House of Commons
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 021 • 1st SESSION • 39th PARLIAMENT

EVIDENCE

Tuesday, October 17, 2006

Chair

Mr. Art Hanger

Standing Committee on Justice and Human Rights

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● (1530)

[*English*]

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

We will continue our debate on Bill C-9, an act to amend the Criminal Code on conditional sentence of imprisonment.

I would ask the media and the camera to leave. Thank you.

We have before us three different groups today: Barreau du Québec, Aboriginal Legal Services of Toronto, and the Assembly of First Nations.

I would like to proceed with the presentations in the order in which they appear on our agenda. Who will be speaking? Will it be Giuseppe Battista? I understand that Madame Moffet will introduce Mr. Battista. Please go ahead.

[*Translation*]

Ms. Claire Moffet (Lawyer, Research and Legislation Service, Barreau du Québec): We represent the Barreau du Québec, a professional body responsible for governing lawyers and ensuring public protection.

The Barreau du Québec has several standing committees, including one on criminal law. It is an advisory committee composed of over 20 members including defence lawyers, crown prosecutors and some university professors.

Mr. Battista has been a member of the Barreau du Québec since 1986. He has been on the criminal law committee for over 10 years. He practises mainly in the field of criminal law and, on occasion, disciplinary law. Mr. Battista is the author of several legal articles and has lectured in his field.

I'll now turn the floor over to Mr. Battista.

Mr. Giuseppe Battista (Member of the Committee on Criminal Law, Barreau du Québec): Thank you.

It is an honour for me to have this opportunity to present the Barreau du Québec's views before this committee. We of course hope to be able to contribute to your work.

The Barreau du Québec holds the following views on conditional sentences: the Barreau du Québec believes that conditional sentences, as introduced in the Criminal Code in 1996, are an important additional instrument made available to the Canadian criminal law system. It meets the objectives of sentencing and the tailoring of sanctions, without endangering public safety.

We believe that the proposed amendment would effectively made conditional sentences unavailable in cases punishable by terms of less than 10 years of imprisonment, and could consequently mean the setting aside of this precious tool.

By eliminating all offences punishable by terms of less than 10 years, could this sanction conceivably serve as an alternative to jail? Because that is the question.

We wonder how useful it would be to have a sanction that applied in cases where judges determine that a sentence of two years or less is appropriate. Will it only apply when offences are punishable by a maximum term of imprisonment of 5 years, 2 years, 18 months or 6 months? As regards of imprisonment, the Canadian tradition—according to the law, and case law—has always held that jail terms were to be used as a last resort when sentencing an offender.

Terms of imprisonment are imposed sparingly and carefully. If the maximum sentence provided is five years and we want to maintain this provision, will it apply? If a judge finds that an offence punishable by a maximum term of five years warrants a jail term, there may be issues as to the type of individual who finds themselves before the court. Some may wonder whether a conditional sentence will be imposed. We believe this limitation could have significant repercussions.

Conditional sentences are not automatically granted at this point. There are criteria for the granting of such a sentence: no minimum; less than two years; no danger to public safety; and compliance with the objectives.

The objectives are clearly defined by you, the legislators. Sentencing must denounce behaviour, and deter the offender and others. So, the idea of sending a message to society is a factor which must be borne in mind. Isolating an offender, if need be, is already a criterion under the law.

In my humble opinion, and in the opinion of members of the committee, conditional sentences are an important instrument of social rehabilitation. Obviously, we need to ensure redress for damages and we need to educate the offender. At this point, judges need to keep these factors in mind, and in our opinion, they do.

The criticism which has arisen, and which we read about in the consultation document, has to do mainly with one issue, the fact that this provision could be applied in serious cases or cases involving violence. In our opinion, these criticisms relate to one factor only, which judges need to bear in mind and which must be considered as required under the law and case law.

When sentences are imposed, a number of factors related to the granting of a conditional sentence must be assessed, as I mentioned earlier on, in addition to all the sentencing factors. Objective and subjective factors must be considered, as well as aggravating and mitigating ones.

● (1535)

It is conceivable that serious violent crimes, or crimes leading to serious outcomes may include subjective and objective factors which call for detailed consideration at the time of sentencing. It may be that positive factors far outweigh any negative factor in the case, despite the offender's guilt. Conditional sentences allow the legal system to deal with these cases humanely, and adequately. They allow judges to impose sanctions which serve as denunciation, and yet reflect the need and desire to rehabilitate offenders.

The Barreau du Québec favours an approach which provide for more administrative and monitoring support for this type of sanction, rather than limitation of its application. The Barreau believes that a cost-benefit analysis based on available information would be helpful. Indeed, we also have available information on the application of this type of sentence, but studies still need to be done on a number of aspects of its application.

Based on the information we have, we see no rationale behind any increase in costs. In our humble opinion, the proposed provision or amendment would certainly increase the costs of running jails. More people would obviously be sent yet there would be no corresponding benefits involved. Costs would definitely increase, but there is no guarantee that we would benefit from a decreased crime rate, because since conditional sentences have been available, nothing has indicated that there has been an increase in crime, a decrease in public safety or a decrease in the risk of recidivism. Once again, that is an area that has not been studied.

Finally, this amendment would reduce judicial leeway in sentencing. We believe that goes to the heart of an independent judiciary. We are of the view that it is important for judges to have more latitude in sentencing.

Thank you.

● (1540)

[*English*]

The Chair: Thank you, Mr. Battista.

May I ask for a point of clarification? In your presentation you mentioned that the studies don't show an increase in crime. Which studies are you referring to?

Mr. Giuseppe Battista: We can refer to the ones that were submitted to the justice ministry. In particular, I'm referring to documents we were able to access, the legislative résumé, where studies are considered in terms of the application of the sanction, where it's been applied in different provinces, the increase in its application, and the decrease in the number of individuals sent to prison. There is no correlation anywhere between an increase in the imposition of sentences in the community and an increase in the crime rate. Nothing indicates that people who are given those sanctions reoffend more often than others.

Our point is that we know for certain that we will be increasing the costs, but we have no certainty whatsoever of any benefit to society.

The Chair: Thank you.

From the Aboriginal Legal Services of Toronto, we have Mr. Rudin and Ms. Roman.

Who will be starting the presentation? Ms. Roman, please go ahead.

Ms. Marisha Roman (Vice-President, Board of Directors, Aboriginal Legal Services of Toronto): Thank you.

On behalf of Aboriginal Legal Services of Toronto, we appreciate the opportunity to present our position on Bill C-9 to the Standing Committee on Justice and Human Rights.

ALST has appeared before the Supreme Court of Canada on a number of occasions to address issues surrounding the sentencing of aboriginal people. We are also very active on the ground in justice issues. In 1999 we developed the community council, the first urban aboriginal and restorative justice program in Canada. We were also involved in the development of the Gladue Aboriginal Persons Courts in Toronto. Our Gladue caseworkers provide detailed Gladue reports to judges in Toronto, Hamilton, Brantford, and elsewhere in southern Ontario.

Our work has resulted in the imposition of many conditional sentences in circumstances where a jail sentence would otherwise have been a certainty.

We wish to make it clear at the outset that in our opinion, Bill C-9 is a retrograde move. It will not only worsen the already significant aboriginal over-representation in Canadian prisons; it will also result in less safe communities.

To put this issue in perspective, it is important to keep in mind a few statistics. The issue of aboriginal over-representation in prison was one of the motivating factors behind Parliament’s sentencing reforms in Bill C-41 and specifically in the introduction of paragraph 718.2(e).

Yet despite all the concerns expressed over aboriginal over-representation, the situation continues to get worse. From 1997 to 2001, the percentage of aboriginal people in jails in Canada rose from 15% to 20%. By the end of 2003-04, one in five men admitted to custody were aboriginal, while almost one in three women were aboriginal.

● (1545)

Mr. Jonathan Rudin (Program Director, Aboriginal Legal Services of Toronto): We have five specific but linked concerns with the proposed bill, and we will address each one in turn.

First, the bill casts too wide a net. If passed, Bill C-9 would include among offences ineligible for conditional sentences robbery and break and enter into a dwelling. While most Canadians might think that these offences represent particularly heinous crimes, as members of this committee know, that is not always the case.

Take the offence of robbery. What is robbery? It is theft with violence. In some cases, the violence can be extreme and would require the incarceration of the offender for public safety. In other cases, a theft is turned into a robbery because the offender pushes or threatens to push the victim. Most of us would agree that this latter situation is by no means comparable to the first example, yet both are robberies.

The same holds true with respect to break and enter charges. While we cannot discount the trauma experienced by people who have had their homes broken into, there is a difference between a gang carrying out a home invasion and someone with an addiction attracted to an open window. We have clients who have been charged with break and enter who were found asleep in front of the television in the house they broke into. Did they commit a crime? Yes. Should their action disentitle them to consideration of a conditional sentence? No.

The second concern is about an increase in prosecutorial discretion. Many of the offences listed in Bill C-9 are hybrid offences. If prosecuted summarily, a conditional sentence is possible. If prosecuted by indictment, it is not.

Sentencing decisions should be made by the judge, not by the crown attorney. There is nothing wrong with the crown proceeding by indictment and strenuously arguing for a jail sentence, but it does not seem right to us to allow the crown to unilaterally remove one of the possible sentences available to the sentencing judge at the outset of the process.

Third, we are concerned about forcing judges to choose between probation and jail. Bill C-9 will require a judge who does not think jail is an option to choose a sanction that may be less able to accomplish the sentencing goal than a conditional sentence. We fail to see the logic in this process. How is giving a judge a choice between two sanctions that he or she would rather not choose better than allowing the judge the full panoply of sentencing options?

Fourth is a concern about increasing the problem of aboriginal overrepresentation. It is worth remembering the words of the Supreme Court of Canada in R. v. Gladue. With respect to aboriginal over-representation, the court said:

> These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.

