that decisions would be made based on the right, like the seriousness of the offence and so on, but what we have seen—and the reason we're stating these facts up until now—is that the discretion that does exist in terms of sentencing is a result of the principles, and the sentences that have come out, compared to what we had thought at the outset of this in 1996, are certainly not the same. We have talked about our concerns—the denunciation, the deterrence, and the separation of offenders from society when necessary. We're looking at those and we're looking at some of these more serious offences getting conditional sentences. That is our concern.

Mr. Joe Comartin: Would you agree with me—and I think we've heard it from some of the other presenters today—that there are a number of things you can do with conditional sentences that you can't do under probation, that you just legally cannot do? We just had a decision from the Supreme Court last week on bodily substances; under probation orders, you can't order those.

Do you agree with me that you can do a number of things with conditional sentences that you can't do with probation orders?

● (1735)

Ms. Catherine Hutchison: The main difference is the treatment. The normal difference that you see in terms of how that plays out is treatment versus calling it counselling. Often the service the offender receives is the same, and the issue is calling it "house arrest" as opposed to "curfew". On probation, we have probationers. With curfews, we have many probationers who get treatment as well. The difference with the conditional sentence is that you can call it "treatment" when you order it, as opposed to putting it on a probation order and putting "counselling" or "rehabilitative programming" and so on. That's a difference in the language, but in fact that offender may go to the same program as the one on the conditional sentence. It's the language.

With conditional sentencing, you don't have to have the offender's consent to order treatment; with probation, you do, but in fact the service the offender may get may be the same service. It may even be at the same facility. That's the legal issue about needing consent versus not, but we would still have that offender on probation and we would still assess the offender and send the person to whatever rehabilitation was necessary, using the term that's on a probation order, which is very similar.

Mr. Joe Comartin: Ms. Pate, do you agree with that analysis, that there's not really much difference between counselling and treatment? What pattern do you see?

Ms. Kim Pate: No, I wouldn't agree with that.

I think certainly there is a need for increased resources, and my experience with probation officers whom I've had the experience of working with is that the real concern has been the lack of resources to support these orders. For instance, we were directly involved in one of the very few cases in which a manslaughter conviction resulted in a conditional sentence. There was also a long history of violence against the woman. There were many questions raised about whether charges should have been laid in the first place, about whether it was defensive. The man who died happened to be working for the RCMP. There was evidence that there was difficulty getting evidence to bring before the court. There were many other issues. Suffice it to say that when the judge heard all the information, even though the jury brought back a conviction not for murder, which was the initial charge, but for manslaughter, the decision was taken that a conditional sentence with many other conditions in place was the appropriate penalty. That woman has gone on to try to contribute in whatever ways she can, including raising her and the deceased's children.

I think it's very clear that we need to look at the issues and the conditions that need to be met and the issues raised by the particular individual who's charged. I could go on with many cases involving aboriginal women. I just came back from a trip across the country in the summer. I heard many stories of the number of aboriginal women who were counselled by their own communities to take responsibility in a context in which every lawyer who talked to those women thought they had a defence, and those defences weren't applied. In some of those cases they received community sentences, but not all. Most of them, in fact, spent extensive periods of time in prison as well. We would not want to see the removal of a conditional sentence for those cases.

The Chair: Thank you, Mr. Comartin.

Mr. Moore is next.

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

Thank you, witnesses, for all your testimony.

I found it interesting today. We've heard a lot of testimony about offenders, what happens after an offence has been committed, and the lack of balance, as I see it, between the rights, the feelings, and the sense of justice of the victims.

A good part of the reason why this bill is being introduced is to recognize the seriousness of some offences. In opposition, some people seem to have the sense that conditional sentences came down from on high and they've created a panacea, but that's not the case. At the time conditional sentences were brought in, they were made available for some offences. Some people feel the use of conditional sentences has gone beyond anything contemplated at the time; they're used too frequently, and they take away from a sense of justice and rehabilitation.

I would suggest to the Council of Criminal Defence Lawyers that there's probably a reason why you request a conditional sentence order rather than a term of imprisonment for your clients. I would suggest that if you were to request a term of imprisonment instead of a conditional sentence order you wouldn't have them as a client very long because there is a deterrent effect. People do not want to go to prison. They would rather serve a conditional sentence.

We're trying to build some common ground with the bill. My question for the defence lawyers is, are there any of the offences included in Bill C-9 that you feel a conditional sentence should not be available for?

● (1740)

Mr. Andy Rady: No, and I'll tell you why. It's because of the broadness of so many offences under the Criminal Code. As I said earlier, a robbery is not a robbery. If the offences were tighter, that would be one thing, but if you don't want it to apply to certain situations within a robbery, then you'd have to say that.

The difficulty is if you exclude it completely, then you're excluding it from that first offender who is 19 and pushes the kid off the bike. A bank robber is probably not going to get a conditional sentence. The judge is likely going to sentence him to jail and the judge can see that. They're also going to take into account the victim impact statements in every case and the feelings of the victims in these cases. Having conditional sentences doesn't mean they're not going to go to jail; it just means that in those lighter areas of a particular crime they may not have to, yet probation may not be light enough. It's an in-between measure. It's something more than probation and something less than conventional jail. It might allow them to keep their job, or go to school, and it might be for a first offender. If it's a hardened criminal, they're not going to get it anyway. It doesn't really take anything away from the judges.

