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Chair

Mr. Rick Dykstra

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● (1550)

[*English*]

The Chair (Mr. Rick Dykstra (St. Catharines, CPC)): I call our meeting to order this afternoon. Pursuant to the order of reference of October 26, the committee will now resume its study of Bill C-2.

I want to welcome our ministry officials. Thank you for the attendance today in terms of being able to deal with some of the issues we may not have been able to finish up with yesterday, after the minister's presentation.

I just want to make a couple of comments on what I'll term housekeeping items that we will need to do, or should do, after we've had our ministry folks complete their presentation to us. I'd indulge the committee for probably three or four or perhaps five minutes after we're finished with the witnesses in order to finish up a couple of housekeeping items.

I would also note that we did plan to have the ministry here for an hour. If we had witnesses following that, they would be here for the second hour. In fact we do not have any witnesses who were able to make it today. We do have witnesses on schedule for tomorrow morning. If we want to use this opportunity to extend the time and try to work through any questions we have with the ministry—this was a request, I know, from both Mr. Comartin and Madame Jennings—the ministry folks have agreed.

We certainly thank you for your time. I would like to turn it over to you to begin.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Will the meeting continue until 5:30 p.m.?

[*English*]

The Chair: Just give me a minute, Mr. Ménard.

[*Translation*]

Mr. Réal Ménard: Am I to understand, Mr. Chairman, that we will continue sitting until 5:30 p.m.? I propose that we continue to hear from ministry officials until 5:15 p.m. and then, that we dispense with our technical matters between 5:15 p.m. and 5:30 p.m. Could we agree on how we plan to proceed? Are colleague okay with this proposal? Would this be amenable to Ms. Jennings?

You are not paying attention, Ms. Jennings. We're quite the pair, you and I.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): I would like to publicly apologize. I was focusing on another rather important subject. However, your proposal is equally important.

Mr. Réal Ménard: Ms. Jennings, look me closely in the eyes and let's talk.

Hon. Marlene Jennings: I'm looking closely at you.

Mr. Réal Ménard: Would you like us to continue hearing testimony from ministry officials until 5:30 p.m.?

[*English*]

The Chair: There's a lot of love in the room here today, and I really appreciate that. It's warming me up inside. It's just unbelievable.

I think Mr. Ménard has a very good recommendation, that we go until we've exhausted our questions, or 5:15 p.m., and then allow officials to leave. We'll complete our committee business in the last five or ten minutes.

Very good. Thank you.

Ms. Kane.

Ms. Catherine Kane (Acting Senior General Counsel, Criminal Law Policy Section, Department of Justice): Thank you.

Good afternoon. I'm Catherine Kane, acting senior general counsel in the criminal law policy section.

I would like to introduce my colleagues and briefly indicate their areas of expertise with respect to Bill C-2. As you know, Bill C-2 is a compilation of bills that were in the previous session of Parliament. My colleagues are the subject matter experts on those bills.

We have not prepared an opening statement or presentation. The minister provided the overview yesterday. We are here as a resource to answer any questions you may have. I would also suggest that often as the committee progresses in its work, questions arise. You may also want to have officials for questions towards the end of your proceedings. We could make ourselves available at the end of the committee's work as well.

With me is Greg Yost, counsel in the criminal law policy section responsible for the impaired driving provisions of Bill C-2.

Julie Besner is counsel as well. She is responsible for the gun-related provisions, the penalties for firearms and the provisions with respect to bail for firearms offences. Those were formerly in Bill C-10 and in Bill C-35.

Doug Hoover is responsible for the dangerous offender reforms that were formerly in Bill C-27, in addition to the new reforms that are in Bill C-2.

Finally, my colleague Carole Morency is senior counsel with the criminal law policy section and responsible for the age of protection provisions formerly in Bill C-22.

I can certainly act as the master of ceremonies or whatever to direct the questions. I may be able to answer a few myself, but you have the experts here.

The Chair: Thank you very much.

We'll start with Madame Jennings.

Hon. Marlene Jennings: Thank you, Mr. Chair.

Thank you very much for being here today.

I do have a couple of questions concerning the dangerous offender section of Bill C-2. First, are there any women who have been declared dangerous offenders? Secondly, how many women, if any, have gone through a dangerous offender hearing? Thirdly, how many women over the last five years, given their convictions, could potentially have been subject to an application for remand and assessment? And has any gender-based analysis of this particular piece of legislation, this particular section of the legislation that the government has brought forth, been done? We already know that there's an disproportional number of aboriginals, for instance, who are swept up in our justice system who are represented in the correction services, and that pertains to women as well.

I'd like to know if you're able to provide us with this information, and if you're not, why not.

● (1555)

Mr. Douglas Hoover (Counsel, Criminal Law Policy Section, Department of Justice): I can confirm that to my knowledge there has been a successful DO application brought against a woman. I know of one. There may have been others, but I can't confirm that.

As to current dangerous offenders in the system, we can undertake to contact Correctional Services and make those inquiries on your behalf and get back to you if they're not appearing directly as a witness.

At Justice Canada, we have not done a gender-based examination of part XXIV applications. I would not be qualified to respond as to the number of potential applications that could have been done over five years or any of the other questions, except to confirm that I know of one woman who has been successfully DO'ed once.

Hon. Marlene Jennings: Do you know or have the information as to how many women, given their convictions over the last five years, could potentially have been subject to an application for remand and assessment for dangerous offender designation? Are you able to provide us with that information?

Mr. Douglas Hoover: I have the same answer on that: no, we haven't done that analysis. I think there's a potential for that type of analysis to come forward, because certainly we'd have to cross-reference the number of women who have been convicted of a sexual offence over a given time period. Through the help of current Statistics Canada tracking of convictions, you could do that. We haven't done it. We could again check with Public Safety Canada to see if they've done any type of analysis on that.

That type of review would take some time, because there's a pretty large body of information that would have to be reviewed by analysts and researchers and put together.

Hon. Marlene Jennings: Is there any specific reason why such a study has not been conducted by the Ministry of Justice?

Mr. Douglas Hoover: I can only suggest that from my perspective it is not specifically an issue. The number of women who have been subject to dangerous offender applications is quite low. There's a very small handful. I know of one as being successful.

If there were a concern that women were somehow being treated differently, then I guess we could take a look at it, but no one has made that suggestion to me. Certainly in my work over the past number of years there's no evidence to suggest that there is a discrepancy based on gender in terms of the application by prosecutors of this provision.

Hon. Marlene Jennings: Thank you.

In terms of the number of people who have been convicted of offences, let's say over the last five years, that could have led to an application by the crown for remand and assessment for a dangerous offender hearing and possible designation, do you have the figures as to how many offenders could have been subject to such an application over the last five years? How many actually were subject to such an application?

Mr. Douglas Hoover: I don't have numbers. Again, we can make the inquiry. No, it's not something that I have at my fingertips.

Hon. Marlene Jennings: Do you know if the information exists in a form that could be brought before this committee? To me, it's elementary that if that kind of system exists, one would want to determine whether the law is being used in all of the cases where it could potentially be used for application for remand and assessment. If it's not in a significant proportion of cases where potentially it could be, then why is it not?

Mr. Douglas Hoover: I can certainly answer the question in terms of why we don't and why it may not be applicable.

If you consider again the threshold for remand for assessment, it's not exactly a hard test. There are soft criteria that a judge has to consider to determine whether it meets the criteria of a serious personal injury offence. The base threshold for that—where you would start—would be at least a 10-year possible sentence. You'd potentially have to look at every single individual who was convicted of that prerequisite offence. Then you'd have to look at each and every decision of the sentencing court to determine whether in the court's mind.... And you'd have to step into the shoes of the court, which is virtually impossible. You'd have to go through the transcripts from over five years, meaning for probably over a hundred thousand cases. The amount of resources it would take to do that would probably not really justify the exercise.

