House of Commons
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 066 • 1st SESSION • 39th PARLIAMENT

EVIDENCE

Thursday, May 3, 2007

Chair

Mr. Art Hanger

Standing Committee on Justice and Human Rights

Thursday, May 3, 2007

● (0910)

[*English*]

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

It is Thursday, May 3, and our orders of the day deal with Bill C-23, An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments).

Again, I will apologize directly to our witnesses for my late appearance, as well as Mr. Comartin's. We were listening to a very riveting story at the national prayer breakfast, and we didn't want to leave before we could get the total gist of it. But I do apologize for making everyone wait.

We have, from the Office of the Commissioner of Official Languages, Mr. Graham Fraser, Commissioner; and Johane Tremblay, director of the legal affairs branch. From the Federation of Associations of French-speaking Jurists of Common Law, we have Louise Aucoin as well as Madame Côté.

Thank you all for being here. We will proceed along the order in which the witnesses are noted on the agenda, beginning with Mr. Fraser.

Mr. Graham Fraser (Commissioner of Official Languages, Office of the Commissioner of Official Languages): Thank you very much, Mr. Chair.

Ladies and gentlemen of the committee, *mesdames et messieurs*, thank you for giving me the opportunity to appear today to comment on Bill C-23, and more specifically on the proposed amendments to sections 530 and 530.1, which guarantee the language rights of accused persons.

As stated by the Supreme Court of Canada in Beaulac, the purpose of these provisions is to provide equal access to the courts by accused persons speaking one of the official languages of Canada in order to assist official languages minorities in preserving their cultural identity. For quite some time, the commissioner's office has identified the need to amend these provisions.

To provide some background to my comments, I should point out that Bill C-23 deals with some of the issues that were brought to light in the 1995 study by the then Commissioner of Official Languages, Victor Goldbloom, *The Equitable use of English and French Before the Courts in Canada*.

I am pleased to see that a number of the provisions of Bill C-23 serve to clarify and improve the language rights provisions of the Criminal Code and must be seen as advancements in that regard.

For example, Bill C-23 clarifies that the justice of the peace or provincial court judge before whom the accused first appears will ensure that the accused is advised of his or her right to a trial in the official language of choice. Currently the accused is informed of this right only if unrepresented by counsel. The extension of this right to all accused represents a positive step forward.

Furthermore, that the purpose of the proposed amendments is to codify existing jurisprudence on language rights in Canada is indeed reflected in a number of the bill's provisions.

For instance, Bill C-23 recognizes the accused's right to receive a translation of the information or indictment against him or her. This is a positive step in the direction set out by the courts. However, under the proposed amendment, the accused would have to make an application for a translation of the information or indictment even if he or she had already chosen the official language to be used at trial.

The information or indictment contains important information required for the accused to respond to the charges. The burden should not fall upon the accused to make an application for translation. He or she should have access to this as promptly as possible without having to make an application.

I recommend that clause 19 of Bill C-23, which adds proposed section 530.01, be modified accordingly.

● (0915)

[*Translation*]

Another issue that I wish to address today is that of bilingual trials. Under the new subsection 530(6) of the Criminal Code, introduced by subsection 18(2) of Bill C-23, where two or more accused who would otherwise be tried jointly choose to be tried in different official languages, an order that the trial be held in both official languages is warranted. The Criminal Code currently allows for courts to order bilingual trials. However, according to the relevant jurisprudence in this area of the law, for a court to make such an order, it must first be satisfied that the rights of the co-accused and the interests of justice are appropriately balanced. Because this amendment explicitly provides for circumstances in which a bilingual trial is warranted, it is my concern that it would eliminate this important balancing exercise. I therefore recommend that the proposed wording of subsection 530(6) be modified to maintain this element of judicial discretion in ordering a bilingual trial. The holding of a bilingual trial presupposes that the co-accused have a sufficient grasp of both languages to understand the proceedings. This may not always the case.

To conclude, I would like to draw your attention to two issues not specifically addressed by Bill C-23. The first pertains to the fact that the language rights provisions in the Criminal Code are restricted to the trial and preliminary inquiry stages of the criminal process. In the past, my predecessors advocated for the extension of such rights to procedures related to the trial, such as motions, jury selection and bail hearings, as well as the appeal process generally. These are critical stages of the criminal process, and have a significant impact on the outcome of the process as a whole. Without extending language rights to related proceedings, the right of the accused to a trial in his or her official language is not fully achieved. We encourage the government to examine this issue in the near future.

The second, but perhaps most important issue, pertains to the shortage of bilingual judges in provincial superior courts. As you are no doubt aware, the shortage of bilingual judges, that is judges with adequate knowledge of both English and French, constitutes one of the main barriers to access to justice in our two official languages. This problem has been identified by my predecessors since the early 1990s, and by the Department of Justice in a study entitled "Environmental Scan: Access to Justice". It still exists.

The Fédération des associations des juristes d'expression française, the Canadian Bar Association as well as Commissioner Dyane Adam raised the issue before the House Subcommittee on the Process for Appointment of the Judiciary.

In its preliminary report made public in November 2005, the subcommittee recognized the importance of modifying the process in order to remedy the problem. It is important that the superior courts have a sufficient level of institutional bilingualism in order for the accused to benefit from the language guarantees provided for in sections 530 and 530.1 of the Criminal Code. Without this capacity, the language provisions of the Criminal Code have no chance of fulfilling their objective, which is to provide the accused with the right to be tried in the official language of his or her choice.

[*English*]

Thank you for hearing my comments, both positive and constructive, on Bill C-23. I'm very pleased by the positive features of the bill in terms of language rights in the criminal context. However, I would ask that you consider the suggestions I've made in order to improve it, as well as my comments for further advancement in this important area.

I'd be very happy to answer any questions you may have.

The Chair: Thank you, Mr. Fraser.

Ms. Aucoin.

[*Translation*]

Mrs. Louise Aucoin (President, Federation of Associations of French-speaking Jurists of Common Law Inc.): Good morning to all members of the committee.

My name is Louise Aucoin and I am the President of the Fédération des associations de juristes d'expression française de Common Law, also known as the FAJEF. With me this morning is Diane Côté, the Director of Community and Government Liaison for the Fédération des communautés francophones et acadienne du Canada, the FCFA.

With your permission, I would like to talk to you briefly about the FAJEF. The federation is made up of seven French-speaking jurists associations and its mandate is to promote and defend the language rights of francophones in minority situations, particularly, but not exclusively, with regard to the administration of justice. The FAJEF therefore has a community mandate.

For your information, there are French-speaking jurists associations in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia, and they represent approximately 1,200 French-speaking jurists. The FAJEF is also a member of the FCFA. That is the reason why Ms. Côté is here with me.

My presentation today will deal with Bill C-23, particularly with its proposed language amendments to the Criminal Code.

To begin, the FAJEF is generally pleased with the amendments to the language provisions in Bill C-23. The amendments are positive, particularly the duty to advise the accused of their right to choose the official language used during their criminal court case. That being said, the FAJEF is still concerned by a number of amendments and would like to suggest a few improvements. We have drawn up four specific recommendations.

The first recommendation deals with subsection 530(6). This subsection automatically directs trials to be bilingual—and we insist upon the word "automatic"—when co-accused choose different official languages. Although it is in the interest of justice to occasionally hold bilingual trials, the FAJEF believes that bilingual trials should not become automatic, because they can significantly weaken the accused's language rights.

The FAJEF recommends that there be a very minor amendment to the wording of subsection 530(6), namely the addition of the word "may", at the beginning. Such an amendment to the wording would allow judges to exercise their discretionary authority by either agreeing or not agreeing to a bilingual trial, in light of the specific circumstances of each case.