Mr. Marvin Bloos: Mr. Moore, if I might respond to your initial premise, I once appeared in front of a wise judge in Regina. He took the position that judges are representatives of the community; they in fact reflect the community feeling about a particular matter. He saw his role as passing the sentence of the community. He would take into account the offender, the victim, and the community circumstances.

I've had cases of impaired driving causing death where there were two best friends and one was driving and the other was killed. I've had one case where the family didn't want anything to do with that individual. I've had another case where the family wanted to forgive that individual and did not want to see him go to jail. I ask you, for every family that wants a harsher punishment in the sense of a conditional sentence, are we then to say to the families who think the person should be forgiven that there should be no penalty and that person should walk out of court? In my respectful submission, that's why we have a judge to balance all these considerations.

Mr. Rob Moore: With respect, I think if we were to go into many of these communities, you'd find that some of the decisions that are coming down from judges, where the community would expect the offender would serve jail time, even on some of these so-called property offences.... Some of the testimony would lead us to believe that property offences are not serious. Whether you're in B.C. or where I'm from, in New Brunswick, property offences are serious, and the sense is that there is not a deterrent effect in the conditional sentencing. And we're seeing recidivism.

I recognize that there has to be discretion, and by taking away conditional sentences for some of these offences that past parliaments have given this cap of ten years—past parliaments have drawn that line—we are saying as a Parliament that conditional sentences are not going to be available, but there's still a broad discretion. There are other defences where conditional sentences are not available, but there's still a broad discretion, when it comes to sentencing, on the part of the judge.

For the Probation Officers of Ontario, in your initial comments you said you had some points to add on rehabilitation, and I would be interested to hear them. You also made the comment that if jail is not a deterrent, then why are offenders warned that breach of a conditional sentence could lead to jail time? I find that persuasive, because we've heard that actually, oh, no, a conditional sentence is sometimes harsher than jail time. I think the same thing could apply to an offender who's on a conditional sentence as to someone who's contemplating committing a crime and getting caught, that there is a deterrent effect to having to serve time in jail. I'd like you to comment on those two things.

Ms. Catherine Hutchison: I am answering this, but first I'd like to clarify the programming comment that was made about lack of resources. The lack of resources in a community would apply regardless of what form of supervision you were on. I want to clarify that. If there's a community that lacks a certain type of programming for offenders, that would be a lack regardless of whether you're on conditional sentence, probation, or so on.

In terms of the deterrent effect we were talking about, it was just to say that when we have seen some previous testimony, or references, or research that there's no deterrent effect at all to jail, that is not our experience in dealing with offenders. We deal with supervising, literally, hundreds and thousands of offenders, and in fact for some offenders there is a deterrent.

Regarding the comment about the seriousness of the offence and that the judge reflects the community values and that would come out, we're not dealing with these sensational media cases, these three cases; we are seeing all of the cases. So we're not saying, I read in the paper about one such horrific case; we are seeing all of them. After you see, for example, hundreds and hundreds and hundreds of serious sexual offences against children, you would have to say in what community does that sentence that judge has handed down reflect the values of that community? Is it the value they placed on children? That's where I'm saying some of our concerns are coming from. We're actually seeing the cases, all of the circumstances—the prospects for rehabilitation, the offender's attitude—and that's the source of our comments.

● (1745)

Mr. Rob Moore: I think that's important.

Do I have a second, or a minute, or thirty seconds?

The Chair: You have one second, but I don't know if you can—

Mr. Rob Moore: I think that's an important point, because there are individuals who have suggested that someone is condemning conditional sentences because of one or two high-profile, sensational cases, and you're testifying that it's on the hundreds of cases.

Ms. Catherine Hutchison: If there are, for example, hundreds of serious sexual assaults, we're not talking about one. If we looked at the numbers in Ontario, if we're supervising all of them, then we would know that there are many serious sexual assaults. No, it's not as many as the frauds, certainly, but there are many, and if you looked at the seriousness of that offence, you would wonder whether that sentence does reflect the values of that community. I would question that, because I would hope, at least personally and professionally, that we place more value on our children and that we place more value on those behaviours as being inappropriate and dangerous.

The Chair: Thank you, Mr. Moore.

Ms. Barnes.

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

Thank you for your excellent testimony. It was very helpful.

First of all, I want to talk about how these bills normally get to us, and, Ms. Saulis, you've mentioned that there was no consultation with you in any form. Maybe to you and the defence lawyers, is consultation something that you usually obtain from the government prior to the passage of a government bill?

Ms. Jolene Saulis: Yes, there have been some circumstances when NWAC has been consulted. For example, in legislation concerning the Indian Act, Indian Affairs often comes and consults with major national aboriginal organizations.

Mr. Marvin Bloos: We've been consulted regularly since 1992, and I've been to Ottawa and Toronto any number of times to meet with the Department of Justice.

Prior to coming here today, I spoke to Judge David Orr in Newfoundland, who is the chair of the provincial judges law section. I asked him if they had been consulted. I didn't know if there was a process. He said no, they had not been consulted on this bill.