The court went on to say:

> Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.

Bill C-9 will impede the ability of sentencing judges to follow the dictates of the Supreme Court of Canada. It will make the problem of aboriginal over-representation worse.

We have found that judges can design quite creative and helpful conditional sentences. Sentences can be fashioned to allow the offender to take responsibility for his or her actions, and also take concrete steps to address why they are involved with the criminal justice system. In many cases, the offenders are required to attend or complete treatment programs, often in conjunction with other conditions.

Let's look again at aboriginal over-representation, but from a different perspective. Jail sentences are often advocated because they act as a general or specific deterrent. If incarceration really worked as a general deterrent, we would expect that rates of aboriginal representation in prison would drop. After all, what aboriginal person in Canada does not know that if you break the law, you stand a good chance of going to jail?

If jail worked as a specific deterrent, we would not see aboriginal people coming before the courts with criminal records that stretch over three or four pages and include multiple periods of incarceration. But that is what we see, and we see it every day.

● (1550)

As this committee has heard, the average jail sentence of an offender serving time in a provincial institution is between two and three months. No positive change will come over a person who spends 60 to 90 days in custody. No programs will be made available to the person; no counselling will take place; nothing positive will happen. For our clients, frequent periods of jail lead simply to the institutionalization of the offender. Conditional sentences can offer hope for change for the aboriginal offender; incarceration offers just more of the same, more of the same that does not work.

Our fifth concern is that removing conditional sentences would not make communities safer. Let's talk about victims. In addition to being over-represented in prisons, aboriginal people are also over-represented as victims of crime. Aboriginal people and aboriginal communities are very aware of the need for initiatives that will lead to safer communities. It is for this reason that aboriginal communities are at the forefront of restorative justice programs.

Restorative justice programs allow for individuals to break the cycle of jail and the street by having them take responsibility for their actions and for their healing. We have seen what incredible changes aboriginal justice programs can have with individuals with long criminal histories, including many spells in jail. While a conditional sentence is not a restorative justice sentence, it is often an appropriate sentence for an individual who requires a greater degree of supervision. Taking away this option will not lead to safer communities; it will mean communities—aboriginal and non-aboriginal—will be more at risk form offenders who have simply done their time and emerged, at best, no worse than when they went in, but certainly no better.

Ms. Marisha Roman: When important decisions are made in the aboriginal community, we are often reminded by the elders that we must think seven generations ahead. As Oren Lyons, Faithkeeper of the Onondaga Nation, has said:

> In our ways of life, in our government, with every decision we make, we always keep in mind the seventh generation to come. It's our job to see that the people coming ahead, the generations still unborn, have a world no worse than ours - hopefully better. When we walk on Mother Earth we always plant our feet carefully because we know the faces of our future generations are looking up at us from beneath the ground. We never forget them.

We realize that it is often difficult for politicians, particularly in a minority Parliament, to think 10 or 15 years down the line, never mind seven generations. But the sad reality is that the tragedy of aboriginal over-incarceration in this country can at least be partially understood by the fact that decision-makers have often not looked at all on the impact of their decisions on aboriginal communities. It is because we so often do not look forward and contemplate the outcomes of our decisions that we leap to hasty conclusions and quick fixes. Even if we cannot solve a problem, we want to look like we are solving a problem.

In our opinion, Bill C-9 is an example of a hasty, ill-advised response to what is perceived to be public unease with the operation of the criminal justice system. It is a response that will have a disproportionate impact on aboriginal offenders and will make the already growing problem of aboriginal over-incarceration worse; and it will do so with no corresponding benefits in terms of increased public safety.

We urge this committee to carefully review this bill and to recommend against its adoption. Conditional sentences can play an important role in addressing the root causes of offending behaviour. They are not a panacea, but they are a very useful sentencing option for judges. Removing this option in a significant number of cases is a serious step backwards.

Thank you.

The Chair: Thank you very much, Ms. Roman.

Next we have, from the Assembly of First Nations, Mr. Richard Jock and Mr. Bob Watts.

Mr. Watts, please go ahead.

Mr. Bob Watts (Chief of Staff, Office of the National Chief, Assembly of First Nations): Thank you, Mr. Chair.

Honourable members, on Richard's behalf and my own, I want to say we're pleased to be here today to present before you. I want to offer greetings to all of you on behalf of our national chief Phil Fontaine and the executive of the Assembly of First Nations.

As committee members know, we've tabled a document entitled “First Nation Perspectives on Bill C-9 (Conditional Sentencing)”, so we're not going to go into great detail. You have that document, and we are going to give some highlights of it.

The over-representation of first nations people in the criminal justice system has reached crisis proportions. The numbers confirm this critical situation. While aboriginal adults represent 2.7% of the Canadian adult population, they accounted for 11% of admissions to federal penitentiaries in 1991-1992 and 18% in 2002-2003; 29.5% of all incarcerated women and 18.2% of all incarcerated men in Canada are aboriginal. While the federally incarcerated population in Canada declined by 12.5% from 1996 to 2004, the number of first nations people in federal institutions has increased by 21.7% during the same period of time. Even more alarming, the number of incarcerated first nations women increased by 74.2% over the same period of time.

Just yesterday a correctional investigator, Howard Sapers, the Government of Canada's ombudsman, said that the federal prison system has practices that discriminate against aboriginal offenders. He found that the Correctional Service of Canada routinely classifies first nation inmates as higher security risks than non-native inmates, that aboriginal offenders are released later in their sentences than other inmates, and that they are more likely to have their conditional release revoked for technical reasons than other offenders. We are concerned that Bill C-9 will only contribute to these problems. We have identified in our written submission to this committee exactly why.

We'd like to focus on a few areas we believe require specific attention. I am going to go over some of them in general detail, and Richard will go into more specific recommendations.

In terms of solutions, there are four areas we believe require attention.

First of all, there's the issue of poverty. The socio-economic gap between first nations and other Canadians has led to the over-representation of first nations in the criminal justice system and must be addressed if we are to make meaningful progress in reducing the over-representation of first nations people in the criminal justice system in Canada.

I want to read into the record a quote from the Manitoba aboriginal justice inquiry with respect to this. The Manitoba aboriginal justice inquiry said:

> Poverty, inadequate educational opportunities, unemployment, poor living conditions, alcohol abuse and domestic violence all contribute to Aboriginal people coming into conflict with the law. Where disadvantaged socio-economic factors lead to over-representation of First Nations people in the criminal justice system, this is...systemic discrimination.

In terms of structural change, we'd like to point out that the undermining of first nation law and governments by federal and provincial legislation and their policies is another factor that has directly and indirectly contributed to the over-representation of first nations people in the criminal justice system.

This minority government and the minority government before it struggled with the issue of residential schools and struggled with issues like alternative dispute resolution, restorative justice, truth and reconciliation—all those issues that are fundamental to what we're talking about here. And both of the last two governments have come to the conclusion that those are good things; that we need to work through those things. In fact, the foundation of truth and reconciliation is restorative justice. It's an important principle that I think governments have come to agree is important; yet we're seeing it side-stepped in this case, and we're concerned about that.

Existing institutions involved in the administration of justice in Canada are often foreign and not familiar to many first nations people. There are language barriers and issues of affordable legal representation that all contribute to the over-representation of our people in courts and subsequently in jails and prisons.

We'd like to point out that the aboriginal justice strategy is up for renewal and ask for your support as parliamentarians to ensure that this justice strategy is recommitted to and re-funded as of the end of next fiscal year.

● (1555)

One issue that oftentimes gets overlooked and that we found frustrating in preparing for this is the lack of data. We're able to give you some statistics, but in order to try to get behind those numbers we need more reliable statistics. In talking with some of our federal counterparts, they encounter the same problem. So one of the recommendations we would like this committee to consider is really the need for more evidence-based research, in fact, to conduct more research before more consideration of this bill goes on.

I'd like to turn it over to Richard for a more detailed recommendation.

Thank you.

● (1600)

Mr. Richard Jock (Chief Executive Officer, Assembly of First Nations): Thank you. What I'd like to do is summarize the recommendations.

First of all, we agree with the notion that it is important to study the impact of the proposed revisions that are contemplated by Bill C-9 before proceeding with those revisions. We feel it would be really important to conduct such an evidence-based study in advance of such enactment, in order to protect first nations people from further impacts and outcomes of systemic discrimination. This would also require a review of the potential impact of the bill on self-government arrangements that were negotiated in good faith by the crown and first nation governments. Our view is that should such a study be done, this would really reveal a different course of action.

We also propose that further revisions to sections 718, 718.2, and 742.1 of the Criminal Code be conducted in order to ensure that conditional sentencing and restorative justice options remain available to first nations offenders in respect to offences that are prosecuted by way of indictment, for which the maximum term of imprisonment is ten years or more, and for which offences are punishable by minimum terms of imprisonment. In our view, it's really essential that restorative justice and alternative sentencing measures remain available as a way to address the issues of over-representation that have been very effectively made by colleagues.

We would also urge the Government of Canada, on a more broad basis, to launch an inquiry into the causes of over-representation of first nations people, and that such an inquiry adopt some of the measures that would come from this inquiry in order to eliminate the systemic forms of discrimination and over-representation.

We also feel that prior to enactment of a bill, the Government of Canada should conduct a public education campaign among first nations citizens, particularly youth, regarding the potential impacts of any proposed legislation or any final legislation.

As mentioned, the aboriginal justice strategy should be renewed. This would also be a mitigating element in terms of any potential changes to legislation.

We're prepared to discuss the statistics issue at greater length. It's a critical issue, and we have several distinct recommendations as to how to improve and enhance those statistics and to take advantage of provincial databases.

Last, we recommend that this measure not be taken in isolation, that an overall plan be taken to address the socio-economic disadvantage of first nations people. That's a critical element; otherwise this will simply result in more cost to the Canadian public. The cost of education is much more preferable, in our view, to the cost of incarceration.

