House of Commons
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 037 • 1st SESSION • 39th PARLIAMENT

EVIDENCE

Monday, December 4, 2006

Chair

Mr. Art Hanger

Also available on the Parliament of Canada Web Site at the following address:

http://www.parl.gc.ca

Standing Committee on Justice and Human Rights

Monday, December 4, 2006

● (1530)

[*English*]

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

Our agenda is still on Bill C-10, An Act to amend the Criminal Code (minimum penalties for offences involving firearms) and to make a consequential amendment to another Act.

We have a number of witnesses appearing today: the Quebec Association of Defence Lawyers; Mr. Jean-Paul Brodeur, as an individual; the Canadian Bar Association; and the Mennonite Central Committee Canada.

I would like to proceed along the lines as noted on the agenda. I turn the floor over to the Quebec Association of Defence Lawyers and Ms. Lucie Joncas.

Ms. Joncas.

[*Translation*]

Ms. Lucie Joncas (President, Association québécoise des avocats et avocates de la défense): Hello.

The Association québécoise des avocats et avocates de la défense is a not-for-profit association composed of 600 criminal defence lawyers practising throughout all regions of Quebec. Our members include private practice lawyers as well as those working for the Commission des services juridiques. I have had the honour of serving as president of the association since June 2005. I have been practising mainly in the field of criminal law for almost 15 years now.

First off, the AQAAD would like to thank the committee for this invitation to appear. I hope my remarks will be useful to you in the course of your deliberations.

[*English*]

It seems troubling to read the May 1, 2006, press release that states the objective of these new dispositions. It says that mandatory minimum penalties will ensure that sentencing is proportionate to the seriousness of the offence that involves guns and gang violence.

The aim is obviously a direct attack on judicial discretion. It is my belief and experience that judges in Canada are currently imposing just and proportional sentences. Furthermore, the concern with gang-related offences is already the object of a specific sentencing provision of the Criminal Code, namely subparagraph 718.2(a)(iv). It is considered an aggravating factor on sentence that an offence is committed for the benefit of, or under the direction or association with, a criminal organization.

The AQAAD is in agreement with the statement found in the legislative summary of Bill C-10: “Mandatory minimum terms of imprisonment are generally inconsistent with the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, as they do not allow a judge to make any exception in an appropriate case.” It is generally recognized as a principle, and is borne out by my experience as a defence attorney, that the deterrent effect is triggered by the fear of being apprehended rather than by the existence of harsh sentences.

[*Translation*]

The Canadian crime rate does not require these legislative changes. The American example has served as an eloquent example of the ineffectiveness of such measures.

Moreover, the new wave of bills your committee has dealt with and those it will be considering, such as Bill C-9, and reverse onus for dangerous offenders, to name but two, may have a domino effect. We would like to draw this to your attention because we believe it is a possibility you should consider. Allow me to explain: the combined effect of these measures will have a direct impact on the justice system's ability to deal with cases within a reasonable timeframe, as provided under the charter.

These provisions will also effectively short-circuit the case settlement process. At the moment, as a general rule, approximately 90% of criminal charges are resolved through guilty pleas, and a number of these guilty pleas are accompanied by joint submissions. These figures may drastically change as a result of so many legislative amendments. Consequently, the number of individuals in pre-trial detention will increase, thereby increasing the burden on provincial resources.

We must remember that under sentencing in Canada, if the crown finds a sentence too lenient, it is always at liberty to appeal. Conversely, this same right would be denied under mandatory minimum sentences when the defence believed that given the circumstances of the offence and the offender, a sentence was clearly too harsh.

We consider that these legislative amendments are not necessary, and feel that they will have a significant negative effect on the criminal justice system. Finally, as an alternative—and I repeat, as an alternative—if the committee were to come to the conclusion that the proposed sentences may be useful as guidelines, we would suggest an amendment to section 718.3 of the Criminal Code, an amendment calling for residual judicial discretion. Under special circumstances and when it is in the interest of the community and of the accused, judges could exercise their discretion at the time of sentencing.

I thank you and I am now prepared to answer any questions you may have.

● (1535)

[*English*]

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

Mr. Jean-Paul Brodeur.

[*Translation*]

Prof. Jean-Paul Brodeur (Professor, Criminology, Director, International Centre of Comparative Criminology, University of Montreal, As an Individual): Hello. I thank the committee for having invited me to appear.

My name is Jean-Paul Brodeur and I am a professor at the University of Montreal. I am also director of the International Centre of Comparative Criminology. From 1984 to 1987, I was the director of research for the Canadian Sentencing Commission.

[*English*]

I'll just say a few words about myself. I am a teacher at the University of Montreal, the director of a research centre, and I was director of research for the Canadian Sentencing Commission, which issued its report in 1987. So I have an abiding interest in sentencing.

[*Translation*]

You will be hearing arguments from many people. For one, you just heard representations from a lawyer. Some witnesses may also provide you with very detailed statistical analyses. That is not what I intend to do here today.

[*English*]

I want to address one question. I'll make some general comments, but my question is the following. One rationale for having a harsher penalty is to deter people from committing violent offences and offences with weapons. The question I'm going to address is whether people are susceptible to being deterred by such measures. That will be my main argument. Before saying so, I will make some general comments.

● (1540)

[*Translation*]

I have two general comments.

Take, for example, the studies that have been done on the deterrence effect. Do harsher penalties usually act as a deterrent? We might say that these studies cancel one another; in some cases, the outcome is positive, while other studies say that it is not. The results over time have been consistent. The deterrence effect, as observed for the past 30 years, has been modest and not everyone agrees with the theory that a harsher sentence will lead to a lower crime rate. The best example is, of course, the death penalty. American states that apply the death penalty don't necessarily have a lower murder rate.

Here is my second point. When the Canadian Sentencing Commission tabled its report, in 1987, it spoke out quite vigorously against minimum sentences. There were few remaining at that time; one of them was important: the seven-year minimum sentence for importing or exporting drugs. In 1987 the Supreme Court, in Smith v. R., overturned the seven-year minimum sentence citing various reasons and likening a seven-year minimum sentence, to cruel and unusual punishment.

This bill provides for minimum sentences of 7 and 10 years, respectively, for repeat offenders. Will these sentences meet the Charter and Supreme Court test? I am not at all sure of that.

[*English*]

I want to move to my main argument. Number one, is this bill of law necessary? It states that its objective is to increase the safety of Canadians. And here I just want to remind you that in December 2005 there was actually a paper—it was a whole book published by StatsCan—and it was a survey of Canadians, asking them whether they felt safe in Canada. There were four kinds of answers: very much so; I feel safe; not so much; and I do not feel at all safe.

I want to stress the fact that from 1988 to 2004, the number of people who answered that they felt very safe or safe grew from 88% to a fairly astonishing 94% in 2004. So that's a very high level of safety that is enjoyed by our citizens. Of course, one can always point to a shooting or to these incidents which are more than regrettable, and which should be denounced, and so forth and so on, but is it necessary to make legislation on the basis of the single scandalous incidents that are given a lot of spin by the media? I'm not sure.

[*Translation*]

I will now move on to my main point. Basically, the bill is about punishment and deterrence.

Will the people for whom this bill is intended, namely, those who use firearms or who commit violent crimes, be deterred from committing those offences?

I would like to advance three arguments to demonstrate that any deterrent effect would be slight.

At our centre we have research specialists who study the use of narcotics and drugs. They have found that 57% of murders are committed by people who are under the influence of drugs or alcohol consumed just before, or sometimes while committing the crime. The rate for attempted murder is 58%; for assault, 69%; for abduction, 54%; for sex-related offences, 44%. The statistics are the same for robbery. About 60% of those who commit these offences do so under the influence of alcohol or narcotics. Therefore, increasing the minimum sentence by one year will not act as much of a deterrent for them.

I myself have studied homicides; I have a data bank of about 153 homicide cases. Of the 153 cases, 71% were solved in less than 24 hours. I would like to stress that fact, because it means that many homicides are the result of a spontaneous criminal act, something done on the spur of the moment by way of, as we call it in our jargon, acting out. Once again, the bill would do little to deter this type of crime.

I would like to bring one final thing to your attention, something that surprised us. We questioned some young people who occasionally dealt drugs. We asked them if they were armed when engaging in such activities. We found that 32% of the drop-outs carried a weapon. Moreover, 55% of those who were charged under the Young Offenders Act carried either a firearm, a knife or some type of weapon. For those who were younger, the rate was 17%.

This is what it all means. The act may apply to youth, but it is more significant for gang members and those who engage in organized crime. These people find themselves, to a certain extent, between two types of threat: on the one hand, there is the law which tells them that if they commit the crime, they will be arrested and charged, and given a minimum sentence which, in some cases, can be rather long; on the other hand, the type of activity in which they are engaged requires that they carry a weapon.

These people are involved in dangerous transactions and often feel that they need a gun to protect themselves from assault. I am not saying that they are justified in doing so; I simply want to point out that the deterrent effect of these sentences is, to a great extent, neutralized by what they consider to be a necessity: the fact that they must be armed in order to conduct their business.

