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Thursday, November 15, 2007

Chair

Mr. Rick Dykstra

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● (0905)

[*English*]

The Chair (Mr. Rick Dykstra (St. Catharines, CPC)): Pursuant to the House of Commons order of reference of October 26, the Legislative Committee on Bill C-2 will now resume its study of the bill.

Good morning, everybody. Welcome back for our final session of this week.

Mr. Landreville, perhaps I could just let you know we do have a little bit of committee business to take care of before we turn the floor over to you. If you could bear with us for a few minutes, we'll get through that and then we'll certainly get started with respect to your presentation and questions to follow. So thank you.

When we finished off yesterday, Monsieur Ménard, you had the floor.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Mr. Chairman, I have already made my arguments in favour of the motion. Therefore, if any colleagues wish to add something, I am ready to hear them.

[*English*]

I'm going to wait.

The Chair: Thank you.

[*Translation*]

Mr. Réal Ménard: Mr. Chairman, it is clear that I have already evoked the main reasons why the Bloc Québécois has tabled this motion.

Now, if ever the government were hesitant despite Ms. Jennings' amendment, which seems quite reasonable to me, would it be possible to at least consider getting a letter signed by the minister stating that studies have been carried out to ensure that the bill is constitutional?

I would rather see the research—and I cannot imagine that the government would have lacked the professionalism to have done the research—but I would like us to have written information regarding the constitutionality of this bill before we begin.

I have to tell you in all honesty that if by chance the government were not to take our request seriously, we would have no choice but to table motions for adjournment of the proceedings so long as we did not have any information allowing us to ensure the constitutionality of the bill.

I still have a baby face, but I have been here since 1993, and it is the first time that I have heard so many witnesses tell us that bill is unconstitutional. I have never sat on a committee where, out of a dozen witnesses, nine informed us that the probability of unconstitutionality was very high.

I want to have something, whether it is research or a letter from the minister. I have confidence in the minister. Before going to cabinet, he is supposed to have signed a memorandum—that is how they refer to it—in which he ensures that he has taken the necessary steps to ensure the conformity of the measure.

If we cannot have access to the research, we must have the letter tabled by the minister. In that way, we will be reassured as to the soundness of the work that was done. But if we do not have that, we will have no other choice than to table motions for adjournment on Tuesday morning when we begin our work.

Therefore, I invite the minister, the parliamentary secretary and Mr. Petit to take our request very seriously. We are parliamentary professionals and we love our work and the committee, but we cannot vote without having some minimum guarantees.

[*English*]

The Chair: Mr. Moore.

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

I read the motion as amended by Ms. Jennings. I think Ms. Jennings and Mr. Ménard know very well and don't need me to tell them—they've actually been here longer than I have—that advice provided to the minister, legal advice from his department, is advice, just that. There is a solicitor-client privilege that goes with that. Frankly, what's being asked would be quite unprecedented.

To address Mr. Ménard's concern on the constitutionality of what's been put forward, the Minister of Justice has already appeared. The question, I believe, was put to him on this bill, and previous to this on the bills that make up Bill C-2 from the last session, as to their constitutionality. The minister has to certify in each case that he believes the bills to be constitutional, based on advice he receives. And that advice is subject to solicitor-client privilege. The minister is not able to provide the type of legal advice that he receives.

Now, as is obvious, we've already received testimony from individuals who have rendered their opinion—not in writing, mind you—and provided legal input as to whether something is, in their opinion, constitutional or not constitutional. But the fact remains....

We can call as witnesses some individuals who are experts in one way or another who may want to give an opinion in that regard, but as to the advice the minister receives—and Ms. Jennings knows this, having been in government at one time—that is subject to solicitor-client privilege. It's up to the client to waive that privilege, which would not happen.

So in the interest of moving things along quickly, I would refer everybody to the testimony that the minister has already given, where he has stated that it's his duty as a minister to certify that legislation coming forward is, in his opinion, compliant with the Charter of Rights.

Mr. Chair, I should add—and I don't necessarily want this to have to happen, because we have a witness here—that we do have individuals here from the department who could give some testimony as to the long-standing history, going way back, that would say that this would not be a practice of the House of Commons, would not be a practice of the committee, and who could explain to honourable members, if they need an explanation, the concept of solicitor-client privilege and the reasons why the client in this case would not be waiving that privilege.

I'll take at face value why Mr. Ménard has introduced this, but the minister has said on this that he believes it's compliant with our Constitution. That's based on the advice he has received, and that advice is subject to solicitor-client privilege. The minister would restate that.

So I don't believe there's any need to proceed on this basis, especially when we have witnesses who are here, ready to testify. We also have witnesses from the Department of Justice who will speak to the bill, but it's not their role to give legal opinions to the committee.

● (0910)

The Chair: Thank you.

Madam Jennings.

[*Translation*]

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Thank you, Mr. Chairman, I greatly appreciate the comments of the parliamentary secretary to the Minister of Justice, Mr. Moore. In fact, solicitor-client privilege could be set aside by the client. In this case, the minister decided not to do so. But according to his statement, Mr. Moore claims that the minister has already stated and affirmed, following a question that was put to him by a member of this committee, that he has already received legal opinions telling him that Bill C-2, more particularly the provisions of Bill C-2 that are directly related to the dangerous offender regime comply with our charter and our Constitution.

Mr. Ménard asked a question of Mr. Moore, and he avoided answering. Mr. Ménard asked if the minister was prepared to simply sign a letter addressed to the chair of the committee giving a written confirmation that, indeed, according to the legal opinions he received—and he would not be obliged to disclose or table those opinions—he certifies that Bill C-2 and more specifically the changes dealing with dangerous offenders, comply with our charter and our Constitution.

A response would satisfy Mr. Ménard as well as my Liberal colleagues. I have not had the opportunity to check the transcript of his testimony before the committee, but if the minister has already made a statement to that effect, it should not cause him any problem to do so in writing. He is not obliged to disclose the legal opinions he received under the protection of solicitor-client privilege. However, he should confirm in writing that Bill C-2 complies with the charter and the Constitution, according to the legal opinions he has received.

Therefore, I would like Mr. Moore to answer that question specifically.

● (0915)

[*English*]

The Chair: I'm going to allow it, if you wish to answer that question before we go to....

Thank you.

Mr. Rob Moore: Ms. Jennings can't seem to take yes for an answer, because the minister's already been here. He's already testified. It's well known that the minister has to certify that in his opinion all legislation complies with the charter.

We're speaking to her motion. Her motion doesn't ask for something written from the minister, some statement to restate what he's already said at committee. So I'm only at this point speaking to the motion, which, as I've already said, we don't support. Now, if Ms. Jennings has another request of the minister, I can ask the minister that question. But right now we're speaking to this motion, which obviously is an unreasonable motion.

The Chair: Mr. Bagnell has the floor.

Hon. Larry Bagnell (Yukon, Lib.): I agree with Ms. Jennings and Mr. Ménard that if we just got a letter it would be solved and we'd be finished; that's easy. But I also think we shouldn't be debating this while we have witnesses waiting.

My other point is that Mr. Ménard and Ms. Jennings haven't asked for the advice to the minister; they've just asked what the department has. So that gets rid of the first complaint against it. Second, on client privilege, this money is paid for by the public. It's in the public interest, and if the minister were acting in the public interest, he would just release it.

The Chair: We have three more speakers, and then we're starting to go around.

I have you down, Mr. Ménard.

We're starting to go around the horn again here, folks. I think we're going to let Mr. Harris speak, and then I beg the committee to consider that we call the question, or if there are any further amendments, that Monsieur Ménard make them. But I'd like to move this forward.

Go ahead, Mr. Harris.

Mr. Richard Harris (Cariboo—Prince George, CPC): I pass my time to the parliamentary secretary.

The Chair: Mr. Moore, I'm going to let you go. I'll just let Mr. Ménard speak finally to his motion.

Mr. Moore.

[*Translation*]

Mr. Réal Ménard: Mr. Chairman, point of order.

Time is marching on and out of respect for Mr. Landreville, I propose that we suspend the debate and that we come back to it before hearing from the officials. If not, we will continue.

[*English*]

The Chair: Monsieur Petit is next on a point of order.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Mr. Chairman, a point of order.

Yesterday, I changed my schedule for today specifically because the Bloc Québécois had asked that the motion have precedence. We will settle this. We will not postpone it to the end of the meeting, whether there is a witness or not. You knew this yesterday. Therefore, we will prepare the motion today.

[*English*]

The Chair: Folks, we started out all happy this morning. We're going to stay happy because we have a witness here who is going to present, and we have the ministry folks here ready to present. I want to keep things moving along. Let's make sure we direct our comments through the chair.

Mr. Ménard, you'll have a chance to respond, if you like. I'm going to let Mr. Moore go first, and you'll have the final say on this, Mr. Ménard.

Mr. Rob Moore: When the minister appeared here specifically on this issue he said, and I'll read from the blues for all of us:

> Of course I have carefully considered the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights in respect of the totality of these new dangerous offender reforms, and I am satisfied that they are fully constitutional. These measures have been carefully tailored to provide a prospective, targeted, and balanced response to the real and pressing problem posed by these dangerous offenders.

I leave that with the committee. That is in writing. They're the minister's words from the transcript of the committee. He has certified that they're constitutional, and going beyond that would be extremely unusual.

The Chair: Thank you, Mr. Moore.

Monsieur Ménard, you have the final say here.

[*Translation*]

Mr. Réal Ménard: Mr. Chairman, I think what we are seeing here this morning is rather hypocritical. I remember very well that when the Conservatives were in opposition, they invoked the fact that we were elected, that we were parliamentarians, in order to have a right to all the information before voting.

What are we asking for? First of all, the minister is not a client. He is an elected official and is responsible for a department. Before voting on a bill, we have the responsibility of ensuring that we have all the information. Nine witnesses told us that this bill was not constitutional. I feel I am doing my job as a member of Parliament when I ask for information. If the minister appeared before us and said so, he should give it to us in writing.

Why do we not have faith in the word of members of Parliament? Ms. Jennings tabled an amendment saying that we would keep this information confidential. Is this not paid for with public funds? What is the point of voting on a bill like C-2 on accountability, on access to information, on transparency if you are not even able to give parliamentarians all the information they need? Is it unreasonable, as an elected official, to vote on a bill nine witnesses said was unconstitutional? Is it unreasonable to ask if this was investigated? If the minister said so, that is not enough. We need more information.