Thank you.

The Chair: Thank you, Mr. Jock.

I would like to thank all the witnesses for their presentations.

We will now begin questioning. Mr. Bagnell, what is your question?

Hon. Larry Bagnell (Yukon, Lib.): Thank you.

Thank you all for coming. This is very helpful.

Giuseppe, you mentioned that the evidence you had showed that increasing conditional sentences didn't increase crime. Did this actually come from evidence the justice department has?

Mr. Giuseppe Battista: No. My point was that there is no such evidence. What we're saying is that we know for certain—

Hon. Larry Bagnell: That came from studies for the justice—

Mr. Giuseppe Battista: No, but there are studies that have been made. There is the study—I have it here—from the Information and Research Service, and there are a number of studies that are quoted in the document. They relate to the application of the sentence in different provinces and national statistics on its use. But there is nothing that demonstrates anything regarding repeat offences, regarding increase in crime, or anything of that nature.

So what we're saying is that there is a certainty that if we put more people in jail, that will increase the costs of running the prisons, because we're talking about sentences of less than two years—obviously, it's a provincial expense—but we don't have the counterpart, anything that indicates that it will have any kind of impact.

● (1605)

Hon. Larry Bagnell: Does anyone have any evidence or statistics about the treatment you get with conditional sentences, that the vast array of treatment is more effective than having a jail sentence or having probation, which is less intensive and can do less as far as rehabilitation goes?

Mr. Jonathan Rudin: I'm not aware of any studies that have been conducted to address that issue.

Hon. Larry Bagnell: I don't know, Richard and Bob, if you had input from the Council of Yukon First Nations, but aboriginal people in the north live in the most rural communities in Canada, with the most distance, and small communities. What are the effects of incarceration when you sometimes have to take someone a thousand miles from their home to put them in jail and the effects on their rehabilitation potential by not having family support? Conversely, if you have a woman who's been assaulted and is living right back in the same small, isolated community next door to the offender again....

Do you have any comments on either of those effects on aboriginal people living in rural communities?

Mr. Bob Watts: Thank you for the question.

One of the effects, for sure, from evidence we've looked at—some of it anecdotal, some of it more empirical—really goes to the effect of family on rehabilitation. If you have no access to your family, you have no access to your community, and the likelihood of your being able to serve time or to be rehabilitated and enter easily back into your family or into your community is lessened. Therefore, in some cases the likelihood, then, of reoffending grows higher because a person hasn't been accepted back into their family or into their community. So somebody who is sent thousands of miles away from their community is not going to have any contact...maybe the odd phone call or letter from their family. There's a great harm in terms of the ability of that person to deal with the issues and for the community.

It's important in our case to talk about community because community is going to be one of the keys in terms of that person being rehabilitated, being accepted back into society, being part of something that's functioning at the family...and larger than the family order.

Hon. Larry Bagnell: On the aboriginal justice strategy that you referred to, does it refer to discretionary sentences, conditional sentences? Is that part of the strategy?

Mr. Bob Watts: A part of the strategy is indeed looking at conditional and alternative sentencing, at defined sentencing like what's going on in Toronto. Actually, on the service in Toronto, it would be nice if we had more time to hear some of the real stories that happen through this institution, but they're cited in a number of studies and in a number of books in terms of the effect of their services, their sentencing services, the elders they work with, the healers they work with, in terms of the impact on individuals and the impact on communities. That's exactly the type of thing that's cited in the Manitoba justice inquiry.

Hon. Larry Bagnell: Let me just pursue that a bit. It was suggested earlier in committee meetings that with conditional sentences, a guy goes home and watches TV and has fun. I know there's more to it than that, but just so people know and it's on the record, could you tell us some of the things that occur in a conditional sentence?

Mr. Jonathan Rudin: We are very active, as Marisha pointed out, in making recommendations and suggestions to judges for sentences. For many of the clients we work with, because of their criminal records, there is no way a judge would ordinarily release them. So what are very common conditional sentences for our clients are sentences, for example, that will require them to go to a treatment program and complete an addiction treatment program. As part of our work, we help the client fill out the forms to get there, we pay for the bus to get there. Those sorts of things are very common.

There are often quite rigorous requirements to make people follow through. We have clients who are literally under house arrest, and it's not “sitting around watching TV” house arrest. Most of our clients don't live in places where they have access to a lot of luxuries, so they're very real. There are requirements to do specific things. Often the judges ask the individuals to come back and report on what they're doing during the course of the conditional sentence.

Certainly our experiences with conditional sentences are not that it's just go away and pretend to do something for six months. If the judge doesn't have concerns for safety, the judge can look to probation as an option. Conditional sentences allow for things like treatment requirements, taking people to get diagnoses to see if they have mental health issues. All those things we see regularly dealt with by way of a conditional sentence.

● (1610)

Hon. Larry Bagnell: In our first session, the stats were given. An average prison sentence, I think, was 47 days, and a conditional sentence could be around 700. Do you think you could have more effect on improving or rehabilitating a person if you worked with them for 700 days on some of the things you just outlined, than you could by putting them in prison for 47 days?

Mr. Jonathan Rudin: The difficulty with the short prison sentences is that you cannot access any programming. If you want to accomplish something, if you want someone to get to a treatment program, you need to give them time for that to happen. So you do need four, five, or six months. A client who does 50 or 60 days will receive nothing. No one cares, and there'll be nothing provided to them.

The Chair: Thank you, Mr. Bagnell.

[*Translation*]

Mr. Lemay, you have the floor.

Mr. Marc Lemay (Abitibi—Témiscamingue, BQ): Thank you, Mr. Chairman.

I want to thank our witnesses this afternoon. You shed significant light on the issue of conditional sentences.

Having personally practised criminal law for almost 25 years—from 1996 until I was elected in 2004—arguing cases involving conditional sentences in Aboriginal communities, because my riding is in northern Quebec. So I know Aboriginal communities as well.

I am fascinated by one thing. Actually, you are in a way repeating what we've already heard, because you are not the first witnesses to have appeared before us. So, our questions may seem rather pointed. Actually mine will be. My question is for the representatives from the Aboriginal Legal Services of Toronto.

I read your brief, where you state that you have five specific concerns with the proposed bill. One of them is of great interest to me. You state "In many cases it shifts important sentencing decisions from the judge to the Crown prosecutor".

That is not something I had heard up until now, and I'd like you to explain what you mean by that.

I'd also like to know if that applies to Quebec, which would avoid me having to ask the same question of the members of the Barreau du Québec, and in Aboriginal communities that are further away from large urban centres. You seem to be located in the heart of a big city, like Toronto or Montreal, despite the fact that there are small communities elsewhere.

Could you explain to me what you mean by "it shifts important sentencing decisions from the judge to the Crown prosecutor"?

[*English*]

Mr. Jonathan Rudin: Yes, thank you for the question.

As we mentioned, a number of hybrid offences carry with them, if prosecuted by indictment, sentences of over ten years. So what happens now is the crown elects whether they'll proceed summarily or by indictment.

If Bill C-9 were to be passed, the crown could decide, on a hybrid offence, to proceed by indictment. Because the maximum sentence, if proceeded on by indictment, is over ten years, any possibility of a conditional sentence would be removed, even though the crown may be seeking a relatively short jail sentence. So that is our concern: that it gives crown discretion.

I want to be clear that we have a very good relationship with the crown's office in Toronto, and we're not suggesting that there is a widespread design on the part of crowns, but at the same time, it allows crowns, in this case, to make the decision as to whether or not a conditional sentence will be available to an offender at the outset, simply by saying they're proceeding by indictment.

● (1615)

[*Translation*]

Mr. Marc Lemay: Would a member of the Barreau du Québec like to comment on that?

Mr. Giuseppe Battista: I would say the same thing, the application of the provisions. The Crown elects how to proceed. So this election may limit the judge's options in sentencing.

Mr. Marc Lemay: Mr. Watts or Mr. Jock, would you have any comments to add?

[*English*]

Mr. Richard Jock: I think we would have a similar concern. Also, the expansion of the types and numbers of offences as well would have a multiplying effect, in our view, as to the number and type of persons affected under this provision.

[*Translation*]

Mr. Marc Lemay: As I have argued on several occasions, I suggest we speak amongst ourselves, as lawyers. They will not listen, on the other side of the table.

But seriously, we all know what plea bargaining is. Do you think that Bill C-9 will lead to more or less plea bargaining? Do you think that if the bill were to pass in its current form, far more trials would go to completion? That would preclude any plea bargaining. Am I completely wrong or partly right?

Mr. Giuseppe Battista: If you will allow me, I would like to add that any measure precluding reasonable or negotiated settlements will necessarily lead to an increase in the number of trials. I think we need to factor that in when making these decisions. Let us say, for instance, that an individual with no prior record stands accused of having committed a serious crime, like one of those that are mentioned here, punishable by a term of 10 years or more. Even if this person meets all of today's criteria which would allow for a conditional sentence, if he is found guilty and has no other option but a jail term, he will be unable to say anything.

To get back to your earlier question, I would say that when Crown attorneys find themselves in that type of situation, because they now have the discretion which the judges used to have, it may be that prosecutors decide the only way to settle a case or ensure a reasonable sentence would be to proceed by summary conviction. But generally, the case would involve an indictable offence.

That leads to the opposite results. Why? Because a strict enforcement of the provision would, in this case, lead to an undesirable outcome for society. The underlying principle when it comes to penalties and sanctions is that we want to punish the person, not the crime. When you limit the options within the system, specifically for judges, this can lead to more trials. The Crown may be forced to find another charge which could apply in the circumstances, to avoid a situation which would be undesirable all around.

Mr. Marc Lemay: I noted one interesting comment. You said that we punished the individual and not the crime. Under Bill C-9, we would be punishing the crime and not the individual.

