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Chair

Mr. Rick Dykstra

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● (1535)

[*English*]

The Chair (Mr. Rick Dykstra (St. Catharines, CPC)): Mr. Lee has given me a pretty stern look, and a fair one, to say that we should get started.

Pursuant to the order of reference of Friday, October 26, 2007, Bill C-2, An Act to amend the Criminal Code and to make consequential amendments to other Acts, I want to welcome everyone back to committee.

We will spend our time this afternoon dealing with witnesses from the Canadian Association of Chiefs of Police, the John Howard Society, and, as an individual, Isabel Schurman from the Faculty of Law.

I want to welcome all of our witnesses this afternoon. Just as a brief overview—I think most of you have actually been here before, so you know the rules, but let me just review them for everyone's sake—each of you has 10 minutes to make your presentation. We have a small timer up here, so once you get a little bit close to the end, I'll just give you an indication to wrap things up. We will then begin rounds of questioning. The first round will be seven minutes in length, and it will start with the Liberals, then go to the Bloc, then the NDP, then the Conservatives. Then we'll go to five-minute rounds from each of the parties.

I would like to indicate that we try to keep things as concise as possible to get in as many questions as possible, so if that's something that all members of the committee can do, and also witnesses, it would be much appreciated, and I think we'll have a solid afternoon.

With that, I would ask Mr. Pichette to begin.

[*Translation*]

Mr. Pierre-Paul Pichette (Co-Chair, Law Amendments Committee, Canadian Association of Chiefs of Police): Thank you, Mr. Chair.

Ladies and gentlemen, honourable members of the committee, allow me to introduce myself: my name is Pierre-Paul Pichette and I am the assistant-director, chief of corporate services for the Montreal Urban Community Police. With me today is my colleague, Mr. Clayton Pecknold, who is the deputy chief for the Saanich police service in British Columbia. We are appearing before you today as representatives for the Canadian Association of Chiefs of Police, since we are the two co-chairs of the Law Amendments Committee for the organization. I would also like to take this opportunity to greet you on behalf of our president, Mr. Steven Chabot, deputy director general of the Sûreté du Québec.

The Canadian Association of Chiefs of Police represents the administrative arm of Canada's police forces. Ninety per cent of its members are directors, deputy directors or other senior managers from various Canadian police forces at the municipal, provincial and federal levels. The mandate of our mission is to effectively enforce provincial and federal laws and regulations to protect the Canadian public. We are therefore regularly called upon to give our position on legislative reform, and we always take part with enthusiasm in consultations with governments on the reform of the Criminal Code, much as we are doing today.

I will now ask my colleague Mr. Pecknold to comment on Bill C-2. Mr. Pecknold will speak in English, and I will then conclude in French.

[*English*]

Mr. Clayton Pecknold (Co-Chair, Law Amendments Committee, Canadian Association of Chiefs of Police): Good afternoon, Mr. Chair, honourable members. Thank you for the opportunity to speak to you today.

Many of you will know that the CACP appears before your committee and before the Senate on a wide range of bills. In fact, members of our association have appeared before this committee on several of the bills that now find themselves part of Bill C-2.

Before we comment on Bill C-2, we would reiterate a general comment that we have made before you on a previous occasion with respect to the complexity of criminal law and the public's general faith in the justice system. As with many aspects of the Criminal Code, the CACP believes quick fixes and band-aids are no longer sufficient.

We offer two quick points. First, we believe criminal law, including the law of sentencing, is in need of a sustained and comprehensive overhaul if the criminal justice system is to regain the eroding confidence of the public. Second, we believe much more could be done to give police the tools they need to detect and apprehend violent offenders. I will elaborate in a few moments.

As you know, the short title of Bill C-2 is the Tackling Violent Crime Act. We at the CACP join Parliament in saying that we must put an end to the violent crime we are seeing in our communities.

Before appearing here today, I had occasion to speak to my colleagues at the Vancouver police department, who are struggling with a wave of gun violence in their city. They, like all of us in the policing community, recognize that no one piece of legislation is going to solve what is a complex social problem underlying gang activity and the culture of violence it instills in our young people. A comprehensive, nationally focused, and locally resourced strategy is required. Much is being done, but much more can be done.

In terms of Bill C-2, the CACP supports the bill as one step of an overall crime reduction strategy. We believe Canadians are very concerned with the areas addressed in the bill. Gun violence, drugs, and the exploitation of our children rate high on the public's list of public safety concerns for very good reason.

We are also pleased to see Parliament help the courts keep those persons who pose a danger to our society in jail and away from the public. Examples of offenders reoffending while on judicial interim release, or escaping justice by fleeing to other jurisdictions in Canada, go far to erode the public's confidence and faith in the ability of the criminal justice system to protect them.

My colleague and I will be pleased to answer specific questions on Bill C-2, but before we do, permit us to elaborate on what we mean when we say that it is but one step in an overall strategy.

The CACP has several legislative priorities, and has, as one example, for some years now been advocating for modern tools to deal with modern crimes. Bill C-2 is directed in part to three important dangers to society: guns and gangs, child exploitation, and drugs. Your police struggle every day to stop the violence, disrupt the gangs, apprehend child sexual predators, and interdict drug dealers. These investigations are often made more difficult by the offender's success at exploiting the new technologies, such as digital communications and the Internet, to further their interests.

The CACP has been asking and pleading with government to modernize our investigative abilities for many years in this area, under the auspices of the lawful access initiative. As you know, the previous government introduced the Modernization of Investigative Techniques Act, which did not get passed before Parliament dissolved. We were pleased to see a private member's bill come forth reintroducing MITA and take that as a sign that all parliamentarians are concerned, as we are, with the eroding interception capabilities of your police.

With due respect to all, the time has come—it is past due—for action on this front. We ask you to act decisively on this matter, and act soon.

You need not be reminded, I'm sure, that it is your police who must find their way through an increasingly complex society using only those tools you allow them to keep the streets safe. For our part, the CACP will continue to offer you the voice of Canadian police leadership as you move forward with your work on this bill and hopefully the many others to come.

Thank you for the opportunity.

● (1540)

The Chair: Thank you.

[*Translation*]

Mr. Pierre-Paul Pichette: I am sorry, Mr. Chairman, but I would like to briefly conclude.

[*English*]

The Chair: Mr. Pichette, you have three and a half minutes, so no problem.

[*Translation*]

Mr. Pierre-Paul Pichette: All right.

To follow up on what my colleague has just said, I would like to remind committee members that every Canadian police force is concerned with enforcing existing laws and regulations in an appropriate manner. Clear, unambiguous laws make our lives much easier on the ground, and are easier for the public to understand and support.

I would also like to thank you for having given us the opportunity to comment on this issue, and please understand that we are available to answer any questions our presentation may have raised.

[*English*]

The Chair: *Merci.*

Mr. Jones, I'll give you the floor.

Mr. Craig Jones (Executive Director, John Howard Society of Canada): I thank you, Mr. Chairman, members of the committee, and honoured guests, for the opportunity to comment on this legislation.

The John Howard Society of Canada is driven by its mission statement, which calls for effective, just, and humane responses to the causes and consequences of crime. Our 70 offices across Canada deliver evidence-based programs to released prisoners and their families, including preparation for release and a range of programs to more effectively ensure the successful reintegration of prisoners into their communities. We put great stock in the expert evidence.

The John Howard Society aspires to be smart on crime rather than tough. We advocate for evidence-based policies that actually work to reduce crime and recidivism.

I wish to make four points in this short submission. Number one, the preamble to Bill C-2 states, “whereas those laws should ensure that violent offenders are kept in prison...”. This clause announces a fundamental reorientation in Canada's philosophy and practice of incarceration, and to introduce it as the last of seven introductory clauses—making it seem thereby innocuous—is a demonstration of legislative overreach of a particularly egregious kind.

Nowhere does the CCRA warrant that offenders are to be kept in prison, or for that matter punished. In Canada, we send people to prison as punishment, not for punishment. This has been a long tradition in this country, a tradition grounded in the evidence-based finding that prison simply hardens people and renders them less suitable to live among us.

In fact, as CSC's experts will attest, evidence-based community centre programs are more cost-effective and work better to lower recidivism. Unlimited incapacitation offends the principles of the CCRA and the values of Canadian society, which endorses moderation and restraint in the application of our most draconian state-authorized sanction. This preamble announces the abandonment of the principle of restraint in the use of incarceration.

In fact, the theme running through Bill C-2 is that, the evidence notwithstanding, Canada is going to import from the United States the worst of what has not worked to lower crime rates and make communities safer. A philosophical change of this magnitude—which should properly be the object of sustained and expert deliberation—ought not be secreted into an act, which, taken as a whole, is likely to have far-reaching implications for the philosophy and practice of incarceration across Canada.

The implications of this preamble are numerous and significant, and I have neither time nor expertise to detail them for you. I only wish to go on the record with our profound concerns that Canadians ought to know that Bill C-2 is changing the foundations of our correctional principles without adequate or even expert deliberation.

Number two, I want to address the process of deliberation.

Although the components of Bill C-2 have been examined by this Parliament over the course of the prior session, there are important new features in this omnibus act. Speeding Bill C-2 to royal assent in the manner demonstrated in this committee process offends the fundamental principles of democratic practice in the Westminster system by cutting off deliberation and reflection. The least we owe to Canadians, if we're preparing to incarcerate more of them, is sustained deliberation on the consequences, coupled with a commitment to minimize the worst harms that will inevitably arise from a higher incarceration rate.

Although we have already submitted on aspects of prior bills, Bill C-2 is sufficiently complex and has enormous implications for—

● (1545)

The Chair: Mr. Jones, I'm sorry to interrupt. One of the things that happens here, and I probably should have indicated this at the beginning, is that we do have translation happening simultaneously. So I would just ask you—and perhaps allow for a bit of extra time—to slow down a little bit so our translators have the opportunity to do the translation.