An hon. member: [*Editor's Note: Inaudible*]

Mr. Réal Ménard: I was not finished. Calm down! I have the floor.

Mr. Chairman, if we do not have the information by Tuesday morning, I say to the government that we will table motions for adjournment. That is what we will do. We have the right to have that information. If you do not want to give it to us, we will table a motion to extend our deliberations so that the government can invite constitutionalists to come and meet with us. If we do not have the information we require, we will not vote on the bill.

When the Conservatives were the opposition, there was never enough information available. Today, they are trying to make us vote whereas we know that the bill is potentially unconstitutional. May I point out to you that yesterday, we were ready to extend the debate in order to move to the vote but it was the Conservatives who got up to leave.

Therefore, there is a limit to making a travesty of democracy, to being pharisees and philistines. There is no point on voting on bills like C-2 if we cannot give the information to parliamentarians. I regret, but we are not faced with a privileged relationship involving private practice, the minister, and cabinet. I expect officials who have knowledge of constitutional law, who provided opinions to the minister, who are not from the private sector, who are paid with public funds, to give us that information.

Mr. Chairman, let me conclude by stating that if we do not have something in writing guaranteeing the constitutionality of the bill by Tuesday, we will table motion for adjournment after motion for adjournment.

● (0920)

[*English*]

The Chair: Mr. Ménard, in terms of process, I'm reminding you that your motion is on the floor. If this motion carries, a request will be made to the department.

Having said that, we've had all of our speakers and I will now put the question.

We'll first vote on Ms. Jennings' amendment, which is “To provide on a confidential, in camera basis which protects “advice to the Minister”...in its possession...by Friday, November 16th, 2007, 3 pm.” I'm reading the bold type part of the amendment here.

We've been asked for a recorded vote.

(Amendment negatived [See *Minutes of Proceedings*])

● (0925)

The Chair: Now that the amendment has been defeated, I would move to Mr. Ménard's original motion, that the Department of Justice be asked to table all available legal opinions relating to the constitutionality of Bill C-2.

There will be a recorded vote.

(Motion negatived: nays 6; yeas 5)

Mr. Joe Comartin (Windsor—Tecumseh, NDP): On a point of order, Mr. Chair, is Mr. Keddy allowed to vote?

The Chair: Mr. Keddy was allowed to vote. He was not allowed to vote in the first round of voting on the amendment. He had not submitted his papers with respect to substituting to the committee. But by the time we had our second motion to vote on Mr. Menard's original motion, he had substituted back into the committee. So his vote is official.

Mr. Landreville, we welcome you to, as you can see, a very energetic and focused committee. Some may say strongly opinionated. I would say otherwise.

I would like just quickly to let you know that you have 10 minutes for your opening remarks. We'll then turn to the committee, and the first round of questioning will be seven minutes. Each party will have the opportunity to question you for seven minutes. The rounds following the first round will be five minutes in length. We might go a little bit further than 10 o'clock, but we're going to try to get at least 35 to 40 minutes of questioning in.

I appreciate your coming this morning on short notice, because the committee was struck fairly quickly and witness lists put together fairly quickly. We certainly appreciate your being here this morning.

I'll turn the floor over to you.

[*Translation*]

Mr. Pierre Landreville (Emeritus Professor, School of Criminology, Montreal University, As an Individual): Thank you, Mr. Chairman. I would like to thank committee members for allowing me to express my viewpoint on Bill C-2.

I am professor emeritus at the University of Montreal School of Criminology and a Research Associate at the International Centre for Comparative Criminology, the ICCC. I have taught penology and correctional policy since 1970 and have conducted research in those fields for more than 40 years.

My brief will focus on the section of Bill C-2 concerning Bill C-27. I would address two points regarding the bill in succession: first, clauses 40 to 51 concerning dangerous offenders and, two, clauses 52 and 53 on the recognizance to keep the peace.

I will start with the issue of dangerous offenders. The purpose of this part of the bill is to create a measure to neutralize multiple re-offenders. This is not a new concern. In 1908, England passed the *Prevention of Crime Act* respecting habitual criminals.

In 1947, Canada also passed an Act respecting habitual offenders or "habitual criminals", which is very much based on the English act which had already been repealed. An offender determined to be a "habitual criminal" could be detained for indeterminate period. The *Criminal Code* provided that:

> [...] an accused is a habitual criminal,
>
> a) if, since reaching the age of 18, he has previously, or on at least three separate and independent occasions, been convicted of an indictable offence for which he was liable to a term of imprisonment five years or more and continues to lead a criminal life, [...]

Clauses 40 to 51 of Bill C-2 are also similar to a more recent series of acts, passed in the United States in the early 1990s, commonly called "three strikes" laws, the best known and most used of which is that of California, which was passed in 1994. It is in fact a two—and three-strike Act. Briefly stated, it provides that, in the event of a second felony conviction, the sentence is twice the sentence that would have been imposed for that offence and that for a third felony conviction, the sentence is 25 years to life. On March 31, 2007, 41,503 offenders were imprisoned under that act. Over 90% of all convictions under the "three strikes" laws in the United States have been in California.

Habitual criminal legislation has failed for five reasons: first, it does not distinguish between those offenders who present a real threat to society, since it applies to a considerable number of non-dangerous offenders; second, it is not applied uniformly, thus causing serious fairness problems; three, it applies in a discriminatory fashion against minority groups; four, it has no significant impact on crime; and, five, it can result in a considerable increase in the prison population, particularly the population of older offenders.

Let me reiterate the first point. It does not distinguish between those offenders who present a real threat to society, since it applies to a considerable number of non-dangerous offenders.

In Canada, the Ouimet Committee (1969) examined the cases of 80 "habitual criminals" sentenced to "preventive detention" in penitentiaries in February 1968.

● (0930)

The committee first observed that:

> The average age of the 80 offenders at the time they were sentenced to preventive detention was 40 years.

They concluded on this point that:

> These figures tend to support the finding that one of the weaknesses of the application of this legislation is that it appears to be most often invoked against offenders at an age where violence is no longer part of their usual behaviour.

The committee also stated that:

> Nearly 40 % of those sentenced to preventive detention appear not to have presented a threat to the safety of others; 2. Perhaps one-third of persons incarcerated as habitual criminals appear to have presented a serious threat to the safety of others [...]
>
> The Committee finds that, although the statutory provisions concerning habitual criminals were enforced to protect the public from certain dangerous offenders, they were also applied to a considerable number of multiple repeat offenders who may constitute a serious social embarrassment, but not a serious threat to people's safety.

Similar observations have been made about England's preventive detention and California's "three strikes" legislation.

Moving on to the second point, it is not applied uniformly, thus causing serious fairness problems. Once again, in Canada, the Ouimet Committee found in its study on 80 "habitual criminals" that:

> 45 [...] were sentenced in British Columbia and 39, that is virtually half the total number of those so sentenced, in the same city (Vancouver). The Committee feels that legislation the application of which is likely to vary to that degree should not be part of a rational correctional system.

The committee also observed the same disparity in the application of the dangerous sex offender law which existed at the time. Current dangerous offender legislation may also deserve the same criticism. In April 2006, 42% of criminals found to be dangerous offenders were in Ontario, compared to 9% in Quebec and 22% in British Columbia. California's “three strikes” legislation is not evenly applied either.

Moving on to the third point, it applies in a discriminatory fashion against minority groups. In Canada, we have no data on the application of habitual offender legislation to aboriginal persons, but we do know that they are over-represented at all stages of the correctional process, including in the application of the dangerous offender law. This state of affairs raises major issues and is of concern to all those who attach importance to the values of justice and equity. We know that aboriginal persons represent approximately 3% of the Canadian population, that they form 18% of persons admitted to penitentiaries, that they are even more over-represented in certain provinces. In 2003-2004, they represented 54% of persons admitted to Manitoba penitentiaries, and 63% of those admitted in Saskatchewan. Aboriginal persons also represented, in 2005-2006, 23% of offenders sentenced to life imprisonment or given indeterminate sentences. This over-representation of aboriginal persons in penitentiaries, combined with the fact that they enter penitentiaries at a younger age than non-aboriginals, means that they would be even more often affected by the measures under Bill C-2 concerning multiple re-offenders. It will be readily understood that the younger members of a group are when they enter a penitentiary, the greater chance they have of being convicted a third time.

Now, turning to the fourth point, this legislation has no significant impact on crime. Since they are rarely enforced in ordinary circumstances, habitual criminal laws cannot have an impact on crime. However, even where they are used on a broad scale, as in California, they have little or no measurable impact. Even though, in the 1990s, the crime rate fell more sharply in California than the U.S. national average, researchers who conducted a survey of the literature came to the conclusion that the drop cannot be attributed in any significant way to the “three strikes” law.

● (0935)

That takes us to the fifth point. This legislation can result in a considerable increase in the prison population, particularly the population of older offenders. If applied on a broad scale, multiple re-offender laws inevitably cause an increase in the aging of the prison population. On the one hand, longer sentences result in a rise in the prison population...

[*English*]

The Chair: Mr. Landreville, I'll ask you to wrap up in about 15 or 20 seconds. We're just over the 10-minute mark.

[*Translation*]

Mr. Pierre Landreville: As regards recognizance to keep the peace, the bill sets out four new conditions: that the defendant participate in a treatment program; that the defendant wear an electronic monitoring device; that the defendant return to and remain at his or her place of residence at times specified in the recognizance; and that the defendant appear before correctional authorities.

While these provisions may seem warranted in certain cases for convicted offenders, we consider them excessive for individuals who have been convicted of no offence.

Thank you very much.

● (0940)

[*English*]

The Chair: Thank you, Mr. Landreville.

Mr. Bagnell, you have the first seven minutes.

Hon. Larry Bagnell: Thank you.

I understand that what you have said suggests that this law would treat aboriginal people in Canada in heavier quantities, probably, than they are in the population, as they already are in the prison system.

In the California experience, are the other ethnic races over-represented compared with the general population—first of all in the criminal justice system; but second of all, is there even worse overrepresentation at the dangerous offenders level?