In closing, with respect to the security that Canadians enjoy, even though sensational incidents do occur, I see no real reason for this legislation. I don't think that it will reduce the rate of violent crimes or offences committed with weapons.

Rather, it could aggravate the situation in three ways.

First, by facilitating the arbitrary nature of plea bargaining, since, in many cases, the Crown has a choice between a summary conviction or invoking an indictable offence.

● (1545)

Secondly, as has already been mentioned, if we avoid the arbitrary and enforce the law in a mechanical way, then in all likelihood, proportionality will not be respected and the discretion of the judges will be unduly restricted.

Finally, one thing is certain, this act will lead to an increase in the prison population. We know that increasing the number of inmates is always a given, but is never part of the solution.

Thank you.

[*English*]

The Chair: Thank you very much, Professor.

To the Canadian Bar Association, I understood you will be presenting, Mr. Weinstein, and that Ms. Thomson will.... How will it go?

● (1550)

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): I will start; he will finish.

The Chair: You will start. Thank you.

Ms. Tamra Thomson: Thank you, Mr. Chair and honourable members.

The Canadian Bar Association welcomes the opportunity to present our comments to you today on Bill C-10.

The CBA is a national organization that represents 37,000 jurists across Canada, and among our objectives is improvement in the law and fair justice systems in Canada.

The submission before you today was prepared by the national criminal justice section of the CBA. It's interesting to note that the members of that section comprise both defence and crown counsel and university professors who teach criminal law. In that sense it brings a balance of multiple perspectives to the review of the law.

I'm going to ask Mr. Weinstein to give the comments on the particular aspects of Bill C-10.

Mr. Joshua Weinstein (Secretary, National Criminal Justice Section, Canadian Bar Association): Thank you.

While the criminal justice section supports measures to address violent crime rates, such a call to action must be acted upon using only measures that are both fair and effective. This section opposes the use of mandatory minimum penalties. Any action must proceed only if it is likely to achieve the goal of public safety and is at the same time consistent with what I'll call the three Cs: charter, common law, and Criminal Code—specifically, the principles of sentencing. We oppose the use of mandatory minimum sentences because they limit a judge's ability to fashion an appropriate sentence and they distort sentencing principles established by the Criminal Code.

Now, let me start with the judge's ability to craft a just sentence. You've had, I think, criticism in the past before this committee about the “one size fits all” approach. As someone who is 6'8", I can tell you that's not always the case.

Our section has faith in the judiciary, who are charged with the often difficult task of weighing a number of considerations when imposing a just sentence. They are guided by both common law principles, the charter, and again, the principles of sentence as outlined in the code. But let me go further. They're in the unique position of being able to address the just punishment not only based on the principles of sentence, but also taking into account the specific circumstances of an offender, the circumstances of the offence, and the particular community of the offender and the victim.

In addition, given Canada's track record of over-incarceration of aboriginal peoples, section 718.2 was a tool put in place to require judges to look at such options when sentencing aboriginal offenders. The bill would have the effect of taking away such a requirement and would amplify the current problems of over-incarceration of aboriginals. If a particular offence warrants a lengthy penalty, the sentencing judge already has the tools to impose the appropriate sentence. It is our section's experience that gun crimes already receive lengthy sentences.

Bill C-10 has the potential to distort a number of sentencing principles. One of those principles is proportionality—that is, that a sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender. Bill C-10 would set the floor of sentencing for all offenders, even those whose degree of responsibility is towards the lower end of the spectrum.

The Criminal Code also recognizes the principle of restraint—that is, that we restrain ourselves from jailing an offender unless it's necessary to protect the public. As outlined in our written submission, and as I present to you today, the criminal justice section believes that mandatory minimum sentences do not advance the goal of deterrence.

Other goals of sentencing, particularly denunciation and rehabilitation, are also principles a judge must consider. In the indiscriminate application of mandatory minimum sentences for all offenders, a judge is limited in fashioning a rehabilitative sentence for an offender who would benefit from such a disposition.

Now, it's also our opinion that Bill C-10 would not improve justice efficiencies and would most likely lead to lengthy delays within the criminal justice system; more trials, given the higher stakes; higher incarceration rates; and more jails. This obviously all comes at a higher cost to the public.

Clause 9 of the bill would create two new offences: breaking and entering to steal a firearm, and robbery to steal a firearm. While theft of firearms already constitutes an aggravating factor on sentence, what the proposed amendment would likely do is create another hurdle for crown prosecutors to prove. To prove that the accused specifically intended to steal firearms would require very compelling evidence of intent, which often isn't the case unless there is an admissible statement by the accused or co-accused.

Now, another aspect of the bill that our section submits is a problem is the sheer complexity of its provisions in calculating the applicable sentence. I have read with great interest background information before appearing in front of you today. The debates have, I believe, illustrated this point. It is not just my inherent inability at doing simple math that is the source of the confusion, but the scheme itself, which in our opinion lacks cohesion and is just outright complex. If our section had difficulty in winding through the maze, imagine what it would be for those individuals we want to send a message to.

Now, our section wants to also bring to your attention a very real phenomenon that is actually occurring already, whereby sentencing discretion is being transferred to the Crown. When an accused is facing a mandatory minimum sentence, the negotiations between Crown and defence cease to become plea bargains; rather, they're charge bargains.

Let's say an individual is charged with discharging a firearm with intent. The Crown will agree to reduce the charge in exchange for the accused's pleading guilty, thus securing a conviction, while at the same time allowing the accused to avoid jail time. However, the charge bargaining process relies on Crown discretion. While meaning no disrespect to prosecutors, an accused is more likely to buy into a process that has as its pillar an independent arbiter exercising discretion rather than a representative of Her Majesty.

● (1555)

The second problem is that such a process dilutes the intention of things like the present legislation, instead of being tough on crime, as an accused comes out of the process with not only a potential lesser sentence, but a lesser offence. Eliminating mandatory minimums may very well have the effect of such an accused receiving the appropriate sentence, but still within the framework of the charge as originally laid.

Our section urges this committee to reject this bill. While the bill strives to achieve the goal of protection of society, a goal we share, it does so in a manner that won't have the intended effect and will lead to injustices.

Thank you very much.

The Chair: Thank you, Mr. Weinstein.

Now from the Mennonite Central Committee of Canada we have Sandra Elgersma.

Will you be presenting, or will it be Ms. Henderson?

Mrs. Sandra Elgersma (Domestic Policy Analyst, Mennonite Central Committee Canada): We'll both be presenting, but I'll lead off.

The Mennonite Central Committee of Canada is the relief, development, and peace-building arm of the Mennonite and Brethren in Christ churches in Canada. In the area of justice, we have a long history of programs that work with victims, programs that work with offenders, and programs that bring the two together in dialogue. We thank you for inviting us here today.

MCC envisions a criminal justice system where human realities are taken into account. Communities play a strong role in addressing justice, and a variety of alternatives exist to ensure that victim needs are met, that offenders take responsibility and have the opportunity for rehabilitation, and that harm is repaired.

This vision conflicts in several ways with Bill C-10. Taking into account the human realities of guns and gangs calls for a much broader response than the sentencing provisions proposed here; however, even these provisions cause us some concern. As we have already heard today, mandatory minimums reduce judicial discretion, which is important for responding to human realities and creating community alternatives.

Additionally, the increased use of incarceration has undesirable affects. It limits opportunities for victims to receive restitution and other forms of restoration. As crowding becomes a problem, incarceration limits opportunities for offenders to leave jail with more life skills than they went in with.

Longer sentences create greater difficulties for successful integration into community life. Increased use of incarceration leads to these negative effects, while at the same time it has no positive effect on reducing the crime rate.

Today we'd like to speak to you of our own experience with deterrence and community safety, both strong themes in the justification of Bill C-10. In previous appearances before this committee, we have talked to you about our program of circles of support and accountability; today we're going to elaborate on that experience.

Ms. Eileen Henderson (Restorative Justice Coordinator, Mennonite Central Committee Ontario, Mennonite Central Committee Canada): Thank you.

Sooner or later, the majority of incarcerated individuals return to our communities. Many offenders are returning to communities in which there are few, if any, community supports in place, or are resuming community contacts that are part of their offending history. Both of these scenarios escalate the risk of reoffending. Past victims feel unsafe, and the potential for new victims is escalated.

The challenge for governments, police, and the community is how to integrate people into society while at the same time managing the risk of reoffence. We're all affected by crime. We've handed over our safety to our police services and other government agencies. We've come to believe that there's nothing we can do to protect ourselves and that our best option is to lock people up for as long as possible. Our communities are living in fear but have not been given the tools to help them address their fears in helpful and safe ways.