Mr. Craig Jones: Bill C-2 is sufficiently complex and has enormous implications for, among other things, the rate of incarceration; the overcrowding of existing prisons, including detention centres; the issue of double bunking for the safe management of inmate populations, including the consequences of an increase of inmates with mental disorders and substance abuse problems; the issue of overcrowding as it affects the working conditions of CSC staff; the accelerated transmission of blood-borne diseases among inmates and the spectre of multidrug-resistant tuberculosis; the already under-resourced range of treatment options, which are demonstrated to reduce recidivism; the expected termination of statutory release and its implications for the effective reintegration of offenders; the economic costs that will accrue from Bill C-2 combined with the national anti-drug strategy and the evidence-based opportunities thereby foregone; the asymmetric distribution of pain and suffering that will accompany implementation of Bill C-2 combined with the national anti-drug strategy, that is, more offenders from lower socio-economic circumstances, more aboriginal offenders, offenders with greater needs, including already overtaxed needs for mental health treatment, substance abuse, etc.; and finally, the implications of this punitive turn for the penal ecology of Canada's criminal justice system, which has, until now, largely resisted the drift toward a meaner and more retributive Americanization of our correctional system.

Point number three is mandatory minimum sentences. It is no small irony that Bill C-2 seeks to extend the use of mandatory minimum sentences at precisely the same time as jurisdictions in the United States, notably Florida and California, are trying to extricate themselves from them. Mandatory minimums are sold to Canadians as part of a larger strategy to reduce crime. But as Professor Anthony Doob testified on December 6: "The best research on this is quite consistent. Mandatory minimum sentences will not reduce crime."

Furthermore, Bill C-2 adds injury to insult by ignoring evidence-based approaches that do actually reduce crime and make communities safer.

Bill C-2, particularly in combination with the national anti-drug strategy, signals that the Government of Canada is prepared to tolerate even greater inequalities in the distribution of pain, denunciation, and punishment. It is as good as certain that mandatory minimum sentences will occasion disproportionate sentences for at least some offenders, likely those most marginalized and vulnerable to having their rights trampled. Canadians ought to be consulted on whether our current model of proportional sentencing should be reformed in this hasty and undemocratic manner, particularly if the reform offends against fundamental principles of distributive justice and targets those already most vulnerable to state-sanctioned discrimination.

I sense I'm running out of time, so I'm going to skip over the health consequences of greater incarceration and go directly to my conclusion.

In summation, I wish to reiterate what has long been known among criminologists, penologists, and historians of incarceration: prison is an expensive way to make people, most of whom come from disadvantaged and deprived social circumstances, worse than they already are. The evidence on this is by now so conclusive that it is no longer a point of contention. We ought not pretend that the last 200 years of research into prisons and their effects is irrelevant or ideologically inconvenient. Community-based programs are more effective and cost less. Community-based programs are not incubators of disease, cynicism, and despair as prisons are. They do not harden anti-social attitudes and behaviours as prisons do. Evidence-based community-based programs do not break apart families and poison the minds of young persons as prisons do. Prisons are the solution that is worse, in many cases, than the disease they are meant to treat. They ought to be the very last resort of a policy that aspires to democratic ideals of self-governance. If the government defies its own experts and the evidence base on prisons and proceeds down the path of growing Canada's incarceration rate, it will bequeath to your children and grandchildren a curse that will be hundreds of years in the undoing.

Thank you.

● (1550)

The Chair: Thank you, Mr. Jones.

Ms. Schurman, I understand from the clerk that you may have to leave a bit early just to make sure you will have transportation.

Ms. Isabel Schurman (Professor, Faculty of Law, McGill University, As an Individual): Thank you very much. My train is at 6:55, for which I've been told I should leave at 5:15.

The Chair: Okay.

Just so the committee is aware, if you do have any questions for Ms. Schurman, try to keep them at the front end so that you get a chance to ask them.

Thank you.

Ms. Isabel Schurman: I'd like to thank you all for the opportunity to come back and speak with you again.

I will limit the comments I'm making now to what was Bill C-27, given that the invitation I received indicated that this is of particular interest to you. Should anyone have questions on other parts of Bill C-2, I will try to address them.

The most troubling part of Bill C-27, which is now part of Bill C-2 —Actually, there are two most troubling parts. First, it's not necessary. It doesn't cover any situation of dangerousness that the present law does not already cover. The second very troubling aspect is twofold. The removal of judicial discretion is disturbing, and it's a disturbing theme reoccurring in numerous criminal law bills. A second part of that is the reverse onus provisions contained in Bill C-27. These provisions will not survive a constitutional challenge if we rely on Supreme Court of Canada jurisprudence over the last 20 years.

The bill resembles a kind of U.S. three strikes legislation. Although there are clear differences, copying the U.S. model, even a loose copy of it, is neither necessary nor workable.

As the present law stands, the crown “may” apply for an assessment to have someone declared a dangerous offender and the judge “may” order the assessment. The trigger is the conviction for a serious personal injury offence. The present law in that category includes all indictable offences with sex or violent components, all conduct that endangers individuals, even including psychological violence. It's vast coverage that we already have. Once the report comes back in the present law, the judge must be convinced beyond a reasonable doubt that there was a serious personal injury offence, threats to others based on certain evidence—repetitive behaviour, aggressive behaviour—or evidence that the incident was of such a brutal nature.

Constitutionally, the deprivation of liberty will require proof beyond a reasonable doubt when that deprivation is to be for an indeterminate period of time. In fact, the burden at this stage is one element that saved the present articles from being declared unconstitutional in the past. Currently an application can be made at the time of sentencing, or even six months after sentencing, or even after that if new evidence comes to light. With the present law the way it is, we don't have to be letting dangerous offenders escape the claws of the law, if you will.

Currently, if the evidence is not enough to meet the dangerousness category, the individual may fall into the subcategory of long-term offender where there's substantial risk but a reasonable possibility of eventual control. This allows us to recuperate those we can when there's a real chance that we may do so.

A key sentencing principle in Canada is the use of less restrictive sanctions, when possible, to meet the goals of sentencing. That's why the case of Johnson in 2003 decided that when a judge is facing a dangerous offender hearing, he or she must look at whether the person could actually be a long-term offender, whether the long-term offender designation is enough. The present law gives us everything we need.

Part two of my representation is that the issues of the removal of judicial discretion and reversal of burdens are very troubling. Presently if a judge is convinced, by evidence, of dangerous offender status or long-term offender status, the code mandates that the judge “shall” give a certain sentence—indeterminate in the case of dangerous offender, others in the case of long-term. So there is no discretion to the sentence once the judge decides that you are a dangerous offender. But there is discretion; the judge does retain discretion in ordering a report to make an assessment, and the crown must prove the allegations they are making. In the new system, the judge will have to order the report, and the crown will have nothing to prove when the presumption applies.

Even though the crown has a burden to prove a certain number of things—the crown must prove, yes, the conviction and the elements of dangerousness as put out in the code—it should be noted that the crown has not been held to a burden of proving absolute hopelessness before someone is declared a dangerous offender. In some cases treatment was shown to be possible, but the person was still declared a dangerous offender. I'm referring to Pedden in British Columbia in 2005.

The crown right now can prove behaviour that would constitute dangerous offender behaviour without having to show the person had prior convictions. You can have someone determined a dangerous offender today based on the one incident he or she was convicted for.

● (1555)

The existing likelihood of future behaviour through the accused's failure to control his or her impulses is what the crown must prove. Brutal conduct can be one incident, and we saw that in the Ontario Court of Appeal in Langevin. Conduct has been interpreted to mean things such as sexually sadistic writings. Even writings could be considered conduct under the present law in some circumstances.

It is worth noting that removing judicial discretion and removing the burden on the crown would remove two important protections for individuals before the courts. Such a system is not likely to pass constitutional muster. The case of Lyons in 1987 upheld the present system because there was room for crown discretion and because the burdens were adequate to protect the rights of the person before the courts.

Speaking of judicial discretion, it's important for you, I think, as a group to realize that judges are not heard here. They don't come and speak to you because of their obligation of discretion

[*Translation*]

—obligation of discretion—

[*English*]

The application of sentencing principles requires proper weighing of a lot of different elements. Mandatory minimums in removing discretion, as we see here, tie the hands of judges and will keep them from coming to very just results.

My colleague spoke about the U.S. experience with mandatory minimums and sentences. They have in fact targeted the economically disadvantaged, the minorities, not to mention those with learning disabilities and lower education. We've already seen a disproportionate incarceration of first nations people in this country. Will this law exacerbate that situation?

I'll skip over speaking about the U.S. situation, but should anyone have questions, I have some comments on it.

Taking away the judicial discretion leaves a situation in which the threat of the dangerous offender application with an impossible burden for the accused person is going to put huge power into the hands of some crown prosecutors. Will it be used to force guilty pleas: “If you plead guilty, I won't make the application”? Is this a coercion that we want to see in our criminal justice system?

Those who are trapped will be the economically disadvantaged, minorities, and native offenders. How many times will the threat result in a plea to something else to avoid the application, and how good is that for us? We won't know what crime was actually committed. Before we even get to the dangerous offender application, lawyers will be trying to avoid the two-year mandatory minimum sentences on earlier offences, because every time you chalk up another two-year mandatory minimum, you're running the risk that the next time around your guy is going to be a dangerous offender. Will this just skew the entire system? It's a question that has to be asked.

Under the new system, there are 25 designated offences. They include assault, pointing a firearm, and what have you. Mandatory minimums may mean that many of these designated offences are going to become two-year offences, regardless of the objective seriousness of them. Is the youth with a drug problem who goes out with friends and commits two separate robberies really a dangerous offender because the two were committed in the six months of his life when he had a drug problem? Prior convictions for two designated offences with two two-year prison terms will trigger the crown's request for dangerous offender status.

Of the 12 primary designated offences—take a look at them—sexual assault was everything from a touch to something very serious. Discharging a firearm with intent has a mandatory minimum. We're looking at going back to old articles in the primary designated offences. You have all the old articles. How far back are we going to go? A conviction with two years twenty years ago is going to be conviction number one and a mandatory minimum a year ago is going to be number two, and then you're a dangerous offender. How real a portrait is that of the dangerousness of that person? The crown request will be triggered in these cases, and in these cases, for the primary designated offences, there is the reverse onus.

