House of Commons
CANADA

Legislative Committee on Bill C-2

CC2 • NUMBER 005 • 2nd SESSION • 39th PARLIAMENT

EVIDENCE

Tuesday, November 13, 2007

Chair

Mr. Rick Dykstra

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● (0905)

[*English*]

The Chair (Mr. Rick Dykstra (St. Catharines, CPC)): Pursuant to the order of reference of Friday, October 26, 2007, we are dealing with Bill C-2, an act to amend the Criminal Code and to make consequential amendments to other acts.

I first want to welcome all of our MPs back from a week in their ridings, and to a reinvigorated committee to continue our work on Bill C-2.

I welcome our witnesses who are here this morning. We certainly appreciate the efforts that you all have made. I know that this committee was formed in fairly short order, and we certainly appreciate the fact that you've been able to put time into your schedules to be able to join us here and present your perspective on the bill. We obviously have something to learn from that this morning.

I know that we've only been away for a week, but let me make a couple of gentle reminders in terms of timeframes. Each group has ten minutes to make their presentation, whether an individual or a group. It's up to you to divide your time. If you are dividing your time with your colleague, certainly that is your decision to make. It's your time to do so. I would just respectfully ask that if you keep an eye on me, I'll try to give you a warning when there's about a minute left in your presentation, so you know that you can work towards wrap-up.

The way the questions will move is the first round of questioning will begin with the Liberal Party for seven minutes. Each party will have a seven-minute allocation. Once we get into subsequent rounds, they'll be five-minute time-allocated question and answer sessions.

I again would ask if you could just keep a bit of an eye on me in terms of being able to make sure that we get as many questions in as possible and that we stay as close to our timeframes as we can.

With that, I would like to ask the Canadian Council of Criminal Defence Lawyers, Mr. Rady and Mr. Roitenberg, to please start.

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

Good morning to all. I'm here along with Evan Roitenberg on behalf of the Canadian Council of Criminal Defence Lawyers. I want to thank you all for allowing us to attend and be witnesses this morning. I'm going to make a few brief opening remarks and then Mr. Roitenberg will continue.

For those of you who aren't familiar with our organization, we are a council of defence lawyers from across Canada, including the territories, of 17 persons. We represent criminal law associations in all of the provinces; they all have a member on our association. So we respond on matters of national interest to the defence bar as a whole. We've been doing this since 1992, and we've appeared before this committee and other committees over the years.

Bill C-2 consisted of five other bills in the previous Parliament, and we've already made representations on those: Mark Brayford from Saskatchewan on Bill C-32, Bill Trudell on Bill C-35, Mr. Trudell and myself on Bill C-10, and Mr. Roitenberg was set to speak on Bill C-27 before Parliament dissolved.

It is our position that the current system of dangerous offender legislation in the Criminal Code works and need not be changed. We have concerns with Bill C-2. Our concern is that if society is going to seek to lock someone up indefinitely, the burden must in all cases be on society to show that this should occur. In other words, we're talking about what we call the reverse onus provision of Bill C-2 with respect to dangerous offenders.

It is our position that this new section really provides a false sense of security and nothing else to what we already have, which is a very careful system, because dangerous offender designations result in perhaps the most draconian penalities that we know in our law. We are concerned as well that what the burden-shifting does is place it on the defence and on the accused person. One of the things that appears not to have been considered is the effect this is going to have on legal aid plans throughout the country. Obviously, if the convicted person is going to have to try to demonstrate why they should not be declared dangerous, the kinds of resources they are going to require from legal aid plans are going to be very high. We're concerned that there isn't a corresponding amount of funding for that.

We also have some concern with respect to the fact that it would appear that aboriginal offenders represent—at least a few years ago—21% of all dangerous offender designations. This is not reflective of the overall aboriginal population. Again, that may have to do with a cost situation in terms of being able to defend dangerous offender applications. One of the things we read indicated that it takes the crown approximately 600 man-hours to put one of these together. If that burden shifts to the accused, we're going to see more dangerous offenders simply because they're not going to have the resources to meet this reverse onus test.

Mr. Roitenberg.

Mr. Evan Roitenberg (Director, Canadian Council of Criminal Defence Lawyers): Thank you.

There are a couple of glaring difficulties in the legislation, as I see it right now, as well as concerns that we have on behalf of our organization. To echo Mr. Rady's comments, including those on resources, the constitutionality of the reversing of the onus is another concern.

A further difficulty with reversing the onus is that you're not simply reversing the onus onto the accused because there have been three predicate offences. You're raising the bar that the convicted person has to meet. Right now under the Criminal Code of Canada, any kind of aggravating feature of a sentence has to be proven beyond a reasonable doubt by the crown. What you're going to be doing now in the most aggravating circumstance is shifting the burden to the convicted person, but not just saying to them, "Because of your three predicate offences, we're going to have a prima facie case that the crown has met its burden". We're not just doing that. We're not saying to the accused, "Now it's your turn, if you wish, to try to raise a reasonable doubt as to the dangerousness". We are now saying to that convicted person, "You have to go beyond raising a reasonable doubt and prove on a balance of probabilities the negative—that you're not dangerous". In many cases that will actually be an impossible test to meet. Philosophically, proving a negative is extremely difficult, but in a situation like this, where you're sapping the resources and putting, as Mr. Rady has alluded to, the onus on the defence and on legal aid plans to provide those resources, you're making it a next-to-impossible test.

Another concern that we have is that the net is being cast far too wide. For example, if you look at some of the primary designated offences, some that leap to mind—assault causing bodily harm, assault with a weapon, and robbery—are very widely defined offences. Certainly they capture within them very dangerous offences committed by very dangerous people, but they also capture within them offences that aren't overly dangerous per se when you get down to the basic factual underpinnings of the offence. What you have, practically speaking, is a situation where sentences in this country do not decrease, so if an individual has received a sentence of two years for an assault causing bodily harm or for a robbery, the next time they are before the court on a similar type of sentence they're not going to receive a lesser sentence; they're going to receive one on par or greate. So even though the factual underpinnings of the new sentence have not become of greater concern, the individual is looking at a sentence within that frame or worse, and therefore is going to be on a slippery slope to being caught within these three predicate offences. That is of concern.

Another concern arises when we get to the presumption of a dangerous offender, under proposed subsection 753(1.1). You are then in a situation where the court is being ordered to make the finding of dangerousness and impose the most severe sentence—an indeterminate sentence—unless the accused can show why or how they can be managed with a less onerous sentence. But there's no standard prescribed within the section, nor is it stated who has the burden within that framework. So you have made the finding of dangerousness as mandated by the changing of the "may"—the permissive—to the "shall", which is part of Bill C-2 as well, and then you are not offering any guidance as to who has the burden of professing what should be the appropriate sentence once the finding of dangerousness has been made and on what burden. You're not only placing the burden on the accused earlier, but you are leaving it open and vague in the secondary stage regarding what finding needs to be made.

The concern goes further when you get into concerns such as the right to silence, which I know has been discussed at this committee on prior occasions. There have been answers offered such as the example of the Ontario Court of Appeal's R. v. Grayer decision, which shows that while clinging to the right to silence is something that an individual subject to a dangerous offender hearing can do, that individual does so at their own peril.

● (0910)

That's all well and good to say in the confines of a crown-must-prove dangerous offender, but once you reverse the onus onto the accused, you are mandating that if they in any way, shape, or form assist the fact-finder in determining what the appropriate sentence is, they give up their right to silence. That is a further concern.

The Chair: Completed? Thank you.

We will now hear from an individual, Mr. Doob.

Dr. Anthony Doob (Professor, Centre for Criminology, University of Toronto, As an Individual): Thank you very much for inviting me to appear before you.

At your request, I'll focus most of my specific remarks on the aspects of the bill that deal with dangerous offenders. But I will place those specific remarks in the context of the concerns that I have with the bill as a whole.

I'm a criminologist, and for the last 35 years have carried out research on a number of different aspects of the justice system, most notably, in this context, on sentencing, imprisonment policies, and public attitudes concerning the criminal justice system. More recently I've been examining the pretrial detention process here in Ontario.

I would like to start, however, by explaining how I approached my analysis of the various aspects of Bill C-2. My starting point is not different from what I expect to be that of everyone in this room. I would like to be able to support policies that would be effective in reducing crime, in particular violent crime, in our communities. The rate of violent crime is, at the moment, relatively stable, which provides, I think, an ideal time for developing rational and effective approaches to crime.

The second general principle that guides my thinking on some aspects of this bill is that sentences should be proportionate to the seriousness of the offence and the offender's responsibility for that offence. Most of the research that I have seen on public attitudes concerning sentencing would suggest that my views on this issue are widely held. I don't expect that many of you would argue against proportionate sentences.

It is in the context of these two concerns—effectively addressing violence in our society and handing down punishments that are proportionate to the seriousness of the crime—that I examine Bill C-2. It largely fails to address crime effectively and fails to ensure that sentences are proportionate to the harm that's done.

The title of the proposed act, the Tackling Violent Crime Act, makes a statement and a promise. The minister referred to the desire to tackle crime and make our communities safer as the primary justification for the bill. Similarly, the preamble of the bill talks about "enacting comprehensive laws to combat violent crime and to protect Canadians". Although the preamble suggests that the laws would ensure that violent offenders are kept in prison, it is notable that there is not a reference to fair and proportionate sentences that focus on the harm, on what the offenders have done.

Let me give some examples of provisions in this act that have little to do with protecting us from violent crime. The mandatory minimum penalties for firearms offences have been discussed extensively. I won't spend much time talking about them here. But perhaps the most patently absurd mandatory minimum sentence provision in this act is related to the third impaired driving offence, moving it from a minimum of 90 days to 120 days. Aside from the added but minor incoherence that this provision injects into the overall sentencing structure of the Criminal Code, this provision will do nothing to reduce the likelihood of impaired driving. The suggestion that there is some group of people who would be deterred by a 120-day sentence but not by a 90-day sentence is certainly something that most people would question. More importantly, as long as you—you as the Parliament of Canada—suggest ineffective solutions, the motivation to do something effective is blunted.

Similarly, the bill has provisions creating reverse onus provisions at bail hearings for certain firearms offences. These provisions imply that crown attorneys are either ineffective or unmotivated when faced with a case involving an offender with a serious offence involving firearms. The proposal ignores the fact that in the context of stable or falling violent crime rates, the number of people detained in provincial institutions now awaiting trial rivals—and in some provinces, like Ontario, dramatically exceeds—the number of people who are serving sentences. There's no systematic evidence that I've been able to find that suggests that these aspects of our laws need such change.