Overall, I would suggest, as has been said many times by the Supreme Court of Canada, that the dangerous offender application is to be used in the rarest of circumstances for those offenders who show no prospect of rehabilitation, for the purpose of protection of society. Because of that, the number of actual applications is, by its nature, going to be very small relative to the total number of offenders before the court. In the vast majority of cases, the sentencing scheme provided for in the Criminal Code is satisfactory to manage the risk posed by most offenders. In the rare instance where the sentencing scheme is not, the dangerous offender proceedings are there to provide for an alternative sentence—the indeterminate sentence—to ensure public safety.

Again, while I can see why you're asking the question, the type of review you're asking about would probably be somewhat impractical and really would not assist in determining whether there's an appropriate policy in place.

● (1600)

The Chair: Thank you, Mr. Hoover.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard: I'd like to take up where Ms. Jennings left off. I must admit that my understanding of the issue is somewhat muddled and I hope you can clarify things for me, Mr. Hoover.

Perhaps we did not agree with the proposed increase in minimum sentences in Bill C-10, but at least the proposal was clear. It was a matter of judicial philosophy and one could be either for or against the recommendation.

I don't quite understand and I would like you to explain where the problem lies for the prosecutor, who as we understand is often the crown. Why are the current provisions of the Criminal Code inadequate? Why does the government feel the need to put forward a list? You talk about primary designated offences, but as I understand it, there is also a list of secondary designated offences.

What is the problem, if I am a crown prosecutor and I want to invoke these provisions in the case of a dangerous offender? You told Ms. Jennings that the criteria were overly stringent, but could you be more specific? Don't be afraid of referring to administrative realities, because that will be a determining factor in whether or not we choose to back the provisions taken from the former Bill C-27. Administratively speaking, where does the problem lie at this time for the prosecutor trying a case in a court of law?

[*English*]

Mr. Douglas Hoover: Again, a couple of problems have been identified in ongoing consultations with provincial senior justice and territorial officials representing the provinces' and territories' attorneys general.

To begin with, the crown declaration is addressing the issue that in not every case are the crowns able to put their minds to the issue of whether this particular offender merits a dangerous offender application. I don't think the issue is one of necessity in some jurisdictions or that the issue is one of resources in other jurisdictions. It tends to vary.

What we do know is that statistically there seem to be variances in the prevalence of the use of the dangerous offender provisions from province to province and territory to territory. That being the case, I think the policy behind this was in fact to not force crowns to bring a dangerous offender application in a certain situation but to make sure they've addressed their minds to whether this individual deserves or merits a part XXIV application, and to make that intent clear on the record in the court.

[*Translation*]

Mr. Réal Ménard: I want to be certain that I understand clearly the first part of your response. You say the crowns are not in a position to make a dangerous offender application, but why is that? As I understand it, voir-dire comes into play. We're talking about a professional, in this case, a psychiatrist, at least in the case of Quebec. Why aren't the crowns in a position to make such an application? What is the problem?

[*English*]

Mr. Douglas Hoover: I don't think it's that they're not in a position. The crowns clearly are in a position to make the application from the outset, but to understand fully the context...I think in many jurisdictions the resources of the court, of the Crown, are stretched somewhat thin. There is often very much a revolving door issue in remand throughout Canada and I guess there is overburden—

● (1605)

[*Translation*]

Mr. Réal Ménard: What resources are we talking about here? Resources to secure some expertise? What type of resources is the crown lacking?

[*English*]

Mr. Douglas Hoover: This precedes the assessment. The first stage, prior to an assessment, is that the crown has to bring an application to the court under part XXIV for a dangerous offender proceeding. So the first step is that they apply to the court and they argue before the court that the individual has a threshold conviction—either a serious personal injury offence or one of the three sexual offences designated. Then the crown is applying for the psychiatric assessment.

But to get there, I guess what I'm suggesting is that the crown has to make the decision right at sentencing that that's what they're going to do. I think the concern was by some provincial attorneys general, by the federal attorney general, that in some cases the crowns were unable to turn their attention to this adequately for a number of reasons, I guess, so the crown declaration is specifically not to bind the crown to—

Mr. Réal Ménard: Why?

Mr. Douglas Hoover: It's to make sure that in every case where there is a history of violent or sexual offences, the crown has at least considered a part XXIV application and says so on the record. It's not to bind the crown. It's not to tie him or the court to a dangerous offender application either way; it's just to make sure that in the cases where there seems to be some suggestion of violent sexual history or a pattern, the crown has at least considered this option.

[*Translation*]

Mr. Réal Ménard: I'm having trouble understanding. Let's say I'm the federal prosecutor, I have the Criminal Code in front of me and I'm told that there must be a risk of re-offending. Three criteria are spelled out in the Criminal Code. I realize that there are certain nuances that must be drawn between the provinces and the crowns, but I'd like to know why a finding isn't made, for example, or why an application isn't filed with the judge. Could it be that prosecutors have too many documents to fill out? I don't quite understand why matters do not proceed to the next stage.

[*English*]

Mr. Douglas Hoover: I think the real issue that the crown declaration tries to get to is just to ensure that the first stage of inquiry is thoroughly examined by the crown prosecutor. I think the concern was that that's not always done. And again, those reasons are varied. It may not always be the same.

I can also suggest, for example, that the national flagging system, which is fairly young throughout Canada, is attempting to resolve this administratively by making sure that for those offenders who are migrant in nature—in other words, he may be convicted in Ontario the first time, maybe in Manitoba the third time, and in B.C. the fourth time—the crowns in each of those jurisdictions are aware in fact that this individual has this past and, if they are convicted again, that they're flagged for a part XXIV application. I think this is pretty much in the same vein as that effort.

It's important that there is a comprehensive approach to the management of high-risk offenders coast to coast, and if you have one jurisdiction that is perhaps less vigilant than another, it tends to break down. So this tries to make sure we have consistency in all jurisdictions.

[*Translation*]

Mr. Réal Ménard: With your permission, I would like to ask one last question.

[*English*]

The Chair: You've got a few seconds.

[*Translation*]

Mr. Réal Ménard: Are there dangerous offenders who have been designated as such under the Criminal Code following a first serious offence? Would it be possible to have breakdown of the number of offences? According to our figures, there are 384 such offenders, 333 of whom are in the prison population. Do any such cases come to mind?

[*English*]

Mr. Douglas Hoover: Yes. Technically you only need to have one conviction as the long as the crown is able to establish that there was a pattern of violence. You can in fact tender evidence during a dangerous offender proceeding that goes outside of a conviction. In other words, you can have a number of witnesses come and testify that the individual had done a number of other violent offences even though they weren't charged or convicted. I think you will find, to my knowledge...and again, there are a couple of such dangerous offenders already. Although it is a rare circumstance, it can happen.

The Chair: Thank you very much, Monsieur Ménard.

Mr. Comartin, the floor is yours.

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

Just to pursue this a bit more, let's take the case of the balcony rapist. That blew up this past summer. So he gets 20 years; obviously they treat it as a very serious offence and he's convicted of multiple offences all at the same time. Now we're 20 years down the road and he's released without reasonable control on him.

In fact situations like that, has anybody ever gone back and looked at the crown's conduct in not applying for dangerous offender? Have there been any case studies on that? I would think, Mr. Hoover, that would be done at attorney general offices at the provincial level. Have there been any studies done on that, and if so, are they public?

● (1610)

Mr. Douglas Hoover: Without being too facetious, I think there's a lot of analysis of that in the press and in the political world. We don't tend to want to comment too much on specific instances that are before the courts, and this one is certainly in that category.

Mr. Joe Comartin: No, just so I'm clear, I'm not asking you to comment on that one. I'm using that as an example.

Have there been any cases where the attorneys general across the country have gone in and looked at the process that occurred where they didn't apply at that time—

Mr. Douglas Hoover: That's fair comment. Certainly I think that is exactly what we have been doing since 1995 with the high-risk offender working group, which is a committee of senior justice officials from across the country. Its works first culminated in the 1997 changes to the Criminal Code that brought in the long-term offender. I think most experts would agree that this has been a highly successful program in managing the risk of offences to Canadians.

Post-Johnson, the same committee has been working hard to identify resolutions to the problems created by that decision in the lower courts. This bill is the fruit of a lot of that labour.