The new law includes that the reverse onus for primary designated offences and, arguably, that list of offences will be seen as arbitrary. Sexual assault is a broad category. Hostage-taking seems pretty dangerous, but hostage-taking is only a designated offence. Will that pass a constitutional test for arbitrariness? The arbitrariness will be key to the constitutional challenge.

Those in the primary designated category are the only ones to whom the first reverse onus is going to apply. There is a manifest unfairness that at the same dangerous offender hearing some people will benefit from the ordinary rules because the first reverse onus doesn't apply, no matter how violent and how disgusting their crime was, because they have no record. Yet other people will have a reverse onus and a burden that they can't possibly hope to meet in some circumstances. So under the operation of the presumption for the list of 12 selected offences, for no particular reason, because they're not even selected according to the fact that they're all punishable by the same maximum, this limited group of people, or offenders, if you will, would lose the benefit of the ordinary rules. The inequality will be key to the constitutional debate.

Mr. Chair, I will go rapidly now.

The justification and jurisprudence showing the need for reverse onus is exceptional. I have a number of comments to do with reverse onus and with what would pass constitutional muster, and I will keep them for questions from people here.

At the dangerous offender hearing, the reverse onus will raise other questions. The accused will attempt to prove he's not a danger. He'll bring experts. The experts will have interviewed him. The crown can't compel him. How is the crown going to contest that evidence? These are practical problems that no one has really properly considered.

● (1600)

Likewise, when there's a second reverse onus, and that is when the court finds that the accused is a dangerous offender, the court must decide in favour of indeterminate detention unless satisfied that something lesser would protect the public. This second reverse onus is also unnecessary, and we don't seem to have compelling evidence to show that dangerous offenders with priors are not being picked up by the system.

The Chair: Ms. Schurman, I know you have a lot to get out there, and I'm sure our committee is going to give you the chance to do that, but we do need to get to questions. Thank you.

Madam Jennings.

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

I'd like to thank all of the witnesses for being here today, for agreeing to come before this committee on such short notice.

I have some questions for the Association of Chiefs of Police. Mr. Pecknold, you talked about how it's no longer the time for quick fixes and band-aids just won't do it, that in fact a comprehensive overhaul of our criminal justice system is really required, urgently needed. You said you would be prepared to answer questions specifically about different sections of Bill C-27, so I do have a couple of questions about Bill C-27.

If the association had cognizance of the original Bill C-27 and has now examined the dangerous offender section of Bill C-2, you will see that the government has brought forth some significant amendments, one of which deals with the long-term offender, breaches of the long-term offender's supervision order. That actually was a Liberal proposal, because we felt that if someone had been deemed a long-term offender under the current system, it meant that in many cases they had gone through a long-term offender hearing, was found to be dangerous, but the judge examined whether or not a long-term offender designation and supervision order would be sufficient to control the level of dangerousness in the community, etc.

On the issue of the crown's discretion to either trigger or not trigger an application, under Bill C-27, as it now is in Bill C-2, do you not...? Has the association thought about whether, if we were truly interested in protecting Canadians, ensuring safer communities, a better way would be in fact to ensure that there are actual assessments made, that there's an actual trigger, that it becomes automatic—it could be on second or third conviction, taking care of the issues Maître Schurman raised about arbitrary offences—so that you actually have an expert assessment of the offender, a repeat offender in many cases? If that assessment shows that the individual should not be designated a dangerous offender, the assessment still will provide much information to correctional services, for instance, to ensure that they receive the proper programs, the proper therapy, whatever it is they need to enhance the chances of their actually being rehabilitated or to control the risk of dangerousness and the possibility of repeats. That would be rather than what we have now, which is if there's a third conviction, the crown might seek an application. There's no guarantee that the crown...and you could have then the situation that Maître Schurman is talking about, where they'll be pleaded down.

● (1605)

Mr. Clayton Pecknold: Neither of us would profess to be experts in this particular area of the criminal law, but I think there's a certain reality. I've heard our colleagues here talk about judicial discretion. We've alluded to what prosecutors may or may not do. This is a theme you're going to hear our association talk about a little bit more over coming days, and that is the capacity of the rest of the justice system, our partners in the justice system, to deal with some of these legislative changes and the downstream consequences of them. We recognize that. I've heard my colleague from the John Howard Society talk about that, the incarceration rates.

We're also concerned about our colleagues in the prosecutorial services and their ability to handle the workload, much like we have a challenge. You're going to hear us speak up about that a little bit. If we want to deal with some of these problems in a holistic way, a comprehensive way, then we need to deal with our capacity challenges a little bit.

The reality of that, of course, is that when they're faced with capacity challenges, their first priority, obviously, is to make decisions in the public interest, but the fact is you only have so many resources, you have to make decisions, and where there are areas that are discretionary and challenging, I would say, from the association's point of view, we would have a concern that the purposes of the bill may be frustrated by the realities.

Hon. Marlene Jennings: So even under the current system, a major challenge is the lack of resources, both for local police on the ground to deal with the issues of violent crime—

We know that the rate of violent crime is actually decreasing, except amongst young people. Statistics are showing that there is a rise in violent crime amongst our youth. It's my understanding, from the studies I've read, that the best deterrence is when people think they'll actually get caught, and that if they are caught, they will be charged and prosecuted quickly, with a good chance of conviction if they actually did the crime.

If all of the resources were in place to do all of that, we would in fact be making our communities and our children and Canadians safer. So why not start with that?

Mr. Clayton Pecknold: You're not going to get an argument from a chief of police or deputy chief of police about liking more resources.

Hon. Marlene Jennings: Do I have any time left?

The Chair: You have about 40 seconds.

Hon. Marlene Jennings: In that case, I'm just going to thank you.

Mr. Jones, Ms. Schurman, if you have comments on the questions I've asked, I would ask you to feel free to comment in another round.

The Chair: Thank you, Madam Jennings.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Thank you, Mr. Chairman. I will begin with Ms. Schurman.

I would like you to provide us with further explanations so we can be sure we understand. Our main challenge is to ensure that Bill C-27 is constitutional.

You say, for example, that the judge will have to ask for the Crown's report and that there will be nothing left to prove. How, exactly, will this situation unfold in court, and how will the burden of proof and the evidence to be provided be affected? What are you trying to warn us about?

I understand that you are satisfied with the way the current system protects society, but can you tell us exactly why you are so concerned with the burden of proof and the way trials would be affected?

I then have a question for the Canadian Association of Chiefs of Police.

● (1610)

Ms. Isabel Schurman: First, I am concerned that there are two reversals in the bill. The first reversal concerns a person who has twice been convicted in the past for a primary offence. For that person, there will be a reverse onus which will force the judge to declare this person a dangerous offender, unless the person can prove otherwise. Of course, the bill spells this out much more clearly than the way I have just explained it.

The other reversal is that once a judge has declared a person a dangerous offender, the judge may not consider any other type of sentence except for an indeterminate one, unless the person who has been declared a dangerous offender can show that another sentence is appropriate.

Mr. Réal Ménard: I'm sorry, but I did not quite understand. If a judge rules that the person must be designated a dangerous offender, what can that person do or not do?

Ms. Isabel Schurman: My understanding is that, under the bill, a judge must impose a sentence of an indeterminate period of time. But there are two other options which the judge could not choose, except if the person being convicted convinces the judge that one of the two other options would be appropriate.

Mr. Réal Ménard: That's the Johnson case.

Ms. Isabel Schurman: Let's say it's a variation on Johnson.

The problem related to these reversals is not the fact that at the sentencing stage a person is not presumed innocent anymore. I read from testimony given before the committee assuring you that this was constitutional because the presumption of innocence was gone and the person had been found guilty. That's not where the problem lies.

The problem is related to sections 9 and 7 of the Canadian Charter of Rights and Freedoms, which deal with arbitrary detention, and the fact that each person has the right to life, liberty and security, and cannot be deprived thereof, unless it is for reasons of fundamental justice. Those are your two problems; this is where the bill will fail to stand up to a constitutional challenge.

To withstand a constitutional challenge, it will have to be shown that the objective is important, the change is necessary, that the current law is lacking, and that the new law is the least intrusive option which infringes the least on a person's rights. This will not be possible, and the burden of proof will be borne by the Crown and government lawyers, because the party which wants—

Mr. Réal Ménard: If I may, I'll just go back a bit to make sure I understand.

Ms. Isabel Schurman: Yes.

Mr. Réal Ménard: I want to discuss this before we talk about section 1 and the test.

Why don't you think that this will be acceptable from the perspective of arbitrary detention? Tell us precisely why. We are very concerned, so much so that the Bloc has tabled a motion calling on the government to table every study and legal opinion on the matter. I can't image the government not doing so; that would destroy me. We will vote on the motion later on, but tell me exactly why arbitrary detention would be an obstacle here.

Ms. Isabel Schurman: It specifically refers to the Supreme Court's 1987 ruling in the Lyons case.

● (1615)

Mr. Réal Ménard: Does the bill infringe the provisions on arbitrary detention?

Ms. Isabel Schurman: In the Lyons case, the current provisions were challenged, but they held up because the crown prosecutor had discretion to go ahead or not, and the judge had discretion, amongst other things. I'm trying to remember—it's been a while since I read the entire decision—but there was judicial discretion, the burden of proof was fair in the circumstances. The burden of proof did not lie with the accused, and the prosecution had to prove beyond a reasonable doubt—

Mr. Réal Ménard: Was section 753 challenged in...?

Ms. Isabel Schurman: That's correct.

Mr. Réal Ménard: Fine. I remember that it was a question on an exam two years ago. Any how, that's another issue.

Ms. Isabel Schurman: In Lyons, it was also argued that section 7 was infringed upon; this section deals with a person's right to life, liberty and security, and these are principles of fundamental justice.

Mr. Réal Ménard: All right. If the new system is adopted, when a judge is about to declare a person a dangerous offender, there will be no more judicial discretion for sentencing.