We at MCC believe that communities need and have the ability to participate in keeping themselves safe. Circles of support and accountability originated as a faith-based response to a crisis. Twelve years ago, a high-profile, high-needs sexual offender deemed at 99% risk to reoffend within the first year was released into the city of Hamilton. Small groups of individuals formed a circle around him, to both support him and hold him accountable for choices and behaviours. Fully aware of his offending history and his offence cycle, this group of men and women were committed to the concept of “no more victims”. Shortly after that, another individual was released to Toronto, and the concept of circles began to take shape.

Each released offender or core member in our circles project is encircled by three to four community members and a designated staff person. Each circle meets weekly as a group, and each volunteer is committed to at least one in-depth contact with the core member outside of the circle meeting. The circle does not do surveillance, nor is it custodial in nature. It is, however, a group of community members who are committed to community safety through inclusion, rather than exclusion of offenders.

Each circle member is very aware of offending histories, patterns of behaviour, and risk factors. Each is committed to both supporting the core member, while at the same time holding the person accountable for the choices they're making. Circle staff and volunteers work with other professionals in the community, including the police, and are committed to calling the appropriate authorities if community safety is at risk. Although the initial thought was that a circle was needed only for the first year post-incarceration, the reality is that many individuals need this intentional community for many years, if not a lifetime.

In the past 12 years, this project has worked with over 100 men, and the circles concept has been replicated in almost every province across Canada and a number of the states, including Colorado and Vermont, and in Great Britain. The success of this approach has been verified in the statistical study conducted by Dr. Robin Wilson under the auspices of the Correctional Service of Canada. This study has also been replicated using data from other circles' initiatives from across the country, and has come to basically the same conclusions: that this kind of approach works.

Charlie Taylor, the first circle member, died on December 25, 2005. For 12 years, aside from having one shoplifting charge, Charlie lived in the community, participated in community activities where appropriate, lived in his own apartment for the first time in his life, looked for ways to give back to the community, was in contact every single day with one of his circle members, and did not reoffend sexually.

Don, presently living in the GTA, was released four years ago with a community notification by police services. Also designated at a high risk to reoffend within the first year, he was unable to find and maintain housing for the first four months after his release, due to public reaction. Don has actively participated in the circle, in conjunction with the circle has become a valued volunteer with a partner organization, and is looking for ways to give back to the community.

We do not believe that sexual offending can be cured. But we do believe that with appropriate support and accountability structures in place, and hard work on the part of the individual core members, sexual offenders can live safely in the community. Volunteers who work with circles feel empowered by their involvement. They model community standards, challenge ways of thinking by the offender, and engage in a more relational way of monitoring behaviour: security that is dynamic rather than static.

● (1600)

A keen need for victims is the need for safety. Victims report that they want to know that there will be no other victims. Circles are committed to no more victims, and although we cannot undo the past, volunteers and staff work diligently with the core member to ensure that the offending behaviour does not occur again. The goal of circles of support and accountability is to ease the fear of victims and to prevent further victimization.

Although the circles model has been primarily used with sexual offenders post-sentencing, it has also been utilized with other kinds of offending histories—drugs, arson, theft—and has been replicated with women moving from transitional to permanent housing, primarily those returning to the community from federal institutions.

We believe that the circles model has potential for use earlier in the justice process. It has been used already as part of a bail condition and has been considered in other situations where security and public safety are high priorities. We believe that using a circles model earlier would allow for a more effective response to victims' needs, would open up greater possibilities for their experience of justice, and would allow communities to be engaged in providing safety and accountability.

● (1605)

Mrs. Sandra Elgersma: In conclusion, we share the government's concern for safety and the interests of victims and offenders. We offer our experience of providing protection to show that there are more effective means of deterrence, of ensuring that there are no more victims, and of successfully integrating people into communities.

The potential of circles is not limited to post-sentencing alone but could be introduced at a much earlier stage in the justice system. This may well result in fewer victims and lower social and economic costs for the system.

We believe that judicial discretion is very important, that communities should be afforded more opportunity to handle justice issues rather than less, and that the use of government resources should be directed more toward community-based initiatives than toward expanding our prison capacity.

While we do not support this bill, should it find favour among you, we encourage you to include stronger provisions for reintegration. At the very least, additional support for community-based initiatives like circles of support and accountability, both pre- and post-sentencing, and other programs like it, can mitigate some of the harmful effects of the increased and longer incarceration that would follow from this bill's implementation.

Thank you.

The Chair: Thank you very much.

Now we'll go to questions.

Ms. Barnes.

Hon. Sue Barnes (London West, Lib.): Just to the last point about adding new things, this is a bill sent by the government after second reading. It does not allow us, therefore, to add extraneous matter. We can only do tinkering, so that puts us in a very harsh position, usually, of accepting or rejecting the bill with minor amendments. We've had other suggestions. I just want to put that on the record and clarify that point, so you do not feel that we're ignoring your comments, perhaps.

My colleagues and I were noticing that our format has you down as an individual. We regard you as an expert, and we're very pleased that you are here, Professor.

I'd like to talk about the report you were very involved in about abolishing mandatory minimum sentences and some of the anomalies that happen inside the court system when you have both to avoid and.... I'll let you put in your words what happens, actually, when you have mandatory minimums, based on the study that you did.

Prof. Jean-Paul Brodeur: Yes, you have a certain number of effects. Let's take a first shot at least three.

Number one, it's very difficult to reconcile minimum sentences with the principle of proportionality, because the principle of proportionality basically is guided by several factors, harm and guilt. For instance, the determination of guilt is not automatic. In some cases you have crimes that are caused by certain circumstances. In some other cases, some of these crimes are, at first blush, motivated by pure evil and some things like that. So you have to look into these different circumstances. So that's one effect.

So if you have one formula fits all, it supplants the principle of proportionality, and of course, secondly, justice doesn't appear to be done either in the eyes of the public or in the eyes of the person who is subjected to this penalty.

The second thing is that it curbs the discretion of the judges, and here let me be even more precise than this. I think one has to alienate judges only if there's an overwhelming public interest in doing so. My example would be this. When we submitted our report, the Canadian Sentencing Commission report, we had some guidelines that we wanted to submit to judges, and these were presumptive advisory guidelines and there was no coercion whatsoever in the guidelines. The response of judges, I have to say, was fairly negative, meaning that they didn't want to have any kind of constriction on their discretion, excepting the one that exists right now. Basically, you have two lawyers, you can have an appeal, you have the charter, so sentencing is not done in a vacuum. Basically, they felt that guidelines were an imposition upon them.

If that is true with guidelines, multiply...sorry?

● (1610)

Hon. Sue Barnes: I have a few other questions too.

Prof. Jean-Paul Brodeur: Okay, 30 seconds.

So if this is true with regard to guidelines, this is overwhelmingly true with regard to minimum sentences, which are the most mandatory form of guidelines.

I'll leave it there.

Hon. Sue Barnes: Thank you.

Ms. Joncas, I want to talk to you about the bill and specifically the differing role that a prosecutor gets if this bill is passed, different from the current situation in any courtroom.

Ms. Lucie Joncas: Obviously the judicial discretion will be now exercised by crown attorneys, and the process for appointing both of these.... We in the AQAAD believe that crown attorneys should have some discretion, but I don't believe the judicial discretion should be put into the hands of the prosecutors.

I really like the argument put forward by the Canadian Bar Association, which is that we're not going to be plea bargaining, we're going to be charge bargaining, if we want to maintain the objectives of the Criminal Code, which is the individualization of the sentence. So I find that very disturbing.

Hon. Sue Barnes: To the Canadian Bar Association, thank you for your brief and the work that I know went into it.

I did want to ask you whether you thought it might be incumbent on a government that had put in mandatory minimum on gun crimes in 1995 to have at least studied the effect of these before we move in this type of direction.

Mr. Joshua Weinstein: In terms of that, I know what our position has remained before and when those amendments came in. Obviously, with data coming forward, I'm sure it's going to assist you. But aside from that point, it still doesn't take away really from one of the main points we're making, which is about, as I think you've heard many times before, judicial discretion. It does not remove the ability of the judge to impose a lengthy sentence.

So if the statistics showed.... I don't know whether you will ever find statistics in terms of showing the correlation between the mandatory minimums and the deterrent effect, but if it were to remain that there were no mandatory minimums and the Crown came forward and showed the statistics that gun violence is on the rise, there is nothing preventing a judge from imposing a harsh penalty. And if that goes across the board, then those sentences in and of themselves, rather than the policy imposed.... And I'm not necessarily agreeing; we don't agree about the deterrent effect, but if it's the position that lengthier sentences will deter, judges can impose those lengthy sentences.

Hon. Sue Barnes: I haven't seen any credible studies that prove they deter.

The Chair: Thank you, Ms. Barnes.

Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Thank you. If I may, Mr. Chairman, I have a few questions for Professor Brodeur.

This summer, I read the Archambault Commission report. I would not go so far as to say that it was an enriching experience, but I did enjoy reading it. Nevertheless, I'm sure you will agree that it is a scientific document.