[*Translation*]

Mr. Pierre Landreville: Yes. In most countries, ethnic minorities —or racial minorities in certain cases—are over represented in the prison population. In the United States in particular, we know that blacks are over represented in the prison population, as they are among people convicted under the “ three strikes law”. In California, for example, Afro-Americans make up 28% of inmates in prisons, but they make up 34% of people convicted after two strikes and 44% after three strikes. In California, they truly are harder hit, generally speaking, by incarceration, but even more so under the two strikes and three strikes principle.

[*English*]

Hon. Larry Bagnell: My understanding of what you said is that the law in England is for offences that are punishable by five years, whereas here I think it's two years. Would this make it such that this law would catch even more people who are less dangerous, more people who are not dangerous, and that more minor offences would be caught by this law in Canada than even by the English law, which is for offences for which the penalty is five years?

[*Translation*]

Mr. Pierre Landreville: I did not reference British law directly, and I do not fully understand your question.

[*English*]

Hon. Larry Bagnell: I'm sorry. I thought you had made reference to it at the beginning.

I have another question, then.

I think the minister would argue that the judge has discretion; he doesn't have to give an indeterminate sentence, but it does have to be based on the evidence of the trial. For you, does this make this law acceptable? The judge still has the same discretion and could actually give nothing extra for a dangerous offender, if he felt that was appropriate.

[*Translation*]

Mr. Pierre Landreville: In actual fact, as regards sentencing, judges currently have rather broad discretionary power. The same is true for the Crown, and you realize that despite or because of this discretionary power—which I would not want to discuss—aboriginals are over represented at all stages of the correctional system. The same is true in terms of parole. Parole board members have discretionary power to release aboriginal persons, yet they are released on parole less frequently than non-aboriginal inmates.

In this case, two reasons explain why aboriginal persons are—and I would assume that they still are—over represented. On the one hand, they are incarcerated more frequently than non-aboriginals. The probability of their being incarcerated for second or third times is therefore higher, all the more so since they are incarcerated at a much younger age than non-aboriginals are. For example, 25% of aboriginal persons entered penitentiaries when they were under the age of 25. In fact, there are many more aboriginals in the segment of the population under the age of 25 than there are non-aboriginals. I am not saying this is due to decisions made by certain people: the problem is systemic.

● (0945)

[*English*]

Hon. Larry Bagnell: I know you weren't finished your remarks. If there's anything else you want to say, you can use my last two minutes, or you can tell me whether the crime level is higher in states where they don't have a law like this, unlike California—where they don't have three-strike legislation.

[*Translation*]

Mr. Pierre Landreville: As a matter of fact, both the incarceration rate and the crime rate in the United States vary a great deal from one state to another. About 25 or 30 states—I do not know the exact number—use “three strikes laws”, but there is no relationship between that use and the fact that the crime rate has decreased or not. In the United States as in Canada, moreover, crime rates have decreased considerably since 1990-1991, but the decrease is not at all linked to the “three strikes” or to incarceration. That is a very important fact.

A very enlightening comparison can be made. In United States, violent and non violent crime rates have decreased significantly since 1990. The same is true in Canada. Studies have showed that the decrease followed the same curve, in other words, the percentage was more less the same. However, in the United States from 1970 to date, the incarceration rate has gone from 215 to 750, which is not the case in Canada, where the incarceration rate remained quite stable over that period. It varied only from 10 to 15 out of every 100,000 inhabitants. Consequently, incarceration cannot, generally speaking, be considered responsible for reducing crime rates in United States. In fact, Canada experienced the same type of decrease without an increase in the incarceration rate.

[*English*]

The Chair: Thank you, Mr. Landreville.

Mr. Ménard.

[*Translation*]

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

Mr. Landreville, I am pleased to participate in this exchange with you. In recent years, I have heard many good things about you from professors at the Université de Montréal like André Jodoin and others. They praised your learnedness. I regret your having to witness this demonstration of authority by the government, but rest assured, the opposition is keeping an eye open for problems.

Having said that, I think you did a very good job of clarifying—

Mr. Chairman, I would like to be able to live my life as I see fit.

[*English*]

The Chair: Mr. Ménard, there's a lot of latitude here for discussion, but let's try to stay focused on Bill C-2 versus your opinions on the government. Thank you.

[*Translation*]

Mr. Réal Ménard: As for you, Mr. Chairman, you are not authoritarian.

Mr. Landreville, I was in the process of paying tribute to your learnedness. What really pleased me was the link that you very clearly identified. You compared American society, which has relied on incarceration and has crime rates that have not declined as a result, and Canada. You did not provide statistics per 100,000 inhabitants for Canada, but we have heard that it ranges from 115 to 123.

I would like you to explain yourself very clearly. If I understand correctly, you are inviting us to reject Bill C-2. Based on my understanding, you say that it is not effective in terms of its objectives. I would like you to tell us more clearly why it is not effective and what legislative measures you would like to see adopted so that we can meet those objectives, in other words, making communities safer, while keeping in mind that the violent crime rate is not on the rise.

● (0950)

Mr. Pierre Landreville: In terms of drawing comparisons between the United States and Canada, the situation is truly ideal. We live in the same environment, everyone knows that. Our socio-political and economic environments are the same. We clearly have different crime rates. In the United States, crime rates are generally higher. On our side, our incarceration practices have been quite different since 1970.

I am going to give you some more statistics. In 1970, the prison population in the United States was almost twice as high as ours. At present, it is more than seven times higher than ours. Our prison population is 105 for 100,000 inhabitants, whereas it is 750 in the United States. The Americans have a much stricter incarceration policy that cannot be considered responsible for reducing the crime rate. Other sociological factors, including demographics and economic growth, are the cause. They are important factors.

As regards special legislation, I said earlier that in the United States, about 25 or 30 states have been using "three strikes" laws since 1993 or 1994. Most states make little use of these laws. In fact, 90% of people convicted were in California, where that type of legislation is used very widely. More than 40,000 people, in other words, more than the entire prison population in Canada, are incarcerated there. Studies have not really shown that these laws have had a significant effect.

There was a second part to your question.

Mr. Réal Ménard: Indeed. The major issue with which were are struggling on this committee is that nobody seems able to tell us exactly what it is that is not working with our current system of offender designation. Our researchers tell us that 333 people have been designated as being dangerous offenders. We are trying to determine whether there are arguments to support an automatic reversal of the burden of proof. As a highly esteemed, moderate and centrist intellectual, are you aware of particular problems with the current system for designating dangerous offenders?

Mr. Pierre Landreville: As I said, the special legislation on dangerous offenders is ineffective because it is difficult to pinpoint which offenders will end up causing serious harm to others. When I say special legislation, I am thinking of the time when Canada had both legislation on habitual offenders and legislation on dangerous sexual offenders.

Part of the problem is that we do not know exactly whom we should target. Furthermore, when very harsh legislation is introduced, such as the act providing for indeterminate sentences, there is sometimes resistance within the criminal justice system itself to using them. That explains, to a degree, the huge disparity and the way different provinces apply such legislation. The way it is applied essentially depends on the attorney general and certain prosecutors. It seems also true of California, where a single prosecutor is said to be responsible for a huge number of convictions.

To my mind, the current dangerous offenders legislation has its shortcomings. However, it is not widely applied, and I am glad of that. That being said, I believe that it is both flexible and stringent enough to pinpoint those multiple repeat offenders who are likely to commit serious crimes against persons in the future.

As a general rule, statistically speaking, these laws primarily affect people over 40. Indeed, most people who go to prison are over 30 years of age. By the time they get to their third conviction, especially if they are convicted of a violent offence, they will generally be over 40 years of age due to the length of time they will have spent serving their first two sentences. Yet the vast majority of these offenders do not commit violent crimes after the age of 40.

I therefore believe that the current legislation is both flexible enough and stringent enough to deal with those exceptional cases where prosecutors and specialists have reasonable grounds to believe that an offender will commit a serious crime.

● (0955)

[*English*]

The Chair: Thank you.

Mr. Comartin.

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

[*Translation*]

Thank you for being here, professor Landreville.

I am going to ask my questions in English. I would prefer to ask them in French, but I want to make sure that I express myself accurately.

[*English*]

You described the regional disparity between British Columbia and the two central provinces. Do we see disparity in any of the other prairie provinces, in the western provinces?

[*Translation*]

Mr. Pierre Landreville: My remarks actually concerned three pieces of legislation. 80% of the cases decided under the former habitual offenders legislation were in the Vancouver region. There has also been disparity in how the dangerous offenders legislation has been applied; nowadays, it is primarily used in Ontario. I can get you some statistics to back that up. I said earlier that 40% of all dangerous offenders are designated as such in Ontario, but only 9% are designated as such in Quebec.

I also have figures on the other provinces. 403 criminals have been designated as being dangerous offenders since 1978, 168 in Ontario, 90 in British Columbia, 31 in Alberta and 29 in Saskatchewan. Obviously, we could calculate the percentages, but the important point is that Ontario has the most and Quebec the least.

[*English*]

Mr. Joe Comartin: On the difference between Ontario and Quebec, obviously we have a population difference, but the crime rates are roughly similar. It's a little bit lower in Quebec across the whole line, but it's roughly similar. Are the applications for dangerous offender designations—not the findings, but the applications—also significantly higher in Ontario than they are in Quebec?

[*Translation*]

Mr. Pierre Landreville: I believe so, but I could not give you exact statistics off the top of my head. I know that we have statistics for long-term supervision orders, and that Quebec has roughly the same percentage of offenders under these orders as Ontario. Ontario has 40% of all the dangerous offenders and 25% of offenders under long-term supervision orders, while Quebec has 9% of the dangerous offenders and 26% of offenders under long-term supervision orders. This indicates that different decisions are made within the system itself.

Mr. Joe Comartin: Do you think that the difference between Ontario and Quebec can be attributed to their respective judges?

● (1000)

Mr. Pierre Landreville: In fact, I think that the biggest difference is between the prosecutors. The applications are where the greatest difference...

Mr. Joe Comartin: Is it because the Ontario prosecutors are better, or it because they have adopted a more offensive approach?

Mr. Pierre Landreville: That is a matter of opinion. It depends greatly on the policy preference of the attorney general. There are times when governments want to be harsher on crime and times when they wish to adopt a less hard-line approach. As a general rule, and in many regards, sentences and criminal sanctions are harsher in Ontario than in Quebec.