If provisions such as these are merely ineffective, what's the concern? I remind you of my starting point. We have a relatively stable rate of violent crime at the moment. By advocating provisions like those contained in the bill, you successfully avoid anything the Government of Canada might do that would be effective in reducing violent crime in Canada.

● (0915)

Bills such as this one imply that the solution to serious crime in Canada lies in small changes in the criminal law. In effect, the message you give is that you have addressed the violent crime problem. In fact, there's almost nothing in this bill that will have any impact on violent crime. So not only are you distracting yourselves from changes that will have long-term positive impacts on our society, but you are doing things that will use resources that could be better spent on measures that would address crime.

Second, as I have suggested, you are at best ignoring the principle of proportionality in sentences. The changes in the dangerous offender provisions in the Criminal Code, then, can be seen in this context: as provisions that, by definition, move us away from sentencing offenders for the wrongs they have committed, and that suggest to Canadians that the criminal justice system is capable of doing something that it cannot do with any degree of accuracy—identifying those who might, in the future, commit serious acts.

I'll start with the problem of prediction, a central feature of this legislation. The legislation is designed to incapacitate people who are seen as dangerous to our communities for periods of time that are longer than what they deserve given their offences. Most of those who have been designated as dangerous offenders would have been given very long sentences on the basis of proportionality. Simply put, the proposal is that more people be sentenced not for what they have done but for what we think they might do in the future. The changes you are considering might be seen as an attempt to take some of the worst penitentiary inmates and try to ensure that they would be designated as dangerous offenders because they might offend in the future.

Let's look at our ability to predict future offending. One study of penitentiary inmates divided those being released into five groups according to their measured risk. The worst of these groups, about 22% of them, were followed for a period of three years after they were released, and about half of them did not end up back in federal custody within that three-year period. Said differently, a prediction model, which was the best Correctional Service of Canada could come up with, such as the dangerous offender provisions would have made the wrong decisions for most of these worst-off offenders.

You might be saying to yourself, so what? They've done something bad, and under the proposed set of amendments, they would have to do bad things three times before they would be presumptively considered to be dangerous offenders. The problem with the provisions is that they imply that this group of offenders is responsible for a substantial portion of crime. This, however, turns out to be a myth. Violent crime is unfortunately much more widely distributed than most people think.

When you look at these offenders, what you find is that the worst offenders in our system, those who are released from penitentiary on statutory release, are responsible for a minuscule amount of crime. But by addressing the problem of violence in our society as you have in this bill, you keep suggesting repeatedly in this bill that these kinds of changes, these relatively small changes, will have a large impact. We know that they won't, and unfortunately the suggestion that's being made is that they will.

So let's go back and look at the bill. It states, of course, that for a person who's committed a primary designated offence for which it would be appropriate to serve a two-year sentence, the dangerous offender status can be presumed unless the contrary is proved on the balance of probabilities. Implicitly then, it makes a prediction about this offender's future, a prediction that we know is seriously flawed. What this means, of course, is that the person who has two previous convictions of assault causing bodily harm or robbery, as was suggested, that gave him a penitentiary sentence in large part because of an extensive record for perhaps property crimes is in jeopardy of dangerous offender designation. A third fight or minor robbery in which someone is hurt puts him in the category of being a presumptive dangerous offender. Given what he has been convicted of, we now tell him that he must prove that the presumption has not been met.

My concern is twofold. First, given that the offender has just been convicted of a serious violent offence, how exactly will he or she prove to the court on the balance of probabilities that he or she is not dangerous? Stated differently, it's a presumption that effectively cannot be successfully rebutted. And of course this offender is facing an indefinite sentence that will be first reviewed in seven years, a sentence that would be almost certainly, in the case I've just described, not proportionate to the offence itself. In addition, once again, it implies that this is going to keep us safe from dangerous people.

● (0920)

In terms of the benefits of incapacitation, we have to remember that the dangerous offender provisions only protect us to the extent that a person who would normally have received the regular sentence now is incarcerated for longer. But our hypothetical offender will of course be in penitentiary for quite a few additional years. Is this the best we can do in order to reduce violence in our community?

The Chair: Mr. Doob, I would just ask you to finish up. You have about ten seconds.

Dr. Anthony Doob: Yes.

What we know is that the cost of keeping that offender in our penitentiaries is approximately $90,000. What we have to ask is whether that $90,000 is best spent on this or on other kinds of measures that this Parliament therefore is ignoring.

Thank you very much.

The Chair: Thank you.

I want to apologize to Mr. Rady and Mr. Roitenberg. You're the first presenters who have finished under the clock. You caught me off guard a little bit. Congratulations.

We do have a third witness. They're presently in transit; they should be here just before the end of your presentation.

I would ask Ms. Joncas and Ms. Pate to go ahead.

● (0925)

Ms. Lucie Joncas (President, Canadian Association of Elizabeth Fry Societies): Thank you for inviting us.

It is CAEFS' position that the proposed new legislation is not only unnecessary, because all the behaviours the government professes to be addressing with this omnibus bill are already addressed by the current Criminal Code and are in effect, but we're not fooled by the sorts of smoke and mirror approaches aimed at creating a public impression that the government is responding to public need when in fact they are creating or perpetuating a false impression that there's a need for such repetitive or more harsh laws. The measures being proposed are unnecessary and a waste of hard-working taxpayers' money to use public and government time and resources to develop new laws when the moneys could be better spent on services that will benefit all Canadians.

We don't accept yet more focus on longer and more punitive sentences at the expense of public education, health care, and social services. The government must stop using prisons as a substitute for mental health services, public housing, or shelters for women escaping violence.

We object to the government misleading the public as part of what the Prime Minister has described as a game of politics.

I would like Ms. Pate to address something that we're very concerned about, and that is the detention conditions and how the dangerous offender provisions might affect women.

Ms. Kim Pate (Executive Director, Canadian Association of Elizabeth Fry Societies): My focus, as my president, Maître Joncas, outlined, will be on the dangerous offender provisions specifically and the potential impact of what's being proposed.

The only surviving young woman who was declared a dangerous offender at one point was supposed to be with us. Her name is Lisa Neve. She was declared a dangerous offender at the age of 21. She then spent six and a half years in prison, until her dangerous offender designation was overturned. When it was overturned, the judges who overturned it determined that she was essentially labelled a dangerous offender on the basis of what she said, what she thought, what she wrote about what she thought, and not about what she did.

I suggest to you that with these provisions, more young women would face that situation. She was a young aboriginal woman, who I have known since she was 12 years old. The reason she is not here today is because her family asked her not to come and publicly expose the family yet again to what has happened to her even since she's been out of prison. She's been out over eight and a half years. She now works with young people; she mentors young people. She's doing very good work. Some of you, I know, have heard her speak in other contexts. But even when it's a positive story about her, her family is hounded. They have had to move several times as a result of the media attention, even though she is no longer declared a dangerous offender.

The first woman declared a dangerous offender committed suicide in the prison for women in Kingston. Since then, there have been others who have been threatened with a dangerous offender designation. These cases we have intervened in, and we will continue to do that. One such young woman who was fearful, who had been told she might likely face a dangerous offender designation, died on October 19 in the prison for women in the Grand Valley Institution in Kitchener-Waterloo. She was a young woman who, at the age of 19, had been transferred into the adult system, again on the basis of much of what she said, what she threatened, what she yelled, and in some cases what she did—although our examination of her record shows that most everything she did that might be considered violent actually occurred in a prison setting.

We actually now are accumulating more cases like this, where we're seeing individuals come in on relatively minor charges and based on the conditions of confinement they are subject to, the treatment they receive in those prison settings, they are accumulating charges.

Another young aboriginal woman started on a three-year sentence is now doing over 25 years. This young woman started, her family reports, at the age of 15. She was throwing crab apples at a postal delivery worker, which is obviously not something anybody wants to face, but it's not something as a result of which they anticipated six years later receiving their daughter home in a body bag.

I first met this young woman, and she looks like this. I saw her through a meal slot in a segregation cell in one of the prisons. When I first tried to meet her, I couldn't; I was denied access, as were lawyers who tried to meet with her. We now know that part of the reason we were denied access appears to have been that she had been assaulted. That was before she was in the prison where she eventually died.

I encourage this committee to really examine the violations that the Canadian Human Rights Commission has cited Canada for, that the United Nations Human Rights Committee has cited Canada for, that we have tried to raise with the current Minister of Public Safety, who has not met with us, and that we have tried to raise at every senior level of government, and certainly with the Correctional Service of Canada. We have requested that the human rights violations and charter violations that we have cited be investigated. If they have been, we are not aware of the results of those investigations, even though we have requested them. Before Ms. Ashley Smith died, she asked us to request them. Before she died, in the last release of information we received from her, she was not even permitted to have a pencil to sign that release of information. We had to get a correctional officer to verify that she wanted us to look into this information.

I strongly urge you to look at the conditions of confinement that young woman was in, without anything in her cell save a security gown. There was not a mattress, not a blanket, nothing else in her cell for, as far as we can tell, approximately one month. I last saw her on September 24 of this year in that segregation cell. You know that four officers, possibly more, will be charged in relation to the treatment she received at the hands of corrections.

● (0930)

We have urged this committee in the past—it was not this particular committee, Mr. Chair, so I don't want to in any way intimate that it was you to whom we had spoken—to fulfill the mandate of ensuring that human rights are protected in this country. We urge this committee, before you go to clause-by-clause on this bill, to actually go to the prisons and see the conditions of confinement that individuals who receive these designations will be subjected to. I will take you to see the conditions of confinement in the women's prisons. You have an obligation, I would suggest, as parliamentarians who are implementing this legislation and who are going to be voting on it, to actually see the results of what you will be doing. I would encourage you to come with us to see those conditions. I would encourage you to exercise your right as parliamentarians to have access, and to also seek access to the men's prisons. It's been some time since I worked in the men's prisons, but I would suggest that if you look at the issues outlined by the correctional investigator, most recently in the deaths in custody outlined in their annual report, there are many issues with which you should be very concerned.

We consider the regimes under which women are serving their sentences right now, under what's called a management protocol, to be unlawful. I encourage you to examine that. I encourage you to see what it's like to see disembodied groups of eyes every time you go to a prison, and then what it's like when you actually see people being denied access to their counsel, being denied access to us. And it's our legislated mandate to go and provide that opportunity for individuals to have their needs met.