I would also suggest that, again, every time something like that happens, there are certain pressures on Justice Canada to take a look to see if it might trigger further analysis or a further issue that we're concerned about.

Mr. Joe Comartin: So when that analysis is done, is it made public? Are there reports we can look at that will tell us why applications weren't made? I think that's what Mr. Ménard was getting at, and I share his concern: why is the application not made under the existing law?

Mr. Douglas Hoover: Certainly in any given case, normally the transcripts and the decisions are public record and can be obtained by any individual who wishes to study them.

Mr. Joe Comartin: Mr. Hoover, I'm looking for a summary of that. Given the time constraints the government has us under at this point, there's no way we're going to be able to go back and go through those transcripts.

Mr. Douglas Hoover: No. To be fair, though, in that particular instance that was under a previous set of laws. I think the original case, the original decision, was in 1978. The long-term offender designation was not available. I would suggest that in that particular case, had that happened today, it would have been quite a different outcome. Most likely a part XXIV application would have been sought. Even if a dangerous offender designation was not successful, you probably would have seen a long-term offender designation.

Again, we do take a look at these as they come in. Have we actually done studies? The point of my answer is that we do undertake studies. There are reports of the working group, for example, that have been released publicly. One was in 1995, just prior to the 1997 one. The high-risk offender working group also published a report, I think, on the sex offender registry, which was released a number of years ago and resulted in Bill C-16, passed by the House of Commons a few years ago.

Again, its work right now in relation to this bill is still being vetted among the provinces, but that may be released at some point as well.

Mr. Joe Comartin: Could I ask you to provide the clerk with both those reports? What was the first one again?

Mr. Douglas Hoover: The high-risk offender working group task force report on dangerous offenders was in 1995, and in I believe in 2002 was the report of the high-risk working group on the sex offender registry.

Mr. Joe Comartin: Okay.

With regard to the amendment you've made in Bill C-2 from the previous Bill C-27, just quickly, with regard to being able to treat the breach of the long-term offender conditions, are we going to be able to do that at any time? That is, once the breach occurs, how long do we have before we have to apply? Are there time limits, and if so, what are they?

Mr. Douglas Hoover: The designation by the court that occurs now, under this proposed reform, lasts for the life of the offender. So the offender has in fact been found to be a dangerous offender. If the offender breaches a condition and is convicted of the breach of a long-term offender supervision order, then he is liable for this subsequent hearing. If the offender serves out his sentence and his LTSO, beyond the life of that, and commits another serious personal injury offence and is convicted, then he is also liable for the abbreviated hearing, where the crown will not again have to prove the section 753.1 dangerous offender criteria.

● (1615)

Mr. Joe Comartin: What I'm asking, though, is how much time the prosecutor has to make the application for a dangerous offender.

Mr. Douglas Hoover: It's exactly the same as it is under the current procedure. It's exactly the same procedure you see currently. Basically it's at sentencing, although there is provision currently in part XXIV, dealing with dangerous offenders,that allows the crown to give notice if it intends to bring a part XXIV application but doesn't have the material before it. It has six months to bring the application, but that's rarely used.

Mr. Joe Comartin: Okay. That's all I have, Mr. Chair. Thank you.

The Chair: Thank you, Mr. Comartin.

Mr. Keddy.

Mr. Gerald Keddy (South Shore—St. Margaret's, CPC): Thank you, Mr. Chairman.

Welcome to our witnesses.

I have a couple of questions, but before I use my time for questioning, Mr. Chairman, I have a point on process. Yesterday there were a couple of comments made by the opposition parties about the "three strikes you're out" legislation in the U.S. Because this is a legislative committee and it's not a regular committee sitting in this House, I don't see how that pertains to this particular piece of legislation. I would like you to look into that and come back to our committee with whether or not it's pertinent to this discussion, because I really don't think it is pertinent to this discussion.

The Chair: Okay. Thank you.

Mr. Gerald Keddy: My first question will be on firearms-related offences.

As all Canadians are aware, there are tens of thousands of unregistered firearms in this country, most of them owned by law-abiding citizens who have never had a speeding ticket or been stopped for going through a stop sign. They're held by many rural and urban Canadians, but there are literally tens of thousands of them. My concern is that when this legislation comes into place—and I expect it will come into place and Canadians will support it—we will have created a group of people who, through no fault of their own, because they didn't register their firearms, suddenly become criminals under this new bill. Quite frankly, they're criminals under the existing legislation.

I'm wondering if there's been any thought or any process given to the idea of an amnesty. Amnesties work. We tend to have a firearms amnesty on an ad hoc basis every six, seven, or ten years. People turn in firearms that they're not using. That takes a lot of handguns off the streets. It would also be an opportunity for people to legally register firearms that haven't been registered so far.

I'm wondering if any thought has been given to that.

Ms. Catherine Kane: My colleague Julie Besner can answer with respect to the provisions of this bill that deal with the firearms-related parts, the penalties, and the bail provisions, but we're not in a position to comment on other measures that the government is exploring for initiatives that go beyond the scope of this bill. We're best confined to the scope of this bill.

Mr. Gerald Keddy: I appreciate that. I think I talked about that earlier.

My next question would be regarding the actual formula, if you will—for a non-legal term—to designate a dangerous offender. There is a very rigorous, encompassing process in place. For the benefit of the committee and for the benefit of Canadians who are watching this, could you go through the formula that will actually be in place to designate a dangerous offender?

Ms. Julie Besner (Counsel, Criminal Law Policy Section, Department of Justice): Do you want the firearms first?

Mr. Gerald Keddy: I mean with firearms or with any part of the dangerous offender designation.

Ms. Julie Besner: Very briefly, to respond to the question of potential exposure of law-abiding people who own firearms for a legitimate reason and whether they could be targeted through some of the offence provisions proposed in Bill C-2, I can indicate that the offences that are targeted in this bill are the most serious gun crime offences contained in the Criminal Code. Simple possession offences without, for example, a registration certificate are not targeted in Bill C-2. It's very much tailored to target problems with respect to gangs who use firearms to commit offences and the more serious non-use offences like firearms trafficking and smuggling.

Is that a satisfactory response?

● (1620)

Mr. Gerald Keddy: How would that firearms offence roll into a dangerous offender designation?

Ms. Julie Besner: The firearms provisions proposed in Bill C-2 and the dangerous offender applications are not tightly connected, except in the case of two new offences that are created under the bill. The offence of break and enter to steal a firearm or robbery to steal a firearm is going to be listed under the designated offences.

Perhaps my colleague Mr. Hoover can elaborate a little bit more on that and on your other broader question about the format for the application.

Mr. Douglas Hoover: Yes. Any of the firearm offences that have a minimum possible penalty of at least ten years open up the door for a potential dangerous offender application as long as they meet the remaining criteria for serious personal injury offence. All you have to do is take a look at the new offences created, and if there's a ten-year possible penalty, then it could possibly trigger a dangerous offender application.

As to the other question, do you want me to just go through how a dangerous offender...?

The first stage is that the individual is convicted of what can be typified as a serious personal injury offence or one of the three enumerated sexual offences. Once that occurs, the crown has to make a case to the judge that there's a reasonable likelihood of success of the application, and if that's the case, the crown has the authority to order a psychiatric assessment of the offender, which is a process that ordinarily takes about a month. A report is filed to the court and reviewed by the crown. If the crown is of the view that the potential dangerous offender application will be successful, they will file with the Attorney General's consent and a notice to the defence counsel of the intent to bring the application. Once that occurs, the hearing will proceed.

The hearing is based firstly on the criteria listed in section 753(1), which requires the crown to prove beyond a reasonable doubt that the offender has a certain pattern of brutality that is sufficiently dangerous, etc., and pointing to future risk. Once that finding has been made, as a result of the decision in R. v. Johnson in 2003 by the Supreme Court of Canada, the court then has ultimate discretion to refuse the indeterminate sentence and the dangerous offender application if in fact it is satisfied that a lesser sentence can manage the threat posed to the general public.

Thank you.

The Chair: You're just almost dead-on seven minutes, so nicely done.

Mr. Lee.