[*English*]

Mr. Joe Comartin: Is there any way of knowing if the cost of doing the application for the dangerous offender is driving the number that we see in Ontario versus the number that we see in Quebec?

[*Translation*]

Mr. Pierre Landreville: I'm afraid I do not know.

[*English*]

Mr. Joe Comartin: That's all, Mr. Chair.

Thank you.

The Chair: Thank you, Mr. Comartin.

Mr. Kramp is next.

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

Good morning, Professor Landreville.

I'm having a little difficulty with the fact that you're equating the legislation proposed with the California three-strike law. You've mentioned, as an example, that they have incarcerations down there of perhaps 40,000 people under this legislation in California, yet we have witnesses testifying at this committee and other justice committees that what we're talking about here is a very select few people. It's perhaps as low as one, two, three, four, or five; perhaps, it's been registered, there may be a possibility of up to 50 in this country, so we are talking about a very select few people with very heinous and serious indictable crimes, crimes against persons.

With the California three-strike law, do you have the percentage of crimes that would be crimes against property versus crimes against persons in the California law?

[*Translation*]

Mr. Pierre Landreville: I have a breakdown of the percentage of crimes against property versus crimes against persons somewhere around here, and I can say that...

[*English*]

Mr. Daryl Kramp: A guesstimate would be fine. I'm not looking for actual statistics.

[*Translation*]

Mr. Pierre Landreville: Around half of the offenders sentenced after two strikes, and a slightly lower percentage of those sentenced after three strikes, were found guilty of property crimes on their second or third conviction.

I believe you said that some witnesses have told you that this bill is to deal with some 50 offenders. Did I understand you correctly?

[*English*]

Mr. Daryl Kramp: That's correct.

[*Translation*]

Mr. Pierre Landreville: Good. If, in an ideal world, the legislation was used to target offenders who have committed very serious offences and who constitute a real threat to the public, then I imagine that we would come up with a roughly similar figure. However, that is not the way that the bill has been drafted.

[*English*]

Mr. Daryl Kramp: My understanding is that the legislation is designed that way. These are serious crimes against a person. These primary offences are designated as such. We're not talking about one conviction. We're not talking about a second conviction. We're talking about a third conviction. And these are for rape, robbery, murder, manslaughter, and so on.

Now, every one of these convictions, of course, involves victims, and your experience, I expect, would also lead you to believe that there will be multiple victims. So do you not think that we have an obligation to society as well, to provide some balance there?

● (1005)

[*Translation*]

Mr. Pierre Landreville: You are right in saying that the legislators must provide tools to protect society; however, if I am correct in my understanding of your bill, there is a fairly long list of offences including, for example, burglary and assault which can... It is just like the habitual criminal act. Parliament wanted to target dangerous repeat offenders, but in reality, the legislation it adopted targeted chronic petty offenders. There is a difference between targeting chronic petty offenders and the stated intent of the bill, in other words targeting some 50 dangerous repeat offenders. In my opinion, dangerous repeat offenders can be adequately dealt with under the current dangerous offenders legislation, especially with the reversal of the burden of proof mechanisms. Looking at the list, I think you run the risk of repeating past mistakes: instead of targeting dangerous offenders as intended, the bill will primarily affect chronic petty offenders.

[*English*]

Mr. Daryl Kramp: I just have a couple of other quick questions.

One point was disturbing to me a little bit, and perhaps I could be in error on this. You said that when individuals, of course, reach the age of 40, they're maybe not deemed to be a threat anymore relative to their previous years. Well, does not the fact that there was just another conviction registered allay that theory? Does that not suggest that they obviously haven't learned and they've just had another conviction registered? Does that not possibly suggest that the threat of recidivism is still highly prominent, regardless of their accelerated age?

[*Translation*]

Mr. Pierre Landreville: I think it is important to distinguish between people who are likely to commit serious crimes against persons and who constitute a real danger to society, and people who will commit further offences—including some of those on your list—but who do not pose a serious threat to the public. All of the evidence indicates that violent crime is less prevalent amongst those aged over 35 or 40. Furthermore, even if they are still numerous, there are far fewer people over 40 being sent to prison than there are 20-year-olds. In my opinion, only a small percentage of offenders convicted for a third time will go on to commit serious crimes against persons.

[*English*]

Mr. Daryl Kramp: Okay, thank you.

We've heard from various witnesses—expert witnesses in their own fields—at this committee and at other committees in the justice field who have commented on, of course, this relatively recent phenomenon of guns, gangs, and drugs. You've stated that in reality there's a decrease in the rate of violent crime, and yet these witnesses have testified that it's quite the opposite. They've suggested that as of late there has been a rather dramatic increase in the rate of violent crime, particularly associated with this triple phenomenon.

Would you agree with that assessment?

The Chair: Give a very short response, Mr. Landreville, a very short response.

[*Translation*]

Mr. Pierre Landreville: Perhaps we could qualify that. Violent crimes have been decreasing consistently in Canada since 1991. It is possible that some gang-related violent crimes are on the increase, but generally speaking, violent crime has decreased noticeably in Canada since 1991. It is not increasing. I am talking about statistics.

[*English*]

The Chair: Thank you, Mr. Landreville.

Madam Jennings.

[*Translation*]

Hon. Marlene Jennings: Thank you.

[*English*]

The Chair: I'm sorry, Madam Jennings. I don't mean to interrupt.

We are running into some time constraints. We have ministry folks here, and I know there are some folks who want to ask some more questions. So I'm asking that we lower our rounds down to about three and a half minutes so that those who have indicated an interest in asking a question get a chance to do that.

● (1010)

[*Translation*]

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

First of all, would you be able to tell us the annual number of individuals convicted for the first time of a crime found on the list in part 27 of Bill C-2?

Secondly, do you know the annual number of people convicted for a second time?

Thirdly, do you know the annual number of people convicted for a third time?

If you have access to these figures, could you tell us the percentage of these individuals who belong to visible minorities, or who are members of a first nation, who are women or people with an intellectual or physical handicap? In brief, I am referring to the four groups contained in our charter.

Do you have these numbers? If not, do you know how the committee could obtain them? Up until now, it appears the government has been unable to provide us with this data.

Mr. Pierre Landreville: No, I do not have these figures. I do not believe that we have figures for the majority of the cases you ask for. We could get some figures about people who are in jail, given that correctional statistics are more complete, for instance, for categories such as women, men, aboriginal persons and visible minorities.

The Correctional Service could probably also provide figures on people who are jailed for the second or third time, but these statistics are generally not available. I even believe that these people should be studying their statistics.

Hon. Marlene Jennings: To your knowledge, is there somewhere in Canada a study that is currently underway, or has been completed in a criminology institute, or one that has been ordered by the Department of Justice or any other group, in a effort to obtain these figures?

Mr. Pierre Landreville: No. I think that these figures could be obtained from researchers at the Correctional Service of Canada because they are the ones who have the data bank on admissions. Their system is probably sophisticated enough to provide such figures. These researchers could do this because they are the ones who have the information.

Hon. Marlene Jennings: Thank you.

[*English*]

The Chair: Mr. Harris.

Mr. Richard Harris: Thank you, Mr. Chairman.

Mr. Landreville, it's been clearly established, I think, that the intention of the dangerous offender legislation is to catch the worst of the worst criminals in our society who have been convicted, and to remove them so that they cannot be a threat to our society, to our families, to our children. It's been agreed that judges and crown prosecutors still will retain a tool of discretion that they can use to work within the provisions of this new legislation.

No one at this table would disagree with the fact that there's a disproportionate number of aboriginals in our penal system today. No one would disagree that there are some tremendous social problems that aboriginals can face from the time they're born until the time they grow into their teens and perhaps start getting into some problems. Those have to be fixed, and no one disagrees with that. We want to fix that.

I guess the point I want to make is that in this piece of the legislation, the dangerous offender, I would suggest that given the discretion of the judges and crown prosecutors, given the way the legislation is written, and given the intention of the legislation, the chance of this legislation being onerous because of one's culture, race, or background is in fact a lot slimmer than what some of the members opposite would suggest.

I also would suggest, Mr. Landreville, and I'd like to get your opinion on this, that when it comes to this legislation, Canadians who are concerned about the threats to their personal selves, to their families, and to their communities are concerned about the threats. Notwithstanding their cultural background, whether people are white, red, black, pink, or otherwise, if someone fits into the parameters that would cause a crown prosecutor to seek a dangerous offender designation against a person who meets all the qualifications and fits that description, Canadians care not about anything but to remove that person from society. Do you not think it's the obligation of the justice system and the obligation of the Criminal Code to provide that in order to protect our societies?

Could you respond to that, please.

● (1015)

The Chair: You have about 30 seconds for that, Mr. Landreville. We're trying to make sure....

We have two more speakers—I'm going to allow Madame Freeman and Mr. Keddy—and then we're going to have to move on.

[*Translation*]

Mr. Pierre Landreville: Unfortunately, I do not share your opinion with respect to this issue. Despite the fact that neither you nor anyone else in the justice administration system has any intention of targeting aboriginal people in a disproportionate manner, they are targeted, and I am personally convinced—and this is my opinion—that they will be even further targeted, given the probabilities, as I mentioned earlier.

Even though this is not the intention of this bill, it will have a disproportionate impact on them. It is perfectly fair to want to try to target dangerous offenders. You have this right and duty; however, what will happen in practice, unfortunately, is that they will—and here I am repeating myself—be discriminated against because they have a higher incarceration rate and they are sent to jail at a younger age, despite the discretionary power of the judges.

[*English*]

The Chair: Madame Freeman.

[*Translation*]

Mrs. Carole Freeman (Châteauguay—Saint-Constant, BQ): Thank you, Mr. Landreville, for your presentation.

I would like to ask a question that follows up on Mr. Kramp's intervention. It is often claimed—indeed, the Conservative Party often claims—that violent crimes are on the rise. However, according to all these statistics that we have, it would appear that violent crimes, indeed crime in general, is really decreasing significantly. Given that all the proposed legislation is designed to tackle the increasing crime, I would like you to provide us with some clarification on the matter.

Mr. Pierre Landreville: I have here some statistics from Statistics Canada. In 1992, we had reached the highest rate of violent crime in Canada, namely, 1,084 crimes per 100,000 inhabitants. In 2006, this figure declined to 951 per 100,000 inhabitants, which represents a decrease of 12 %. During this period, the total number of criminal code offences declined by 27 %. Violent crime did not decrease at the same rate, but the rate it did nevertheless go down.