Hon. Sue Barnes: Were you consulted? Was your organization consulted on this bill?

Mr. Marvin Bloos: No.

Hon. Sue Barnes: On other criminal law bills in past years, were you consulted on all or most?

Mr. Marvin Bloos: Yes, we were asked for input and in many cases we were asked to attend meetings in Ottawa or Toronto on various legislation that was on the way.

Hon. Sue Barnes: I want to get to some of the drug issues. What's the difference in the courtroom between a conditional sentence treatment order and any other, say, a probation? What's the difference in process?

Mr. Andy Rady: The difference in process in terms of what's going to happen as a result of the sentence?

Hon. Sue Barnes: I want to know whether it's mandatory or by consent. What's the difference in, say, tacking on a drug treatment order to probation versus getting it under a conditional sentence?

Mr. Marvin Bloos: It's an order of the court. The person is in jail, so it amounts to jail. If they don't follow the order, then they get punished. It's as simple as that. So it's the same as if they were in jail and then got caught with drugs—they go into segregation. So there's no difference. They have no choice. They must follow the order.

That's not true on probation, where they have to agree to it.

● (1750)

Hon. Sue Barnes: So there is a major difference between the conditional sentence drug treatment order and any of the other drug....

What about the probation officers?

Mr. Donald Larman: It's a matter of terminology in respect of how they want to structure the order and the term on the specific order, whether it's conditional sentencing or a probation order.

Ms. Catherine Hutchison: You would use the word "treatment" and order the conditional sentence. Many of the probation orders have treatment. They call for counselling or programming, and they don't need the offender's consent to order those on probation. To actually order a treatment program with conditional sentence, they don't need their consent. With probation, they would if they put the word "treatment".

If we had a child sex offender with a conditional sentence and probation, often they're going to go to the same facility and receive the same treatment. It's a matter of the nature of the problem and the language they use in the order.

Hon. Sue Barnes: The sentencing principles are in this section in Bill C-9. Mr. Roberts, could you tell us whether you feel that the way Bill C-9 is currently drafted is compatible with the sentencing principles that have not been changed in the code?

Dr. Julian Roberts: It's incompatible in the sense that it's not consistent with the fundamental principle of proportionality, which, as I say, has these two branches. This bill would remove the ability to establish the culpability of the offender. It's prejudged by the parliamentary committee that's reviewing it.

Hon. Sue Barnes: I want to take your comments a little further. This bill was sent to this committee after second reading. That means that we can't introduce another concept into the way the paragraph... because it's a one-paragraph bill affecting some 160-odd parts of the code.

But in Bill C-70, we did. I want to make sure that you're clear that this was affecting criminal organization offences, which would capture some large drug operations, the serious personal injury offences in section 752 of the Criminal Code, and terrorist activity.

I know you've answered directly to Bill C-70, but I'm asking you about the limitation on a smaller group. It effectively takes out the property crimes and some of the other lesser crimes. It drastically drops this list. Would you think those are the right areas? If there were a wish by Parliament to take away some of the things the probation officers are telling us about, would this be the place you would go?

Dr. Julian Roberts: Yes, it would be, but I think you need to take a look at the research on public opinion. It's all very well to say communities don't like this or communities don't like that, I've had tonnes of letters, blah blah blah. Take a look at the research—and the Department of Justice conducted a lot of it. What you find is substantial public support for conditional sentencing, except for these very serious personal injury offences, sexual offences in particular, on which the public is clearly strongly opposed.

Hon. Sue Barnes: In fact, probably all that research was done under the prior government and was consulted at that time. Is that correct?

Dr. Julian Roberts: It was done under the previous government.

The Chair: Thank you, Ms. Barnes.

Mr. Lemay.

[*Translation*]

Mr. Marc Lemay: This is a very interesting debate. Firstly, I wish to thank you for being here. For 25 years, I practised as a defence lawyer, and spent the last 15 years working in criminal law exclusively. Between 1996 and 2004, the year that I was elected, I acquired much experience with conditional sentences of imprisonment.

I have a question for the Probation Officers Association of Ontario. Do you work with both probationers who have received a prison sentence and those who have been handed down a sentence by the provincial court? Do you deal with both sets of probationers?

[*English*]

Ms. Catherine Hutchison: Anyone who is sentenced to a term of two years less a day remains in the provincial system. That includes everyone on probation and all conditional sentences. There is no federal probation, so we have provincial probation, we have conditional sentencing, and then we have provincial parole.

● (1755)

[*Translation*]

Mr. Marc Lemay: Excellent.

Therefore, I assume that you have the figures. We work a lot with figures. Do you have them? If so, how many failures concerning conditional sentences occurred since 1996? Within the probation system, we know that if a person does not carry out his present sentence for whatever reason, he must return before the courts. Do you have those statistics?

[*English*]

Ms. Catherine Hutchison: Are you talking about breaches?

Mr. Marc Lemay: Breaches, yes.

Mr. Donald Larman: On breaches—this is in Ontario—half result in no custody at all before the courts, in approximately 30% they terminate the conditional sentence, and the balance get some custody.

Ms. Catherine Hutchison: The Ontario Ministry of Community Safety and Correctional Services is the keeper of the statistics and could probably provide them from back then. We do have some of the statistics here, but we don't have them, for example, from 1996 until now. We don't have the numbers of every breach here, but the ministry would have that information.