Our second recommendation concerns subsection 530.01(1) of the bill. This subsection provides that, once the accused has asked to be tried in an official language that is different from that of the information and indictment, the prosecutor has to, at the request of the accused—and this is an issue raised by Mr. Fraser—provide the accused with a written translation of the text. The FAJEF believes that the accused should automatically receive a translated copy of the information and indictment, rather than have to ask for it, especially since the accused would already have indicated the official language to be used during his or her trial. It is the FAJEF's view that the accused should not be required to make several requests for proceedings to be conducted in the official language of his or her choice. A single request should be sufficient.

Our third recommendation deals with paragraph 530.1(c). This paragraph allows the presiding justice or judge to authorize the prosecutor to examine or cross-examine a witness in the official language of the witness, even though it is not that of the accused or that in which the accused can best give testimony.

● (0920)

The FAJEF is of the view that the prosecutor should, as far as possible, use the language of the accused to examine or cross-examine a witness, although at times it may be justified for the prosecutor to examine or cross-examine a witness in a language other than that of the accused. We believe that by adding "where circumstances warrant" to the wording of paragraph 530.1(c), the discretion of the judge or justice would be better delimited so that such a practice would not become automatic.

Finally, our fourth recommendation has to do with section 531. The FAJEF is concerned about section 531 of the bill, and its application in New Brunswick in particular, because this section could lead to trials being moved from one territorial division to another for reasons of language. Given the quite unique language situation in New Brunswick, the only officially bilingual province, criminal trials are suppose to be available in both official languages in all territorial divisions of the province, without requiring the accused to be tried in another division. The FAJEF would like to see the wording of section 531 of Bill C-23 amended accordingly.

So those are FAJEF's four recommendations. However, before closing, I would like to point out that Bill C-23 raises two other concerns that we would like to see dealt with in the near future.

First, since the right to be tried in the official language of one's choosing requires there to be a minimum number of bilingual judges, the process for appointing judges to the federal bench should be changed in order to better reflect that reality. For example, the level of bilingualism of candidates should be evaluated, and the number of bilingual judges needed to ensure equal access to justice in French in Canada should be provided for in every province or region. That's definitely not the way things stand right now.

Second, it is important that language rights at trial also extend, hopefully in the near future, to all of the procedures incidental to a trial and to other forms of inquiry and hearing under the Criminal Code, such as an application for variation in a probation or conditional sentence order, a dangerous offender application, or an application for judicial review.

By way of conclusion, the FAJEF supports the linguistic amendments set out in Bill C-23, subject to the reservations we have expressed.

I would be happy to answer all of your questions. Thank you.

● (0925)

[*English*]

The Chair: Thank you, Madam Aucoin.

Mr. Bagnell.

Hon. Larry Bagnell (Yukon, Lib.): I guess I'll speak for the Liberals.

Thank you very much for coming.

It sounds to me as if all the witnesses are in agreement on three cases, for which I'll be prepared to do amendments. First is mandatory translation. Second is that trials may be unilingual and don't have to be bilingual. Third is that other processes can be captured in French. I'll be interested to hear from the government speakers if they have any reasons in their preambles to not approve those amendments. But I agree that all the witnesses are in agreement with those three areas of amendment.

I think the government's response to the one on translation is that this may be excessive, unnecessary work. These aren't huge documents.

Mrs. Louise Aucoin: I quite agree. There aren't that many French trials outside of Quebec, other than in New Brunswick. We're not talking about thousands. It would be a very short document, and there aren't that many trials in French.

Hon. Larry Bagnell: The number of documents an MP gets translated every day, almost.

Mr. Graham Fraser: I would agree. I think this is a case where, if this right is to be guaranteed, it should be at the beginning of the process rather than something that somebody has to keep on asking for at every step. I think it's unfortunate that the way it is.... I think that once you've said you want to have your trial in French, or in Quebec in English, it ought to be automatic that the process kicks in, rather than at every stage....

● (0930)

Hon. Larry Bagnell: And it's not excessive amounts.

Mr. Graham Fraser: No. Well, I will refer to my legal adviser on this. My understanding is that it's not an excessive amount.

Mrs. Johane Tremblay (Director, Legal Affairs Branch, Office of the Commissioner of Official Languages): I would tend to agree.

Hon. Larry Bagnell: On the second amendment, it “may” be bilingual, I can't imagine anyone disagreeing with that. I mean, if the judge wants to have it bilingual, he will.

As for the third one, on the other processes, I guess the biggest push-back on this one...because you're talking about a significant amount of what appears to be, obviously, just modification to the system, it appears quite fair and reasonable and logical. But I guess the push-back from the provinces would be that this is all in negotiation with the provinces and territories that only have so much capacity, and you can only make so much progress at a time.

Do you think that such a large but justified logical amendment might sort of cause chaos in that type of gradual progression, getting the provinces and territories onside and getting the capacity to do this?

Mrs. Louise Aucoin: I don't think so. It doesn't cost more to hire a bilingual stenographer, or whatever, than a unilingual one, and I think if we want to make sure that these are rights and not privileges, then we have to offer.... I mean, access has to be there, and if the personnel is—

Hon. Larry Bagnell: But if you're doing bail hearings and all these other processes, it's more than a stenographer.

Mrs. Louise Aucoin: Yes, but I think it's not that onerous. It doesn't mean that everybody has to be bilingual. I mean, if we look at New Brunswick, not everybody in the court system is bilingual. So I don't think that—

Hon. Larry Bagnell: Okay, I'll leave the New Brunswick one to Mr. Ménard. I have one more question, though, if I have time.

Something you didn't bring up but I think you're interested in is the fact that if the accused has the judge or jury who can speak his language, it doesn't necessarily mean that they will. A lot of people say they're bilingual—perhaps they passed the test years ago—but then they go on in the wrong language. Do you have any amendment to propose that would ensure that, as much as possible, the accused gets the language of his right, that even if the person claims to be bilingual, they actually work in the language of the accused?

Mrs. Louise Aucoin: I think that's an excellent point. That's why we suggested the idea that the bilingual capacity should be evaluated at one point, because it's quite a different thing to be bilingual and to function in the other language. I remember being in a French situation and then studying in English, and thinking, “What does that mean?” So I think it's very important that they are functionally bilingual, because it's not that easy.

Hon. Larry Bagnell: Do you want to comment on that particular concept?

Mr. Graham Fraser: We haven't made a proposal in this regard, but you know, it's a challenge in every aspect of administration, not simply the administration of justice. I was recently given a report that was done in British Columbia on the challenge of identifying jurors who could hear a trial and suggesting that there be more imaginative ways of developing the potential lists to draw on jurors, to ensure that jurors could in fact hear a fair trial. I think this is a continuing challenge for every aspect of—

● (0935)

Hon. Larry Bagnell: The point I was making was just a minor change, that if you choose a juror or a judge who claims to be bilingual, it also says that as much as possible they should speak in the language of the accused. Just because they're bilingual...you know, a bilingual judge could have taken French lessons and passed the B level, and then he comes to the trial and he does all his speaking in English.

So the modification I'm suggesting is that as much as possible he uses his bilingual ability to speak in the language of the accused.

Mr. Graham Fraser: Yes. Whether this is something that should be inscribed in the legislation, I'm not sure. I think this may be more of a regulatory or an administrative matter than something that is inscribed in the law, but I leave it to your discretion as legislators.

Hon. Larry Bagnell: Thank you.

The Chair: Thank you, Mr. Bagnell.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): I have three questions for Mr. Fraser and two for Ms. Aucoin.

First, congratulations on your appointment. This is the first time you have appeared before this committee since your appointment. I wish you all the best.