Murder has been, if I may use this expression, in a free fall since 1975. I have the figures here. Currently in Canada, the murder rate has gone down by 40 % since 1975. This rate has decreased in relatively constant fashion since that year, and it coincides with the abolition of capital punishment.

Mrs. Carole Freeman: If I understand correctly, violent crime in Canada is declining. The government is saying that it wants to implement bills to tackle the increase in crime, but Statistics Canada is not telling us the same thing.

● (1020)

Mr. Pierre Landreville: Indeed. It would appear that the assumption is false.

Mrs. Carole Freeman: All right.

This bill pertains primarily to repeat offenders, to offenders who are not necessarily dangerous. Could you tell us what type of repeat offender would be targeted by this bill should it be adopted?

Mr. Pierre Landreville: All of our previous experiences lead us to believe that a significant number of habitual offenders, which we sometimes refer to in criminology as chronic petty offenders, would be targeted by this act. Some dangerous offenders targeted by the act would certainly be offenders that eventually would perpetrate violent crimes, but the majority of the offenders, because of the fact that they are over the age of 40, would not represent a serious threat to others.

Mrs. Carole Freeman: So the bill will not target dangerous offenders directly, the people that we really want to target?

Mr. Pierre Landreville: It would target these people, but it would not have an impact on them.

Mrs. Carole Freeman: The objective is there, however...

Mr. Pierre Landreville: This is what previous research demonstrates.

Mrs. Carole Freeman: Thank you.

[*English*]

The Chair: We'll have Mr. Keddy to conclude this session.

Mr. Gerald Keddy (South Shore—St. Margaret's, CPC): Thank you, Mr. Chair, and welcome to our witness.

It's been an interesting discussion here, in particular the discussion around the dangerous offender. You're basically saying the net would be cast too wide, and we're going to catch some chronic petty offenders.

The general public out there who are listening or watching or who will read this at some time need to know who is actually being targeted here as the dangerous offender. I don't see these individuals who have committed not one, not two, but three violent crimes, including those that involve the use of explosives, intimidation with firearms in the commission of an offence, sexual exploitation of a person with a disability, a parent or guardian procuring sexual activity, child pornography, a householder permitting the sexual exploitation of a child, luring a child, violent crime, sexual assault, living off the avails of prostitution, and unlawfully causing bodily harm.... These are not petty crimes. These are very serious, very violent, very heinous crimes.

I can't help but take note of your comment that violent crime is going down. Does that mean that we as a society and as people, we in the House of Commons who are trying to enact legislation for Canada, should do nothing or that we should be satisfied with mediocrity or that we should suddenly say that if we can do something to prevent violent crime...? We're not talking about petty criminals here, quite frankly. I disagree. We're talking about serious violent offenders.

To compare this to "three strikes and you're out" in California is a disservice to this piece of legislation, because it doesn't even resemble it. In California you can be put in prison for jaywalking, quite frankly, which is too far, and it's ridiculous. That's not what we're talking about here. We're talking about trying to protect the general public from serious violent crime.

I'm not saying the legislation is perfect, but surely we shouldn't settle for mediocrity.

If I have time here—

The Chair: You've a minute left.

Mr. Gerald Keddy: I've a minute. Well, I want to give our witness a chance to speak.

If I could change tack a little bit, my question is on the constitutionality of this particular piece of legislation and, in particular, the designated offender part of the legislation. Do you believe this particular piece of legislation, and the designated offender portion of it, would withstand a constitutional challenge?

● (1025)

[*Translation*]

Mr. Pierre Landreville: I am not going to answer your second question, it is beyond my scope. As for your first question, if I understood correctly, the bill includes a list of offences; you named the most serious ones, but there are also offences such as breaking and entering and assault.

[*English*]

The Chair: Thank you.

I think we're going to have to conclude there.

Thank you, Mr. Landreville, for your detailed statistical perspective. As I know there were a couple of questions about your stats, if you did want to forward them to the clerk, I'm sure she would be more than happy to extend those to members of the committee.

I would like to ask our ministry officials to come forward. We are running into a bit of a time constraint here, so I'm seeking a little bit of a time extension past 11 o'clock so that we can allow for questions to our ministry officials. The second part of it is that we'll probably start immediately with five-minute, rather than seven-minute, rounds.

As I indicated, it would be extremely helpful if we could keep our questions as concise as possible to allow as many of us to ask questions as we can. Certainly if the officials have any opening comments, I would ask that they be extremely brief. I'd like to leave as much time as possible for questions and an opportunity for you to respond to those over the next 45 minutes. I'll probably seek from the committee an extension of about 10 minutes, or perhaps 15 minutes, just to make up for the time we spent dealing with the motion, and that will allow us a full hour to be able to deal with the ministry.

Mr. Cohen.

Mr. Stanley Cohen (Senior General Counsel, Human Rights Law Section, Department of Justice): I have no opening statement to make, but I thought perhaps I should introduce myself since I haven't appeared on this matter.

The Chair: We would really appreciate your doing that. Thank you.

Mr. Stanley Cohen: My name is Stanley Cohen and I am the senior general counsel at the Department of Justice. I give advice on the charter as it applies to criminal justice and national security matters. I have appeared before parliamentary committees before, so I'm a familiar figure to some of you around this table. I have a background in academia and law reform, and I hope that I have what you're looking for. I'm here to be cooperative and to assist you in any way I can.

Thank you.

The Chair: Thank you very much, Mr. Cohen.

I will immediately turn to our first panel.

● (1030)

Hon. Marlene Jennings: I simply have one question, and then I'll hand over the rest of my time to my colleague Mr. Murphy.

Is it your expert opinion that the provisions of Bill C-2 that are directly related to the dangerous offender system would pass a constitutional challenge? If so, why?

The rest of my time is for Mr. Murphy.

Mr. Stanley Cohen: The way I can answer that question, without straying over any lines that constrain my operation, is to suggest that there is a process in the department for analyzing legislation for its compatibility or inconsistency with the Canadian Charter of Rights and Freedoms. This legislation has been examined and would not be in front of you if an opinion had been issued to the effect that the legislation in question was manifestly unconstitutional and could not be defended by credible arguments before a court.

Mr. Brian Murphy: Thank you, Mr. Chairman.

Drilling down on that answer, there was some suggestion that in the dangerous offender procedure where this evidentiary burden would shift to the accused—it's more than an accused, the convicted person on sentencing—it might in some way infringe the convicted person's right to silence, that is, the right against self-incrimination. In buttressing that position, I believe Mr. Hoover suggested that there was case law to that effect. I believe the name is—I was going to say Grewal, but that's not the right name—Grayer, something like the cheese, not the member of Parliament.

In any event, it was subsequently suggested by witnesses at our last meeting that that case law was not authoritative for the proposition that when there are shifting evidentiary burdens, silence is still protected, just at one's peril. In other words, the convicted person can remain silent, but they bear the consequences of doing so if it means they don't adduce evidence that might help them.

It was quite clear in the testimony we had from the Criminal Lawyers' Association that it was a misinterpretation of that....

Well, Mr. Hoover, you were in the room when it was suggested.

So maybe rightfully to you, Mr. Cohen, what is the implication of these changes to the right to remain silent or the right against self-incrimination in the charter?

Mr. Stanley Cohen: That question, of course, covers a lot of ground.

There is, of course, under the Constitution, a right to silence. Generally that's a right that accrues when one is faced with police interrogation. The relationship between the right to silence and the right against self-incrimination is one that has been commented upon in the case law, and self-incrimination is a somewhat larger concept.

To come back to your question about the significance of the Grayer case as it relates to the right to silence, the Grayer case basically says that an individual who finds himself in the kinds of circumstances that an individual might find himself in, in a dangerous offender application, is entitled to rest and to sit on his or her hands and not to cooperate in any way. There is nothing in this legislation that compels that individual to testify, and there is nothing in a reverse onus that directly causes the person to have to speak.

When an individual is facing this kind of situation—we can call it jeopardy—there is a natural implication or a natural impetus in the individual to want to be able to answer, and that is why, of course, these matters will end up in litigation. But individuals are capable, notwithstanding their right to sit on their hands, of making an informed and tactical decision as to whether or not they will speak up. They don't have to speak up. That does not end the matter.

The individual has—and indeed it emerges from the legislation and from practice—the right to cross-examine, the right to call witnesses, the right to rely upon any evidence that's adduced by the state, in order to answer the case that has been brought forward. So to that extent, this perhaps might not be called silence, but it certainly is silence in terms of the individual speaking or the individual cooperating. That is not a matter that I would suggest implicates the so-called notion of self-incrimination.

I would point out that self-incrimination protections generally are housed either under section 11 or section 13 of the charter, which are premised and preceded by an indication that those rights are guaranteed in relation to persons charged with an offence. When an individual is charged with an offence, then those particular protections arise.

Lyons, which remains the fundamental case and the one to which everyone should return when they look at dangerous offender legislation, written by Mr. Justice La Forest, a balanced and moderate jurist and an expert in this area—

● (1035)

The Chair: Excuse me, Mr. Cohen.

We're going to have to move forward.

Mr. Stanley Cohen: All right. Let me just say what Lyons does say. Lyons says that this is not a situation involving the protection of section 11 because the person is not charged with an offence. This is part of the sentencing process.

The Chair: Thank you.

I apologize. We're on a tight timeframe. I don't want to cut you off, but we do need to try to keep order for everyone.

Mr. Ménard.

[*Translation*]

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

With all due respect, Mr. Cohen, I have been here since 1994 and I can tell you that we have already in the past examined regulations and legislation which the department said was constitutional but which was subsequently invalidated. My colleague may have said that this happened under the Liberals, but the antiterrorism provisions were studied in committee, right? Mr. Comartin was a member of the committee. Some provisions were ruled to be unconstitutional. When Ms. Marleau was Minister of Health, the anti-smoking regulations were invalidated. So I find your assertion to be presumptuous to say the least. Just because the department refers the bill to us does not mean that it cannot be deemed unconstitutional later on.

But since you are telling us with confidence that the bill is constitutional, I would like you for once, as a parliamentarian, to clarify the verification mechanisms. Please be quite precise. When the minister signs a memorandum in cabinet stating that it is constitutional, exactly how is this done?