Mr. Giuseppe Battista: The emphasis is actually on the offence. Judges are told that even in a case where a just solution would be found in another provision, he cannot apply this provision. Our colleague, who is here now, gave as an example a situation where the judge had to choose between two extreme solutions. On the one hand, there would be a suspended sentence. The judge would find that it is inadequate because it does not send a strong enough message about the seriousness of the crime. But on the other hand, a prison sentence could also be unsuitable.

Offenders might not have a criminal record or associate with known criminals. When faced with a choice of putting such an individual away in a place where he can associate only with convicted criminals, a judge might decide that if it is not yet time to take this step. I think that our Aboriginal colleagues will have some things to tell us about this. At a certain point, a cycle sets in. In some cases, we want to break that cycle. In other cases, we want to avoid starting it. Conditional sentences allows us to do this. If we restrict its application, we restrict our chances of rehabilitating offenders.

● (1620)

[*English*]

The Chair: Thank you, Mr. Lemay.

Mr. Brown.

Mr. Patrick Brown (Barrie, CPC): Thank you, Chair.

My question will be directed to Mr. Rudin and Mr. Jock.

I hear a significant amount today in your comments about the overrepresentation of aboriginal offenders and the consequences that has for aboriginal criminals. My question relates to the over-representation of aboriginal victims. If we're talking about an over-representation of aboriginal offenders in remote northern communities and what it means when they—I heard reference—are brought down to other jails in different locations, my larger concern is what this means for an over-representation of victims within the aboriginal community. It's certainly not healthy that we're having an over-representation of tragedies, in a sense, where families are shattered and the communities are shaken.

The concern I have is that if we do nothing, if we accept the status quo of an over-representation of aboriginal victims, then we are really doing a disservice to aboriginal communities. If we're going to stand up for aboriginal communities, there has to be some medicine for that problem. What can we do? What is your advice? What can the government do to stand up for over-representation of aboriginal victims?

I'd ask for a few examples. I've heard this shying away from conditional sentences is something that wouldn't be welcome. Are there are any examples of things listed in the legislation where you believe a conditional sentence isn't warranted? Are there aspects of the proposed legislation with which you agree?

For example, I looked at a few instances within parts of the Criminal Code that would be affected by this. I looked at section 155: incest. Can you think of any example where a conditional sentence would be warranted in a case of incest; or section 234, manslaughter; or section 271, sexual assault, or someone's integrity has been attacked; or section 281, abduction of a person under 14? What message are you sending someone, a mother and a father, their family, if someone has been given a conditional sentence, if the criminal, the person proven in court to have been a criminal, has an available recourse so that they could have a conditional sentence? Or for arson, where someone has lost their own home, in a case where a building or property they've saved up for has been completely disrespected and ruined...?

So what advice do you have for the government as to what we can do to protect an over-representation of aboriginal victims?

Mr. Jonathan Rudin: I certainly can actually speak to three of those specific examples. It's not to say, of course, that everyone who commits offences should receive a conditional sentence; we're not suggesting that conditional sentences are appropriate for everyone. What this bill does is remove that option for everyone, and there are a number of cases—there is a case at the Ontario Court of Appeal. I can get you the...it's M. and C. or M. and A. It in fact was an incest case. It went to the Court of Appeal for Ontario, and the Court of Appeal for Ontario is very strict: incest is something you go to jail for.

In this particular case, this offender had himself been molested, been sexually abused. Bob talked about residential schools. It's interesting that at the same time the government recognizes the impact of residential schools and is providing funds to people, many people are now inflicting on others the damage that they experienced in residential schools and are not getting the opportunity to heal from that. This particular individual had been sexually abused, and the court was taken by the steps that he had taken to address his issues; they felt that in this case jail was not appropriate.

We in fact were involved just recently in a manslaughter case in a town in southern Ontario. A woman whose parents had been to residential school had been drinking and got into a fight, an argument with her sister, her best friend. In the midst of that she took a knife and stabbed her, and as often tragically happens, her sister died. She killed her.

She did six months pretrial custody. When she came up for trial, she was more remorseful than you could be. There was nothing more you could do to her than had already been done, because she had killed her sister; she knew what that was like. The judge was convinced and the crown didn't appeal. There was a conditional sentence, which in her case involved house arrest and two spells of alcohol treatment, the first a short-term residential program and the second a long-term residential program. Is that the norm in all cases? No—but this was a manslaughter in which clearly the most appropriate sentence was a conditional sentence.

As for arson, I am aware of a case up in northern Ontario that occurred before conditional sentences came along. A family left their home and there was a fire and they lost their children. Again, they were so.... Remorseful can't even touch it. The pain they felt was so huge that the crown in that case said that rather than prosecuting, it was preferable to deal with it through the community justice program in the community because it would be able to help them both address why they did what they did and what led to it, and also help them heal so they wouldn't do those things again.

Those are just three examples in which conditional sentences or options like that have been used and have been effective.

● (1625)

Mr. Patrick Brown: To be clear, do you believe that a conditional sentence can be potentially appropriate for all the offences listed in the proposed legislation?

Mr. Jonathan Rudin: I can't conceive of, and I don't think anyone here can conceive of, all the situations and all the individuals who come before them. Those of you who have practised law or have been in courts will have seen, on occasion, a case for which jail makes no sense. It's a rare case, but we'll see it. It is for those cases that conditional sentences, certainly in the examples you raised, would be appropriate, and at the end of the day I do think they make communities safer. This woman who killed her sister will be a better person; if she has the treatment she needs, it's not going to happen to her again. But I can't give you the same promise if you put her in jail for 9, 10, 11, or 12 months.

Mr. Patrick Brown: Is that perspective shared by you, Mr. Watts?

Mr. Bob Watts: I think, first of all, that it's a simplistic equation to say that a first nation offender or an aboriginal offender equals a first nation or aboriginal victim. I don't think that's true. I think there are a lot of aboriginal victims who weren't victimized by aboriginal people. The premise in the first part of your question, I would argue, is incorrect.

Mr. Patrick Brown: Would it be your assumption that there is not an over-representation of aboriginal victims?

Mr. Bob Watts: Yes. What I'm saying is it's not due...it's not a straight line to the over-representation of first nation or aboriginal people imprisoned.

Mr. Patrick Brown: But conditional sentences would apply to everyone—

Mr. Bob Watts: That's true.

Mr. Patrick Brown: —and the issue is an over-representation of victims.

Mr. Bob Watts: That's true. And what this bill is talking about is taking an important tool out of the hands of judges and, as one of our colleagues has said, putting that tool into the hands of crown attorneys where a judge is trying to weigh a variety of evidence and trying to take the whole situation into account, including community, in our case; and often consulting with the community in terms of what's best for everyone, offender, perhaps victim, also community, to try to balance all those.

In the restorative justice programs in some of our communities, in particular in western Canada, a lot of non-native people who have offended aboriginal people are coming before our justice circles asking for forgiveness, asking to be sentenced through our sentencing circles. A lot are people who abused our people in residential schools, and we've already heard a bit about the intergenerational effect of residential schools.

If we're not going to allow judges to have tools to help deal with some of those situations, then that intergenerational effect is going be perpetuated to the next generation. It has to stop somewhere, and prison isn't the answer.

● (1630)

The Chair: Thank you, Mr. Brown.

I don't know if Mr. Battista would like to comment on Mr. Brown's question.

Mr. Giuseppe Battista: Just to state that when we look at an offence in and of itself, no one supports the commission of offences. And when lawyers make representations to judges, they're not making representations on the appropriateness of having committed an offence. The issue is how to deal with the person.

Before sentences in the community were put into effect for the types of offences you mentioned, Mr. Brown, judges sometimes, when it was appropriate, ordered suspended sentences. Today, those same judges have another tool. In the past they could control that person for three years on probation. Today, they can control that person for five years, two years sentence in the community and three years probation to follow that. So it's a better tool.

We have more today than we had in the past for those very same offences in those cases where jail was wrong. No offence in and of itself can ever.... When we look at the offence, we can all look at it and say it's absolutely abominable and no one should find it's appropriate. That's not the issue.

What we're dealing with is someone who's done it and we can't fix that. What we have to do now is make sure they don't do it again, make sure society is protected, and make this person a useful, productive individual. What's the best way to do that?

The Chair: Thank you, Mr. Battista.

Ms. Barnes.

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

First of all, for the record, my party certainly wants and will encourage whatever government is in place to continue with the aboriginal justice program. This is an essential program. If anything, it's underfunded and needs more funding and a wider distribution. It does an amazing, very necessary job with the remarkable resources and overstressed and hardworking people in the system.

I'd like to talk to Mr. Rudin. I visited your centre in Toronto a couple of years ago. You've got three Gladue courts now operating in Toronto? I just want a brief update on the number of Gladue courts operating throughout Canada, if that's increased at all. You're also doing the Gladue reports out of Toronto for some of the other areas—you said southwestern Ontario.

Some people around this table don't know what a Gladue report is, so perhaps just for the record and for the education of some people....

Mr. Jonathan Rudin: Thank you. I'd be happy to answer that.

There are three Gladue courts in Toronto. They are courts that are specifically designed to work with aboriginal people. They deal specifically with bail and sentencing. They are the only three Gladue courts in Canada, so there are no other courts like that. There are Cree courts and some travelling courts, but these are the only Gladue courts.

We produce what we call Gladue reports because they're done in light of the Supreme Court of Canada's decision in the Gladu case. It instructs judges to look for alternative sentences, and in order to do that judges need information about the clients. They need to know some of the background and systemic factors that have led the person to commit crime, and they also need to have some very specific ideas about what options might be available for sentencing.

Our Gladue case workers interview the clients, family members, and counsellors. It's a very wide process, and it often takes 30 to 40 hours to do a Gladue report. They run 10 to 20 pages. They consist of the person's background, including an examination of systemic factors. For example, we will provide background on residential schools generally, or on specific residential schools that a client may have been to, intergenerational trauma, and things that judges aren't necessarily aware of. Once we've done that, the report goes into very specific detail about the client.