Ms. Isabel Schurman: Two things are at play here. The first reversal is even more troubling. It affects a person convicted twice of a primary offence. When that person appears before a judge, the judge has no choice but to declare the person a dangerous offender, unless the person convinces the judge otherwise. That's the first reversal.

Mr. Réal Ménard: But the Crown must ask for the designation; there is no choice. Therefore, the judge has to make a decision.

Ms. Isabel Schurman: That's correct, but when the designation is asked for, it is granted, unless the person can show he or she should not be designated a dangerous offender. But how can a person prove they will never do something again?

Mr. Réal Ménard: If the Crown asks for the designation, it is automatically given. But we did not get the same answer from the officials.

Ms. Isabel Schurman: When the Crown asks for an evaluation, under the new bill, the judge must order one. When the evaluation is complete, if the Crown is able to show that the person before the judge has twice been convicted for the same primary offence, and that person is in Court again for the same type of offence, the judge must declare that person a dangerous offender.

Mr. Réal Ménard: Was that the conclusion of the evaluation?

Ms. Isabel Schurman: Yes.

[*English*]

The Chair: Monsieur Ménard, we're just over seven minutes. It breaks my heart, as you know, to tell you that your time is up, but your time is up. We'll have to turn the floor over to Mr. Comartin.

[*Translation*]

Mr. Réal Ménard: You are so sensitive that you are like a rose in a field of poison ivy.

[*English*]

The Chair: I think I'm more like a thorn.

Mr. Comartin.

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

Thank you to the witnesses for being here.

We've had a number of—well, when it was C-27—evaluations of how many additional applications would come before the courts. We've seen numbers as low as five and as high as fifty.

Of the three groups that are here, has anybody done an analysis of how many additional applications—not successful ones but how many additional applications—are likely to come if the legislation passes under its present form?

Mr. Craig Jones: My understanding is it's been climbing pretty steadily since 1997.

Mr. Joe Comartin: The numbers have gone up to about 20 a year now, and it was running substantially lower than that at one time.

Professor Schurman, in terms of the constitutional charter issue, I've been asking everyone, is there one expert in the country, especially on the reverse onus issue, that the courts will pay attention to or who would be best able to reflect what the courts are likely to do with the inevitable challenge that's coming? You can put yourself in that category if you want, but I'm looking for—

Ms. Isabel Schurman: I wouldn't be so immodest. As to whether there is one expert on reverse onus, it's a very specialized part of constitutional law generally, so what you need is someone who is at the same time a constitutional law specialist and a criminal law specialist. Perhaps what I can do is just give that one some thought and give you the name, if I think of one, of someone who would really be the expert for that type of thing. It's most likely that in the Supreme Court of Canada decision in Lyons, they referred to writings by people whose opinions they respected at the time. As long as none of them have been named judges, you might be able to get them here in front of the committee, but many of them have been. I was thinking of Yves-Marie Morissette at the time, but he's been named, so I can't tell you offhand.

Mr. Joe Comartin: All right.

You made a reference to the ability to bring applications, even after the two time limits that were specified there. The initial one has to be brought at the time of sentencing and the other one six months after, or if new evidence is coming forward—But you opened up—and I know there's another provision—the possibility of bringing an application at an even later date. Could you explain the circumstances around when that occurs?

● (1620)

Ms. Isabel Schurman: As the law is now, the application can be brought more than six months after the sentence if it is shown that relevant evidence that was not reasonably available to the prosecution at the time of the imposition of the sentence became available. So if the prosecution finds out after the fact something that would have been important, if you will, in their decision to make or not make this application, they can go back, even after the six months. It's rare, but the point is the law allows for it now. We don't need to change the law in order to have that possibility. It's already there.

Mr. Joe Comartin: Does the likelihood of that section being used open up the door for more applications to be made on the basis of the amendments that are being proposed now?

Ms. Isabel Schurman: I don't know. I don't know if that would change—

Mr. Joe Comartin: Okay, but if it were used, then the reverse onus again would be applicable. So if there were the discovery of new evidence, maybe in cases that have already unfolded over a long time, and the evidence came forward, they could still apply the reverse onus?

Ms. Isabel Schurman: I don't see anything in the proposed amendments that precludes that.

Mr. Joe Comartin: I have one final question, again for Ms. Schurman. Are we at risk, by having set this fairly rigid criterion—the three offences—of having a change in attitude at the courts, or perhaps of having the prosecutors say they're not going to bring anything based on past behaviour, misbehaviour, misconduct, egregious as it is, unless they also meet the three-conviction test?

Ms. Isabel Schurman: It's interesting you raise that, because I think one of the things you can foresee happening is that legal counsel will plead that if the legislator saw fit to amend, to bring in the necessity of a prior conviction, then the legislator really doesn't want dangerous offenders to be designated very often unless they have prior convictions. That's the kind of logic that we can foresee will be pleaded. You raise it, and it's an important point.

I think something else that's sort of connected to that is that you can't underestimate the combined effect of this piece of legislation and the mandatory minimum sentencing laws, because you're going to see prosecutors who are going to sit there and say, “Wait a minute, this 20-year-old has two priors for which he got two years, and because of the mandatory minimums, I can't go ahead with this kind of thing.” You're going to see people who aren't going to be applying the law strictly as it's worded in this bill because it won't be fair. We'll be relying heavily on prosecutorial discretion, and what about in areas of the country or in certain communities where the prosecutors just refuse to use that discretion? So that's a bit troubling as well.

The Chair: You still have well over a minute.

Mr. Joe Comartin: Mr. Pichette, do you have any idea of the number of cases in Canada in which you would have people who, as one of the charges, commit assault causing bodily harm, maybe of a fairly minor nature, and they get two years because it's a repeat offence, and then they've got a B and E with intent, so they get another two years or better because they've got a previous offence, and then they commit a serious, violent act? Can I suggest there are at least thousands of those cases in the country every year?

[*Translation*]

Mr. Pierre-Paul Pichette: Mr. Comartin, I could say that you are entirely right. However, if I may, I will tell you about typical cases we have to deal with in Montreal, and then I will show how they generally relate to crimes committed by street gangs.

In 2006, out of 42 homicides committed in Montreal, 12 were directly related to street gangs. These were very violent crimes. In 2007, that is, beginning on October 31, out of 37 homicides, 14 were related to street gangs. As for attempted murders, there were 42 of them in 2006. Beginning October 31, 2007, there were 45 of them. I am just referring to crimes committed by street gangs. I am not including all similar crimes committed in other situations. To come back to your question, I would say that for us, it is significant.

● (1625)

Mr. Joe Comartin: Are the people—

[*English*]

The Chair: Mr. Comartin, your time is used up, sorry.

Mr. Moore, seven minutes.

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

Thank you to all the witnesses. I have a couple of questions for you.

To the Canadian Association of Chiefs of Police, thank you for your testimony and for the message you've brought, that correcting what's wrong with the justice system isn't going to be solved by any one component, because many components go into that. We are certainly hearing that message. There is what's needed for resources and what's needed in the area of technologies. Of course, most people believe also that the Criminal Code plays an important role in keeping our communities and streets safe. So thank you for bringing that message.

To Professor Schurman, a question. Hopefully we are all operating from the premise that our justice system should, as one of its main components—the primary component, I think—be about keeping communities safe, keeping Canadians safe, protecting innocent Canadians from those who would do harm against them. Do you think it is ever appropriate to have an indeterminate sentence, a sentence where someone could potentially not be back on the street?

Ms. Isabel Schurman: First of all, let me reassure you that we all —not just not those around the table but all the judges in this country, the prosecutors, defence counsel, and the people who appear in court daily—are very concerned with the justice system being a system that keeps Canada safe.

I would say to my colleagues at the end of the table that many of us have been pleading openly, for years, that there be more resources for police for the detection of crime and apprehension. Studies have shown and evidence has shown that this is the place where we're going to deter crime the most, in the certainty of apprehension and the fear of being brought before the courts.

Also, concerning my colleague beside me, the Americans have discovered, and we should be listening to them, that for every $1 million they're spending in prisons in California and Florida, they can in fact reduce crime 15 times the amount they're presently doing if that $1 million goes into education or into drug abuse programs.

As far as whether it's ever appropriate, our Supreme Court of Canada said so in Lyons, that, look, we have this provision, and it's appropriate as long as it's very exceptional, very clearly defined, and it makes sure the person's rights are very protected before the courts. The Supreme Court of Canada said it: this will be appropriate but in the most exceptional of situations.

Mr. Rob Moore: Thank you for that.

I think this bill is dealing with the most exceptional situations. Bill C-2, with respect to dangerous offenders, is dealing with what could be termed the worst of the worst offenders in Canada. There was some reference made to someone who may have had what's termed "less serious" crimes. That's not what this bill is going to target.

I think we're all aware, at the end of the day, that there is still a tremendous threshold and there are tremendous safeguards, including our Constitution, that will protect all Canadians from this being too broad in scope. But at the end of the day, we have a situation where there are individuals who have shown, unfortunately, no desire whatsoever, and no ability, to be rehabilitated even though they've had maybe dozens of contacts with the justice system. These are people who commit very serious offences like the ones set out in this bill—the primary designated offences, for example, which are perhaps the worst imaginable offences. What we've said is that we have to act to protect Canadians from those who have shown no desire to be rehabilitated and are committing the worst offences.

To the Association of Chiefs of Police, in a way these are rare individuals, fortunately, and the dangerous offender provisions would apply to the very worst offenders. From your experience or through your representation, I'm wondering if you could tell me what are some of the challenges in dealing with the most high-risk offenders, the most dangerous offenders in Canada, as opposed to those who, although they have committed serious crimes, don't fit into this category. I'm speaking specifically of the recidivist nature.

● (1630)

Mr. Clayton Pecknold: We support constitutionally valid provisions that allow for the continued incarceration of the most serious of offenders. We support that, and we work with the prosecutor service to try to make that a reality. When the Johnson case came out, we were a bit concerned about the impact that would have. I'm not aware of any study that showed the impact of it.