Was that your question?

The Chair: Those stats on the breaches sound like a good set of stats that we could use, Mr. Lemay.

Ms. Catherine Hutchison: In terms of your question about the breaches and the results, I have heard reference here to the idea that you go to jail and serve your sentence. In Ontario, that's not the case. About half the breaches that we have laid have not resulted in any jail time at all. As Don was just mentioning, in the last two years, approximately 25% to 32% resulted in the conditional sentence being terminated—which means serving the balance of the sentence in its entirety in jail—with the remainder, which is about one-quarter or so, getting some custody.

So the fact is that in half the cases in Ontario they don't get any jail time at all as a result of their breach. That's significant compared to what is being said here, that you go to jail if you breach. That's certainly the message the offenders may get at the outset in terms of a deterrent, but the reality in Ontario is not that.

Mr. Andy Rady: I might be out of order, but I don't believe that was his question. I believe his question was, of all conditional sentences, how many are breached? It wasn't what happens after the breach, but how many are breached.

The Chair: And we could get that information, I'm sure.

Mr. Donald Larman: We answered that. We don't have it; the ministry does.

The Chair: Yes, if we could get that information from the ministry, it would be good.

Mr. Donald Larman: We will work on that.

[*Translation*]

Mr. Marc Lemay: Yes, Ms. Joncas.

Ms. Lucie Joncas: I simply want to draw your attention to what constitutes a breach. Even if an individual has met all conditions for one year, and one day shows up 20 minutes late, this action would be considered a breach. We are well aware that this does not constitute another offence. One really has to take circumstances into account when determining whether or not a breach has occurred, as each breach can lead to charges.

Mr. Marc Lemay: I agree with you.

[*English*]

The Chair: Thank you, Mr. Lemay. You had the good fortune of being in the second round, so your time isn't quite as long.

Mr. Thompson.

Mr. Myron Thompson (Wild Rose, CPC): Thank you very much for being here, to all of you. I'll try to be quick. I know time is running out.

To the Council of Criminal Defence Lawyers, Mr. Bloos, you started off your presentation by a list of people you've conferred with—I believe you had judges, lawyers, prosecutors, farmers, teachers, school administrators, people who work at 7-11, McDonald's—but I didn't hear about victims. Why didn't you consult with victims and other people who are not in the classification of judges and lawyers and prosecutors?

Mr. Marvin Bloos: I have a lot of victims as clients. These are the families of my clients, the wives and the children. So when their husband or their father goes to jail and they are cast onto welfare or cast out of their house, they are victims too. We don't hear much about them, but I deal with them day in and day out. Their children are also ostracized at school because of media reports, their families are thrown into turmoil, not because they've done anything wrong but because somebody in their family, with whom they really had no involvement with in the sense of the wrongdoing, has done something wrong. But in law there is a test. It's called the reasonable person test, and we use that. It means that a person fully informed of all the circumstances—

● (1800)

Mr. Myron Thompson: Thank you. You answered my question.

However, the victims of the family of the perpetrator are one group. There are tons of victims out there who aren't related to that perpetrator, and I didn't hear about any of those conversations. In other words, the victims of crime are really supporting this legislation. The public at large is supporting this kind of legislation. Taxpayers, the regular people out there who pay the bill, will tell you —as a politician who talks to everybody—we'll pay the bills to build more prisons, if we need them; we want this taken care of. We applaud the probation....

I've been here 13 years and I've been working hard on crimes against children. I am pleased to hear the emphasis that's put on that by this group, by the police officers, and by the enforcers of these laws. I think the public is sick and tired of reading about these types of individuals getting house arrest. I find it amazing that there's such a difference in the expression of conditional sentence, of confinement and harshness, from you fellows. Yet I heard they have access to TVs, they have nice showers, they get a warm bed, and they come and go basically as they please. I see a big difference in the opinion on house arrest, which is basically what a conditional sentence is. I don't know why that is, but you may want to answer or comment.

I would like to throw one more question out. Ms. Saulis, you made a good point on root causes. Nobody could disagree with that. I can assure you that all of us here believe in conditional sentencing, that there's a better way than jail in a lot of cases. There's no doubt about that. We believe that.

But in my years, when I went across the country for the leader of our party at the time, I spent time with grassroots natives from coast to coast and visited with the coalition of accountability, basically run by aboriginal women. The thing I heard more and more in regard to sections like 718, I believe it was, was, why is the justice system treating us like second-class citizens? Why aren't harsher penalties given to those who offend us who are usually of native race? Why are they given special attention?

You see, there are so many questions out there from people we don't hear from—from the guys and gals and women and men who are the victims of these crimes.

Mr. Bloos, I understand the family problem. That's a sad situation, there's no doubt about it.

But we're hearing these things over and over again. They're saying, okay, we want the root causes addressed, we want the possibility of rehabilitation—we want all that. But you people on the justice committee, you're coming up with a law that isn't going to deal with root causes, and so on. But what do you do with those who cross that line? I would strongly suggest that in the public eye, Bill C-9 is a very good direction to go.