We very commonly have clients who have substance abuse issues. We explain why those arose. Given the client's criminal record, the judge is often not prepared to give a probation sentence. So while the client is in custody, or if they're out on bail, we have them apply to and be accepted into a treatment centre. We're able to suggest to the judge that rather than sentence this person to jail, we have an option for consideration. Tomorrow this person will go on a bus to a treatment centre where he has been accepted—this is the acceptance date.

So we're able to put those sorts of things together. That's what a Gladue report looks like.

● (1635)

Hon. Sue Barnes: Because of the interaction and the intensity of these reports, you tend to know the people who work through the system quite well, compared to a duty counsel going through a courtroom in another setting.

Mr. Jonathan Rudin: Yes. By the end of the process we know the clients quite well.

Hon. Sue Barnes: Given that, even though I'm not going to hold you to the absolute accuracy of your answer, I'm aware that some of your clients have drug addictions that lead to their criminal activity. But we have different levels of drug addictions, and some of these hit the organized crime level where three or more persons are involved. Generally speaking, is that the level of addiction of the person with whom you're involved?

Mr. Jonathan Rudin: No. The drug traffickers we deal with are crack addicts who sell bits of crack in order to get a bit of crack to use. So they're essentially crack-addicted clients, and the only way they can make a living is by selling bits of crack.They're not involved in any large conspiracy. If there is one they certainly don't know it. They're just sitting on the street.

Hon. Sue Barnes: So you wouldn't have any problem if someone who was involved in organized crime activity in drugs was not available for conditional sentencing. You would have a problem at the lower...well, other people might not call it lower, but there could be serious substances, but not in the sense of being involved in organized crime activity.

Mr. Jonathan Rudin: Yes. Drug trafficking is another good example of an offence that for many people conjures up images of Al Pacino in *Scarface* or something—someone living large and doing all those things. The reality is that our clients involved in drug trafficking do it to survive. It's not a good thing, we don't like it and we'd rather they didn't, but that's what they do. They're caught up in that sort of web, but they're not at all like the large gangs that deal drugs.

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

The Chair: Thank you, Ms. Barnes.

Ms. Barnes obviously had some knowledge of the Gladue court. I'm not too familiar with it, apart from the information before me stating that the courts were set up, if I believe correctly, to deal with the over-representation of aboriginal people in our jails.

Mr. Jonathan Rudin: The courts were established following the Gladue decision of 1999. There was a concern by judges that even though the court had instructed them to do certain things as a result of Gladue, they didn't have the information or expertise to be able to do that. The idea of the Gladue court came from judges who decided that maybe one way to do that was to locate, at least in Toronto, the expertise in one or two courts where they would best be able to follow the dictates of the Supreme Court.

The Chair: There's a question that begs to be asked. The courts were established to deal with this over-representation of aboriginal people in the jail system, yet we're still experiencing the same thing.

Mr. Jonathan Rudin: That's certainly the case.

The Chair: I want the information before the committee. This is pertinent to what we're talking about. I wouldn't mind comments from the three different representatives here in that regard.

Go ahead, Mr. Rudin.

Mr. Jonathan Rudin: As Ms. Barnes mentioned, the reality is that although the Gladue decision came from the Supreme Court of Canada, it is not being acted upon across the country. We know that. I get calls every day from lawyers who have never heard of the decision, and I get calls from clients who say they've heard of this decision but no one seems to want to hear about it. We hear about judges who don't want to hear about Gladue in their courts. The reality is that things are not changing.

We've discovered with the Gladue court that when judges are given the resources they need, they have the opportunity to come up with creative sanctions. It doesn't mean that people never go to jail. In Gladue court people do go to jail on occasion, so it's not that the judges feel it's their job to keep aboriginal people out of jail, but it's to look at all the available options.

The difficulty is that the resources have not been put into the criminal justice system to give judges the information they need to come up with the responses they need, nor have the resources been put into healing centres and addiction programs so there are options for people. So judges often feel hamstrung.

● (1640)

The Chair: Thank you.

Mr. Bob Watts: Thank you, Mr. Chair.

There are parts of the country that may skew some of our statistics. We note in our presentation that numbers reach critical levels in the prairie region, where aboriginal people make up more than 60% of the inmate population in some penitentiaries. There are parts of the country where there are no Gladue courts. Perhaps the systems aren't in place like we're trying to do in Toronto. Part of it's learning, and part of it is applying what has been learned to other parts of the country. Some of that isn't happening.

The Chair: Monsieur Ménard.

[*Translation*]

Mr. Serge Ménard (Marc-Aurèle-Fortin, BQ): I am impressed by the excellence of these presentations and by all the information they provide regarding the use of conditional sentences.

I have practised criminal law since 1966, both for the Crown and for defence. I have been Minister of Justice and Minister of Public Security in Quebec. Therefore, I am familiar with these matters. I also have some very specific questions for you.

Mr. Battista, you mentioned several times that you have reviewed a number of studies on crime. You obtained these studies from the ones that had been submitted to the Department of Justice. Could you tell us about them?

Mr. Giuseppe Battista: Yes.

The legislative summary describes various aspects of conditional sentencing. There are references to studies of such sentences, as well as statistics about their implementation at the provincial level. These are the studies I was referring to. The Department of Justice is aware of them.

Mr. Serge Ménard: The committee should also be aware of them, I gather.

Let me say right away that this is not my committee. I am here this afternoon by accident.

Did these studies show you an increase or a decrease in crime since conditional sentencing was introduced?

Mr. Giuseppe Battista: We are sorry to say that this kind of analysis does not seem to have done yet, especially with regard to the application of such sentences in the case of various offences and the circumstances of their application.

For instance, we do not know whether persons without a criminal record who have benefited from a conditional sentence are more likely to reoffend than persons who have been jailed.

Mr. Serge Ménard: According to statistics, since the implementation of conditional sentences, has there been an increase or a decrease in crime in Canada?

Mr. Giuseppe Battista: I could give you an empirical answer, but on page 15, in the section entitled "Conditional Sentencing Data", you will find the data I was referring to earlier. That section deals with the use of conditional sentencing, the number of conditional sentences that have been imposed and the percentage of convictions involving a conditional sentence.

There have been increases and decreases, but in general, the use of conditional sentencing has increased, albeit always within certain limits. The percentage of these sentences does not exceed 12%. So it's a very limited category. In any event, no reference is made to the type of study you are referring to.

● (1645)

Mr. Serge Ménard: Well, that's not what I wanted to know.

Regardless of the studies, do the statistics show that crime has gone up or gone down?

Mr. Giuseppe Battista: I will give you an empirical answer, as an informed person, not as someone who has done in-depth studies on this. The general trend indicates that crime is decreasing.

Mr. Serge Ménard: You will find that in general, people in favour of doing away with conditional sentencing tend to look at the most serious offences and say that conditional sentences cannot be justified in those cases. They say that some judges have used them, but that it should no longer be done, and that as a result, conditional sentencing should be completely abolished.

However, in the studies you have, and that are available to the committee, it says in relation to offences for which conditional sentencing is not possible that judges impose them in only 12 per cent of cases. So that remains a relatively infrequent sentence.

Could you explain to those who don't know what the circumstances are in which a maximum sentence is imposed? In Canada, those are very stiff sentences. For example, entering a home and falling asleep in front of the television could give rise to a sentence of life imprisonment. Theft over $5,000 could give rise to 10 years imprisonment.

In which cases do the courts feel obliged to impose the maximum sentence?

Mr. Giuseppe Battista: I think, as the saying goes, it's in cases of the worst crime for the worst offender.

[*English*]

That is, the worst crime for the worst offender.

[*Translation*]

That's why, in my presentation, I questioned whether it was reasonable to think that this sentence would be useful if it were only applied in the case of offences liable to sentences of 5 years, 2 years, 18 months or 6 months. The Criminal Code provides for these sentences.

If someone who has committed an offence that is liable to a sentence of at least two years appears for the first time before a judge, the judge, before sending the person to jail, is going to have to verify whether there are circumstances warranting that person's isolation from society. I can tell you that it's relatively rare for people appearing in court for the first, or even second, time.

Conditional sentences are imposed in cases where the judges feel that a sentence of imprisonment is required. When that is required for a first offence, it's because that offence is serious. We are talking here about individuals with no previous criminal record, who have committed an offence, but who fit the profile of someone who is clearly a candidate for rehabilitation. Sometimes the person is already fully rehabilitated, for example, when the offence was only reported years after the fact. We are not just talking about sexual abuse here; there are other types of offence too. In some cases, the person is fully rehabilitated.

So the court has before it an individual who has committed an objectively serious offence, which, objectively, should give rise to a sentence of imprisonment. However, a sentence of imprisonment is not justified in such a case. This is the type of offence we are talking about.

I have taken up too much time, I'm sorry, Mr. Chairman.

The Chair: Thank you, Mr. Ménard.

[*English*]

Mr. Petit, what do you say?

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): My question is for Mr. Battista, from the Barreau du Québec, first; Mr. Rudin or the lady here could also answer after.

There are extremely powerful street gangs in Montreal, so much so that Ms. Mourani, from the Bloc Québécois, has published a book condemning the situation. Not far from Montreal, in Kanesatake, houses are being burned down, drugs are being trafficked, there is prostitution and there are street gangs. We are dealing with two separate groups, but they operate the same way. These groups are subject to—I hope you will agree—the Criminal Code, and they should certainly be punished. The former minister here had problems with the Kanesatake group in the past. The Sûreté du Québec is afraid to go into Kanesatake. That's the first problem.