This is just a reminder that we are now in five-minute rounds.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Yes. Thank you.

I want to get back to a question I left on the table yesterday that we didn't have time to answer. It had to do with the dangerous offender provisions of the statute. I think there's agreement all around that the right to remain silent is a principle of fundamental justice. It's protected by the charter. If there's any argument about that from officials, I'd like to hear that, but I'll take it as a given that the right to remain silent is protected.

My question was whether or not that right to remain silent remained right through the conviction phase into the sentencing phase of a trial. That's the first question. If the right is there, then I'm going to suggest that these provisions may actually breach that charter-protected right because it imposes on that person a burden to rebut a presumption and they have to prove a negative, i.e., that they're not a dangerous person. These people hopefully are all dangerous once the crown attorneys make their decision, but in any event, the judge in this case will be looking at, to quote Mr. Keddy, someone who has attained the three strikes threshold.

So could you answer that, please, about whether or not this would breach the charter, if the right to remain silent is a protected right?

Mr. Douglas Hoover: The right to which you speak can be found perhaps in a couple of places. In section 11 there is a right not to be compelled to give witness against oneself during a proceeding. There is potentially a section 7 right—fundamental principles of justice—that applies perhaps more broadly and includes that right.

The Supreme Court of Canada in R. v. Lyons in 1987, which was the first post-charter challenge of the dangerous offender provisions, said that section 11 rights don't apply per se to dangerous offender proceedings, again because of the context of that provision. They talk about rights that traditionally attach to trial and to charge. The decision of the court there was that in fact the rights that were claimed by that particular individual could not be used as a shield against the dangerous offender finding. So I don't think it would fall under that one.

They then turn to analysis of section 7, the fundamental principles of justice attaching to the right to life, liberty, and security of person. They said what was important in the dangerous offender proceedings was not to perhaps transfer over these rights one by one as they might apply, but in the context of the overall proceedings to ensure fairness, to ensure that the offender had an opportunity to present his side of the story, to make sure there was not an arbitrary hearing, etc. The important thing is that the offender's right to silence is in fact maintained in these proceedings. He does not have to get up on the stand.

Well prior to that phase, recall that there is an impartial psychiatric assessment ordered by the court, which is often the basis of most of the arguments during a dangerous offender application, and in most cases, as a matter of fact, through legal aid there are subsequent experts brought on board by defence to counter any negative assertions by the crown's impartial witness.

● (1625)

Mr. Derek Lee: It's worth noting that the Lyons case was decided under the old dangerous offender rules.

Mr. Douglas Hoover: Well, that's not exactly correct.

Mr. Derek Lee: We're about to change the legislation here. So I'm asking you about charter applicability not to the old rules, the existing rules, but to the ones we're going to change them to, and the new ones impose a presumption on the person who may or may not have this right to remain silent.

Wouldn't you agree that it's not the old dangerous offender provisions we have to measure, that it's the new ones here? I'm asking you not to measure the charter acceptability of the old provisions, but rather the new one, where we've imposed on a three-time convicted person a presumption that they are a dangerous person, and the only way they can get out of that box, that presumption that the law is imposing, is to come forward and speak, and they have to deal with those issues. Now, that may be a very common sense thing to do. My question is, does that breach the right to remain silent, and is that right there? Have you, as a department, determined that the right to remain silent applies in the sentencing phase?

Mr. Douglas Hoover: Yes, we have. We've done our analysis. We've taken a hard look at this.

I can also point you to more recent case law. The Ontario Court of Appeal in R. v. Grayer, as a matter of fact, suggested that the right to remain silent in a dangerous offender proceeding is something that the offender can exercise, but to his detriment. When the evidence is there that he poses a threat of future harm to society and he chooses not to speak, chooses not to participate in any respect in the assessment process or in the actual hearing itself, then the court is going to make the determination, whether he speaks or not.

The Chair: Thank you.

Monsieur Petit.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Good day.

We met with you on two or three occasions during the various stages of the bill that we attempted to have passed during the last session. There is one point that interests me. As it now stands, all of these bills have been combined into omnibus legislation, but I would like to hear more from you about drug-impaired driving.

I have almost 30 years of experience in this field and virtually all of the cases that I dealt with involved driving while under the influence of alcohol. There was a reference to drugs in the Criminal Code, but it wasn't readily apparent. Even if a person had taken drugs, it was difficult to prosecute him.

What advantage is there to the bill now before us and how is it different? I think we can congratulate ourselves, and the opposition, for the progress that this bill represents. In Quebec, accidents caused by impairment—and we are not just talking about alcohol—are a serious problem. They occur every day.

I don't know who can answer me, but how is this bill different from the provisions currently in place? The public knows what to expect with alcohol-related incidents, but is not quite as clear on what happens in cases where drugs are involved.

● (1630)

Mr. Greg Yost (Counsel, Criminal Law Policy Section, Department of Justice): It is a fact that once these provisions were included in the Criminal Code, individuals were in fact tried on drug-related offences. The problem has always been establishing proof of drug use. There are no devices available to detect the presence of drugs, unlike roadside breathalyzers. This issue has been under review for a number of years, at least since the 1999 report of the special committee. There are thousands of drugs that fall into many different categories and each drug affects people differently. There is no technical tool available to us to test for the presence of drugs that is comparable to the breathalyzer test.

We have found the new Drug Recognition Expert Program to be the most effective tool. I say the program is new because it is new to Canada. It has been in use in the United States and in other countries for about 20 years. Here in Canada, it has been used in British Columbia for the past decade or so. Under the program, if there is reason to suspect that a person is drug impaired, an examination by a drug expert can be ordered. A series of physical tests will be conducted, such as testing the person's response to light, taking his pulse and blood pressure, and so forth.

Based on his observations, the expert can say which type of drug was likely ingested by the individual and caused his impairment. The expert can then ask the individual to provide a sample of a bodily substance for analysis purposes. If the expert believes that the drug in question is cocaine and traces are found in the person's system, then the case goes to trial. So then, a person was observed driving erratically, an expert recognized the presence of a particular drug and an analysis was done.

Under the proposed new legislation, testing of this nature will be mandatory. Initially, roadside tests will be conducted to detect impairment, whether alcohol or drug related. The individual in question will be subjected to a series of physical tests, as prescribed by regulation. These tests are fairly well known and have been around for years. If the person fails the tests, but alcohol is not a factor, that is his blood alcohol level is below .08, he can then be ordered to participate in the drug expert recognition program. Failure to agree to participate in the program and to supply a sample of a bodily substance for analysis purposes will be deemed an offence.

What we're offering here is a tool to ensure the program's effectiveness. British Columbians quickly understood that it was not a good idea to make the test voluntary, because the hoped-for results were not achieved. Looking to the experience of the United States, we believe that the program will prove effective in detecting the presence of drugs, identifying drug impaired individuals and establishing sufficient proof in order to obtain a conviction. Obviously, the program's success will depend on the number of drug recognition experts. It will take time to train enough experts.

[*English*]

The Chair: Thank you, Mr. Yost. *Merci*.

Madame Freeman.

● (1635)

[*Translation*]

Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ): My question is for Mr. Hoover.

Mr. Hoover, I would like some clarification on clause 43 of the Bill. The provision in question reads as follows:

> 43. The Act is amended by adding the following after section 753:
>
> 753.01(1) If an offender who is found to be a dangerous offender is later convicted of a serious personal injury offence or an offence under subsection 753.3(1) [...]

Subsection 753.3(1) of the Criminal Code says this:

> An offender who is required to be supervised by an order made under subsection 753.1(3)(b) and who, without reasonable excuse, fails or refuses to comply with that order is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Clause 43 goes on to describe the procedure followed, while subsection 753.01(5) says that an offender can be sentenced for an indeterminate period.

Could you explain to me how these two provisions work, since they don't appear to say the same thing. I would imagine that you have a very clear explanation for me. It's just that clause 43 refers to subsection 753.3(1) which provides for a term of imprisonment not exceeding ten years for refusing to comply with an order, while at the same time, it creates a new subsection covering all kinds of other offences and providing for a sentence of detention of an indeterminate period. The two provisions do not seem to jibe with each other... unless you have an explanation for me.