I encourage you, I urge this committee, urgently, to examine the conditions of confinement that those who will be subject to the dangerous offender provisions certainly, and likely some of the others, will be subjected if and when this bill is passed.

Thank you.

The Chair: You still have about a minute and a half, if there's anything else you want to add.

Thank you.

To our fourth witness, welcome. I understand you had a little bit of difficulty getting in this morning. I certainly want to welcome you to the committee.

You now have ten minutes to make your presentation. The other three groups have already presented. Afterwards we'll turn to members for questions.

[*Translation*]

Mr. Richard Prihoda (Lawyer, Association québécoise des avocats et avocates de la défense): I would like to thank the committee on behalf of the Association québécoise des avocats et avocates de la défense, and to express my own thanks, for giving us the opportunity to offer our point of view on certain parts of BillC-2.

Our association believes in the supremacy of the Constitution, in the rule of law, and in the separation of executive, legislative and judiciary powers. It believes in our justice system that is based on the presumption of innocence and that requires the state to establish guilt beyond a reasonable doubt, after a fair and equitable trial, before an independent and impartial judge who is knowledgeable of the law and of the realities of his community.

We do not have a great deal of time today to cover all the significant changes that Bill C-2 would bring about and that we would like to comment on. We have therefore prepared a short document that highlights some of our concerns. This document will be distributed in due course.

I now refer to the amendments that deal with mandatory minimum prison sentences. In a word, we are suggesting that you amend the Criminal Code to list the aggravating factors that would result in more severe punishments, and that you not deal with mandatory minimum sentences.

With regard to the amendments dealing with the age of consent to sexual activity, there seems to be a contradiction between, on the one hand, the Young Offenders' Act that requires everyone to be accountable for his or her actions from the age of 14, and, on the other, the fact that a person of the same age is not able to consent to a non-exploitative sexual act.

I would like to take some more time today to speak to you about the amendments dealing with conduct when a person is impaired by alcohol or drugs. Bill C-2 makes significant changes in this area. Presently, section 254 of the Criminal Code allows peace officers who have reasonable and probable grounds to believe that a person has committed an offence to require that person to provide a breath sample in an approved instrument. Furthermore, under section 258, the Crown can make certain legal presumptions to facilitate the prosecution's work. Persons arrested under section 254 must comply and must provide the required breath samples if the samples are collected in an approved instrument.

The Alcohol Test Committee recommends approved instruments to Parliament. This committee—and I will shortly provide you with documentation—also conducts exhaustive tests before recommending to Parliament that an instrument be approved. After these rigorous tests and as the result of the committee's recommendation, Parliament accepts an instrument. This same committee makes recommendations to police services and to provinces, who are responsible for maintaining the devices and for all the programs that have to do with breathalyzers such as training, the courses given to qualified technicians, and so on.

In Canada, laboratories of three kinds are responsible for advising provinces and police services on matters of forensic science. These are the RCMP laboratories that serve eight provinces, the laboratory in Ontario, and the forensic laboratory in Quebec. It is important to understand that programs are not uniform across Canada. Maintaining these devices remains the responsibility of police services.

In one recent case, we found that there was no maintenance program for the Intoxilyzer 5000C devices used by police in Montreal. They were purchased in 1996. They are repaired if they malfunction, but, if they do not, their performance is not checked.

● (0935)

That goes against the recommendations of the Alcohol Test Committee that advises Parliament. So, the Montreal police is not following the recommendations of the Alcohol Test Committee, nor those of the manufacturer, concerning the maintenance of the devices.

After my remarks, Mr. Jean Charbonneau will provide you with more explanation of the legal and technical considerations. Though the case is not over, the legal community in Montreal has concerns for natural justice when these devices are used.

If BillC-2is passed in its present form, the situation will be even worse, because it removes our ability to present evidence to the contrary, as we can today. The Supreme Court of Canada has held that, given that it is possible to present evidence to the contrary, the presumptions of the Criminal Code are reasonable.

Our position is that if the bill is passed in its present form, it will no longer be possible to present evidence to the contrary, and the presumptions will be almost impossible to contest. It is almost impossible for an accused to show that the device was not working properly on the day when he provided samples. We will then be in a situation where thousands of people will provide samples, because they have no other choice. There will be a presumption of guilt and it will be almost impossible to present evidence to the contrary if the bill is passed in its present form.

We may present evidence showing that the device was possibly not reliable, or that there were perhaps errors on the day when our client provided samples. But the Supreme Court of Canada's 2005 decision in the Boucher case defines evidence to the contrary. The definition does not include speculative evidence. We can show that the device is not reliable and that its results cannot be relied on today. But since this is not sufficient evidence to the contrary, we cannot present it, and we certainly will not be able to after Bill C-2 is passed.

Furthermore, the present situation...

● (0940)

[*English*]

The Chair: Mr. Prihoda, you have about two and a half minutes left. Did you want Mr. Charbonneau to speak?

Mr. Richard Prihoda: Yes. Thank you very much.

[*Translation*]

Mr. Jean Charbonneau (Expert witness, Association québécoise des avocats et avocates de la défense): First, thank you for hearing us today. Our apologies for being late. Unfortunately, we were directed to another building; that is why we were late.

I am not a lawyer, but I am an expert witness. I am called upon to testify in impairment cases all the time. So I am well aware of BillC-2.

The problem I see with this bill is that we must first understand that when breathalyzers began to be used at the end of the 1960s, they were a compromise. A breathalyzer does not show alcohol levels directly. It uses statistics to establish a credible level of blood ethanol.

There are a number of problems linked to the use of a breathalyzer. Even under our present legislation, there are people who, at levels close to the legal limit, are not guilty. Because their physiology does not match the calibration of the machine, they would be found guilty without question if they were not able to present evidence to the contrary.

Even at present, generally speaking, defence counsel and expert witnesses are fighting to ensure that police forces are subject to checks and balances. Determining blood alcohol levels indirectly already creates prejudices in the minds of the public. Not only are we fighting that, but you will also notice that, in the Criminal Code, while it is a crime to drive with more than 80 mg of alcohol in the blood, there is nothing that requires police forces to maintain and check the reliability of the machines they use. The Alcohol Test Committee and the Canadian Society of Forensic Science have made recommendations, but we have realized that in a number of cases—we have just gone through one with the Montreal police—people did not care in the slightest.

If a bill like C-2 is passed, with no requirements and no mechanism to force police to make checks, because of a desire to put teeth into the bill, you have to realize that it will be just about impossible to contest. Scientifically, in my opinion, it will be impossible, for all practical purposes, for people who fail a breathalyzer test when they are arrested to show that the machine was not working. At most, you could show that its reliability was in question, but it is almost impossible. A blood test should be taken at the same time as the breath sample. This is very important to understand because we are not talking about a direct measurement. It does not measure the blood directly, it calculates.

I will stop there, because I am being told that the time is almost up. When breathalyzers were introduced, the Criminal Code even provided for keeping the sample, as is done with blood, so that the accused would be able to have objective evidence to the contrary. That was never put into effect, and it is certainly not provided for in Bill C-2.

[*English*]

The Chair: Merci, Monsieur Charbonneau.

Madame Jennings.

[*Translation*]

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Thank you, Mr. Chair.

Thanks also to all the witnesses who agreed to appear at such short notice, and, in spite of that, made presentations dealing with several very important matters.

Ms. Pate, I made a careful note of your request for the committee to go to the prisons where those designated dangerous offenders, both male and female, are incarcerated.

My next question is for the Canadian Council of Criminal Defence Lawyers. Given your presentation and your analysis of the provisions in Bill C-2 that deal with the dangerous offender system, I would like to know if your association considers the provisions to be constitutional, that is in conformity with the Canadian Charter of Rights and Freedoms.

● (0945)

[*English*]

Mr. Andy Rady: If I may, I think that with the first case that comes up like this you're going to see a charter challenge, and that's a charter challenge that will probably go all the way to the Supreme Court of Canada. And I would think that whatever lawyer gets that first case will be chomping at the bit to bring a charter challenge on it.

It's an unclear area. It's not the same as a reverse onus in terms of the finding of guilt. Because the penalty is so severe and the consequences are so severe, you can be completely assured that it will be challenged under the charter.

Hon. Marlene Jennings: Are you aware that the Bill C-27 that was brought before the House of Commons and that the justice committee had begun to examine last spring is not identical to the Bill C-27 we find in Bill C-2? The government did bring amendments, particularly on the issue of the sentencing, and it has, as we call it, restored the court's discretion in terms of sentencing. So it's not just an indeterminate sentence.

Mr. Andy Rady: There's no question that it brought back what was the old regime prior to what we have in the Criminal Code now, where the judge finds dangerousness and then determines whether it's an indeterminate or a definite sentence. The difficulty is that that doesn't change the issue of the reverse onus. If you're presumed to be dangerous after the three strikes, so to speak, the onus is still on the accused to show why they may not get an indeterminate sentence.

So I don't think that changes the argument in terms of constitutionality. Certainly it provides for potentially what one might think is a lesser penalty, but the test is still the same. It's a reverse onus on the accused on the balance of probabilities.

Hon. Marlene Jennings: But when the judge had that authority previously, was not the burden...? I'm trying to understand this. I'm not a criminal lawyer.

Previously, if the judge had the authority to order an indeterminate sentence, or to order a long-term offender supervision order, or to order a sentence that an individual found guilty for a third time of the same kind of offence would have been liable for, was it not at that point that both sides had to bring evidence for one or the other option?

Mr. Andy Rady: The onus was always on the crown to establish what the sentence should be. Here there's the presumption of that first finding, which is the dangerousness. There used to be a second part of the test, which was then to determine the sentence. Well, here there's a presumption of dangerousness, and the reverse onus is with respect to that finding, not with respect to the sentence. So there still would be a judicial discretion, but it's the onus on getting around the finding of dangerousness that has now shifted to the accused, where in the past that burden was on the crown.

Hon. Marlene Jennings: Okay. Thank you.

If there's time left, I will share it with Mr. Bagnell.

The Chair: You have two and a half minutes.

Hon. Larry Bagnell (Yukon, Lib.): I wanted to pursue the same line of questioning with both the criminal defence lawyers and with Mr. Doob.

First of all, reverse onus already exists in the code in practice. Secondly, these changes that Ms. Jennings talked about make it at least more comfortable for me. The crown does not have to pursue dangerous offender; they just have to make sure they've considered that option. And secondly, the judge can determine what sentence there should be.