The Montreal police has problems because the street gangs so powerful that they operate virtually in broad daylight, and it's no secret to anyone. What do they do? Quite calm things at times: they sell drugs and engage in prostitution. They commit crimes that, on the face of it, are not violent. However, these crimes entail a frightening problem for all communities: 14 and 15-year-old prostitutes. For seven, eight or ten years, even our Department of Justice has been having problems. Mr. Ménard had to confront the worst gang ever, the bikers. However, they weren't selling drugs. That's soft, drugs.

We are dealing with the same problem currently. There was the legislation we are talking about today. Everyone was given every opportunity to succeed. I'm wondering whether, despite all of those opportunities, we haven't fallen into the same trap 10 years later. We can't get out of it. We had this problem before, and now we are having it again. Do you have a solution?

You say that imprisonment is sometimes an excessive sentence. It's easy for us to sit around a table and talk about what is excessive. But could you tell me why, when a conditional sentence is imposed and not respected, a sentence of imprisonment is imposed? If a sentence of imprisonment is not the right sentence, why don't we hand out a second conditional sentence, if it's so good? I'm trying to understand your view point. I respect it, but you and I both have a problem in our community. If we don't get it together, we will soon have a problem.

Mr. Battista, what is unreasonable about this bill? What would you keep and what would you get rid of?

● (1650)

Mr. Giuseppe Battista: Thank you, Mr. Petit. There are a number of aspects to your question.

You said that the threat of imprisonment is always there when a judge imposes a conditional sentence. To begin, you have to acknowledge that it is indeed a sentence of imprisonment that is imposed. The only difference is where the sentence is served.

When there is a breach, the legislator at the time provided that incarceration would not be automatic. The judge can do nothing, adjust or order imprisonment. There's a range of options. In this respect the current legislation affords some leeway to rectify a given situation, if needed.

A member asked a question about the distinction to be made between a street pusher who is addicted to hard drugs and those who are involved at the higher, more organized level. I think that is what you are alluding to.

On the facts, I don't think many conditional sentences are imposed. People involved in structured criminal organizations, who have a criminal past and represent a danger to society, are not entitled to a conditional sentence. If a judge feels that an individual is involved in organized crime and will continue, once released, to act as a member of an organized and structured gang, that provides sufficient ground for the judge to deny bail. That individual, although presumed innocent, may not be released from captivity.

In serious cases, if a judge feels that a conditional sentence is warranted, it's because the individual meets all of the criteria and because the best way of ensuring that the individual does not go back into that environment is to order a conditional sentence. But I think that the cases you are describing are rare, exceptional cases. When it comes to dealers, the image that comes to mind is the one your colleague referred to, that of Al Pacino. It's an image, but there are many steps to take before you reach that level. There are some individuals who find themselves in the wrong place at the wrong time. They grow up in a neighbourhood and have certain associations. These realities have to be taken into account.

You are talking about a serious problem. But you have to adapt the punishment to the individual who is brought before the courts.

● (1655)

[*English*]

The Chair: Thank you, Mr. Battista and Mr. Petit.

Mr. Murphy.

[*Translation*]

Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.): Thank you, Mr. Chairman. I have a few questions for Mr. Battista.

We have just received a brief about the bill from André Jodoin and other academics from Quebec. Do you know these people: Julie Desrosiers, law professor at Laval University, Simon Roy, from the Université de Sherbrooke, Rachel Grondin, from the University of Ottawa, and Anne-Marie Boisvert, dean at the Université de Montréal?

Mr. Giuseppe Battista: I know Anne-Marie Boisvert, at least.

Mr. Brian Murphy All we have received is this brief, and, unfortunately, they will not be appearing before this committee. Mr. Jodoin wrote a sentence that says—I have the English version—that conditional sentencing is used more often in Quebec than in other parts of Canada.

In your opinion, is that true? If so, why?

Mr. Giuseppe Battista: I'm going to speak from an empirical standpoint, because I have not studied this, and on behalf of the majority of lawyers who practise criminal law. Conditional sentencing has been used a lot in Quebec. As a practioner, it's my impression that the Quebec Court of Appeal has had a tendency to restrict its application, whereas the courts of appeal of other provinces have tended to extend it.

We have found that judges at times impose suspended sentences in cases where they felt that imprisonment would not promote rehabilitation as well as a different type of sentence.

Judges now impose conditional sentences automatically. So they now exercise greater supervision over individuals than before. A suspended sentence allows for three years of supervision; a conditional sentence, if a judge applies the full range of measures that go with it, allows for five years of supervision.

I have spoken about our experience from an empirical standpoint. At the Barreau, we are somewhat concerned, because we see no negative causal connection. It seems to us that the use of this provision has had positive effects.

[*English*]

Mr. Brian Murphy: Merci.

The paper I have is in English and includes probably the best few sentences I've seen. I'll open this up to all of the witnesses and ask whether you agree with the kernels contained in it. This is from the paper by the professor I mentioned.

> The Bill introduces rigidity where flexibility is needed. It deprives judges of a powerful and sophisticated tool enabling them to arrive at equitable solutions in complex and difficult cases. It hinders the development of a harmonious and coherent law. It promotes prisons instead of cheaper more efficient and more humane solutions. It should not become law.

What do you think of that synthesis of the issue by the academics?

● (1700)

Mr. Bob Watts: In some ways it sums up what we've been talking about as far as the tools judges require, particularly when you're dealing with our communities. We need tools and types of sentencing that are specific to our communities.

At the same time, as we've said in our report, there needs to be more study. We've tried to do a sort of reverse study of this to find out things like all the good things about mandatory minimums. How has that worked? What great success stories are out there? There aren't many statistics either way. I think we should engage with each other, do our homework, and find out what will be best for the people of Canada and first nations people in particular.

Thank you.

The Chair: Ms. Roman.

Ms. Marisha Roman: I concur with my colleague.

Mr. Jonathan Rudin: That sums up our position as well.

Mr. Giuseppe Battista: I concur.

The Chair: Mr. Rudin, I know you wanted to reply to Mr. Petit. Do you still want to make a comment?

Mr. Jonathan Rudin: No, that's fine.

The Chair: Mr. Thompson.

Mr. Myron Thompson (Wild Rose, CPC): Thank you very much, folks, for the fine presentations you made today.

As you know, we've been studying this bill for quite some time now and we've been listening to quite a large number of witnesses of varied opinions. One opinion that's not brought to this table very often is the opinion of various groups or organizations that are specifically working in certain areas that we mostly hear from. I find that the supporters of this bill seem to come from the enforcement side of the spectrum. Police officers are supporting this bill. Probation officers are supporting this bill. I know corrections people are. Victims of crime are certainly supporting this kind of legislation. But there are other groups who are not.

I'm a politician, as are the rest of them, and we're sitting in a position where we have to make up our minds on what we are going to do. On one hand, we have a group of people who say this is not the route to go, yet on the other hand we have people who are cheering us for this decision.

Some people would call it political, but I don't think it's necessarily political. Over the last few years, we've had quite a few elections rather quickly. I can remember my door-knocking, going door to door and talking to the public. It seemed like no matter where I went, other than just in my riding, the top issue that was always mentioned, but it seemed that always second to that was the justice system: for crying out loud, fix the justice system. I heard that over and over again.

I would suggest to you that the public, from my door-knocking experience, is not satisfied with what's happening in our judicial system, not at all. I think that's reflected in...yes, they're not the standard, but when you hear of a seventeen-year-old who sexually assaulted and virtually raped the next-door neighbours' little girls, and he received house arrest and is back living in the home beside those same victims, what kind of a justice system would allow that to happen?

We hear probation officers talking about the great number or quite large number of people they are supervising on house arrest or community service who have attacked or violently attacked little kids. They're sexually assaulting little children, yet they're out there doing this. The public objects most vehemently that these people should be allowed into the public.

I have some reserves in my riding where the people are complaining about guys being allowed back in their communities after what they did, given the seriousness of the crime. That's not every case, because I believe—and so do a lot of other people—that there is room for conditional sentencing and there's room for this thing. But sometimes we get this message completely misconstrued, and I'm telling you that the Canadian people are not a happy lot. They want change, and that can be verified by the literally millions—not a few, but millions—of signatures on petitions that have come through this House of Commons starting in 1993, since I've been here. They are still in there, demanding that we toughen up this justice system, start getting justice in our society, and stop supporting a legal system that is not effective.

So that's the dilemma I'm in as a politician. I can't disagree with anything you folks have said, but I do know one thing. The public that pays the bills for our justice system is not happy. To the people at the door, I'll say that's going to take a lot more prisons, and they'll say to build them, they're paying for them, they're the taxpayers, so build them and fix this because it's not safe out there. People in our communities are feeling safe less and less as time goes on. And we know the events that are happening in our cities and all that they're causing.

So is your final analysis that this is not a move to get tough on crime and to give people some hope that we are going to definitely do something about protecting them? Or are we going to continue going down this path of saying we must provide this and that and still leave that same perception, still receive our petitions, and still table those petitions in the House of Commons while still not answering the cry from the public? And I might add once again,the public is made up of the ones who pay the bills—the taxpayer.

● (1705)

I get to the point where I sometimes don't know what to do. I understand what you're saying, but I believe you're not adhering to what the public's demands are. Those demands are even coming from the reserves. I want to stress that, because I have heard over and over again, particularly from the women on reserves, questions about why they are treated as second-class citizens.

Why is it that people who offend, if they happen to be aboriginal, get special consideration because 718 of the Criminal Code says they should? They want to know why we do that to them. If that offender was a white man, they'd throw the book at him, so why are we giving them second-class citizenship?

There's no satisfaction out there. There is none, and we have to do something about it.

The Chair: Thank you, Mr. Thompson.

Mr. Watts, do you have a reply?