[*English*]

Mr. Douglas Hoover: This provision in fact is the authority for the reconsideration of the individual who was previously given a dangerous offender designation but given a lesser sentence from the original hearing, so if the individual subsequently is convicted of a breach of the long-term supervision order or of a subsequent serious personal injury offence, this is now the provision that Crowns will use under part XXIV after the assessment or even prior to the assessment. So once the court is able to determine that there was the prior conviction, this is the procedure that's laid out. Specifically proposed subsection (5) is the determination of the sentence issue. It provides to the court the direction that they must use in deciding whether or not the individual should now receive an indeterminate sentence or a lesser sentence.

Maybe you could draw my attention to any particular issues you have with proposed section 753.01. Was it proposed subsection (1) that you were concerned about?

[*Translation*]

Mrs. Carole Freeman: This is a new provision, one that was not included in Bill C-27. Was it in fact included in Bill C-27, or is it new to Bill C-2?

[*English*]

Mr. Douglas Hoover: This is part of the new reforms that were not in Bill C-27. Again, this one was the addition. If you recall the discussion last year, one of the concerns of the provincial attorneys general, which was also stated in committee, was the lack of ability to bring an individual back for reconsideration after the original hearing.

This one gives effect to that new reform, so that if an individual is given the long-term offender supervision order and breaches that order and is convicted of the breach, he's brought back to the court, and the crown no longer has to demonstrate again that he is a dangerous offender because the designation is already there. All they have to do is argue before the court whether or not the individual can be managed under a lesser sentence than the indeterminate one.

[*Translation*]

Mrs. Carole Freeman: I understand.

I would like you to explain something else to me. Clause 43 of the bill refers to subsection 753.3(1) of the Criminal Code which says that when an offender, without reasonable excuse, fails to comply with a supervision order, that offender is liable, under subsection 753.1(3) to imprisonment for a term not exceeding ten years. The provision in question already refers to a possible term of imprisonment, while the new clause mentions additional sentences. That's what I do not understand.

[*English*]

Mr. Douglas Hoover: I'm not sure where you're reading that from, and so you might want to draw my attention to it, because I can't quite find it in the provision itself.

[*Translation*]

Mrs. Carole Freeman: Consider the actual wording of clause 43:

> 43. The Act is amended by adding the following after section 753:
>
> 753.01(1) If an offender who is found to be a dangerous offender is later convicted of a serious personal injury offence or an offence under subsection 753.3(1) [...]

Subsection 753.3(1) concerns a breach of a supervision order...

● (1640)

[*English*]

The Chair: Madame Freeman—

[*Translation*]

Mrs. Carole Freeman: ... and the offender is already liable to imprisonment for a term not exceeding ten years.

[*English*]

The Chair: —you have really only about ten seconds left.

Mr. Douglas Hoover: Proposed subsection 753.3(1) is the breach. That's the conviction for a breach. So if you're convicted of the breach, then you come back under this provision. What this provision does is it does away with the part of the hearing where you have to prove he's a dangerous offender, because that's already done. The only part you have to prove here in terms of the sentence is under proposed subsection 753.01(5).

So proposed subsection 753.3(1) brings you in for the breach. That, I think, is where you are looking at that.

The Chair: Thank you.

Mr. Moore.

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

Thanks to all of the witnesses for being here today and for the different areas of expertise you bring forward. We appreciate that. It definitely adds value to our discussion.

I wouldn't want anyone to come here, sit here for two hours, and not get to say anything, so I'll ask Ms. Morency a question.

There have been a number of high-profile issues—I certainly don't ask you to comment on any case that's ongoing—regarding people who are travelling to different jurisdictions to basically prey on young people. I guess you'd call them child sex tourists or something to that effect. I'm wondering if you could comment a bit on the changes that were in Bill C-22 on raising the age of protection that are now incorporated in Bill C-2 and on the impact that might have on people. Maybe you can comment on whether or not people in the past did see Canada as somewhat of a destination, and on what impact this would have.

I do recall some testimony from the last Parliament that dealt with the sophistication of groups of older individuals who were seeking out young people for these types of relationships, and how they used the Internet to further their exploitation. Could you comment a bit on whether that message is going to be getting out there to those groups, and also on Canada being a destination in that regard?

Mrs. Carole Morency (Acting General Counsel, Department of Justice): As you've said in the question, the reforms proposed by Bill C-2 reintroduce what was in Bill C-22, basically increasing the age of protection from 14 to 16 and maintaining the age of protection at 18 for acts related to the sex trade or prostitution. The Criminal Code already prohibits, since 1997, child sex tourism. In other words, if a Canadian resident or citizen goes abroad and engages in one of the enumerated child sex offences—any of the offences that would apply under the new age of protection—they could be convicted here in Canada for committing that offence abroad, as if the offence had been committed here in Canada.

Right now the way the law works is that if the offence is committed against a person under the age of 14, the existing child sex tourism provision would enable a Canadian prosecution here for that offence, provided that the offender wasn't convicted for that same incident abroad in the country where the offence was alleged to have been committed. Raising the age of consent from 14 to 16 will protect youths here, 14- and 15-year-olds, against sexual exploitation by adults. Similarly, it will raise the age at which the child sex tourism provisions will apply. So for whatever the offence would have been here in Canada, if the new age of protection is 16, for the child-specific offence, the child sex tourism offence would apply to that.

Certainly the justice committee heard testimony from some of the police witnesses about the sophistication of some adult predators, particularly in terms of using the Internet to try to lure young persons for the purposes of committing a sexual offence against them or exploiting them. Again, raising the age of protection will better protect youth against that kind of conduct on the Internet.

Some of those witnesses did say that they have seen, through some of the exchanges the undercover police have seen, references to Canada's age of protection being lower. Perhaps that is an attraction for some predators from outside of the country. Certainly there have been reported cases where somebody has been coming from, say, the United States to meet up with someone they've met on the Internet to follow through on the Internet luring, and they've been caught at the border. That evidence has been provided to the justice committee.

● (1645)

Mr. Rob Moore: Thank you.

The Chair: Thirty seconds, Mr. Moore.

Mr. Rob Moore: Oh, thanks. We'll just go on, because that wouldn't allow a very full answer. I have no further questions.

The Chair: Thank you.

Mr. Comartin.

Mr. Joe Comartin: I'm fine. Thank you.

The Chair: Okay.

Ms. Jennings.

Hon. Marlene Jennings: Right now, under the current dangerous offender system, the crown is not obliged to make an application for assessment and remand on first conviction, second, third, tenth conviction, twenty-fifth conviction. Under the proposed amendments from this Conservative government that we find in Bill C-2, has that changed? Is the crown obliged...? Is an application for remand and assessment for a dangerous offender designation mandatory at any number of convictions of violent or serious crimes that are designated?

Mr. Douglas Hoover: No.

Hon. Marlene Jennings: No. So when we hear that this is three strikes and you're out, that in fact has no connection to reality. There is nothing in Bill C-2 that obliges the crown to apply for a dangerous offender assessment and remand and file that application after a third conviction, for instance?

Mr. Douglas Hoover: A third conviction on the designated list will trigger a requirement by the crown to declare in open court whether he has considered fully the part XXIV application sentencing option. In addition, a third offence of the primary list will in fact shift the onus of proof to the offender on balance of probabilities to demonstrate that he does not meet the criteria.

Hon. Marlene Jennings: If the crown makes the application for remand assessment.

Mr. Douglas Hoover: Yes.

Hon. Marlene Jennings: But if the crown does not make that application, whether the crown declares in open court that they're not going to make the application for whatever reason, there's nothing in this bill that requires the crown to make an application for assessment and remand.

Mr. Douglas Hoover: You understand the bill correctly. That's correct.

Hon. Marlene Jennings: Thank you.

Now, one of the points that you've made in response to questions from some of my colleagues is that there appear to be difficulties in terms of resources in some provinces, possibly in all provinces, that may influence the question as to whether or not applications are made, and if they are made whether they are continued to the next phase.