Could you remind us of the provisions, particularly for Quebec, dealing with the administration of justice and the right to legal services? What is the situation?

I am very interested in the part of your brief that says that subsection 530(6) could alter the discretion of the judge to order that a trial be held in one language or the other or in both. I would like you to give me more information about that.

Mr. Graham Fraser: I will start with the question on bilingual trials. We found that bilingual trials would become automatic. That's based on the assumption that the co-accuseds know both languages equally well and are equally bilingual and thus understand the charges, the testimony and the evidence. Clearly, that is not always the case.

The judge should be given the discretion to determine in one case, that the trial should be bilingual, but in another involving co-accuseds, that the circumstances are different and that the co-accuseds do not have the same ability as others to understand the proceedings.

Mr. Réal Ménard: The judge does not lose that discretion under the current bill. In some cases, it's automatic, but the judge does not lose this discretionary authority.

Mrs. Johane Tremblay: In fact, the provision contains an ambiguity. As drafted, the provision could give rise to two possible interpretations. Once the co-accuseds choose to be tried in different official languages, a bilingual trial would automatically be ordered. That interpretation is possible.

What we are suggesting is consistent with the case law, which recognizes that the judge has the discretion to evaluate, on one hand, the language rights of the accuseds, and on the other, the interests of justice. Does holding two separate trials serve the interests of justice? The two interests at stake have to be weighed. That's what the case law says. Since the main purpose of the bill is to codify the current case law, subsection 530(6) should maintain that judicial discretion as per the current case law. It's just a matter of clarifying what we believe to be the legislator's intent.

Mr. Réal Ménard: Would your legal services, of whom you appear to be a distinguished representative, be able to propose some wording to the committee?

Mrs. Johane Tremblay: We did attach wording to that effect to our presentation.

● (0940)

Mr. Réal Ménard: I look forward to reading it.

Let's talk about Quebec. I'm thinking of the Blaikie decision, the Ford decision, etc. If access to bilingual services were to be extended beyond the preliminary inquiry and the trial on the merits, what influence, in view of current constitutional law, would that have on Quebec's obligations?

Mr. Graham Fraser: I don't think there would be any change, because there is no problem in that respect in Quebec, but I am going to refer that question to my legal counsel.

Mrs. Johane Tremblay: The proposed provisions remain within a criminal context. Under sections 530 and 530.1, language rights would be extended throughout the entire process, not just to the trial itself.

Mr. Réal Ménard: In other words, you want to extend these rights to all related proceedings.

Mrs. Johane Tremblay: The idea is to extend it to all related proceedings, including motions, but also to appeals, because if an accused chooses French at trial, but on appeal no longer has the right to choose the language in which the appeal is to be held, that could have an effect on the choice of language at trial.

Mr. Réal Ménard: I intend to move a motion that we devote a few meetings in September to the issue of bilingualism in justice.

What is it that would you like? You know that this committee has questioned Justice Rothstein, whose competence is not in question. However, how can a government appoint a unilingual English-speaking judge to the Supreme Court? You will recall that the government dealt this affront to francophones. I am not questioning the skill and ability of Justice Rothstein. However, it doesn't make sense, and the same thing has just been done with Mr. Sullivan, the ombudsman for victims of crime, who can only speak English. I think we have to send a very clear message, especially to the current government, which is less concerned about bilingualism.

What would you like to see, in terms of gentle legislation coercion, for there to be more bilingual judges?

Perhaps Ms. Aucoin might have some ideas on that.

Mrs. Louise Aucoin: We believe there should be some sort of evaluation of the needs of each province. We hear all kinds of stories, and I think there should be some language criteria on selection committees—

Mr. Réal Ménard: —especially for Superior Court judges.

Mrs. Louise Aucoin: That's right.

Mr. Graham Fraser: I believe that my predecessor, Dyane Adam, has already made a presentation on this topic to the committee. I agree that it should be an important selection criterion. The Supreme Court is currently exempt.

Allow me to speak in more general terms. In my opinion, linguistic capability is becoming more important when it comes to leadership in Canada, and not only in the legal field. All of the political parties have come to understand this. We can live in only one language in Canada's regions, but I think that in order to play a real leadership role in this country, one must be able to speak both languages. This means that not only are secondary schools responsible, but so too are the universities, and in this case, the faculties of law.

If it is well understood at the outset that one must master both official languages in order to rise through the ranks within a given profession, this will have a broad implication for professional faculties.

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

[*English*]

The Chair: Thank you, Monsieur Ménard.

Mr. Comartin.

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

[*Translation*]

Thank you for being here today, Mr. Fraser. I would like to take this opportunity to congratulate you.

My question is for Ms. Tremblay and for Ms. Aucoin.

I have read and reread the proposed amendments to section 530.1, and I just can't seem to get my head around them. I don't really know if the government should bring in these changes which will adversely affect the rights of francophones in Manitoba and Saskatchewan before the courts. I would like to hear your opinions on this.

● (0945)

Mrs. Louise Aucoin: We, in New Brunswick, feel that trials should never be transferred from one judicial district to another for reasons related to language.

Mr. Joe Comartin: Things won't really change in New Brunswick, because you have enough judges and you are bilingual enough; that is not a problem.

Mrs. Louise Aucoin: Yes, but just in the last month, two new unilingual anglophone judges were appointed. I spoke recently with a judge from the Court of The Queen's Bench who has noticed that few bilingual judges are being appointed in New Brunswick. Of course, if we compare the province to the rest of the country, we have better access to trials in both official languages and it is probably easier here than it is elsewhere, but they are still taking a step backwards in New Brunswick.

It may be different for someone who lives in Saint-Boniface, for example. If someone is accused of rape in Saint-Boniface, that person may prefer not to have his case heard in French. Otherwise, everyone from his village or his community will attend the trial. That person might prefer to have his case heard in English in Winnipeg. That's what happens, so the accused should have the choice. Do you think that no one will ever be accused of rape in Saint-Boniface?

In any case, we can understand that some accused may prefer not to appear in court in their own region. Things are different everywhere. In New Brunswick, generally speaking, the trial will be held in French if the accused is French-speaking.

Mr. Joe Comartin: Ms. Aucoin, are the French-speaking members of the legal profession ready to accept the government's amendments to section 530.1?

Mrs. Louise Aucoin: We do not accept them for New Brunswick.

Mr. Joe Comartin: It isn't really possible to have a measure for only one—

Mrs. Louise Aucoin: Yes, it is done for the Constitution. I have also spoken to people from Ontario. They say that is how it currently works. If you don't want a trial in French in a given region of Ontario, then you request a change of venue.

I'm not saying that it is right or that it would be my first choice, but according to the francophone lawyers in Ontario, that is how things are done now.

Mr. Joe Comartin: I'm from Windsor: I know all about it.

What do you think, Ms. Tremblay or Mr. Fraser?

Mr. Graham Fraser: Since we have made no recommendation on that subject, I would prefer not to comment.

[*English*]

Mr. Joe Comartin: I just want to make one point, because I wasn't here yesterday.

I want the committee to know that I am going to be moving an amendment—and I think the government is going to support this—to reduce the amount of the increase in the fine. Their proposal is to go from $2,000 now to $10,000. I think inflation has not been as severe in this country as it was over the period of time when we increased it from $1,000 to $2,000. So I'm going to be making an amendment; I'm just giving notice. I will move that the fine be increased from $2,000 to $5,000, Mr. Chair.

Those are all my questions.

The Chair: That issue came up yesterday, Mr. Comartin.

● (0950)

Mr. Joe Comartin: I'm sorry. I didn't know that.

The Chair: Thank you, Mr. Comartin.

Monsieur Petit.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Good morning Mr. Fraser. This is the second time that I have met you. The first time was at the Official Languages Committee.