Ms. Jolene Saulis: I'm from Tobique First Nation in New Brunswick, and I worked in the correctional system for three years. I worked with the policy adviser group there, and then I worked in the institution with these aboriginal men and women we're talking about today.

The root causes are the reasons why these people are going to jail. There are reasons of unemployment, lack of education, and lack of resources in the communities. Many of these communities are isolated, and many of these aboriginal people coming from these communities are lacking access to families and their culture.

So when they go to these institutions and they're sitting in jail, it puts a damper...again in showing the overrepresentation of aboriginal people in these institutions. Root causes are the reason why aboriginal people are in prison.

● (1805)

Mr. Myron Thompson: I have a point of order, Mr. Chair.

I might add that I've been told on a number of occasions that the main root cause is alcohol and drugs for all of these things.

Ms. Jolene Saulis: No, that's not true. The main root cause is—

Mr. Myron Thompson: That's what I've been told by Correctional Service a number of times.

Ms. Jolene Saulis: I worked in the aboriginal issues branch at the Correctional Service of Canada, and I come from a community.

The root cause is not simply alcohol and drug addiction. It's residential schools and the “60's scoop”—these have intergenerational effects. The child welfare system is another thing. Lack of opportunities for programming, such as proper education and proper substance abuse programs....

Nothing in the Correctional Service of Canada or within the justice system is culturally relevant. And if it is, it's serving less than a quarter of the population. Programming needs to be instilled.

At least conditional sentencing offers these people the opportunity to go back to their roots, go back to their communities, and it address them in a culturally traditional manner. And that's—

Mr. Myron Thompson: I understand why you don't agree with that, but that's what I've been told by pretty high officials who have been in the Correctional Service for a long time.

Ms. Jolene Saulis: Yes, and I'm just letting you know that I'm somebody who has worked in those institutions and with these people.

Mr. Myron Thompson: That's who I'm talking to, the workers in the institutions, the same kind of people, who would disagree with you.

Ms. Jolene Saulis: I'm an aboriginal. I come from a community where these issues have arisen, and yes, alcohol and drugs are factors, but they're always just one factor. We have to look at things like residential schools, fetal alcohol syndrome, mental health issues. These are root causes for aboriginal people going to jail. You can turn today to the correctional investigative report that was just released. Howard Sapers, who is the correctional investigator, just released a whole document, a whole section, on discrimination against aboriginal people in the justice system, and if you turn there, all your questions will be answered.

The Chair: Thank you, Ms. Saulis.

Mr. Bloos, did you want to respond to Mr. Thompson?

And I might point out that I have a note referencing several witnesses who may want to leave at six. Can you still continue for a bit here?

Dr. Julian Roberts: We can't tear ourselves away.

The Chair: All right. I would hope not. I think we have a good debate going with Mr. Bloos.

Mr. Marvin Bloos: I think Mr. Thompson and I approach this from different premises, because what we've heard today is that when you give individuals in the community all the information and then ask them what sentence they would impose, they come pretty close to the sentence imposed by the judge. So if we're going to establish the laws in Canada based on the sensational details people read in the newspaper, we want a well-informed community. We've been told over and over again deterrence isn't what keeps people from committing crime. Most of my clients aren't thinking. A lot of them are young people who do foolish things and now they have to pay the price through the conviction and sentence process.

I echo what my friend from the native community has said. In the north, these individuals stay within their communities. They work with the elders. They are given an education, they're given drug treatment, and they're taught proper respect for women, which is a big problem in the north, as the men don't respect the women. They do all of that within the context of a CSO. If they're sent to jail, they're out of the community. They don't face the situation; they don't face their problems. They're not working with the elders and they're not learning. They come back probably as bad as they left.

When we're dealing with these orders, it's not a matter of what the community might like. I'd like the community to be informed and then hear what they say, because these are a relatively small percentage of sentences based on the statistics in front of this committee. I understand the sentences we're talking about in Bill C-9 are approximately 3% of the sentences imposed every year in Canada. Five percent equal conditional sentence orders or something like that, or 8%, and of the longer sentences in the offence categories, we're talking about perhaps 3%.

The wheel isn't broken, as I've said before. I think it's working very well. We've got a good judiciary in Canada. Day in and day out, they try as hard as they can to get it right, to do the right thing in that individual case. They sometimes make mistakes. That's where I come in. I go on the appeal. But they're working very hard to get it right. They read the papers. They have neighbours who complain to them. It's in the newspaper all the time about the easy sentence someone got. They're aware of that. But they are trying to do justice in a specific case based on the best information they're given.

● (1810)

The Chair: Ms. Pate, quickly, please.

Ms. Kim Pate: Thank you.

In terms of the victims, as I think your members and other members of the committee are well aware, our organization and the Native Women's Association of Canada work with women who have been victimized as well as those who are criminalized. It's our experience that most people, if they're basing their information on what's in the media, don't have the full information or the full picture. It's our experience that those who are victimized are more likely to be women, and especially aboriginal women, in the context of some of the serious offences being talked about. I think the report that has come out recently about the rate of victimization and criminalization of aboriginal women speaks to that. I'll just underscore what Ms. Saulis said about the report that was released today.