I am dismayed. First, the clerk gives us a document—which I can forward to you—from your colleague, Mr. Doob, from the University of Toronto's Centre of Criminology; this document lists everything that has ever been written about deterrence and minimum sentences. He suggests that there is no real relationship between the two. He said that some variables may account for a small difference, but on the whole, it would be scientifically wrong to relate a deterrent effect caused by minimum sentences to the drop in the crime rate.

I would like you to expand on the subject of murder. You said that you have a data bank of homicide cases and that, 75% of the time, these murders are the result of a crime of expression. That leads me to wonder if we, as legislators, are not mistaken when we try to reduce the crime rate by advocating a public firearms registry or by trying to reduce the number of firearms in circulation or by turning our attention to contraband, street gangs and criminality. Are we not approaching the problem from the wrong angle?

I would like you to help us to understand the conclusions that you have drawn from your second point relating to your data bank.

● (1615)

Prof. Jean-Paul Brodeur: In my study, I found that people are influenced by detective novels and generally think it takes around 365 pages to solve a murder.

Actually, I can only give you examples of crimes. Take the case of an individual who is harassed at work for a long time, gets mad and suddenly kills someone. Another example might be a mother who kills her child who is very sick, or young people who point their weapons at one another and fire them in plain sight.

For the first type of crime, to some extent, deterrence isn't really an issue, because they are crimes committed on impulse. As for other crimes, crimes committed by organized crime, their rate of solution is generally quite low. When you hire a hitman to knock someone off... Take the Auger case; the guy who tried to kill that reporter was never found.

Mr. Réal Ménard: He says he knows who did it.

Mr. Jean-Paul Brodeur: The police say they know too, but can't prove it.

So there's a bit of a split: on one hand, you have people who act on impulse, who are impervious to the deterrence, and on the other, you have pros who think they've got a good chance of getting away with it.

In closing, one of the things the commission was trying to say was that you need to have an integrated and consistent approach to justice.

One thing struck me when I read these provisions. When you referred to the firearms registry, you said two new offences were being created: breaking and entering to steal of a firearm, and robbery to steal a firearm. For someone who wants to steal firearms, a weapon is far more desirable if it's unregistered. When the weapon is registered, it's a less attractive target for theft.

So it's hard to see the logic in "deregistering" firearms and creating new offences for individuals who break and enter to steal these weapons. These are contradictory efforts.

Mr. Réal Ménard: With all due respect, I hope the government members have duly taken note of your comments, which were very relevant.

That said, what's also of concern is the fact that we, as legislators, are entitled to make decisions based on clear and compelling evidence. After all the studies we have seen, if deterrence worked, the bill would be pointless because it was already adopted back in the time of Allan Rock, when the firearms registry was created. At that time, there were 10 offences for which mandatory minimum penalties were created.

Why should we now be increasing the sentence by one year or increasing it in the case of a subsequent offence, when there's already a legislative scheme? We do see this happening elsewhere.

Do you have any information on street gangs that you could share with us, in connection with what could be done with firearms?

Prof. Jean-Paul Brodeur: In terms of information on street gangs, Ms. Mourani—

Mr. Réal Ménard: Whom we associate with on a regular basis—

Prof. Jean-Paul Brodeur: —recently published a book in Quebec.

Yes, I'm aware of that, sir. Don't take it as flattery. The phenomenon, which is attracting a lot of attention, is relatively recent.

I'm just going to repeat something I probably went over too quickly in my presentation. Young people who join street gangs are arming themselves, and arming themselves heavily. It's a spiral. They arm themselves because their opponents are armed, and the third guy arms himself because the first two are armed, and so on.

In this case, increasing the sentences or imposing minimum sentences has little deterrent effect because to some extent, they are more afraid of the young men in the other gang, their rivals, than the law. That's why, if you want to solve the problem of street gangs, you have to deal with the root causes of the problem rather than piling on relatively useless penalties.

The reason a young person decides not to enter into a drug transaction unarmed is to avoid the risk of getting stabbed or shot by the other person. I'm not saying I agree with that; it's unfortunate that that's the way it is. However, that shows once again that the deterrent effect is really minimal.

● (1620)

Mr. Réal Ménard: Do I have time to ask another question?

[*English*]

The Chair: One more question, quickly, Mr. Ménard.

[*Translation*]

Mr. Réal Ménard: Ms. Joncas, you were saying that in 90% of cases, that leads to a guilty plea, which gives rise to a joint sentencing recommendation. Did I understand correctly?

Ms. Lucie Joncas: No. I said that 90% of charges lead to a plea or plea bargaining that closes the case. So only 10% of charges go to trial. And a lot of cases get settled after the pre-trial, which people are also trying to chip away at these days. That's another factor.

If you consider the amendments to the Criminal Code, they shouldn't be taken in isolation, one bill at a time; you have to take a more comprehensive view of them. I think the bill currently before you doesn't meet the needs. On the contrary, it's going to make the problem worse. Preventive detention and case settlement will definitely be seriously affected by these legislative measures.

[*English*]

The Chair: Thank you, Mr. Ménard.

Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): I just want to say to Professor Brodeur that I feel very strongly that the point he made about the street gangs arming themselves, especially around drug deals, is so true.

We had a police officer killed in my riding while breaking up a drug deal. Five or ten years ago that individual, who hasn't yet been convicted but I'm assuming will be, but is alleged to have killed him, would not have been carrying that gun, and that officer would still be alive. So I think it's a very good point that he's made—and I thank you for that, Professor.

Ms. Henderson, concerning the circle model, I've been studying it a bit, and it's a bit off topic today, but I want to know some more about it. One of the questions I have, from talking to some of the people who have been through it, is whether the model can be adopted in our prison system, either at the provincial or the federal level. Is there any way it can be adapted so it would work there, particularly in preparation for people who have been convicted and have spent their time and are coming out—so, let's say, those few months or a year before they're released?

Ms. Eileen Henderson: The initial concept of the circle model was that a circle would be formed at least six months prior to someone's release back to the community. We don't always have that luxury in terms of knowing when people are coming back or where they're coming to, but there are some attempts at this moment to begin to look at how to move the model into the institution so people are in a circle a year or two years before they come out, so there is a situation of trust and there is outside community modelling and setting standards of community behaviour, but also building supports for that person.

Mr. Joe Comartin: I'm having a hard time conceiving how that would work. Would you be moving, then, members from the general community into the prison for that period of time, on a periodic basis? How would it function?

Ms. Eileen Henderson: It's visitation through visiting programs in the institution, perhaps, and we've explored looking at one of the family visit opportunities that an individual might have of moving. We're exploring that presently at one of the institutions in Ontario as to whether we can use that kind of scenario to begin to build a circle model for an individual who is presently incarcerated.

Mr. Joe Comartin: But there are no models right now where that's been tried in the prison setting?

Ms. Eileen Henderson: Not at this moment.

Mr. Joe Comartin: To Mr. Weinstein and Ms. Joncas, regarding the impact on the judiciary of this bill, if it goes through unamended —and Professor Brodeur, you might want to add something as well —is there discussion within the judiciary now about any concerns over this shift in discretion from them to the prosecutors and crown attorneys? And if so, even if it's anecdotal, could you give me some sense of the discussion going on within the legal community? Similarly, do you have any impressions of how the prosecutors feel about this shift in discretion?

● (1625)

Mr. Joshua Weinstein: What I can say, for obvious reasons, is that I don't know what a lot of judges are feeling, because there are certain constraints on what they're able to tell us. I think there's no doubt there are lawyers who have been in situations where a judge has made a comment during a sentencing that their hands are tied.

But I can maybe comment more in terms of the prosecutors. When they're trying to resolve a matter, you would think that maybe some prosecutors would find it efficient that they at least have the floor set, but it does create problems.

I will give you an example of a very real problem that I have dealt with, where a farmer shot down a crop-duster that had flown too close to his farm. The person wasn't injured, but there was no doubt that there were effects psychologically. At the end of the day, what the victim wanted was restitution, restitution for the cost of the plane, the lost business. Now, if that person were incarcerated for four years —and that's for having discharged a firearm with intent—and they had a farm and were trying to make money, they would have little or no ability to pay the restitution. To the crown, recognizing what the real goals of everyone were, of the victim to be in the situation they were in before, in terms of reparations, and of the offender obviously to be allowed to be out in order to be able to make the money to pay back the victim, that charge then becomes a careless use of a firearm.

So you have those constraints. And I've mentioned that there's an out that's been played. But again, it relies on that crown attorney to exercise that discretion; it may not happen in every case. But if you put that situation before a judge with no constraints in terms of minimums, and you say, what we're presenting to you today is that the victim wants to be in a situation they were in before and have their money paid back to repair the damage, and in doing so, we ask that you consider a conditional sentence, so that the offender will be out in the community and make regular restitution payments, that is then achieved within the framework of the charges that were originally dealt with. But you can't, obviously, because there's a mandatory minimum for discharging a firearm with intent.

That is the example of a potentially lesser sentence and a lesser offence to achieve the goals of sentencing.