I also have three questions to ask you about the substance. Like you I am a lawyer and I obviously know that legislation can be challenged. You said that you have checked everything generally, but what, more specifically, have you done, and what are the reasonable guarantees?

[*English*]

Mr. Stanley Cohen: First of all, I've appeared in front of you in a number of these matters that you've mentioned, and I have never offered an opinion that a piece of legislation is constitutional and will be upheld by the court, or is unconstitutional and will be struck down by the court. What I have said is what I said at the beginning. There is a process for making an assessment and the Minister of Justice has an obligation to make this examination. What conclusion we have reached is that the legislation in question is not manifestly unconstitutional. That does not mean that it cannot be—

[*Translation*]

Mr. Réal Ménard: Wait a minute, I'm the one asking the questions. What is the process? Don't tell me that it is constitutional, explain the process to me.

[*English*]

Mr. Stanley Cohen: I said that the legislation is not manifestly unconstitutional and is capable of reasoned defence in the court. The process for making that assessment...you asked me what the process is.

● (1040)

[*Translation*]

Mr. Réal Ménard: That was not my question. Tell me what process the department follows, step by step. That's what I want to understand. And answer my question specifically.

[*English*]

Mr. Stanley Cohen: This is what I'm trying to address.

The process for assessing legislation begins at an early stage, when we are presented with various options for reform. These are the subjects of legal opinions, discussions, round tables, etc. The implications, constitutional or otherwise—policy people also weigh in on these discussions—also are involved. Constitutional considerations are taken into account. Opinions are prepared and they are sent up for consideration by higher-ups and ultimately will make their way to the minister who has the final authority for deciding these things.

[*Translation*]

Mr. Réal Ménard: How many legal opinions have there been for this file?

[*English*]

Mr. Stanley Cohen: I could not tell you the number in particular. I know there have been more than one. I also know there are opinions that are not just written in relation to the charter, that various other parts of the department would weigh in on other legal issues.

What I can say is that when opinions are devised, we attempt to look realistically at the prospects of the legislation that's been contemplated to determine whether or not there is, as I've said, at one level manifest unconstitutionality on the one hand or, on the other extreme, a continuum that would stretch manifest constitutionality.

[*Translation*]

Mr. Réal Ménard: I would like to ask you a second question before my time is up.

Mr. Chairman—

[*English*]

The Chair: Your time is officially up, Mr. Ménard. My apologies. I'm sure you're going to get another round.

Mr. Comartin.

Mr. Joe Comartin: I'm not sure, Mr. Cohen, if this is to you or Mr. Hoover, but I'm concerned about a number of things. The constitutionality with regard to the division of power really concerns me. If you look at some of the exchanges we've had at the meetings between the federal government and the provincial attorneys general over the last couple of decades, they've always been very careful about protecting the administration of justice as their territory, which it obviously is under the Constitution. I think we may be infringing on that, but even more so on the charter.

I've been told that the direction to the department to put these five bills into one came just 48 hours before this session of Parliament started. I don't know when the decision was made. Will you confirm that you got only 48 hours' notice to put these together? That's my first question.

Question number two is, when was the decision made to incorporate the breach of supervision order as a triggering event?

The third one—and I guess this is the one that disturbs me the most—is what kind of consultation went on? We heard from Mr. Cooper when he testified. Here you have the person who prosecutes in a region more than anybody in the country right now. He came forward and said, look, what I really need are amendments to part XXIV so I have access to better evidence to prosecute these applications. He said if he got those amendments they would be of immeasurable assistance.

The other point he made in his testimony was that he really wasn't going to change his practice if these amendments went through. So why are we doing this, and why didn't we pay attention to people like him and do amendments to part XXIV, which would have made his job easier?

Mr. Douglas Hoover (Counsel, Criminal Law Policy Section, Department of Justice): On your first question as to whether we had more than 48 hours' notice to put a bill together, clearly we did.

On the second question regarding how the issue of including the breach of LTSO evolved, I first heard of that issue in November 2004, when it was raised by the Ontario Attorney General. It was in fact tabled officially in January 2005 for consideration. The FPT high-risk offender working group has been tackling that issue for some time.

As you'll recall, in testimony before this committee on June 5, the minister confirmed he was awaiting the deliberations of the FPT working group and consideration by FPT justice ministers, and that he was hoping to come back this fall with inclusion of such a provision. That work was for the most part completed over this past summer and a recommendation was discussed thoroughly. In fact the fruit of that labour is as you see in the bill before you. So there has been extensive consultation, which has been going on for some time, to achieve not only a viable model but one that will work in all jurisdictions.

I think the question raised by Mr. Cooper, for whom I have great respect, is his particular perspective. He was not here as an official speaking for the Ontario Attorney General; he made it clear he was speaking on his own behalf. Prior to our exploring that further and jumping in with any type of conclusion—I think he proposed a specific amendment to section 760—we would want to consult fully and broadly with the FPT partners. We haven't done that work, and it wasn't raised by the Ontario Attorney General officials during prior consultations.

● (1045)

Mr. Joe Comartin: When were you told to put these five bills together into one?

Mr. Douglas Hoover: That was not a decision of mine personally. You would have to address that perhaps to other officials. Again, my responsibility is lead counsel on the dangerous offender legislation.

Mr. Joe Comartin: When was the decision made to make that amendment on the supervision order?

Mr. Douglas Hoover: Again, I would refer you to the statements of the minister, back on June 5.

Mr. Joe Comartin: But when he was here, I think the rest of the members of the committee who were sitting at that time were left a very clear impression that it was not coming in Bill C-27, that it was going to be further down the road. That was certainly the impression I was left with.

Mr. Douglas Hoover: I think the clear statement of the minister—The question of whether he would allow a motion to Bill C-27 was put, as I recall, and his response was that if it was at that moment, we weren't ready because there were still consultations going on, but that he was hoping—and I believe he actually stated—that the fall was when we were hoping to have those consultations completed.

Mr. Joe Comartin: I'd have to go back. That is not my recollection.

Let me go back to—

The Chair: Mr. Comartin, unfortunately you're going to have to save that one.

Go ahead, Mr. Kramp.

We have a point of order.

Mr. Joe Comartin: It is maybe a point of privilege, really.

We were told by Mr. Cooper that he was going to submit an amendment. I haven't seen that. The question to these gentlemen would be whether he's been told not to do that.

The Chair: I'll allow an answer to that. I'll call it a point of privilege, and we'll get a response.

Mr. Douglas Hoover: I have no authority whatsoever over Mr. Cooper and I have not discussed whether he should or should not submit such an amendment. The first time I heard of such a proposal was when he made that statement here. I have not seen any proposed amendment. I don't know what stage he's at or in what form it would come. I have no knowledge of that, I'm sorry.

The Chair: The clerk has informed me that we'll check it. It's her understanding that he may have sent something; we just have not had a chance to bring it forward yet. We certainly will.

Go ahead, Mr. Kramp.

Mr. Daryl Kramp: Thank you, Mr. Chair.

To our witnesses, thank you again.

One of the great prides we've always had in Canada has been our capacity for judicial discretion, whether it's to the crown or to the judiciary itself. We've had various witnesses before this committee who have suggested, in particular with the dangerous offender legislation, that this would remove the opportunity for due discretion capacity by either crown or judiciary, both prior to the actual designation and in the sentencing process. I'd like your opinion on that.

In addition, could you walk us through this process again, so that we can clearly understand the allowances and provisions that are there for judicial discretion?

● (1050)

Mr. Douglas Hoover: Well, the first obvious opportunity for judicial discretion is at the time the crown applies under section 752, when the crown may have to make argument to the court that in fact the predicate offence is a serious personal injury offence. If the judge finds it does not meet the section 752 criteria, at that point he can rule under his discretion that it does not meet the threshold and it can't go any further.

The next opportunity for discretion, if it passes that initial threshold, is that the crown must apply under section 752.1 for a psychiatric assessment. The judge has discretion at that time to stop the application there if the judge is of the view that it's not likely to result in a dangerous offender designation.

Once the assessment is returned and filed with the court, the crown then has to seek and obtain and table in writing the Attorney General's consent. If that is done, along with notice to the defendant, then it goes into the hearing phase. At that point the final exercise of discretion of the court is first of all whether the offender meets the dangerous offender criteria; then, per the decision in R. v. Johnson, even if the offender does meet dangerous offender criteria, the court of course may refuse the indeterminate sentence if in fact a lesser punishment is available to manage the risk posed to the general public.

Under the new provision, all those discretions are retained. Even in the circumstances of the presumption kicked in by a third sufficiently serious predicate offence, the judge still has the discretion, if the offender is able to rebut the presumption, to refuse the designation.

In either case, if the designation is made, then again the qualification of the Johnson principle is very clear: the judge retains final discretion to not impose the indeterminate sentence if the risk to society can be successfully managed under a lesser sentence.

Mr. Daryl Kramp: Thank you. That was my only question.

The Chair: Thank you, Mr. Kramp.

Mr. Lee, go ahead for five minutes.

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

I do accept that the judicial discretion piece of this legislation has been successfully reconstructed, rebuilt, reinserted into the bill, and that's a good thing.

The part that has concerned me is charter compliance, with specific reference to section 7 of the charter and the principles of fundamental justice, the right to remain silent. That continues to bother me. I accept that we're in a grey area, and I appreciate the previous remarks of Mr. Hoover as well as Mr. Cohen's remarks today. They've done their very best to grapple with that, but I just want to lay out my core concern, and perhaps you can address it.

Principles of fundamental justice include the right to silence. I'm assuming the right to silence would prevail throughout the entire criminal procedure, including the point at which the person is sentenced. I include a DO—dangerous offender—procedure as well. If I'm wrong, I'll stand corrected, but at this point I have no reason to believe that a person's right to remain silent in a criminal procedure wouldn't exist at any point during a criminal procedure, particularly the part where the person's liberty is potentially taken away.

In the normal course, where there is the right to remain silent, we would look to the crown to paint a picture of dangerousness such as would entitle the state to further constrain the liberty of the subject. In this particular case, the way the statute is drafted, the crown does not have to paint a picture. Yes, there is an assessment report that predates the hearing, but the crown doesn't have to paint the picture because the statute creates a presumption that the person is dangerous. So the crown doesn't have to paint the picture any more. There is simply a mathematical formula that says the person is presumed to be dangerous.