We also have to take into account the fact that we've heard MPs from the party that introduced this legislation talk about the legislation and clearly make mistakes about it. If we're relying merely on what people are being told when you go out to speak, without first giving information, I think we're following a false premise. I would suggest that once people have the full information, understand why a sentence was imposed, more likely than not you'll see support for those sentences. That certainly has been our experience working with those who are victimized as well as those who work in the system, including the police.

The Chair: Thank you.

Mr. Merasty is next.

Mr. Gary Merasty (Desnethé—Missinippi—Churchill River, Lib.): This is to Jolene, Kim, or Lucie. I myself come from a first nations community and grew up on a reserve, and from what I understand there are systemic barriers that contribute to the higher rates of incarceration. One mechanism to try to address this was the restorative justice approaches that were introduced.

I think Bill C-9 actually removes the restorative justice approach in large part, potentially, because many of the offences are listed under Bill C-9. What other mechanisms do you think would work if Bill C-9 passes and these restorative justice approaches are taken away?

I know in my community we've had fly-in courts in which maybe sometimes the judges, the prosecutors, and the defence lawyers have an agreement before they land in the community on the outcome of some of the—

The Chair: I'd like to just make a correction on one comment you made. The bill does not totally take away restorative justice, nor does it take away CS.

Hon. Sue Barnes: On a point of order, this is his time, Mr. Chair.

The Chair: I know, but I was just correcting a misunderstanding, obviously.

Mr. Gary Merasty: No. In large part, when I look at a lot of the restorative justice cases that are occurring out there.... When you look at Hollow Water, which the minister addressed here earlier, I think he was unsure if it would, and was not absolutely sure that would happen; I think the minister himself was confused on this issue.

Being remote, flying in, lacking a court...what other mechanisms do you think could be employed if this fails or if that alternative is potentially removed?

Ms. Kim Pate: I think there are some other mechanisms. Certainly in the past we've seen probation and other options used. The reality is, though, that because conditional sentences have become so entrenched in our system, it's more likely to be a conditional sentence option in particularly the more serious cases, which in our experience are the ones in which the aboriginal communities and the communities up north have wanted to see those approaches. That's where we're seeing increased use, or some of the greatest use, of conditional sentences, and Jolene can correct me if I'm wrong, and it's where we hear from elders and from members of those communities that the person who is the predator....

I was surprised, actually, to hear from our friends at the probation service that there are many hundreds of those cases, because certainly we're not aware of many hundreds of child sexual abuse cases going to conditional sentence. So I'm very interested in seeing the stats as well.

In fact, what happens, particularly in some of the northern and aboriginal communities, is the elders in those communities are respected and are asked for their support and advice on what should happen in terms of sentencing. If they say this fellow has been here a while and we don't think he should be continuing on, chances are he won't be accepted by even the community to be looked at for a conditional sentence. So some of the screening is happening there.

Some lawyers will still argue for those individuals; probably some of them still get those. My guess is that if they do, they have very stringent conditions placed on them and probably they're not held or kept in their own communities—just from the stories I've heard.

There's no doubt that there are concerns. Women's groups, ourselves included, and the Native Women's Association as well, have expressed concern over the years about really lenient approaches being used in cases of misogynist violence.

The fact that we have systemic discrimination already in our system and that sometimes our judges suffer from using bias is not new—there have been far too many aboriginal justice reports to challenge that—but the reality is that an arbitrary removal of conditional sentences based on the provisions in Bill C-9 is not going to solve that problem; it is quite the contrary.

● (1815)

Ms. Jolene Saulis: She said it all.

The Chair: Are there any other questions?

Mr. Gary Merasty: I think one of the big issues.... This is getting into the symptom issue. You know, heart attacks kill; heart problems are the symptom....

There are other factors in life that contribute to this discussion we had earlier.

What would you recommend, given Ms. Barnes' earlier comments? At this stage of second reading, what types of amendments or possibilities could you suggest for the committee to consider as we move forward?

Ms. Jolene Saulis: I'm going to reiterate that consultation needs to take place. The removal of conditional sentences, or whatever you call it—I see it as a removal—will greatly impact aboriginal people. It would add to the overrepresentation of aboriginal people in the justice system.

We are consistently seeing a lack of programming. Aboriginal people are always getting out of jail last. They are always classified higher, at maximum—60% of aboriginal women in jail are maximum; 46% are medium.

I think you need to consult with the organizations that are acting as the voice of these women. Clearly, being in an institution.... You always hear the argument, “Who's going to listen to them?” If they can't do it, then I need to speak on their behalf. Consulting, hearing these women's stories, and hearing about...again, I'm going to go back to the root causes of why these people are in jail. At least through the consultation process you will be able to say that we took the time to listen, we took the time to address the overrepresentation of aboriginal people, and we're looking in a direction to address aboriginal women in particular in regard to Bill C-9.

I still believe that consultation is probably the route to go.

The Chair: Thank you, Mr. Merasty.

Mr. Petit.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): My question is for Mr. Bloos or Mr. Rady. There is something that I am puzzled about. You said it is easier if you use conditional sentencing. Currently, there are street gangs in Montreal. I just heard someone say that criminals have no knowledge of the law. They use youngsters under the age of 14 because they know that the sentences will not be as harsh. In this way, young people are employed as street pushers, and this is spreading all over Montreal. A member from the Bloc has even written a book about this very topic. The problem has reached endemic proportions.