Incidental to that question, I have before me a study the Vancouver police did with respect to their chronic offenders program. They operate a program to deal with the prolific offenders in the community. Oddly enough, in a sample group they studied, they found that sentences for chronic offenders were falling in terms of their period of incarceration over time. They were surprised to see this, and they brought this to the attention of the Department of Justice.

We have a big problem with that group. Beyond the most serious of the serious, we have these offenders who are committing property crimes and other violent and non-violent crimes on a continuing basis in our communities. Pick your target; any one of them is—

Mr. Rob Moore: You're aware of individuals who have been designated as dangerous offenders. Perhaps there are individuals who should have been designated dangerous offenders but weren't in the past.

I would like your comment on this. I know there are plenty of people who line up to protect the rights of the accused, and rightfully so. We have a system where the rights of the accused are fully protected. But from what we've heard in the testimony of some individuals, it's not a question of will they reoffend, it's a question of when will they reoffend. Despite best efforts, despite resources, despite in some cases having someone who basically tails them almost day in and day out, some people will reoffend.

Am I out of time?

The Chair: Yes, you're basically out of time.

Mr. Rob Moore: Can I get a quick comment? We do hear about this.

The Chair: I'll ask the gentlemen if they can respond once we turn it over to Mr. Bagnell for his questions.

If you could work in a response, I'm sure Mr. Moore would appreciate it.

Hon. Larry Bagnell (Yukon, Lib.): I'm sorry, but I want to ask a few questions.

I do want to thank the chiefs of police, though, for supporting Ms. Jennings' bill on modernization of investigative techniques.

Mr. Jones, I agree with virtually everything you said, and I've been lobbying for that.

My questions are for Ms. Schurman. Were you saying that under the old act, if someone committed a particularly brutal crime, one time, they could actually be a dangerous offender, but under the new act the prosecutors will wait until three crimes are committed?

Ms. Isabel Schurman: I'm not saying they'll wait; I'm saying there's a danger in bringing this in, if you will, to the section. Under the old act, one of the key cases was the Ontario Court of Appeal in Langevin, where one very brutal act was sufficient to be declared a dangerous offender. So that exists now.

One of the dangers I can foresee—although I can't tell the future—is given that the legislator has seen fit to make specific sections to get the people who have prior convictions, there's a risk the courts might say that the legislator has spoken quite clearly, that if it's one act, it has to be very, very exceptional. We may even end up with a higher standard than we have now for the one-act situation. I'm not saying it will happen; I'm saying it could.

Hon. Larry Bagnell: My second question is on the judicial discretion. My understanding is that subclause 42(4) basically allows judicial discretion. The judge—he or she—could impose a sentence for the offence of which the offender has been convicted only, so in fact being a dangerous offender would make no difference. The third offence would get the same level of sentence. Does that not leave the discretion with the judge, and therefore make it "charter fine" because he can make a proportionate sentence?

● (1635)

Ms. Isabel Schurman: It does say that the court shall impose one of three possibilities. But then subsection 753(4.1) says that it has to be the indeterminate period unless the court is satisfied by the evidence that there's a reasonable expectation that a lesser measure would protect the public. That's putting the burden on the person before the court, as opposed to putting the burden on the prosecution to show that the indeterminate sentence is the appropriate response.

Hon. Larry Bagnell: Doesn't that put the burden on the judge, based on what he sees, to provide a reasonable sentence?

Ms. Isabel Schurman: You see, because of the way 753(4.1) is worded, he's forced to impose the sentence of an indeterminate period in the penitentiary unless satisfied by evidence adduced by the hearing. The evidence is going to have to be adduced by somebody, and it's certainly not going to be adduced by the crown.

Hon. Larry Bagnell: Okay. I have another question. Sorry for the rush, but we have time....

I know you wanted to talk more about reverse onus, and in that it's not an uncommon feature of the justice system and has passed charter muster before, can you explain to me why it wouldn't in this new use of it?

Ms. Isabel Schurman: It is actually uncommon. It is an exceptional measure, the reverse onus. Gradually, over the years, we've seen them come into bail in a very limited way and to certain other provisions of the code in a very limited way, but every time the Supreme Court of Canada is called upon to talk about reverse onus, they still use the word "exceptional", because it is in fact contrary to what the system generally should be doing.

Other than the comments I made earlier, I think one of the big problems we see here is that in the absence of empirical evidence showing why this is necessary, it's highly unlikely that it will pass a constitutional challenge, because if we don't have the evidence here to show why it's necessary, how is the crown going to have it at the challenge stage before the Supreme Court of Canada?

This is what my colleague beside me was talking about: there's no evidence here to show why it's necessary in these circumstances to reverse the burden.

Hon. Larry Bagnell: My last question is this. You said this act isn't necessary, but would the fact that it calls for the prosecutor to actually make a decision as to whether or not to go for a hearing not help stop situations from slipping through the cracks?

I just want to go back to your last comments. When reverse onus is used on remand, it could be for every case, so it's not an exceptional situation.

Ms. Isabel Schurman: Reverse onus in bail matters is exceptional. It's very exceptional. You have Pearson and Morales from the Supreme Court of Canada concerning major drug offences, but there are very limited offences for which the reverse onus has been approved in bail matters. When I spoke here on Bill C-35, we talked a bit about that, I think.

The other part of what you were asking—it's just escaped me now; I've lost it.

Hon. Larry Bagnell: The fact that the prosecutor has to make a decision with that stuff.

The Chair: A very quick response.

Ms. Isabel Schurman: As it is now, the prosecutor has to start the process. It's that once the prosecutor requests the assessment, the judge has to order it. There's no more judicial discretion to say, "Wait a minute now, I don't think this is an appropriate case for this", at the beginning of the whole process.

The Chair: Over to you, Mr. Harris, for five minutes.

Mr. Richard Harris (Cariboo—Prince George, CPC): Thank you very much, Mr. Chairman.

I think it's important to reiterate in this time that the designated offender part of this bill is designed specifically for the "worst of the worst" criminal, for the most incorrigible criminals in our society. Lest we get led astray by some of the comments that this will filter down to those who are not deserving of it, that's absolute nonsense: this designation is for the very worst in our society, who simply cannot take responsibility for what they're doing. I think it's important to keep repeating this, so that those folks who are watching this proceeding today have a clear understanding of why it's there.

Secondly, Professor Schurman, I appreciate your legal opinions. You've done a very great job. Your opinions are important to this. I think it's important also for the record to say that this bill wasn't drafted on the back of a napkin in an afternoon; it was drafted with the assistance of the finest legal and constitutional minds the Minister of Justice can find. When they signed off on it, they signed off with an understanding that it may face a constitutional or charter challenge in the future and they signed off with the complete confidence that this bill will withstand any constitutional or charter challenge. I think that's important to put on the record as well.

What we have here is a difference in legal opinion, which some day will be determined in the Supreme Court, likely. So appreciate those comments.

I want to ask one question before I finish on this reverse onus that witnesses yesterday seemed to be quite afraid of and that I think you, Mr. Jones, stated your apprehension about.

It's my understanding that in fact the reverse onus is used in the criminal system today when it comes to applying for parole, whereby someone who's making application for parole must go before a parole board and prove to them that he or she is worthy of getting parole.

That type of process seems to have worked pretty well up till now. If someone can't show the parole board hearing that they should be let out on parole, they simply don't get parole.

I'm trying to find where all the apprehension about this reverse onus comes from concerning a person who is already convicted. There's no question about whether they're guilty or not, as they've already been convicted. Now the onus is on them to tell the judge why they shouldn't be designated a dangerous offender, if that's what the crown is seeking.

It's an extension of a process that's already used today, so I can't understand the apprehension that defence lawyers in particular have with it, other than the fact that they're going to have to go from being defence lawyers to some other type of law where they're having to prove something rather than defend it.

Could you comment on that?

● (1640)

Ms. Isabel Schurman: Do you mean anybody? Was it for me or for—

Mr. Richard Harris: If we have a reverse onus system that works in the parole system for parole applications today, why are you so afraid of it as Bill C-2 would extend it to another part of the justice system?

Ms. Isabel Schurman: It's because the rules of the game in a court of criminal justice have never been the same as the rules before an administrative body; because the goals and purposes of the hearing before the administrative body are different from the goals and purposes of the hearing in a criminal court; because the consequences to the accused person in a criminal court are often in a whole different category from those if they're proceeding before an administrative body. It's the whole common law tradition, which has been taken into our laws today, that—

Mr. Richard Harris: Aren't they trying to accomplish the same thing? In the one case they want to get out of jail, and in the second case they want to stay out of jail, so they have to provide reasons why either one of those two things should happen.

Ms. Isabel Schurman: Yes, but the rules of fundamental justice that the courts have said have to apply to the sentencing process are sometimes very different from what the courts have said are adequate for the administrative decision-making process after the sentencing has taken place. Those rules are often quite different.

Mr. Richard Harris: And that's what keeps lawyers in business, I guess.

Thank you very much.

The Chair: Thank you, Mr. Harris.

Mr. Richard Harris: Amazing.

The Chair: Monsieur Ménard.

[*Translation*]

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

Ms. Schurman, if you'll allow me, I would invite you to pick up where we left off. Those issues are of great concern to me.

I greatly appreciated Mr. Harris' hyperbole. But you realize that hyperbole is not the Conservatives' biggest trademark. It was said, in so many words, that the bill was drafted by one of the greatest legal minds; it's no secret that it was a tribute to Mr. Hoover. I don't object, but please understand that it is not enough, and we need to be apprised of the legal opinions. But I share your unbridled enthusiasm for the professionalism of the public service.

That being said, I would like you to continue. You stated clearly that you have concerns regarding arbitrary detention. If these provisions were challenged, there is jurisprudence. There are concerns.

Let us continue with section 7. How can we reconcile that, and which provisions of the bill are most at risk as far as section 7 is concerned?