Good morning Ms. Tremblay, Ms. Aucoin and Ms. Côté.

With respect to Bill C-23, I think that it does provide some protection to the accused. I believe that we agree on that. We are often criticized for following an ideology that is only concerned about the victims. In this case, we have given some thought to the accused. My question is to Ms. Aucoin, who is a lawyer.

About two years ago, there was a megatrial in my province. Do you know what a megatrial looks like? Thirty-eight individuals who were involved in drug trafficking, murders, etc., were all charged at the same time. Some were francophones, and others were anglophones. The language of crime is universal. They were all brought before the judge at the Gouin Court House. The lawyers, myself among them, were not stupid. We asked for separate trials. Why? Because time spent waiting for trials means a double credit, so it is something that is often used.

I am wondering if the trials could be split. In this type of situation, an individual does not want to be charged alongside a co-accused who could testify against him, and vice versa. If I understand correctly, language will also become a tool. Therefore, if you have 38 defendants, you could end up with 38 separate trials.

I am talking about a megatrial. You are probably thinking about an ordinary trial with a single defendant. That would not be very difficult. But in almost every province, there are megatrials related to drug charges. That means that a clever lawyer could now use this bill, which protects the rights of the accused, and there would be 38 separate trials. Two grounds would then be available to him.

You are a lawyer working in the area of common law. I would like you to tell me if you think that could ever happen.

Mrs. Louise Aucoin: It seems to me that with 38 defendants, you would divide the number by 2, since there are only 2 official languages in Canada.

Mr. Daniel Petit: I would like you to understand something, Ms. Aucoin. You know that currently, even if a trial is only heard in only one language in British Columbia, under common law, if two people are accused, then the trial can be separated in order to avoid having one defendant testify against the other. So, conceivably, a trial could be divided 38 ways, plus 38 more because of language considerations. Is that correct?

Mrs. Louise Aucoin: We're proposing that provisions be made to allow for the judge's discretion. I have a sister who sat on a jury for a megatrial. Everyone agrees that it's absolute hell. Nevertheless, I don't think the Criminal Code should be rearranged for the sole purpose of accommodating mega trials.

That's the flip side of the coin. These provisions give the accused an additional right. In that type of trial, if there were French-speaking and English-speaking defendants, it seems to me that it would be preferable to put all of the francophones in one group, and all of the anglophones in another.

Mr. Daniel Petit: Do I have any time left, Mr. Chairman?

[*English*]

The Chair: You do, Mr. Petit.

I know you're a dear colleague and all of that, but I would have to say, being a former police officer, that you would be a police officer's nightmare if you came into a courtroom wanting 38 separate trials.

Go ahead and ask your second question.

[*Translation*]

Mr. Daniel Petit: My question is for Mr. Fraser.

On page 2 of the English version of your document, it says:

> The second, but perhaps most important, pertains to the shortage of bilingual judges in provincial superior courts.

In the province of Quebec, judges are appointed by the provincial government, but there are also Superior Court judges. However, when we were working on the issue of judicial appointment committees, we learned that the Superior Court judges appointed in Quebec were assigned to criminal cases in only 2% of cases. So 98% of criminal cases go before provincial judges. If I have understood correctly, this applies only to Superior Court judges, i.e. to those appointed by the federal government. The remaining 98% of judges are not affected by this recommendation.

● (0955)

Mr. Graham Fraser: Right.

I am neither a lawyer nor a former policeman, but I believe that in Quebec, it is much less of a problem than in the rest of Canada. As a journalist I found that when trials were held in Quebec, the rate of bilingualism among judges and lawyers was quite impressive.

Mr. Daniel Petit: I am talking about Quebec because that's the only province I know. If I understand correctly, you are recommending that 100% of judges, who may never work on criminal cases, be bilingual. I don't know whether that's functional or institutional bilingualism.

Do you see any difference between the two?

Mr. Graham Fraser: We stress the importance of bilingual capacity within institutions, but institutions are the ones with the duty to have that capacity so that defendants can be tried in the official language of their choice. However, that doesn't mean that all judges and lawyers are required to be bilingual.

Mr. Daniel Petit: Thank you.

[*English*]

The Chair: Thank you, Mr. Petit.

Mr. Bagnell, I know you're the only representative of the Liberal Party here. I'm going to pass over the Liberal Party right now, since you've already had one round, and go to Ms. Freeman. But I will come back to you.

[*Translation*]

Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ): My question has to do with transfers to another court. You mentioned an order that the trial be held in another territorial division.

Suppose a city in Saskatchewan could not hold a trial in French. I gave Saskatchewan as an example, but it could be Quebec. What about courts in Trois-Rivières or Joliette, where a trial could not be conducted in English?

It's complex. How could we do this?

Mrs. Louise Aucoin: For example, if someone from Windsor insists on a trial in French and there's no bilingual or French-speaking judge in that division, then they will have to travel at their own expense with their witnesses and counsel. The whole apparatus will have to move to another judicial division. That's how things are done in common law provinces, except for New Brunswick. There aren't thousands of trials, but that is the reality facing an individual who is determined to have his or her trial conducted in French. If there's no judge or all of the apparatus necessary to hold a trial in the language of the accused, but the accused nevertheless insists and is very determined, there's no choice. That's reality.

Mr. Graham Fraser: It depends on the ability to have a fair trial. The same criterion applies when there has been a lot of media coverage of the accused. If it is decided that an accused cannot have a fair trial in one area because of that coverage, the venue will be changed to ensure that the jurors are not contaminated by that coverage. I think the same criteria apply in the linguistic context.

● (1000)

Mrs. Carole Freeman: Except that cases like the one you have just described are rare, unlike official language cases.

Mr. Graham Fraser: It depends. I don't have any statistics.

Mrs. Carole Freeman: If we recommended that judges be bilingual, that would greatly clarify the situation, rather than orchestrating an entire situation around it.

Mr. Graham Fraser: Obviously. I agree.

Mrs. Johane Tremblay: This provision should only be used in exceptional circumstances. If the point is to allow an accused person to be tried in a judicial district or division of their language, the judicial appointment process should ensure that each district is appropriately bilingual and that the provision governing a change of venue is only applied in exceptional circumstances.

Mrs. Carole Freeman: We could also ensure that all legal personnel is functionally bilingual, as you stated at the beginning.

Mrs. Johane Tremblay: We're not talking about all personnel. We're talking about institutional capacity. Out of a group of 10 Crown prosecutors working in one district, for instance, you would need to assess the correct proportion to ensure that the accused receives—

Mrs. Carole Freeman: When I said all personnel, I meant that at every level, at every stage, there are—

Mrs. Johane Tremblay: At every level, yes. The clerk—

Mrs. Carole Freeman: We should specify that at every level, there should be enough functionally bilingual staff to provide the service. It is therefore a recommendation which is absolutely...

Fine, thank you.

[*English*]

The Chair: Thank you, Ms. Freeman.

We'll go to Mr. Thompson.

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

I find this discussion to be very interesting. I live in the riding of Wild Rose. I attend a lot of the court sessions in that area in Alberta, mainly because of the work I've done over the years in the justice area.

I'm listening to this discussion, and I'm agreeing with this bill, and I think it's the right thing to do. But I wonder if you would care to comment on an area like mine, where a large majority of the cases require languages other than French or English. We have a huge European settlement—Dutch and German people, many of whom may be involved in this, not to the mention the Asian immigrants.

It seems to me that there's been a tremendous amount of pressure on the courts in my area from time to time to provide a trial of some sort in some language other than French or English. Do you care to comment on that?

Mr. Graham Fraser: My understanding is that the courts have gone to considerable efforts, along with other institutions in Canadian society, to ensure that translation services are provided for languages other than the official languages.