Would you not agree that resources aside, if we're talking about serious violent crime and sexual offences and we're talking about someone who has been convicted more than once—three times, let's say—it would be much more effective to ensure that the offender actually goes through the expert evaluation and assessment, that it would become automatic, rather than leaving it up to the crown to decide whether they're going to file the application?

Mr. Douglas Hoover: Well, as a former defence attorney, I would take every possible opportunity to attack the credibility of my adversaries.

I would have to suggest that the consideration of any automatic requirements for a crown to do anything in the criminal process is misguided. I think it would probably do a lot more harm than good. Overall, the potential for harm of the—

● (1650)

Hon. Marlene Jennings: I'll interrupt you for one moment, Mr. Hoover.

How could it be misguided when it would automatically result in expert assessment and evaluation of the offenders' risks and dangers that they present or don't present to the community? How would that be misguided when you're ensuring that anyone who's been convicted three times, let's say, or it might be four times, automatically goes through that assessment?

Mr. Douglas Hoover: Again, we're talking about a relatively large number of individuals who would go through that particular threshold. We're talking about each of those individuals taking up a very large amount of resources. We're talking about what I would argue would not be a significant increase in the number of successful applications, if any increase in successful applications. In other words, you might get a lot more people in the door, but the court would not be designating, arguably, anybody else as a dangerous offender.

Hon. Marlene Jennings: But we don't know that.

Mr. Douglas Hoover: Well, I would suggest that's the job of the crowns at the front end.

Hon. Marlene Jennings: You just said that you don't have—

Mr. Douglas Hoover: I would suggest that at the front end it is the crowns' responsibility to consider whether or not they have a fair opportunity to—

Hon. Marlene Jennings: Mr. Hoover, you said that the studies haven't been done.

The Chair: Madam Jennings, I've let you go over your time. I was hoping we could finish an answer. But the time is up.

Mr. Kramp.

Mr. Daryl Kramp (Prince Edward—Hastings, CPC): Thank you, Mr. Chair.

Welcome, witnesses.

We've seen many occasions where...of course our judicial system is based on a lot of discretion and the give-and-take and the ebb and flow of the capacity of both crown and defence to negotiate the legal process to the benefit of everyone. My concern is this. Will any of this legislation as proposed affect the potential for either crown or defence to negotiate any other variants in the plea bargain system per se as it exists now versus potential changes? Will it affect it negatively or positively, or do we have the status quo?

Ms. Catherine Kane: Perhaps I could probe your question a little bit more.

The bill has several components. In the provisions with respect to impaired driving there are changes to the penalties, in the provisions with respect to serious gun crimes there are mandatory minimum penalties, and then in the dangerous offenders proceedings it's based on somebody who has already been convicted of serious violent crimes. So in that context, the negotiation of an outcome would perhaps have already occurred for the previous conviction.

Was there any particular context you're asking about?

Mr. Daryl Kramp: No, I'm basically suggesting that obviously it appears as though this will streamline some of the options that have existed in the past, that it potentially might close potential loopholes for abuse in that it's much clearer and more explicit. Would that be a fair assessment?

Ms. Catherine Kane: In the context of the provisions with respect to the penalties for gun crimes and in the dangerous offenders context, we're dealing with very serious offences where the crowns are exercising their discretion in terms of what the appropriate charges are, and they would be making that determination at the front end rather than looking at lesser offences. So with the serious offences, I don't think there are the same concerns to avoid the serious penalties. Serious offences will result in serious penalties.

Mr. Daryl Kramp: Thank you.

I have just one other small point. I have not a concern but a thought regarding constitutional challenge.

I can recall that in minimum mandatories, when they were discussed in previous legislation and/or issues that have come forward, the Supreme Court ruled that a particular punishment might be unconstitutional if it was deemed to be too severe. As an example, there was a minimum mandatory sought for possession of narcotics and they were seeking ten years, and the court deemed it to be not acceptable because it went beyond what was expected; in other words, the crime wouldn't have matched the punishment. However, here there's a solid recognition that we are not dealing with misdemeanours, we are not dealing with common assault, we are not dealing with the summary conviction offences; we are dealing with the most serious, heinous crimes within our Criminal Code: rape, robbery, murder, manslaughter, extortion, kidnapping, etc. But the legislation as proposed still will come under intense scrutiny at the upper level, and justice delayed can be justice denied.

So how confident are you that the legislation as proposed will withstand, to the best possible degree, any constitutional challenge?

● (1655)

Ms. Catherine Kane: We recognize that all legislation is subject to charter scrutiny and charter challenge. We've seen this since the days when the charter was enacted. All of our legislation has been challenged at some point at some level of court, and we're prepared to defend the legislation in all cases.

I might call on my colleague Ms. Besner to speak about the penalties in the bill with respect to firearms offences, because they have been very carefully tailored with the charter considerations in mind.

Ms. Julie Besner: Just to elaborate on that point, the enhanced minimum penalties proposed in the bill with respect to firearm offences are very much tailored to specific offences that appear to be growing in terms of their problematic nature—the gangs and guns problem in certain urban centres—and only serious offences are targeted again. There are specific aggravating factors inserted into the bill—repeat offending is one example, and organized crime is another—and those elements were inserted into the bill to enhance its viability under the charter, if you will.

Mr. Daryl Kramp: So is there a presumption of guilt in many of these occasions? If you're in possession, obviously, of that weapon when you have committed the crime, is there a presumption under this legislation?

Ms. Julie Besner: I'm sorry, I missed part of the question. Were you asking if there's a presumption of guilt?

Mr. Daryl Kramp: Yes.

The Chair: Ms. Besner, very quickly, please.

Ms. Julie Besner: No, the evidentiary burden on the crown to prove all the requisite elements of the offence is not changed under this law.

The Chair: Thank you, Mr. Kramp.

Mr. Comartin.

Mr. Joe Comartin: Mr. Hoover, on the provisions with regard to presumption, when they are talking about prior offences it says "that the offender was convicted previously". I'm going to use an example, because we have it in Windsor right now, of an individual who has committed a series of offences. He is HIV/AIDS positive and they are moving for a dangerous offender.... He committed all the offences, he was convicted of all the offences all at one time, and now they are applying. Would that trigger this section, or would he have to have been convicted of other offences two years ago or ten years ago? What does "convicted previously" mean?

Mr. Douglas Hoover: That's a fair question. Again, the way it's worded is to leave some discretion to the court. There is often a fine line between the nexus of one offence to the other. What we wanted to avoid was, in one sense, an individual who is subject to the presumption when there is a nexus between the offences, chain-of-events types of thing, but we did want to capture an individual who, for example, had a number of victims over even a short period of time. So it's worded to provide argument available to court from the crown that in fact in the particular circumstances of the case, the presumption will apply based on the fact that while close in time, if absent the nexus between the offences, then it would meet the prerequisite of three separate offences.

Mr. Joe Comartin: Let me just be clear. Under "convicted previously", if the convictions are registered only seconds apart, literally, will that apply?

Mr. Douglas Hoover: I don't think so. That's certainly not the intent. If it's one of a series of events, then we would suggest, based on case law and jurisprudence, that in fact it would only be seen as one series of offences, not separate offences. In other words, if an individual commits a break and enter and commits assaults against two individuals, then that probably would be seen as one series of offences for the purposes of this. It wouldn't count as three separate offences.

Mr. Joe Comartin: So the presumption would not apply.

● (1700)

Mr. Douglas Hoover: It would not apply in that case.

Mr. Joe Comartin: Thank you, Mr. Chair.

The Chair: Okay. We have—

Ms. Catherine Kane: I'm sorry, there's also the added requirement in the presumption that you had to be sentenced to at least two years. So that would be the other basic criterion to meet the presumption.

Mr. Joe Comartin: I'm sorry, I'm not sure if there's a significance there. Given the same fact situation, the assault and the B and E all at one time, sentenced to two years, again, the presumption would not apply against him.

Mr. Douglas Hoover: No, not unless there was a significant nexus differentiation between the three offences.