Ms. Isabel Schurman: As far as section 7 of the Charter is concerned, you cannot be deprived of your liberty, unless it is in line with the principles of fundamental justice. But what certain provisions of the bill say is more or less that you will be jailed for an indeterminate period of time, except if you will never be a threat in the future. So the onus is on the person to prove that something will never happen in the future. Of course, that is a fairly bizarre burden of proof.

Section 7 was at issue in the 1987 Supreme Court ruling in the Lyons case. In this ruling, the reason why the process was upheld was because the burden of proving that someone was a dangerous offender fell to the Crown, which had to prove this beyond a reasonable doubt. This was a key point in the Lyons decision at the time.

The Supreme Court even ruled that the fact that the Crown was not obliged to give notice that it would call for a dangerous offender hearing did not violate the Charter, but that it might be grounds for a person to withdraw their guilty plea.

But as far as section 7 is concerned, it was at issue in the Lyons case, as it is in the current legislation. What we have now is constitutional and it works. So then why start something which might provoke a debate which will go on for years before prosecutors can actually use it?

● (1645)

Mr. Réal Ménard: You are touching upon an interesting point because there are very few witnesses, and I must say that the minister did not answer the question.

How is it that the current system does not work? We were told that it took about 600 hours to prepare a case. But the minister really did not tell us how the current system is broken; after all, under this system over 300 people were declared dangerous offenders.

It seems that we were told that crown prosecutors were reluctant to work on these cases, that they were hard to prosecute. So is it necessary to create a whole new system? Have you also received indications the system is broken?

Ms. Isabel Schurman: It might be a little dangerous to start from the premise that the system doesn't work, because what we want, and what your colleagues today say they want, is something which will only be used exceptionally. So if a country like Canada wants something which is absolutely exceptional, given our crime rates, we should not have such a high number of people who are declared dangerous offenders each year.

But I agree that there is a real problem with resources. In some situations, a crown prosecutor might think he can argue a case, but will not do so because he might not be given enough freedom or time to prepare a case for court.

Mr. Réal Ménard: What resources are lacking?

Ms. Isabel Schurman: Prosecutors don't have enough money or staff. Yes, I am convinced that this problem exists, but I also believe that we must not necessarily take for granted the fact that the system is broken. We are talking about an exceptional measure which should remain so.

Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ): However, Ms. Schurman, if the onus is reversed and if a person is found guilty of a third offence, the reverse onus kicks in, and it will be very difficult, and very costly, for legal aid to argue that the person should not be declared a dangerous offender. Other witnesses have told us that it would be extremely difficult—and you have said so yourself—to prove this. Trying to prove that a person will not commit a crime in the future is to impose a negative onus. It is almost impossible to prove such a thing.

Ms. Isabel Schurman: Yes, and legal aid costs are also an issue. Further, as you say, the fact that a person may succeed in presenting this evidence with the support of experts, and everything else, does not affect the process. I imagine that the process will remain long and difficult in most cases. Perhaps the reverse onus is a way to shorten the process, but I'm not sure it will produce the desired results.

[*English*]

The Chair: Madam Freeman.

[*Translation*]

Mrs. Carole Freeman: Do I have a minute left?

[*English*]

The Chair: We can get you on the list, but we have to turn it over to Monsieur Petit.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you.

Thank you for being with us this afternoon. My questions will mainly be for Mr. Pichette and Mr. Pecknold.

For the last hour or hour and a half, we have only been discussing the reverse onus, but the bill also contains provisions on mandatory minimum sentences, the age of protection and impaired driving. You mentioned earlier—and this drew my attention—that you already have statistics on Montreal homicides, including others. If we are to amend the Criminal Code, it is because we want to solve a problem, or at least prevent a problem from happening again and again.

A little earlier, you told us about statistics related to homicides carried out by street gangs. Do you have other statistics, or data, on impaired driving for the province of Quebec, for example, which might guide us and tell us if we're heading in the right direction?

● (1650)

Mr. Pierre-Paul Pichette: Unfortunately, Mr. Petit, I do not have any statistics which I could reliably present to you now. However, I've been listening to the discussion for over an hour and I will take the liberty to repeat the position of the association. As my colleague, Mr. Pecknold, said earlier, we believe that the Criminal Code is already very complex. I would encourage you to place yourself in the position of the citizens you represent and we are called on to protect. For these people, the situation is already very complex. I would invite you to ask yourselves whether the average citizen would understand what we have just talked about.

I understand that the law is important and that the rights of inmates are also important, but can't we just for a moment stop and think about the victims? Can't we try to see how citizens perceive the fairness of the legal system, and ask ourselves whether they feel a person who has been found guilty has received an appropriate sentence?

I mingle with Montrealers on a regular basis, and I can humbly tell you that in many cases, they wonder why people who have committed crimes I would qualify as being violent receive such light sentences, or why repeat offenders of crimes against citizens—such as break-ins or vehicle theft—are walking the streets.

I understand that we need a debate on the provisions of the bill, but I encourage you to question the way you are going about it. What will the average citizen remember of the discussion we're having today?

[*English*]

The Chair: Thank you.

Mr. Comartin.

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

Mr. Jones, the Callow case—the balcony rapist, as he's more commonly referred to—highlighted problems with when we should perhaps bring applications for dangerous offenders and don't. But it also highlighted the failure in the system to have mechanisms available to deal with someone who is of great concern to cause further risk to society when they are released.

Has your agency looked at what would be useful legislation to provide that structure or infrastructure, and what resources would be necessary to deal with someone like that who was coming out after an extended period of time and at least potentially posing a risk to society?

Mr. Craig Jones: Thank you for that question, Mr. Comartin.

The society is driven by very high-quality evidence, most of which you're probably aware is produced here in Canada, on how to reduce recidivism and reoffending. And from our standpoint, the more emphasis we put on security or building prisons or—with respect to my friends here—law enforcement, the less resources are put into exactly the kinds of treatment programs that produce results.

I will direct a comment to Mr. Harris, who has absented himself for a moment. Bill C-2 does not stand in isolation. Bill C-2 stands in the context of the new national anti-drug strategy, and these things have a tendency to combine.

With respect to Mr. Harris' observation, from our standpoint, when I looked at the text of the national anti-drug strategy, I looked in vain for the words “evidence-based” or “harm reduction”. Here are two concepts that are endorsed by every expert body, from the World Health Organization to the Canadian Medical Association, and they were nowhere to be found, and that signals something to Canadians. I think the message is we're not interested in the evidence; we're interested in ideology.

Now I'm going to defer to the legal experts on the evidence base for the case you're referring to, but our persistent complaint is that we don't fund treatment programs adequately, given what the evidence says about their success in creating safer communities.

● (1655)

Mr. Joe Comartin: Professor Schurman, on the same issue, have you analyzed what additional legislation would be useful in terms of providing an extension when a person comes out under those circumstances?

Ms. Isabel Schurman: I'm not aware enough of what happened in that particular case to be of any real use to you on this one. But there are certainly possibilities in terms of amendments that can be made to the Criminal Code in keeping with the way the code is now drafted that don't need to be sweeping amendments that would bring in the types of clauses the Supreme Court has already told us to be very careful of. So I'm sorry I can't be more helpful to you on that one.

Mr. Joe Comartin: Okay.

In your presentation you also indicated that you had additional information with regard to the U.S. experience and the greater incarceration of people there. If you want to take this opportunity to add any additional information, it might be helpful to the committee.

Ms. Isabel Schurman: One of the things that the United States is seeing—and I agree with my colleague here who spoke about it—is that they are pulling back from mandatory minimum sentences in several states because they have come to the conclusion that they cost a fortune and don't work. The cost-benefit analysis doesn't check out.

One of the things they talk about in the U.S. now is costs related to aging prison populations, in which people are jailed for indeterminate periods of time, and costs related to people being incarcerated when they're younger. Often the young people being incarcerated are men between 18 and 35 years old. Often they are fathers. There is a huge societal cost to the incarceration of parents. Children suffer from emotional and economic problems. There have been studies done by the Urban Institute Justice Policy Center in Michigan indicating that the social cost to the children of people incarcerated, because of the incidence of depression and dysfunction, is huge. These are some of the things they are seeing in the United States.

Also, there is the fact that the fraction of money spent on prisons, as I mentioned earlier, can be more helpful in other areas in terms of reducing crime.

The 18- to 35-year-old male example is a good one because anybody who works in the justice system knows that there are many, many instances of people who, for four, five, or six years, have a period of delinquency and then turn out to be very fine, law-abiding citizens.

Now under this law, with the combination of the mandatory minimum sentences, we might catch some of those people in this net, even though your colleagues on the other side of the table say all they want to catch are the most exceptional criminals. The fear is that we'll catch those people, and it's far more than what we're really aiming for.

Mr. Joe Comartin: In terms of the—

The Chair: Mr. Comartin, I'm sorry, your time is up.

Mr. Kramp is next, and then Mr. Lee.

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

Ms. Schurman, you mentioned a word that struck me a bit, and that's "cost", whether it's a cost to the prison system or whether, as Mr. Craig Jones has stated, it's the cost to deal with a serious criminal. I would really like to remind you, and everybody watching this hearing as well, of the enormous cost that seems to be ignored here, and that's the cost to victims. There isn't a person here who doesn't know at some point somebody in life who's been victimized. We could all imagine if it were our sister or our brother or a parent or a sibling or a friend or a neighbour, and we've seen that. We've seen the horrendous impact—lives ruined, families ruined, communities ruined. So we have to strike a balance here.

Over two-thirds of the public are demanding some sort of protection that does not exist at this particular point. They need the balance back in. This is what they're telling us. We're suggesting that we have to find a way. The amendments to the Criminal Code are not a panacea, granted, but they are a component that's been designated as being part of the problem. Sure, the social root causes, etc., are paramount. Rehabilitation is crucial.

When we get talking about the dangerous offender portion of this in particular, I'd like to ask a couple of questions to either Mr. Pecknold or Mr. Pichette.