Basically, my mandate only covers our official languages. The official languages policy has by no means prevented the courts from providing translation services for people who are accused or testify, in the same way as hospitals often have emergency translation services to ensure that someone who comes to the hospital screaming in pain who doesn't speak either French or English can be understood.

I think one of the things that should be understood generally about the non-official languages spoken in Canada is that, by and large, they're transition languages.They're languages that are spoken in the home for a generation.

There was a rule of thumb developed by a political scientist, Michael MacMillan, which I've found very useful, which he calls the third-generation rule of thumb. If a community sustains a language as the language of the home for three generations, they can make a legitimate claim for language rights.

It may have been because of this that one of the commissioners at the Royal Commission on Bilingualism and Biculturalism submitted a dissenting report arguing that Ukrainian should be an official language in Canada. In 1951 there were 450,000 Canadians who spoke Ukrainian at home, but by 1981, that number was down to 45,000.

In contrast, in 1961 there were five million French-speaking Canadians, three million of whom were unilingual, and in 2001 there were seven million French-speaking Canadians, four million of whom were unilingual. This is not a transitional language in Canada; this is an official language. It's a growing language, and increasingly across the country it's becoming a language of welcome to immigrants and refugees. It's an official language to which various language rights have been enshrined in the Charter.

● (1005)

Mrs. Louise Aucoin: I quite agree with Mr. Fraser. We are a very multicultural country. We have many languages across the country, but there are really only two official languages.

While there may be some people who are in the court system who need translation, I can't imagine that we'll be offering institutionalized languages other than French and English. We're having a hard enough time making sure that French-speaking people have access to the court system. It's quite obvious that the need may be there, but it would be quite a complicated process.

Mr. Myron Thompson: I think that's the reason I mention it. I want to make absolutely certain that everybody understands that the needs are there and that there are many areas throughout the country where this problem exists. It's out of the realm of whether you speak English or French, because they speak neither.

If I've time left, I'd like to share it with Mr. Dykstra or other colleagues.

The Chair: You don't have any time left. I'll come to Mr. Dykstra right after this.

Mr. Bagnell, the sole Liberal representative, please, the floor is yours.

Hon. Larry Bagnell: I have consulted with my colleagues and they don't have any questions, so they've asked me to do another round.

Just following up on Myron's question, I found in my travels that a lot of French people actually also speak English, but the one group in Canada that doesn't is Inuit, the older Inuit people. Of course, they were here long before the French or the English. I assume in Nunavut they don't have a problem because it's an official language there, but once they get to the federal level, has that been a problem?

Mr. Graham Fraser: Inuktitut is an official language in Nunavut. There are, I think, seven official languages in the Northwest Territories, but only English and French in Yukon; although there are eight aboriginal language groups, they are quite small.

There are 23,000 to 25,000 Inuktitut speakers, and I think that virtually all of them are in Nunavut. I'm not aware of a concentration of Inuktitut speakers, possibly in Nunavik in northern—

Hon. Larry Bagnell: They aren't in the courts, though.

Mr. Graham Fraser: But I'm not aware of a problem that the higher levels of the courts have had in dealing with this. Certainly aboriginal languages is an issue that interests my office. We support the idea, and we've sent letters of support to the Nunavut government, supporting the changes they are now making to their language legislation to ensure the protection of the three official languages in Nunavut, but it's not directly within my mandate. I'm not aware of the problem affecting the upper levels of the courts.

● (1010)

Hon. Larry Bagnell: I had basically hoped to propose the four amendments I talked to in the first round. I haven't heard any objections to those from any other members yet, but I just want to continue making sure that they're practical, to fine-tune them a bit.

On the translation, I think we've understood that it's not a big deal, that there are not a lot of documents and it shouldn't be very onerous to add that right. The mandatory trials is the one being talked about. We're not talking about a lot of trials where there are co-accused in different languages where the judge might decide to have unilingual trials as opposed to bilingual trials. We're not talking about a huge number of cases, are we?

Mr. Graham Fraser: We don't have information. I have no reports to suggest that it's numerous.

Hon. Larry Bagnell: And it would only be under the jurisdiction—

Mr. Graham Fraser: Again, what we're suggesting is that the discretion of the judge be maintained.

Hon. Larry Bagnell: So there are probably very few occurrences, so that's not an onerous change, to change from “may” to “must”.

The last one, I guess—

The Chair: From “must” to “may”.

Hon. Larry Bagnell: From “must” to “may”.

The last one, although it looks a bit bigger, is to put all the other procedures...which seems to make obvious sense. But not being a lawyer, I wonder what proportion of what happens this would change. How many of these procedures are not covered? What proportion of work in courts and in the system is not covered in French now?

Mr. Graham Fraser: Before I defer to my legal adviser on this, my understanding is that this right exists now; it's just a question of the way things happen now. The accused has to make the request at every stage of the process, which results in a delay of the kicking in of this approach, as I understand.

The proposal I'm putting forward is that once you tick the box saying you want to have the trial in English or in French, immediately the process goes to work, without your having to then, even though you've asked for this trial to be in English in Quebec or in French outside Quebec, ask again for this other stuff, and then ask again for this other stuff. There would be an automatic understanding that, if the trial is going to be in French or in English, the process would start immediately.

Hon. Larry Bagnell: Madame Tremblay.

Mrs. Johane Tremblay: Currently the Criminal Code does not explicitly recognize the right to be heard in the official language of your choice in the context of the incidental procedures and appeal process.

The commissioner has suggested interested governments look at extending the rights of the accused in that regard. The commissioner is not asking for a specific amendment. We are asking for two amendments only, but encouraging the government to look at this issue in the near future.

Hon. Larry Bagnell: Madame Aucoin.

Mrs. Louise Aucoin: That's the same recommendation we made, that this be looked at very seriously in the near future.

Hon. Larry Bagnell: But not a specific amendment on this?

What about the amendment to make sure a bilingual judge or a jury makes every possible attempt to speak in the language of the accused?

Mrs. Louise Aucoin: We haven't proposed one, but we have discussed it, and I entirely support the idea. I think your example was quite eloquent. I think it might.... I think the way it's organized now is very coherent, with all the criminal codes, but it probably should be fine-tuned, given a little tweaking, so it reflects not just the fact that the judge is bilingual, but that he should be able to do the whole thing so the accused really has access to the language of his choice.

The Chair: Thank you, Mr. Bagnell.

Mr. Dykstra.

Mr. Rick Dykstra (St. Catharines, CPC): I'm going to pass.

The Chair: Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): I'm fine. Thanks, Mr. Chair.

The Chair: Mr. Lee.

Mr. Bagnell, you have another question?

Hon. Larry Bagnell: Just to summarize, then, if this is okay with the witnesses, I would propose three amendments. One is on the translation; the second is, as the chair says, from “must” to “may”; and the third is making sure that the bilingual person speaks in the language of the accused, where possible, as much as possible.

Would the witnesses agree with that?

● (1015)

Mr. Graham Fraser: Yes.

Mrs. Louise Aucoin: Yes.

The Chair: I see no further questions to be put to the witnesses.

Thank you for being so generous with all your time to me, but given that there are no further questions—

Hon. Larry Bagnell: Maybe they want to wrap up.

The Chair: That's not customary, but would any of the witnesses like to make some concluding statements?

Yes, Mr. Fraser.

Mr. Graham Fraser: I wanted to say I appreciated the questions I received. I hope this was a useful contribution to your deliberations.

The Chair: I believe it very much was, Mr. Fraser.

Thank you all for your appearance, Madame Côté, Madame Aucoin, Mr. Fraser, and Ms. Tremblay. Thank you for being here.