Do you not think that either the crown attorney or the judges, for whom I'm sure we all have great respect, would use those provisions to ensure that the provision of proportionality was not abused, and that a proportional sentence was provided, and indeed, that if a dangerous offender hearing wasn't required the crown attorney wouldn't proceed with it?

Perhaps we could start with Mr. Doob and then the criminal defence lawyers.

● (0950)

Dr. Anthony Doob: My concern is that the whole dangerous offender regime is preventive detention. If we were satisfied with a proportionate sentence, we wouldn't need a dangerous offender designation at all. We have the dangerous offender designation and procedures in the Criminal Code at the moment, but I think I would go back to what was just said, which is that under Bill C-2 as I read it, when the court has found the person to be a dangerous offender, yes, there are those choices, but to read proposed subsection 753 (4.1), "the court shall impose a sentence of detention in penitentiary for an indeterminate period unless", so that there's still a presumption in favour of an indeterminate sentence. So yes, there's the choice, but the judges by this point have already in effect gone past proportionality; they've said they're going to sentence this person for a sentence they don't deserve on the basis of their previous convictions and this particular offence. So I think we're past proportionality, and we're into preventive detention.

Hon. Larry Bagnell: And if you add to that—

The Chair: Mr. Bagnell, we'll have to perhaps get your question in on the next round. We're on to the next questioner.

Monsieur Ménard.

[*Translation*]

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

I have four or five questions. I will start with the Canadian Council of Criminal Defence Lawyers.

I would like you to talk to us a little about the list of offences. You told us that the net was being cast too wide. In anticipation of possible amendments during clause-by-clause study, could you please tell us specifically, with concrete examples, if we should withdraw some of these offences. How should we rework the list?

You also told us that, in clause 53, the question of the burden of proof was not clear. The Crown has to provide its opinion of the danger posed by the offender. But when the time comes to determine the penalty, it is not clear who has the burden of proof. Could you talk about this again, so that if we propose amendments during clause-by-clause study, we will have a clear understanding of the matter?

I was very intrigued by the case law you cited. Could you give us the reference so that we can look it up for ourselves? I am referring to the possible incompatibility between, on the one hand, the requirement for the person to defend himself in order to prove his innocence when a dangerous offender designation is made and, on the other hand, a decision of our courts on the right to remain silent.

These are my three questions for you. I have two others for Mr. Charbonneau, the expert witness.

[*English*]

Mr. Evan Roitenberg: Thank you.

First, regarding the offences, if you look at the primary designated offences, I don't think it's necessarily a situation of removing those that are offered there. It's a question of looking at the practical aspects of what offences are there and the effect they might have within the confines of the three predicate offences leading to a reverse onus. I think we can all agree that there are certainly assaults with a weapon or assaults causing bodily harm or robberies or kidnappings that carry with them an extreme level of dangerousness, but if you look at, practically, assault causing bodily harm as an offence or assault with a weapon, you can have offences within the confines of those sections as defined and convictions that are not dangerous and are not as serious as others. If you remove from consideration the factual underpinnings of the offence and simply go from the conviction and sentence received to a presumption of dangerousness, you're completely missing the point. That's why I think the net is cast too wide. It's not the presence of the offence; it's the fact that you are ignoring the factual underpinnings that gave rise to the conviction that I see as problematic.

You mentioned the case law that I referred to. You will recall that Mr. Douglas Hoover testified before this committee on October 31. He's a lawyer with the Department of Justice, in policy, and he was answering questions. I believe he was answering a question from Mr. Lee regarding the right to silence and the effect that it may or may not have within the sentencing milieu. Mr. Hoover answered the question in relation to a case called Grayer from the Ontario Court of Appeal. Grayer was a decision, I believe, in 2003 that dealt with the question of whether or not the dangerous offender provisions and the mandating of the individual meeting with the state psychiatrist or the state authorities to prepare the report and the need for him or her to testify at the hearing or give evidence at the hearing infringed on their right to silence. The Court of Appeal stated—and I paraphrase, of course—that it might be an infringement of the right to silence per se. An individual can give up that right or stand by that right, but they do so at their own peril. If they don't wish to provide evidence at the hearing in the face of the evidence that the state has mustered, then the chips may fall where they may. That case, of course, was decided within the framework of the state having to prove dangerousness.

What I'm suggesting to this committee is where you move to the reverse onus, you are in effect mandating that that convicted person give up their right to silence, because if they don't, the judge sentencing will be lacking any evidence other than the presumption that would exist under subsection 753(1)(1.1).

● (0955)

[*Translation*]

Mr. Réal Ménard: So this is one more argument supporting the contention that these provisions are not constitutional. Eventually, if there was a court challenge, this second argument could...

Tell us about the burden of proof in section 753. I also want time to ask Mr. Charbonneau my questions and there is no way to get around our chair about that.

[*English*]

Mr. Evan Roitenberg: I will simply say, in answer to your question, yes, it would be an additional ground of unconstitutionality.

As far as your other question, if I can just say it briefly so you have time left, when you get to the stage where a finding has been made of dangerousness, you then move to the actual sentencing stage, which is, what do we do with the person? According to the amendments, what we would have then is a further presumption for the indeterminate sentence, unless it can be shown that the individual can be managed in the community. What's not prescribed within the legislation is on what standard one would have to prove that the individual could be managed within the community. Would it be raising a reasonable doubt? Would it be on a balance of probabilities? It doesn't state who has the burden, but obviously it would be the accused because the state would simply like to maintain the presumption once they get to that stage. So that's where the further problem comes in.

[*Translation*]

Mr. Réal Ménard: Great. I think that I still have a little time, Mr. Chair. A minute? OK, thank you.

Are you going to suggest concrete amendments in your document that we will read once it becomes available? I assume that it will be in both languages. Basically, you are saying that, under the Criminal Code, police officers have no requirement to maintain the devices that can lead to a person being convicted or not. I would like to know what you suggest as an amendment. Do you have one to propose to us yourself?

Mr. Jean Charbonneau: At the moment in Canada, the Highway Safety Code, whether in Quebec or in other provinces, has standards for the use of detection devices. As I mentioned, in the 1960s, an accused was at least allowed to provide a sealed sample so that it could then be tested, as is done with a blood sample. With people whose level of impairment has caused injuries or death, the blood sample is usually put into two vials, one for the defence and one for the prosecution.

Breathalyzers provide, I repeat, an indirect measurement which is bound to give false positives from time to time because it is simply that, one measurement. These days, you can base evidence to the contrary on the person's credibility, but that will no longer be possible if the bill becomes law. In addition, the police have no requirements to maintain or check the devices. For a breathalyzer, there is only one control test, and even it can vary with different scientific approaches. This is 100 mg of alcohol per 100 ml of blood. With other values, we have no idea about the device's performance. But the Crown will have the presumption of accuracy that is, for all intents and purposes, impossible to challenge. If you want to show that the device is not working, you will have no scientific way to do so.

● (1000)

Mr. Réal Ménard: Would you like an amendment to the code?

Mr. Chair, now I know that you are a child of Mike Harris' common sense revolution. I thought you might be able to let me have just a minute more.

[*English*]

The Chair: I actually did grant you an extra 35 seconds, Mr. Ménard. And I'm actually a son of Peter Dykstra.

Mr. Comartin.

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

Thank you to all of the witnesses for being here.

Mr. Rady and Mr. Roitenberg, Mr. Cooper, who is a crown prosecutor, was here the week before last, and he described the system as one in which when he brings his application he's really proving long-term behaviour that's antisocial, leading the court to an inevitable conclusion that this person will continue to remain violent and a threat to society.

By inserting, as we have here, the reverse onus to a list of specific charges, are we changing those criteria? Will the courts begin to simply say that someone has committed these three offences, that they've been designated as violent offences whether they are in fact or not, and then will they move away from the behaviour test and move to just a rigid formula that says these are the three?

Mr. Andy Rady: I think that will occur because all the crown has to show is that it's the third offence in those cases, and then the burden shifts to the accused to go and show that he didn't have...or he's not dangerous for whatever reasons. That might be very difficult. There's this presumption of three convictions against him, and now he's going to have to marshal the kind of evidence he can to show that he shouldn't get an indeterminate sentence for the following reasons, and that he's not dangerous. I think that's going to be a difficult situation as well from a resource standpoint.

Mr. Joe Comartin: With regard to resources, in the paper on the weekend there was a case that was heard last week in Ontario, I believe, in which a person was not designated as a dangerous offender because the correctional services do not have the ability to treat a person who has fetal alcohol syndrome. A large number of the people who are in long-term incarceration suffer from that condition.

Ms. Pate, I may want to ask you about this as well. Is it possible that we're going to be faced with a number of these types of cases for other types of medical conditions, for which we will not be finding the dangerous offender designation even under existing legislation because of that kind of problem—that we do not have the resources in the prison system to treat the people?

Mr. Andy Rady: I think that might be a bit unusual. In the cases that I've done—and I've dealt with some dangerous offender cases—it's generally well known that no matter what the problem is, the person is warehoused. The reason for that is the presumption that they're not going to get out perhaps ever, or for a long time. So resources are given to those with shorter cases. That may be one that has fallen within the cracks. I think it's a difficult situation when we don't have the resources for people in the penitentiary. We're really not there trying to make them better, especially when they've been designated as a dangerous offender.

Mr. Joe Comartin: Mr. Rady, if the state intentionally does not spend the money to provide those services, we then have the courts saying, "If you are not spending the money to provide those services, we're not going to find these people dangerous offenders." That's a risk we're faced with right now because of this decision.

Mr. Andy Rady: That may be a risk because of the decision. The difficulty is that the initial test for dangerousness really has nothing to do with resources. That may come into more whether one applies an indeterminate sentence—

Mr. Joe Comartin: Well, no, it very much has to do with resources. If the resources are there in society to treat the person, then they can very well make the determination that dangerous offender should not apply.

Mr. Andy Rady: That's right, because they may be treated when they're in jail, and if they're treated in jail then they may not be so incorrigible that they can't be released at some time. That's where it comes into it, I believe. The question is on resources, the resources now on both ends of the spectrum, from the point of view of both the crown and the defence in terms of fighting the cases. Then, if you have more people in there, there will have to be some resources for the prison system, because as we all know, our prisons are going to get busier than they've ever been.

Mr. Joe Comartin: And if we don't provide those resources, our judiciary is going to start making determinations.

Mr. Andy Rady: I would think so, because that will be raised by the defence.

Mr. Joe Comartin: Going back to you, Mr. Roitenberg, with regard to a charter challenge and the argument that other parts of the code provide for reverse onus, so use the organized crime sections in terms of confiscating assets, is that a valid analogy with the type of reverse onus we're putting in here?