I am suggesting that is a practical removal of the right to remain silent, because not only does the subject have to face a presumption based on a mathematical formula that foists upon him or her the status of dangerousness, but they're forced to prove a negative. The subject has to come out and say “I'm not that. Whatever you think I am, I'm not that.” Forcing someone to prove a negative in the face of a mathematical presumption to me says we have practically removed the right to remain silent in a criminal procedure, and that is my concern.

I'll just leave that with you now and see if you can address my concern that the subject has practically lost the right to remain silent and is “DOed”, if I can use that as a verb, by a mathematical formula in which the crown doesn't have to paint the picture and doesn't have to face the burden of doing it.

● (1055)

Mr. Stanley Cohen: I appreciate the concerns you're voicing. I would imagine that any time a reverse onus comes up in any part of criminal procedure, there is a similar kind of concern that arises in the sense that an onus that's cast upon the affected party obliges them to answer in some way. Answering directly by testifying is something that perhaps one can see as a violation of a right to silence. I don't believe that in reverse onus cases when a person is called upon to answer, it is necessarily characterized that way in the jurisprudence, but from, let's say, a psychological or a tactical point of view, I understand the point you are getting at.

I would say this about the right to silence. The right to silence is not expressly mentioned in the Constitution. It has emerged in the case law under section 7. I know that you have been referred to the Hebert case in relation to section 7 and its relation to the right to silence. More recently, just two or three weeks ago, the Supreme Court, in a case called Singh, which dealt with the case of repeated police questioning while an individual was in custody, ruled in an expansive way, suggesting that the right to silence did not prevent the police from repeatedly questioning an individual in the face of new evidence and new circumstances that called for questions that required an answer.

I see the chair is looking at me as though I'm answering too hard.

The Chair: Yes. Maybe you wouldn't mind taking another 20 seconds or so.

Mr. Stanley Cohen: I will try to wrap up.

I would suggest that—

Mr. Derek Lee: Mr. Chairman, on a point of order, this is probably the one core area that is almost predetermined to come up later in the courts, so it would be really helpful to have Mr. Cohen's full—

The Chair: I recognize that, Mr. Lee, and I'm trying to provide a little leeway here to get at this.

Mr. Stanley Cohen: I will try to wrap up.

I would just say that the Singh case deals with the right to silence and it also makes some observations on the relationship between self-incrimination and the right to silence. It's worth looking at.

It also refers to the case of White in the Supreme Court of Canada, which deals extensively with the ambit of self-incrimination protection.

I would suggest that this one quote taken from Singh, which actually draws on White, is germane. This is Mr. Justice Iacobucci:

> I begin this inquiry by asserting that any rule demanded by the principle against self-incrimination which places a limit on compellability is in dynamic tension with an opposing principle of fundamental justice. That is the principle which suggests that, in a search for truth, relevant evidence should be available to the trier of fact. Obviously, the Charter sanctions deviations from this positive general rule. Sections 11(c) and 13 stand as obvious examples. The question is whether we need another exemption and if so, why?

I think that has to be examined and shaken down in terms of the Grayer case, which you've been referred to, which indicates that an individual is able to lawfully resist any mechanisms that might seek to enlist his cooperation. No separate proceedings are contemplated here, and the right to silence, in effect, can be successfully asserted, albeit at the peril of the individual.

● (1100)

The Chair: Thank you.

Madam Freeman.

[*Translation*]

Mrs. Carole Freeman: I will give the floor to Mr. Ménard.

Mr. Réal Ménard: I would like to talk about the issue of the right to remain silent. Out of 11 witnesses, if I exclude the minister and his officials, six have challenged the constitutionality of the bill, and this includes criminal law professors. You will therefore understand why we are just a little bit worried. The right to remain silent will no longer be able to exist in its integrity if the bill is adopted, given that the reverse onus compels the accused to defend himself. We could obviously say that the individual will refrain from defending himself, but if we use the same logic, there is no longer any constitutional guarantee.

You should know that we are very concerned. I fully agree with Mr. Lee's line of questioning. The right to remain silent is being challenged and, in addition, we have been told that the bill is incompatible with guarantees pertaining to arbitrary detention and article 7, the right to life, security and everything that corresponds to that.

How can you make us feel comfortable about the issue of arbitrary detention and section 7? I have other questions I would like to ask later on, if I have time.

[*English*]

Mr. Stanley Cohen: First, on the suggestion that you've had a number of witnesses who suggested that the bill is unconstitutional, I haven't followed your proceedings or read the blues or anything like that, but I am not surprised that people would come with a different point of view and suggest that there is a constitutional issue that will result in litigation and a constitutional challenge. I would suggest that this is not an issue. None of the issues that you have raised are straightforward. It's not science. We cannot say ipso facto that because there is an infringement there is necessarily going to be a court striking down or not sustaining the legislation.

What I would be curious about is the way in which these individuals have addressed the question, because they have found that there is a violation and they would then have to pass on to the second question, of whether or not the legislation can be capable of reasonable justification in accordance with the standards that govern a free and democratic society. That, I believe, is where much of the —

[*Translation*]

Mr. Réal Ménard: The people who said that are, in my opinion, just as competent as you are. You spoke about your background as a professor, but the people who appeared before us were professors from McGill or the University of Toronto and I feel they are at least as competent as you.

[*English*]

Mr. Stanley Cohen: I'm not doubting that they are, and maybe they have greater competence than I have. What I have attempted to get at here is simply the question that reasonable people at this stage, when considering legislation, will assess the legislation in a certain way. When I say that the legislation is not manifestly unconstitutional and is capable of a credible and reasoned defence, I am saying that if the government presses ahead with the legislation, as it is determined to do, it will have a good case to present in court, and the arguments that will be presented are capable of being accepted by the courts.

To address your larger questions about section 9, section 7, and the others, this is the history of dangerous offender legislation. If we look at Lyons, which again is the fountain, the *locus classicus* in this area, you will find not only sections 7 and 9; you'll find sections 11 and 12 of the charter being invoked and dealt with quite comprehensively and extensively in the course of the challenge to what was then relatively new dangerous offender legislation.

● (1105)

[*Translation*]

Mr. Réal Ménard: I simply want to be reassured that in the federal-provincial-territorial conferences of ministers responsible for Justice—moreover, I know that there is one underway right now and I will be tabling a motion to obtain information about what was discussed there—the provisions that we are about to adopt, if we are in fact going to be voting on them, have already been more or less agreed to.

Is that what you are trying to tell us, Mr. Hoover? Are you trying to tell us that the five bills that we may be voting on have already been examined by this forum, namely the federal-provincial-territorial conference of the ministers of Justice?

[*English*]

Mr. Douglas Hoover: I think the answer is fairly straightforward. They've certainly considered many issues that are in the bill, and there are other issues that aren't in the bill that they've discussed. There are various opinions at that table. I'm not sure which provision you want me to talk to in particular, but the bill is certainly discussed on a regular basis. All legislation that is going to impact on the administration of justice by the provinces is of concern to them, not just this one.

[*Translation*]

Mr. Réal Ménard: Moreover, as for the former Bill C-27 and the specific provisions on dangerous offenders, do you feel that this was something that was truly wanted, or something that people were lukewarm about or had categorically rejected? Are we dealing with a bill that is really wanted, which one province may be lukewarm about or has come out and rejected categorically?

I know that you are always uncomfortable when you hear references about love, but this is just a figure of speech.

[*English*]

Mr. Douglas Hoover: I think strong desire was expressed, both publicly and during meetings of senior officials, for reforms that specifically respond to the Johnson problem, as the minister stated on June 5 in his testimony and most recently again. Johnson created some conundrums in interpretation in each jurisdiction, and great concern was expressed that we address those. For the most part, provinces are very supportive of the legislation as it currently stands—maybe not all provinces 100%, but at this point we have not received, regarding C-2....

You're asking about Quebec? Again, I am uncomfortable speaking for any particular province. I would say overall there's a strong consensus that this bill is necessary.

The Chair: Monsieur Petit.

[*Translation*]

Mr. Daniel Petit: Thank you, Mr. Chairman.

Good morning, Mr. Hoover and Mr. Cohen.

I would like to go back to the questions raised regarding the right to remain silent. You were very clear about the point that the right to remain silent is not necessarily something that is guaranteed by the charter, but which has resulted from various Supreme Court decisions made over the past 20 years.

My question will be a little bit more focused. In the Criminal Code, since you work with the Criminal Code, there are some presumptions. There are already some presumptions. Presumption counters what we refer to as the right to be presumed innocent and the right to remain silent, because we are presuming that you are guilty, for example and it's up to you to prove the opposite.

With respect to receiving stolen goods, when we talk about theft and receiving stolen goods, we have used the presumption for more than 50 years, ever since the code has existed. Has an attorney ever attacked this issue? Since the charter came into existence, has there ever been an attack that demonstrated that presumptions in general—and I am not only referring to this presumption—would violate inalienable charter rights? That is my first question.

I also have a related question, which is also a comment. We often see, when we go to court, the crown attorney present a notice of prior conviction in order to obtain an additional conviction. A presumption is made. We are already indicating that we will be seeking more severe fines, a longer prison term. We are already presuming something. This has never been questioned, at least, personally, I have never seen this being overturned or quashed by the Supreme Court of Canada.

I would therefore like to know whether or not the question put by Mr. Lee, of the Liberal Party, was relevant. I would also like to know whether or not Criminal Code presumptions have ever been questioned or overturned by a ruling of the Supreme Court of Canada.

● (1110)

[*English*]

Mr. Stanley Cohen: I'll try to break your question down into parts. You began with some statements to the effect that in a way we were creating a presumption of guilt. Guilt, of course, is not part of this particular exercise. We are already past the point of guilt. We've established three convictions here. Any presumption that presumes guilt would, in my view, be manifestly unconstitutional, and those kinds of presumptions are not presumptions that have been advanced in the Criminal Code or elsewhere.

We're talking about reverse onus provisions. As to the question about how one addresses the justifiability of reverse onus provisions, the determining question is whether the presumption itself, the reverse onus, is justifiable. Basically this stems from the Supreme Court of Canada decision in Oakes, which is the leading decision on section 1 of the charter, and basically that court case says that facts that are not rationally open to an individual to prove or disprove cannot be justified. A rational connection has to exist between the proved fact—in this case we're dealing with three convictions—and the presumed fact. The presumed fact has to do with the linkage between those convictions, those designated offences, and dangerousness.