That brings our meeting dealing with Bill C-23to a close.

We will suspend for about two to three minutes.

● (1015)

(Pause)

● (1020)

The Chair: I call the Standing Committee on Justice and Human Rights to order.

We have a motion put forward by Monsieur Ménard regarding matters dealing with organized crime, gangs, drugs, etc.

I'll give Mr. Ménard the floor. There are some issues as to how the government can deal with the motion, but I'll let you explain first, Mr. Ménard.

● (1025)

[*Translation*]

Mr. Réal Ménard: Do you agree that we should hear from the officials, since we only have half an hour left and I have already explained the motion? I could speak to it at the end. So, if everyone is in agreement, I would prefer to hear from the officials first.

[*English*]

The Chair: Certainly we can proceed that way.

We have two officials from the Department of Justice, Mr. William Bartlett, senior counsel, criminal law policy section; and Mr. Matthew Taylor, counsel, criminal law policy section.

Thank you, gentlemen, for being here. I gather you have the information at hand with reference to Mr. Ménard's motion?

Mr. William Bartlett (Senior Counsel, Criminal Law Policy Section, Department of Justice): Yes, we do.

The Chair: If you could address that I would appreciate it.

Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Mr. Ménard has put forward a motion. It would be normal for him to introduce it. Is he asking officials...?

The Chair: It was actually introduced last time.

[*Translation*]

Mr. Réal Ménard: I could table it again, but I have already spoken to it. However, we only have half an hour left. If Mr. Lee wants me to table it again, I can do that.

[*English*]

The Chair: You have.

Mr. Derek Lee: I'm just curious what officials are expected to do in relation to a motion that's been put forward by a member.

The Chair: They're going to comment on the feasibility of proceeding with something like this. There are some sections in it that already pose a bit of a problem, but Mr. Ménard has already introduced it. He has given some description of what he wants.

Mr. Derek Lee: What would the officials possibly be expected to say about what is proposed?

The Chair: Maybe we can hear from them and they'll tell you.

Mr. Derek Lee: All right. I suppose they won't be making any value judgments. It is legislators who will make the decision.

The Chair: We understand that, and that will still be the case if anything is going to proceed in that fashion.

Mr. Derek Lee: All right.

The Chair: There are some issues with the motion, and the members from the Department of Justice are going to put their position forward.

Mr. Derek Lee: That's my point. The Department of Justice hasn't had an opportunity to have a position. This is a justice committee issue. The Department of Justice is an observer. It may have some very expert views that can be brought to the table, but it would have to be asked first.

The Chair: It has been asked.

Mr. Derek Lee: I'm unaware of those questions, but that's fine.

The Chair: Thank you, Mr. Lee.

[*Translation*]

Mr. Réal Ménard: I'll come back to it at the end.

[*English*]

I'm going to give a speech at the end.

The Chair: That's fine, Mr. Ménard.

Mr. Bartlett.

Mr. William Bartlett: I hope we can be helpful to the committee in dealing with Monsieur Ménard's motion. I appreciate the opportunity to provide the committee with some background on the issues raised by the motion that is before you.

I'll focus my remarks primarily on the first two issues raised in Mr. Ménard's motion.

As you know, Bill C-24 came into force in 2002, and I believe Monsieur Ménard was a member of the committee at that time. In so doing, it modified the definition of criminal organization. Subsection 467.1(1) defines a criminal organization as:

> a group, however organized, that
>
> (a) is composed of three or more persons in or outside Canada; and
>
> (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

The amendment was made because the previous definition of criminal organization was a more complex and demanding definition. It required, for example, showing a pattern of criminality, which was found to be a difficult issue for crowns to deal with. There had been some development on the international level that I'll refer to a little later, and the new definition was largely based on that international development that led to a definition of criminalization in the transnational organized crime convention.

The concept of material benefit, as it has been interpreted, is quite broad, and sufficiently broad so as to address instances of gratuitous violence, such as drive-by shootings, the issue raised in Monsieur Ménard's motion. This view is confirmed by international legal norms as well as our own jurisprudence. From a criminal policy perspective, it's the inclusion of the requirement that there be a receipt of a material benefit for the offences that the criminal organization is focused on facilitating or committing that is important.

Mr. Chairman, as this committee is no doubt aware, the passage of Bill C-24 was aimed in part with the view to enable Canada to ratify this big international convention, the UN Convention Against Transnational Organized Crime. That convention's definition of an organized criminal group also contains a requirement that the commission of serious crimes be done in order to obtain a financial or other material benefit. We have the definition available if the members of the committee would like to see it.

Similar to the issue before you today, the drafters of the convention struggled with those instances where organized criminals might commit crimes such as murders, which allegedly yield no direct material benefit to the organization. Proposals to broaden the definition to include other illegitimate purposes were suggested as a way to ensure that such acts were captured. However, in the end, the drafters concluded that the concept of material benefit must be construed broadly, and our own courts have confirmed this, and that the motivation for such criminal acts could nonetheless be seen as indirectly linked to the obtaining of a material benefit. The domestic interpretation has solidly confirmed this view.

It should also be noted that the concept of material benefit from a legal policy perspective serves to limit the range of groups that could be seen as criminal organizations but not be within the target of what the criminal organization legislation is designed to capture. For example, the concept of material benefit assists in differentiating organized crime groups from groups who commit crimes for reasons other than a material benefit, such as political reasons.

Mr. Chairman, domestic jurisprudence confirms that the concept of material benefit is broad and that the breadth of this section was deliberate so as to provide law enforcement with the necessary flexibility so as to capture the full range of behaviour engaged in by criminal organizations.

● (1030)

In decisions before the Ontario Superior Court of Justice as well as the Quebec Superior Court, the courts have noted that the term "material benefit" is broad, and that what constitutes a material benefit will depend on the facts of the case.

For example, in Regina v. Leclerc, Quebec Superior Court noted that activity that is intended to provide a gang with an increased presence in a particular territory in order to deal in narcotics would be for the benefit of a criminal organization. This indeed is what lies behind the drive-by shootings and other apparently random acts of apparently gratuitous violence, including those engaged in by street gangs. It creates a climate of intimidation that contributes indirectly to the drug trafficking or other forms of crime that result in the direct material benefit.

In addition, it should be noted that nothing flows directly from the definition of a criminal organization. It is not essential that the crime in issue before the courts be one that is included within the definition of a criminal organization. What is involved in using the definition of criminal organization is that there is an offence before the court....

For example, in section 467.12, there is an additional offence that is applicable if the offence in issue is one committed for the benefit of, in association with, or at the direction of a criminal organization. So you must have the offence and the existence of a criminal organization. The criminal organization exists if it commits or facilitates crime that brings material benefit—this broad concept of material benefit—whether or not it may also sometimes engage in purely random, or apparently purely random, acts of violence.

Having said all this, the issue that Mr. Ménard is raising in this element of the motion, the issue of drive-by shootings, is certainly a serious one. We have been reviewing our criminal laws with a view to ensuring that there are adequate tools within it to address in particular that kind of reckless criminal behaviour.

In regard to warrants for tracking devices such as GPS systems, that is something that we indeed have been looking at. We thank Mr. Ménard for raising that issue in the motion. We are looking for a variety of ways to strengthen our criminal law responses to organized crime. Certainly we are examining the exact issue he has raised in the second part of his motion.

The remaining issues involve primarily funding matters. We really can't comment on those except to note that indeed there is no funding presently available for the activities that the motion raises.

I'll make one comment, perhaps. The idea of a secure website, while certainly a resource-intensive issue, would certainly be feasible in regard to case law, but there are a variety of reasons why it would probably not be possible to put on a website evidence used by the defence and the Crown. That simply wouldn't be available to put on a website, but certainly case law would be available, although making it a secure website would be a fairly resource-intensive exercise.