● (1005)

Mr. Evan Roitenberg: Generally speaking, if you start from the perspective that reverse onuses prima facie fly in the face of the charter, they can often be shown, and have been shown in other charter challenges on other sections, to be necessary in the circumstances: what they are trying to accomplish justifies the imposition of the reverse onus. But in a situation like this, I think it would be hard to justify when there's absolutely no good reason for doing it in the dangerous offender setting.

If an individual is a danger, allow the prosecution to call its case, prove its case, and have the appropriate designation made by the court. To simply cut corners in a situation where it's the individual's third time, what's the purpose behind it? It's not as if we have prosecutors or individuals across the country screaming and yelling that we have an un-meetable burden here as prosecutors. That's not the case. It's being done for expediency and nothing more.

In the case of organized crime, where you have the reverse onus—there have been challenges to it, and there will continue to be, I expect—there is a situation that's being justified by the government that we have no other way of proving certain things, therefore we have to resort to the reverse onus. But that's not the case here.

Mr. Joe Comartin: I'm looking, I guess, for an academic, for somebody who's actually written extensively on the reverse onus. Are you aware of anyone who's a constitutional or charter expert specifically on this?

Mr. Evan Roitenberg: Not off the top of my head. I think some have come out on other provisions, but nothing touching on this, since it's so relatively new.

Mr. Joe Comartin: Okay, thank you.

Ms. Pate, I want to go back to the issue of what's available in the prisons with regard to dangerous offenders, and to ask specifically about women. In the case last week that I just spoke about, it was a male person charged. Are we faced with the same problem with the women, I think 18 or 20, who have been subject to the dangerous offender designation?

Ms. Kim Pate: Actually, there have only been two women subject to a dangerous offender designation. There are none currently, but there are a number of long-term supervision orders.

Mr. Joe Comartin: Right, the rest are long-term.

Ms. Kim Pate: Part of it is that we have intervened in those. Of those who have been designated, though, the challenge is that the context is often determined by those who we're also relying on to determine what resources are available to meet the needs of that individual. So when the needs of the individual are being determined by the very prison system where they've accumulated most of their charges, I think there have to be some obvious questions about the validity of a reverse onus in that context.

In terms of the prison conditions, though, and the issue you've raised, our experience is that those who are seen as having the most challenges end up in the most austere and, I would argue, also some of the most brutalizing, conditions. That's part of why I've urged the committee to go and see those conditions.

The reality is that even the most well-intentioned of correctional staff, whether they be senior or junior, know that in fact they have no ability to actually monitor individuals, other than in camera cells, in isolation, in some of the most inhumane, dehumanizing situations. Arguably, if our concern is for public safety, certainly we wouldn't be putting them there. Our organization is not arguing for more resources in that context. In fact, we need to see more resources in the community, because the fact that women, particularly women with mental health issues, are the fastest-growing prison population is indicative of the problem of trying to inject into a prison setting.

The Chair: Thank you.

Mr. Moore.

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

Thanks to all the witnesses for appearing.

I want to take some issue with a couple of points that were made. The assertion has never been made that somehow Bill C-2 is the be-all and end-all to fix everything that ails the criminal justice system. As a matter of fact, our government recognizes that there's a lot of work to be done in the criminal justice system, and that the solution to preventing crime—I think it was Professor Doob who mentioned this—is going to be multi-pronged. But I would hope that there would be some acknowledgement.... We've acknowledged that there have to be resources and that there has to be support for youth at risk. We've acknowledged that there have to be resources for prevention, including police. But we also acknowledge that there have to be some changes with the Criminal Code.

After hearing from witnesses, I'm left a bit with the impression that the Criminal Code must be absolutely perfect as is. That would be the impression I was left with—that it needs no changes whatsoever. I think that if we ask Canadians, and even those of us in this room, surely the Criminal Code does from time to time need to be revised, need to be amended in ways that better protect Canadians, which is our fundamental priority.

I have two questions. First, the mention of proportionality has come up numerous times in relation to what was in Bill C-27 and now in BIll C-2 are the dangerous offender provisions.

I think there has been some confusion mixing up what is proposed in this legislation with what is contained in other jurisdictions and which is known as three strikes rules, where for a relatively minor crime someone could get a mandatory punishment. In my view, proportionality is fully respected in this legislation. Number one, it deals with the most serious of offences, the designated offences that are set out. Number two, it specifically targets recidivist behaviour—those who have repeatedly committed these crimes. Numer three, all of the safeguards that one would expect in a modern justice system are in place—safeguards with crown prosecutors, safeguards with defence, the availability of defence counsel, and safeguards with discretion on the part of the judge.

Numerous attorneys general provincially have called for some changes that are made in this legislation. I'm wondering if someone from the criminal defence bar wants to comment on the difference between what is proposed in this legislation and what is in the United States system.

I'll leave it open, because I know we don't have a whole lot of time, but I heard a lot of mention of the offender. All witnesses here today mentioned the offender, but there was not one mention of victims. I believe fundamentally that victims have to play a role in what's happening in our justice system. We've had victims who have said that our justice system is not doing enough to protect them. One way we protect people is that when someone has shown repeat behaviour, and time and time again they have committed the worst acts, the worst acts that are set out in our Criminal Code.... They have not only committed them once, they've committed them twice, committed them several times, recidivist behaviour. Society has told us and Canadians are telling us that it is proportional to limit their rights to protect society.

● (1010)

If everything is looked at through too narrow a scope, we miss the big picture. The big picture is that we want to protect Canadians who want to protect their rights.

I would like some comment, perhaps from the Elizabeth Fry Society, about the stage at which we look at the new victims every day in our system.

Mr. Andy Rady: If I could just begin, we've had the Criminal Code for a long time. Obviously, the Criminal Code needs amendments from time to time when things are found to be problematic in it.

The question that this legislation isn't answering is that we've had this same Criminal Code, and we've had dangerous offender provisions for a long time, and we're not disputing that we have them. Why is it then that now we need them? What is the code not doing? Why has society changed such that we arguably have more gun crime? That's the question that has to be answered. It's not the Criminal Code's fault or the laxity of the Criminal Code, because those sections of the Criminal Code have always been there.

Deterrence is another debate for another time. If deterrence worked so well, we wouldn't have such a murder rate in the United States when they have the death penalty in Texas. I think we have to be careful about judging that.

Your other comment was about the dangerous offender situation in terms of availability of defence. I think that's going to be a problem here. We're not saying that people who are habitual criminals, who are dangerous, shouldn't be locked up, perhaps indefinitely. That's not what we're saying, because we're citizens of the community as well. We're saying that the burden should be on the state. The state has to prove guilt beyond a reasonable doubt, in most cases. We do have some reverse onus, but if we're going to seek to lock someone up indefinitely, as a society, then that burden should be on the society to do that. It can be done, and it has been done, and we do have dangerous offenders. It shouldn't just be based on some mathematical example that says this is your third conviction for more than two years, so you're now designated dangerous unless you can show otherwise.

We won't dispute a lot of things—

● (1015)

The Chair: Mr. Rady, we have about 20 to 30 seconds for Ms. Pate to respond. I just wanted to give her enough time.

Ms. Kim Pate: Thanks.

I think you're well aware that we work with women who are victimized, as well, not just women who are criminalized in the system. It's certainly a concern for all of us that those needs be met.

There's also a concern that this type of legislation is being introduced on the backs of victims as though it will solve those issues. In fact, we know, from what we've seen in other jurisdictions where these kinds of measures have been brought in, that it actually sucks resources out of the very areas that most support victims: social services, health care—particularly mental health services and supports—counselling services, and assistance there. It also sucks resources out of the very supports that provide interventions before someone gets involved in the system, which actually prevent there being victims.

That pretext is absolutely the concern of our organization. It's why we raise the fact that if in fact these issues were being addressed by this kind of legislation, we would not see women being the fastest-growing prison population at the same time crime rates are going down.

The Chair: Thank you, Ms. Pate.

Mr. Lee.

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

In our continuing effort to hit the nail on the head here on charter issues, I'll ask a question to any of the witnesses who wishes to make a quick answer.

If the right to remain silent as a principle of fundamental justice recognized by our law is, in fact, a right, and if that right has existed in a criminal law framework where the state has always had to prove, usually beyond a reasonable doubt, whatever had to be proved, and if the right exists right through the criminal justice procedure from the time of investigation, charge, trial, and sentencing, then doesn't this new presumption practically remove that right to remain silent? Because if you do remain silent, you're done—you're a dangerous offender, subject to a judge relying on the assessment report or some fair-minded crown attorney determining otherwise.

What I want one or more of the witnesses to say—just yes or no—is whether that change in the presumption practically removes for a convicted person the right to remain silent. Are we not looking at a brick wall here as legislators in trying to legislate the removal of what up to now has been called and styled as a right?

Mr. Evan Roitenberg: The short answer is yes.

Mr. Derek Lee: It's a bit of a leading question, but....

● (1020)

Mr. Evan Roitenberg: I appreciate it, because it tells me where you want to go.

The short answer is yes, but you've actually alluded to something else. You've talked about being subject to a fair-minded judge looking at the assessment report. The assessment report, in that context, almost becomes immaterial, because the assessment report is filed—that's how you get into the hearing—and if in fact the individual is looking at the third predicate offence, then the presumption kicks in regardless of what that assessment report happens to say. So the answer is yes, it does remove the right to silence.

Mr. Derek Lee: Anyone else?

Okay, I have another question that follows up on that. It's procedural. It has to do with, once the presumption kicks in, how it's worded in terms of the law—not the practice, because we've heard the practice is actually fairly fair. I can't say that across the country, but the witness we did have here, Mr. Cooper, outlined the procedure, and the practical steps that were taken in these DO procedures seemed pretty fair. If the presumption kicks in—and there are four ways you can be found to be a dangerous offender in the statute—how does the convicted person know which ones of the four he or she is found to be dangerous on? Is our law deficient procedurally in failing to require sufficient particularity as to what type of dangerousness we're dealing with here? I realize the practice is out there, but what if the practice varies from the statute? We're just legislators. Is our law deficient procedurally in failing to demand sufficient particularity of what the dangerous might be, especially in the face of a presumption?

Mr. Evan Roitenberg: With regard to the legislation, regardless of whether the presumption kicks in, there still has to be, in essence, documentation as signed by the attorney general of the province particularizing that you are sought to be declared a dangerous offender for the following reason. So even if there is the presumption, that does have to be particularized procedurally by the legislation. That's not affected by the amendments.