Ms. Kane's point is that by adding a requirement that there be a two-year sentence, it perhaps lends the court to move away from those convictions that are part of one series of events, because the court would potentially tie those together as the intent of Parliament that there has to be sufficient differentiation between the different offences.

Mr. Joe Comartin: If you have a serial sexual abuser and the events, the assaults, occur over a two-year period and the convictions are all at one time, the presumption does not apply.

Mr. Douglas Hoover: No. In that particular case the presumption may well apply. If you have, for example, three different victims months apart, clearly the intent of these provisions is that the presumption would apply in that case, because there is no nexus between the different offences. In that case the actual sentencing court would be saying "Okay, for this offence I'm going to give you two years, for that offence I'm going to give you two years, and for that offence I'm going to give you two years, and then for the current offence I give you two years". Clearly, the intent of this provision is that the presumption would kick in at that point.

Mr. Joe Comartin: We've had other legislation in the last year or two, or maybe three, that has dealt with this issue and that was more specific as to whether the application was there. Was that under some of the mandatory minimums? Why didn't we use that kind of wording?

Mr. Douglas Hoover: Again, just to—

Mr. Joe Comartin: Actually, that may be in this bill. I don't know if it's in the early part of the bill under the old Bill C-10.

Ms. Catherine Kane: The provisions that were in Bill C-10 have been replicated in this bill to clarify what is meant by a previous conviction, because there's an escalating scheme of penalties. It's very clear what does or does not constitute a previous conviction.

The Chair: I'm sorry, Mr. Comartin. We're into a bit of overtime here.

I do want to note that Mr. Moore will have the next five minutes. Mr. Ménard will have the five minutes after that, and then Mr. Bagnell. If we have any time left, we can have another speaker, but that's the order as we speak.

Mr. Rob Moore: Thanks, Mr. Chair.

Mr. Hoover, for Canadians who are watching and have been following this, there are a lot of terms out there with regard to dangerous offenders and long-term offenders. There may be some confusion as to what each of those means. We've talked a lot about dangerous offenders, but could you set out what it is to be a long-term offender and what it means to get that designation? Also, how will the changes in Bill C-2 impact on the interplay between someone who is a dangerous offender but is being treated as a long-term offender and someone who is being treated as a dangerous offender, and how will that interplay change after this bill comes into force?

Mr. Douglas Hoover: Okay. I'll try to be quick.

It's a complicated question in some sense because it's a complicated provision. Essentially, the dangerous offender designation has been around for quite a while. Originally, you could get an indeterminate or a determinate sentence when you had a dangerous offender designation, prior to 1997. The criterion for a dangerous offender designation was a habitual failure to control one's impulses regarding violent and sexual offending.

In 1997 we saw the introduction of the long-term offender provisions, which are also in part XXIV. They're somewhat married to the dangerous offender designation, because if a judge refuses a dangerous offender indeterminate sentence, he or she can in fact impose a long-term offender sentence. With the long-term offender sentence, you'll get the sentence you'd otherwise get for the predicate offence—for example, 10 years or five years—plus the court may impose up to 10 years of federally supervised long-term supervision orders. In that case, the National Parole Board, upon your release into the community, can set a list of conditions for you to abide by while you're living in the community. The conditions can be quite regimented and strict and, again, last up to 10 years, with the purpose of ensuring public safety and rehabilitation of the offender.

Under the new provisions, of course, what we're seeing is the big change toward reform since Bill C-27. That is, a breach of a long-term supervision order will enable the crown to bring you forward on the breach conviction instead of having to wait for an additional sexual offence or violent offence before they can rehear the indeterminate sentence option, as was the case prior to this.

Again, we're now seeing a large number of individuals, who would otherwise be designated dangerous offenders, being released into the community since Johnson, and that's the target audience for these new provisions. Again, if they are unable to control themselves under the watchful eye of the National Parole Board and Correctional Service Canada, it demonstrates a long-term problem beyond what the current long-term supervision order can manage. That being the case, if they are convicted of a breach, they're brought back before the court, and the court can reconsider the indeterminate sentence option.

● (1705)

Mr. Rob Moore: Something you said kind of struck home.

Is that what we're talking about here—someone who has met the criteria for dangerous offender but who, it's been decided, is going to be handled as a long-term offender? Time goes by, and they reoffend. That, in effect, is the difference this change is making under Bill C-2. It will mean not having to wait until this person commits another violent sexual offence before having a rehearing of the dangerous offender.

Is that what we're talking about here, the difference in our justice system's being able to have that here where it's obvious tougher controls are needed because the person has breached some pretty stringent controls, without having to wait for that person to victimize somebody? Is that the difference?

Mr. Douglas Hoover: Yes. Certainly I think that the concern expressed by provincial attorneys general was that individuals who, prior to the decision in R. v. Johnson in 2003, would otherwise have been designated dangerous offenders were not being designated dangerous offenders post-Johnson and were in fact being given lesser sentences. The difference, I think, was that pre-1997 you were a dangerous offender but you could get a determinate sentence. So there was a certain label, a certain watchfulness. Post-1997 you did not get the dangerous offender label at all; you were a long-term offender.

And now that we've had the opportunity to study the individuals who have gone in the post-Johnson world from being a dangerous offender to being a long-term offender, it turns out they are somewhat more difficult to manage under the long-term supervision order. I'm not suggesting that none of them can be managed. The courts have, in some cases, made the proper decision. And as Johnson says, it's a constitutional decision, something that's required. The discretion is required by the court in this case to determine whether or not a lesser sentence can manage the risk posed to the general public. So in that sense this is a very significant change.

Mr. Rob Moore: Thank you.

The Chair: Thank you.

Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: I simply want to be certain that I've understood correctly. I think it's important as we move forward with our work. Therefore, I will take up the questioning where Ms. Jennings left off.

Fundamentally, the provisions of the bill are not automatic in nature, strictly speaking. If I look at the list of 12 primary designated offences, I see that the new obligation created involves disclosing the intention of invoking the provisions of section 753.

Am I wrong in saying that the crown will never be required to take legal action or obliged to invoke these provisions? There will never be a situation where it will be compelled to declare a person a dangerous offender.

What is new here is that in the case of primary designated offences, if this provision is invoked, then the burden of proof is reversed, that is the onus is now on the accused. No one in the judicial system will be required to invoke these provisions, either under the primary designated offence regime or under the secondary designated offence regime. This doesn't jibe at all with what the Conservatives are saying, but I'll come back to that later. I just want to be sure that I understood correctly.

● (1710)

[*English*]

Mr. Douglas Hoover: I can't speak for the Conservatives, but certainly from the departmental perspective that is correct. There is no mandatory or automatic nature to these provisions.

[*Translation*]

Mr. Réal Ménard: I have a second question for you. It's important to mention that, because it's somewhat different. Far be it for me to indulge in partisan politics. I'm completely incapable of doing that, although you seem rather skeptical.

The second thing I'm counting on a great deal is getting a realistic picture of dangerous offenders before this committee wraps up its work. To my mind, it makes every difference in the world knowing that of the 384 designated dangerous offenders, 333 are part of the prison population. We need to have an idea of the number of offenders who were declared dangerous offenders after a first, second or third offence and of the type of offence they committed.

How is the primary designated offence scheme different? With the secondary designated offence scheme, the presumption does not shift. At least, that's what you seemed to be saying earlier. I must have misunderstood you. Regardless of whether we're dealing with the primary or secondary designated offence scheme, when a third offence is committed, the reverse onus provision applies. Is my understanding correct? Basically, what is the difference between the primary and secondary designated offence schemes?

Mr. Daniel Petit: [*Editor's note: Inaudible*]

Mr. Réal Ménard: I don't mean from an academic standpoint, Mr. Petit. I think you've understood the issue on both levels.

[*English*]

Mr. Douglas Hoover: The last part of your question I think I understood. If I misunderstood the earlier part, you'll have to forgive me.

If I have this right, you're wanting to know the difference between the designated and the primary list, the impact of those two lists. Is that correct?

[*Translation*]

Mr. Réal Ménard: That's right, from the standpoint of the evidence and in terms of the consequences for the accused who is designated a dangerous offender.