Those are my comments, Mr. Chairman. I hope they will provide some assistance to the committee in reviewing Mr. Ménard's motion.

● (1035)

The Chair: Thank you, Mr. Bartlett.

Just to go back to your initial intervention, Mr. Lee, I know that some of these proceedings maybe aren't quite in line with what we would be calling the justice department in to provide information on. But we had this discussion quite thoroughly on this particular motion. You contributed to it.

The issue that you brought forward—and I think it's an important part of it—was to consider the "advisability of"; those were your terms back then. I think this is what we're trying to do in determining just where we're going to go with this motion.

Now I'll turn it over to Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: Thank you, Mr. Chairman.

The officials are always welcomed here if they can shed some light on the committee's work. I have no problem with that. I don't know if I can go along with their argument, however, but I do want to be certain that I understand.

I've done my homework as a member of Parliament. I represent a Montreal riding, and the people who work for my police department are worried about fights between street gangs. This is not only happening in Montreal. It is also happening in Toronto, Vancouver and elsewhere.

If you maintain— and I want to see the jurisprudence— that under current legislation, the police...

The Montreal police have told me that they cannot lay charges under section 467.11 against known gang members when they engage in a drive-by shooting. They can lay charges of homicide, possession of illegal weapons, disturbing the peace, but they cannot lay charges if these people are in a car and shoot at someone, not necessarily with the intent to kill, but simply to increase their influence on their territory. The police told me that this type of activity did not meet the definition of "criminal organization".

I also read the Leclerc and Carrier rulings and I don't remember having read that. If you tell me that it is already covered under current legislation, so much the better. Laws are not passed without a purpose. If the problem is solved, I will withdraw that part of my motion and move the adoption of the three other parts. However, the police have told me differently.

I would like you to be very clear with us. Can you confirm that the courts have interpreted the definition of "criminal organization" in a way which would allow the police, be it in Quebec or elsewhere in Canada, to lay charges in a drive-by shooting under the definition of criminal organization? That's what you're telling us this morning. You're saying said that financial and material benefit include an increase in influence over a particular territory. You're saying that you will present to us related jurisprudence.

Moreover, you have the bad habit of never distributing your texts. I would be nice to see them. You have been before the committee two or three times already, and yet you have never distributed your texts. It would be nice to see them.

As the law now stands, can the police lay charges under sections 467.11, 467.12 and 467.13 for drive-by shootings? Yes or no?

● (1040)

[*English*]

Mr. William Bartlett: Yes, indeed, Monsieur Ménard. The applicable offence would vary when a drive-by shooting is involved, depending upon the particular facts of the case. As I've noted, we are reviewing the range of offences that could apply to see if the offences that are applicable are the best ones. We might be looking at a new offence to more adequately address the actual act of a drive-by shooting. But certainly there would be a number of offences that apply.

What would be required is that they charge someone with an attempted murder, various firearms offences, whatever the facts of the case would support. Then, if they want to use the criminal organization provisions, they would add the additional charge of committing that offence in connection with, for the benefit of, at the direction of, in association with, the criminal offence. That's how the charge would have to be mounted. They would have to show that a criminal organization exists, and certainly that's a very difficult thing to do. The jurisprudence would allow them to include acts like this, where they were clearly carried out—as they are most of the time—for the purpose of—

[*Translation*]

Mr. Réal Ménard: Wait a moment. I want to make sure I understand because this is what worries the police.

My question is quite clear. Of course, the Criminal Code says that it is a major offence for a person to attempt to kill someone in the community with a firearm. However, the police have told us that they would like to be able to lay charges under section 467.11 because that would result in lengthier sentences and delayed parole. I realize full well that the police can lay other types of charges.

Supposing that in Montreal, Toronto or Vancouver, a gang member takes part in a drive-by shooting and the police can link the culprits to a criminal organization by applying the three criteria. In this instance, three persons got together and committed an offence that resulted in the receipt of a material and financial benefit by the group. Will the fact that they committed an offence, in this instance a drive-by shooting, allow the police to lay charges under sections 467.11, 467.12 and 467.13?

I don't want to hear about any other offence, because I know that charges can be laid. I want to know whether, yes or no, it is possible to establish a link between drive-by shootings and criminal organizations? If so, I would like to see you provide us with the appropriate jurisprudence. If it already exists, I am willing to withdraw part (a) of my motion. It is possible that the police were misinformed. If that turns out to be the case, they will be told and they will receive a written response, but I would ask you to be specific and clear.

[*English*]

Mr. William Bartlett: Yes, indeed, Monsieur Ménard, they can lay charges and link those charges to the existence of a criminal organization. The charge is not laid under section 467.1. That's simply a definitions section. The charge will be laid under section 467.11, participating in an activity; section 467.12, committing an offence for the benefit of; or section 467.13, instructing somebody to commit an offence.

In the circumstance you're describing, the applicable offence would presumably be section 467.12, committing an offence in association with, for the benefit of, or at the direction of a criminal organization. They could certainly lay that charge in addition to the drive-by shooting if they could show that the drive-by shooting was linked to a criminal organization.

● (1045)

The Chair: I understand Monsieur Ménard's point—if you don't mind, Monsieur Ménard.

To gather evidence that a carload of individuals popped off somebody who may have been unrelated and drove on, even though they may have been targeting someone they wanted to drop or shoot or kill, in order to prove that the group was attempting to shoot someone else because it would have been of benefit to them—maybe it was somebody in the same business, pushing drugs, and they want to knock him off—but they didn't kill him, they killed someone else, the police have to gather evidence to bring it all the way back and prove that this was the reason they did what they did.

Since it's a criminal organization that's dealing in drugs, the evidence would have to show clearly that the link is there. If they cannot show that, they can't charge that.

Mr. William Bartlett: Not quite. They have to show that the crime was committed for the benefit of a criminal organization. They don't have to show that there was a link in that particular case as long as they can show that the group constitutes a criminal organization and that the crime was committed for the benefit of that criminal organization.

The link is not necessarily through the particular offence in front of the court. It could be shown, through other evidence, that the group engages in drug trafficking, for example. If it can be shown that they engage in drug trafficking, extortion, prostitution, or whatever offences they may specialize in, or the range of offences they may be involved in, you would be able to prove that the criminal organization exists. And if you can show that the offence was committed for the benefit of the criminal organization...and that does have to be shown. You don't necessarily have to trace that particular offence back to show what benefit that offence may have garnered for that criminal organization; you simply have to show that it was done at the instance of the criminal organization or in association with them.

So once the issue of the existence of the criminal organization is shown, and you can then show that the people committing the drive-by shooting were doing so in association with them, that would be sufficient for the charge.

The Chair: Thank you.

We'll have Mr. Dykstra.

Mr. Rick Dykstra: I guess I'm trying to get a fairly clear understanding.

Also, Mr. Ménard, if I understand, have you or have you not withdrawn the first part of your motion? It's in four parts. You suggest that—

[*Translation*]

Mr. Réal Ménard: Not yet.

[*English*]

Not yet.

Mr. Rick Dykstra: Okay, thank you.

I guess what I'm trying to get clear and what we're trying to understand is that, overall, there's definitely a focus on the concept of specifically trying to identify drive-by shootings in a much more detailed way, which is certainly something we support. There's no question about that. The difficulty is the link to defining it under the code and defining it as a criminal organization.

It seemed to me, from what you were saying, that the two were mutually exclusive.