Mr. Derek Lee: Okay, thank you. That's helpful.

The Chair: You have 30 seconds left, Mr. Lee.

Mr. Derek Lee: Do you have a 30-second question, Mr. Murphy?

Mr. Brian Murphy (Moncton—Riverview—Dieppe, Lib.): Doesn't this somewhat clear up the problem with the Johnson case? Isn't some this some housekeeping because Johnson had some incongruity as the legislators saw it?

Mr. Evan Roitenberg: Johnson wasn't incongruous with the legislation. What the court said in Johnson is we are going to hold off making a declaration of dangerousness because we don't want to impose the indeterminate sentence. What this legislation does to a degree is clarify that, because it allows you to make the declaration of dangerousness and then determine within the framework what the sentence will be. The problem is with determining what the sentence will be, based on onus and standard.

Mr. Brian Murphy: Thank you.

The Chair: Mr. Kramp.

Mr. Daryl Kramp (Prince Edward—Hastings, CPC): Thank you very much, all of you, for coming here today.

I have a number of questions if I have an opportunity and the time to get through them here.

To the defence council, Mr. Rady, you made reference in your remarks earlier today that these are “draconian penalties”. That was the terminology used. Do you not really think that the primary offences we're talking about here—rape, robbery, murder, manslaughter, extortion, kidnapping—are draconian crimes? These are not misdemeanours.

Mr. Andy Rady: Well, the difficulty is that some of the crimes include assault or assault causing bodily harm. Bodily harm can be a black eye. You're probably not going to get two years in penitentiary for that, but it's broad. So is robbery. There are different sorts of robbery. When I used the word “draconian”, it was a strong word. There probably is no greater punishment that we have than being declared a dangerous offender with an indeterminate sentence—even the first-degree murder conviction for life and no parole on 25.

The fact that there's parole after seven years for dangerous offenders is a bit of a myth. It rarely happens. They're put in; they're going to have that designation forever. So there's very little chance of getting out. More people convicted of murder would be released on parole than this. That's why I used that word. It's a very harsh punishment and probably deservedly so in many cases. The only point I think we're trying to make is that it has to be the state that puts it there, not the accused.

Mr. Daryl Kramp: Okay, thank you.

This committee and various committees on justice have heard from many witnesses on both sides of the coin on this issue. We've heard testimony that has stated that when a person has a conviction, on many occasions that has not been their only offence. Someone mentioned an average. I could not be quoted as being deadly accurate on this, but it might be 10 to 15 offences that an offender might commit during the course of getting a conviction. That varied, naturally, depending upon the offence, and I would certainly understand that.

Taking that into the context, we have a conviction. We finally have a difficult conviction through the diligence of defence counsel doing their job adequately. We have a conviction for a violent crime. This is the Violent Crime Act we're talking about here. Who knows how many victims, but obviously we have a victim at a bare minimum here. We go through that and the person does their time, and that's our system; we all respect the legalities. Now we have it happen again and we have a repeat of the entire situation. Once again, who knows how many victims there have been through all of this, but we have another conviction for the same situation, or similar. Now we have a situation where that person goes ahead and serves their sentence and has gone through our system and hopefully would have been rehabilitated and hopefully would have got the attention needed to rehabilitate, but nonetheless comes out and now is alleged to have committed another offence.

Upon conviction, do you not think it is reasonable...? Our job is to provide a reasonable balance. Putting the human side on you, rather than the defence lawyer side of this particular case, because, as you said, we're all citizens here, is it not reasonable to expect, after all of these offences, the hurt, the heartache, the trauma, the victims, that the offender should have some sense of responsibility to act in a responsible manner for himself? Is it not reasonable to affirm how and why that person should be designated as such after that many offences? Is that not a set of reasonable balances?

● (1025)

Mr. Andy Rady: I would say it is not. Usually sentences, as has been indicated, increase from one time to another. We do have the provision to declare that person dangerous, but again, just to say that because it's a third conviction....There are different degrees of dangerousness, and the prosecutor can assess that on a particular case. If they determine this is a case for a dangerous offender application after the two, it can be their onus to show why there should be a dangerous offender application, the way we have it now.

The difficulty is that we have robbery, and there are different levels of that. We have different levels of assault. We have different levels of dangerousness and how incorrigible certain offenders may be. The other difficulty is they may have committed two offences when they were 20, one when they were 23, and now they are 35, and the next thing you know, they have had so many years when they have rehabilitated, but according to this they are deemed dangerous. That would be one where a prosecutor might use discretion otherwise.

Mr. Daryl Kramp: Okay, thank you.

Don't take this the wrong way. Please don't take offence to this, but while I certainly understand defence counsels' concern and responsibility for respecting and representing the valid interests of the criminals, I continue to believe that we, as parliamentarians, have an absolute responsibility to the general public, to the citizens of this country, to provide protection. I would almost consider that may be one of our primary responsibilities.

Do you not believe that we, as legislators, have a duty and a responsibility to balance this?

The Chair: We're pretty much over the time limit here. I'm sorry.

Thanks for your comments.

Madam Freeman.

[*Translation*]

Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ): First, I would like to thank you all for the exceptional quality of your presentations.

Before asking Ms. Joncas my question, I want to say that, in 2006, there were 333 dangerous offenders in our prisons, of whom 21% were Aboriginal. That number concerns me a great deal.

Ms. Joncas, you mentioned that this bill is quite useless, that all the situations are already dealt with in the Criminal Code and that it is a waste of resources. Could you expand on that? We have heard the opinions of the other witnesses, but not yours. Could you tell us more?

Ms. Lucie Joncas: I would like to confirm that, yes, 20% of dangerous offenders are Aboriginal. They are significantly over-represented in the prison population. They make up 3% of the population, and, in the case of the women, above all in the west, they can represent over 50% of the prison population. This is a great concern for CAEFS. I think that the Criminal Code presently meets the needs of Canadians and I must repeat my confidence in our current justice system. In my opinion, prosecutors, judges and counsel for the defence do an excellent job. That people come from outside Canada to study our way of doing things is proof enough. Canadians are very well served in my view.

Mr. Moore spoke of a safeguard, and of each person's right to be respected in the determination process. Nothing in this bill provides for vulnerable people to be represented by counsel. You are trying to pass an approach whereby the burden of proof is reversed, but nowhere are you making it possible for these people to have representation.

The Criminal Code already requires a judge to appoint a lawyer when a person is incapable of facing trial. But nothing in these proposals protects the accused in proceedings of this kind. I repeat that, under section 718.2 of the Criminal Code, the prosecution has to prove an aggravating circumstance beyond reasonable doubt. This proposal goes against these principles. It has been debated, and I really feel that there will be constitutional challenges if the proposal is passed as it stands.

This proposal is not helpful, in my view. Prosecutors are certainly not asking for this kind of thing. The applications are heard at present. As you mentioned, quite a lot of people are designated dangerous or long term offenders. Not only do I not see the use for this request to modify the Criminal Code, but I also consider it dangerous particularly for vulnerable populations like Aboriginals, like women, and like those who, while not necessarily being incapable, are still not the best equipped to fight their way through the justice system.

● (1030)

Mrs. Carole Freeman: Thank you. I am going to let...

Mr. Réal Ménard: Can you go back to the discussion that you began earlier? Would you or would you not like to see us, as an opposition party, make amendments to the Criminal Code during the clause-by-clause study that would require police offices to have ways of maintaining or checking their devices?

Mr. Jean Charbonneau: It is essential in order to protect the public. Otherwise, parliamentarians and society are going to have to live with the consequences. If you want to have a law that is objectively the same for all, go for zero tolerance. Then the system will no longer be able to make a mistake in one case and be right in another. As it stands, there are no provisions for police forces to look after breathalyzers. As a result, police forces have no duty towards the people whom they stop and ask to blow into the device. That is for sure. We see it every day in our job.

Recently, we had a case that took 33 days of proceedings to finally discover that the police had done no maintenance and had not checked the device when it was repaired, not the first time, nor three or four times a year afterwards. Yet the device was getting older and less accurate with time. No values were checked other than the 100 mg. Now, under the Criminal Code, if a person blows more than twice the legal limit, the judge must impose a harsher penalty. If we choose to be repressive—that one was a choice that society made—objective measurements must also apply.

In this case, you are taking away any possibility for people to defend themselves, but, given that some physiological factors prevent a blood sample being taken, you are not requiring police forces to be sure that the result they get is realistic.

[*English*]

The Chair: Thank you, Monsieur Charbonneau and Monsieur Ménard.

Mr. Harris.

Mr. Richard Harris (Cariboo—Prince George, CPC): Thank you, Mr. Chair.

Just for the record, Mr. Chair, I think it's important to state, in the case of Mr. Charbonneau and Mr. Doob, that they are of course expert witnesses and probably called many times to testify, and judging from their presentation, likely in almost all cases on the side of the defence attorneys. I think it's important to say, in particular with Mr. Charbonneau talking about the breathalyzers, that for every argument he puts forward, there will be expert witnesses in our country who will testify that certificate evidence is as accurate and pure and should be given an even higher consideration in a court of law when it comes to impaired driving trials, etc. So it's important to say, just to get it on the record, that there are expert witnesses who testify repeatedly on both sides of a trial, and that's the case we have here.

The Chair: On a point of order, Madam Jennings.

Hon. Marlene Jennings: Thank you, Chair.

It's my understanding that Maître Prihoda and Monsieur Jean Charbonneau are here as representatives of

[*Translation*]

the Association québécoise des avocats et avocates de la défense. They are speaking for the association, not personally. Mr. Harris' comments are out of order because these witnesses are not here as individuals, but as properly designated representatives of an association.

● (1035)

[*English*]

The Chair: Thank you for your point.

Mr. Richard Harris: I appreciate that. On that point of order, Mr. Chair, I made that point lest someone viewing this today come to the understanding that there is only one position given by an expert witness that is valid.

The Chair: Okay, thank you. Your time has started again.

Mr. Richard Harris: I hate to sound a little cynical, gentlemen, particularly those of you who are engaged primarily in the defence side of the law. I understand that you are here primarily to present that side of opinion on this bill, and you've done it quite thoroughly. And Ms. Joncas and Ms. Pate, you've represented your particular area of advocacy very thoroughly.