Ms. Lucie Joncas: Mr. Chairman, if I may, I obviously represent the defence attorneys' association in Quebec. I cannot speak on behalf of the judges, but I can say from work and the information that I've gathered that judges feel they can do their job in Canada today. They don't need specific guidelines that are not already there. Section 718 of the Criminal Code gives guidelines to the judges, and they give motivated decisions. They are the people who are in the best position to get proper representations and to know the circumstances of the file, of the offence and the offender.

Therefore, as I said, they feel they can do their job and that this is not necessary. And this is contrary to the principles of section 718.

The Chair: Monsieur Brodeur, do you have another comment?

Prof. Jean-Paul Brodeur: Yes, very briefly, the most excessive example we have had of mandatory sentencing has been at the federal level in the U.S., where you had rules that would direct a judge, if you had a quantity of crack cocaine, for instance, to multiply that quantity by a factor of 100 and then impose a mandatory sentence. So we've had many examples of a judge saying, I have to sentence you to this amount of time in jail, although I believe, and I declare it publicly, that I think the sentence is unfair. Eventually the whole system was thrown out by the Supreme Court.

There is something that I find disquieting in this project. At some point, depending on whether you're using a shotgun or a handgun, you have a different minimum. This is not as excessive as crack cocaine and powder cocaine, but still, it's difficult to comprehend. I mean, a shotgun is at times more lethal than a handgun.

● (1630)

The Chair: Thank you.

Just a general question comes to mind over Mr. Brodeur's comments. There are over 40 mandatory minimum sentence sections in the Criminal Code right now. Many of them deal with firearms. I haven't heard any of the witnesses thus far who have come before the committee looking at any of those mandatory minimum firearms offences that we've had thus far and saying, well, this is what happened, or that's what happened, or this is a result of a mandatory minimum. I'm just curious as to whether anyone here has done such a thing.

For instance, in 1995 in the Criminal Code there was a four-year mandatory minimum offence for a firearm. It was introduced at that time, in 1995. That's 11 years in play now. If that mandatory minimum has been in play for 11 years, has anyone done a study on it, or can anyone comment in reference to the effectiveness or ineffectiveness of that particular thing?

Can you, sir?

Prof. Jean-Paul Brodeur: Yes. Well, our time is very limited.

Actually, with regard to the mandatory minimum in respect to firearms, you may ask the question of Professor Doob. There was kind of a statistical study. It was basically shown that judges actually were tailoring their sentences to neutralize the effect of having new minimums. So basically the situation didn't change, not because the minimums were too stringent. What was happening here is that they were, at some point, not circumventing the law but tailoring against their sentence for the minimum mandatory sentence not to have any specific effect.

That is one that was studied. You may ask Professor Doob.

The Chair: I know Statistics Canada has examined this particular point and has not come up with any conclusion, because there are so few cases where the mandatory minimum has been applied. It's one of the first things dealt away by the prosecution to get a quick guilty plea. So any kind of analysis or conclusion, I would have to suggest, is probably going to be erroneous anyway.

Prof. Jean-Paul Brodeur: Right. Studies on deterrents or the effect of sentencing are some sort of wasteland. They tend to cancel each other out. You have one that says it's going this way, and another one for that.

The point I want to make is that if that is the situation, on the basis of research results that are uncertain and cancelling themselves out, you do not increase the potential harm that will be done to the lives of people through incarcerating them. I think that's a very shaky basis. From uncertainty, nothing follows, and certainly not punishment.

The Chair: Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): Thank you to all the witnesses.

Professor Brodeur, on the remarks you made just now that some of the studies cancel each other out, I've seen studies that say there is a deterrent effect, and other people say there is no deterrent effect. Have there been any studies that you know of, or that any of our witnesses know about, that speak to the effect on crime when high-risk offenders and recidivists, people who are continually committing crimes, people with long criminal records, are behind bars, when you take those people out of society?

The reason I ask is that we did hear testimony from the chief of police from Toronto about the effect in some communities when those who were committing the crime were taken off the street. In one way or another, they were off the street for some time, and he found there was a corresponding drop in the violent crime rates there. So quite apart from the deterrent effect, we could argue back and forth, if I'm at risk of getting a one-year sentence versus a 10-year sentence, whether I would be more or less likely to commit a crime. What about when we take a high-risk offender out of society and put that person into prison?

● (1635)

Prof. Jean-Paul Brodeur: It has been studied. There's some sort of Nobel prize in criminology that has been awarded for two years. Professor Alfred Blumstein was awarded this prize. He actually studied the phenomenon you are mentioning.

What you're saying is something like, let's move out of deterrence rehabilitation and talk about incapacitation; that's what you're saying. If you incapacitate or neutralize these people by sending them to jail for a long period of time, does it have an effect? Professor Blumstein found two things. It has a modest effect; however, the price you pay to have this effect is that you have to do what the U.S. is doing right now, which is mass incarceration.

The sentencing process is an instrument that is not very precise. In order to have these career criminals—these highly dangerous offenders—in prison for a long period of time, you have to pay the price that you're going to cast a wide net and catch all kinds of fish. Of course, you will eventually catch some highly productive criminals, but I want to remind you that mass incarceration in the U. S. has produced one of the highest rates of incarceration known to the western world. It is probably, as of now, at least six or seven times the rate of incarceration in Canada.

So to answer your question, yes, that kind of effect has been spotted. It is modest, but the price to obtain the effect is mass incarceration, and I'm not sure that this is in line with our Canadian values.

Mr. Rob Moore: Thank you, Professor, and I appreciate that point. That's certainly not what we are proposing, any mass incarceration.

That is precisely why this bill, Bill C-10, is narrowly targeted at those involved in gang activities and using guns to commit crimes. Not wanting to cast the net too wide, we're focusing very much on what Canadians are telling us are the most serious offences.

I've heard quite a bit of talk about this discretion of judges, but I'd like some comment from the Canadian Bar Association or others. For many of the offences we've listed, and I'll talk about some of the primary offences where it's an escalating five, seven, or ten years, what we're dealing with in the second and third cases, of seven and ten years, is someone who has used a firearm in attempted murder, discharged a firearm with intent, committed sexual or aggravated assault, and so on—what we've found to be the most serious offences —and has done it not only once but twice.

Many people feel that when there's been a recidivist activity, obviously we have to bring in safeguards and start to err on the side of protection of society. When someone has done this once, that's one thing. When they're out and have done it again, it's quite another, in the public's view.

Just so I know what we're really talking about, isn't it the case with many of these offences that there's already a four-year mandatory minimum? What Bill C-10 does, instead of making it a four-year mandatory minimum, is make it a five-year mandatory minimum. We're talking about taking discretion away from judges.

It's been presented, I know, by the opposition—in some cases very alarmingly—as that we're narrowing the discretion of judges. But what we're doing with this bill is saying that on these most serious offences, on a first offence, instead of four years, it's five. Is that not the case?

Mr. Joshua Weinstein: The national criminal justice section's position when the four-year minimums came in was that we opposed them.

● (1640)

Mr. Rob Moore: I appreciate that, and we realize that.

Mr. Joshua Weinstein: Then, going to the five-seven-ten rule, you have these sorts of calculations, in our view: that there is not much use in appearing in front of the judge, that the data could be input into a computer and it would spit out the results. But that's not our system.

In the example I gave, you have a situation where a farmer shoots down a crop-duster and is facing the mandatory minimum of four years. If that is the second offence, we're going to come up with a calculation. What I am saying is that if we have faith in the judiciary—and our section and the CBA do have faith in the judiciary—there is nothing stopping the judiciary from imposing a seven-year sentence.

I'll give you one example, in a case where there are no mandatory minimums: an assault proceeding by indictment, a very real case called Ganton, out of Manitoba. It was an attack on a bus driver. What the Crown did was present all the statistics of that particular bus route, showing it was the second most violent in Winnipeg, and aside from that, showing that in the last five years there had been an escalation in attacks on bus drivers. With all of that information put before the courts, and with an accused with a related but relatively minor record, the accused received 26 months on a simple assault, a mischief, and a breach.

Mr. Rob Moore: That's fine, and I appreciate that sometimes judges do sentence what people feel is appropriate. Many times it's appropriate.

But I feel there has to be an acknowledgement that this is not entirely new. Our Criminal Code contains mandatory minimums and it contains maximums, both of which limit the discretion of a judge somewhat. The argument has to go both ways, I would think. If one is against all minimums, presumably we'd be against all maximums too, because those also limit the discretion of a judge.

But I guess what this bill does—and I'll use your example—is that right now if you shoot down a crop-duster, the mandatory minimum, if you're charged under some offences, would be four years. Under our bill, if you shoot down a crop-duster, it would be five years, and all the same principles apply regarding any bargaining that could take place with the prosecutor.

Now, if you show yourself to be a recidivist, either after getting a lesser charge or serving your time, and you are back in your field and shoot down another crop-duster, what society is saying, and what we're saying, is that you've shown you're dangerous to society. We want to limit that discretion; we want to send a message. We want to ensure that the public is protected. We want to take dangerous repeat offenders off the streets. That's what this bill does.