[*English*]

Mr. Douglas Hoover: Again, on the designated list, if there are two prior convictions from the designated list plus, in the crown's opinion, the third conviction is for a serious personal injury offence, then the only thing that does is require the crown to declare his intent on whether or not he has considered a dangerous offender application. Again, that's not binding on the crown or the court. There is no automatic. It's not leaning to a presumption. All it does is make sure that the crown has fully considered the part XXIV option.

Second, there is the primary list, the 12 offences. If there are in fact two prior convictions from the primary list that received at least a two-year sentence as well as the current conviction—the predicate conviction is from the primary list—and the court would otherwise give it a sentence of two years, then the presumption shifts from the crown, which is ordinarily beyond a reasonable doubt, to prove the dangerous offender criteria in section 753(1), and goes back to the defendant. He must prove that he does not on balance meet the criteria of a dangerous offender.

[*Translation*]

Mr. Réal Ménard: It's clear as far as the 12 primary designated offences are concerned. We understand that in the case of a third conviction, the burden of proof shifts to the accused and there is an obligation on the part of the crown to declare its intent. However, I thought there was a second set of offences because our notes mention a total of 42 offences. I was under the impression that there was a second set of offences called secondary designated offences. That's what I was getting at with this question.

[*English*]

Mr. Douglas Hoover: That's not applicable at all to the—

The Chair: Mr. Hoover, I'm sorry.

We've used up your time, Mr. Ménard.

Mr. Lee.

Mr. Derek Lee: Let me say that my scrutiny of these provisions doesn't mean I don't want to support the bill. We over here do want to support the bill. We just want to make sure it's as good as we can make it.

My question here concerns the procedure that will be in place for the convicted person if there is to be a dangerous offender designation. The way the presumption operates here now is that it will presume the person has met any of the conditions in paragraphs 753(1)(a), 753(1)(a)(ii), 753(1)(a)(iii) or 753(1)(b). There are all kinds of different particulars there. There's repetitive behaviour. There's a pattern of persistent aggressive behaviour. There is brutal nature. There is the sexual impulses part. There's a whole list of particulars.

In a normal, non-presumed hearing, those things will be set out by the prosecutor to say, "We think you are one of these categories or more". If there's a presumption, the bill contains no mechanism that would provide the convicted person of the particulars on which the crown relied upon. In other words, it just says, "You're one of those dangerous offenders. Now, prove you're not." The convicted person has no particulars with which to start and to disprove the presumption.

So I'm suggesting to you that procedurally we have a serious weakness here, where a convicted person is going to say, "I've got no particulars and I have to rebut a bald presumption and I'm unable to do it." I think it is a very serious weakness and I'd ask you to respond to that and on whether or not you think we may be able to fix this, if you think it's a problem, before the bill gets through the process here.

● (1715)

Mr. Douglas Hoover: Once again I could assure the honourable member that we have taken a close look at the potential charter attacks on this provision. I would suggest that yes, it is correct that ordinarily the burden is on the crown to prove the criteria in proposed subsection 753(1), as you laid out. However, again we are suggesting that it is viable to provide to the crown the shift in burden to the defendant because in the first case, this is a narrow list of offences. This is 12 of the most serious offences that there are in terms of violent and sexual offences.

Second, these offences are in fact the triggering offences for most successful dangerous offender applications. Therefore, there is a sufficient narrowing nexus toward the finding of dangerous offender when you've had three of these convictions, all of which have received a significantly serious sentence of two years or more. As such, it's reasonable to impose the burden of proof back onto the defendant, because what we're suggesting is that in this particular situation—which will not be the majority of cases before the courts for dangerous offender proceedings—the offender has shown by his own past conduct that he meets these prerequisites.

Finally, I would suggest that again, consistent with the decision in R. v. Lyons, there is still considerable procedural protection provided for in the dangerous offender protections. Primarily you can find these right from the beginning in terms of the discretion of the court not to allow the psychiatric assessment to go forward if there's no reasonable likelihood of success. The Attorney General's consent is still required for this instance. Once the presumption is in place, the offender has full opportunity to rebut on balance, in which case the burden in the very real sense shifts back to the crown.

Finally, we have the Johnson test whereby the court, regardless of the finding on dangerous offender, has to consider whether or not the offender can be managed under a lesser sentence. Again, as you already suggested, and I agreed, the defendant has the full right to silence. He does not have to put himself on the stand. He does not have to bring forward further evidence.

Mr. Derek Lee: What is it exactly that the convicted person would have to prove here in order to rebut the presumption? If you were acting for a convicted person and you walked into one of these hearings where there was presumption A, B, C, D.... There isn't going to be an A, B, C, D; you are simply one of those DOs.

Can you tell me what you would try to prove in order to rebut? What exactly are you trying to rebut?

Mr. Douglas Hoover: Typically, as the crown does, I get the same information in the disclosure package, which includes the filed psychiatric assessment. Typically, in all dangerous offender applications, the routine is that once I get that assessment, that is going to dictate what I do next with my case. If the assessment indicates strongly one way or the other that my case is either good or bad, then I have to act on that. If it says that it looks as though the expert assessor is suggesting that in fact I am a dangerous offender, that I meet the criteria, that I can't be managed, I'm going to go out and find another expert with my legal aid ticket to rebut that evidence.

Mr. Derek Lee: But in this case, sir, no one found that you met any one of the specific criteria. The presumption simply says you met all of them or one of them. What is it that the person would have to rebut?

Thank you. I'll leave it there.

The Chair: You have ten seconds for an answer.

Ms. Catherine Kane: I would suggest that it's the same criteria that you are deemed to have met that you will be obliged to rebut, depending on the circumstances. The assessment will indicate the nature of the factors that make you considered to be dangerous. It may not be a pattern of behaviour. It may be one of the other criteria that are set out in paragraph (a) or (b). It's not both that need to be proven. Whichever you are deemed to have met will be what you are required to rebut if, on the basis of the evidence, you can rebut that.

● (1720)

The Chair: Thank you, Ms. Kane.

I just want to wrap up. We've gone about one or two minutes over time, but I think everyone was able to get in the questions they wanted.

I want to sincerely thank the ministry representatives for being here today. It's been very thorough and well done. I appreciate it. We'll let you escape for the day.

Perhaps we'll suspend for one minute, and then we'll come back and finish up a couple of housekeeping matters.

● _____ (Pause) _____

●

The Chair: Could we have everybody back?

There are two things we need to do. First, I want to let folks know that we do need a motion to go to the internal board with regard to our budget issue. Let me read it out.

Mr. Derek Lee: It's routine.

The Chair: This is just routine.

Mr. Derek Lee: Can I move that we just de-televise? We don't need this.

Some hon. members: Agreed.

The Chair: All right. We will suspend the television for now, just to complete.

I appreciate your aggressiveness, Mr. Lee, to get this completed here, but first let me read the motion before you move it: that the budget in the amount of $45,850 be adopted and that the chair be authorized to present it to the Board of Internal Economy.

It is moved by Mr. Lee.

(Motion agreed to)

● (1725)

The Chair: Tomorrow morning, I am able to say, everyone won't have to get up as bright and early as we had first thought. We had two witnesses confirmed for tomorrow, one being the Canadian Centre for Abuse Awareness and the other being the Ontario attorney general's office. They had confirmed, but of course we saw a new cabinet appointed yesterday by the Premier of Ontario. They had permission to be here from the former minister but not from the new minister. They are trying to get that. We were hoping to get that before the end of our meeting today, but we weren't able to.

I'm going to suggest that we start at 10 a.m. tomorrow and that we certainly hear from the Canadian Centre for Abuse Awareness, with the provision that if the attorney general's office does in fact confirm, we would hear both at the same time, if that is the case. I would count on there being only one witness tomorrow, and we start at 10 and complete at 11.

Yes.

[*Translation*]

Mr. Daniel Petit: Mr. Chairman, if the witness does arrive and we finish up in half an hour, I hope that we can wrap up our business early.

[*English*]

The Chair: Yes, we do.

Mr. Daniel Petit: Okay.

The Chair: Good question.

The meeting is adjourned.

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