I go back to a comment my colleagues made regarding the concern for victims and the safety of our society here. I have to ask the question. I'm not a lawyer; you gentlemen are, and you may find this a little simplistic, but I have to ask. In your understanding, in your comprehension of justice, in your grasp of how we are to respond to people who have demonstrated evil and people who have demonstrated good, where in all of this, in your minds, do the protection of society and the rights of victims of crime come into consideration? That's what we as legislators have to grasp, what two-thirds of Canadians have solidly said, that the justice system is not working for them when it comes to dealing with violent crime. They want it fixed.

These are victims of crime. These are law-abiding citizens who feel threatened in their own communities, in their own homes, in their own streets. They're worried about their safety. Victims are worried about the government responding in some manner that gives the appearance that justice is being served.

Where does this all come into it, in your arguments against Bill C-2?

The Chair: Ms. Pate, would you like to respond to this?

Ms. Kim Pate: I know you asked the gentlemen to speak to this, but I would like to speak to this because I think the presumption that we come without any knowledge or understanding of victims is misleading. It's cynical. I have a daughter who is growing up without a grandfather because he was murdered. I have friends, family members, who have been severely victimized in the way you are suggesting we would not have any appreciation of.

So I would ask you, sir, to please refrain from presuming that because we come with a perspective that doesn't accord with yours, we have no lived experience.

I would like to then address your—

Mr. Richard Harris: In your presentations—I'm referring to your presentations—there was no mention of victims or the protection of society. That's what I was questioning. Why did you not—

Ms. Kim Pate: In fact, there was mention of victims. I mentioned a woman who was assaulted while in prison. I mentioned a woman who died partially as a result of the treatment she received in prison. We know that a full 90% of the aboriginal women in prison and approximately 82% of the non-aboriginal, the rest of the women in prison, are people who were first identified as victims, often of physical and/or sexual assault. So please don't presume that.

I want to come back, though, to something that was raised. We've been talking about a lot of hypotheticals. Let's go back to the case of Lisa Neve. She was declared a dangerous offender. It was because of an armed robbery. But let me explain the context of the armed robbery, which, picking up on Mr. Lee's question, had she not testified, would not have come out. It was considered—not that she supports it at this stage at all—as street justice. She was responding to someone having beaten up a friend of hers and caused her to miscarry. The robbery was the removal of clothing—

The Chair: I'm sorry, Ms. Pate, but we have four more folks who would like to ask questions, and somewhere between a quarter to and ten to we will need to suspend to be able to deal with a motion that has been put on the—

Hon. Marlene Jennings: I have a point of order.

● (1040)

The Chair: Madam Jennings, on a point of order.

Hon. Marlene Jennings: I'm not contesting that we need to.... I would just ask that when witnesses are not able to respond in full to what it is they feel they need to give to the committee because time is running out, if you could simply propose to them that they provide their full response in writing to the committee, through the chair and—

The Chair: I appreciate the advice, Madam Jennings, but it's not a point of order.

We have four more individuals who have indicated they'd like to speak. I want to try to get everybody in, so I'm going to go to three-minute rounds, and I would ask that you really get at the question you want to ask.

Mr. Comartin, three minutes.

Mr. Joe Comartin: I have three questions, and I'm going to ask them all in order, and if you can be very succinct in your answers....

The first one is when Mr. Cooper was here—

Mr. Derek Lee: I have a point of order, Mr. Chair.

All right. My friend has asked me not to make a point of order, so I won't.

I'm sorry, Mr. Comartin.

Mr. Joe Comartin: When Mr. Cooper was here last week he suggested that some amendments to part XXIV would be useful in prosecuting dangerous offenders. I don't know if you've had a chance to look at what he was saying, but do you have any comments as to whether they are valid or whether they would survive a Constitution or a charter challenge?

Second, there have been suggestions that we impose specific duties on the crown to bring dangerous offender applications under a set criteria, and then the countervail against that would be that it's constitutionally improper because that's the responsibility of the provincial governments.

The third one is to you, Mr. Rady. Do you know how much it costs legal aid on average to defend a dangerous offender application?

Mr. Andy Rady: I don't. There are certain hours—and I can only speak for Ontario—allowed for this sort of thing. I would think if we go to the current regime, where you have to have the accused show why they shouldn't be, they will be the kinds of cases that we call in Ontario “big case managed”.

If your documentation is that the crown needs 600 hours, I would think it's going to be more. It'll be a great burden on the legal aid system. I can't speak for the other provinces, but I would think it would be that way across the country.

Mr. Evan Roitenberg: As to tying the hands of the crown and saying that under certain criteria you must, putting constitutional considerations as to division of powers aside, absent political motivation, what possible reason could there be to dictate to a crown attorney, who knows his or her case, that he must do something because of set criteria? Allow a crown attorney to do their job, look at the case they have, and make the determinations accordingly. Absent some political gain, why would you possibly do that?

Mr. Joe Comartin: On the third question, the amendments Mr. Cooper was suggesting in terms of gathering evidence?

Mr. Evan Roitenberg: I haven't had the opportunity to fully peruse them, as they are afresh, and I think my answer would really run afoul of the time constraints.

The Chair: Thank you.

Next on our list is Monsieur Petit. Monsieur Petit, you have three minutes.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you for having come here this morning.

My question goes to Mr. Rady or to Mr. Roitenberg. It is often said that we are trying to put in place a "three strikes law" such as they have in the United States. But there are 50 united states with criminal law that differs in almost all of them, as you can see from the different penalties they impose. We have a single system all across Canada.

Given that there has been a lot of criticism because of that method, have you, Mr. Rady or Mr. Roitenberg, been able to compare the American "three strikes" legislation with what we are proposing today? Since we are in the public eye here, can you tell me which state we are dealing with? Is it California's criminal law, or Vermont's? Can you tell me if either of you can compare or contrast them?

[*English*]

Mr. Andy Rady: To say I've done a study, no. California, obviously, has a three-strikes-and-you're-out law. Some states have. Laws, obviously, differ from state to state in the United States, plus they have their own federal jurisdiction.

All I can say is that anecdotally my understanding is that the Americans are trying to stray away from this because they've seen injustices that have occurred. Mind you, their three-strikes-and-you're-out laws can also be different. In some states you receive a sentence of life imprisonment if it's the third drug offence.

So it's difficult to compare with respect to this dangerous offender legislation. American comparisons may be a bit of a red herring because we view it as the basic principle of the reversal of the onus and our own fundamental principles of justice that we have in this country nationwide.

● (1045)

The Chair: Merci.

Mr. Murphy, three minutes, sir.

Mr. Brian Murphy: I'll talk very quickly.

There seems to be an awful lot that's canvassed here, but the principal job of this committee, I submit, with all due respect to all the members, is to find out whether this designation, this scheme, violates the charter or does not. Now, we were quite attentive and satisfied with the Department of Justice's opening salvo and Mr. Hoover's suggestion that the right to silence will not be deleteriously affected. I'm somewhat in doubt, frankly, after hearing from you, Mr. Roitenberg.

So I would urge people to take us through—not in these three minutes or minute and a half—the charter, section 7, paragraph 11 (d), and section 1 might even apply. Draw analogies to the ATA, which we are about to study in this parliament. There are conditions where the liberty of bad people is affected because it's demonstrably justifiable, but this is too short for this.

In short, Professor Doob, on the opportunity costs, which you had half a second to talk about, of putting someone in jail for $90,000 a year, what could we do with that money to make society safer?

Dr. Anthony Doob: What I would like to see is a serious debate about how to make society safer so that you can invest in lots of things. The police would say that in certain kinds of circumstances we need more police resources. Schools would say that we need.... The fact is we're releasing thousands of people every day onto the streets with inadequate resources to try to reintegrate them into society. There are a wide range of things that have been shown to be effective. What we're doing, I'm afraid, is focusing on specific aspects of the Criminal Code for which there's no problem that's being corrected.

One of the most interesting things, sitting here on the dangerous offender legislation, is that people are talking about the solution, but nobody has actually suggested that there's a problem. So what we're doing here is wasting resources on increasing imprisonment, where what we could be doing for each person who is being put in a federal penitentiary for a year is taking that $94,000 and saying let's have a serious debate about whether that should be used for reintegration, whether that should be used for early experience, or whatever. That debate doesn't seem to be happening anywhere in Parliament.

The Chair: Thirty seconds.

Mr. Brian Murphy: Just on the use of psychiatric evidence, Mr. Rady, it is used now. There are court decisions that say it can be used against the accused. There is protection—I would say protection—or at least an element that there is a mandatory examination. Don't you see that this is justifiable in the sense that there are a number of tools already in the kit—we haven't talked about them—for the offender and his lawyer to use?

Mr. Andy Rady: There are tools that way. There used to be both a defence and a crown psychiatric examination on dangerous offender applications of their choice, and then the court made a decision. Frankly, I thought that was a fair system.

That's 15 seconds.

The Chair: Well done, Mr. Rady.

Mr. Keddy, to conclude, three minutes.

Mr. Gerald Keddy (South Shore—St. Margaret's, CPC): I don't think I can speak quite so fast, Mr. Chair.

I'd like to welcome our witnesses. It's a very good discussion here today.

I think part of what we're grappling with as parliamentarians is that we don't have a perfect system, we have an imperfect system, and regardless of how we change it, it will still be imperfect. There's no such thing as perfection here; it's a very elusive goal, at least in the Criminal Code and the court of law.

However, we do have a situation before us where we see an increasing amount of violence and violent crime. I think this is an attempt to try to deal with that.

I have two questions. The first one is on constitutionality. Obviously, as parliamentarians, we don't want to bring in changes to the Criminal Code that will be challenged through the Constitution and turned back. It's a waste of everyone's time, quite frankly.

The other question is to Mr. Charbonneau about the impaired driving test and the equipment, because it's problematic. Obviously, there should be some type of regular routine maintenance that would qualify all equipment to be in working order and the same. My real question is this. In matters where fatalities occur with impaired driving you can take a blood test, so what is the big deal about taking a blood test to look at alcohol levels in the blood versus blowing into a breathalyzer?

● (1050)

Mr. Evan Roitenberg: Would you like the constitutionality addressed first?

Mr. Gerald Keddy: Sure. If you can do all that within 30 seconds, I will be impressed.

Mr. Evan Roitenberg: I'll do my best.

We've spoken of section 7 and the right to silence, of the principles of justice with regard to life, liberty, and the security of person, and of whether the reverse onus would satisfy those charter considerations. But what about paragraph 11(i), the individual being entitled to the benefit of lesser punishment if the punishment is changed in between the commission of the offence and sentencing? I think one could argue that if you, 15 years ago, were induced to plead guilty on a plea bargain for a sentence of two years, and now the law is being changed to add ramifications to that plea bargain that you had accepted then, never considering that the two years you accepted would come back to haunt you further down the road, you might be open to a challenge under that section as well.