Also there are some new things: robbery where a firearm is stolen, and break and enter where a firearm is stolen. We feel those are new provisions that need to be in place, because that's a real problem too.

Thank you.

The Chair: Ms. Joncas, you had a comment to make.

Ms. Lucie Joncas: I wanted to answer the first question, because you put it to all the witnesses.

If there is a repeat offender and there are serious crimes being committed, the Criminal Code already has provisions regarding dangerous and long-term offenders. So I believe that if the Crown has reason to believe society is at risk, they will make that application, and it's working fairly well. So I don't see why minimums in another way would meet a need that is actually in the society.

The Chair: Mr. Brodeur, do you have a further comment?

Prof. Jean-Paul Brodeur: Yes, very briefly. It's this idea that maximum sentences, like minimum sentences, are constraining the discretion of judges. At least this is something that we know a lot about and have studied in the Canadian Sentencing Commission.

Even today, the average sentence in Canada is less than three years, all over the board. My point here is that the maximum sentence is given by judges in much less than 1% of cases. So this idea that the maximum is as constraining as minimum doesn't really fly.

The Chair: Thank you, Mr. Brodeur.

Mr. Bagnell.

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

Mr. Brodeur, you talked a little earlier about an effect of incarceration. But if a 20-year-old is put in jail for five or seven years—a couple of extra years, because of this bill—of course we'll be safer because they can't do anything. But then there are the negative effects that many witnesses, even the chief of police, told us about: they learn more crime in jail, they become less social, fit in.... Then they all get out. As you said, the average is less than three years, so they're going to be out for a long time and more dangerous.

If you take it over their entire life cycle, are we actually safer?

● (1645)

Prof. Jean-Paul Brodeur: Very briefly, when I was with the Sentencing Commission, we commissioned some research on the theme of the prison being the university of crime. We asked our researchers to give us quotes in official documents from the birth of Canada up until now.

You can look at the report. There is one quote to this effect about every three years, and it goes all the way back to the invention of prison. So I would say the most recurrent leitmotif in all the literature of incarceration is that yes, it hardens criminals and teaches them new tricks.

The silent system, which was first envisaged by the Americans, was for prisoners not to talk to each other, so that they would not teach each other new tricks. This is the commonplace in the literature on incarceration.

Hon. Larry Bagnell: Ms. Joncas, you said that you found that judges made proportional sentences. You didn't see that they were making bad sentences. I asked the justice minister the same question, and he said that he thought judges were making good sentences. So why would we need this law? If we've left all the maximums there, they could make sentences just as strict if this law didn't exist.

I assume sentences could be appealed, and I assume judges don't like to have their decisions appealed, so why would we need this law? If you're saying they make good sentences, and the justice minister said they make good sentences, and they can still give the maximum, why would we need this law?

Ms. Lucie Joncas: Well, you've got my point exactly. I believe this law is not necessary. Judges are giving just sentences, and the appeal process is there for anybody who wants to take it up. If the Crown believes the sentence is not harsh enough, they will appeal, and they do. I don't believe the cases that have been put forward to justify this type of legislation are cases that have withstood an appeal, and I think that's an important point.

Hon. Larry Bagnell: I know you represent defence lawyers, but I'd just like to ask you and the bar if you know the position, in general, of prosecuting lawyers?

Mr. Joshua Weinstein: Obviously the section goes to both prosecutors and defence. I can speak from that experience, from the experience of being a defence lawyer. The way the system is—and when I say "is". I mean it's in terms of where a judge exercises discretion and is entitled to impose the appropriate sentence—it's our submission that, while not necessarily perfect, it works, and it works because there is that ability to appeal the sentence.

That sentence in the case I described of the attack on the bus driver was viewed by many as a very harsh sentence: 26 months for an assault on a bus driver. It was upheld by the Manitoba Court of Appeal. So you have crowns who will have the ability to go forward with a set of circumstances and their statistics and their media information, present it all in front of a judge, and then the judge will be able to exercise discretion and impose a lengthy sentence, where appropriate, without the use of any mandatory minimum in that type of situation.

Hon. Larry Bagnell: So crown prosecutors aren't asking for this bill, in general?

Mr. Joshua Weinstein: I don't speak on behalf of a crown attorneys association. All I can say is that in consulting with our section—both crown prosecutors and defence lawyers—it is the view that mandatory minimums should be opposed.

Ms. Lucie Joncas: If I may, on the same question, I can refer the committee to the submissions of the Quebec Bar Association. The Quebec Bar made submissions on Bill C-9 about restricting jail time to be served within the community. I believe the legislative committee of the Quebec Bar represents both defence and Crown.

The Chair: Thank you, Mr. Bagnell.

Mr. Lemay.

[*Translation*]

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

Thank you for coming. This is very interesting. Needless to say, I appreciated you statements. I have practised criminal law as a defence attorney for 25 years and I oppose this bill. I think that my position is clear.

As I have practised criminal law for a long time, I carefully read the brief from the Canadian Bar Association. I had the same question and I want you to explain something to me. Perhaps, Ms. Joncas, you could confirm it for me as well.

As we analyze Bill C-10, it would almost be fair to say that it contains some heresies. In fact, I do not know what came over the minister or his assistants when they drafted this bill, but if we knew, it might help us to understand this. I would like some clarifications on section 1, which amends section 84 of the Criminal Code. If I understand correctly, time spent in custody awaiting trial would not be taken into account for repeat offenders. I do not know whether you are following me.

As you studied this very closely, could you tell me whether I am right in saying that one must be entirely disconnected from reality to take no account of the time spent in custody awaiting trial? I refer specifically to section 1 of the bill, which amends section 84 of the Criminal Code.

I would like to hear what you have to say about this. I would also like to hear what you have to say about time spent in custody pursuant to subsection 719(3) of the Criminal Code and of course about the Supreme Court's Wust decision, whereby the time spent in custody must be taken into account. The legislator has decided to go against a decision made by the Supreme Court! I would like to hear what you have to say about this because to me, it seems entirely divorced from reality.

I would like to hear your opinion on this, Ms. Joncas or Mr. Weinstein; I do not know which one of you two has read this attentively.

● (1650)

Ms. Lucie Joncas: We read all the provisions very attentively before coming here, but in fact—and we mentioned this during our presentations—that there will be more instances of preventive detention with this kind of project. This is absolutely certain.

The Supreme Court made a decision, in the Wust case, regarding preventive detention. Moreover, the Quebec Court of Appeal also made a decision in the R. c. Beauchamp case, whose leave to appeal was refused by the Supreme Court.

Preventive detention is at the judge's discretion, but nevertheless, the conditions of preventive detention are generally much more severe than those of detention after sentencing, and we must take this into account. We must certainly deal with this factor. And as there will be more challenges, there could well be, moreover, more lengthy periods of preventive detention.

[*English*]

Mr. Joshua Weinstein: The view of our section, in reading through it.... I just don't see that the bill addresses the issue of pre-trial detention at all. I don't see that there are provisions specifically excluding that calculation. It will remain to be seen, if this bill were to pass, what it would look like, but as it stands now, as I look at it, it doesn't seem to address that time and how it's to be taken into account.

Really, some of the comments that were made in terms of the way it would function, about the break in time, were just outlining what that essentially would look like and how it would function. We really make no other comment than that. In looking at it, I don't see how it addresses the issue of pre-trial detention. We would ask that obviously, if it were to be calculated, it be calculated in accordance with the charter and in accordance with the decision in Wust.

The Chair: Monsieur Lemay, do you have another question?

[*Translation*]

Mr. Marc Lemay: No, that's all right.

[*English*]

The Chair: Thank you.

We'll go to Mr. Thompson.

Mr. Myron Thompson (Wild Rose, CPC): Thanks for being here.

I have a couple of questions. Number one, I'd like to speak to the Mennonite ladies who are here. Thanks for coming.

I don't know if you've heard of Linden, Alberta, and Didsbury, Alberta. There's a huge community of Mennonites in that area, and that's the area I represent. I've played a lot of baseball against those guys. I could never beat them. They were always a little better than we were. I don't know how they had all that time to practise in the middle of their farming, but they were tough to beat.

Talking to these people, the very people I talk to, we talk about these kinds of issues and these kinds of things that we intend to do. I've asked them what we should do with a person who does this with a gun. Do you know what the response is? “Well, you have jails. That's what they're for. That's where they belong.”

They also believe heavily in going into the penitentiaries and doing the very fine work they do in rehabilitation, and I can appreciate that, because I went there with them on a couple of occasions before I got into politics.

So I don't really understand why you people would come here and oppose this, when I can guarantee you that I know a whole group in my riding who would support it heavily. That would be a question. I'll give you a minute to think about it, because now I'm going to go to the Bar Association.

Shooting down a crop-duster, I thought, was a very poor example of what we're getting at here. Number one, I know that there's self-defence, but I can't really find any root cause of anything that would cause a person to pick up a gun and shoot a crop-duster down. You shot a crop-duster down? You took a gun out and shot a plane? And you think you're justified in doing that because he flew too close to your house?