Possibly, just from your life experiences in the judicial field, in the police, have you found that if you have a violent offender...? Do you think there's any chance of their ever reoffending again, or are they just a one-time Charlie? Have you ever found that they only offend once and that's it? Is that what you've found, or have you occasionally seen some who might reoffend again?

● (1700)

Mr. Clayton Pecknold: I'll answer that this way. If there aren't people offending and reoffending, why do we need chronic offender units? Why do we need integrated sexual predator units that follow sexual predators who are on warrant expiry or who are under some sort of supervision and are reoffending? We are responding to those threats because we have to. We have chronic offenders. We have repeat offenders. We have some concern that their sentencing and their progressive sentencing does not meet what they're up to and what they're doing and the harm they're inflicting on society.

Mr. Daryl Kramp: Does the public deserve to be protected from people who are admittedly a serious problem?

Mr. Clayton Pecknold: We're here to support these Criminal Code amendments as one part of a larger initiative against violent crime, so clearly, sir, the public is calling for it.

Mr. Daryl Kramp: Thank you.

The Chair: Are you looking for comments just from one group in particular? Sorry, one of the other witnesses wanted to comment.

Mr. Daryl Kramp: No. If Mr. Jones wishes to comment on the same topic, I'd be pleased to....

Mr. Craig Jones: Thank you, Mr. Kramp.

If, as you say correctly, the social root causes are paramount, put the resources there. That's what the evidence calls for.

Mr. Daryl Kramp: I'm suggesting, sir, with the greatest of respect, we are doing that as well, but this is a multi-pronged attack. We are putting resources there. We do need education. We do need to deal with the social impact to the community. I'm not just suggesting this government, but previous governments as well, are moving towards, obviously, all of the preventative measures as well as the rehabilitative factors.

Has our society dealt with this in a perfect manner? No. Particularly with rehabilitation, I think our record is dismal, but we also need protection from those who.... We're talking about a handful of people here. We're not talking about hundreds and hundreds of people being incarcerated. We're talking about a mere handful of people who have created the most heinous, unspeakable crimes and violations of humanity. Should there not be a degree of protection from people like that? That's my question.

Mr. Craig Jones: There definitely should, but keep in mind that the crime rate has been in decline for 25 years running.

Mr. Daryl Kramp: I take issue with that. The violent crime rate is up, sir. The crime rate overall, I agree, is down, but we're not talking about summary conviction offences here. We're not talking about misdemeanours. We are talking about violent crime, and that's why this is a violent crime act that we're dealing with.

The Chair: The time's up.

Mr. Lee.

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

Mr. Chairman, I continue to be concerned about the constitutionality of the dangerous offender part of this bill. I had to note Mr. Harris' comment today. He seemed to be saying that the Department of Justice had provided—I forget the exact words—an absolute assurance of the constitutionality of this. I am very skeptical that the Department of Justice would have been in a position to provide an absolute opinion on the constitutionality, and I'm interested in knowing how Mr. Harris knows this.

The Chair: I'm sure you are, Mr. Lee, but the questions—

Mr. Derek Lee: I'm not directing the question to Mr. Harris, but if Mr. Harris has information about this golden constitutionality opinion, I'd love to see it.

I want to ask Professor Schurman a question, because she teaches law and because my friends opposite here often engage in hypotheticals. Mr. Harris referred to this bill as targeting the worst of the worst. I'd be happy if we had a bill that actually did that, and properly did it. But we don't use those words. We have to use regular words in our statute, so we have to design something that protects our citizens.

I want to ask Professor Schurman this. Let's forget about the side of the scale that deals with the worst of the worst, the guy with the record as long as your arm, with tons of violent offences, Eddie Greenspan, our colleague, is his lawyer, and he has a full hearing and then is designated. Let's go to the other extreme; let's go to a citizen. Could you conjure up a hypothetical that in your mind would place these sections at risk in a constitutional challenge because of the circumstances of the person who is accused or convicted, because of the circumstance surrounding it? My gut tells me there is a vulnerability here to a charter challenge. Not on the "worst of the worst" scenario, but in some county town in northern Saskatchewan or northern Quebec, where you get a citizen who is suddenly facing a presumption. The citizen doesn't have a full education, might not have the best of lawyers, and might have committed some of the offences that you refer to in your testimony.

Can you offer us that hypothetical that you think would be likely to show an extremely weak charter position?

● (1705)

Ms. Isabel Schurman: Sure.

Suppose you're dealing with a situation where you have a 19-year-old who is in a barroom brawl and all that's committed is an assault, but that's under the designated offences. And suppose you want to add to that that he had a weapon with him. He gets a two-year mandatory minimum. Then a couple of years later he's involved in some other business with his friends, when they all set out to do something. He's still only 21, and he still ends up with another mandatory minimum sentence. Then you find yourself in the position where those are both designated offences, so the burden is a little heavier on him.

But if you take that one step further and you look under primary designated offences, discharging a firearm with intent, put yourself in a first nations community, somewhere where you have some kind of big incident going on, discharging a firearm with intent. It doesn't take very long before somebody gets charged with something like that, discharging a firearm with intent. That now is a primary designated offence in this law, which brings—and I think the law also foresees—a higher mandatory minimum sentence for that. Take that same person, who, for argument's sake, might be 30 years old, who 20 years ago had some offence for which he had received a two-year sentence. That would then fall into this, even though it was so many years before.

So these are situations, but what you must remember, too, is that the constitutional challenge won't just come about because the facts of a particular case will permit it. When the Supreme Court of Canada heard Smith years ago on the mandatory minimum seven-year sentence for importation of narcotics, they upheld Mr. Smith's sentence. They said, "We're striking down this law. You're not going to benefit from it because we believe you deserved eight years, but we're striking down this law because we are going into hypothetical possibilities here. We're looking at it."

So it won't even have to be that perfect fact situation before a challenge comes up.

Mr. Derek Lee: I want to support this bill. Is there any way we can fix this? Is there any way we could modify, fix, band-aid—sorry about the use of the word "band-aid"—use some Polyfilla or something and get this thing fixed so it would be less vulnerable to challenge?

The Chair: You have about 15 to 20 seconds.

Ms. Isabel Schurman: I'm not sure the fix doesn't already exist in the legislation as it is and perhaps redirecting the energies to the resources going to the people to use the laws as they are now. That may be your fix, because we may be just complicating our lives for nothing here.

The Chair: We have two more people on the speaking list, and I'm going to let you know that you each have four minutes rather than five. We need to get to 5:15 when we have a motion that's been presented and will be debated and voted on at 5:15. That's the motion from Monsieur Ménard.

Mr. Jean.

● (1710)

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Thank you, Mr. Chair. I appreciate having the opportunity to ask these questions today.

First of all, to the police chiefs, I come from a background of 11 years as a criminal lawyer in northern Alberta, so quite frankly I don't think the changing of onus is going to make a tremendous difference to those individuals; to be blunt, I don't. I've been in the trenches working it and I don't think at all that the onus is going to change things tremendously. Would you agree?

Mr. Clayton Pecknold: I'm sorry, I'm not sure I entirely understand your question. Change things with respect to whom?

Mr. Brian Jean: As far as the criminals themselves in getting fair trials and having the ability to be heard.

Mr. Clayton Pecknold: I listened to the discussion of the reverse onus provisions. My understanding is that the Constitution and the charter are living documents. I have great faith in the Supreme Court of Canada to see the issues before us right now and to revisit the law if necessary.

Mr. Brian Jean: Okay.

Do you actually think the minimum mandatories will send a clear message to criminals? Is that the purpose of it, or is it more to manage them separately from society after the fact?

Mr. Clayton Pecknold: Probably both. There is the specific deterrent aspect, clearly, but we know that the 21-year-olds killing each other with guns on the streets of our cities know what they're facing when they're found with a loaded gun. They know what the law is, and I'm sure if you practise criminal law you would understand that they know it.

Mr. Brian Jean: They do know.

Ms. Schurman, would you comment on that last question, as far as whether or not it sends a clear message to criminals or indeed if it's going to be used primarily to manage the situation for those 200 to 300—

Ms. Isabel Schurman: The mandatory minimum sentences, you mean?

Mr. Brian Jean: Yes.

Ms. Isabel Schurman: I'm glad you asked, because that was something I didn't get a chance to say anything about, and I think it's so complex that this particular offence is going to have this mandatory minimum and this one is going to have this mandatory minimum. It's just not realistic to think that the kinds of crimes committed by people with firearms is going to stop because it's going to be one year more or one year less—number one.

Number two, I think there's a real issue just for me as a citizen and as someone sensitive to families of victims of crime and as a mother and all the rest; there's a real issue about saying that sexual assault with a firearm, for example, is so much further than sexual assault with a machete. Frankly, I see that both are horrible crimes. So I'm just a little concerned about the fact that the mandatory minimums are going in on certain things, not on other things that might be equally horrendous, and that we're presuming that people on the streets, who are out there with illegal weapons, are going to say they'd better not touch this one, they're going to get a year extra. That's my concern there.

Mr. Brian Jean: What about the aspect of sending a clear message to criminals, the violent offenders? Do you think that's going to take place?

Ms. Isabel Schurman: You put the resources in too. You're going to send your message: if you do it, you're going to be caught. That's what the evidence has told us from before our Law Reform Commission in the seventies. We're doing study after study after study saying the certainty of apprehension and conviction is what's going to really work in terms of lowering crime in the country.

Mr. Brian Jean: Thank you.

The Chair: Thank you, Mr. Jean.

Mr. Bagnell.

Hon. Larry Bagnell: Thank you, Mr. Chair.

I have two questions, and I'd just like a short answer to the first question, which is this. We were talking about discretion, that the discretion still exists for the prosecutor, that even after three offences he does not have to ask for a hearing; he just has to decide whether or not he wants a hearing. So there's still discretion there?

Ms. Isabel Schurman: Right.

Hon. Larry Bagnell: Okay.

Now this is the question I want you to spend the rest of the four minutes on. A couple of the opposition members have, I think mistakenly, suggested, because they want the public to hear in this hearing that this will, and let me just quote, “catch only the worst violators of humanity, the worst of the worst, for the most hideous crimes”. I want you to explain how, in connection with the mandatory minimums, there are going to be people caught who are not the most hideous in society, not the worst of the worst offenders.