Now the sale of drugs does not involved violence as such. Deals are made, and that is all. But on the other hand, this leads to prostitution, theft, assaults of the elderly, etc. I know for a fact that defendants are overly protected, but I am speaking on the behalf of the victims, because there are far more victims than you might think, for instance, there are people who become addicted and take up prostitution. In Quebec, this frightful situation lasted for two years. I do not wish it on anyone. The entire system was contaminated.

You said that aboriginal people are overly represented. We know very well that most Aboriginal people—as Ms. Saulis just said—live in poverty. We have been working with Legal Aid Certificates. How do you react when you have a legal aid certificate? Right away, you would enter a guilty plea so as to avoid a trial. This is how many Aboriginal persons end up in jail because the legal aid grants are insufficient to pay for their defence.

I would like to hear what you have to say about this

● (1820)

[*English*]

Mr. Andy Rady: Maybe I can answer that.

I do a lot of legal aid work. I represent a lot of aboriginals, both through legal aid and by way of their paying me privately. I don't make any differentiation between the two and how they're treated by me.

The difficulty seems to be that everyone who consults a criminal lawyer expects that lawyer to be their advocate in court, whether they're pleading guilty or having a trial. They all have the presumption of innocence.

In terms of the native community being overrepresented, there are two reserves near where I come from in London, and they are overrepresented in that more natives than non-natives per capita are being charged with offences. So I don't know how to answer that question, because it seems we have a lot of natives being charged in the first place. So obviously in some cases I'm representing more natives—given that they're part of the population—than non-native people. I don't know if that really answers your question.

In terms of what we are supposed to do, it's not just to make a deal. Sometimes it is. But at all times it is to see that they're treated fairly by the justice system. And that's what we're trying to do in all of those cases. Whether that means going to trial or whether it means a guilty plea and trying to mitigate their sentence or get a sentence that's fair and just for them, that is the role of any criminal defence lawyer.

Mr. Marvin Bloos: I would like to add to that, sir.

With respect to your example of the street gangs, starting off with the 14-year-olds and on up the chain, I can tell you that in Alberta the offenders at the lowest end, the ones who have just been dragged into it and are still young and don't know what they've gotten themselves into, if they're involved in a minor way, might be eligible for a conditional sentence order. But our court of appeal has made it crystal clear that anybody involved with drug trafficking for commercial purpose is going to jail. There is no availability in Alberta for a CSO for those kinds of offences because of the appeal pronouncements our court has made, and that applies, I believe, to the Northwest Territories. I'm sure the same is true in Saskatchewan.

When you get those young kids who don't know what they're doing and get dragged into it because of a friend and are in the car one night selling to somebody and get caught, those are the guys who you can still reclaim. Those are the ones you can help. Sometimes, if the right conditions are there, they can get a CSO, but otherwise, at least in Alberta and in the west, they're not getting CSOs for those kinds of offences. They're treated very seriously. Gangs are a problem in Edmonton and in Calgary. The community is concerned and sentences are not light for persons involved in gang activity, I can tell you that.

The Chair: Thank you, Mr. Petit.

Do you have another question?

Mr. Daniel Petit: Yes.

The Chair: You may have to hold it.

Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): I've enjoyed the discussion here this afternoon very much.

I've perhaps already reached the conclusion before I got here today, but today just confirms it, that we all know that this bill doesn't get rid of conditional sentencing. It never intended to. Any pretension otherwise is misleading.

The ambit of the provisions goes way beyond any rational approach to designing a sentencing regime because it includes things such as unauthorized use of a computer and—I'll mention it again—cattle theft. The chair pointed out at some point that you could use a cow for a terrorist offence and then you'd really be into some serious territory.

I'm disturbed by that and the criteria. In other words, using the criterion of the ten-year maximum is anything but reasoned, almost to the point of being irrational, given the state that the Criminal Code is in, in its whole listing of maximum sentences.

So we have a very difficult situation here in which we're expected to be reasonable and rational in designing laws and enacting them. I can't find a way out of this, other than rejecting the bill, yet the public seems to want a bill. I mean, some people want to get rid of conditional sentencing, but the government isn't going to do it, and I don't want to do it in opposition, and professionals in the field all say don't do it.

I want to ask Mr. Roberts this. Is there any quick fix here? I know you made some suggestions. Is there any quick fix that you could see here that would allow us to reach out and grab a hold of something that's reasoned, so that in the end the judges will understand it and that would allow the public to see a shift that meets the political need and still allow aboriginal communities to get on with the good work they've been doing in sentencing and accomplish some of the other objectives?

● (1825)

Dr. Julian Roberts: My simple answer would be that I'd tell the government to go back to the drawing board. If you have the bill as it stands and you have no judicial discretion, it's not going to be an effective piece of legislation. It's not going to achieve the goals, as I mentioned.

One thing you could do is you could make it presumptive: for an offence proceeding by way of indictment, with a maximum penalty of ten years or more, the offender will be presumed not to receive a conditional sentence, or language to that effect. This would permit a court in exceptional circumstances, for example, with respect to the aboriginal issue, if restorative justice was uppermost in the court's mind, and the conditional sentence is, of course, a hybrid—punitive and restorative—to impose a conditional sentence in that case, notwithstanding the language of the statute. That's one way of doing it. You could allow the courts some *souplesse*, some ability to impose a conditional sentence, although there would be a strong statutory presumption against it.