In my riding I've seen people who accidentally got on private land—who thought they were on crown land hunting—and the owner came out and shot them. Are you justified in shooting somebody who got on your land? Maybe they were trespassing, but maybe they unintentionally trespassed. Nevertheless, do you think you should pull out a gun and shoot them? You can find examples like that, and I just can't find any root cause or any excuse for taking up a gun and trying to take someone's life, other than self-defence.

As far as the Bar Association goes, I'm really confused about you people, because I have lots of lawyers in my riding who seem to think that this bill is right on, that it's what we should be doing. I've even talked to two lawyers, believe it or not, who are Liberals who believe this is what we need to be doing. And you say you're representing all the lawyers in the country? Well, I don't think you are.

And I want to emphasize this. We had the police come here, and I guarantee you, with their presentation to the committee, that the police out there, everywhere, are supporting their position at this table. Why is that? Other groups of people have come here representing groups like the police, and the support is there. I can guarantee you that coming here against this legislation is not fully supported by your people. That doesn't make sense to me.

The last question will be on the New York City experience. Are you familiar with that, with the “broken window” theory and what that has caused? They hired a whole bunch more police and built more jails to try to curb crime, and you went to jail regardless of the offence. I understand that it's one of the safest cities to be in now.

If you have any comment on that, I'd like to hear it. Thank you.

● (1655)

The Chair: Would the Mennonite Central Committee please respond?

Ms. Eileen Henderson: We certainly do not represent the entire Mennonite constituency, but we represent some of the Mennonite constituency who would say that longer, harsher sentences remove people from community, and that makes it much more difficult to return people, and that escalates risks for community safety.

At the same time, we also work from a restorative justice approach that says that crime is the breaking of relationships. How do we engage communities and victims and offenders in repairing the harm of broken relationships? It's often easier to do time than it is to look the person in the face and come back out to the community and deal with the harm that has been caused, in the community sense, returning to families, returning to friends, returning to relationships that people in very many ways have horrendously destroyed.

Mr. Myron Thompson: If I may interject here, I want you to know that I appreciate the work in the prisons and when they are released. That work must continue with the victims. I agree with all that, but I also agree with making sure the penalty is provided.

Ms. Eileen Henderson: Thank you.

The Chair: The Canadian Bar Association, what say you?

Mr. Joshua Weinstein: First, I'll address the issue of the example that came up with the crop-duster, and then I'll turn things over to Ms. Thomson to address who we're representing today.

I couldn't agree with you more in terms of there being no excuse for that individual who shot down the crop-duster. He was my client. There was no excuse and there was no defence. Therefore, he pleaded guilty. But he pleaded guilty in a framework that both the Crown and defence agreed upon, which would provide for a balanced sentence. I agree that there was no justification, and that's why a guilty plea was entered to this type of offence.

That example is a real example. It illustrates exactly the flexibility that is required in the system for a judge to address an appropriate sentence. It could not have been done but for the crown attorneys exercising their discretion, and it could have been done in the absence of mandatory minimum penalties, with a judge exercising his or her discretion. What you would have had is, at the end of the day, an individual convicted of discharging a firearm with intent, rather than careless use, which is a lesser offence.

● (1700)

The Chair: Ms. Thomson.

Ms. Tamra Thomson: In terms of how CBA policy is developed, it is through democratic processes, representative processes. It does not claim to be unanimous, but it is representative.

The Chair: Thank you, Mr. Thompson.

Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): I have a query for Professor Brodeur.

I'm searching for good reasons, really cogent reasons, to proceed with legislation of this type. To be honest, I'm having some difficulty. There is a lot of conflicting opinion.

If I speak to the police, they say we have to get "these guys" off the street—whoever "these guys" are. I'm pretty sure they're not referring to everybody in the criminal system but whoever they've brought in on charges. They want to get those guys off the streets so they won't have to deal with them next week and next year and the year after. That's a natural position they have.

If I speak to the public generally, they'd like to see more denunciation built into a sentence. They like that. They would like to see more deterrence built into a sentence. They like that.

I don't see a lot of deterrence, based on the opinion we're getting from our experts. I do understand the denunciation piece. If we told our public that we were going to put everybody in jail for 10 years minimum for anything in the Criminal Code, there would probably be some members of the public who would say yes, that will do it, that's denunciation; they will get the message. But I know it won't make much of a difference in our criminal law system. It might even hurt it.

Can you help me? Can you help me on the denunciation message? Is there any component of this legislation that you think would assist in both the political message of denunciation to the public and the denunciation message to the existing or potential criminal?

Prof. Jean-Paul Brodeur: Very briefly on denunciation, my number one point, which relates to things that have been said before, is that a lot can be done with the law as it exists. For instance, cop killers and people who kill crop-dusters wouldn't get away with things as the law presently stands. But with regard to denunciation, my point would be this. if you go through minimum sentences you may have a denunciation effect on a situation; however, the question is, what is it you want to denounce? Do you want to denounce killing people, or do you want to denounce a killer in particular circumstances?

If you're into mandatory or automatic mechanical justice, whatever denunciation effect you will have in denouncing a situation will eventually be lost. And when you're going to denounce particular and at times heinous offenders, if you impose a mandatory minimum, the effect of denouncing this particular person is lost. People will say he's just part of a minimum sentencing scheme. Basically, he is not denounced in these particular circumstances; I mean, he happens to fall under a mandatory sentencing scheme.

My point here is, what is it you want to denounce? Do you want to have one shot at denouncing the use of a firearm, or do you want to have a real repeated effect, denouncing people who use firearms to kill people? Every time a judge does it, the second thing is probably more important than the first one.

● (1705)

Mr. Derek Lee: That's an important distinction, and I think the government is keen on getting a political message out. They may also care about item two—your second alternative—in substance. The second paradigm you mentioned is much more important, because the political messaging will only take us to the next election, and there might be an echo effect beyond that.

On another complaint, I'd like to know whether you think this bill addresses what is referred to sometimes as the revolving door of the criminal justice system. I think a lot of people confuse bail with the revolving door. Of course, before you get convicted of an offence, the door is a revolving door. You're in and out of court two or three times perhaps, with several days of trial. There's a huge revolving door there, and you're seen on the street as an accused.

Could you assist me? Do you see anything in this bill that would allow us, as political representatives, to show Canadians that this bill will address the revolving door?

Prof. Jean-Paul Brodeur: The answer is no. I think we should look at a prison as being like a pressure cooker. If you put a lot of things in it to be cooked, the pressure mounts. Either you're going to decrease the pressure through the revolving door and through sending people out on conditional release and so forth, or you're going to build new prisons.

Let me put this point this way. Absolutely nobody is for mass incarceration, but the problem is, how do you get into mass incarceration? The answer is that you get there through a slippery slope. At some point you end up having too many prisons, and you end up making choices between schools and prisons.

Basically this bill is a front-door approach that does not have a back-door strategy. You are going to send people in, but if the prisons are too full, what's going to happen? As has always been done in Canada, people will devise a situation to decrease the pressure, to avoid riots and so on. We know these strategies quite well.

The Chair: Thank you, Mr. Brodeur. It sounds like we should have a little more discipline in our prisons.

Mr. Petit.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Good afternoon, Mr. Brodeur, Ms. Thompson, Mr. Weinstein, Ms. Henderson, Ms. Elgersma, and Ms. Joncas.

Mr. Brodeur, this question is for you. First of all, unlike the people opposite, I am not yet used to being an MP, as I have only been an MP for a short while, but I do like to know who I am dealing with. Often, when working on a file, I try to find out who you are, etc. I would have appreciated knowing that Ms. Joncas had already represented Mr. Guité.

I would also have appreciated—Mr. Ménard did not tell me this either—knowing that in Mr. Ménard's riding, a young man named Sébastien had been the victim of a bomb planted by the Hells Angels. I would have appreciated knowing that Ms. Joncas had in the past represented the Hells Angels during a mega-trial. It is important that I know these things. As a parliamentarian, I must be above partisan interests, and try to see whether the bill we are studying is good and if I can support it, even if I am a member of the governing party.

Mr. Réal Ménard: On a point of order, Mr. Chairman. With your permission, I think that—

[*English*]

The Chair: I'm sorry, Mr. Ménard. Go ahead.

[*Translation*]

Mr. Réal Ménard: I apologize for interrupting my colleague, but when we are working together, we cannot impugn people's motives for ethical reasons. Of course people were killed in my constituency, that is what got me involved in the anti-gang legislation. What connection do you make between the fact that people have a background representing—

● (1710)

Mr. Daniel Petit: No, I am coming to my question.

Mr. Réal Ménard: Be careful when you make certain links.

Mr. Daniel Petit: I am very careful. I proceed the way Mr. Lemay does when he questions some witnesses very closely, which is not something I do.

My question is to you, Mr. Brodeur.