Mr. Bob Watts: I don't think there's any one easy answer. Early on in our submission, we talked about systemic discrimination and we identified what the Manitoba justice inquiry said about systemic discrimination. When we met with Minister Day, the national chief was there and he asked Minister Day for support in terms of talking with his cabinet colleagues and dealing with the issue of first nation aboriginal poverty. Those are the underlying issues in terms of whether we're talking about a justice system or a legal system or healing or healthy communities.

Minister Day said he doesn't think too many things happen that aren't planned, and he was talking in particular about poverty and wealth. He said you can win a lottery, but that's kind of accidental and you can become really wealthy. Or a hurricane could come through and rip up a small community or a trailer park, but that's accidental too. That's extreme in terms of wealth and poverty that happen by accident, but he said most of it's planned. Our question is, where's the plan? Is our poverty a plan? Our poverty is part of what underpins what we're talking about in terms of the negative effects of Bill C-9.

The honourable member talked about maybe some sort of a mix in terms of a conditional sentence and a mandatory minimum. Maybe that's the way. I don't know. But we've also said we have to do the homework. We've tried to find the statistics. We can find tons of anecdotal evidence from the good to the bad to the ugly, but I think we're working in a vacuum on some of this. We don't have the good evidence that says, given this evidence, this is what we need to do in terms of legislation. Until we have that, I think we may be trying to appeal to public opinion but we're fighting with one hand tied behind our backs.

The Chair: Thank you, Mr. Watts.

Mr. Rudin.

Mr. Jonathan Rudin: Thank you.

First, I should make it clear that we have a victims' rights component to our organization, so victims' issues are very significant to us as well.

I don't sympathize with the dilemma that you have in some ways as Parliamentarians. I certainly know that many people have those concerns that you have with the justice system. But I found it interesting that when you spoke, you said there's room for both conditional sentences and imprisonment. That's what we have now. That's why we don't understand Bill C-9.

The concern is that we have no confidence, no belief that this will make any community any safer. May it make some of your constituents feel they're safer? It may do that. But in order to do that, you are sending individuals to jail who shouldn't be going to jail. And we know that, disproportionately, those individuals will be aboriginal.

So if Parliament would like to respond to real concerns about public safety by enacting a bill that will not do anything to actually address those concerns, but will send aboriginal people to jail in even greater numbers while not resulting in any increase in public safety, then you should do that. But you should be aware of what you're doing. You are simply perpetuating what has been done for years.

So if the concern is how we remedy the problems, we look for real answers. In our opinion, this is unfortunately not going to do that.

● (1710)

The Chair: Mr. Rudin, regarding the Gladue courts, why would the other courts refuse to embrace a Supreme Court ruling—and I assume more than one particular ruling?

Mr. Jonathan Rudin: I can't speculate on that. I know that the Ontario Court of Appeals has just issued a decision in the Kakekagamick case, in which they asked that question.

In my more pessimistic moments—

The Chair: You mean your more realistic ones?

Mr. Jonathan Rudin: We're realistic with what we do in Toronto. But in my more pessimistic moments, I realize the justice system sometimes works very quickly. As a judge once described it to me, it works sometimes like a sausage factory. People don't have time to talk and discuss and think about what needs to be done. Aboriginal people make up an increasing number of sausages in that factory. Often, as the aboriginal justice inquiry noted, they do not receive the best representation. They don't often have good people to advocate for them, so they go through very quickly. Sometimes rocking the boat is difficult.

The Chair: Yes, indeed.

Section 718.2(e)—where is the override? Does that not override conditional sentencing?

Mr. Jonathan Rudin: There is a series of things a judge could take into account in section 718.2(e). It is one of the elements, but certainly, as the Supreme Court and several courts of appeal have said, it's not a get-out-of-jail-free card for aboriginal people. Where offences are violent, the expectation often is that the sentence for an aboriginal offender will be the same as for a non-aboriginal offender.

The court of appeal said in Kakekagamick that the result may be the same. It's the process by which you get to the result that may be different. That's what section 718.2(e) does. It doesn't mandate a different result; it mandates a different approach to get to that result.

The Chair: Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): This is another interesting panel. I know that each of you comes from communities and constituencies that are fairly extensive, representing a fairly large catchment area, and the AFN is virtually national in spanning the country. We have the policy wonks fine-tuning the correction system and the sentencing regime, and we have the lawyers and the judicial system working with it. As it passes through Parliament, Mr. Thompson has articulated what he says is a sense among Canadians out there that we should be taking certain steps to "crack down on crime".

I'm asking you a political question rather than a policy-wonk question. From the constituencies you come from—and I don't know where each of you is based—would you acknowledge that there is a demand from Canadians that we take a step like this? If you're hearing it, how the heck are we supposed to respond in Parliament? If Canadians want us to take steps, is this one of the right steps? Can we move back? Can we step sideways? Can we improve our footing? Maybe one person could answer from each group: the AFN, Toronto, and the Quebec group.

● (1715)

Mr. Bob Watts: Not being a politician, I would ask if the amber alerts get rid of all the abductions of kids. A couple of years ago, every time we turned on CNN it was all about child abductions. Those abductions are still going on at probably the same rate they were before, but other things have overtaken them in the news. Sometimes this happens in politics too. Some things are cyclical. I think the member is right: people want justice, not just a legal system. But we don't all have the same definition of it. That's part of the difficulty: we have to engage each other on what it means.

We wouldn't be here if we didn't care about the legal system, justice, victims, and offenders. That's why we're here. We're not here to trash Parliament or any particular party. We're here to engage folks. We've talked about the need for some of these studies to be done, because we want to see justice done in our communities. I think everybody does. I don't think it's the political imperative of any particular people, party, or area of the country. So I don't know that there's an easy answer. People have to know that you're doing something as parliamentarians. We're saying we should make sure to do the right thing.

Mr. Derek Lee: Mr. Rudin.

Mr. Jonathan Rudin: Certainly the constituency that we represent is not clamouring for Bill C-9 to be passed. They're not clamouring for more opportunities to put aboriginal people in jail. What they're looking for are facilities where people who have been damaged can be healed. What they're looking for are safer communities.

You mentioned the issue about jail and people wanting to be safe. The difficulty is that jail doesn't make people safe. There's a recent study by the Canadian Centre for Justice Statistics that talks about aboriginal people being much more likely to go back to jail after they've been in jail. They have a higher recidivism rate than non-aboriginal people. What that says is that this option isn't working. It's not making the community safer, because the person comes out and reoffends. So unless we can find real ways to break that cycle, people won't feel safe. The way to break that cycle is not to send people back to a place that doesn't work.

It has always struck me as odd—though I can't expect people to do things with it—but given the high rate of recidivism we have.... If I started a program at Aboriginal Legal Services in which I could guarantee that 75% or 80% of the people who went into it would then get out and reoffend very quickly, I wouldn't be funded for very long. And if I could say that on top of this, if they come in on a minor offence, later they will commit more serious offences, my funding would be cut off right away. Yet that's what happens in the prison system.

I'm not saying that we should get rid of prisons altogether, but we have to look at what the consequences are when we simply respond to legitimate public concerns by saying we're going to look like we're doing something and we're going to look like we're getting tough.

● (1720)

The Chair: Thank you, Mr. Rudin.

Mr. Battista.

Mr. Giuseppe Battista: Yes, I'll try to be brief.

It's difficult to talk about the constituents. I'm representing the Quebec Bar here today. We have two honourable members who are members of the bar, and they are probably on opposing sides of the issue. So it's difficult to say that we're speaking from one simple point of view.

I am a member of a committee that recruits lawyers who are university professors, crown prosecutors, defence lawyers, and who practise in a wide range of the province. There are people from Montreal, Quebec City, and the province. The committee is balanced in that way. So the Bar of Quebec obviously takes into account the views held by those who are practitioners in the field.

I would dare say, very respectfully, that you're parliamentarians and you obviously have a duty to the people who elect you, and you have a duty to the people of Canada because you are representatives of the people of Canada. But you are also leaders. There may be voices that call to be tough on crime, but we also hear many times that prisons are the universities of crime. That is also a reality.

When this legislation was introduced, Canada was among the countries that imprisoned people more than anyone else. Are we less safe today if we're imprisoning less? Have we done anything wrong from that perspective? Was it a wrong objective to not want to be one of the societies that imprisoned the most? I think those are some of the issues that need to be addressed.

I think the point is well taken. If someone was asking for government subsidies and they did not produce results in relation to what they were asking for, it would be legitimate for members of this Parliament to say no and for them to criticize and hold the government accountable for funding that.

What we're saying is that we haven't seen the studies to support the costs. There are no benefits that are obvious or available for the costs that are going to be incurred by the amendment to this legislation.

The Chair: Thank you, Mr. Battista.

It's an interesting question you raise. I've heard that issue about the effectiveness of programs more now that we're in government than I have in the last 13 years.

Mr. Preston, you have a question.

Mr. Joe Preston (Elgin—Middlesex—London, CPC): No, I don't—

The Chair: Make one up.

Mr. Joe Preston: —but I'll make one up.

I'll follow up on what was last said. You're asking us not to go down one road and to stick with a road, as my colleague has said, that many of our constituents say isn't working. So if you're asking us to stick with a policy that isn't working, in lieu of one that might, I'm sorry, but I have to err on the side of the one that might.

Mr. Jonathan Rudin: I think, though, the way you phrased that is a bit misleading. We don't know this isn't working.

You made three statements. One was that the public is not pleased, and I'll accept that.

Mr. Joe Preston: You'll accept that? Okay.

Mr. Jonathan Rudin: You're the politicians; you would know.

But then you asked, why should we continue down a road that isn't working? But we don't know that. We know that the public is not happy, but—

Mr. Joe Preston: We don't need to know if the public thinks it isn't. The point here is that I'm taking the value judgment of the public.

I understand what the other side are trying to say with their hounding, but what I'm saying is that if the public is telling us one thing, then I have to listen to that too.