You asked the question about whether these provisions have been upheld in the jurisprudence. Reverse onuses and mandatory presumptions are treated the same and they can constitute a reasonable limitation that is justifiable under section 1 of the charter, and the courts have dealt with this in many cases: the Whyte case in 1988 dealing with care and control of a motor vehicle; the Holmes case, also in 1988, dealing with possession of housebreaking instruments; the Keegstra case dealing with the wilful promotion of hatred; the Chaulk case dealing with the presumption of sanity; the Downey case dealing with association with prostitutes; and the Pearson case dealing with reasonable bail.

These are cases, but this is not to suggest that there are not also cases where the courts have found constitutional infringement. These kinds of cases do throw up litigation, and no one is denying that a statutory provision that creates a reversal of onus will not throw off litigation.

One of the complicating factors, for those who choose to challenge this legislation, will be overcoming the idea that this is not an issue going to guilt and innocence and therefore does not fall within section 11 of the charter dealing with the presumption of innocence; but rather they will have to find shelter, if you want to call it that, under section 7 of the charter, and that may lead to a different kind of consideration.

The Chair: Thank you, Mr. Cohen.

Just so we can wrap this up—Mr. Harris is next, Mr. Bagnell has a question, Ms. Jennings has one, and Mr. Comartin—I would ask each of you to be as quick and as concise as you can be. I know this is pretty provocative stuff, and we're getting a long way, but we do need to try to finish up by 11:15. Then I have just a couple of comments concerning our process next week....

It may be 11:17, Mr. Comartin.

Mr. Harris.

Mr. Richard Harris: Thank you very much, Mr. Chair.

I have two quick questions. I want to go back to some of my comments yesterday regarding the similarity that I see—not as a lawyer, as I'm not one—between a parole hearing, an application for parole, and the reverse onus that is in that process and the reverse onus we're talking about now.

Mr. Cohen, you just made a statement in which you stated that two things, proved fact and dangerousness, are present within the reverse onus system in the dangerous offender designation process. I would suggest that in a parole hearing, those two principles exist as well: proved fact, the person is in jail, it's been proven, the person has been judged guilty; and second, dangerousness is something that's considered in the parole application. Is it safe? Is it dangerous or not to society to let this person out at this time? So while the circumstances may admittedly be different, we are dealing with a very similar process.

It is my understanding that in the reverse onus, as it applies to a parole application, someone who's incarcerated must prove to a parole board that they are worthy to be let out. That's a reverse onus.

Has that ever been challenged? Has that successfully passed the Constitution or charter test, so to speak? I would assume it has, since it's still in existence. Am I correct in assuming that?

● (1115)

Mr. Stanley Cohen: I would have to get back to you on that. I don't profess to be an expert in the validity of or at least the history of challenges to the parole system. I do note that under this statutory arrangement, there is of course a safeguard that there will be eligibility for parole within the system.

Mr. Richard Harris: I realize that, but this is an application to get out early, in which case the incarcerated person must prove that they're worthy to be let out ahead of the—

Mr. Stanley Cohen: I see the analogy you're drawing there.

Mr. Richard Harris: Okay.

Secondly, it's my understanding that in regard to Mr. Lee's concern, the right to remain silent, if someone is appearing before the parole board they also have the right to remain silent if they so choose. Considering that this process, this privilege, still exists, and has for many years now, somewhere along the line someone must have thought about whether this had passed a charter or constitutional test. It must have, because it's still being used.

If either of these things, the reverse onus or the right to remain silent in the case of a parole application, were at some time proven to not pass the constitutional or charter test, I would doubt very much that they would still be used today. I would suggest that because of the similarity between the reverse onus and the right to remain silent, certainly it's similar enough to assume that we're on safe ground on this.

Mr. Stanley Cohen: Just to draw a circle around this, once again we are into a situation where we consider what the charter guarantees actually apply to. Sections 11 and 13, which are the self-incrimination and presumption of innocence provisions, are all formulated in terms of charged with an offence. The case law may very well have something to say on that. I'm not going to point one way or another on that. Section 7 definitely has its application to look for the....

The courts are looking for fair procedure and for fundamental justice.

The Chair: Mr. Bagnell, very quickly.

Hon. Larry Bagnell: Thank you.

The public watching this must find it bizarre that the department has a process that has determined it's not manifestly unconstitutional when a majority of our esteemed legal witnesses have said it is.

I have just one short question. The points they bring up are related to the arbitrary detention and the Constitution, because they'll be arbitrarily detained if they can't somehow prove they're not going to offend again. And how would they prove that?

Second of all, they say it offends the proportionality principle in that of course he already has a sentence for each of the three crimes. So the additional detention would be non-proportional to the crimes.

● (1120)

Mr. Stanley Cohen: Arbitrary detention, of course, is something that will have to shake out in any litigation challenge.

Manifest unconstitutionality is something that basically says it is on its face manifestly unconstitutional.

I would challenge any of the experts you've had before you to suggest that this legislation is manifestly unconstitutional. I would assume that the experts who have been here have testified that in their view, in a properly constructed challenge to the legislation, they are capable of coming up with credible arguments that would convince the court—and I'm sure they can feel certain about this—that the legislation is unconstitutional, or at least that some aspects of the legislation are unconstitutional.

I understand where they're coming from, and I don't think they would be dismissing it off the top of their heads as manifestly unconstitutional.

I'm sorry, I didn't mark down the second part of your—

Hon. Larry Bagnell: It was about proportionality.

Mr. Stanley Cohen: Proportionality is an issue that, of course, comes into the section 1 justification question, the justifiability of the legislation. When looking to whether or not this is a proportional response, the courts will have regard to a number of factors. Certainly they're going to look to the tailoring that goes into the design of the legislation.

You have heard lots of testimony from my colleagues and others about what has gone into the legislation and the safeguards that are built into it. Just to repeat some of them, the person is presumed innocent at trial of the predicate offence; the court can refuse the crown application for an order for an assessment; the assessments are by a neutral party and can provide evidence sufficient in itself to overcome the presumption; there is a prior consent that is necessary from the Attorney General; there is a requirement of notice of the dangerous offender application; the offender is entitled to full disclosure of the crown's case and has full rights of participation, notwithstanding that there's no need to testify; there is a court discretion to refuse indeterminate detention.

And, of course, there is parole review, which was very central to the consideration of Mr. Justice La Forest in the Lyons case. The Lyons case should be revisited.

The Chair: I'm sorry, Mr. Cohen. We're a bit over time here. I want to allow you the time to get your points in, but Ms. Jennings has a question and Mr. Comartin has, and then we're going to finish up.

Hon. Marlene Jennings: Thank you, Chair.

Mr. Cohen, you have consistently used the term that the minister has certified that Bill C-2 is not manifestly unconstitutional. In response to questions of my colleague, you again used the term “manifestly unconstitutional”.

For the word “manifestly”, one the definitions is this: in a manifest manner, evidently, unmistakably. That's quite a low bar. I think most people would say it's a very low bar, because it would have to slap everyone in the face. Even people who don't necessarily have legal training would look at the law and say there's something wrong with it.

My question to you then is, in your experience as the senior general counsel in the human rights law section of the Department of Justice, are you aware of previous situations where draft legislation has come forward and has been discussed, where the legal opinion was that it is not manifestly unconstitutional, but that there are solid arguments that it might be unconstitutional—and solid arguments that it is constitutional—and where the minister has refused to certify it because the minister has decided to go for a higher bar than simply “manifestly unconstitutional”?

The Chair: Please be very quick in your response.

● (1125)

Mr. Stanley Cohen: What I will say is that I haven't left the words “manifestly unconstitutional” hanging out there alone. I have said that the situation is one in which the legislation is not manifestly unconstitutional and is capable of reason, justification, and credible argumentation such that a court would accept it in a properly argued challenge.

I think that's the best I can do for you on that in short order.

The Chair: Mr. Comartin.

Mr. Joe Comartin: Mr. Cohen, do you believe Gardiner is still good law, or do you have any reason to believe that Gardiner has been overruled by any of the subsequent decisions—Lyons, or Johnson, or whatever?

Mr. Stanley Cohen: Gardiner has not been overruled, to my knowledge. Gardiner is a decision of the common law and Gardiner has some expression in the current Criminal Code.

Mr. Joe Comartin: Thank you.

Mr. Hoover, in spite of Mr. Keddy's protestations to the opposite, there are a number of sections in here that are, or will be, on specific facts, minor crimes—not serious violent crimes. Does the department know how many cases there are each year that would meet the three-conviction test? How many B and Es do we have where people get two years? How many of those do we have in total? My estimation is that there are thousands of cases each year with a third conviction, where they would have had two priors and would have received two years or more.

Mr. Douglas Hoover: In deliberations during the formulation of the policy behind this, we were able, as much as possible, to look at case law and convictions. It's certainly not in the thousands on an annual basis.

Again, based on our review and our discussions with our provincial colleagues who actually do the prosecutions, etc., I think the upper limit we were able to put our finger on for the 12 primary designated offences with at least a two-year conviction in every case —which makes it relatively serious on the scale of things—was that there would be a potential maximum of about 50 cases coming forward. And then again, given the discretion of the crown to bring those forward, I don't think you would see 100% of those actually brought forward. But that was our best estimate of what we would see coming forward on an annual basis.

The Chair: Thank you, Mr. Hoover.

I want to thank both of you, gentlemen. I'm sorry about the time constraints. I'm sure we could have spent another hour or so at this, but I want to thank both of you for presenting this morning and for being at committee.

Just to close this up as the witnesses are moving from the table, we've concluded our witness schedule, so we are going to move into clause-by-clause consideration next week.

Concerning amendments, the motion the committee adopted was that amendments to Bill C-2 be submitted to the clerk 24 hours before the beginning of clause-by-clause consideration, without precluding the tabling of additional amendments from the floor. In order for the office of the clerk to receive a copy of the amendments package submitted by the members for three o'clock on Monday afternoon—in both languages, I would add—the amendments need to be submitted to the clerk by no later than noon. So I'm asking for agreement that we can assume that all members agree to send their amendments to the clerk by noon on Monday to facilitate the clause-by-clause process.

Very good. Thank you.

We are adjourned.

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