Mr. Marc Lemay: She is not here as an individual witness, she is here to represent the Association des avocats et avocates de la défense.

Mr. Daniel Petit: I come now to my question, Mr. Brodeur.

[*English*]

The Chair: Order, please.

Mr. Petit, please direct your questions to the chair.

[*Translation*]

Mr. Daniel Petit: When an individual with connections to a gang is the victim of a crime involving a firearm—and Mr. Ménard made reference to this earlier—there are what is known as aggravating circumstances. Let us also look at a different case, where an individual who is not a member of a gang is a victim of an indictable offence in which a firearm was used. So we have two victims: one who was attacked with a firearm because of membership in a criminal gang, and the other a victim of a serious indictable offence even though he was not a member of a gang.

How will the judge react? In the first case, he must do one thing because of the aggravating circumstances; in the other, he is not required to do so.

I'm trying to summarize my question, Mr. Brodeur. From the victim's point of view, I would prefer to be "attacked" by someone who is a member of a gang, because I am sure that person will go to jail longer, rather than by a person who is not a member of a street gang. Something should be mentioned to the judge. Things are always the same for the victim. In some cases, victims will think that the approach is rather lax, while in others, it is rather severe.

In light of what I have just said, do you think Bill C-10 is strong enough to ensure that victims are treated in the same way by the justice system? I have tried to outline my point as best I could.

Prof. Jean-Paul Brodeur: I see. I will try to answer your question, but I am not sure I understood perfectly, Mr. Petit.

Your comments are in the context of a justice system that tailors sentences to individuals. In one case, the person who commits the crime is a member of a gang, and the other, the person does not belong to a gang. We could say that the justice system tailors the sentence to the individual.

To some extent, the bill is the diametric opposite of individualized justice, because it provides for mandatory minimum sentences which are the same in all cases. This is why I am not sure I understand your question properly.

Mr. Daniel Petit: No, I'm talking about the equity of the bill for the victim. I am asking you to look at this from the point of view of the victim, not from the point of view of the person who, rightly or wrongly, will be sent to prison.

Prof. Jean-Paul Brodeur: Very good. I would make two quick points. You have asked an interesting and difficult question, and I will try to tell you what I think about it.

If I were a victim myself and I had been injured seriously, it would not be very important to me whether I was injured by a member of the Hells Angels or by my neighbour. However, the point I would stress—and this is the thing that recurs often in justice, namely the fact that victims play a very minor role in court at the moment—is the opportunity to express my opinion. The victim is the Queen, as is stated in the names of cases. I think that if we want to give victims a voice, if we want to hear their views—and there is someone at our school, Ms. Arlène Gaudreault, who has been defending this issue for a long time—we could perhaps try to give them a greater role in court. However, the bill itself is a general bill on sentencing, and I have not seen any provisions in it specifically about the role we would want to give to victims.

● (1715)

[*English*]

The Chair: Thank you, Mr. Petit. Thank you, Mr. Brodeur.

Mr. Brown.

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

My first question relates to judicial discretion. I've heard some reference made to judicial discretion by a few of the witnesses today and I want to see where you're coming from on this.

I believe in some cases, in the cases of maximums and in the cases of minimums, that if judicial discretion is given some guidance it's helpful. We've seen that with the maximums in the code and with the minimums in the code.

I certainly support this legislation, because I believe in some cases we need minimums. So for those who have spoken against any curbing of judicial discretion, I want to see what your opinions are on other cases where we inhibit judicial discretion in the code.

For example, would you be in favour of removing the current maximums in the code? And I want to get your opinion on this because I want to understand if it is this specific legislation that tackles criminals—and if it's that, then I can appreciate where you're coming from—or is it really judicial discretion that you're concerned about, because both those are incongruent. You can't come from both positions. You can't be in favour of limiting judicial discretion in one case but not in the other.

So we could start off with Lucie, and I know you're the first one who mentioned judicial discretion in your comments.

Ms. Lucie Joncas: You're asking us precisely if we should get rid of the maximum, and I believe Mr. Brodeur answered that question when he was making his representations, in that the average sentence in Canada is nowhere near the maximum. So I don't believe this is an issue.

And in 15 years of practice—and obviously I've had some very interesting cases—I've never seen a judge or a prosecutor have a problem with the maximum sentence that is there.

Mr. Patrick Brown: What I'm looking at is not that it may not happen, and many times we may not need to use the minimums. A judge is going to have cases go in different directions, there may be findings of guilty or not guilty. What I'm concerned about is knowing your position on the limiting of judicial discretion.

I keep hearing this term referenced, and I'll give you an example of Paul Bernardo. Maybe the judge in that case would have wanted to give beyond the maximum. There are cases where maximums are used. By having maximums in the code, we're limiting judicial discretion.

What I want to know is, are you in favour of limiting judicial discretion in that case, or is it only selective?

Ms. Lucie Joncas: There is just one thing that can be said. First of all, when there are serious offences, as I've already mentioned, there are dispositions in the code for offenders to be controlled, or for long-term offenders. So if that's the issue, it's already there.

You say that the judge can always make a decision, but if there is a minimum, that's what we're saying, that the judge has no discretion. And on the finding of guilt, a jury is never informed of what the potential sentence is, so nobody can have that in the front or the back of their mind. It is against the law, currently in Canada, to inform a jury about the potential sentence the person they would be convicting would be facing.

Mr. Joshua Weinstein: With respect to Mr. Bernardo, I don't know what the sentence is beyond life, in that particular situation. That is obviously the maximum that Mr. Bernardo's under.

I don't accept, with the greatest of respect, that with judicial discretion I have to accept that it must mean we have to do away with maximums as well. They can be distinguished, and they're distinguished for some of the reasons Professor Brodeur talks about. I challenge people to find sentences where the judge felt that his or her hands were tied because of the maximum. I won't necessarily bet money on it, but I imagine they are either few or nil.

The situations that are more often the case—these are the situations that we as a section, when we talk about it, come across more often—are those that are caught by the mandatory minimums. They have sweeping effects, and it is not just a reasonable hypothetical; it's an actual situation, with individuals who are caught up by the mandatory minimum.

What we've obviously come to speak about as a section today is the mandatory minimums. It is our submission that they will lead to injustices, and the injustices are on the side of those caught by the provision, where an appropriate sentence might not be that which is set by the floor of a mandatory minimum.

● (1720)

Mr. Patrick Brown: Well, using that approach, you said you haven't heard examples where judges have felt constrained by the maximums. Are there cases you can illustrate to us where judges have felt constrained by the existing minimums in the code? Obviously we already have minimums. Are there cases where a judge felt horrified by the current minimums and wasn't able to do his job?

Mr. Joshua Weinstein: Maybe Ms. Joncas will be able to deal with that. I don't know whether there are situations in respect of judges—

Mr. Patrick Brown: Well, it was your example.

Mr. Joshua Weinstein: I can deal with the examples of the constraint in terms of the whole process of dealing with matters, and that is one of them—

Mr. Patrick Brown: You mentioned specific cases.

Mr. Joshua Weinstein: —and I'll give you others. You have obviously mandatory minimums with respect to offences involving distribution of child pornography. If those are situations that present themselves where the Crown might recognize that the person is actually in need of rehabilitation, and the best rehabilitation is that which is offered in the community—

Mr. Patrick Brown: Are there any cases, though, that you can tell us about?

Mr. Joshua Weinstein: I won't cite the actual case, but this is an actual case that has occurred. You have between dates.... November 15, 2005, is the magic number, because on that day it was proclaimed that for sentences beyond that date there should be a mandatory minimum for distribution. If you have an occurrence where you have someone who was distributing between those dates, a crown prosecutor would be open to amend the charge, to make it such that it is going to only take into account the pre-November 15, 2005, events, to accomplish what the Crown is also of the opinion is the best objective in terms of sentencing: that the rehabilitation of this person is best achieved in the community.

Again, that flexibility is now being exercised by the Crown. Had there not been mandatory minimums, we could be in a situation where the judge could make that call and, if appropriate, then the jail sentence be opposed.

The Chair: Thank you, Mr. Brown and Mr. Weinstein.

That brings us to a conclusion. I would like to thank all of the witnesses for coming forward with your presentations. This certainly has generated a good discussion, and we have something else to think about in our evaluation of Bill C-10.

Thank you for coming.

[*Proceedings continue in camera*]

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

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

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

The Speaker of the House hereby grants permission to reproduce this document, in whole or in part, for use in schools and for other purposes such as private study, research, criticism, review or newspaper summary. Any commercial or other use or reproduction of this publication requires the express prior written authorization of the Speaker of the House of Commons.

Le Président de la Chambre des communes accorde, par la présente, l'autorisation de reproduire la totalité ou une partie de ce document à des fins éducatives et à des fins d'étude privée, de recherche, de critique, de compte rendu ou en vue d'en préparer un résumé de journal. Toute reproduction de ce document à des fins commerciales ou autres nécessite l'obtention au préalable d'une autorisation écrite du Président.