Mr. Jonathan Rudin: I would never tell you how to do your job —and I would never want to do your job. It's an incredibly difficult one, and I have great respect for all of you who do that work.

This gets to one of Bob's points, I guess, that we actually have very little information about whether things are working or not. So to assume that things aren't working because people say they aren't working seems to be a strange way to do business or set public policy—and that's what we're doing here.

Our sense is that Bill C-9 is a response to a perceptual issue, but not an actual or real concern. So I think it would be dangerous to act simply on public perception when we don't actually know if that perception is correct.

● (1725)

The Chair: Thank you, Mr. Preston.

It should be pointed out that a question was posed to a previous group of witnesses, not unlike the question Mr. Preston just posed. What was going on prior to 1996 that would invite a change to the Criminal Code dealing with conditional sentences? Has empirical evidence been presented to the committee? I don't think anyone has ever done so at this point in time, that I know of, and nobody across the country, that I can recall, was ever consulted broadly.

Mr. Jonathan Rudin: Actually, though, the 1996 amendments were the result of—

Hon. Sue Barnes: Consultation.

Mr. Jonathan Rudin: —consultation in a House committee.

The Chair: To whom?

Mr. Jonathan Rudin: Well, there was a House committee—

The Chair: And was there empirical evidence? I'd like to know what empirical evidence there was at the time.

Hon. Sue Barnes: There was some. Maybe you could read some Hansard from that point, and I'll ask some questions.

First of all to the Barreau, were you consulted on this bill?

Mr. Giuseppe Battista: On this bill?

Hon. Sue Barnes: Yes.

Mr. Giuseppe Battista: Yes, we provided a document; we responded to the minister. The people in charge of the liaison committee sent a letter to the minister. I believe *madame la greffière* has a—

Hon. Sue Barnes: Some of the other organizations before us have not been consulted as much. The consultation net was not as wide, it would appear.

Also, when the minister was before us he didn't seem to buy into the idea that in the courtroom there could be some under-sentencing as well, as a result of this type of bill—in other words, for people going around the system at whatever level, whether it was the judge on his final sentencing after a conviction, or the prosecutor not charging high enough.

What do you think of those areas? Do you think they will be impacted?

Mr. Giuseppe Battista: If I understand the question correctly, you're asking if prosecutors were faced with a situation where, under this legislation, they would necessarily have to impose jail, would that maybe cause some prosecutors not to charge, for example, but to indict?

Hon. Sue Barnes: Or cause a judge not to sentence where he would have given a conditional sentence. Instead of going into the prison situation, he opts lower into the suspended sentence situation, with perhaps probation afterwards.

Mr. Giuseppe Battista: That definitely used to happen before 1996; there is no question about that. The court of appeals had maintained those situations because it was obvious that sending people to jail would be disastrous.

The problem is that now there is an additional tool in those circumstances that we may lose. But again, that was very limited because judges only had the probation. They now have something more, so they can use it a little more.

But there were exceptional cases before 1996. They were very, very exceptional; but with the introduction of this sentencing provision, what it did.... As I said, my empirical experience in Quebec is that people who used to get suspended sentences are now getting conditional sentences, so they're being monitored more than before, and obviously those who could qualify because they meet the criteria are also followed through in a more rigorous manner.

Hon. Sue Barnes: Jonathan?

The Chair: Thank you, Ms. Barnes.

Hon. Sue Barnes: I just wanted to see if Mr. Rudin wanted to add anything.

The Chair: Did you want to make a comment?

Mr. Jonathan Rudin: No, that's fine.

Hon. Sue Barnes: Okay. Thank you.

The Chair: That concludes our session; the time is up.

Mr. Myron Thompson: On a point of order, I want to clarify what I heard from Mr. Battista.

What I heard coming from you, sir, was—

The Chair: Mr. Thompson, let me ask, are the witnesses willing to stay for a few more minutes?

A voice: Yes.

The Chair: They are. In that case, Mr. Ménard is ahead of you.

Go ahead, Mr. Ménard, with one question, please.

[*Translation*]

Mr. Serge Ménard: Thank you. After hearing Mr. Thompson, I would still like to ask you one basic question. My introduction will be far shorter than his.

First of all, I would put a lot more stock in his arguments about police officers', probation officers' and victims' demands if he applied the same reasoning to firearms control. The police, victims, doctors, basically everyone wants the registry maintained. And yet, they want it eliminated. Yes, there are studies. We asked for studies at the outset of the committee's deliberations. I will read just 10 lines from the long report we received.

> After decades of relatively steady increases, Canada's overall crime rate began to drop significantly in the early 1990s. From 1991 to 2004, crimes reported by police forces dropped by a little over 22 per cent, or by an average of 1.6 per cent per year. The drop in crime was particularly sharp in the 1990s. From 1991 to 2000 alone, the rate dropped by nearly 26 per cent, or an average of a little over 2 per cent per year. The downward trend in the overall crime rate was followed by a period of stability between 2000 and 2002, then a notable increase of 6 per cent in 2003, largely due to the increase in crimes against property. The slight decrease of 1 per cent posted in 2004 appears to indicate a return to the downward trend that started early in the decade.

That is what you find out when you take the trouble of consulting Juristat, which very few people do. Crime is tracked daily in Canada through the compilation of police reports. Most people do not know that. They find out about crime through the newspapers they read everyday and by watching television. And I suspect that to a large extent, anglophones in Canada are informed about crime by American television, which reports on all of the horrors that occur in the United States, where the murder rate, do not forget, is three times higher than Canada's. So the public perception is that...

● (1730)

[*English*]

The Chair: Mr. Ménard, ask your question.

[*Translation*]

Mr. Serge Ménard: I will ask my question. Do you expect politicians to make decisions that will please an electorate that is clearly ill informed, or to do their job based on reality, even if there is a political price to be paid?

[*English*]

The Chair: Thank you, Mr. Ménard.

Would someone like to reply to Mr. Ménard's point?

Mr. Watts.

Mr. Derek Lee: I think the philosopher Edmund Burke tried to do that a couple of hundred years ago, but maybe Mr. Watts can improve on it.

Mr. Bob Watts: Just to reiterate the point that Richard and I have tried to make a number of times, the statistical information is not available. As a federal government you may be able to talk to your provincial counterparts and get it, but we question whether it's really available there either. We need to do some joint research and we need to look at some of the best practices out there. There are some great programs. One of them is sitting right beside us, but there are other programs in the country looking at the question of restorative justice. We need to inform ourselves.

I don't know, Mr. Ménard; your question is so huge, and I don't think there's any easy answer to it. But I think there would be some satisfaction for all of us in using the best information available to make the best decision, and not just a gut reaction. As a parliamentary committee, you have at your disposal some of the tools. Bring them to bear on this; let's work together.

The Chair: Thank you, Mr. Watts.

Mr. Thompson, I know you wanted some clarification from Mr. Battista.

Mr. Myron Thompson: Yes, but there's one thing I want to clarify.

I supported conditional sentencing in the beginning, but I was also informed that I wouldn't have to worry about it pertaining to violent types of criminal, and it certainly has gone that way. That was the disappointment.

In my understanding, if Bill C-9 becomes law, you're saying, sir, that judges have then lost their ability to determine whether this should be through indictment or summary—

Mr. Giuseppe Battista: Not judges, but prosecutors.

Mr. Myron Thompson: Did you say judges have lost that ability?

Mr. Giuseppe Battista: They don't have it. The decision to prosecute by way of indictment or by way of summary conviction is a prosecutorial decision. The point that was made by our colleague earlier is that what this law will do is shift the power to the prosecutor in deciding whether this person will eventually be able to argue before a judge for a conditional sentence.

Mr. Myron Thompson: Isn't that presently the case, though?

● (1735)

Mr. Giuseppe Battista: What do you mean?

Mr. Myron Thompson: This is where I'm having a problem. To me, the crown prosecutors and the police investigators discuss the situation, and then they present to the judge whether it should be an indictment or summary conviction. Is that correct?

Mr. Giuseppe Battista: Yes, but the point is this. When people are charged in Canada, they can be charged by way of summary conviction or by way of indictment. If they're charged by way of summary conviction for the same offence—assault, for example, by summary conviction—or by indictment.... If there's an offence that's punishable by ten years of imprisonment that can be prosecuted by way of summary conviction or by way of indictment, the prosecutor makes that decision. Usually they make that decision based on the person's prior history, based on the specific facts of the case, and based on what they think an appropriate sentence may be in the long run.

Mr. Myron Thompson: But you're telling me that couldn't be the case, if this law were passed.

Mr. Giuseppe Battista: If the legislation says that for any offence that's punishable by ten years or more the judge no longer has the discretion to apply a conditional sentence, for example, in some cases, then the prosecutor ultimately has that decision, because if the prosecutor before charging says this person shouldn't go to jail but should get a conditional sentence, then they'll prosecute by way of summary conviction. So the decision is being made there, and not by the judge.

Mr. Myron Thompson: Isn't it being made there now?

Mr. Giuseppe Battista: Yes, but for different reasons.

The Chair: Thank you, Mr. Thompson.

Mr. Brown has one point he wanted to make.

Mr. Patrick Brown: It's just two pieces of information, Mr. Chair.

One, there was a question about the government's own cost estimates. That document is currently being translated and will be available in tomorrow's justice committee meeting and will be distributed.

Two, the report presented at the FPT justice ministers meeting that Mr. Comartin requested previously is not available to be distributed by the Government of Canada itself; it's also with our provincial governments. But committee members are free to seek it out, as this is provincial data as well.

The Chair: Thank you, Mr. Brown.

I would like to thank the witnesses for testifying before this committee. I think we had a very informative discussion. It's very much appreciated that you took the time to come and make this presentation. We're trusting that this dialogue will continue. The time of Bill C-9 will be very limited now, as far as further testimony is concerned, but we will be analyzing everything that's before us now. Thank you very much.

The meeting is adjourned.

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

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

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