Mr. William Bartlett: No. Drive-by shootings, in terms of the context in which they're committed and what they're all about, are usually quite directly linked to the primary criminal activities of these organized crime groups: drug trafficking, extortion, protection rackets, a variety of things. The drive-by shootings are part of an effort sometimes to establish turf, which is important to being able to control the drug trafficking in a given area or to deal with rivals in the field, or simply to create an air of intimidation in the community, so that these groups can carry out their criminal activities. So there is usually quite a direct link with the drive-by shooting.

The drive-by shooting doesn't bring the direct financial benefit. But what the courts have said is that the drive-by shooting produces, nonetheless, a material benefit for the organization if it means that the intimidation they create or the direct action taken against a rival gang has fortified their drug trafficking activity or whatever else they're engaged in that does bring them a financial benefit.

The requirement of material benefit, including a financial benefit, has been interpreted as being this indirect fortification of their ability to carry out the crimes that then bring a further benefit.

● (1050)

Mr. Rick Dykstra: And the material benefit part would not include the drive-by shooting aspect of it?

Mr. William Bartlett: It would include the drive-by shooting where that drive-by shooting was designed to fortify the gang's position within a given territory, so that it can carry on drug trafficking or extortion or whatever else it's primarily engaged in.

Mr. Rick Dykstra: So from that perspective, I get the sense that you're identifying that there isn't a need to join the two together, because in fact, in case law, and in the way the courts and lawyers approach this, or the way cases are fought, the links are made in court as it stands already.

Mr. William Bartlett: Yes. We can certainly make the jurisprudence available to the committee, if that's your wish, but yes, the link has been made in a couple of major cases.

Mr. Rick Dykstra: I think that's significant, if I understand this part of Mr. Ménard's motion, from the perspective that this is what he was trying to achieve in terms of the Criminal Code, but which in fact already exists in case law.

Mr. William Bartlett: Yes. That's not to downgrade the difficulties that police and crowns face in making those links. Proving the link to a criminal organization, we recognize, is a very challenging matter for law enforcement and crowns.

The Chair: Thank you, Mr. Dykstra.

I'm now going to move to Mr. Lee. You're on the list, Mr. Lee.

Mr. Derek Lee: Well, I think we've had sufficient discussion of item (a).

Can we go to item (b)? I'll just say, as an aside, that as much as Monsieur Ménard is well intentioned—and we all are here—this particular mechanism of moving a substantive motion, a relatively complex policy motion, to the committee has the effect of circumventing the House's private members' business procedures. I appreciate that it's well intentioned, but I really have second thoughts about whether it is in order.

In any event, let's continue with the substance. I'm going to ask this question. In item (b), if there are warrants for electronic surveillance, why would GPS electronic monitoring not fall within that envelope? Why does there have to be a special case made for GPS system monitoring? I would have thought that GPS system monitoring would fall easily within the rubric of electronic monitoring or electronic surveillance.

Could you comment on that, Mr. Bartlett or Mr. Taylor?

Mr. William Bartlett: Certainly it does, and what I believe Mr. Ménard's motion is aimed at is not that there needs to be a provision to provide for this. There is a provision that makes warrants that authorize the use of the GPS system. It's generally under the description of tracking devices, and GPS is one of them, but there are other forms of tracking devices.

I think the point of the motion is that there is currently a 60-day time limit on these tracking device warrants—

Mr. Derek Lee: But there is not for electronic surveillance warrants?

Mr. William Bartlett: Yes, for electronic surveillance warrants there is—

Mr. Derek Lee: A one year.

Mr. William Bartlett: Electronic surveillance is a little different because it comes under the general warrant provision and doesn't have the same limitation. But a tracking device does have a limitation. Wiretaps are probably the best comparator here. Wiretaps are normally for 60 days, but if the case for which they're sought is a criminal organization offence or a terrorism offence, they can be for up to one year.

● (1055)

Mr. Derek Lee: Is there such a thing as a warrant for electronic surveillance?

Mr. William Bartlett: It's under the general warrant provision.

Mr. Derek Lee: A general warrant for what?

Mr. William Bartlett: It's simply called a general warrant and it covers several different kinds of access to what people are doing, including electronic surveillance.

Mr. Derek Lee: So when Mr. Ménard's motion refers to warrants for electronic surveillance, he's just talking about general warrants?

Mr. William Bartlett: He's talking about general warrants, yes, but the GPS ones are tracking device warrants.

Mr. Derek Lee: And there is a specific provision in the code governing tracking?

Mr. William Bartlett: Yes, section 492.1 of the Criminal Code covers tracking devices.

Mr. Derek Lee: And there's no way they could ever be considered general warrants?

Mr. William Bartlett: They're not general warrants; they're warrants for the attachment of a device to a motor vehicle specifically in order to monitor its whereabouts.

Mr. Derek Lee: And one time we thought that...was it 90 days or 60 days? What are those?

Mr. William Bartlett: Traditionally the limitation period, where there is a limitation period, has been 60 days. As I say, for wiretaps it is 60 days, but can be for up to a year in these cases. Mr. Ménard's point is well taken that perhaps the same provision should extend to tracking devices.

Mr. Derek Lee: Thank you.

The Chair: Thank you, Mr. Lee.

It appears that our time is running short. I'm not going to get to two speakers, but I am going to give the floor back to Monsieur Ménard for some final comment. We may have to deal with the substance of this motion later on at another meeting, but—

[*Translation*]

Mr. Réal Ménard: I will make a proposal to the committee. I propose that the motion be tabled, that it not be sent today, but that the officials send us the jurisprudence. We will look at the jurisprudence. I will sit down with the parliamentary secretary, and we will see what tie-ins would have to be made in light of the information we will have received. Can you send us the jurisprudence, in both languages, within a week's time?

I will sit down with the parliamentary secretary, and we will make those tie-ins. If part (a) is not necessary, then we won't vote on it. Mr. Chairman, you are well aware of my legendary spirit of accommodation.

[*English*]

The Chair: We certainly do, Monsieur Ménard, but their minds just keep turning and turning and pumping out all these motions, so we have to deal with them as they come along.

I can understand your thought here on point (a), given the fact that some police departments may not want to charge or maybe they don't understand fully what those links are to be able to charge. I see that's something you're seeking in the motion, to begin with.

For the benefit of the committee as a whole, we discussed this point thoroughly and we were all in agreement that this is the way it should move along. At that point, you will table the motion then?

[*Translation*]

Mr. Réal Ménard: Yes.

[*English*]

The Chair: Agreed?

Some hon. members: Agreed.

The Chair: Mr. Bartlett, you had something you wanted to conclude with?

Mr. William Bartlett: Just that we'll certainly be happy to provide the jurisprudence in both languages where it exists, but not all of it will be in both languages.

The Chair: Thank you, Mr. Bartlett.

Mr. Lee, on a point of order, and then Mr. Dykstra right afterwards.

Mr. Derek Lee: On a point of order, I actually don't need to see all of this jurisprudence. It's not clear to me that it's necessary for the Department of Justice to fully blast the committee with all the jurisprudence. But Mr. Ménard clearly has an interest, and if it was just a matter of the department making the information available to Monsieur Ménard, I'd be very happy and it would cut down on a lot of paper.

The Chair: Point taken, Mr. Lee. Thank you for bringing that up.

Mr. Dykstra.

Mr. Rick Dykstra: My only question is one of process and clarification. If Mr. Ménard has now tabled his motion—and it sounds to me, with a great deal of certainty, that it's going to come back as a different type of motion—do we need another notice of motion, or are we just going to accept it back and work through it and go from there?

The Chair: We'll see what it looks like. There will probably be another move.

[*Translation*]

Mr. Réal Ménard: We will give notice again.

[*English*]

The Chair: Thank you very much gentlemen, Mr. Bartlett and Mr. Taylor.

Is there a motion for adjournment?

This meeting is adjourned.

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

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

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