I come from Manitoba, and in our jurisdiction there is a wealth of programming available within the federal system and very little within the provincial jails. I have individuals looking at an 18-month sentence who oftentimes will say, “I'd rather do my two years in a penitentiary than 18 months in the provincial jail, because at least there are programs for me.” A decision like that can now come back to haunt them because of these amendments.

So I think there are considerations within that framework as well.

● (1055)

The Chair: Thank you.

I'm sorry, Mr. Charbonneau, but you're not going to get a chance to respond. We are right out of time.

Ms. Jennings, while she didn't have a point of order, I think made a good suggestion, followed up by Mr. Murphy's suggestion, that if you do have issues or matters that you did not get the opportunity to respond to, the committee more than welcomes your written submissions. So if there were questions that you didn't get a chance to answer, or any comments coming out of today's meeting, we would certainly appreciate getting them. The clerk will ensure that each of member of the committee receives a copy.

Thank you very much for appearing this morning.

I want to suspend for just 30 seconds to allow our witnesses a chance to leave. I would ask that members stay in their seats, if they can, just based on the fact that we have the justice committee meeting immediately afterwards.

● (Pause) ●

The Chair: If I could I get everyone back to the table, we have a motion we need to deal with.

We have a motion from Mr. Comartin that was duly presented in enough time to be able to be dealt with today. It was received last week, and I understand that each member of the committee has a copy. I do need to make a ruling on the motion itself, so I'll ask for a couple of minutes from the committee in order to do that.

Mr. Comartin, would you like to move the motion?

Mr. Joe Comartin: Yes, I would move the motion as presented, Mr. Chair.

Do you want me to speak to it or do you want to make your ruling first?

The Chair: I'd like to make my ruling first.

First I'm going to make three points leading up to a decision in terms of the motion itself. The first one is that Standing Order 113 (5), which relates directly to legislative committees, states the following:

> Any legislative committee shall be empowered to examine and enquire into the bills referred to it by the House and to report the same with or without amendments, to prepare a bill pursuant to Standing Order 68 and to report thereon and, except when the House otherwise orders, to send for officials from government departments and agencies and crown corporations and for other persons whom the committee deems to be competent to appear as witnesses on technical matters, to send for papers and records, to sit when the House is sitting, to sit when the House stands adjourned, and to print from day to day such papers and evidence as may be ordered by it.

There are three points here, and the first is the form. From this I'll emphasize the quote, “report the same with or without amendments, to prepare a bill pursuant to Standing Order 68 and to report thereon”.

The second point is that the standing order states that the legislative committee can only report the bill that was assigned to it. No division of the bill into portions or separate bills is requested as per the motion.

Third, the contrast to this is Standing Order 108(1)a, which deals with standing committees and allows them to table reports from time to time on various issues, giving them more latitude. I can certainly read the standing order. If you ask me to, I certainly will, but I don't think it's necessary. It simply points out that the standing committee has more latitude with respect to this.

The second part is that if you pay attention to the first part of our motion that we received from the House, it indicates:

> That, notwithstanding any Standing Order or usual practice of the House, Bill C-2, An Act to amend the Criminal Code and to make consequential amendments to other Acts, be proceeded with as follows:

And the motion actually outlines what our responsibilities are. I speak very specifically to a part of this, which states that:

> proceedings in the committee on the Bill shall be conc1uded as follows: if not previously concluded by midnight on Thursday, November 22, 2007, at midnight...any proceedings before the legislative committee shall be interrupted, if required for the purpose of this Order, and in tum every question necessary for the disposaI of the committee stage of the Bill shall be put forthwith and successively without further debate, at the conclusion of the committee stage the Chair shall be instructed to report the Bill back to the House on Friday, November 23, 2007

So the motion is very specific in terms of when this committee is to report back to the House. In fact, if we are not done by midnight on Thursday, November 22, the chair is to report back to the House on Friday, November 23, without amendments. I just want to point out that the motion was unanimously passed through the House by all four parties.

Finally, my third point on the ruling is that Mr. Comartin's motion begins with the operative clause, “That the Committee adopt the following report”. As the committee can only report the bill, clearly such a report is out of order, because as committee members are aware, motions required to be tabled in the House are presented as reports. And as I previously mentioned, this committee is only empowered to report the bill with or without amendment. The motion from the House did not allow for an extra order of reference authorizing the committee to report more than the bill itself. This committee can only report the bill with or without amendment. It is my interpretation that if the committee wishes to seek instruction from the House, committee members should—and they are free to—raise that matter directly in the House as opposed to tabling a report from the committee and moving concurrence of that report.

It's my determination that Mr. Comartin's motion contravenes the instructions given to us by the House of Commons. For the three reasons stated above, I'm ruling that this motion is out of order.

Mr. Comartin.

● (1100)

Mr. Joe Comartin: To start off, I would have appreciated being advised, Mr. Chair, that in fact you were going to make a resolution so I could have prepared counter-arguments. I think I can respond to the last two with regard to the time limit issue.

The motion in fact—

The Chair: Mr. Comartin, I apologize, but the decision I've rendered isn't debatable. Obviously there is—

Mr. Joe Comartin: But I can challenge the chair, Mr. Chairman.

The Chair: You certainly can do that, Mr. Comartin. You're more than within your right, as a member of this committee, to challenge the chair on his ruling.

Mr. Joe Comartin: I would do so, but ask that the motion now stand down so I've got the opportunity.

I just want to say to you that I had cleared this motion with the table as in fact being a proper motion. I want to go back now and gather together the material they had to show that in fact this was in its proper form. I think the committee deserves that opportunity. So I'd like to have the motion tabled and put over until tomorrow so I can prepare that material.

The Chair: You can make that request to the committee, Mr. Comartin, but you need unanimous consent from the committee to withdraw the motion and then we'll deal with it at our next meeting date, which is tomorrow.

Do I have unanimous consent?

Mr. Joe Comartin: Mr. Chair, I'm not asking for the motion to be deferred, I'm asking for the challenge of your determination to be deferred until tomorrow. And that does not require unanimous consent.

The Chair: I understand why you would like to do that. The difficulty with that is that a challenge of the chair is not debatable. So you can certainly put the motion forward to challenge the chair, and if you get a majority from this committee, we can then deal with your request to move the motion forward.

Based on that, just to be clear, so everyone understands, what I'm asking is for the chair's ruling to be sustained. If you're in favour of the ruling that I've indicated, then you would obviously say yes. If you're opposed to the ruling that I've presented, then obviously you would say no.

Point of order.

[*Translation*]

Mr. Réal Ménard: I am not sure that we understand each other. You made a decision on a colleague's motion. I feel that this group may wish not to deal with the decision now. We understand that it is not debatable, but we can decide not to deal with it. And we can certainly ask for what has just been said to be tabled.

Why are you insisting on a vote? Who is asking for a vote? Is it you asking for a vote on the decision you have just made?

[*English*]

The Chair: Monsieur Ménard, the reason I'm calling for the vote is because when a challenge is issued to a chair's ruling, it's not debatable. Mr. Comartin requested unanimous consent to withdraw his motion so that we could table it and deal with it potentially tomorrow. That was not supported unanimously, so his challenge to the chair stands.

I would call for a vote that the chair's ruling be sustained.

(Ruling of the chair sustained)

● (1105)

The Chair: Okay, the motion is carried.

Yes, Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: Mr. Chair, I just want to tell you that we are greatly concerned about the way our deliberations are proceeding, given that the list of witnesses that we received from the clerk does not include a constitutional expert. I will give a notice of motion to the clerk this afternoon, but I do not think that the Bloc will agree to begin clause-by-clause study without legal opinions. Either the minister should come back to provide them, or we should find witnesses. But I cannot imagine that, as a committee, we would be so careless as to begin clause-by-clause study without the opinion of constitutional experts, certainly in the light of what these witnesses have told us. I am therefore sharing with you my great concern about the position in which we find ourselves.

[*English*]

The Chair: What you're asking for is additional witnesses with specific expertise to deal with the constitutional issues surrounding Bill C-2.

[*Translation*]

Mr. Réal Ménard: Or the minister.

[*English*]

The Chair: Okay.

Yes, Madame Jennings.

[*Translation*]

Hon. Marlene Jennings: I think that Mr. Ménard has raised a very important point. We have heard presentations from the Minister of Justice and his officials, and they have assured the committee that the part of the bill relating to the previous Bill C-27 is constitutional and in accordance with the Charter. A number of witnesses have told us that they believe that it is not in accordance with the Charter, and that there may well be a lawsuit challenging the constitutionality of that section.

If the committee is not able to find a constitutional expert who could talk to us about that question, I ask, as Mr. Ménard has done, that experts from the Department of Justice come here and respond point by point to each of the questions that have been raised by other witnesses about the constitutionality of this part of the bill.

[*English*]

The Chair:

Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: They could provide something in writing.

Hon. Marlene Jennings: I do not want just a verbal reply. Some witnesses have told us that they think that some points are not constitutional. We need an answer.

Mr. Réal Ménard: Mr. Chair, I do not want to try your patience, but the clerk could even tell us at the next meeting. I know that when a minister signs a memorandum to cabinet, it has been examined for its constitutionality and its compliance with the Charter. Maybe, for this occasion only, the minister could provide us with the memorandum to cabinet in camera, even if we are...

[*English*]

The Chair: We're now getting into department recommendations that go directly to the minister, and that wouldn't necessarily come here, so we need to be a little bit careful about that. I will indicate that when we determined our schedule, with respect to witnesses and how we were going to handle this, there was agreement around the table. I believe that we left open our option to ask the ministry to come back prior to doing clause-by-clause. I would think that this is a pretty good opportunity or an opportune time to ask the ministry to be specific to the issues that have been raised with respect to constitutionality. I'm not sure that we're going to get point by point, Madam Jennings, but I think we should be able to get folks here from the ministry to be able to deal with that. And, saving that, we do have an opportunity to do that because one of our sessions has only two witnesses, so we could actually use some of that time to pursue with the ministry.

Mr. Derek Lee: Mr. Chairman, could I ask you also, in this same vein, to alert the parliamentary counsel who will be here for clause-by-clause that this question will arise? Then the parliamentary counsel should do whatever is appropriate to prepare for that question at that time.

The Chair: Thank you for that. We'll will make sure that they're aware of it.

The meeting is adjourned.

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

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

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