Ms. Isabel Schurman: We already see it now with the operation of pre-existing mandatory minimums. For instance, you see a relatively young offender, and you have a fabulous pre-sentence report. Everybody in the community has said there's no history of violence, but the judge has no option but to sentence to the mandatory minimum because the crime was committed with a firearm. We see this regularly, and if you were able to have judges here before you who would be able to talk about this, they would talk about how the quality of justice suffers from their not being able to make those distinctions. You're taking someone who potentially could be a very constructive member of society, putting them into a prison, which is going to be a school for crime, and making them feel that there's no hope and no way out of it. I think that is the sort of situation that makes people a bit anxious.

The problem is that with the 25 designated offences and the 12 primary designated offences, you have a pretty vast blackboard there of offences that will be caught in this.

● (1715)

Hon. Larry Bagnell: Sorry, I meant government members were saying that.

I think Mr. Jones wanted to say something.

The Chair: Yes, I was just going to ask, Mr. Bagnell. Mr. Jones would like to respond, if that's all right.

Mr. Craig Jones: I guess my question is if mandatory minimum sentences can be seen to work in this situation, why don't we use them for everything? Why do we need judges? Why don't we have politicians passing sentence by remote control? If mandatory minimum sentences work, why aren't they more widespread? Why are jurisdictions backing away from them, rather than running to embrace them?

I think the onus is on defenders of mandatory minimums to show that they in fact deter, because the evidence doesn't.

The Chair: Mr. Bagnell, you still have a minute and a half left.

Hon. Larry Bagnell: I would just follow up with Ms. Schurman on the idea that the people who could be put away indeterminately, for the rest of their lives, are not the most hideous, not the worst of the worst. Is that possible under this legislation?

Ms. Isabel Schurman: I think it's absolutely possible under the legislation because of the combination of the burdens, the number of offences, and the taking away of certain discretion on the part of judges. Yes, the prosecutor still has discretion as to whether to make their application or not. But once it's made, in certain circumstances, the judicial discretion has been severely limited.

The Chair: I understand, Ms. Schurman, that you have to go because your taxi won't wait.

Ms. Isabel Schurman: I'm very sorry, but thank you again for the invitation.

The Chair: Thank you for appearing today.

That concludes our rounds with the witnesses.

I'd like to suspend for about 30 seconds. We do have a vote this evening. The bells will start at 5:30. If we can suspend for 30 seconds to a minute and then come back, we will deal with Mr. Ménard's motion.

● _____ (Pause) _____ ●

● (1720)

The Chair: I'd like to get our meeting back to order so we can all make sure we don't miss the confidence vote this evening. I'm sure none of us wants to miss that. I have all the confidence in the world in Mr. Ménard that we will not miss the confidence vote in the House this evening.

[*Translation*]

Mr. Réal Ménard: The government must not fall now. Let us look to the future.

Do you want me to explain my motion, Mr. Chair?

[*English*]

The Chair: That would be great, if you could.

[*Translation*]

Mr. Réal Ménard: I am prepared to withdraw the first part of the motion if both you and the clerk can confirm that the department officials will be here tomorrow morning from 10:00 to 11:00 o'clock to tell us about the safeguards, namely, if they can prove to us that this bill is reasonably constitutional. Obviously, we must keep in mind that anyone can challenge bills.

Under the circumstances, I think that we could remove the first part of the motion and vote on the second. The second part is very important. Indeed, as part of our duties as parliamentarians, we must be guided by vigilance and information. It is up to the government and the department to show us what has been drafted to date. When Mr. Harris waxed lyrical, in a very unusual moment for him, he told us that there were very competent people in the department, and I agree with him. I cannot conceive of a government that would not be equipped with studies, expert opinions or legal briefs.

I believe that Ms. Jennings or Mr. Lee will present an amendment that we will be supporting. Concerns have been expressed about the right to remain silent, arbitrary detention and section 7. I am prepared to respect the confidential nature of anything that might be suggested to us, but I do not believe that we can vote without having obtained this information. This is just one way of being responsible as parliamentarians.

I therefore withdraw the first part.

[*English*]

The Chair: I want to confirm with you, Monsieur Ménard, that in fact the ministry officials have confirmed with us that they will be able to. We have one witness tomorrow morning. We'll have witness time from 9 to 10 o'clock tomorrow morning, and from 10 to 11 o'clock we'll have ministry officials here to respond to your questions, and obviously to questions from all members of the committee, for the duration. In fact, we'll limit the time. They have indicated that they will be here to answer questions more than they will be here to make any presentations, so we'll get a maximum amount of time to be able to ask them questions.

[*Translation*]

Mr. Réal Ménard: Would it be possible to ask our researchers to draw up a short brief concerning the major precedential principles and the decisions that have been handed down concerning reverse onus? Two decisions have already been quoted. I am aware of two of them, and I am going to reread them. I know this means a great deal of work for the researchers and that consequently, this information will not be available tomorrow. However if it could be distributed to our offices Monday before clause-by-clause consideration, it would be greatly appreciated.

[*English*]

The Chair: Maybe you could leave that request with me until I have a chance to speak with the clerk and with our researchers in terms of whether we can provide that or not.

So if I understand correctly—I just want to be clear—based on the fact that the ministry officials will be here tomorrow, you are removing the first part of your motion.

[*Translation*]

Mr. Réal Ménard: There.

[*English*]

The Chair: Okay, so we're dealing with just the second part.

Madam Jennings.

Hon. Marlene Jennings: Yes.

[*Translation*]

Further to discussions with our colleague Mr. Ménard, the Liberals will be proposing the following amendment:

[*English*]

> That the Department of Justice be asked to

—and then we add on—

> provide on a confidential/in camera basis, which protects advice to the minister, opinions in its possession relating to the constitutionality of Bill C-2 by 3:00 p.m., Friday, November 16, 2007.

● (1725)

The Chair: Monsieur Ménard, are you accepting this amendment?

[*Translation*]

Mr. Réal Ménard: I accept the amendment.

[*English*]

The Chair: You accept the amendment.

[*Translation*]

Mr. Réal Ménard: Yes, of course.

[*English*]

The Chair: Mr. Moore.

[*Translation*]

Mr. Réal Ménard: He accepts the amendment.

[*English*]

Mr. Rob Moore: I'm actually pretty surprised. I knew Mr. Ménard's motion was going to be here, but with regard to the amendment put forward just now by Ms. Jennings—I mean, of all people, she should know that it is so inappropriate that we would have that type of evidence put forward at committee.

Number one, the advice that's provided by the Department of Justice is provided to the government and provided to the minister. It's not for that type of disclosure. The department officials are more than happy to appear, and they have appeared in the past, to speak to the legal position of the government, the government's position on bills, but not to produce legal opinions. This is what galls me a bit. The opposition has every opportunity to call whomever they would like as a witness to render a constitutional opinion as to the constitutionality of this legislation, but Ms. Jennings and I'm sure Mr. Lee both know that this wouldn't happen under any prior government and it's certainly not going to happen in our case—that privileged information will be disclosed to committee. It's highly inappropriate, actually.

The Chair: Ms. Jennings.

Hon. Marlene Jennings: Thank you.

I did not have a chance to speak to my own amendment when I moved it, so I appreciate the chair's providing me with that opportunity.

The issue of client-attorney privilege is well-known. The Parliamentary Secretary to the Minister of Justice and Attorney General of Canada is quite correct when he says that previous governments formed by both the Liberal Party of Canada and the Progressive Conservative Party of Canada—I don't believe another party in Canada ever formed the Government of Canada—have not waived the client-attorney privilege.

However, that privilege can be waived. The committee does have a right to call for the tabling of documents. Because of our concern that the confidentiality of the information continue to be protected, the Liberals have brought this amendment.

In the same way, when a committee hears testimony in camera or receives in camera documentary evidence, that evidence is not public. Every single person who assists in an in camera meeting and has access to the information is bound to keep it confidential. If there's a transcript, there is one transcript that remains in the office of the clerk, and members have to go to a specific office, sign in, and are only able to consult there.

If this committee determines that it supports this amendment, those would be the conditions under which the minister would be required to table all legal opinions on the constitutionality of Bill C-2, which he has received in the course of his responsibilities as Minister of Justice and Attorney General, and that information would be kept confidential.

The Chair: Monsieur Ménard is next, then Mr. Moore, and then Mr. Lee.

[*Translation*]

Mr. Réal Ménard: Mr. Chair, I think we must first situate debate in its appropriate context.

We are parliamentarians, it is our responsibility to make law, and we must do so in an informed fashion. I could have presented another amendment whereby we would not have begun clause-by-clause consideration before having ourselves first called upon experts and legal advisers who could advise the committee. We could have gone to the House, asked for a budget and hired experts. However, given that we do not want to delay analysis of the bill and that the leaders have pledged to ensure that the bill is sent back to the House by November 23rd, I did not table this amendment.

I was a member of the subcommittee that studied organized crime. Indeed, a subcommittee had been created at a time when, in the presence of the Hells Angels, bombs were exploding in our communities. We had sworn under oath not to make certain information public. We are parliamentarians. I feel that if I take an oath and promise to respect the confidential nature of information provided in camera, then I am going to honour that promise.

Unless the government fears—

● (1730)

[*English*]

The Chair: Sorry, Monsieur Ménard, I don't want to take away your train of thought, but I need unanimous consent from the committee to continue for another five or seven minutes leading up to the vote so we can work through this issue. We need to get consent, as the bells are ringing.

Is that agreed?

[*Translation*]

Mr. Réal Ménard: I hereby notify you, Mr. Chair, that we will begin with this question tomorrow and that we will not allow any other witnesses to be heard until such time as this question has been voted upon.

[*English*]

The Chair: I appreciate your thoughts on how we're going to move forward. We will deal with this motion tomorrow morning when we meet.

I did not get unanimous consent, so we're adjourned until tomorrow morning at nine.

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