Mr. Derek Lee: Would we have to rely on the Constitution and the sidebar wording of the charter to allow aboriginal communities access to that kind of a special arrangement?

Dr. Julian Roberts: I don't think so, because paragraph 718.2(e) has withstood.... That provision could be invoked to override the presumption against the conditional sentence in a case involving an aboriginal offender in which restorative objectives were uppermost in the mind of the court.

Mr. Derek Lee: Thank you, Mr. Chairman.

The Chair: You have thirty seconds.

Hon. Sue Barnes: I want to touch on legal aid and the impact of the lack of resources for legal aid, and maybe I can talk to defence counsel. Usually, at least in my province of Ontario, the legal aid professionals tell me that even though there's not enough, it usually goes to those facing jail terms. What's going to be the impact of this bill on those seeking legal aid so that they can get representation or end up going without representation?

Mr. Andy Rady: It will obviously have a bigger impact, because one of the criteria for getting legal aid, at least in the province of Ontario, is that you have to face a substantial likelihood of jail. If this increases the likelihood of jail, then there are going to be more people requiring legal aid. Right now, the province of Ontario is facing a $10 million shortfall in legal aid for this year—and that's just at this point in this year, since Ontario's fiscal year ends at the end of March. So it will put a much greater pressure on the legal aid system, and I would think that would apply across the country.

The Chair: Thank you, Ms. Barnes.

Mr. Brown, please.

Mr. Patrick Brown (Barrie, CPC): I have a question for Mr. Rady.

Touching upon a point Mr. Lee made, there certainly is a will in the public for changes and a tougher Criminal Code. Can you give me any examples of an offence for which you believe a conditional sentence isn't warranted?

Mr. Andy Rady: Isn't warranted?

Mr. Patrick Brown: Is there anything in the list put forward in this bill that—

● (1830)

Mr. Andy Rady: Obviously, there's what is there right now. But one of the things we obviously have to remember is that if there is a mandatory minimum punishment, those sentences are not entitled to have conditional sentences. There were amendments to the Criminal Code, effected last November, to a lot of the offences that included being sexual predators on children, including sexual interference and sexual touching. They imposed mandatory minimums, albeit small ones, that have already taken conditional sentences away from those crimes.

Mr. Patrick Brown: But from the existing legislation...?

Mr. Andy Rady: From the existing legislation, no, and I'll tell you why. I even thought of what the most serious charge could be. It's probably manslaughter. Manslaughter in one case can be some fellow who has gone to a bar with his wife or girlfriend and some other fellow makes a comment and the first fellow punches that second fellow. The punch kills the guy. That's a one-punch thing, and all he's doing there.... Now, maybe that's a conditional sentence and maybe it isn't under the circumstances. Of course, manslaughter could be something much, much more violent than that.

Take a case that's already been mentioned, impaired driving causing death. You have two friends. The driver of the car also suffers an incredible brain injury and can barely function now, but he is fit and he understands the judicial process. To put him in jail would effectively be to kill him, yet a suspended sentence is probably not denunciatory enough from society's point of view, because he did cause someone's death. So perhaps a conditional sentence is a good middle road.

All I'm saying is if it's a serious crime, there's no reason why we can't be tough on it with what we have now. We're not changing the ability of judges to send people to jail. They do send them to jail. We're just giving them another tool.

Mr. Patrick Brown: You've argued that there's a wide variety in robbery. As an example, a first-time offender kicks a kid off his bike and steals his bike. That individual does it repeatedly and uses violence. Is that an example for which you believe a conditional sentence is appropriate?

Mr. Andy Rady: I don't know if it's appropriate, but if he pushes him off the bike once, the judge has the option. If he kicks him repeatedly and then he's violent and perhaps a danger to the community, it's unlikely a judge is going to impose that. It's going to be vociferously opposed by the crown attorney. So actually, no, it's not. But to cut it out for that more serious situation also cuts it out for the less serious one, unless we start breaking down what a robbery charge is. That's the difficulty as I see it, because the offences are so broad.

Mr. Patrick Brown: Conditional sentencing came in around 1996. Did you believe the Criminal Code was inadequate prior to that?

Mr. Andy Rady: I have to tell you that I believed at the time that there were some things for which people were going to jail because their activity was beyond that which would have resulted in, properly, a suspended sentence and probation. However, jail was probably too harsh for some of these people, in that it was a sentence over ninety days. They couldn't get an intermittent sentence, they were going to lose their job, it might have affected the family, they might have had other mitigating factors. So I believe we were lacking for that in-between area, and that's the void conditional sentences have filled.

The Chair: Thank you very much.

I would like to thank the witnesses for presenting.

I believe this has been a very good discussion. I think we've touched on a lot of areas that drew interest from our members here.

I want to thank you for coming, and again, I apologize for the lateness of getting you to the table.

I again will ask the Probation Officers Association of Ontario for those stats.

Ms. Catherine Hutchison: Yes, we will.

The Chair: All right.

The meeting is adjourned.

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